

## An Overview of the Recent Fair Pay Act and Regulations

July 2023

*The Fair Pay Act 2022 (the Act) came into force on 1 December 2022 following the issue of the Fair Pay Agreements Regulations (the Regulations) on 30 November 2022. This article will give a brief overview of the main updates relating to the Act, the Regulations and the process around fair pay agreements (FPAs).*

### BACKGROUND

The Act sets out that: “the purpose of this Act is to enable employment terms to be improved for employees by providing a framework for negotiating fair pay agreements that specify industry, or occupation-wide minimum employment terms, or in certain circumstances, for the Authority to determine those minimum employment terms.”

FPAs are essentially a form of industrywide collective employment agreement that sets minimum terms and conditions across industries and occupations. FPAs sit above any individual or other collective agreement and create a floor of entitlements for all employees in a particular occupation or industry, whether union members or not. An FPA, once negotiated or concluded, must be validated by the Chief Executive of MBIE (Chief Executive) through the issue of a fair pay notice in accordance with section 168 of the Act. FPAs set a minimum standard for everyone in that industry.

### THE FPA PROCESS

The FPA process begins with a union (the Initiating Union) making an application to the Chief Executive to initiate bargaining. The application must either satisfy the representation test or the public interest test. The representation test requires the applying union to establish that at least 1,000 employees or 10% of all employees within the coverage of the proposed FPA support the application to initiate bargaining for the FPA .

The public interest test requires that MBIE is satisfied that some of the covered employees receive low pay for their work and either:

- do not have much bargaining power;
- lack progression in their pay; or
- receive low pay for their work considering other factors - for example, long hours, unsocial hours or hours of work being on an irregular basis.

The coverage of the proposed FPA must include:

- the work or type of work undertaken by the employees who will be covered by the FPA; and
- if it is an industry-based agreement, the bargaining initiation application needs to describe the industry or type of industry.

If either of the initiation tests have been met, the Chief Executive checks the application and verifies that a test has been met. The Chief Executive then approves or declines the application. Once the bargaining initiation application is accepted, the process must continue until an FPA has been agreed.

The next step is to publish a notice of approval to initiate the bargaining and notify all relevant employers and employees that the process has commenced. The employees will have the opportunity to have a say about what should be in the FPA before the bargaining begins.

The Act sets out the issues that must be covered off in the FPAs such as:

- the date the agreement comes into force and when it expires;
- coverage of the agreement determining the work or type of work covered;
- work hours;
- minimum base wage rates and when they apply;
- pay rates for overtime and penalty rates; and
- training and development arrangements and leave arrangements.

An FPA can include terms that apply to a class of covered employees that are different from the terms applying to another class covered by the same FPA. FPAs can also include terms that apply to different districts.

The Act also sets out issues that must be discussed at bargaining but are not required to be included in the FPA itself including health and safety requirements, flexible working, and arrangements relating to redundancy.

Following the notification, bargaining begins. The Initiating Union, and any other union entitled to form part of the employee bargaining side, will bargain with all relevant employers in the industry as a collective on behalf of the employees. Employers that are to be covered by the proposed FPA will be represented by eligible industry associations approved by the Chief Executive to form the employer bargaining side. There are requirements for both the employer and employee bargaining sides to use their best efforts to ensure that Māori employees and employers are effectively represented in the bargaining process.

The employee and employer bargaining sides have obligations to represent all covered employees or employers as applicable regardless of whether the employees are union members. This includes providing regular updates, an opportunity to provide feedback in relation to bargaining and considering any feedback.

# Update

Once the bargaining for a proposed FPA is complete, the agreement is submitted to the Employment Relations Authority (Authority) for a compliance assessment. Once approved by the Authority, the FPA needs to be ratified by both sides by way of a ratification vote. The ratification process gives employers one vote per employee covered by the agreement, with higher vote weightings for employers with fewer than 20 employees. The Act sets out information that is required to be provided by both bargaining sides before a ratification vote occurs. There must be more than 50% of positive votes on each side.

If an FPA is agreed, then the process is complete. If not, the FPA goes back to the bargaining stage where any resulting agreement gets voted on again at a later date. If the second round of voting does not result in an agreed FPA (or the bargaining sides have exhausted all other reasonable alternatives for reaching an agreed FPA, or there have been breaches of good faith involved in the bargaining process), then a bargaining side may apply to the Authority for a determination to fix the terms of the proposed FPA.

## PROGRESS OF PROPOSED FPAS

MBIE has recently approved a number of applications for FPAs including in the security guard, bus transportation, hospitality and waterfront worker industries.

This is an interesting space to watch, especially with the upcoming elections in October 2023. The Act was introduced under the Labour government and there is a possibility of the Act being repealed if a different government is elected.

## FURTHER FPA REGULATIONS

A second tranche of the Regulations came into effect 8 June 2023, which provides guidance regarding the specification of core mandatory terms in an FPA. The Second Regulations include:

- [Fair Pay Agreements Amendment Regulations 2023](#)
- [Employment Relations Authority \(Fair Pay Agreements\) Amendment Regulations 2023](#)
- [Employment Court \(Fair Pay Agreements\) Amendment Regulations 2023](#)

## WHAT ARE MY RESPONSIBILITIES UNDER THE FPA SYSTEM AS AN EMPLOYER?

Following the notification of an FPA application, employers are required to provide the contact details of their relevant employees to the Initiating Union in electronic form. Employees who do not want their contact details shared with the Initiating Union or employee bargaining side can complete this form which excludes them from this requirement. Employers are also required to use their best endeavours to identify and inform the Initiating Union of the approval to begin bargaining.

As the FPA process progresses employers must also, subject to conditions, allow their employees to attend two FPA meetings and allow access to the workplace to employee's representatives.

## FOR FURTHER INFORMATION

Please visit Employment New Zealand's website [here](#) and the Fair Pay Agreements dashboard on MBIE's website [here](#) for further information about FPA obligations, updates and timeframes. For help and advice about the Act or Regulations, please contact Glenn Finnigan.

## KEY JACKSON RUSSELL CONTACTS

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