

---

## BusinessNZ Network Member FAQ - Fair Pay Agreements

The Government has recently passed the Fair Pay Agreements legislation. The introduction of FPAs is one of the most significant changes to New Zealand's employment relations system.

Please find below a FAQ about FPAs and how they will impact businesses, if your particular sector or occupation is covered by one.

You can also find more information about FPAs on the MBIE website [here](#).

If you have any specific questions, or would like to speak directly to someone about FPAs, please contact **AdviceLine: 0508 656 757**

### *What are Fair Pay Agreements?*

- FPAs are compulsory, collective employment agreements that cover everyone working in an entire industry (e.g. all restaurants) or occupation (e.g. all chefs).
- An FPA will set pay and conditions including wages and overtime rates, hours of work, leave and training entitlements.
- An FPA will be in force for a minimum 3 years and a maximum of 5 years.
- Wage rates will apply across *all* covered employers and employees (although they can vary between regions).

### *Who can initiate an FPA, and how?*

Only a union can initiate an FPA.

There are only two ways that an FPA can be initiated; either a representation test or a public interest test:

- **Representation test:** Requires approval of either 1000 employees or 10% of all employees in a industry or occupation (whichever is lower).
- **Public interest test:** Requires that employees be "low paid" and meet one of the three other criteria: little bargaining power, lack of pay progression or inadequate pay (taking into account factors such as contractual uncertainty or long or unsocial working hours).

### *Who will be allowed to bargain for an FPA?*

- Registered unions will represent **all** covered employees (and eventually workers)
- Employer organisation(s) will represent **all** covered employers.

One or more employer organisations may be parties to the bargaining for an FPA. Individual businesses cannot be parties to an FPA. Bargaining sides must appoint a lead advocate and agree an inter-party agreement. If no employer organisation is available or willing to

negotiate, a “default employer organisation” will be offered the chance to bargain on behalf of employers. If that organisation declines, the ERA will fix the terms of the FPA without input from employers.

### ***How will I know if my business will be covered by an FPA?***

Once a union initiates an FPA, it must use its ‘best endeavours’ to notify the unions and employer(s) that will be covered by the FPA.

An employee (and their employer) is covered by a proposed FPA if their type of work is within coverage and at least 25% of their actual work is in coverage. Employers who misclassify employees as contractors to avoid FPA coverage will be penalised.

### ***My business does not have any union membership or any collective agreement. Why do I need to know about FPAs?***

If employers have employees who would be covered by the coverage clause, they will be covered whether the employees are union members or not. The legislation casts a wide net, and all employers and employees included in the specified coverage will be required to comply with the FPA.

### ***What happens if our business does not want to be part of an FPA?***

Unfortunately, if your business is covered by an FPA, you cannot opt out.

However, an FPA can allow for temporary delays of up to 12 months (i.e., a delayed commencement date) for businesses if they are in significant financial hardship.

This delay is not guaranteed – the employer has to make an application, and there are specific criteria that must be satisfied before the bargaining sides can approve that application. The Government has indicated that this is expected to be tightly controlled and approvals given only in extreme circumstances, especially initially, to avoid precedents that allow too many employers to delay the impacts.

### ***How can our organisation have a voice at the bargaining table?***

The vast majority of employers will not have a direct voice at the bargaining table. Rather, they will be represented by an “eligible employer association” which would have to apply to join the employer bargaining side.

However, where the bargaining side agrees it is possible that industry or occupational expertise is best sourced from enterprises, company representatives may also be invited to participate. MBIE must approve any application for approval to join the employer bargaining side.

### ***If my business is covered by an FPA, what do I need to do?***

Covered employers must:

- Provide their employees with information about the proposed FPA, including the initiation of bargaining and how to contact the relevant union.
- Provide details of covered employees to the initiating union unless employees object.
- In bargaining, the employer bargaining side must use its best endeavours to represent all employers and to act in good faith, including in relation to non-members. Best

endeavours are not defined, but will almost certainly include a requirement to find ways of keeping affected employers informed.

- Ensure effective representation of Maori employers.

### ***This sounds like a costly exercise to have to go through. Who will pay for it?***

Yes, it is likely to be expensive, particularly with anticipated litigation (given the lack of clarity).

Some funding (NZ\$50,000 per bargaining side), has been set aside for bargaining parties, on the assumption that there will be no more than four FPAs bargained in any year. This funding is likely to be inadequate given the large numbers of employees and employers potentially covered by an FPA.

There is also nothing in the legislation to prevent *more* than four FPAs being bargained in any year. Essentially employers will be on their own. Employer organisations, such as the BusinessNZ Network, may need to look at ways of raising funds, but this will be difficult if non-members are reluctant to contribute.

### ***What support is available for employers?***

MBIE must provide support services to bargaining sides and parties, unions and employers. Specialised services are being developed. Parties to bargaining may also use the existing mediation service.

### ***My business has employees who perform different roles. What happens if an FPA only covers part of their role?***

Where at least 25% of an employee's work is covered by an FPA, that employee is covered by the FPA; and if two or more FPAs meet the 25% threshold, the FPA that covers the largest portion of the employee's work should apply.

In businesses where employees change between different tasks or roles over the course of any given day or week, there is a real risk of inadvertent non-compliance with FPAs. This is because businesses may not easily recognise when an employee's work has shifted such that they now fall within the coverage of an FPA (particularly if the employee fluidly shifts into and out of coverage as part of their normal role).

### ***Will FPAs will replace IEAs and CEAs?***

FPAs will not replace IEAs and CEAs.

If the terms of an FPA are more favourable than the terms in an employment agreement, the FPA terms will apply. If an existing employee agreement is more favourable than the terms of an FPA, the existing agreement will apply.

This is likely to create significant administrative difficulties for covered employers who will be required to assess ***every*** covered employee's current arrangements against an applicable FPA to determine what agreement applies.

There may also be situations when it is not entirely clear whether a term in the FPA is "more favourable" than the equivalent term in an IEA or CEA. Changes to an employee's duties will also have an impact, as this will require a reassessment of the contractual terms applying to an employee, as well as whether there are changes in the coverage of an FPA.

### ***Can I appeal the outcome of an ERA decision on an FPA?***

Challenges to ERA decisions may be made to the Court on questions of law regarding if applications or determinations meet criteria.

The ERA may also remove a matter to the Employment Court but the Court cannot fix the terms of an FPA. The Court must appoint counsel to assist the court when a party was not present in bargaining. Appeals to the appellate courts are possible with the permission of the court, but are restricted to questions of law only

### ***Could FPA bargaining lead to strike action?***

Strikes are not permitted for FPAs (except for health and safety reasons) but there is no restriction for second tier bargaining under the ERA, i.e. using ordinary collective bargaining to “top up” FPA settlements. This is ironic as it was second tier bargaining that nearly bankrupted the country in the 1970s and 80s. The government is actually encouraging the use of second tier bargaining to “top up” FPA settlements. If history repeats itself, it is possible that large scale industrial action will again become common.

### ***Once agreed, how is an FPA finalised?***

For a FPA to be finalised, it must:

- Be assessed and approved by the ERA (through a “vetting” process to ensure compliance with the FPA requirements) then
- Ratified through a voting process by the covered employees and covered employers, which is
- Verified by MBIE
- Brought into force by the Chief Executive of MBIE through secondary legislation.

### ***What does ratification process involve?***

Ratification will require a majority of employees and employers to respectively vote in favour of the proposed FPA. Employers will have one vote per employee in coverage, with slightly higher vote weighting for employers with less than 21 employees in coverage (e.g., two votes if only one employee).

Parties can return to bargaining if the first ratification vote fails, but the FPA must go to the ERA for determination if a second vote fails, effectively making the voting process meaningless since “no” cannot mean “no”.

A finalised FPA will apply to *all* employers within its coverage, regardless of whether that employer participated in the bargaining or ratification process.

### ***What penalties can be applied if we don't abide by the FPA requirements?***

Businesses that breach the requirements of the Fair Pay Agreements Act can be penalised. Penalties range from a maximum of \$20,000 for Individuals up to \$40,000 for businesses. Offences include:

- Breach of good faith
- Employing contractors to avoid FPA coverage
- Failure to provide employee details to union
- Failure to permit employee to attend FPA meeting
- Failure to permit union rep to enter workplace
- Intentional or reckless failure to maintain contact details

- Intentional or reckless failure to provide information for ratification
- Intentional or reckless failure to provide accurate information for verification
- Failure to comply with a Fair Pay Agreement.

### ***What sectors are expected to be first in line for an FPA?***

The Unite Union has announced its intention to initiate an FPA for the Hospitality sector as soon as the Bill passes. They are already collecting 1000 signatures from around New Zealand. Bus drivers, retail workers (especially grocery) workers and security guards have all indicated an intention to seek an FPA.

### ***What has the BusinessNZ Network done to date?***

- In December 2021, the BusinessNZ Network [announced](#) it refused to be part of the FPA scheme as the default employer organisation, as the scheme is fundamentally flawed. We have consistently urged the Government to rethink the policy and instead improve and strengthen the current system.
- Launched and promoted a nationwide campaign [‘Your Work, Your Way’](#) against FPAs, including an [open letter](#) to the Government about why the BusinessNZ network and its members are opposed to the legislation.
- Presented an alternative, voluntary approach to FPAs.
- Provided extensive submissions and insights throughout the public consultation process, and advocated for the concerns of the business community.
- Repeatedly called on the Government publicly to work with the business community on an alternative to genuinely improve conditions for working Kiwis and meet the needs of the workplace of the future.
- Lodged a formal complaint with the ILO, which was heard in June 2022.

### ***What will the BusinessNZ Network do now?***

While BusinessNZ Network isn’t prepared to be the default bargaining party in the FPA scheme, we are committed to supporting our members to navigate the scheme as it currently stands. This includes possible litigation to test process and requirements of the legislation.

We will continue to actively engage with the Government over emerging issues, as specific FPAs are developed. We have also succeeded in getting the ILO to re-examine the FPA Bill for compliance with international law in time for hearings in June 2023.