MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: advice on communication, paid meetings, and workplace access rights

Date:	1 February 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1925

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** to various notification and communication obligations. **Agree** to allow paid meetings for workers. **Agree** to allow unions to have access to workplaces without consent in certain circumstances.	12 February 2021

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
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The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Purpose

To provide advice on notification and communication requirements during the Fair Pay Agreements (FPA) bargaining process, paid meetings for workers, and workplace access rights for unions.

Executive summary

We consider the FPA Bill will need to be more prescriptive than the Employment Relations Act (ER Act) about notification and communication requirements due to the fact that FPAs will have much wider coverage and the bargaining representatives will be representing parties within coverage who are not members of their organisation.

We recommend that various parties should have a role in relation to notification, which should occur both at initiation and before the ratification process. The initiating union should compile a list of known employers and notify them when it submits its initiation notice to the government body. Employers and unions will have an obligation to contact other known unions and employers respectively. Contacting all employers within coverage will be a challenge, and there is a significant risk that some employers will never be informed and consequently neither will their workers. Employers will be required to notify workers within coverage at two points: when an FPA is initiated (within 30 working days) and when the proposed FPA is ready for ratification (within 15 working days).

From the date that employers give the notifications to workers within coverage of an FPA, employers should have an obligation to pass the contact details of workers onto the initiating union(s) if they do not opt out within 20 working days. Employers should also notify new starters that an FPA has been initiated which covers their work and that they can contact the union(s) to opt in to further communications, but employers do not need to pass contact details on to the union in this situation.

We will soon provide you with advice that bargaining parties should have specific obligations to represent affected parties who are not members of the employer organisation or who are not union members (‘non-members’). We recommend that employers should also have an obligation to inform all employees within coverage about critical stages of the FPA process. This is to ensure that even if workers opt out of communications with the union they are still aware of what is happening.

Paid meetings for workers will be an important mechanism for informing workers about the FPA process but also for unions to understand workers’ priorities and seek a mandate for their bargaining strategy. We recommend that all workers within coverage should be entitled to two, two-hour paid meetings during the whole FPA bargaining process, and an additional two hour meeting in the event the FPA fails to be ratified (the first time only). We also recommend there should be similar procedural safeguards as exist under the ER Act, which require employers and unions to work together to minimise disruptions.

Finally, in relation to workplace access for unions, we recommend a similar approach as under the ER Act. However, in the situation where an FPA is in force and covers a workplace, unions should need consent from employers to enter workplaces within coverage that do not have any union members.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

Section A: Notification requirements

a **Agree** that employers should be required to notify all workers within coverage:

   a. when the FPA is initiated (within 30 working days[1]), and

   b. when it is ready for ratification (within 15 working days)

   c. when an FPA is being renewed or renegotiated (within 30 working days)

Agree / Disagree

b **Agree** that employers should also notify workers who are newly within coverage when there is:

   a. a significant change to coverage notified to the government body (within 30 working days)

   b. a variation to an FPA and a new group is added (within 30 working days)

Agree / Disagree

c **Agree** that unions and employers will have an obligation to inform other relevant employers and unions respectively (within 15 working days).

Agree / Disagree

d **Agree** that the initiating union(s) should be required to compile a list of known employers within coverage and to notify them when it submits its initiation notice to the government body for checking.

Agree / Disagree

e **Note** that it is likely to be difficult to comprehensively identify and notify all employers (particularly in fragmented sectors) and there is therefore a significant risk that a number of employers will not be aware that an FPA is being negotiated and consequently the obligation will never arise for them to notify their workers.

Noted

Section B: Obligation on employers to pass on contact details of workers to unions

f **Note** that the former Minister agreed that employers should be required to pass on the contact details of workers within coverage to the bargaining union(s) unless workers opt out, but we did not advise on when this needed to occur.

Noted

g **Agree** that employers should be required to pass on contact details of workers who do not opt out after the notification (within 20 working days) at two main points: after initiation and prior to ratification (although employees will have the option of opting in at any other time).

Agree / Disagree

[1] We envisage that when these working day obligations are drafted it should be phrased along the lines of 'as soon as reasonably practicable and no later than XX working days after the party becomes aware' but we have omitted this detail from the recommendations for simplicity.

h **Agree** that outside the above processes, employers should also be obliged to notify workers who are newly within coverage (e.g. after starting a new role) that an FPA process is ongoing and they can contact the union(s) to opt in to communication about the FPA (within 15 working days).

Agree / Disagree

Section C: Communication requirements (outside notification)

i **Note** that we will soon be providing you with advice that bargaining representatives should be subject to obligations to represent non-members appropriately which will include a communication element.

Noted

j **Agree** that employers should have an obligation to inform employees at various stages of the FPA process: initiation, when coverage is finalised, when a ratification vote is imminent, when the FPA is finalised, and when the FPA comes into force.

Agree / Disagree

Section D: Paid meetings

k **Agree** to one of the following options:

Option 1: Up to two, two-hour meetings for each employee within coverage of a proposed FPA (**consistent with the ER Act**).	*Agree / Disagree*
Option 2: Up to four hours of meetings per employee per FPA (but meetings must be at least one hour).	*Agree / Disagree*
Option 3: Up to two, two-hour meetings for each employee within coverage of a proposed FPA, with two additional hours if an FPA is voted down at the first ratification process (**MBIE recommendation**).	*Agree / Disagree*
Option 4: two hours of paid meetings for each employee within coverage of a proposed FPA, with one additional hour if an FPA is voted down at the first ratification process.	*Agree / Disagree*

Section E: Workplace access

l **Agree** that unions should have the right to access workplaces without consent where an FPA is being negotiated and there are workers within the proposed coverage, but that the purpose of the visit must directly relate to the proposed FPA.

Agree / Disagree

m **Agree** that once an FPA is finalised and in force unions should need consent from employers to enter workplaces within coverage that do not have any union members.

Agree / Disagree

Tracy Mears
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

01 / 02 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / ..... / .....

Background

1. We are providing you with a series of briefings on outstanding issues in the FPA system.

2. This briefing explores what notification and communication obligations should be placed on parties at various stages of the FPA bargaining process, whether there should be an entitlement to paid meetings, and in what circumstances unions should have access to workplaces without consent.

3. The briefing considers whether the development of bargaining processes can be left entirely to the bargaining parties to determine in the FPA system. After concluding that more prescription is desirable, the briefing explores the following topics:

    - Section A: What level of obligation should be placed on various parties in the notification process?
    - Section B: Requirements for employers to pass on contact details for employees within coverage to union(s)
    - Section C: What level of obligation should be placed on various parties in relation to communication (outside the notification process)?
    - Section D: Should there be an entitlement to paid meetings for workers?
    - Section E: Rights for unions to access workplaces

4. We have used the following criteria in analysing options in this briefing.

    - Legitimacy: whether the option ensures there is a mandate or social licence for an FPA, and that affected parties are aware of the process so they can contribute
    - Workability: whether the option supports the smooth operation of the FPA system
    - Balance between certainty and flexibility: whether the option strikes a suitable balance between certainty and flexibility for participants
    - Consistency with other systems: whether the option is consistent with parallel interventions in the Employment Relations/Employment Standards (ERES) regulatory system, unless there is a good reason for divergence
    - Cost effectiveness / efficiency: whether the option achieves the objective in a way that represents good value for money.

We do not believe bargaining processes can be left entirely to the bargaining parties to determine in the FPA system

The Employment Relations Act is not prescriptive in relation to bargaining processes

5. Under the Employment Relations Act 2000 (ER Act), there are a number of methods that unions can currently use to communicate with workers, and to ratify collective agreements. The way in which a union communicates with its members during bargaining is not prescribed.

6. For employers, there is a direct relationship between parties to bargaining and those who will be covered by the final agreement:

    - For single employer collective agreements, an employer needs to agree to a collective agreement for it to conclude.
    - For multi-employer collective agreements, an agreement generally does not go to ratification until the employer representatives have signed off on it with the consent of employers. It is possible that some employers may authorise an advocate to conclude

an agreement, but there would be an explicit contractual authorisation in this case. Therefore there is no need for prescription in how the bargaining team communicates with employers it represents.

Features of the FPA system create the need for more procedural communication requirements

7. We consider the inclusion of both employers and employees who do not have any contractual or other relationship with the bargaining parties – means that the traditional processes used for collective bargaining need to be modified for the FPA process. We think some level of prescription will be necessary for the FPA system, as there are key differences between the FPA system and collective bargaining under the ER Act:

    - There will be mandatory representation by employer organisations and unions.
    - The FPA system will create obligations for unions to represent all workers and for employer organisations to represent all employers. There would be benefits in setting clear expectations of what this will require at a minimum.
    - The wide coverage of the FPA system (sector-wide, nationwide) may require a more coordinated approach.
    - Some existing mechanisms under the ER Act are only available to union members, not non-members. We consider that mechanisms for the FPA process should be available to union members and non-members equally.

8. For these reasons we do not consider it is appropriate to leave all decisions on the FPA process to the bargaining parties.

9. We consider the FPA legislation will need to be more prescriptive because the bargaining representatives in the FPA system will be bargaining on behalf of parties who are not at the table, and agreement amongst the bargaining parties will not be binding on third parties until the FPA is in force. So any obligations on employers or unions during the bargaining process will need to be specified in the legislation for them to have effect.

10. We will soon advise you on the interconnected issue of specific obligations which should be placed on the bargaining representatives to represent non-members effectively.

11. The following five sections raise the key elements where more prescription is desirable.

Section A: What level of obligation should be placed on various parties in the notification process?

There are notification requirements in other similar systems

ER Act

12. Under the ER Act, once a union has provided notice to the intended party or parties that it intends to initiate bargaining, employers must draw the initiation of collective bargaining to the attention of workers within coverage (whether or not they are union members). Each employer needs to do this as soon as possible, but not later than 10 days after initiation in the case of a single employer collective bargaining, or 15 days in a multi-employer situation.

13. There are no rules for unions to notify their members of the start of collective bargaining, but we assume it would be normal practice for unions to notify all relevant union members that collective bargaining had been initiated.

Pay equity bargaining

14. Under the amended Equal Pay Act 1972, in pay equity bargaining situations, unions can raise pay equity claims and notify affected employers (in a multi-employer situation). On

receipt of a pay equity claim, employers must acknowledge receipt and notify unions (or other unions) where the employer's employees belong to a union that represents people who perform work that is the same or substantially similar to the work which the claim relates.

15. If an employer decides that a pay equity claim is arguable they must give notice to each affected employee (i.e. those that perform the same or substantially similar work as the work set out in the pay equity claim). The Act sets out in substantial detail what information needs to be provided,[2] and that the notice must be given not later than 20 working days after the employer decides the claim is arguable (although this can be extended by a further 25 working days if there are reasonable grounds).

Screen Industry Workers Bill

16. The Screen Industry Workers Bill (SIWB) has minimal statutory processes for notifying affected parties. It sets out that:

    - The Employment Relations Authority (Authority) calls for submissions on whether bargaining should be initiated, at which point affected parties may become aware of the proposed occupation-level collective contract.
    - Once approval is given by the Authority and bargaining has been initiated, a bargaining notice is required to be given to each bargaining party specified in the Authority's decision to allow bargaining.

We previously advised that for the notification process to be successful, various parties would need to support the process

17. The FPA Working Group noted that it would be critical that all affected employers and workers are notified. It recommended that once an independent body had verified that the initiation tests had been met, it should inform all affected parties (workers and employers) that bargaining will commence. It also recommended that minimum requirements for notifying affected parties should be set in law.

18. We previously advised that notification will be required after an FPA is successfully initiated for the following reasons:

    - Affected parties need to understand that change is underway which could affect them.
    - Employers, employers' organisations, unions and employees need to know FPA negotiations have commenced in order to have the option of participating in the bargaining process.
    - Employers and employees may want to clarify whether they fall within or outside the scope of the proposed coverage.

19. We considered it would be critically important to minimise the risk of a situation where employers and employees only become aware of a completed FPA once negotiations have already finished. Smaller employers will need to feed their views into the negotiations to make sure that they are not unfairly disadvantaged and their perspectives are taken into account. We also noted that notification would be much easier for concentrated, well organised industries – conversely it will be very difficult in fragmented, disorganised industries.

20. In relation to notification, we recommended shared responsibility for communication (split among employers, unions, peak bodies and the government) would be the best approach.

[2] For a claim raised by a union, this information includes a statement that their contact information will be passed on to the union unless they opt out within 20 working days, that they can opt-out of the claim, that they are not required to pay fees to the union in order to be represented, and the consequences of being covered by the union claim (i.e. they cannot raise their own claim subsequently). See Schedule 2 of the Equal Pay Act.

Employers could have primary responsibility for informing employees, supported by peak-body networks and unions where applicable.

21. We considered that the bargaining parties would need help from independent third parties to ensure that as many people as possible know that FPA bargaining is about to commence (or has commenced). We recommended that the government should have a role in publicising the initiation of FPAs, but the degree to which this is possible would depend on the funds available.

22. We concluded that a notification approach which drew on the contribution of various parties was likely to be most effective. We therefore recommend that unions, employers, peak bodies, and the government should all have formal roles, as summarised in the table below:

Employers	Unions	Peak bodies	Government
Inform all of their relevant employees that an FPA has been initiated which will cover their role, and tell them where they can find further information.	Inform all relevant members that an FPA has been initiated which will cover their role, and tell them where they can find further information.	Use their networks to raise awareness of the FPA process.	Use existing communication channels to raise awareness of the FPA process, as well as set up a dedicated website for information on FPAs. (The degree of involvement depends on resources available.)

23. We largely maintain our previous advice, but in order to draft the FPA Bill it is now necessary to design the more specific legal requirements which will be placed on each party in relation to notification.

Obligation to inform relevant employers

24. There is no single connecting element between all employers, unlike with employees who all have employers. This makes creating a specific obligation to inform employers more difficult to design.

25. We recommend that the initiating union(s) should be required to compile a list of known employers who will have workers within coverage and which the union must notify when they submit an FPA initiation application. This will go some way towards identifying the employers within coverage.

26. Nonetheless there is a significant risk that some employers will never be notified or become aware of the FPA through other means. This risk is likely to be particularly acute in fragmented sectors with low union membership rates or low membership of employer organisations (e.g. the only café in a small town may be unaware that there is a nationwide hospitality FPA under negotiation).

27. Overall we recommend relying on a combination of roles for peak bodies (who we are proposing will be required as a condition of funding to raise awareness of FPAs), employers and unions, supported by information and education activities by the government.

28. This may result in some employers being notified multiple times, but we consider overlapping obligations will help to ensure that as many affected parties are aware of the process as possible.

Obligation to inform unions

29. We envisage that it will be relatively easy to identify relevant unions within the coverage of the proposed FPA. There is a relatively small number of registered unions (132 as at 2018),

and many of them have readily identifiable coverages (e.g. workers at a particular company or occupation).[3]

30. Overall we recommend relying on a combination of roles for peak bodies, employers and unions. As a condition of funding given to the peak bodies (subject to Budget funding), the NZ Council of Trade Unions will have a role to raise awareness and identify relevant unions.

31. We recommend:

- The initiating union(s) must identify (where possible) and inform other unions in the workforce within proposed coverage within 15 working days
- If an employer has employees which are within coverage of more than one union, then once they become aware of an FPA initiation they also need to inform any union(s) which did not initiate the FPA within 15 working days.

32. This may result in some unions being notified multiple times, but we consider overlapping obligations will help to ensure that as many affected unions are aware of the process as possible.

Obligation to inform workers

In what situations should workers be notified?

33. We consider there are a number of different situations in which notification should be required throughout the FPA bargaining process. In some of these situations it will be necessary to inform all workers and employers within coverage, whereas in some situations (e.g. when coverage is changed) we recommend there should only be an obligation to inform the workers newly within coverage.

When notification should occur	Who should be notified	
	All affected workers and employers within coverage	Only workers and employers who are newly within coverage should be notified
Every time there is a new FPA initiated	✓	
When there is a significant change to coverage notified to the government body		✓
When an FPA has been agreed and ratification process is imminent	✓	
Whenever there is a variation to an FPA and a new group is added		✓
Renewal or renegotiation of FPAs	✓	

34. We recommend all notifications should be provided directly to workers in writing and expressed in plain language. For instance this could take the form of a mass email to all staff within coverage, or an individualised letter or email. A staff notice board would not be direct communication and would therefore not be permissible.

[3] More information is available on the website for the Registrar of Unions: https://www.companiesoffice.govt.nz/all-registers/registered-unions/annual-return-membership-reports/

Specific timeframes will be required for employers and unions to notify affected workers

35. As with the ER Act and the amended Equal Pay Act, it will be necessary to put in place timeframes by which employers and unions must inform employees. Specifying timeframes will help to support the legitimacy of the FPA system by ensuring workers are aware of the process and are in touch with their bargaining representative(s).

36. Compared to these other bargaining systems, we think the FPA system is more complex and it will be challenging to identify and notify all affected employers and workers. Therefore we consider longer timeframes will be required than the ER Act and even the pay equity system, at least in the initial notification stage, to ensure the system is workable.

37. Therefore we recommend the following specific timeframes:

    - Initial notification at the beginning of bargaining: employers notify affected workers as soon as reasonably possible and no later than 30 working days from the date they become aware of a successful initiation. Unions should also be required to notify union members at this stage within the same timeframe (they will not yet have the details of non-members). We consider 30 working days would be an appropriate timeframe, given the potential complexity of determining who is affected by the FPA.
    - Prior to ratification: employers and unions notify affected workers as soon as reasonably possible and no later than 15 working days from the point they become aware of the imminent ratification. We consider a shorter timeframe is appropriate in this situation (compared to the initial notification) as the parties affected by the FPA under negotiation would be clearer.

38. One difficulty with our recommended approach to timeframes above is that employers and unions will become aware of the FPA at different times and it could be difficult to prove when they became aware. This could lead to a confusing and complex range of different dates by which affected workers would become aware of the FPA.

39. Another viable option is for the working day timeframe to start when the government body gives notice of a successful initiation or when ratification is imminent. However, this option would create a mismatch with our proposed approach to penalties discussed below.

40. We envisage there will be an associated penalty for failing to comply with the notification requirements, but it will need to be carefully designed to ensure it does not penalise employers who were legitimately unaware that an FPA was being negotiated and they had an obligation to inform their staff. This could involve the applicant proving the employer or union knew about the FPA but failed to notify workers.

Summary of notification obligations

41. The following table summarises the obligations of parties in the notification process.

42. Where the requirements below refer to working days, we envisage that the legislation will specify that the party must comply with the requirement 'as soon as reasonably practicable and no later than XX working days'.

	First notification (after initiation or where coverage changes)	Ratification notification
Employers	Inform all employees within coverage that an FPA has been initiated which will cover their role, and tell them where they can find further information (within 30 working days). This notification includes an opt-out process for workers' contact details being passed on to union representative(s) – see next section.	Inform all of their relevant employees within coverage that an FPA is about to go to ratification and how they can participate (within 15 working days). Pass on contact details for employees who are within coverage to union representative(s) unless they opt out –

	If an employer has employees which are within coverage of more than one union, then once they become aware of an FPA initiation they also need to inform any union(s) which did not initiate the FPA within 15 working days.	see next section.
Unions	For the initiating union(s): • inform all relevant members that an FPA has been initiated that will cover their role and tell them where they find further information (within 15 working days). • where there are other unions in the workforce within proposed coverage, inform other unions (within 15 working days) • collate a list of known employers and notify them when submitting the initiating notice to the government body. A non-initiating union must inform all relevant members within 30 working days of receiving a notification that an FPA has been initiated.	All unions representing workers within coverage must notify workers (regardless of membership) that ratification is imminent and how they can participate (within 15 days).
Peak bodies	N/A – but as a condition of government funding for peak bodies they must use their networks to raise awareness of the FPA process	
Govt body	Requirement for the government to publish a notice of the initiation of FPA negotiations as soon as reasonably practicable. (The government will also engage in information and education activities to raise awareness of the FPA throughout the process.)	

43. In the event than an FPA is renewed or renegotiated the same process would be used as for the initiation notification above.

Section B: Requirement for employers to pass on contact details for employees within coverage to the union(s)

Background

44. We previously advised that there would be value in unions being able to contact non-members directly during the bargaining process (rather than having to communicate through employers). Our reasoning was that effective representation would require two-way communication between workers and the union(s). We noted that there was a tension between privacy concerns and encouraging worker engagement in the bargaining process, but ultimately recommended that workers' contact information should be passed on automatically to the bargaining union(s) unless the worker opts out. We suggested that non-members information should only be able to be used for FPA-related communication and there should be an unsubscribe option. The former Minister agreed with this recommendation (see briefing 2512 19-20).

In what situations should employers be required to pass on contact information?

45. As explored above, the former Minister agreed that employers will be required to pass on to the bargaining union(s) the names and contact details of workers within coverage of the proposed FPA. We previously suggested this would be an ongoing obligation, but did not advise on specific situations in which contact details would need to be provided.

46. If employers were only required to pass on contact information once at initiation it would quickly become out of date and people would be missed, because:

- New starters with employers will not be included
- Staff will likely move into and out of coverage within an employer
- If there are any changes negotiated to the coverage of the FPA, workers may consequently come within coverage or leave coverage

47. To address these issues it is necessary to consider whether there should be additional obligations for employers to notify unions of workers within coverage of the FPA. We have explored a number of options:

- **Option 1**: For employers to notify unions once after initiation and once before the ratification process (giving employees a chance to opt out in both cases)
- **Option 2**: Option 1 and where there are any changes to the list of workers within coverage (e.g. new starters or people who have left) then they should notify the relevant unions. This is similar to the approach in the recently amended Equal Pay Act, where if a new employee is covered by a union-raised claim they are given a chance to opt out before their details are passed on to the union(s).
- **Option 3**: Option 1 and where there is a change to the list of workers within coverage the employer must inform them an FPA has been initiated and they can contact the union to opt in to communications. However, the employer would not be required to pass on contact information for workers newly within coverage to the union(s).
- **Option 4**: Option 1 and employers would be obligated to provide an updated snapshot on a regular basis (e.g. every six months).
- **Supplementary option**: Combining an above option with workers having an opportunity to opt in to communications with the union(s) at any time. This would be achieved by creating an obligation on employers that when they do a mass communication with all employees about an FPA at various stages (see section C below), they must make them aware that they can opt in to communications from the union.

48. In assessing these options it is necessary to balance the compliance costs associated with providing workers contact details to unions (including the risk of over-notification) versus the risk that workers will not have the opportunity to receive direct communications from the union representatives bargaining on their behalf. In other words there is a trade-off between the cost effectiveness and workability of the system versus the degree to which the bargaining representatives have a true mandate.

49. Our recommended approach is **option 3** combined with the supplementary option. Under this option, employers would undertake the formal notification processes, but they would also have to notify workers when they started or came within coverage that there was an active FPA process. This obligation to inform workers of the ongoing FPA process would alert them to the existence of the FPA and they could then choose to opt in to communications with the union(s) by directly contacting them. However, employers would not be required to pass on the contact details of workers to unions so the obligation would be less onerous than option 2.

50. We also considered options 1 and 2 could be viable:

- **Option 1** combined with the supplementary option would minimise the costs for employers by only requiring the communication opt-out process to be run twice (assuming the FPA passes its first ratification). However, it creates the risk that after the initial notification a sizable number of new starters would not be in contact with their bargaining union(s).

- **Option 2** combined with the supplementary option would increase the likelihood that all workers would have their contact details passed on to the union(s) unless they objected, but it would create a significant burden on employers to regularly notify unions of new starters.

Is it necessary to set out timeframes for employers to pass on contact details?

51. Without a timeframe for employers to pass on contact details there could be significant delays in unions receiving this information, which would frustrate their role as representatives for workers and mean that workers would receive less information about the FPA process.

52. In the pay equity bargaining process, once an employer has accepted that a union claim is arguable, they must notify their relevant workers and workers have 20 working days to opt out of their contact details being passed onto the union(s). This process occurs once at the beginning of the pay equity process and also where there are new starters, but does not occur prior to ratification. The pay equity standard seems like an appropriate timeframe for deciding whether to opt out and we recommend the same timeframe for FPAs.

53. In the FPA system, we are also proposing a notification occur ahead of ratification. The timeframe for the ratification notification is connected to the ratification process, as the vote will not be able to start until employees within coverage have had a chance to opt out and then the contact details are passed onto the union(s). The union(s) will then need to collate all that information from various employers and prepare the ratification vote. In other words, the 15 day timeframe to notify workers is combined with the 20 working day timeframe to opt out, leading to a 35 working day minimum period before ratification could occur. A longer timeframe would give employees a longer opportunity to opt out of their contact details being passed on, but it would slow down the process too much.

If workers opt-out of communication with union(s) do they get an opportunity to participate in the ratification vote?

54. We previously advised that employers would still have a general responsibility to pass on information about FPAs to their workers (e.g. that an FPA had been initiated, or when ratification would take place). This would mean that employees who opted out of communication would still receive some information about the FPA process.

55. We have also suggested above that employees should have at least two opportunities to opt out of their contact details being passed on to the relevant union(s). This will provide employees to opt in right at the end of the process in time for voting in the ratification process if desired.

56. A question remains whether employees who opt out of communications would still receive an opportunity to vote on the FPA. You have decided that unions are responsible for organising the ratification process, so it will be necessary for them to have the contact details of the eligible workers (assuming the vote is organised online). On the other hand, there could be significant freedom of association issues if workers were required to associate with union(s) in order to have a vote in the ratification process which might suggest that having contact details passed onto unions and voting should be separate decisions. We will be providing you with a briefing which provides advice on the details of the ratification process soon and we will provide recommendations on this issue then.

It will be important to ensure workers' privacy is protected, but information will also need to be shared between unions

57. As noted above, we previously advised that there should be safeguards relating to unions' communication with employees:

    - the communication must be directly about the FPA,

- the workers have a mechanism for opting out of communication (e.g. an 'unsubscribe' option), and
- the contact details are not used for any other purpose.

58. We also recommend that employers must specify who the contact information will be given to and how it will be used.

59. Finally, the disclosure of contact information process needs to account for a situation in which there are multiple union bargaining representatives. In this situation we recommend that the initiating union which receives the contact details of workers within coverage can share these with other unions if they are bargaining representatives.

Section C: What communication obligations should be placed on parties (outside notification)?

Other parts of the FPA system already require bargaining representatives to properly represent affected parties

60. The obligations for employers to pass on contact information to the bargaining union(s) is linked to the obligation for bargaining representatives to represent non-members during bargaining. We will soon be providing you with advice on what these bargaining obligations should be (e.g. having an avenue for affected parties to provide feedback).

61. We have previously recommended that the bargaining representatives on both sides must be incorporated societies, and have a legal form, constitution and rules which enable them to represent affected parties appropriately (see most recently briefing 2021-1724).

62. The combination of these requirements for bargaining obligations and legal-form requirements for bargaining parties will provide a reasonable degree of assurance that they will communicate appropriately with all affected parties. We think these requirements should be sufficient for union–employee communication and employer organisation–employer communication, but we explore below whether explicit communication requirements would be useful for employer–employee communication.

Employer to employee communication

63. We will soon be providing you with advice that bargaining obligations should include a requirement for regular communication with all affected parties. However, employer–employee communication is not covered by this obligation, and it will be important for workers who have opted out of communication with unions to receive some basic information from employers as a fall back.

64. We recommend that employers should have an obligation to notify workers at critical stages of bargaining, for example that:

- initiation has occurred
- coverage has been finalised (after it has been vetted)
- the ratification vote is imminent
- the FPA finalised (ratification passed or determination on full FPA)
- the FPA is in force

65. This communication will not need to be personalised and could be a mass communication to all affected workers. As discussed above, we recommend that each communication to workers should include information that the workers are being represented by union(s) and they can opt-in to communications with the unions by contacting them.

66. We have considered whether it is necessary to establish in legislation which party is responsible for the content of messages employers pass on to employees. There is a risk that if each employer is responsible for the content of the messages to employees then employers who are hostile to unions or the FPA may choose to provide information which is not neutral. However, we consider this would be unnecessarily prescriptive and would be better dealt with by the bargaining parties and specified in the bargaining process agreement. In addition, good faith requirements should ensure employers do not communicate in a way that undermines bargaining.

67. We note that in informal conversations, representatives from the NZ Council of Trade Unions have expressed concern that employees would be able to opt out from communications with unions. They also expressed concern that employers would have any role in information provision.

Section D: Should there be an entitlement to paid meetings?

Under the ER Act, union members are entitled to four hours of paid meetings a year

68. Under the ER Act, an employer must allow union members to attend at least two union meetings per year (each of a maximum of two hours) in each calendar year. There are no statutory restrictions on what these meetings can be used for, and the meetings are used for a variety of purposes. Where there is active collective bargaining, unions may use these meetings to seek views from members on what issues to raise at bargaining, to receive updates on bargaining, or to ratify a collective agreement.

69. There is a requirement that the union must make such arrangements with the employer as may be necessary to ensure that the employer's business is maintained during any union meeting, including, where appropriate, an arrangement for sufficient union members to remain available during the meeting to enable the employer's operations to continue.

70. If union-run paid meetings are allowed, we consider they would need to be in addition to paid meetings under the ER Act. We consider union members would consider it to be an erosion of their rights if they had to use existing meeting rights for a new FPA process. These meetings would also not be available to non-members without additional provisions in law.

Paid meetings could be used at various points in the FPA process

71. We consider paid meetings could be used in a number of different situations:

    - After initiation, to instruct bargaining representatives on which issues employees would like to see addressed in the FPA process, as well as to provide information on the FPA bargaining process more generally (e.g. likely timeframes, how the ratification process will work, etc).
    - During bargaining, to provide an update to workers on the outstanding issues.
    - Once an FPA has been concluded, a paid meeting could provide an opportunity for the union bargaining representatives to explain the contents of the proposed FPA and answer questions. Voting could either occur in person or online subsequently.
    - Where a whole FPA had been determined by the ER Authority, to inform affected workers on what the agreement contained.

72. The FPA Working Group recommended that paid meetings be used to appoint the bargaining representatives. However we are not envisaging an exclusive right for one bargaining representative to represent all affected parties on each side, so there is no need to elect bargaining representatives.

Paid meetings should be allowed in the FPA system, but they will create significant costs and there are likely to be logistical issues

73. We consider some sort of meeting is essential for informing affected workers about the FPA process and to seek a mandate for the representative union(s). Paid meetings would likely be the most effective way of transmitting information to large audiences regarding FPAs (such as bargaining progress and priorities). It also enables workers to ask questions and give feedback to unions, and for workers to hear from other workers.

74. We considered but discarded an option for allowing *unpaid* meetings during work hours. Unpaid meetings would have been less costly for employers, but employers would have still had to incur the cost of disruption and lost productivity. This option is also less likely to encourage worker attendance (and thus less engagement), and will most likely be attended by union members or those who already have an interest in FPAs.

There are likely to be logistical issues but they could be mitigated where needed by holding online meetings

75. There could also be major challenges for unions in holding a series of nationwide, sector-wide meetings. There may also be difficulties in consensus-building once initial meetings are held, if there are a wide range of views expressed in the meetings. The format may be less effective in hearing from workers who do not want to publicly express their views, or be publicly associated with those views (compared with more anonymous formats).

76. In-person meetings would be an efficient means of communication with smaller groups, but could be challenging to organise in a way that ensures all workers can attend them. We anticipate that given the large number of workers within coverage across different locations and working hours (e.g. shift workers), unions are likely to hold staggered meetings and may also complement in-person meetings with online video calls or even choose to hold meetings online-only.

77. Unions will likely incur significant costs organising meetings with all the workers within coverage (regardless of their union membership). These costs will vary depending on the degree to which meetings are held online and how fragmented the workers within coverage are. The government contribution to the costs of bargaining will support unions to hold these meetings.

Employers are likely to face significant costs releasing their workers to attend meetings

78. We have not been able to quantify the costs to employers of paid meetings for workers. At the simplest level, employers would have to pay the cost of workers' wages even though they were not working. In addition – and perhaps more importantly – employers will also face the cost of lost productivity (i.e. in addition to the cost of wages, the outcome of the lost work will also be lost).

79. The impacts of paid meetings are likely to vary depending on the type of industry involved, whether all workers attend the meetings at once and other factors. It may also be easier for unionised employers to understand the process surrounding paid meetings, whereas employers without any union presence may have never had to release workers for a paid meeting before.

80. Importantly, the impact on employers should be minimised by procedural safeguards in the organisation of paid meetings which we recommend below.

Procedural protections against undue disruption are needed

81. We recommend largely replicating the ER Act procedures for holding paid meetings, which mitigate the risk of undue disruption. These protections should include:

    - That the bargaining representatives give employers at least 14 days' notice of the date and time of any meeting for employees.

- The bargaining representatives must make such arrangements with employers as may be necessary to ensure employers' businesses are maintained, including – where appropriate – an arrangement for sufficient employees to remain available during the meeting to enable employers' operations to continue
- Work must resume as soon as practicable after the meeting, but employers are not obliged to pay employees for a period of over two hours in respect to any meeting.
- An employer must allow employees to attend the FPA meeting on ordinary pay to the extent that the employee would otherwise be working for the employer during the meeting.
- A requirement that the union(s) provide employers with a list of all people who attended the meeting and the duration of the meeting
- The primary purpose of the meeting must be FPA related (e.g. to provide information on the FPA, seek the views of affected workers, etc).

82. An even stronger protection would be to include longer notice periods as for essential workers undertaking industrial action, or the requirements in the Code of Good Faith for the public health sector to maintain life preserving services. However, we think the ER Act requirement to ensure the maintenance of businesses is sufficient.

You have choices about how many hours of paid meetings to provide workers

83. The ER Act provides a high degree of flexibility for union members to attend at least two, two-hour meetings per year for whatever purpose required. These are likely to include purposes not directly related to bargaining.

84. This will interact for the requirement for union bargaining representatives to represent non-members in good faith. Paid meetings will be an important mechanism for representatives to interact with non-members and hear their views so they can represent them effectively. All workers within coverage will be entitled to attend paid meetings.

85. If there are multiple unions in the negotiation, the bargaining representatives will need to agree an approach for paid meetings among themselves.

86. We consider that paid meetings are likely to be particularly useful for the ratification process. Given that there could be additional ratification processes if ratification fails the first time, we have considered whether additional paid meetings should be provided for in this situation.

87. We have considered a number of options:

- **Option 1**: Up to two, two-hour meetings per employee per FPA (consistent with the ER Act, although meetings can be used for purposes other than collective bargaining).
- **Option 2**: Four hours of meetings per employee per FPA (but meetings must be at least one hour).
- **Option 3**: Option 1 or 2 and give an additional two hours of meeting allowance the first time there is a failed ratification vote.
- **Option 4**: Halve the allowances of option 3, so workers are entitled to two hours of meetings per employee and one additional hour in the event of the first failed ratification vote.

88. We do not have good information on how unions use their paid meetings, or whether shorter duration meeting are more or less disruptive for employers, and have not been able to test these questions with stakeholders in the time available.

89. We recommend **option 3 (combined with option 1)**. This would entitle workers to two, two hour-meetings per FPA. We have put significant weight on maintaining consistency with the ER Act which also allows for two, two-hour meetings.

90. This option would also provide an additional two-hour meeting the first time there is a failed ratification. On the one hand it would beneficial to provide an additional paid meeting in the event that ratification fails, because it will likely be necessary to seek a mandate from workers on how to proceed and/or organise another ratification meeting. However, the two hour paid meeting also increases the burden on employers if there is a failed ratification. This additional allocation may incentivise employers to agree to an FPA in the bargaining and ratification process.

91. **Option 2** would provide employers with certainty about the maximum extent of paid meetings and is consistent with the approach in the ER Act. However, it would not provide for an opportunity for more paid meetings if unions had already exhausted their entitlement and then the FPA was voted down at the ratification process.

92. **Option 4** is less generous than the ER Act, to reflect the fact that FPAs will impose a significant cost across a sector or occupation and that the ER Act entitlement is not solely for collective bargaining meetings. Given this wide impact, it may be appropriate to limit the paid meeting entitlement to a base level of two hours. This option also provides an additional hour of meetings in the event of a failed ratification.

93. The ER Act gives the entitlement to individual workers (rather than workplaces or workforces). We consider this would work well for the FPA system – under all the options – so if coverage was expanded part way through bargaining, the newly covered workers would have an opportunity to attend meetings.

We recommend the FPA legislation should give flexibility in how paid meetings are used

94. We have considered whether the FPA legislation should specify for what purposes the paid meetings should be used (beyond the requirement mentioned above that the primary purpose must be related to the FPA). For example, the legislation could specify that two hours of meetings must set aside for the ratification process.

95. We recommend giving a high degree of flexibility to the bargaining representatives to decide on the best way to engage with affected employees throughout the bargaining process. For example, the representatives may decide to focus on seeking a mandate through the bargaining process and updating members on the current state of the bargaining in person rather than holding a ratification vote in person.

Section E: Rights for unions to access workplaces

96. We previously advised that workplace access for unions should be enabled through similar provisions as exist in the ER Act. Equivalent rights would mean that unions could be granted access to workplaces without consent if an FPA had been initiated, but would need to obtain consent if an FPA had yet to be initiated. For example, unions would need to obtain consent if they wanted to collect signatures from workers to support an application to initiate FPA bargaining. While we recommended that some union access to workplaces should be allowed, we noted more work needed to be done on whether rights to enter workplaces without consent should be extended.

In what situations should unions be able to access workplaces without consent?

97. In general, we consider the approach in ER Act is appropriate and should be carried over to the FPA system.

98. One implication of carrying across the ER Act approach is that during bargaining unions would have access without consent to workplaces where workers were within coverage. Although it is consistent with the existing approach, this would nonetheless be a significant expansion of union workplace access rights overall and is likely to be controversial. On the one hand unions may need to access workplaces to properly represent workers, but employers will likely object to unions being able to enter workplaces without their consent

and potentially create disruptions. Unlike under the ER Act, during FPA negotiations employers may not have any existing relationship with the unions accessing their workplaces. On balance we think unions need to be able to talk face-to-face with workers they are representing, and the existing safeguards in the ER Act relating to workplace access should be sufficient to protect employers' interest in minimising disruption (i.e. it must be at reasonable times when employees are working, it must be done in a reasonable way, and health and safety/security requirements must be met). Finally, we recommend that in addition to these safeguards that the purpose of the visit must be directly related to the FPA.

99. One situation which has no precedent in the ER Act is where there is an FPA in force but there are no union members. Under the ER Act, there must be union members at a workplace and a collective agreement in place (or under negotiation) before unions get access without consent. In this situation we recommend that consent should be required from employers. If the ER Act principle was extended to the FPA system, FPAs in force in a sector would enable unions to enter without consent any workplaces with workers within coverage. This would be a significant expansion of the right for unions to enter workplaces without consent. The existing safeguards in the ER Act should be utilised to ensure that employers do not unreasonably withhold consent to access workplaces.

	No collective/FPA		**Collective/FPA in bargaining** (workers in coverage)	**Collective/FPA in force** (workers in coverage)	
	No union members	**Union members**		**No union members**	**Union members**
Equivalent situation for collective bargaining under the ER Act	Consent required	No consent required if there is a collective agreement in place or under negotiation	No consent required	N/A – have to have union members for there to be a collective	No consent required
FPA	Consent required	Consent required unless there is a collective agreement in place or under negotiation (as above)	No consent required, but the visit must be directly related to the FPA	Consent required	No consent required

Next steps

100. We are providing advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval to draft the Bill and to inform the drafting instructions.

101. The scheduled for the project is set out in the table below:

Milestone	**Date**
Advice on consequential changes to other design aspects Advice on remaining advice on system issues	All provided by 19 February 2021
Cabinet paper drafted RIA prepared	12 March 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	26 March 2021
Cabinet Committee	14 April 2021