



## BRIEFING

### Workplace COVID-19 vaccination: Issues and approaches

<b>Date:</b>	20 September 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1001

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Note the attached framework for considering issues relating to workplace COVID-19 vaccination.  Forward this briefing and our prior advice to the Prime Minister, Minister for COVID-19 Response, Minister of Health and Attorney-General (if you do not require further material to support your discussions with colleagues).	24 September 2021

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

The following departments/agencies have been consulted
Department of the Prime Minister and Cabinet, Public Service Commission, WorkSafe

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 Withdrawn           |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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### Purpose

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To provide you with material to share with your colleagues about issues relating to workplace COVID-19 vaccination, potential options to respond to these issues and considerations for any policy changes.

### Recommended action

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

- a **Note** the attached framework for considering issues relating to workplace COVID-19 vaccination. *Noted*
- b **Indicate** whether any further material is required to support discussions with your colleagues on these issues. *Wish to discuss / No further material required*
- c Subject to your decision on recommendation b above, **forward** this briefing, and our prior advice (briefing 2122-0834) to the Prime Minister, Minister for COVID-19 Response, Minister of Health and Attorney-General. *Agree / Disagree*

Shane Kinley  
**Policy Director, Workplace Relations and  
Safety Policy**  
Labour, Science and Enterprise, MBIE

20 / 09 / 2021

Hon Michael Wood  
**Minister for Workplace Relations and  
Safety**

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## Background

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1. You have requested advice on issues relating to workplace COVID-19 vaccination, and potential approaches to those issues. Following discussion on our previous briefing (2122-0834 refers), you asked us to provide a framework for discussion with Ministers setting out issues relating to workplace COVID-19 vaccination, potential options to respond to these issues and considerations for any policy changes. This briefing responds to your request.

## Issues relating to workplace COVID-19 vaccination

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2. At present, vaccination to perform work can only be required by:
  - a. The COVID-19 Public Health Response (Vaccinations) Order 2021, or
  - b. PCBUs, after a health and safety risk assessment has indicated vaccination as a reasonably practicable way of managing COVID-19 exposure risk.
3. If unvaccinated employees are doing work that requires vaccination, employment law continues to apply in determining their outcomes. In some cases, this could result in the ending of employment, either by mutual agreement, or by an employer.
4. Other than where work is covered by the vaccination Order, there is significant flexibility for PCBUs and employers to decide the approach they take. While employment law and health and safety law both require engagement with workers and their representatives (eg unions), this does not necessarily prevent risk-averse approaches being taken by employers, which could produce unfair outcomes for employees. Similarly, the need for fact-specific risk assessments in a dynamic environment means that PCBUs do not have certainty about the lawfulness of their decisions.

## A framework for considering these issues

5. The boundary between work that requires vaccination, and work that does not, depends on a combination of Government actions (eg the vaccination Order) and PCBUs' decisions (eg on health and safety risk assessments). There is a large degree of overlap between work that requires vaccination by law for public health reasons, and for which PCBUs might require vaccination after health and safety risk assessments. In addition to public health reasons, public expectations and risk tolerance have some effect on the exact boundary between these two types of work that requires vaccination.
6. To support a vaccination-led COVID-19 response, the Government can either shift these boundaries, or influence others (like PCBUs) to do so. However, this largely depends on the prevailing public health rationale. Right now, the aim is to eliminate COVID-19 while vaccinating as many people as possible. In the future, our objectives could change (eg to place increased focus on protecting unvaccinated people and preserving health system performance/capacity).
7. Shifts in the risk posed by COVID-19 in various contexts, and the objectives of our COVID-19 response, could affect the justifiability of different approaches. For example, with relatively high vaccination rates and relatively low (or no) domestic transmission of COVID-19, there may not be sufficient public health grounds to require vaccination for some types of work.
8. Advice on the public health rationale will need to be re-assessed as the risk landscape evolves. Internationally, these considerations appear to be shifting in some countries with high vaccination rates, leading to reduced use of vaccination requirements for certain work or proof of vaccination to enter certain places, and increased reliance on alternative measures such as testing (eg Denmark).

9. How the Government may shift or influence these boundaries will also depend on:
- a. Balancing human rights considerations (eg privacy law, the right to refuse medical treatment, the right to be free from discrimination on certain grounds).
  - b. Social attitudes, including whether being seen to be vaccinated to participate in certain aspects of work and social life increases feelings of social exclusion.
  - c. Economic implications, including from consumer rejection (eg refusal to patronise businesses that do/do not require vaccination).
10. The Government can change what work requires vaccination by law. At present, only work at the border and in MIQ facilities requires vaccination for public health reasons. Other than this, PCBUs can decide that vaccination is required for certain work for health and safety reasons, following a risk assessment done in collaboration with workers and their representatives. This leads to the following issues:
- a. There is likely to be work that PCBUs decide should only be done by vaccinated workers that is not covered by the vaccination Order. At present, PCBUs need to decide what combination of measures is reasonably practicable to mitigate/eliminate COVID-19 exposure risks. This could lead to disparate outcomes. For example some PCBUs may consider regular testing and the use of face coverings sufficient, whereas others might consider vaccination the only acceptable measure. The Government could standardise the approach taken in certain workforces or workplaces (eg to require regular testing in lieu of vaccination, where either of these is justified on public health grounds), but this will require at least secondary legislation.
  - b. Because of the inherent uncertainty in needing to do fact-specific risk assessments, sectors or PCBUs may seek to take standardised approaches. This could produce unfair outcomes for workers, if they are subject to unjustified vaccination requirements as a result of an overly cautious stance. The CTU has raised concerns with Ministers about overly cautious approaches and inadequate consultation about health and safety risk assessments. WorkSafe has published guidance on how PCBUs can assess whether certain work needs to only be done by vaccinated workers. WorkSafe is actively considering how best to provide businesses with additional detail to help them make health and safety assessments about whether certain work needs to be done by vaccinated workers.
  - c. Legal professional privilege
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- d. This is an area where the public health and health and safety regimes overlaps. This could be exacerbated if greater expectations are placed on businesses to use health and safety to manage what is, in effect, a public health matter. Providing greater certainty and clarity to workplaces about roles, responsibilities and expectations under these regimes as well as clarifying how the two regimes interact would be useful.

11. In addition to the above, Annex 1 shows other potential/emerging issues we have identified, which could exert pressure on the current approach to workplace COVID-19 vaccination.

### **Implications for the public sector**

12. We have shared a draft of this paper with the Public Service Commission. Their view is that the public sector has some unique challenges, about which they have provided the following comments.
13. Parts of the public sector workforce are often dealing directly with the public, including in situations where access cannot be denied (eg in the justice, education, welfare and health sectors). The public may also have no option but to directly engage with some parts of the public sector workforce (eg Police and the rest of the justice sector). In addition, some public service workplaces cannot be easily closed to the public where access is important (eg courts, MSD and DOC workplaces). There may also be pressure from public sector workforces about working alongside unvaccinated colleagues.
14. Vaccination may also be required for some work in the public sector following PCBUs' health and safety risk assessments, over and above work already covered by the vaccination Order. At this point, the focus remains on educating and supporting workers.

### **Next steps**

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15. You may wish to use this briefing and our previous advice (briefing 2022-0834 refers) to support discussions with your colleagues about this topic. If this material suffices, we recommend you forward these two briefings to the Prime Minister, the Minister for COVID-19 Response, the Minister of Health and the Attorney-General.
16. Late last week, DPMC and the Ministry of Health briefed the Prime Minister and the Minister for COVID-19 Response about the domestic use of COVID-19 vaccination certificates. That briefing provided initial advice on issues to consider when determining if the Government could, and should, use such certificates. It also sought a decision on the type of framework to initially explore further (eg one for high-risk events and gatherings, or one where there is no Government regulation). There will be workplace implications from the introduction of any vaccination certificate scheme. We are in conversations with DPMC and Crown Law to ensure our advice is aligned.
17. Officials are available to discuss next steps at your convenience.

### **Annexes**

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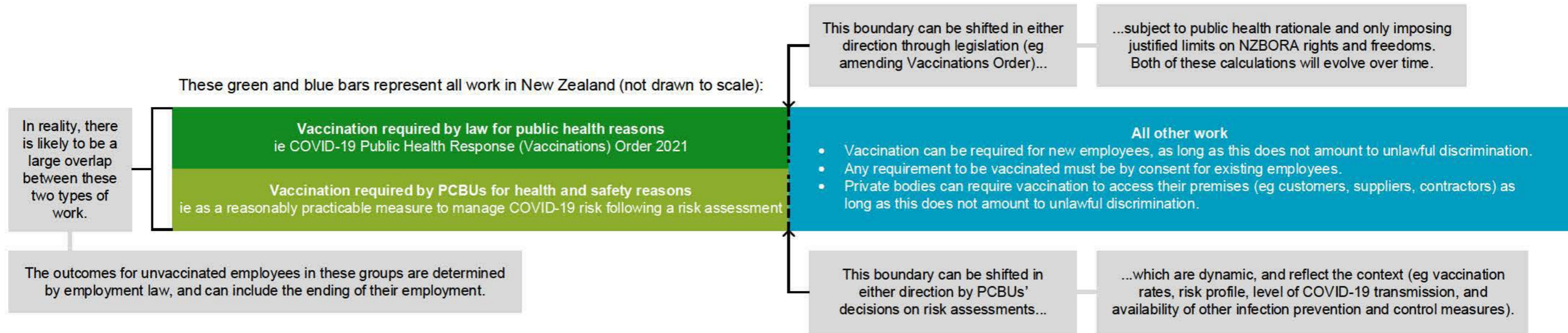
Annex 1: Issues relating to workplace COVID-19 vaccination A3

**Annex 1: Issues relating to workplace COVID-19 vaccination A3**

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# Issues relating to workplace COVID-19 vaccination

## Our current approach to workplace vaccination requirements comprises an Order combined with existing legal frameworks



## However, as the vaccination programme proceeds, issues are starting to emerge with this approach

Stars represent issues where we expect to see the greatest pressure to take a different approach.

Where vaccination is required by law for public health reasons	Where vaccination is required by PCBUs for health and safety reasons	For all other work
<p>★ What other workforces should be required by law to be vaccinated? Does the public health rationale also support them being required to be regularly tested? Note MOH are considering whether some of the health workforce should have to be vaccinated by law.</p>	<p>★ Should PCBUs be allowed to take a more standard approach across workforces/workplaces with similar risk profiles, to reduce uncertainty arising from dynamic risk assessments?</p> <p>For example, should the Government require particular alternative controls (eg regular testing in lieu of vaccination) for higher-risk work not covered by the vaccination Order?</p>	<p>★ What are the implications of businesses requiring proof of vaccination to access their premises?</p> <ul style="list-style-type: none"> <li>• How will businesses meet their privacy obligations? This will likely increase pressure for the Government to provide a legislative solution that increases safeguards for personal health information.</li> <li>• Should alternatives to proof of vaccination be encouraged or required to be offered to minimise the risk of unlawful discrimination?</li> <li>• Should requirements for workers be at least as strict as those for customers accessing the same premises?</li> <li>• What about people who cannot be vaccinated? There may be requests for official/semi-official certification of their reasons for not being vaccinated (like face covering exemptions). This could raise implementation issues if exemptions are not respected by businesses or the public.</li> </ul>
<p>How many of these workers are in roles that are essential or critical (eg to supply chains, or continued provision of key public services)?</p> <ul style="list-style-type: none"> <li>• What is the economic and social impact of these workers being unable to continue working, which is currently the only option if they are not vaccinated?</li> <li>• What mitigations are needed?</li> </ul>	<p>★ Do PCBUs require additional support to ensure their risk assessment processes are robust, to protect against potentially unfair outcomes for workers? Note WorkSafe are actively considering how to best provide businesses with additional detail to support risk assessments.</p>	<p>★ Should the Government take a position on businesses requiring vaccination for other reasons (eg to market/advertise having a fully-vaccinated workforce)? Guidance could be provided on the current legal position, but is likely to raise competing issues and put pressure on legislative safeguards.</p>
<p>Is it justifiable and reasonable to differentiate, in terms of employment outcomes, between workers who cannot be vaccinated for medical or religious reasons, and workers who are unvaccinated for other reasons (eg hesitancy)? Note prior advice is that this would require legislation.</p>		<p>Could vaccination requirements entrench hesitance and exclusion? How will consumer/worker rejection (eg of unvaccinated colleagues) play out?</p>
<p>Does the Government have an interest in how PCBUs treat different vaccines (eg overseas vaccinations)? Note MOH are preparing advice on recognising alternative vaccines under the vaccinations Order.</p>		