

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet

Epidemic Preparedness (Employment Relations Act 2000– Collective Bargaining) Immediate Modification Order 2020

Proposal

1. I propose that the Cabinet authorise the submission of the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020 (the Immediate Modification Order).

Background

2. Under the Epidemic Preparedness Act 2006 (EPA), the Prime Minister issued an Epidemic Notice (EN) on 24 March 2020, on recommendation of the Director-General of Health. The EN came into force on 25 March 2020. An EN is a vehicle for introducing a broader range of powers on a national scale.
3. Once an EN has been issued, section 15 of the EPA 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. The Minister must only make a recommendation to the Governor-General if the Minister is satisfied of the matters set out in a written recommendation from the chief executive of the department responsible for the enactment.
4. The Chief Executive of MBIE has provided me with a written recommendation that in her opinion, a number of restrictions and requirements in the Employment Relations Act 2000 (the ERA) should be temporarily modified. These changes extend timeframes involved in collective bargaining that would otherwise apply, and allow unions to notify an alternative ratification process if the previous ratification process is now impracticable (eg in person meetings).

The Immediate Modification Order gives effect to decisions made by Ministers with power to act to urgently modify employment law

5. The Immediate Modification Order gives effect to Ministers' decisions with power to act to make temporary modifications to the ERA [Minute from COVID-19 Group Ministers meeting - 7 April refers]. There is a modification to an existing decision from Ministers with power to act required.

It is impractical to comply with some collective bargaining timeframe and process obligations

6. When collective bargaining has been initiated, the ERA requires parties to that bargaining to take certain actions within specific timeframes. Some of those timeframes are impractical to meet 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.
7. The ERA also requires that a union must ratify a collective agreement in accordance with procedures notified to the other party at the beginning of bargaining. This may be impracticable where a union has notified an employer that the union will hold an in-person meeting to vote via postal ballot on ratification of the collective agreement. Such meetings cannot be held during Alert level 4 and inadvisable for public health reasons during the epidemic. Likewise the postal system during this time may not enable ratification.

The Immediate Modification Order temporarily modifies the Employment Relations Act 2000 to address these concerns

8. The Immediate Modification Order modifies the ERA to extend timeframes involved in collective bargaining that would otherwise apply. Specifically, the changes:
 - 8.1. Modify the maximum timeframes by which an employer must notify their employees who are in work and covered by collective bargaining that bargaining has been initiated, to exclude the duration of the EN.
 - 8.2. For collective agreements which would otherwise have expired, but are still in force for 12 months: where the 12-month period ends within the EN period or up to three months after the changes modify the 12-month period to exclude any period covered by the EN.

Modifications to existing decisions are required

9. Section 51 of the ERA requires a union to ratify a collective agreement in accordance with the 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 or postal ballot, these will no longer be possible due to the pandemic.
10. As such, Ministers with power to act agreed 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), to allow the parties *to agree* another means by which to ratify the collective agreement (e.g. online balloting, videoconferencing or teleconferencing) [Recommendation 4.4 from the Minute of COVID-19 Group Ministers meeting - 7 April refers].
11. To align with the current obligation in section 51, I propose that if a union has committed at the outset of collective bargaining to a ratification procedure that was either in-person or by post, the union must only *notify* the other parties to bargaining about the new method by which it chooses to ratify the collective agreement (e.g.

online balloting, videoconferencing or teleconferencing). This will mean the union is not required to agree a new ratification procedure with the other parties to bargaining, but rather, only notify those parties about what the new procedure is. This also narrows those circumstances in which a union can change their procedure to those that are impracticable (in person or via post).

12. Under section 50(2) and (3) of the Act, if an employer receives 2 or more notices of initiation of collective bargaining, relating to the same type of work, the employer can request consolidation within 40 days. A 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 meet deadlines.
13. Ministers with power to act agreed to modify 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 any event no later than 40 or 30 days respectively, excluding the duration of the EN.
14. The requirement for employers or unions to respond *as soon as possible* may create the unintended consequence of imposing a requirement over and above the original legislative requirement, which is that parties have up to 40 or 30 days respectively. As such, I propose that to modify 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 no later than 40 or 30 days respectively, excluding the duration of the EN. This removes the requirement to respond *as soon as possible*.

Timing and 28-day rule

15. I propose that the 28-day rule is waived on the grounds that the legislative changes are needed immediately in response to an emergency (cabinet rule 7.97 b). Without immediate effect, employers and unions risk being in breach of specific timeframe or process requirements under the ERA that are impracticable to meet due to impacts from the COVID-19 response. These regulations should come into effect as soon as possible.

Compliance

16. The regulations comply with:
 - 16.1. the principles of the Treaty of Waitangi;
 - 16.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 16.3. the principles and guidelines set out in the Privacy Act 1993 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles);
 - 16.4. relevant international standards and obligations;

- 16.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

17. There does not appear to be any grounds for the Regulations Review Committee to draw these regulations to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

18. The Epidemic Preparedness (Employment Relations Act 2000— Collective Bargaining) Immediate Modification Order 2020 has been certified by the Parliamentary Counsel Office (PCO) as being in order for submission to Cabinet.

Impact Analysis

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).

Publicity

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

Proactive release

21. Proactive release will be considered at a later date.

Consultation

22. The State Services Commission, the Treasury, and the Department of Prime Minister and Cabinet (Policy Advisory Group) were consulted on the policy decisions.

23. The New Zealand Council of Trade Unions and Business New Zealand were also consulted on the policy decisions. Both have confirmed that they do not have significant objections.

24. s 9(2)(h)

25. The Ministry of Justice have been consulted and confirm that there are no New Zealand Bill of Rights Act 1990 implications.

Recommendations

I recommend that Cabinet

1. note that on 7 April 2020 the Covid-19 Ministerial Group agreed to modify the Employment Relations Act 2000 to extend timeframes involved in collective bargaining that would otherwise apply, and to allow the parties to agree another means by which to ratify the collective agreement (e.g. online balloting,

videoconferencing or teleconferencing) [Minute from COVID-19 Group Ministers meeting - 7 April refers];

2. agree to modify existing COVID-19 Group Ministers decisions, so that:
 - 2.1. if a union has committed at the outset of collective bargaining to a ratification procedure that involved in-person or by postal-vote, the union must only *notify* the other parties to bargaining about the new method by which it chooses to ratify the collective agreement; and
 - 2.2. 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 no later than 40 or 30 days respectively, excluding the duration of the EN.
3. note that the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020 will give effect to the decision referred to in paragraph 1 above and the decisions in paragraph 2, if agreed;
4. authorise the submission to the Executive Council of the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020;
5. note that a waiver of the 28-day rule is sought:
 - 5.1. so that the regulations can come into force as soon as possible;
 - 5.2. on the grounds that the legislative changes are needed immediately in response to an emergency (cabinet rule 7.97 b);
6. agree to waive the 28-day rule so that the regulations can come into force on 16 April 2020.
7. note that the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020 is temporary and will be revoked three months after the expiry of the Epidemic Notice.

Authorised for lodgement

Hon Iain Lees Galloway

Minister for Workplace Relations and Safety



Cabinet

Minute of Decision

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Epidemic Preparedness (Employment Relations Act 2000– Collective Bargaining) Immediate Modification Order 2020

Portfolio **Workplace Relations and Safety**

On 14 April 2020, Cabinet:

- 1 **noted** that on 7 April 2020, the group of Ministers with Power to Act on COVID-19 matters [CAB-20-MIN-0130] agreed to modify the Employment Relations Act 2000 to extend timeframes involved in collective bargaining that would otherwise apply, and to allow the parties to agree another means by which to ratify the collective agreement (e.g. online balloting, videoconferencing or teleconferencing);
- 2 **agreed** to modify the above decision, so that:
 - 2.1 if a union has committed at the outset of collective bargaining to a ratification procedure that involved in-person or by postal-vote, the union must only notify the other parties to bargaining about the new method by which it chooses to ratify the collective agreement; and
 - 2.2 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 no later than 40 or 30 days respectively, excluding the duration of the Epidemic Notice;
- 3 **noted** that the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020 gives effect to the above decisions;
- 4 **noted** that before recommending the making of an Immediate Modification Order, the responsible minister must:
 - 4.1 be satisfied of the matters set out in section 15(2)(b) of the Epidemic Preparedness Act 2006;
 - 4.2 have received from the chief executive of the Ministry of Business, Innovation, and Employment a written recommendation stating the matters required by section 15(2)(a) of that Act;
- 5 **noted** the advice of the Minister for Workplace Relations and Safety that the conditions set out in paragraph 4 have been met;

- 6 **authorised** the submission to the Executive Council of the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020 [PCO 22875/6.0];
- 7 **noted** that a waiver of the 28-day rule is sought:
- 7.1 so that the Order can come into force as soon as possible;
- 7.2 on the grounds that the legislative changes are needed immediately in response to an emergency;
- 8 **agreed** to a waiver of the 28-day rule so that the Order can come into force on 16 April 2020;
- 9 **noted** that the Order is temporary and will be revoked three months after the expiry of the Epidemic Notice.

Michael Webster
Secretary of the Cabinet