Fair Pay Agreements

What will they mean for New Zealand businesses?

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A significant overhaul of New Zealand's employment and industrial relations framework

In May 2021, the Labour-led Government announced its long-promised plan to introduce a mandatory, sector-wide collective bargaining regime in the form of Fair Pay Agreements (FPAs). The Government's intention is to improve working conditions and outcomes for employees, while increasing productivity, by setting minimum employment standards across industries and occupations. Unions will play a central role in the new system, acting as the exclusive bargaining representatives for employees within a sector or across an occupation (including for all non-union employees).

Perhaps not surprisingly, the response from both the National Party and the majority of the business community has been swift and condemnatory. A number of industry bodies have criticised the potential negative impact such a change could have on small to medium-sized businesses (SMEs) which account for the vast majority of all organisations in New Zealand. Also, right-leaning political commentators have decried the influential role that unions will have in the new system.

For all New Zealanders, FPAs will represent the most significant overhaul of the country's employment and industrial relations framework in over three decades. It's also one of the largest structural changes – in any field – that the Government has made this term.

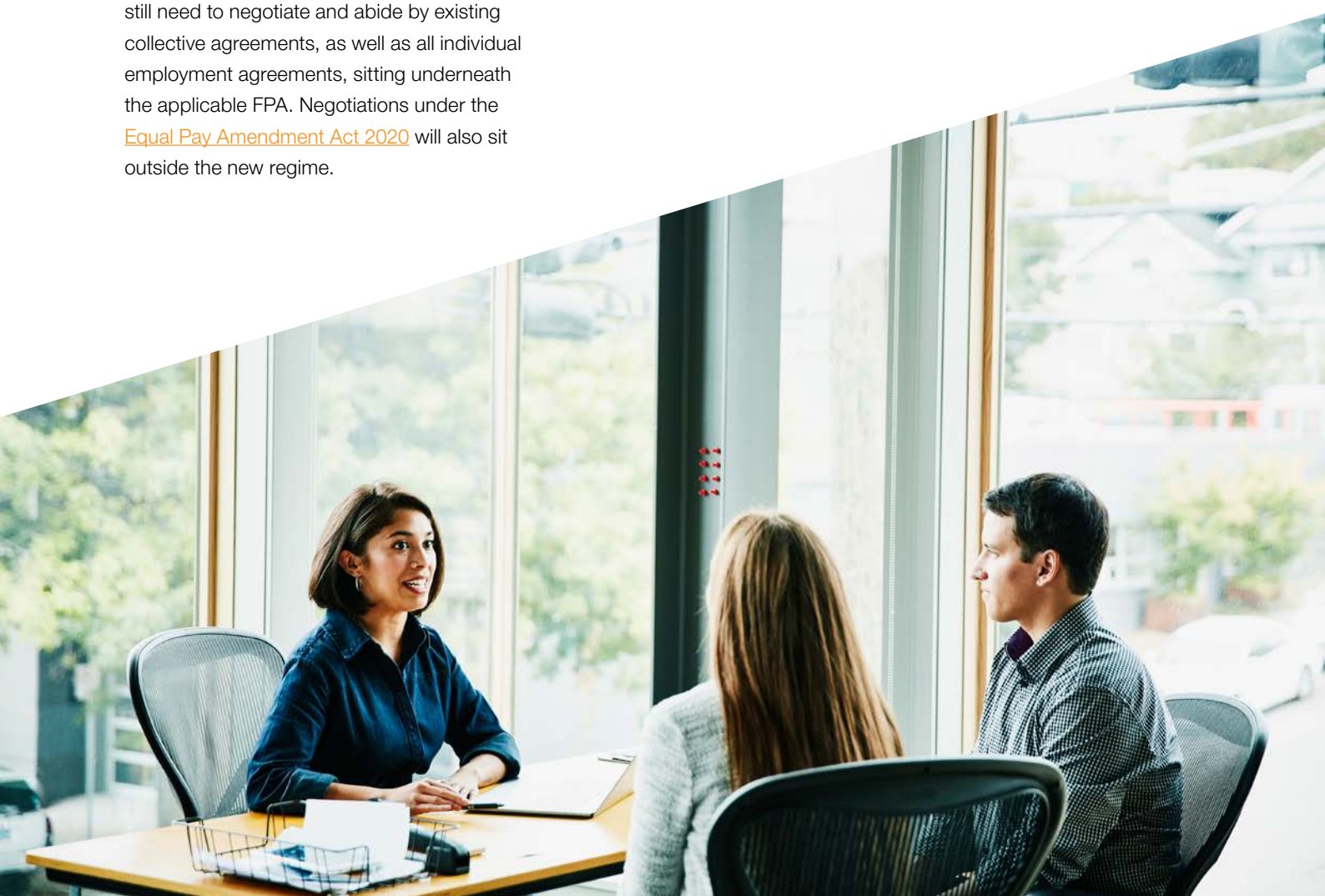
As PwC's Employment Advisory team, we have looked at the details of the Government's proposed system and the possible challenges. Here we share our findings, including key learnings from the Australian Modern Awards system and how SME employers can have their say later this year.

What is a Fair Pay Agreement?

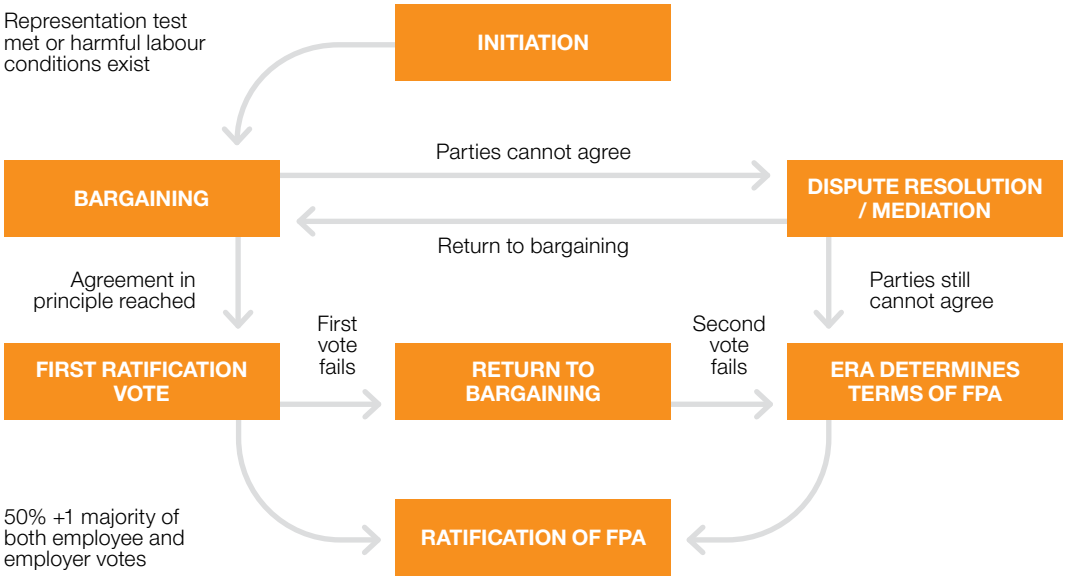
In essence, an FPA is a sector-level collective agreement that sets minimum terms and conditions for all employees within an industry or occupation. For example, an FPA covering the forestry sector would set and standardise key entitlements such as wages, hours of work, overtime and/or penal rates, leave, and redundancy (among other things) for all workers in the forestry sector. A small business that employs a small number of forestry workers will be required to comply with the forestry FPA in respect of those workers, regardless of whether those workers are union members.

The Government has made it clear that FPAs are intended to complement – rather than replace – the existing system, including enterprise-level collective bargaining (i.e. single or multi employer and/or union agreements). This means that workers and employers will still need to negotiate and abide by existing collective agreements, as well as all individual employment agreements, sitting underneath the applicable FPA. Negotiations under the Equal Pay Amendment Act 2020 will also sit outside the new regime.

At this stage, independent contractors will not be covered by the FPA regime. However, the Government intends to incorporate them into the system later.



How will Fair Pay Agreements be negotiated?



FPAs will be negotiated between unions – who will represent employees within specified occupations and sectors – and employers who will choose representatives that meet certain yet-to-be-specified requirements.

Employees, via union representatives, may initiate the bargaining process if they can demonstrate that the lesser of either 10% or 1000 employees in the proposed sector or occupation support the introduction of an FPA. However, these threshold requirements can be waived, and bargaining initiated, where there are harmful labour market conditions in the proposed sector or occupation (e.g. where there is systemic underpayment of wages or poor working conditions).

If an agreement in principle is reached through bargaining, the proposed FPA will be voted on. Employers have one vote for each of their employees that would be covered by the agreement, with a slightly higher weighting granted to employers with less than 20 covered employees (thus providing SMEs with a greater voice in the process, where coverage includes larger organisations).

A simple majority of both employee and employer votes is required in order for the agreement to be ratified. This is similar to the '50% +1' majority that is common in enterprise-level collective bargaining.

What if an agreement cannot be reached?

Employers will take some solace in the fact that strikes and other industrial action will not be permitted during bargaining for an FPA. If the first ratification vote fails, the parties can return to bargaining. If a second ratification vote fails, the terms of the agreement may be determined by the Employment Relations Authority (ERA).

What does this all mean for New Zealand businesses?

Small businesses are the engine room of the New Zealand economy, making up approximately 97% of all businesses. These businesses employ less than 20 workers and, more often than not, have no dedicated human resources capability. In light of this, and the fact that only 17% of New Zealand's workforce is unionised, there is likely to be a general lack of collective bargaining experience, capability, and capacity across many New Zealand businesses to effectively engage in the FPA process.

At a high-level, the introduction of the FPA system will force SMEs, many of which have never been around a bargaining table before, to be involved in the industrial relations process. For many owners and operators, it may be quite confronting to have unions visit their businesses and seek access to their workplace and workers for the first time. Many businesses could feel disengaged from the process and unsure how to have their say in a decision that has the potential to significantly impact them and their most important asset, their people.

Further, for many employers, the new system could have considerable impact on their bottom line, in terms of both increased compliance and direct employee costs. The Government has promised financial support of up to $50,000 per bargaining side during the negotiation process. However, once an agreement is ratified, businesses will be left to bear these increased costs on their own. Employer participation in the process is mandatory and there is no mechanism by which employers may opt out. Some legal commentators have highlighted that this new system could also breach international law, namely the right to freely and voluntarily negotiate collective agreements.

Undoubtedly, the new system will hand significant power to the union movement, which has seen declining membership in recent decades. Unions will be given an institutional role, embedded in legislation, as the exclusive representatives for employees around the bargaining table. A key question, therefore, is how unions, currently covering only 17% of the country's workforce, will effectively represent the interests of all covered employees within a sector or occupation? Unions will need to adapt rapidly to effectively deliver on their new role as sector-wide representatives for both their paid-up members and all unaffiliated, non-member employees.

There is an opportunity, however, for both unions and SMEs to view the new bargaining system as something more than just a vehicle for setting minimum terms and conditions. For example, the regime could provide a platform to debate future workforce and skills development, which in turn may help stimulate a high-skill and high-wage economy. Also, as the number of young workforce-age individuals not in employment, education or training has increased, the FPA system could provide vital linkages with newly established Workforce Development Councils and MBIE's Regional Skills Leadership Groups and operate as part of the Government's wider education to employment reforms.

Learnings from the Australian Modern Awards system

Australia's industrial relations framework may provide an immediate and helpful reference point. Since the inception of the Modern Awards system in 2010, the employment terms of a large percentage of Australia's workforce have been governed by collective arrangements, such as modern awards and enterprise agreements.

Modern Awards set minimum rates of pay and other financial benefits (such as overtime and penalty rates, allowances, leave loading, superannuation and redundancy pay), as well as procedures for consultation, representation, and dispute settlement. There are approximately 120 Modern Awards in Australia, which are set by the Fair Work Commission (rather than through a bargaining process), and cover a wide range of industries and occupations. Once in place, Award terms cannot be displaced, except in very limited circumstances, and must be strictly complied with.

In practice, this presents some challenges. For example, Modern Awards contain multiple triggers for the payment of overtime – hours worked above a daily threshold of hours, hours worked outside a designated span of hours, and hours worked in excess of a weekly average of hours (where the average can be calculated over a 7, 14, 28 day period) may all trigger overtime. Such terms require complex calculations, which employers will almost always prefer to automate, in order to reduce the risk of errors. However, the level of complexity involved makes it almost impossible for the providers of payroll services to develop systems and/or processes that can deliver a completely automated solution.

Similarly, where changes to Award terms are introduced, these are sometimes made effective immediately. Even where payroll and time and attendance systems might be able to accommodate changes, it is rare that they will be able to adapt so quickly. The result is that employers are required to create manual work-arounds, or else risk non-compliance. And the burden of these requirements is often more keenly felt by smaller businesses, who may not have the economies of scale to justify the significant technological investment otherwise required to ensure compliance.

While we do not yet know the full scope of negotiated FPAs in the New Zealand context, we do know that ratified agreements will likely include provisions on base wages, ordinary hours of work, overtime and penalty rates. It is therefore possible that challenges similar to those experienced by Australian employers under the Modern Awards system, could arise here. As Australia has a similar SME landscape to New Zealand (approximately 97% of Australian businesses are SMEs), many New Zealand businesses could bear the brunt of increased compliance costs brought about by the complexity of the new system.

Many New Zealand employers already battle with compliance issues under the Holidays Act 2003, a complex and highly problematic piece of legislation. The announcement earlier this year that the Government intends to push through legislation in early 2022 to repeal the Holidays Act was widely welcomed by employers. In this regard, the introduction of a new, potentially complex compliance framework could seem like a step backwards for businesses.

Further, the prescriptive and rigid nature of the Modern Awards System limits the flexibility employers have over their workplace and their employees. A similar system could be challenging in the New Zealand business environment, where flexibility is considered critical to adaptation and innovation. The ability to adapt has been particularly crucial in the age of COVID-19.

When will this happen?

The Government intends to introduce a draft bill later this year, with a view to implementing the new system in 2022. The public will have the opportunity to comment on the draft legislation during the Select Committee process.
Until then, you can find out more about, and keep up to date with the latest news relating to FPAs, on the MBIE website.

How can PwC help?

PwC's Employment Advisory team helps employers navigate the complexities and opportunities of managing their most important asset – their people. Our multidisciplinary team of legal, consulting and tax specialists, can deliver a complete solution for all people-related issues. This makes us uniquely placed to assist organisations to navigate the new FPA system. We're also here to help businesses with matters such as remote working practices, policy development, as well as tax, legal and immigration issues.

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