



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021	Date to be published	1 April 2022

List of documents that have been proactively released		
Date	Title	Author
December 2021	<i>COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
20 December 2021	<i>COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021</i> <i>CAB-21-MIN-0540</i>	<i>Cabinet Office</i>

Information redacted

NO

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In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet

Approval of COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021

Proposal

- 1 This paper seeks authorisation to submit the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 (“Infringement Offences Amendment Regulations”) to the Executive Council.

Executive summary

- 2 On 13 December 2021, Cabinet agreed to amend the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 (“Infringement Offence Regulations”) to classify breaches of the following provisions of the COVID-19 Public Health Response Act 2020 (COVID Act) accordingly [CAB-21-MIN-0533]:
 - 2.1 duty on PCBUs to keep vaccination records: low risk,
 - 2.2 duty on PCBUs to prevent workers from carrying out work unless vaccinated: high risk, and
 - 2.3 duty on workers not to do work without vaccination: high risk.
- 3 This paper seeks authorisation to submit the Infringement Offences Amendment Regulations to the Executive Council.

Policy

Background

- 4 Some of the new infringement offences in the COVID Act were not assigned a class in the Infringement Offence Regulations because of the passage of two amendment Acts in successive weeks.
- 5 The COVID-19 Public Health Response Amendment Act 2021, among other changes, increased the maximum fees (\$4,000 and \$12,000 for a person or body corporate respectively) and fines (\$12,000 and \$15,000 for a person or body corporate respectively) for infringement offences under the COVID Act.

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- 6 The Amendment Act also contained the ability to prescribe classes of infringement offences through regulations. Subsequently, the Infringement Offence Regulations have been made, which set out three different classes of infringement offences for those contained in the COVID Act: low risk, medium risk and high risk. Classes for infringement offences created by Orders under the COVID Act are specified in the relevant Order.
- 7 The Infringement Offence Regulations were partway through the Cabinet approval process when the recent COVID-19 Response (Vaccinations) Legislation Act 2021 was introduced and passed, which created new infringement offences under the COVID Act.
- 8 These new infringement offences relate to vaccination mandates for work that are made on public interest grounds under section 11AB of the COVID Act. These offences will only be “triggered” when an order mandating vaccination is made under section 11AB and persons conducting a business or undertaking (PCBU) or individual is non-compliant with their duties in the Act.
- 9 An Order under this provision commenced at 11.59 pm on 15 December 2021, mandating vaccination for work done by parts of the New Zealand Police and for the whole New Zealand Defence Force (NZDF). This is the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 (“Specified Work Vaccinations Order”).
- 10 The Infringement Offences Regulations need to be amended to ensure the new infringement offences in the COVID Act are classified in accordance with corresponding offences in the existing COVID-19 Public Health Response (Vaccinations) Order 2021 (“Vaccinations Order”). If the regulations are not amended, the infringement fees and maximum fines for certain breaches of the new Order will be significantly higher than corresponding breaches of the Vaccinations Order.

<i>Duty</i>	<i>Specified Work Vaccinations Order (ie Police and NZDF)</i>		<i>Vaccinations Order (ie all other sectors)</i>	
	<i>Infringement fee</i>	<i>Maximum court-imposed fine</i>	<i>Infringement fee</i>	<i>Maximum court-imposed fine</i>
PCBU must not allow unvaccinated worker to do work	\$12,000	\$15,000	\$12,000 (clause 8)	\$15,000 (clause 8)
PCBU must keep records relating to workers' vaccination status	\$12,000	\$15,000	\$1,500 (clause 11A)	\$4,500 (clause 11A)
Worker must not do work without being vaccinated	\$4,000	\$12,000	\$4,000 (clause 7)	\$12,000 (clause 7)
Worker must provide and update information about vaccination status	N/A	N/A	\$500 (clause 11A)	\$1,500 (clause 11A)

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- 11 The discrepancy relates to breaches of record-keeping duties. A breach of the Vaccinations Order's record-keeping provisions by a PCBU would mean an infringement fee of \$1,500 because it is considered low risk. However, a similar breach of the Specified Work Vaccinations Order would mean an infringement fee of \$12,000 (which corresponds to the high risk level in the Infringement Offences Regulations), unless a lower infringement class is specified. While an enforcement officer will need to be rational in the exercise of their discretion, there is the potential for similar breaches to result in inconsistent outcomes.

Proposed regulations

- 12 The Infringement Offences Amendment Regulations give effect to Cabinet's decision on 13 December 2021 to amend the Infringement Offences Regulations, to ensure the new infringement offences in the COVID Act are classified in accordance with similar offences in the Vaccinations Order [CAB-21-MIN-0533].
- 13 To do this, Cabinet agreed to classify breaches of the following provisions of the COVID Act accordingly [CAB-21-MIN-0533]:
- 13.1 section 17B (duty on PCBUs to keep vaccination records): low risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021;
 - 13.2 section 17C (duty on PCBUs to prevent workers from carrying out work unless vaccinated): high risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021; and
 - 13.3 section 17D (duty on workers not to do work without vaccination): high risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021.

Timing and 28-day rule

- 14 I propose the 28-day rule be waived in relation to COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021. Since the Specified Work Vaccinations Order commenced at 11.59 pm on 15 December 2021, this will minimise, to the extent possible, the period of time in which similar breaches attract differing penalties under the different Orders (the Specified Work Vaccinations Order and the Vaccinations Order). This is consistent with principle 7.97(e) in the Cabinet Manual, which relates to validating irregularities.
- 15 The changes will also benefit the PCBUs or workers covered by the Specified Work Vaccinations Order, who would otherwise be subject to higher fees or fines for behaviour that would attract a lower fee or fine under the Vaccinations Order. This is consistent with principle 7.97(a) of the Cabinet

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Manual, which relates to amendments that will confer only benefits on the public, or which will have little or no effect on the public.

Compliance

- 16 I consider that the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 comply with:
- 16.1 the principles of the Treaty of Waitangi;
 - 16.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA);
 - 16.3 the principles and guidelines set out in the Privacy Act 2020;
 - 16.4 relevant international standards and obligations; and
 - 16.5 the Legislation Guidelines (2018 edition).

BORA implications

- 17 Infringement offences engage the presumption of innocence in section 25 of BORA because they are strict liability offences. The Infringement Offences Amendment Regulations will reduce the infringement fee associated with certain infringement offences in the COVID Act.
- 18 When these infringement offences were added to the COVID Act, the Attorney-General accepted advice that the legislation was consistent with BORA (ie that the limitation on rights was justified). Because this change will reduce the limitation of parties' BORA rights, by ensuring that the infringement fee is proportionate to the risk posed by the relevant offence, I consider it consistent with BORA.

Compliance with statutory prerequisites

- 19 Under section 33(2) of the COVID Act, before prescribing different penalties for different infringement offences or classes of infringement offences, the Minister for COVID-19 Response must consider the following, if relevant:
- 19.1 the severity and impact of the breaches specified as infringement offences or classes of infringement offences;
 - 19.2 the appropriateness of the penalty for any group likely to be affected by the specified offences or specified classes of offences, including equity considerations; and
 - 19.3 penalties for comparable offences or classes of offences in legislation (if any).
- 20 This requirement has been met through last week's Cabinet consideration, as outlined in the tables from that paper [CAB-21-SUB-0533]:

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Section 17B: Duty on PCBU to keep vaccination records	
<i>Severity and impact of breaches</i>	A breach would be administrative and has low likelihood of resulting in transmission and spread of COVID-19, because this provision relates to record-keeping.
<i>Appropriateness of penalty</i>	Given the lower risk of harm to others, a lower penalty is appropriate.
<i>Comparable penalties</i>	A breach of clause 11A of the COVID-19 Public Health Response (Vaccinations) Order, which contains the similar substantive requirement, is classified as low risk.
<i>Recommended class</i>	Low risk

Section 17C: Duty on PCBU to prevent affected worker from carrying out specified work unless vaccinated	
<i>Severity and impact of breaches</i>	This provision requires vaccination for certain work on public interest grounds. A breach would mean risk of transmitting or spreading COVID-19 is not managed. A breach would also pose risks to our overall public health response to COVID-19, which is part of the rationale for mandating vaccination for this work.
<i>Appropriateness of penalty</i>	Given the higher risk of harm to others, a penalty at the higher end of the range is appropriate.
<i>Comparable penalties</i>	A breach of clause 8 of the COVID-19 Public Health Response (Vaccinations) Order, which contains the similar substantive requirement, is classified as high risk.
<i>Recommended class</i>	High risk

Section 17D: Duty on affected worker not to carry out specified work unless vaccinated, exempt or authorised	
<i>Severity and impact of breaches</i>	This provision requires vaccination for certain work on public interest grounds. A breach would mean risk of transmitting or spreading COVID-19 is not managed. A breach would also pose risks to our overall public health response to COVID-19, which is part of the rationale for mandating vaccination for this work.
<i>Appropriateness of penalty</i>	Given the higher risk of harm to others of unvaccinated workers, a penalty at the higher end of the range is appropriate. This could disproportionately impact Māori, who have a lower vaccination status (currently 73%, compared to 88% nationally). For example, within the New Zealand Police, as at 29 October 2021, Māori staff were more likely to not have any doses listed (15.6%) compared to all staff (12.6%).
<i>Comparable penalties</i>	A breach of clause 7 of the COVID-19 Public Health Response (Vaccinations) Order, which contains the similar substantive requirement, is classified as high risk.
<i>Recommended class</i>	High risk

Regulations Review Committee

- 21 There are no anticipated grounds for the Regulations Review Committee to draw the COVID-19 Public Health Response (Infringement Offences)

Amendment Regulations 2021 to the attention of the House under Standing Order 327.

Certification by Parliamentary Counsel

- 22 The Parliamentary Counsel Office (PCO) has certified the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 as being in order for submission to Cabinet, subject to a waiver of the 28-day rule.

Impact analysis

- 23 The Treasury's Regulatory Impact Analysis (RIA) Team determined that the policy proposals for the 26 October 2021 Cabinet paper "Supporting COVID-19 vaccination requirements in the workplace" [CAB-21-MIN-0436] and the 22 November 2021 Cabinet paper "Requiring COVID-19 vaccination for work through Government mandates and employer decisions" [CAB-21-MIN-0495] were exempt from the requirement to provide a Regulatory Impact Statement (RIS). Those papers noted that the Ministry of Business, Innovation and Employment (MBIE) would review the proposals to assess their impact.
- 24 The RIA Team has determined that the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 are exempt from the requirement to provide a RIS. The exemption is granted on the grounds that the proposals are intended to manage, mitigate or alleviate the short-term impacts of the declared emergency event of the COVID-19 pandemic, and implementation of the policy is required urgently to be effective (making complete, robust and timely RIS unfeasible).
- 25 The RIA Team strongly supports MBIE's proposed testing of the assessment tool and the review of the proposals after their implementation, given the significance of potential impacts.

Publicity

- 26 MBIE will inform Police and the NZDF about the timing of changes to infringement fees and fines.

Proactive release

- 27 I intend to proactively release this paper following Cabinet consideration.

Consultation

- 28 This paper was prepared by MBIE.
- 29 The following agencies were consulted on this paper: Crown Law, Department of the Prime Minister and Cabinet, Ministry of Health, Ministry of Justice, New Zealand Defence Force, New Zealand Police, PCO, Treasury and WorkSafe.

Recommendations

The Minister for Workplace Relations and Safety recommends that Cabinet:

- 1 note that on 13 December 2021, Cabinet agreed to amend the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 to classify breaches of the following provisions of the COVID-19 Public Health Response Act 2020 accordingly [CAB-21-MIN-0533]:
 - 1.1 section 17B (duty on PCBUs to keep vaccination records): low risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021;
 - 1.2 section 17C (duty on PCBUs to prevent workers from carrying out work unless vaccinated): high risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021; and
 - 1.3 section 17D (duty on workers not to do work without vaccination): high risk, matching the approach taken in the COVID-19 Public Health Response (Vaccinations) Order 2021;
- 2 note that the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 will give effect to the decision referred to in paragraph 1 above;
- 3 authorise the submission to the Executive Council of the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021;
- 4 note that a waiver of the 28-day rule is sought:
 - 4.1 so that amendments to the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 can come into force on 21 December 2021;
 - 4.2 on the grounds that they validate irregularities, and will confer only benefits on the public;
- 5 agree to waive the 28-day rule so that the COVID-19 Public Health Response (Infringement Offences) Amendment Regulations 2021 can come into force on 21 December 2021;
- 6 note that under section 33(2) of the COVID-19 Public Health Response Act, before prescribing different penalties for different infringement offences or classes of infringement offences, the Minister for COVID-19 Response must consider the following, if relevant:
 - 6.1 the severity and impact of the breaches specified as infringement offences or classes of infringement offences;
 - 6.2 the appropriateness of the penalty for any group likely to be affected by the specified offences or specified classes of offences, including equity considerations; and

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- 6.3 penalties for comparable offences or classes of offences in legislation (if any).
- 7 note the advice of the Minister for Workplace Relations and Safety, on behalf of the Minister for COVID-19 Response, that this requirement has been met.

Authorised for lodgement

Hon Michael Wood
Minister for Workplace Relations and Safety

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