



BRIEFING

Fair Pay Agreements: further advice on different terms for regions and union members

Date:	25 March 2021	Priority:	Urgent
Security classification:	In Confidence	Tracking number:	2021-2994

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree an approach to enforcing regional differences Agree to enable the FPA system to allow for differential terms for union members.	25 March 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
N/A

Minister's office to complete:

Approved

Noted

Seen

See Minister's Notes

Declined

Needs change

Overtaken by Events

Withdrawn

Comments



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Fair Pay Agreements: further advice on different terms for regions and union members

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Purpose

To provide further advice on different terms for regions and union members in the Fair Pay Agreements (FPA) system.


Recommended action

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

- a **Note** this briefing provides further advice on the differential terms briefing [2021-1915 refers] after our recent meetings in which you indicated that your preference was to have the Labour Inspectorate (LI) enforce any regional differences in minimum employment entitlements agreed in an FPA, but you sought further advice about what further decisions were needed to give effect to that choice.
- Noted*
- b **Note** that in order for the LI to enforce multiple regional differences in minimum employment entitlements within an FPA there are three key considerations:
- i. How regions are defined.
 - ii. How employees who work across regions are dealt with.
 - iii. What information the LI will need to enforce multiple regional differences effectively.
- Noted*
- c **Note** that MBIE's view is that the compliance costs of imposing the information requirements necessary for effective enforcement by the LI of multiple regional differences in minimum employment entitlements within a single FPA are likely to be significant and are not outweighed by the benefits of enforcement by the LI (given that the parties are also able to enforce regional differences through the dispute resolution system).

Noted

d Confidential advice to Government



- e **Agree** to one of the following three options:
- i. If one or more regional differences in minimum employment entitlement terms within an FPA are agreed by the parties, each regional specification of those terms will become a minimum employment entitlement and can be enforced by the LI.

Agree / Disagree

or

- ii. Require parties to set a national rate for minimum employment entitlements, which would be enforceable by the LI, and that any regional variation must be above the national rate. (see para 3, MBIE recommended)

Agree / Disagree

or

- iii. Allow parties to set different regional rates for minimum employment entitlements and enable the LI to enforce the lowest regional rate (i.e. the lowest regional rate for each term would be enforced across the whole country). (see para 3)

Agree / Disagree

- f **If you agree to rec e(i), then agree** to each of the following elements to enable effective enforcement by the LI of multiple regional differences in minimum employment entitlements within a single FPA:

i. Where the bargaining representatives agree regional differences they must be specified in terms of territorial authority boundaries.	<i>Agree / Disagree</i>
ii. The FPA system should establish a rule that if a worker works in more than one region, then the region where they perform the majority of their work should be the one that prevails in determining their minimum employment entitlements.	<i>Agree / Disagree</i>
iii. Employers, with workers whose work could fall under two alternative regional minimum employment entitlements in an FPA, must keep a record of where workers work. In addition, the LI should have the power to request this information.	<i>Agree / Disagree</i>

- g **Agree** that the FPA legislation should explicitly authorise FPAs to contain different terms for union members (i.e. the FPA legislation should over-ride the prohibition on preference in s9 of the ER Act to allow for preferential payments to union members).

Agree / Disagree

- h **Agree** that any preferential payment for union members must not be greater than the union member's membership fees.

Agree / Disagree

- i **Agree** that any payment agreed for union members in an FPA should apply to all union members within coverage.

Agree / Disagree



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

25 / 03 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. This briefing provides further advice on the briefing *Fair Pay Agreements: Differential terms* [2021-1915 refers] after our recent meetings.

Further advice on the enforcement of regional differences

2. A previous design decision was that parties will be able to agree regional differences within an FPA. In the recent briefing on differential terms (refer briefing 2021-1915) we provided advice on whether the Labour Inspectorate (LI) should be able to enable regional differences in minimum employment entitlements.
3. We outlined two options:
 - **Option 1 (MBIE preferred):** Require parties to set a national rate for minimum employment entitlements, which would be enforceable by the LI, and that any regional variation must be above the national rate.
 - **Option 2:** Allow parties to set different regional rates for minimum employment entitlements and enable the LI to enforce the lowest regional rate (i.e. the lowest regional rate would be enforced across the whole country). This would be much more complex as each term enforced by the LI (e.g. pay, leave, etc) would be enforced at the lowest regional rate, rather than there being uniform minimum employment entitlements across the country. For example the LI may need to enforce the pay rate set for one region but the leave rate set for a different region.
4. You expressed a concern that both options would mean that only the lowest value regional rate would be enforced and drive bargaining to the “lowest common denominator.”
5. Based on that discussion, we understand that you consider each minimum employment entitlement that is specified by region should be enforceable by LI and would like further advice on this approach.
6. The three main issues raised in relation to the LI enforcing regional differences are:
 - Defining regions to ensure agreements are enforceable
 - How it would apply when workers cross boundaries or work in a different area to whether the business is located.
 - Information required to confirm which regional term applies.

For regional differences to be enforceable by the LI, parties should be required to use specified regions

7. We do not consider it would be workable from an enforcement perspective if bargaining parties were able to define the boundaries of regions that the different terms would apply to. There is a significant risk that what is agreed is not clear enough to be enforceable. The regions would need a clear definition that Labour Inspectors could refer to when out in the field assessing businesses' compliance with the FPA terms.
8. While collective agreements may include regional differences that parties can bargain (with no requirements on how they are defined) these are not enforced by the LI.
9. For regional differences to be enforceable, we consider parties should be required to use specified regions that the differences apply to.
10. We have identified three options for the types of regions that could be used:

- **Regional Councils** – There are 16 Regional Councils. We do not consider these would be granular enough to allow for the type of differences parties might want to include in FPAs.
 - **Territorial Authorities (MBIE preferred)** – There are 61 Territorial Authorities (11 are City Councils and 50 District Councils). These would allow more granular differences than Regional Councils providing more flexibility for parties to bargain the variations that reflects relevant region-based differences. A benefit of this option is that people are generally familiar with what Territorial Authority they are in, though recognising there is often a difference between the Territorial Authority that a person lives in and where they work.
 - **Electoral Boundaries** – In 2020, there were 64 general electorates (and seven Māori electorates). These would allow for slightly more granular differences than the option above. However, these are reviewed regularly and can be adjusted by Gazette. Because changes occur by Gazette and are made public via a government website, it would be difficult to refer to in legislation.
11. We consider the most workable option would be to require parties to specify and apply any regional differences in FPA terms on the basis of the Territorial Authorities boundaries. This would not prevent the bargaining representatives from specifying that terms apply to a group of Territorial Authorities.
12. In terms of the upcoming Cabinet paper, we recommend that it seek to specify that regional differences can be agreed by parties, but must be set within the specified regions so that any differences in minimum entitlements can be enforced by the LI. The detail of how these regions are specified would be confirmed during drafting.

How would regional differences work in practice where workers cross regional boundaries?

13. We have identified the following two options for determining which term should apply where more than one regional term is engaged:
- **Option 1: Require parties to specify how any regional differences would apply to workers who work in multiple regions** – This will allow flexibility for bargaining parties to consider how the differences would most appropriately and practically apply within their occupation or industry, though would complicate enforcement. We could issue guidance that the general principle is that the term applicable to the region where the work performs the majority of their work should apply. The risk of this option is that parties agree to a complicated application of terms (e.g. by applying different terms to workers when they work in different regions).
 - **Option 2: Specify a rule that will apply if a worker works in more than one region**, for example the term that applies to the region where they perform the majority of their work applies to all their work – this would provide greater consistency (simplifying enforcement), but would reduce flexibility.
14. For certainty and simplicity of enforcement, we recommend option two.

It will not be possible for the LI to enforce FPAs with multiple regional differences without a requirement that employers keep records of where employees perform work

15. In some industries or occupations an employee may perform work covered by an FPA in a number of regions (e.g. inter-city bus drivers). If an FPA contains different terms and conditions for work performed in those regions, it may not be clear which should apply. In addition, some employees may work remotely (all or some of the time) in a region different to where the business they work for is located. There may also be a difference between where an employer is located and where the work is actually performed.

16. In order to enforce multiple regional differences we think it will be necessary for the LI and other institutions in the Employment Dispute Resolution system to have good information on where employees are performing the work covered by the FPA. However, current wage keeping requirements in the Employment Relations Act 2000 do not include any requirements about recording where employees work so there would be no way for the LI to measure the proportion of time an employee spent in one region versus another. The LI could attempt to rely on the location of work specified in worker's employment agreements, but this could be easily gamed.
17. Including a requirement to record the location of work performed where an FPA is in place may be possible but would impose significant compliance costs on the majority of employers and does not seem to be in proportion to the small number of times this information is likely to be needed. In other words, the compliance costs associated with enabling enforcement of regional differences are likely to outweigh the benefits of the enforcement of regional differences by the LI, particularly given the parties are able to use the dispute resolution system to enforce any regional terms. In the time available we have not been able to estimate these compliance costs but they are likely to be significant.
18. Confidential advice to Government
 [Redacted]
 [Redacted]
 [Redacted]
 [Redacted]
- [Redacted] we recommend that the LI should not enforce multiple regional differences. Our advice remains that the Labour Inspectorate should enforce the lowest regional minimum employment entitlement terms as set out in paragraph 3.

Further advice on preferential terms for union members in FPAs

20. You requested advice on whether unions should be able to negotiate an additional payment to union members, in recognition that unions will bear the costs of bargaining remaining after government financial support.
21. In the meeting with officials on 22 March 2021, you indicated that you have decided that the FPA system should allow parties to agree different terms for unions and non-union workers. Therefore we would like to confirm the details of your chosen approach.
22. Our understanding based on the discussion at the officials meeting is that you want the system to enable parties to discuss and agree a premium for union members, but not require parties to. Therefore, it would not be included in the 'mandatory to agree' or 'mandatory to discuss' topics.

Allowing different terms for union members would need to be explicitly enabled by the FPA legislation

23. Under the Employment Relations Act 2000 (ER Act), there must be no preference given on the basis of union membership (s9). An exception to this is in relation to collective agreements which can (and do) contain specific provisions for union members (s9(3))¹. This

s9: Prohibition on preference

(1)A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,—

(a) any preference in obtaining or retaining employment; or

(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

exemption reflects the purpose of collective agreements, which is to bargain terms and conditions for the benefit of union members.

24. FPAs are would not be 'collective agreements' under the ER Act, therefore, this exemption would not automatically apply.
25. To enable different terms to be bargained and agreed for union members, the FPA legislation will need to extend the exemption from the rule against preference to FPAs.² If the FPA legislation is silent then terms which discriminate in favour of union members could be viewed as unlawful under the ER Act.

The limitation on the exemption needs to be clear

26. When extending the exemption to cover payments from employers to union members, it will be important that the limitations on this exemption are clear. You have indicated that you would like to enable bargaining parties to agree to a term which means that union members covered by the FPA could receive a preferential payment (one-off or over the life of the FPA) being included in the FPA.
27. We consider the FPA legislation should specify a safeguard for the maximum allowable level of a preferential payment for union members. Although the situation is different, we recommend a similar approach to the one taken in the ER Act in relation to bargaining fees: that the amount of the preferential payment should not exceed the level of the union member's membership fees.³
28. Any payment to union members would be conditional on bargaining representatives agreeing. We envisage they could agree payments in the form of a one-off payment or an annual payment, or any other form of payment where the parties could ensure it would not breach the limit of equivalence to union membership.⁴
29. We do not consider the FPA legislation should allow an uplift in wages for union members. This approach would be highly administratively complex and it would be difficult to prevent union members receiving benefits which were in excess of their union membership fees. This approach would also be inconsistent with the principle we have recommended above.

Application of union premium

30. There are two choices for application of a union premium: all union members within coverage or only members of unions involved in bargaining.
31. At the meeting on 24 March you indicated that the any premium agreed for union members should apply to all union members within coverage of the FPA (regardless of whether their union was involved in bargaining). We are seeking your confirmation of this decision.

(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.

(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits—

(a) of a collective agreement:

(b) arising out of the relationship on which a collective agreement is based.

² An exemption would be equivalent to s9(3) of the ER Act.

³ Section 69U of the ER Act specifies that bargaining fees "must not be greater than the union fee the employee would be required to pay to the union if the employee were a member of the union". The ER Act's bargaining fee framework relates to non-members paying a fee, rather than union members receiving a payment. Nonetheless we consider a similar principle is sound for the FPA system.

⁴ A one-off payment to union members when the FPA comes into force would be most consistent with the policy rationale to compensate union members for the costs of union membership during the bargaining process. Although this would be somewhat complex to administer (e.g. when accounting for different unions present in one workplace) it would be much simpler than the below option. An annual payment would be administratively more complex.

32. There is a minor risk that this approach could disincentive unions from joining the bargaining team. However, in the counterfactual situation where any agreed premium only applied to unions involved in bargaining it could prove difficult for unions to agree who the bargaining representatives should be.

Next steps

33. We will incorporate your decisions on this paper into the FPA Cabinet paper which is due to you on 26 March 2021.