Union Membership and Collective Agreements

1. Freedom of Choice

1.1. Union membership is an inalienable right of an employee under the Employment Relations Act (ERA) and its amendments. If an employee opts to join a union, the employer is required to deal with that union if the employee asks the union to represent them

1.2. An employer cannot discriminate against anyone who is a union member or wants to join a union, or subject them to any duress in relation to membership or otherwise of a union. As a matter of law and practice, as an employer it is best not to enter into any discussion with an employee about union membership.

1.3. Unions have exclusive rights to negotiate collective agreements. Where an employee wants to be covered by a collective agreement, including multi-employer agreements, they need to join the union concerned.

2. Relationship with Unions

2.1. Relationships with unions who represent staff members should be fostered and maintained to ensure that the employer and union representatives can work together in good faith, and in the best interests of the organisation/practice and its employees.

2.2. In most cases in the medical profession, relationships with union representatives tend to be managed on an appropriate professional basis and problems are rare.. The ERA allows unions to compete for members, so there can be more than one union seeking to cover your staff.

2.3. Where the work is covered by a collective employment agreement, the employer will be required to collect union fees and remit these to the union. Members have rights under the law to attend union meetings on pay and to attend union training courses on pay, within the limits prescribed.

Date: March 2024

3. Collective Bargaining

3.1. Collective agreements can be negotiated between one union and one employer, one employer and more than one union, one union and more than one employer (multi-employer collective agreement) or more than one union and more than one employer. Multi-employer collective agreements (MECAs) are quite common in the health sector and the Primary Health Care MECA negotiated with NZNO is an example of a large MECA.

3.2. There are a number of legal requirements around collective bargaining. Bargaining must be initiated in writing within 60 days of expiry of a current collective agreement by a union, or within 40 days of expiry by an employer (the timeframes are different if there is more than one collective agreement being replaced). If there has not been a collective agreement before, only the union can initiate bargaining.

3.3. Once bargaining has been initiated, there are a number of requirements for the parties. Employers must advise the employees who would be covered by the proposed collective agreement that bargaining has been initiated – this includes union members and non-members.

3.4. The parties must meet to bargain, and they must use their best endeavours to agree a bargaining process agreement (this sets out how the bargaining will take place). The parties must consider each others' proposals and respond to them, which in practice means taking some time to properly consider things, not saying no straight away. If the parties have reached a stalemate about one particular aspect of the bargaining, they still need to continue discussing the other issues.

3.5. Both parties need to recognise the role and authority of the advocates each other have chosen to use, and must not directly bargain (side stepping the advocate). In practice, this means that employers need to avoid discussions about collective bargaining directly with their employees while bargaining is underway. The parties must also not do anything that is likely to undermine the authority of the other party's representative, or undermine the bargaining.

3.6. Information may be requested as part of the bargaining, and if it is relevant to the bargaining, it must be provided. The party providing the information has the option to provide it to an independent reviewer if they feel it is confidential.

3.7. The parties must conclude collective bargaining (that is, agree on a collective agreement), unless there are genuine reasons based on reasonable grounds not to. This ensures that parties genuinely attempt to reach an agreement. The Act specifically states that opposition in principle to collective bargaining is not a genuine reason to not conclude bargaining.

3.8. This doesn't mean that an employer must agree to a collective agreement if there are genuine reasons for feeling they cannot. For example, sometimes the

employer and union simply cannot agree on something. In the case of a multi-employer collective agreement (MECA) an employer may have a genuine reason for not settling if, for example, the employer operates primarily after hours, but other employers have agreed on weekend penal rates which would mean a large increase in costs for the after-hours employer. However, employers cannot opt out of multi-employer collective bargaining at the outset – they must participate in the bargaining. That does not mean they are required to agree, but it means they must actively participate and discuss the claims and issues.

3.9. The obligation to meet to bargain and to bargain in good faith means that an employer must either attend the bargaining personally, or must authorise a representative to attend for them. In the case of MECA bargaining, it is quite common for some or all of the employers to be represented by the same representative. This can work well if the employers share common views and positions and the representative has a good knowledge of their preferences for the bargaining, as it means the parties will share the costs and time involved. However, an employer who has a quite different perspective or preference as to outcome will need to either use a different representative or to attend the bargaining personally.

3.10. In practice, bargaining will be attended by the employer/s (and/or their representatives), one or more union officials, and one or more employees who are representative of the employees who would be covered by the proposed agreement. The employees will generally be union delegates, but this is not always the case. Employers need to ensure the employees who will attend the bargaining are given time off to do so. In the case of a single employer collective agreement, it is usual to pay the delegates who are attending the bargaining if they would otherwise have been at work.

3.11. Where agreement is reached about a proposed new collective agreement, this will be subject to ratification. The union members must have a ratification process, and often there will be ratification processes for employer parties too. In the case of a collective agreement involving one employer this might mean the approval of the Directors; in a multi-employer collective agreement there is usually a process whereby each employer will individually decide whether they can agree to the proposed new agreement.

3.12. If agreement is not reached, there are several options available to the parties. They can continue to bargain, or attend mediation. Industrial action may be taken by either party in an attempt to try to persuade the other party to reach agreement. The parties can agree to conclude the bargaining without reaching settlement. The parties can ask the Employment Relations Authority to facilitate, if there has been bad faith, or the bargaining has been unduly protracted, or there has been protracted or acrimonious industrial action, or industrial action has been threatened which would affect the public interest. Finally, the Employment Relations Authority may, in very limited and rare circumstances, determine the bargaining.

4. Collective Agreement

4.1. A collective agreement must be in writing and signed, and must contain a number of provisions. There must be a parties clause (stating who the union/s and employer/s are), and there must be a term (duration), which cannot exceed three years. There must be a coverage clause, which sets out which positions are covered by the agreement. There must be a variation clause, which sets out how the agreement can be varied, and rates of pay must be included. There also needs to be a clause about how employment relationship problems will be resolved. Of course, most collective agreements also contain a range of other provisions including hours, leave and notice.

4.2. When there is a collective agreement in place, every employee who is covered by the coverage clause who is a union member will be covered by the collective agreement. This is not a choice – it is a case of "in the union, in the collective".

5. New Employees

5.1. Where there is a collective agreement in place, new employees who are being employed into positions covered by the collective agreement must be employed on the terms and conditions of the collective agreement for the first 30 days of their employment. The employer and employee may agree on additional terms if they are consistent with and more favourable terms than the collective. For example, the collective agreement may provide for minimum pay rates for the role the employee will be doing, but the employer and employee can agree that the employee will be paid a higher rate.

5.2. If the collective agreement has expired, but bargaining for a new collective agreement was initiated before it expired, the employer must continue to employ new employees on the collective agreement for their first 30 days. This obligation continues until the collective agreement has been expired for a year or more.

5.3. The employer must also provide the new employee with the "Active Choice" prescribed form within the employee's first ten days of employment. The form allows the employee to choose whether they want the union to be told they have been employed. When the employee has provided the completed form, the employer must return the form to the applicable union(s), unless the employee has objected to this being done. If the employee does not return the form the employer must provide the employee's name to the union and tell the union that the employee did not complete the form.

Form for employees to indicate if they intend to join a union ("Active Choice" form):
https://www.employment.govt.nz/assets/Uploads/c3173a524a/form-to-indicate-intention-to-join-union.pdf

Date: March 2024

Guidance for employers in providing the form to new employees
https://www.employment.govt.nz/assets/Uploads/13d74dbe3a/guidance-for-employers-in-providing-the-form.pdf

5.4. Where the union requests the employer to pass on information provided by the union about the role and function of unions to prospective employees, this must be done. The union/s must bear the costs if they want printed materials to be passed on.

5.5. Employers should ensure that they do not discuss with new employees what happens after the 30 days elapses until the 30-day period is up. If the employee has joined the union, they will be covered by the collective agreement ("in the union, in the collective"). If the employee has not joined the union, an individual agreement can be offered. The employer and employee will need to agree on any new individual agreement.

Need more help?

Contact HTRHN:

Phone	021-595-937
Email	Robyn Fell: robyn.fell@htrhn.org.nz

Date: March 2024