

A-Z Guide

UNION RIGHTS



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Use this Guide to help you understand

- Union rights under the Employment Relations Act 2000 in respect of good faith, recognition, representation, and employment relations education leave.
- A union's role in promoting improvements in work health and safety practices and assisting PCBUs and workers to achieve a healthier and safer working environment.
- That the law provides that there is an employment relationship between a union and an employer whether or not they are parties to an applicable collective agreement; most of a union's enforceable rights arise out of this relationship.
- Union access to workplaces.

Introduction

This **A-Z Guide** is about union rights under the current legislative framework. The Employment Relations Act 2000 and the Health and Safety at Work Act 2015 both provide for union involvement in the employment context.

The scope of union rights under the Employment Relations Act is, in some circumstances, dictated by the existence of an applicable collective agreement and under health and safety legislation covering worker engagement and participation.

Unions have enforceable rights in regard to:

Good faith; recognition; representation, including rights of access and to hold union meetings; rights in respect of collective bargaining and union fees; employment relations education leave, and worker participation systems for health and safety in the workplace.

Some of the topics discussed in this guide are discussed in greater depth in their own **A-Z Guides** available online at ema.co.nz

Employment Relations Act 2000

Good faith

The Act requires that all parties to employment relationships must deal with each other in good faith. Section 4 specifies employment relationships; a union may be in an employment relationship with:

- An employer
- A member of that union
- Another union that is a party bargaining for the same collective agreement
- Another union that is a party to the same collective agreement
- A member of another union where both unions are bargaining for the same collective agreement
- A member of another union where both unions are parties to the same collective agreement

The duty of good faith applies to all of these employment relationships. The duty applies to the following matters in particular:



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- Bargaining for a collective agreement or variation of a collective agreement, including matters relating to collective bargaining
- Bargaining for an individual employment agreement or for a variation of an individual employment agreement
- Any matter arising under or in relation to an individual employment agreement while the agreement is in force
- Any matter arising under or in relation to a collective agreement while it is in force
- Consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective interests, including the effect on employees of changes to the employer's business
- A proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business
- Making employees redundant
- Access to a workplace by a representative of a union
- Communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement

Refer to the **A-Z Guide** on **Good Faith** for a deeper discussion of this argument.

Recognition

The Act, in respect of collective bargaining, only recognises unions that have been registered under it. It does not recognise non-registered unions and it does not recognise any other entity in respect of employee representation for collective bargaining.

The Act created a Registrar of Unions, who is a person appointed by the Chief Executive of the Ministry of Business, Innovation and Employment, and who is responsible for the registration (or de-registration) of unions.

Section 18 of the Act provides that unions are entitled to represent their members' interests in any matter involving their collective interests as employees. Additionally, unions may represent their members' interests in respect of individuals' rights as employees where the individual concerned has authorised the union to do so.

Section 236 of the Act provides that where any employee has the right to do anything or take any action in respect of either an employer or the Employment Relations Authority or Employment Court, the employee may choose any other person (including a union) to represent the employee for the purpose.

Union access to the workplace

A representative of a union may enter a workplace for 1 or more of the following purposes:

- Purposes related to the employment of the union's members.
- Purposes related to the union's business.
- Purposes related to the health and safety of any employee on the premises who is not a member of the union if the employee requests the assistance of a representative of the union on those matters.

Union access and denial of access to the workplace is covered in sections 19 to 25 of the Act. The Act defines "workplace" as a place where an employee works from time to time; this includes a place where an employee goes to do work but does not



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include a dwelling house, which is any building or part of building that is occupied as a residence.

The employment of union members includes:

- Collective bargaining
- Health and safety
- Monitoring the operation of a collective agreement
- Monitoring compliance with the law
- Dealings in relation to individual agreements and compliance with them provided the employee has given the union representative authority to do so

The union's business includes:

- Discussing union business with members
- Recruiting members
- Providing information about the union and union membership to employees

Union access and consent

A representative of a union must request and obtain consent of the employer before entering a workplace.

However, a representative of a union does not require consent to enter a workplace;

- If at the time of the representative's entry into the workplace there is a collective agreement in force between the employer and the union and the coverage clause in the collective agreement covers work done by employees in the workplace; or
- At the time of the representative entry into the workplace the union or the employer has initiated bargaining for a collective agreement and the intended coverage of the collective agreement covers the work done by the employees in the workplace.

Where consent is required, an employer must:

- Not unreasonably withhold consent
- Advise the union as soon as is practicable but no later than the working day after the date on which the request was received

Consent of the employer is deemed to be given if the employer does not respond to the union's request within two working days after the request was received.

If consent to access the workplace is declined, the employer must give reasons in writing to the union representative who made the request as soon as is reasonably practicable but no later than the working day after the date of the decision.

An employer cannot unreasonably deny a representative of a union access to a workplace.

A union representative exercising the right to enter a workplace:

- May do so only at reasonable times during any period when any employee is employed to work in the workplace; and
 - Must do so in a reasonable way, having regard to normal business operations in the workplace; and
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- Must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to:
 - Safety or health; or
 - Security.
- Must, at the time of the initial entry and, if requested by the employer (or its representative or any person in control of the workplace) at any time after entering the workplace, give the purpose of the entry, and produce evidence of their identity and evidence of their authority to represent the union concerned.
- Must, if the representative is unable to find the employer (or its representative or any person in control of the workplace), leave in a prominent place in the workplace a written statement stating:
 - The union representative's identity
 - The union the representative represents
 - The date and time of the entry
 - The purpose or purposes of the entry

A discussion in a workplace between an employee and a representative of a union, who is entitled under section 21 to enter the workplace for the purpose of the discussion:

- Must not exceed a reasonable duration
- Is not treated as union meeting for the purposes of section 26 union meeting
- An employer must not make any deduction from an employee's pay for the time spent in the discussion

There have been a number of cases over the years that provide some guidance on managing union access.

In *Terry Young Ltd v NZEPMU*, CC 15/07, the Court decided that the Employment Relations Authority concluded correctly that discussions with employees undertaken by union officials entering workplaces under s20 are not confined to discussions with single employees individually but include discussions with employees collectively.

In *McCain Foods (NZ) Ltd v SFWU*, WC/08, the Court dealt with union access where the union representatives were employed by a competitor. The Court found in favour of the union and in the particular circumstances the union was required to give McCain reasonable notice of its intention to access to allow McCain the ability to protect confidential information on display. The Court imagined no more than a few minutes at most would be required.

In *Finsec, Inc v Bank of New Zealand*, WA 66/10, the matter for declaration was whether or not there was an entitlement for Finsec to access BNZ's secure premises to walk the floor and go desk to desk. The Authority concluded that BNZ was required under the legislation to allow Finsec access to its insurance underwriting floor and also suggested the parties set about developing some agreed protocols to the secure area.

In *The New Zealand Meat Workers and Related Trades Union Inc v South Pacific Meats Limited* [2014 NZERA Christchurch 141] the Authority concluded that South Pacific breached the Act with the unreasonable restrictions it imposed on the union. The Authority ordered South Pacific to comply with the union access provisions of the Act in a number of ways, including providing union representatives with compliant white overalls to allow them to mingle with workers from the edible department. The Authority also ordered South Pacific to pay a \$20,000 penalty to the Union.

In *South Pacific Meats Limited v New Zealand Meat Workers & Related Trades Union* [2015 NZERA Christchurch, the Authority concluded that there was no legal basis for restricting the frequency of the Union's access.

Employers should consider how union requests to access the workplace will be managed.

You may wish to pre-empt any issues by discussing with the union:



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- Who requests are to make to.
- What information you need in the request, such as times for entering and leaving, purpose.
- Confirming other union access provisions must be complied with, such as at the time of entering still advising the manager they are there, providing identification and the purpose of the visit.

If the union has requested access at a time that is disruptive to your business and you need to decline access at that time, then it is recommended that you also indicate the time access would be suitable ensuring the times you suggest are also reasonable.

Denial of access

The December 2018 amendments to the Act made changes to the consent requirements for union access and provides for union access without consent in certain circumstances. An employer cannot unreasonably deny a representative of a union access to a workplace, refusing access without a lawful excuse will be a breach of the Act and subject to a penalty.

Case reference

Any person who without lawful excuse, refuses to allow a representative of a union to enter a workplace, or obstructs a representative of a union in entering a workplace or doing anything reasonably necessary for or incidental to the purpose for entering the workplace, is liable to a penalty under the Act. This means no more than that an employer might deny access where these entry requirements have not been met; an employer is not entitled to deny access for failure to comply with conditions it seeks to impose beyond those imposed by this Act: *Carter Holt Harvey Ltd v National Distribution Union Inc* 2002 1 ERNZ 239.

In the *Carter Holt* case, the Court of Appeal agreed that the union representatives' right to enter the workplace for a purpose related to the employment of the union's members included the monitoring of the company's compliance with section 97 of the Act, which restricts the ability of employers to employ or engage other people to perform the work of striking or locked out employees.

However, access to workplaces by union representatives may be denied, but only in very confined circumstances. Before entering your workplace, a union representative must first have reasonable grounds for believing that a union member or potential union member is working within your workplace, if these reasonable grounds do not exist then access may be denied. Union access to enter the premises or any part of the premises of any workplace may also be denied if entry might prejudice:

- The security or defence of New Zealand
- The investigation or detection of offences

A certificate issued by the Attorney-General certifies that entry is denied on the grounds of security or defence, or investigation or detection of offences.

A certificate of exemption issued by the chief executive of the Ministry certifies that entry is denied because the chief executive is satisfied that the employer is a practicing member of a religious society or order whose doctrines or beliefs preclude membership of any organisation or body other than the religious society or order of which the employer is a member, and none of the employees employed in the workplace is a member of the union, and there are no more than 20 employees employed to work in the workplace.

Union meetings



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What follows applies only in respect of the minimum provision

Employers must allow every employee employed by the employer who is a union member to attend at least two union meetings of up to a maximum of two hours duration each, each year.

Before each union meeting the union must give the employer at least 14 days' notice of the date and time of any union meeting. 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.

In *Greenlea Premier Meats Ltd v NZ Meat & Related Trades Union Inc*, AC 27/06, the Court commented that even though the union has a right to hold stop work meetings during normal working hours this right was fettered by the requirement that the meeting time must be arranged so that the employer's business is maintained during any union meeting.

Employers are obliged to pay each employee employed by the employer who is a union member and who attends the union meeting, up to two hours ordinary pay, to the extent that the employee would otherwise be working for the employer during the meeting. There is no obligation to pay any employee for any period longer than two hours in respect of any meeting.

In order to assist the employer with the provision of payment for the time in which any employee attended a union meeting, the union must supply the employer with a list of members who attended the union meeting and advise the employer of the duration of the meeting.

Every employer who fails to allow a union member to attend a union meeting in respect of the minimum provision is liable to a penalty under the Act. Every employer who fails to allow a union member to attend a union meeting in respect of the terms of an applicable agreement which is binding on the parties is liable to a penalty under the Act for a breach of that agreement.

Collective bargaining

As noted above, only unions registered under the Act are able to negotiate collective agreements.

Refer to the following **A-Z Guides** for information on the rights of unions in respect of bargaining and collective agreements:

- **Bargaining**
- **Bargaining Arrangements**
- **Collective Agreements**
- **Good Faith**
- **MECAs**

Reasonable paid time for union delegates

Union delegates appointed to represent union members will be entitled to reasonable paid time to do so. Payment must be at the same rate as if the employee was working during that time. The delegate must have their employer's agreement to do this without notice, or else give advance notice to their employer.

The employer may refuse if the activities would cause unreasonable disruption.

Union information for new employees



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A union that is party to a collective agreement will be able to request, at any time, that an employer that is party to the agreement provide information about the union and its functions to new employees who are not union members. An employer must comply with a request unless the request relates to information that is about the employer, would mislead or deceive prospective employees, and would significantly undermine bargaining.

Union fees

Collective agreements

Collective agreements are treated as containing a provision that requires the employer that is party to the agreement to deduct, with the union members consent, union fees from the employee's salary or wages. Collective agreements can exclude or vary the deduction requirement.

Union fees deducted from members' wages and salaries must be paid to the union concerned in accordance with any agreement made with the union for that.

Individual agreements

Individual agreements are treated as containing a provision that requires the employer to deduct, with the employee's consent, union fees from the employee's salary or wages. Individual agreements can exclude or vary the deduction requirement.

Union fees deducted from employee's wages and salaries must be paid to the union concerned in accordance with any agreement made with the union for that.

Employment relations education leave

Registered unions are entitled to allocate employment relations education leave to eligible employees under the Act. An eligible employee, in relation to a union or an employer, means an employee who is a member of a union, whether or not a collective is in force. Refer to the **A-Z Guide on Employment Relations Education Leave** for specific information on this right.

Enforcement of rights

Refer to the following **A-Z Guides** for supplementary information on the enforcement of rights generally under the Employment Relations Act 2000:

- **Disputes**
- **Employment Relations Authority**
- **Employment Relationship Problems**
- **Personal Grievances**

A union, whether or not it is a party to an applicable collective agreement with an employer, has an employment relationship with any employer that employs its members. If a union is a party to an applicable collective agreement then it is likely enforce its rights according to the provisions that agreement.



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If a union is not a party to an applicable collective agreement, then it may enforce its rights according to the provisions of the Act. A union may enforce any of the rights covered in this guide, either as a dispute, if that is the case, or as an employment relationship problem.

Disputes

Section 129 of the Act provides that any person bound by an employment agreement or any party to an employment agreement may pursue a dispute about the interpretation, application, or operation of an employment agreement in accordance with Part 10 of the Act.

Part 10 provides for recourse to Mediation services, and to the Employment Relations Authority and Employment Court.

Employment relationship problems

The Act defines an employment relationship problem as including personal grievances (not relevant to unions), disputes, and any other problems relating to or arising out of an employment relationship. A union may seek the resolution of any employment relationship problem it has with an employer it has an employment relationship with through mediation and/or the Employment Relations Authority. The Employment Relations Authority has a wide jurisdiction in respect of union rights.

Compliance orders

On the application of any person, including a union, the Employment Relations Authority may make a compliance order ordering any person, including an employer, who has not observed or complied with any provision of:

- Any employment agreement
- Part 1, Parts 3 to 7, or Part 9 of the Act
- Any terms of settlement or decision that may be enforced by a compliance order; to comply with that provision

Health and Safety at Work Act 2015

Unions have a role in promoting improvements in work health and safety practices and assisting PCBUs and workers to achieve a healthier and safer working environment. Union can represent workers in health and safety matters.

A PCBU must, so far as is reasonably practicable, engage with workers and have practices that provide reasonable opportunities for workers who carry out work for the business or undertaking to participate effectively in improving work health and safety in the business or undertaking on an ongoing basis.

Conclusion

Unions have rights to represent their members and be involved in furthering the interests of their members on a collective basis. Many of those rights are enforceable.

Where a union's members are employed by an employer, the Employment Relations Act 2000 recognises that there is an employment relationship between the employer and the union. This relationship contains enforceable rights as distinct from those rights that are created when an applicable collective agreement becomes binding on the parties.



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A union's right to represent its members may extend to the representation of an employer's employees in respect of the development of, and on-going involvement in an agreed employee participation system under the Health and Safety at Work Act 2015.

Union membership is voluntary.

Remember

If you require assistance with any matter related to unions contact AdviceLine, our Legal Team or your Employment Relations Consultant.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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