

In Confidence

Office of the Minister of Workplace Relations and Safety

COVID-19 Group of Ministers

Temporary employment law changes in response to COVID-19

Proposal

- 1 In response to the COVID-19 epidemic, this paper seeks agreement to temporarily modify the Employment Relations Act 2000 by Order in Council under the Epidemic Preparedness Act 2006.

Relation to government priorities

- 2 This is a regulatory adjustment that requires Cabinet approval.

Executive Summary

- 3 The Epidemic Preparedness Act 2006 authorises the Governor-General, on recommendation of the Minister of the Crown responsible for the administration of an enactment to modify enactments by Order in Council if it is impossible or impracticable to comply with requirements or restrictions in that enactment during the time in which an epidemic notice is in force.
- 4 I have identified a number of necessary changes to the Employment Relations Act 2000. The changes to the Employment Relations Act extend timeframes involved in collective bargaining that would otherwise apply, and allow unions and employers to agree an alternative ratification process if the previously agreed ratification process involves impracticable steps (e.g. in-person meetings).
- 5 If agreed, the changes will be made through Order in Council under the Epidemic Preparedness Act 2006 by the Governor General on my recommendation.

Background

An Epidemic Notice has been issued

- 6 An Epidemic Notice (EN) is a vehicle for introducing a broader range of powers on a national scale. Under the Epidemic Preparedness Act 2006 (EPA), the Prime Minister may issue an EN on recommendation of the Director-General of Health, and must be satisfied that the effects of an outbreak of a quarantinable disease are likely to significantly disrupt (or continue to disrupt) essential government and business activity in New Zealand. The Prime Minister did so on 23 March 2020.

Epidemic Notices can enable modifications to other statutes in response to an epidemic

- 7 Once an EN has been issued, section 15 of the EPA allows the Governor-General to make Orders in Council on recommendation by a Minister

responsible for the administration of an enactment to modify any requirements or restrictions imposed by the enactment.

- 8 Section 15 allows modification of any enactment only to the extent that there is a legislative requirement or restriction that is impossible or impractical to comply with. Any modifications must not go further than what is reasonably necessary in the situation. The Minister must only do so on written recommendation from the chief executive of the department responsible for the enactment.

Modifications are needed to the Employment Relations Act

- 9 I am responsible for the administration of the Employment Relations Act 2000 (ER Act). I have received advice from MBIE that some requirements in those Acts are impossible or impractical to comply with in the current COVID-19 epidemic and under the current epidemic notice.

Analysis: urgent employment legislative modifications are required

It is impractical to comply with some collective bargaining timeframe obligations

- 10 Many of the core requirements of collective bargaining under the ER Act are not subject to strict time limits or requirements. For example, duties of good faith in collective bargaining (such as duties to meet and consider proposals) are expressly subject to the circumstances of the union and employer and in which bargaining occurs (section 32(3)(d)) of the ER Act) including the operational environment of the union and the employer and the resources available to the union and the employer (s 32(4)). For other requirements the ER Act uses language such as “as soon as possible”. In most instances therefore, it is likely that the bargaining framework will be flexible enough to accommodate the circumstances of the epidemic.
- 11 However, the ER Act requires that when collective bargaining has been initiated, parties to that bargaining must take certain actions within specific time limits. Some of those time limits are impractical while the epidemic notice is in place, as both employers and unions face significant disruption due to the closure of some workplaces and the requirements to work from home.
- 12 The ER Act also requires that a union must ratify a collective agreement in accordance with procedures it notified to the other party at the beginning of bargaining. This may be impracticable because many unions hold an in-person meeting to vote on ratification of the collective agreement. Such meetings are impossible during lockdown and inadvisable for public health reasons during the epidemic.
- 13 I recommend that these requirements be modified by Order in Council, to have effect for the period of the Epidemic Notice.
- 14 In making these recommendations I have sought to preserve rights to initiate collective bargaining.
- 15 I propose to modify the following sections of the ER Act:

Section in ER Act	Description of the current requirement / restriction	Why it is impractical to comply with	Proposal
43(2)	Employer must draw the initiation of collective bargaining to the attention of all employees whose work would be covered by it as soon as possible but in any case within: <ul style="list-style-type: none"> • 10 days after the initiation (SECA) • 15 days after the initiation (MECA) 	It is likely to be impossible or impractical for some employers to draw all employees' attention to the initiation of collective bargaining while an EN is in place.	Modify the times in which the employer should draw their employee's attention to the initiation of bargaining to retain the requirement to notify as soon as possible but specify that the calculation of timing should exclude the duration of the epidemic notice.
50(2) and (3)	If an employer receives 2 or more notices of initiation of collective bargaining, relating to the same type of work, employer can request consolidation within 40 days . Union must then agree or withdraw the notice within 30 days .	It is likely to be impossible or impractical for some employers to comply with these timeframes while an EN is in place. It would not be desirable for the consolidation of bargaining to fail, or a request lapse, because parties cannot practically deadlines.	Modify to say that if the timeframe falls within the period in which the Epidemic Notice is in place then the relevant timeframes must be met as soon as possible, but in any event no later than 40 or 30 days respectively after the Epidemic Notice has been withdrawn.
51	Requires union to ratify a collective agreement in accordance with procedures it notified to the other party at the beginning of bargaining.	For collective bargaining which is already underway, the circumstances will have changed substantially since the union notified the employer of the intended ratification procedure, and if it does involve in-person meetings, these will no longer be possible due to the pandemic.	While an Epidemic Notice is in place, if the means by which the parties agreed to ratification at the beginning of the process is such that it requires parties to ratify in a way which is impractical (e.g. in person), then allow the parties to agree other means in which to ratify (e.g. online balloting, videoconferencing or teleconferencing).
53(3)	Collective agreements continue in force for up to 12 months beyond expiry date, if collective bargaining for a replacement agreement has been initiated	It will be impractical or impossible for some employers or unions to conclude collective bargaining and ratify a collective agreement while an Epidemic Notice is in place. This may mean that some collective agreements expire, despite a willingness to conclude negotiations and ratify an agreement.	Modify to say that where s 53 applies, and the 12-month timeframe ends within the Epidemic Notice period or up to three months afterwards, the timeframe does not include the period of time for which the Epidemic Notice is in place.

Financial Implications

- 17 There are no financial implications.

Legislative Implications

- 18 An Order in Council under section 15 of the Epidemic Preparedness Act 2006 is required to give effect to decisions in this paper.

Impact Analysis

Regulatory Impact Statement

- 19 This paper is a direct response to the COVID-19 pandemic and thus no Regulatory Impact Analysis is required (CAB-20-MIN-0138 refers).

Climate Implications of Policy Assessment

- 20 A Climate Implications of Policy Assessment has not been undertaken.

Population Implications

- 21 The likely impacts of this policy on specific population groups have not been analysed.

Human Rights

- 22 No inconsistencies have been identified New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 23 The State Services Commission, the Treasury, and the Department of Prime Minister and Cabinet (Policy Advisory Group) were consulted.
- 24 I have consulted the New Zealand Council of Trade Unions and Business New Zealand on these changes. Both have confirmed that they do not have significant objections.

Communications

- 25 The Minister for Workplace Relations and Safety will announce this decision.

Proactive Release

- 26 Proactive release will be considered at a later date.

Recommendations

The Minister for Workplace Relations and Safety recommends that the COVID Group of Ministers:

- 1 **Note** that under the Epidemic Preparedness Act 2006, The Governor-General on recommendation of the Minister in charge of an enactment can modify

statutory requirements or restrictions by Order in Council, if the requirement is such that it would be impossible or impracticable to comply with during the period for which an epidemic notice is in place, and the modifications go no further than is reasonably necessary in the circumstances.

- 2 **Note** that the Minister for Workplace Relations and Safety has identified provisions in the Employment Relations Act 2000 which need to be modified in light of the epidemic notice being in place.
- 3 s 9(2)(h) [REDACTED]
- 4 **Agree** to amend the provisions below through the Epidemic Preparedness Act 2006 powers:
 - 4.1 That the maximum timeframes by which an employer must notify their employees within work covered by collective bargaining should be extended to exclude the duration of the Epidemic Notice.
 - 4.2 That the timeframes by which an employer must seek to consolidate collective bargaining (40 days), and for unions to respond to an attempted consolidation (30 days), should be done as soon as possible, but in any event no later than 40 or 30 days respectively after excluding the duration of the Epidemic Notice.
 - 4.3 That for collective agreements which would otherwise have expired but are still in force for 12 months, and where the 12-month period ends within the Epidemic Notice period or up to three months after, the 12-month period should exclude any period covered by the Epidemic Notice.
 - 4.4 That if a union has committed at the outset of collective bargaining to a ratification procedure which is no longer practicable (e.g. in-person ratification meetings) then allow the parties to agree another means by which to ratify the collective agreement (e.g. online balloting, videoconferencing or teleconferencing).
- 5 **Invite** the Minister for Workplace Relations and Safety to prepare drafting instructions for Parliamentary Counsel Office to give effect to these recommendations.
- 6 **Authorise** the Minister for Workplace Relations and Safety to make additional minor amendments to implement decisions that may arise during the drafting of the Order in Council.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety



Meeting of the COVID-19 Ministerial Group

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Temporary Employment Law Changes in Response to COVID-19

The group of Ministers with Power to Act on COVID-19 matters [CAB-20-MIN-0130] convened on 7 April 2020 at 10.30am, and in accordance with their Power to Act:

- 1 **noted** that under the Epidemic Preparedness Act 2006, the Governor-General on the recommendation of the Minister in charge of an enactment can modify statutory requirements or restrictions by Order in Council, if the requirement is such that it would be impossible or impracticable to comply with during the period for which an Epidemic Notice is in place, and the modifications go no further than is reasonably necessary in the circumstances;
- 2 **noted** that the Minister for Workplace Relations and Safety has identified provisions in the Employment Relations Act 2000 which need to be modified in light of the Epidemic Notice being in place;
- 3 s 9(2)(h) ;
- 4 **agreed** to make the following changes through the Epidemic Preparedness Act 2006 powers:
 - 4.1 that the maximum timeframes by which an employer must notify their employees within work covered by collective bargaining should be extended to exclude the duration of the Epidemic Notice;
 - 4.2 that the timeframes by which an employer must seek to consolidate collective bargaining (40 days), and for unions to respond to an attempted consolidation (30 days), should be done as soon as possible, but in any event no later than 40 or 30 days respectively after excluding the duration of the Epidemic Notice;
 - 4.3 that for collective agreements which would otherwise have expired but are still in force for 12 months, and where the 12-month period ends within the Epidemic Notice period or up to three months after, the 12-month period should exclude any period covered by the Epidemic Notice;
 - 4.4 that if a union has committed at the outset of collective bargaining to a ratification procedure that is no longer practicable (e.g. in-person ratification meetings), the parties should be allowed to agree another means by which to ratify the collective agreement (e.g. online balloting, videoconferencing or teleconferencing);

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- 5 **invited** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to give effect to paragraph 4 above;
- 6 **authorised** the Minister for Workplace Relations and Safety to make additional minor amendments as required to implement decisions that may arise during the drafting of the Order in Council.

Rachel Hayward
for Secretary of the Cabinet

Distribution:
The Cabinet
Hon James Shaw

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