



BRIEFING

Approaches to workplace COVID-19 vaccination

Date:	6 September 2021	Priority:	High
Security classification:	In Confidence	Tracking number:	2122-0834

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Discuss this briefing at the WRS policy session on 8 September 2021.	8 September 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Privacy of Natural Persons			✓

The following departments/agencies have been consulted

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Approaches to workplace COVID-19 vaccination

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Purpose

To advise you on alternative approaches to workplace COVID-19 vaccination requirements and processes, and issues related to how domestic and international approaches interact with human rights considerations and the COVID-19 Public Health Response Act 2020.

Executive summary

A range of obligations under employment, health and safety and human rights law apply to workplace COVID-19 vaccination decisions.

Currently there are two main approaches that can be taken in New Zealand to COVID-19 vaccination requirements. An employer may determine that an employee performs work that can only be done by a vaccinated worker, either:

- For health and safety reasons, justified by a COVID-19 exposure risk assessment, or
- Because their work is covered by the COVID-19 Public Health Response (Vaccinations) Order 2021.

Any discussions about these matters must follow good faith obligations and other normal employment law processes.

Alternative approaches have been adopted internationally, and are being proposed domestically by some employers. For example, some governments have required healthcare or service sector workers to be vaccinated (eg Australia, Canada), with a few allowing regular testing as a substitute for vaccination (eg France, the United States). In the United States, the Department of Justice has also said that public agencies and private businesses can require vaccination for workplace access, suggesting that proof of vaccination (eg vaccination passports) are likely to become more common as a concept. This is a feature of France's system for service sector workers, who have to carry a valid "health pass" when going to work.

A common feature of the international approaches is that these often involve legislative changes, reflecting the balancing of broad public interests that involve public health considerations (preventing risks to others of the potential transmission of COVID-19) and individual liberties associated with the right to refuse medical treatment.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Discuss** this briefing with officials at the WRS policy session on 8 September 2021.

Agree / Disagree



Shane Kinley
Policy Director, Workplace Relations and
Safety Policy Branch
Labour, Science and Enterprise, MBE
06 / 09 / 2021

Hon Michael Wood
Minister for Workplace Relations and
Safety
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Background

1. On 30 August 2021, you requested advice on alternative approaches to workplace COVID-19 vaccination requirements.

Status quo

2. Workplace issues relating to COVID-19 vaccination straddle several legislative regimes, namely employment, health and safety, public health, and human rights.
3. To date, we have advised that PCBUs must first assess COVID-19 exposure risk (ie do a health and safety risk assessment) to decide whether to require vaccination for certain work.¹ This risk is not static and will change over time. If this risk assessment finds that exposure to COVID-19 is a risk to workers' health and safety, PCBUs then need to consider reasonably practicable options to eliminate or minimise risks that arise from that exposure, including the risks of having an unvaccinated worker doing that work, in consultation with workers and their representatives. If infection prevention and control measures (eg PPE usage and testing) are insufficient, it is likely changes to employment arrangements may need to be considered.
4. The COVID-19 Public Health Response (Vaccinations) Order replaces a COVID-19 exposure risk assessment for work covered by the Order. However, if employees doing that work are unvaccinated, employers will need to use existing employment law levers to ensure they comply with the Order.
5. Where vaccination is required for certain work, and employees currently doing that work are not vaccinated, employers and employees need to work through the available options themselves. It may be easier for parties to reach agreement on short-term options (eg taking leave or temporarily rearranging work) than long-term ones (eg redeployment, redundancy or termination). It remains to be seen what the Employment Relations Authority and Employment Court will consider reasonable in the circumstances.² That is because these decisions will require consideration of employment, health and safety, and human rights law, and will be highly fact-specific.

Requiring vaccination for certain work or to access workplaces

Vaccination requirements set by the Government in law

6. The Government can change what work requires vaccination, or alter the consequences for unvaccinated employees doing such work.

Expanding the definition of work that can only be done by vaccinated workers

7. Secondary legislation (ie an Order under the COVID-19 Public Health Response Act 2020) is needed to override PCBUs' individual risk assessments, and consistently require vaccination for certain work. This option can only be used where there are public health reasons for such a change. There are certain conditions that need to be met before the relevant Minister can make such an Order, including the following:

¹ Whether employers can require vaccination on grounds other than health and safety is a grey area. For example, where roles involve international travel, employers could require COVID-19 vaccination in recognition of differential travel restrictions emerging globally for vaccination and unvaccinated travellers.

² The Employment Relations Authority recently found termination of employment lawful in relation to an unvaccinated Customs employee covered by the Order (*GF v New Zealand Customs Service* [2021] NZERA 382). This determination is highly fact-specific and does not create precedent.

- a. An Order can only be made if it is “to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19”.
 - b. The Minister must have regard to advice from the Director-General of Health about the risks of outbreak/spread of COVID-19, and the nature and extent of measures appropriate to address those risks.
 - c. The Minister must be satisfied the Order either does not limit, or is a justified limit, on the rights and freedoms in the New Zealand Bill of Rights Act 1990. There may be a number of reasons why workers choose not to be vaccinated, some of which could relate to prohibited grounds of discrimination (eg religious belief, disability).
8. At the time the original vaccination Order was made, Legal professional privilege [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
9. Expanding the range of work that requires vaccination will also have privacy implications. A person’s vaccination status is personal information. Employers can ask, but workers are under no obligation to disclose whether they have been vaccinated. The exception is for work covered by the vaccination Order. For other work that PCBUs have determined requires vaccination, workers can choose not to disclose their vaccination status, but their employers can treat them as unvaccinated. If more work is required by law to be done by vaccinated workers, there will need to be consideration of a record-keeping system for these workers’ vaccination status, and any associated compliance activities.
10. If the necessary conditions for an Order under the COVID-19 Public Health Response Act are not met, primary legislation will likely be needed to override PCBUs’ individual risk assessment processes.
11. In most other jurisdictions, work-based vaccination requirements generally apply to healthcare and care home workforces (eg Australia, France, Italy and the United Kingdom). Others require vaccination for workforces in places linked to socialisation, close inter-personal contact and high-density gatherings (eg Russia, Lebanon, New York state). New Zealand is relatively unique in requiring vaccination for workforces who come into contact with people who have recently travelled overseas, but this reflects our unique position in terms of where the greatest risk of potential COVID-19 outbreak or spread comes from. Annex 1 contains more information about alternative approaches taken in other jurisdictions.
12. There are increasing calls from business for the ability to require vaccination for a broader range of work than currently covered by the vaccination Order. The health workforce tends to be commonly mentioned, as well as those operating from workplaces at Alert Levels 3 and 4. Considering whether to expand the range of work for which vaccination is lawfully required will involve traversing the following issues:
- a. What types of work pose the greatest public health risk in terms of COVID-19 exposure? How does this assessment shift based on the prevailing level of community transmission, and risk posed by the likely variant of concern?
 - b. Are there other public policy reasons to require vaccination for certain types of work? Are these reasons in addition to public health reasons, or alternative reasons for requiring vaccination?

- c. Do the policy objectives justify limiting workers' right to refuse medical treatment, and be free from discrimination on protected grounds (eg religious belief, disability)?
- d. How can vaccination requirements be designed to pose the least limitation necessary on rights, while still achieving the policy objective?
- e. Will these requirements be needed in perpetuity, or only while in the acute phase of the pandemic globally?
- f. What is the likely consequence of these requirements, particularly in terms of service levels (eg for the health system) and supply chains (eg for businesses involved in international travel)? Does the benefit from requiring vaccination outweigh any likely costs?

Changing the consequences for unvaccinated workers doing work that requires vaccination

- 13. Currently, if unvaccinated workers are doing work that requires vaccination, employment/contract law accordingly determine their work outcomes. This is regardless of whether work is covered by the vaccination Order, or whether PCBUs have made this determination following a health and safety risk assessment. Employers working through options with unvaccinated employees will likely need to step through issues relating to potential personal grievance grounds and protections against discrimination that apply in employment contexts. For work covered by the Order, there are no alternative controls or measures that PCBUs can implement as a substitute for vaccination (eg regular testing).
- 14. Allowing discretion (eg to avoid ending employment relationships where workers are not vaccinated and cannot be redeployed/alternatives are not feasible) will require primary legislation. Examples could include allowing workers to be regularly tested as a substitute for vaccination, or some other combination of infection prevention and control measures. This depends on public health advice about whether any alternative measure (or combination of measures) are sufficient in the absence of vaccination to manage/mitigate exposure and transmission risks. The desired policy will also determine whether the legislative vehicle for this change can be the COVID-19 Public Health Response Act, or whether bespoke legislation is needed.
- 15. This is the approach that has been taken in the United States for federal employees and contractors. If unvaccinated, they have to subject to regular testing, and other measures such as masking, physical distancing, and restrictions on official travel. In France, workers in businesses that provide face-to-face services need to be vaccinated or have tested negative in the last 72 hours.
- 16. Considering whether to change the consequences for unvaccinated workers doing work that requires vaccination will involve thinking about the following:
 - a. What combination of controls (eg regular testing, masking, distancing) is an adequate substitute for vaccination, in all the contexts in which vaccination is required for work? Does the answer change based on prevailing level of community transmission, risk posed by the likely variant of concern, and the number of workers expected to take up the option of regular testing (or other controls) instead of vaccination?

- i. For example, many of the workers covered by the vaccination Order are already subject to regular testing under a separate Order. This indicates that for certain work, testing alone is not a substitute for vaccination. This does not mean that for all work requiring vaccination, testing (as part of a combination of measures) will be insufficient as a substitute.³
- b. What are the rights implications of asking workers to effectively choose between vaccination (a form of medical treatment, which everyone has the right to refuse under the Bill of Rights Act), regular testing (which could be a search under the Bill of Rights Act), and redundancy/termination?
- c. Is it logistically feasible to substitute a testing requirement for vaccination? What is the accessibility and range of testing options available to workers? Currently, nasal/throat PCR tests (which are more invasive than saliva tests) are available free of charge to anyone who meets testing criteria. These criteria generally require someone to be experiencing COVID-19 symptoms or having potentially been exposed to COVID-19.⁴ Saliva tests are not generally available to the public. Unlike countries experiencing uncontrolled spread of COVID-19, we have yet to establish the infrastructure to support routine, on-demand testing.

Changing what happens when employment relationships are terminated

- 17. Currently, it is possible for employment relationships to be ended if unvaccinated employees are doing work that requires vaccination, and other alternatives (eg redeployment) are not viable. In our guidance on the Employment New Zealand website we have referred to restructuring processes. In addition to restructuring, there are other methods employers may use to terminate an employee's employment.
- 18. When an employment relationship ends in these circumstances, there is no guarantee of compensation for employees. Whether they receive compensation depends on the terms of their employment agreement (or collective agreement if applicable), or what they can negotiate with their employer.
- 19. To require that compensation be paid in these circumstances will require law change. It will likely also include considering the following:
 - a. What is a fair compensation amount for different employment histories/circumstances?
 - b. Will the Government fund any part of this?
 - c. Should compensation be limited to certain reasons for employees being unvaccinated (eg medical reasons)? What are the rights implications of doing so?
- 20. You and the Minister for COVID-19 Response were previously briefed on compensation in relation to the first vaccination Order (briefing 2021-2776 refers).

Retaining current settings, but encouraging behaviour change

- 21. It may be possible to provide additional support to employers who want to encourage their workers to be vaccinated. This could involve the following:
 - a. Strengthening encouragement to employers to support workers to be vaccinated and removing any work-related barriers to vaccination.

³ The notion of a "substitute" measure should also be used with care, as the various measures in our public health toolkit serve different purposes. Vaccination is about reducing the transmission and the incidence of serious illness and death from COVID-19. Regular testing is about rapidly identifying cases of COVID-19 to then activate other measures (eg isolation).

⁴ The exception is workers covered by the COVID-19 Public Health Response (Required Testing) Order 2020. Saliva testing is available for workers covered by this Order as well.

- b. Expanding the current scope of workplace vaccination,⁵ noting this may be difficult logistically, and not provide much additional benefit compared to increasing the accessibility of vaccination centres.
- c. Changing the law to require employers to provide paid time off for vaccination, so that employees can be vaccinated during work hours if necessary. It is unclear whether this would significantly contribute to vaccination uptake.

Vaccination requirements set by employers/PCBUs

- 22. To date, we have said that PCBUs cannot require vaccination for certain work without first carrying out a COVID-19 exposure risk assessment. This assessment must be done in consultation with workers and their representatives, and will need to be repeated regularly as risk shifts. If a PCBU decides work needs to be done by a vaccinated worker, and a worker doing that work is unvaccinated, the implications will stem from employment law (for employees) or contract law (for contractors).
 - a. For existing employees: employers and employees need to agree to make COVID-19 vaccination a condition of employment. If an employee does not want to be vaccinated, short-term options include taking leave or temporarily rearranging work/working remotely. However, in the long-term, employers may find themselves considering options like redeployment, restructuring or termination, and these options all come with legal risk due to the interplay of rights and obligations. Ultimately, employees and employers can mutually agree any lawful outcome.
 - b. For new employees: it is technically “easier” to include a vaccination requirement in new employment agreements, but this still carries legal risk. For example, depending on the circumstances, this could be considered unlawful discrimination.
 - c. For existing contractors: employers may not be able to require vaccination without varying existing contracts, or entering frustration of contract territory.
 - d. For new contractors: requiring vaccination as a contractual term is unlikely to contravene contract law, but will need to be negotiated between parties.
- 23. Occupational requirements for vaccination and medical treatment are not novel. For example, healthcare workers in certain frontline/higher-risk roles generally need to have current vaccinations for a range of infectious diseases. In the past, water and wastewater workers have needed typhoid vaccinations. Health and safety law provides a framework for PCBUs to make similar requirements for COVID-19 vaccination, but exercising this discretion requires fact-specific risk assessments and robust consultation processes.
- 24. We have been discussing issues with using the risk assessment approach with WorkSafe, the Council of Trade Unions (CTU), BusinessNZ, the Business Leaders’ Health and Safety Forum and other key workplace stakeholders. We expect to receive more information from these stakeholders on Thursday, 9 September.

⁵ To be eligible for onsite COVID-19 vaccinations, a workplace will have to either be a large workplace/employer (eg more than 1,000 workers, or being able to vaccinate several hundred workers at each workplace) or be a workplace that has high Māori, Pacific or ethnic populations and those who may find it harder to get a vaccination. In addition, the workplace must have previously delivered a vaccine programme onsite and have an existing relationship with a vaccine provider, and provide workers to support onsite vaccination (eg with worker engagement).

Changing the discretionary nature of PCBUs' risk assessments

25. Removing PCBUs' discretion to make context-specific assessments of COVID-19 exposure risk will either amount to the Government requiring vaccination for certain work (see paragraphs 7 – 12 above), or prohibiting PCBUs' from requiring vaccination for certain work. The latter is likely to require law change. It may also not be necessary, because health and safety law requires PCBUs to engage with workers and their representatives when determining how to manage risks. PCBUs' actions can be challenged if workers experience negative consequences from an overly-cautious risk assessment.

Limiting employers'/PCBUs' options where vaccination requirements are justified

26. It may be possible to require employers to consider/accept alternatives to vaccination before ending employment relationships, if they have decided certain work requires vaccination following a health and safety risk assessment. This would likely require primary legislation, because it removes PCBUs' discretion to decide what steps they take to eliminate or minimise risks. For example, employers could have to accept regular testing (and/or other infection prevention and control measures) as a substitute for vaccination if no other options would guarantee continuation of that employment relationship.
27. Alternatively, law change could also protect PCBUs' ability to restrict workplace access on the basis of vaccination status, for example if they have followed a prescribed process. Currently, health and safety law would not allow PCBUs to restrict unvaccinated workers' access to workplaces purely on the basis of concerns from vaccinated workers, unless that was the outcome of a risk assessment. Law change could also do the opposite, and prevent PCBUs from instituting blanket policies restricting access to unvaccinated people.
28. Internationally, these decisions have typically been made by governments (eg to require vaccination before people can access indoor venues or participate in certain leisure/entertainment activities). The opposite approach has been taken in the United States, where the Department of Justice has said that public agencies or private businesses can require vaccination for their workforces, without federal or state government mandates.
29. Ultimately, the range of approaches taken reflects the countries' different contexts, and where they observe the greatest risk in terms of COVID-19 transmission. What is reasonable will depend on the circumstances, and also how human rights, privacy and other considerations intersect. Vaccination requirements overseas reflect jurisdictions' pressure points, in terms of liberties and social activities people may not have had since the start of the pandemic. In circumstances of relatively uncontrolled COVID-19 transmission, public health considerations are likely to be weighted differently to any analysis done in the New Zealand context.

Next steps

30. We recommend discussing this briefing with you at the next WRS policy session on 8 September 2021.
31. In the meantime, we will continue to respond to queries by referencing the current legal position: employers/PCBUs must rely on either a health and safety risk assessment, or work being covered by the vaccination Order, to require vaccination for particular work. We will also keep engaging with key workplace stakeholders (eg the WorkSafe-convened Ginger Group including the CTU, BusinessNZ, the Business Leaders' Health and Safety Forum) on emerging issues, and update you on these.

Annexes

Annex 1: Approaches taken in other jurisdictions

Annex 1: Approaches taken in other jurisdictions

<i>Jurisdiction</i>	<i>Workforce required to be vaccinated by law</i>	<i>Details</i>	<i>Consequences if not vaccinated</i>
Australia (federal)	Residential aged care workers.	All residential aged care workers must have received the first dose of a COVID-19 vaccine by mid-September (the exact date may vary by state/territory). Each state and territory has made its own public health orders (or use similar mechanisms) to achieve this.	Unclear. Medical contraindications (and in some states/territories, the reasonable unavailability of vaccination for a particular worker) are grounds for an exemption from the vaccination requirement.
New South Wales (state)	Healthcare workers (in addition to residential aged care workers).	For work done from 30 September to 30 November, these workers must have received at least one dose of a COVID-19 vaccine. From 30 November, these workers must be fully vaccinated. Note: Queensland also requires healthcare workers to be vaccinated, but with different dates of the requirement coming into force.	Unclear. Medical contraindications are grounds for an exemption from the vaccination requirement.
Canada (federal)	All federal employees and those working in some federally-regulated industries (airlines, railways).	The Canadian government has also announced that it expects employers in other federally-regulated industries to require vaccination.	Unclear. For those with a medical reason for not being vaccinated, alternative measures (which includes testing) will be arranged.
France	Health and care sector professionals.	Until 15 September, these workers have the option of presenting a certificate of recovery from COVID-19 or a negative result from a test taken within the last 72 hours. From 15 September to 15 October, workers have to show they have received at least one dose of a COVID-19 vaccine and a negative test result. After 15 October, workers have to be fully vaccinated.	Suspension without pay.
	Workers who have face-to-face contact with the public.	This applies to workers in places like public transport, cafes, restaurants, bars and cinemas. This health pass requirement already applies to the public when accessing some of these places.	If not vaccinated, workers will need to show a negative test result from the last 72 hours.
Hungary	Healthcare workers.	The Hungarian government has announced this is the only workforce for whom they intend to mandate vaccination. It is unclear when this came/will come into effect.	Redeployment or suspension without pay for the rest of the year (it is unclear what will happen after 31 December 2021).
Italy	Healthcare workers	Italy was the first European country to require vaccination for	Redeployment or suspension without pay for the

	and pharmacists.	healthcare workers in April.	rest of the year (it is unclear what will happen after 31 December 2021).
Lebanon	Workers at restaurants, cafes, pubs and beaches.	This requirement also applies to all patrons/customers at these venues.	If not vaccinated, workers will need to show a negative result from a PCR test in the last 72 hours.
Panama	Government workers.	This requirement was being considered by the Panamanian government as of mid-August. It is unclear whether it will become law, or when.	Leave without pay.
Russia	Service sector workers.	Businesses in the service sector (eg supermarkets, education services, healthcare services, banks, restaurants, bars, gig work platforms) must ensure 60% of their customer-facing workers are vaccinated. At least 60% needed to have received a first dose by 15 July, and the same proportion needed to be fully vaccinated by 15 August. The 40% of workers who are not vaccinated should consist of workers who cannot receive the vaccine for medical reasons and others "at the employer's discretion," according to official guidelines for businesses.	The relevant authorities have said employers have the right to suspend workers without pay who refuse to be vaccinated. Businesses who fail to meet requirements can be fined or ordered to close their premises for up to 90 days.
Saudi Arabia	All workers seeking to enter a workplace.	All adults are required to be vaccinated in Saudi Arabia, and it has been specifically stated this extends to anyone entering any workplace.	Unclear. The country's vaccination programme is still at a relatively early stage.
United Kingdom	Care home workers.	16 September is the last date for care home workers to receive their first dose. 11 November is when regulations come into force requiring care home workers to be fully vaccinated. The regulations apply to anyone working in Care Quality Commission-regulated care homes.	Operational guidance says redeployment and dismissal are options available to employers.
United States (federal)	All federal employees and contractors.	The Department of Justice has also said public agencies and private businesses can require vaccination.	Unvaccinated workers must subject to regular testing and other mitigation measures (eg masking and physical distancing).
New York (state)	State employees, healthcare and care home workers, and workers at restaurants, gyms and indoor		State employees who are unvaccinated must be tested weekly for COVID-19. It is unclear if this option is available for other unvaccinated workers covered by vaccination mandates.

	entertainment venues.		
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