



A-Z OF EMPLOYING

Essential Services

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

Business**Central** 

Essential Services

Our guide for Employers and Managers

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This is only a guide.
It should not be a
substitute for
professional advice.

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from our AdviceLine
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specific assistance.

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Overview

The Employment Relations Act 2000 permits employees and employers in essential industries to strike and lockout in certain circumstances.

Generally, striking or locking out will relate to either collective bargaining or health and safety.

The notice requirements of the Act are strictly interpreted.

Notice must be given and must be received by the employer. It is a matter of fact whether notice is received.

In some circumstances notice may be posted.

Notice may be given electronically if the recipient has given approval to communicate electronically. The provisions of the Electronic Transactions Act 2002 will apply to electronic communications.

Introduction

This A-Z Guide provides information on essential services, which are those services that have been identified by Parliament as being services where other interests must be protected if work in those services stops for a period of time owing to a strike or lockout. There are important provisions in the Act in respect of notice of a strike or lockout in an essential service.

For information relating to strikes and lockouts in essential services you should refer to the following A-Z Guides:

- ▶ Bargaining
- ▶ Communication during Bargaining
- ▶ Employment Relationship Problems
- ▶ Good Faith
- ▶ Health and Safety in Employment
- ▶ Strikes and Lockouts
- ▶ Suspension
- ▶ Union Rights
- ▶ Wages Protection

Definition

The Court of Appeal has held that the correct test in determining whether a worker is employed in an essential service is: is the worker employed to perform work which can properly be described as part of the essential service?

It is true, as the Judge noted, that in some instances the schedule refers specifically to supporting work. But this only emphasises the point. Supporting work may or may not be part of the provision of the service. Whether it is, must necessarily be a matter of fact and degree. In determining where the line should be drawn, regard must be had to the plain statutory purpose, which is to minimise disruption caused by industrial action. The action of those providing certain

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kinds of supporting work may be just as disruptive as that of those immediately employed: Cunningham Construction (1987) Ltd v New Zealand Labourers' Union [1991] 2 NZLR 12.

The Employment Relations Act provides for two kinds of essential services. They appear in Part A and B of Schedule 1.

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PART A

1. *The production, processing, or supply of manufactured gas or natural gas (including liquefied natural gas).*
2. *The production, processing, distribution, or sale of petroleum, whether refined or not.*
3. *The production or supply of electricity or the operational management of a State enterprise (within the meaning of section 2 of the State-Owned Enterprises Act 1986) that has electricity generation within the definition of the nature and scope of its business in its statement of corporate intent.*
4. *The supply of water to the inhabitants of a city, district, or other place.*
5. *The disposal of sewage.*
6. *The work of a fire brigade within the meaning of the Fire Service Act 1975 (but excluding the work performed by members of volunteer fire brigades).*
7. *The provision of all necessary services in connection with the arrival, berthing, loading, unloading, and departure of ships at a port.*
8. *The operation of*
 - (a) *a service for the carriage of passengers or goods by water between the North Island and the South Island or between the South Island and Stewart Island; or*
 - (b) *a service necessary for the operation of a service referred to in paragraph (a).*
9. *The operation of*
 - (a) *an air transport service, being a service by aircraft for the public carriage of passengers or goods for hire or reward (but excluding an air topdressing service); or*
 - (b) *a service necessary for the operation of an air transport service referred to in paragraph (a).*
10. *The operation of an ambulance service for sick or injured persons.*
11. *The operation of*
 - (a) *a hospital care institution within the meaning of section 58(4) of the Health and Disability Services (Safety) Act 2001; or*
 - (b) *a service necessary for the operation of such an institution.*

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12. *The manufacture or supply of surgical and dialysis solutions.*
13. *The manufacture or supply of a pharmaceutical that is for the time being listed in the pharmaceutical schedule under the New Zealand Public Health and Disability Act 2000.*
14. *The operation of a residential welfare institution or prison.*
15. *The production of butter or cheese or of any other product of milk or cream and the processing, distribution, or sale of milk, cream, butter, or cheese or of any other product of milk or cream.*
16. *The provision of Police Emergency response services as defined in clause 3 of Schedule 1C of the Act.*

PART B

1. *The holding and preparation of an animal that -*
 - (a) is a mammal or bird; and*
 - (c) is held and prepared for the purposes of commercial slaughter and subsequent processing of its meat and offal for human consumption, whether in the domestic market or the export market.*
2. *The operation of meat inspection services associated with the slaughtering or supply of meat for domestic consumption.*

Essential Services And Industrial Action

Striking (or locking out) in essential services is only lawful if it either relates to collective bargaining that will bind each of the employees concerned, or, relates to bargaining with regard to an aspect of a collective agreement in respect of which the right to strike or lock out has been declared by the Employment Court OR it is on health and safety grounds.

Participation in a strike or lockout on health and safety grounds is only lawful if the employees or employer have reasonable grounds for believing that their action is justified on grounds of safety or health.

Refer to the **A-Z Guide on Strikes and Lockouts** for more information on lawful and unlawful strikes.

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90 *Strikes in essential services*

(1) *No employee employed in an essential service may strike*

- (a) *unless participation in the strike is lawful under section 83 or section 84; and*
- (b) *if subsection (2) applies,*

(i) without having given to his or her employer and to the chief executive, within 28 days before the date of the commencement of the strike, notice in writing of his or her intention to strike; and

(ii) before the date and time specified in the notice as the date and time on which the strike will begin.

(2) *The requirements specified in subsection (1)(b) apply if*

(a) the proposed strike will affect the public interest, including (without limitation) public safety or health; and

(b) the proposed strike relates to bargaining of the type specified in section 83 (b).

(3) *The notice required by subsection (1)(b)(i) must specify*

(a) the period of notice, being a period that is

(i) No less than 14 days in the case of an essential service described in Part A of Schedule 1; and

(ii) No less than 3 days in the case of an essential service described in Part B of Schedule 1; and

(b) the nature of the proposed strike, including whether or not the proposed action will be continuous; and

(c) the place or places where the proposed strike will occur; and

(d) the date and time on which the strike will begin; and

(e) the date and time on which , or an event on the occurrence of which, the strike will end.

(4) *The notice*

(a) must be signed by a representative of the employee's union on the employee's behalf:

(b) need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who

(i) are members of a union that is a party to the bargaining; and

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(ii) are covered by the bargaining; and

(iii) are employed in the relevant part of the essential service or at any particular place or places where the essential service is carried on.

91 Lockouts in essential services

(1) No employer engaged in an essential service may lock out any employees who are employed in the essential service

(a) unless participation in the lockout is lawful under section 83 or section 84; and

(b) if subsection (2) applies,

(i) without having given to the employees' union or unions and to the chief executive, within 28 days before the date of commencement of the lockout, notice in writing of the employer's intention to lock out; and

(ii) before the date and time specified in the notice as the date on which the lockout will begin.

(2) The requirements specified in subsection (1)(b) apply if

(a) the proposed lockout will affect the public interest, including (without limitation) public safety or health; and

(b) the proposed lockout relates to bargaining of the type specified in section 83(b).

(3) The notice required by subsection (1)(b)(i) must specify

(a) the period of notice, being a period that is

(i) no less than 14 days in the case of an essential service described in Part A of Schedule 1; and

(ii) no less than 3 days in the case of an essential service described in Part B of Schedule 1; and

(b) the nature of the proposed lockout, including whether or not it will be continuous; and

(c) the place or places where the proposed lockout will occur; and

(d) the date and time on which the lockout will begin; and

(da) the date and time on which, or an event on the occurrence of which, the lockout will end; and

(e) the names of the employees who will be locked out.

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(4) *The notice must be signed either by the employer or on the employer's behalf.*

92 Chief executive to ensure mediation services provided

Where the chief executive receives a notice of intention to strike or lock out under section 90(1)(b)(i) or section 91(1)(b)(i), the chief executive must ensure that mediation services are provided as soon as possible to the parties to the proposed strike or lockout for the purpose of assisting the parties to avoid the need for the strike or lockout.

Secret ballots for strikes -Effective 14 May 2013

In May 2012 the Employment Relations Act was amended to include a requirement for unions to hold a secret ballot for their members when voting on strike action.

The requirement for a secret ballot came into force on 14 May 2013 one year after the date of Royal assent. Unions must amend their rules to contain a provision relating to the process for holding a secret ballot as soon as is reasonably practicable and no later than 2 years after the date of Royal assent.

Before a proposed strike may proceed, the union must hold, in accordance with its rules, a secret ballot of its members. In order for a legal strike to proceed the result of the secret ballot must be in favour of the strike.

The secret ballot requirement does not apply to a strike that is lawful on the grounds of health and safety.

Notice

The Employment Court has held that section 90(4)(b) does not require that the notice contain a list of the employees intending to strike where it is signed by a union on behalf of all the relevant employees. Notices must only specify the requirements of section 90 with clarity and certainty in respect of the nature of the proposed strike, where it will take effect, and when it will take effect. The Court of Appeal has held that a notice of strike or lockout must be interpreted in the light of the information which it would reasonably convey to a reasonable recipient in the particular circumstances of the employment concerned.

No employee may strike pursuant to section 90 without having given the employer and the Chief Executive of MBIE no more than 28 days before the commencement of the strike notice in writing of the intention to strike. Where more than 28 days notice is given the strike notice will be invalid and the strike unlawful.

The period of notice to be specified in the notice is to be not less than 14 clear days in respect of essential services described in Part A of Schedule 1 to the Act, and not less than 3 clear days in respect of essential services described in Part B of Schedule 1 to the Act. This has been held to mean that the day from which notice runs as well as the day on which it expires must be excluded so that the period of notice is effectively 16 and 5 days respectively for the essential services in Part A and Part B.

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Notice that employs the term “midnight” should for clarity also use the 24-hour clock; that term is interpreted to mean the end of a day rather than the beginning.

Section 90 requires the giving of notice; there is no mention of service. The notice must be given and must be received by the employer.

Section 235(1) of the Labour Relations Act 1987 (which section of the Employment Relations Act is based on) required first, that a notice in writing should come into being; secondly, that it should be signed by or on behalf of workers who intend to strike; thirdly, that it should be given to the workers’ employer. There was no requirement in the section that the notice must be given to the employer (if a company) at its registered office.

The Court went on to list eight reasons in support of its contention that the plain words found in this section should be given their ordinary plain meaning and that it is a question of fact in each case whether the notice reaches the proper offices of the employer.

Where notice is forwarded to an employer by post it would not normally be regarded as having been given to the employer unless it was sent to the address to which the employer has invited the union and its own employees to direct communications. That invitation may be inferred from a course of conduct.

Note: The Electronic Transactions Act 2002 may impact on the provision of notice under the Employment Relations Act 2000. Information required to be “in writing” can now be supplied electronically and still satisfy the requirements. However, in order to exercise this option, consent to utilise electronic communication techniques must be obtained from the intended recipient party before it is used. If electronic communication techniques are employed then the Electronic Transactions Act 2002 will apply. Refer to the a-z guide on the Electronic Transactions Act 2002 for more information.

Correspondingly, the same rules apply to employers who give notice to lockout under section 91.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that’s tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to BC Learning courses and conferences designed for those who manage employees.

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