

Collective Bargaining under Covid-19 regulations

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Like time, collective bargaining waits for no-one! As the effects of COVID-19 threaten to reverberate across the economy and Treasury forecast double-digit unemployment levels beyond the end of the year, it is easy to forget that many collective agreements are set to expire and will be up for renegotiation this year. Some, in fact, reached their expiry during the recent lockdown and others are set to expire while the country is under Alert Level 2 and social gatherings are limited to 10 people and to 2-hours' duration. This obviously makes it difficult, if not impossible, for collective bargaining, as normally practiced, to take place.

Table 1: Collective agreements expiring March to September 2020, by month of expiry.

Expiry	Number	Coverage
March	45	2,568
April	133	25,581
May	41	2,344
June	45	3,732
July	207	22,755
August	47	33,153
September	44	3,499
Total	562	93,632

CLEW's analysis of collective agreements which expire in the 6 months from 01 March indicates that a total of 562 collectives, covering 93,632 employees, have yet to be renegotiated. A monthly breakdown of collective agreements in our database with an expiry date falling within that period and which have not been replaced by a new settlement is shown in Table 1. Although coverage across those agreements varies considerably, with those in the public sector covering many more than in the private sector, the average (mean) number of employees covered by an agreement expiring in that period is 167. More than 60 percent of those agreements, covering 48,336 employees or just over 50 percent of total coverage, include an expiry date falling in either April or July of this year.

Table 2: Collective agreements expiring March to September, by industry group.

Industry Group	Number	Coverage
Accommodation and Food Services	12	2,515
Information Media and Telecommunications	12	684
Arts and Recreation Services	12	810
Other Services	12	488
Wholesale Trade	13	164
Construction	20	625
Electricity, Gas, Water and Waste Services	21	569
Education and Training	29	2,301
Retail Trade	32	2,784
Public Administration and Safety	53	12,173
Transport, Postal and Warehousing	63	9,925
Health Care and Social Assistance	77	42,994
Manufacturing	172	14,324
Other Industry Groups	34	3,276
Total	562	93,632

Table 2 shows the data broken down by industry group. (For reasons of confidentiality, only industry groups with at least 10 collective agreements expiring in this period are shown here, with other industry groups combined in the last row.) Fewer than three-in-ten collective agreements expiring during the March-to-September period are from public administration and safety, education and training and health care and social assistance, three industry groups that combined account for the majority of public sector jobs. Nevertheless, those 159 agreements (out of 562 in total) cover 57,468 employees or 61.4 percent of total coverage by collectives relevant to this analysis.

Nearly 43,000, or around 46 percent, of the more than 93,000 employees covered by those agreements ending their term during this 6-month period, work in health and social services. This, of course, is an essential part of the labour market during any health crisis. Lest we be reminded, however, it was just 2 years ago that the sector experienced a significant loss in working time due to industrial action involving more than 30,000 of the New Zealand Nurses Organisation's membership of some 46,000 health professionals. That dispute followed a decade of severe underfunding of public hospitals resulting in the failure of the sector to keep pace with growing community need, the ageing population and workforce, and increased costs.

Perhaps overlooked among the many initiatives undertaken by the Government in response to the COVID-19 crisis are a series of temporary modifications to the rules for collective bargaining under the Employment Relations Act. Last month, on the recommendation of the Minister for Workplace Relations and Safety and the Chief Executive of the Ministry of Business, Innovation, and Employment, an Order in Council came into force on 16 April under section 15 of the Epidemic Preparedness Act 2006. The Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020 makes changes to requirements pertaining to various collective bargaining timeframes imposed by the ERA.

Table 3: COVID-19 Extended Collective Bargaining Timeframes

Relevant Section of the Employment Relations Act 2000	Requirement Under the Employment Relations Act 2000	Temporary Change Under the Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020
Section 43 - Employees' attention to be drawn to initiation of bargaining	On initiating or receiving notice of intention to bargain for a collective agreement, details of that notice are to be drawn to the attention of all employees who come within the coverage of the intended agreement by the employer within 10 days of initiation (or 15 days, if there are to be multiple employers).	The 10-day period (or 15-day period, if there are to be multiple employers) during which details of a notice of intention to bargain for a collective agreement are to be drawn to the attention of all employees who come within the coverage of the intended agreement excludes any days during which the Epidemic Preparedness (COVID-19) Notice 2020 is in force.
Section 50 - Consolidation of bargaining	An employer that receives notices to initiate bargaining for a collective agreement from more than one union may, within 40 days of receiving the first notice, request that the bargaining be consolidated into that for a single collective agreement, and each union must, within 30 days of receiving that request, either agree to the request or withdraw the notice.	The 40-day timeframe for an employer to seek consolidation of notices to initiate collective bargaining, and the 30-day timeframe for unions to respond to an attempted consolidation excludes any days during which the the Epidemic Preparedness (COVID-19) Notice 2020 is in force.
Section 51 - Ratification of collective agreement	A union must not sign a collective agreement or variation unless it has been ratified in accordance with the procedure for ratification by the employees to be bound by the agreement and of which the union notified the other intended party or parties at the beginning of bargaining for the collective agreement.	If the ratification procedure notified requires a union to ratify a collective agreement or variation by post or in person, the union may notify the other party or parties on or after the commencement of the Epidemic Preparedness (COVID-19) Notice 2020 of a new ratification procedure which is practicable and ratify the agreement or variation in accordance with that new procedure.
Section 53 - Continuation of collective agreement after specified expiry date	If a union or the employer initiated collective bargaining for the purpose of replacing a collective agreement before that collective agreement expired, the collective agreement that would otherwise expire continues in force for up to 12 months during which that collective bargaining continues.	If the period (not exceeding 12 months) during which bargaining continues for a replacement collective agreement expires during the period in which the Epidemic Preparedness (COVID-19) Notice 2020 is in force, the period during which otherwise expired collective agreement continues in force is extended by the number of days the Epidemic Notice is in force.

The changes under the Order in Council are summarised in Table 3. These temporary modifications to the rules pertaining to collective bargaining are aimed at addressing difficulties the parties have and will continue to face in complying with restrictions put in place by the Government in response to the current health crisis. In particular, the timeframes for the initiation of bargaining and the expiration of collective agreements have been temporarily extended to account for the fact that social distancing and the limits currently imposed on gatherings are not conducive to collective bargaining. Also, where the ratification process for any agreement has been rendered impractical by these restrictions, the union may give notice to the employer party of an alternative ratification procedure to be followed. These changes remain in force until three months after the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

The financial turbulence caused by the current health crisis and the Government's response to it will undoubtedly heighten tensions and create significant disruption in those negotiations. In our next newsletter and our annual Bargaining and Employment Law Update seminar series and accompanying book, we will identify and explore issues stemming from the parties' experiences with the crisis that have and that we expect to arise during collective bargaining since the advent of COVID-19 pandemic and related economic crisis.