



## BRIEFING

### COVID-19 vaccination issues at work: Options to explore

<b>Date:</b>	4 October 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1197

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Decide which options you wish to explore further.  Forward this briefing to the Prime Minister, Minister for COVID-19 Response, Minister of Health and the Attorney-General.	8 October 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Anna Clark	General Manager, Workplace Relations and Safety Policy	04 901 8619	✓
Privacy of Natural Persons			

The following departments/agencies have been consulted
Crown Law Office, Department of the Prime Minister and Cabinet, Ministry of Health, 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 Withdrawn           |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

To provide potential options for change relating to COVID-19 vaccination issues at work, and seek your decisions on which options to explore further.

### Executive summary

Based on conversations with you and stakeholders (eg the COVID-19 Workplace Ginger Group convened by WorkSafe), we have identified nine potential options to respond to emerging workplace COVID-19 vaccination issues.

### Options we recommend pursuing

Based on where we think the greatest possible benefit lies in terms of supporting vaccination uptake, maintaining social cohesion, taking a rights-consistent stance, and providing certainty to regulated parties, we recommend exploring the following mutually supporting options:

- *Creating a public health risk-based framework to determine requirements (eg vaccination, testing) for all work:* Given piecemeal developments for various workforces, there is a risk of incoherent and inconsistent approaches being taken to vaccination and/or testing requirements for work. We think there is value in creating a framework, centred on public health risk that can be applied to all work, with workforce requirements determined by risk level rather than being designed in an ad hoc manner. Implementing this will require secondary legislation at least, and could potentially require primary legislation (eg amendments to the COVID-19 Public Health Response Act 2020).
- *Forming a Government view on grounds for requiring vaccination (other than public health and health and safety):* Businesses are asking whether they can require vaccination for marketing/economic reasons. At present, what is justifiable depends on the circumstances of each case (including the views and wishes of employees, if this would involve disclosing their vaccination status to other workers and the public). We expect the bar for this to be very high. We think it would be valuable to form a Government view on this, which can then be communicated through regulator guidance (which would not be binding), or given effect in primary/secondary legislation.
- *More extensive stakeholder engagement:* Business and worker organisations (eg the CTU) have expressed interest in working more closely with Government to strengthen vaccination promotion efforts in the workplace. This could also involve supporting/facilitating industry-led guidance about vaccination issues.

## **Other options we have identified**

This briefing also contains initial views on other options that have been raised in recent weeks. Some could be investigated further, but in our view would not best deliver on your objectives at this point. These are:

- Strengthening the risk assessment process using legislative tools under the Health and Safety at Work Act 2015,
- Standardising employment processes when unvaccinated employees are in roles requiring vaccination,
- Creating an entitlement to paid leave for vaccination, and
- Promoting future-proofing of physical work environments (eg to support physical distancing, and improve ventilation systems).

In addition, there are two options we do not recommend pursuing at this stage. These options are:

- Giving employers the right to impose vaccine mandates, and
- Requiring workers to disclose their vaccination status if asked by their PCBU or employer.

## **Timing and urgency of any changes**

A number of these options will require either primary or secondary legislation. There is an opportunity to consider including any legislative changes in the COVID-19 Public Health Response Amendment Bill (No 2), which is currently before the Health Committee. However, careful consideration is needed about whether these changes would be within the Bill's scope, and whether adequate consultation could occur within the Bill's current timeframes (ie enactment in November 2021).

The option we consider the most urgently needed is a single, public health risk-based framework for all work. Legal professional and the Ministry of Health supports the idea of this framework. This would provide PCBUs, employers, unions and workers with certainty, and mitigate the need for further, more prescriptive health and safety guidance. It would also address some of the current uncertainty in the workplace relations/employment law sphere. Depending on its final design, this could be enacted via a COVID-19 Order without change to the COVID-19 Public Health Response Act itself, but we cannot confirm that at this stage. This option will also require significant input from the Ministry of Health. Due to timing, we have only been able to discuss this briefly with them. More detailed engagement would be our first step if you are interested in pursuing this option.

We recommend that following your consideration of these options, we quickly test them with social partners. Our initial view is that a framework will address a number of concerns relating to certainty that business representatives have raised, and, if based on public health advice, will mitigate risks that have been identified by the CTU and its affiliates.

## Recommended action

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

- a **Note** this briefing is on the agenda for discussion at your next Workplace Relations and Safety policy session on 5 October 2021.

*Noted*

- b **Note** the status quo relating to COVID-19 vaccination in the work context is likely to raise several issues, such as lack of certainty for regulated parties, who may seek to take risk-averse approaches as a result.

*Noted*

- c **Decide** which of the following options for change you wish to explore further:

		<i>Circle one</i>
<i>Options recommended by MBIE</i>	Creating a public health risk-based framework to determine requirements (eg vaccination, testing) for all work.	Yes / No
	Forming a Government view on grounds for requiring vaccination other than public health and health and safety.	Yes / No
	More extensive stakeholder engagement.	Yes / No
<i>No initial MBIE preference</i>	Strengthening the health and safety risk assessment process using legislative tools under the Health and Safety at Work Act 2015.	Yes / No
	Standardising employment processes when unvaccinated employees are in roles requiring vaccination.	Yes / No
	Creating an entitlement to paid leave for vaccination.	Yes / No
	Promoting future-proofing of physical work environments.	Yes / No
<i>Options not recommended by MBIE</i>	Giving employers the right to impose vaccine mandates.	Yes / No
	Requiring workers to disclose their vaccination status if asked by their PCBU/employer.	Yes / No

- d **Forward** this briefing to the Prime Minister, Minister for COVID-19 Response, Minister of Health and the Attorney-General.

*Agree / Disagree*

*amclark*

Anna Clark  
**General Manager, Workplace Relations and Safety Policy**  
 Labour, Science and Enterprise, MBIE

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

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*04.10.2021*

## Background

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1. On 28 September 2021, you and the Attorney-General discussed COVID-19 vaccination issues relating to work. You discussed potential options to explore further, which could support your objectives of:
  - a. Achieving very high vaccination rates across New Zealand,
  - b. Maintaining social cohesion,
  - c. Taking a human rights-consistent approach, and
  - d. Providing certainty (eg to employers, PCBUs, workers and unions).
2. This briefing summarises options for further work and requests your direction on next steps.

## Status quo

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3. At present, vaccination to perform work can only be required by:
  - a. The COVID-19 Public Health Response (Vaccinations) Order 2021, which currently applies to work done at the border and in MIQ facilities, or
  - b. PCBUs, after a health and safety risk assessment done in collaboration with workers and their representatives has indicated vaccination as a reasonably practicable way of managing work-related COVID-19 exposure risk.
4. If unvaccinated employees are doing work that requires vaccination, employment law continues to apply in determining their outcomes. This means employers must engage with employees and their unions in good faith to consider options such as leave, changes to work arrangements or redeployment. In some cases, this could result in the ending of employment, either by mutual agreement, or by an employer.
5. Other than where work is covered by the Vaccinations 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 disadvantage some 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.
6. This presents the following issues:
  - a. There is a risk that businesses will take conservative approaches that are very sensitive to risk, and which may disadvantage some employees. There is also a chance that early movers may create expectations about reasonable behaviour for others.
  - b. Over time, the gaps left between government and industry guidance are likely to be tested through litigation. Case law will be of limited guidance given it will be fact-specific. People will need to operate in environments of relative uncertainty, due to the performance-based nature of the work health and safety system (and to a certain extent, the employment system as well).

- c. Similar to what happened when the Alert Level framework was first introduced, there will continue to be calls for government to go beyond guidance and provide definitive answers. Similar to ongoing questions about what constitutes an essential business or service, there will be calls for government direction, either in the form of primary/secondary legislation (eg when PCBUs can or cannot require vaccination for certain work) or other processes (eg assessing levels of COVID-19 exposure risk for PCBUs).

## **Work underway**

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### **Changes to secondary legislation where public health reasons require vaccination**

7. The Ministry of Health is considering expanding the Vaccinations Order to include workers in the health sector. The exact scope of this expansion is still being determined. Work is underway on the design of any exemptions/exceptions from any vaccination requirement, as well as whether other measures (eg testing) will be required. The Ministry of Health is expecting to brief Health portfolio Ministers on this in the coming week.
8. Work is also underway on requiring vaccination for very large high-risk events and venues (ie ticketed events with more than 500 attendees, where there will be dispersal outside the local area). This is linked to the use of a COVID-19 vaccination certificate (CVC), so that attendees can establish they have been vaccinated. Public health advice is that workers at these events/venues should also need to be vaccinated. This proposal is expected to be discussed by Cabinet on 1 November 2021.
9. The Vaccinations Order will also be amended in the coming month to expand the vaccines recognised under it. This will allow workers who have received recognised vaccines overseas to continue to do work covered by the Vaccinations Order. It also enables non-Pfizer vaccines that may be used domestically in the future to be recognised.

### **Improvements to guidance where health and safety reasons require vaccination**

10. WorkSafe has expanded its guidance to PCBUs on risk assessment processes. This responds to calls from businesses for more information about how to do COVID-19 exposure risk assessments, and concerns from the CTU that risk assessment processes are not robust at present.

### **A consistent model or approach for the public sector**

11. Broadly, the public sector is encouraging leadership, rather than compliance, for COVID-19 vaccinations. However, some public sector workplaces are actively reviewing, with unions, their approaches to vaccination for specific roles. This is driven by a strong sense of obligation to ensure safety for the "users" of public services, some of whom cannot choose whether they access public services (eg in the justice sector). This may result in the creation of a de facto framework for workplace assessments for COVID-19 vaccination in the public sector, based on issues being observed by the Public Service Commission and raised by public sector unions. This framework will likely reflect the different levers the Government has in relation to the public sector compared to the private sector.

### **Options for change**

12. Annex 1 summarises nine options for change:
  - a. We recommend exploring three options further at this stage, which are described in the rest of this briefing.

- b. Annex 2 contains more information about the other six options. Of these, we consider four could be explored, but we do not currently have an MBIE view on them. The remaining two options are ones that we do not recommend further work on at present.

*There could be a legislative vehicle for changes if desired*

- 13. The COVID-19 Public Health Response Amendment Bill (No 2) is currently before the Health Committee, and Ministers and agencies are currently considering amendments to that Bill. These amendments could incorporate some or all of the options below which would require legislation, subject to the Bill's scope.
- 14. We also recommend careful consideration about whether adequate consultation could occur based on the Bill's current timeframes (ie enactment by November). This is particularly important where options allocate additional costs between workers and employers, or where significant human rights considerations might be engaged.

## **Options we recommend exploring**

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### **Creating a public health risk-based framework to determine requirements (eg vaccination, testing) for all work**

- 15. At present, workforce vaccination and testing requirements are evolving in a piecemeal manner. Based on the trajectory of current work, we are likely to end up with three different frameworks for vaccination/testing for three different workforces in the coming months (border/MIQ workers; workers at high-risk events and venues; and health sector workers). This reflects the different risks for each group of workers.
- 16. The landscape of potential vaccination requirements in law for work at present is as follows:
  - a. *Border/MIQ facilities:* Workers are currently required to be vaccinated and regularly tested through two Orders under the COVID-19 Public Health Response Act 2020.
    - i. *Testing:* Workers who cannot be tested for medical reasons are exempt from having to be tested regularly. There is no process for case-by-case exceptions from required testing.
    - ii. *Vaccination:* Workers who handle certain items can be exempt if they have medical reasons for not being vaccinated. The relevant Minister may also grant exemptions to prevent significant disruption to essential supply chains. No other workers can be exempt. Case-by-case exceptions can be made in very limited circumstances: if the work is unanticipated, necessary, time-critical, cannot be done by a vaccinated person, and necessary to prevent the ceasing of operations.
  - b. *High-risk events and venues:* Workers at high-risk events and venues are likely to be required to be vaccinated. Workers who have medical reasons for not being vaccinated will instead be required to show proof of a recent negative test.
  - c. *Health sector:* Workers in the health sector are likely to be required to be vaccinated. Those who cannot be vaccinated for medical reasons are likely to be exempt from this requirement. Other elements of this proposal (eg exceptions, testing requirements) are still under development.

17. We recommend a framework be created, grounded in public health advice about risk levels for different work, to guide or determine vaccination and/or testing requirements for work based on risk levels. In our view, public health advice needs to establish a clear rationale for differential treatment (eg in terms of the combination of controls, exemptions and exceptions) across workforces where some level of vaccination and/or testing is required. Legal advice is also needed on the justifiability of this differential treatment.
18. Under this framework, for example, the highest risk work (eg at the border and in MIQ facilities), will likely continue to require both vaccination and regular testing. For work that poses a high risk, but is not the highest risk work, vaccination could be required, with testing as an alternative in limited circumstances. Alternatively, surveillance testing could be justified in certain workforces until a certain vaccination rate is achieved. As risk decreases, the range of situations in which testing or vaccination is required will narrow, with the opposite happening for permitted exemptions and exceptions.
19. We consider the essential components of this framework to be:
  - a. Risk levels for different types of work, based on public health advice.
  - b. Clear vaccination and/or testing requirements for each risk level, based on public health advice and that ensure maximum possible conformity with human rights.
  - c. Articulation of the duties that vaccination and/or testing requirements translate to for workers and PCBUs/employers.
  - d. Exemptions and exceptions for each risk level, linked to the corresponding public health advice. This could potentially reflect workforce- or sector-specific considerations (eg exceptions allowed under the Vaccinations Order at present where workers may be critical to supply chains).
  - e. An approach to compliance and enforcement for each risk level. For example, recording vaccination and testing information in a centralised register that employers/PCBUs can access for the highest risk work, and building the necessary privacy protections for any such register.

#### *Issues to resolve*

20. We are observing pressure from businesses with customer-facing workers to require vaccination. Expanding vaccination requirements beyond workers who either have a significant risk of exposure to COVID-19 in their workplaces (eg at the border and in MIQ facilities), or of transmitting COVID-19 to vulnerable people, will need careful justification. This is why any framework needs to be grounded in public health risks and advice.
21. This framework may need to be regularly updated, for example when a new variant of concern emerges <sup>Legal professional privilege</sup>
22. An issue with overlapping PCBU duties has arisen in relation to the Vaccinations Order, and will need to be worked through when designing this framework. Under the Vaccinations Order, the PCBU who controls a workplace may not be the same PCBU that employs workers covered by the Order. While the Health and Safety at Work Act 2015 (HSWA) requires PCBUs with overlapping duties to cooperate and collaborate, the Order only allows the PCBU that has employed workers to access information about their vaccination status.
23. Another issue is the potential for discrepancies between access requirements for workers and for the general public, either through the CVC proposal or private bodies choosing to require vaccination from customers accessing their premises. In our view, these differences can be justified on the following grounds:



- a. A worker would be significantly more adversely affected by not being allowed to go to work than a customer would from not being able to enter a store. (Note: the COVID-19 Group in DPMC are considering whether certain types of businesses or services, eg supermarkets and pharmacies, should be prohibited from being able to require CVCs for access. This advice will be based on public health risk and be reviewed by Crown Law.)
  - b. PCBUs/employers can use workplace processes to implement a wider range of controls than just proof of vaccination in relation to workers than customers. They can also expect better compliance from workers than customers. This means that even in the absence of a vaccination requirement for workers (where one exists for customers), PCBUs are likely to still be able to ensure they meet public health and work health and safety requirements in relation to workers through the use of a wider range of controls.
24. If this framework includes testing requirements for certain work (in addition to or instead of vaccination requirements), it will also be necessary to consider what is logistically feasible based on our testing infrastructure.

*Mechanism for achieving this*

25. Of the nine options in this briefing, we consider this option to be the most urgently needed. [REDACTED], and the Ministry of Health supports the idea of a framework like this.
26. Legislation (either primary or secondary) will be needed to give effect to this framework:
- a. If this framework only mandates vaccination and/or testing in high-risk situations, it may be possible to create this framework in a COVID-19 Order. Additionally, if COVID-19 becomes endemic in New Zealand over time, there may be public health grounds to require a much wider class of work to only be done by vaccinated people through an Order.
  - b. However, if this framework is to extend to lower-risk work, and either permit or prohibit PCBUs/employers from imposing vaccination and/or testing requirements, primary legislation is likely to be needed. Primary legislation may also be needed if requiring or enabling employers and PCBUs to have consistent vaccination requirements between the general public and workers on the same premises. For example, to require workers to be vaccinated even if this is not indicated as a reasonably practicable step for a PCBU to take following a risk assessment process, and then to require their vaccination status to be disclosed to their PCBU/employer.
27. This option will require significant input from the Ministry of Health. We have had some initial engagement with them on this paper, but if you are interested in pursuing this option further consultation will be required.

**Forming a Government view on other grounds for requiring vaccination**

28. Outside of public health legislation and health and safety reasons, businesses are asking whether there are other reasons for which they can require vaccination. These can generally be considered economic reasons, and include:
- a. Marketing a fully-vaccinated workforce or giving assurances as such to customers,
  - b. Accessing export markets or worksites controlled by other PCBUs (eg suppliers or contractors), and
  - c. Having looser restrictions at higher Alert Levels if their workforce is entirely vaccinated, as is being considered by DPMC.

29. Our guidance to date has been that vaccination can only be required for public health or health and safety reasons. However, this does not mean that a court would necessarily find it unreasonable or unlawful if an employer required their employees to be vaccinated for one of the reasons in the paragraph above.<sup>1</sup>
30. DPMC (COVID-19 Group) are preparing advice on whether businesses might be able to operate with fewer restrictions at higher Alert Levels if their workforce/customers are all vaccinated. This advice will be based on public health advice and input from Crown Law. If Alert Level rules are tied to workforce/customer vaccination status, this could in turn be sufficient grounds for requiring workers to be vaccinated. [REDACTED]

*Mechanism for achieving this*

31. Because this is an area that sits between employment, health and safety and human rights law, and could potentially involve consumer and commercial laws, more certainty could be provided through guidance from relevant regulators about what they consider reasonable in the circumstances.
32. However, while guidance may be relevant and given serious consideration by a court, it will not be binding. If the Government wants to provide absolute certainty that vaccination can or cannot be required for particular reasons, in the absence of a COVID-19 Order, primary legislation will be required. If a decision is made to proceed with a public health risk-based framework this could be extended to cover other risk-based grounds on which vaccination can be required (eg protecting supply chains or critical infrastructure).
33. Alternatively, if restrictions at higher Alert Levels (as set out in a COVID-19 Order) are different for businesses with entirely vaccinated workforces, this may be sufficient for employers/PCBUs to require workers to be vaccinated. We doubt this would provide the required certainty, and expect demand for detailed guidance/direction about how this applies in a workplace context, similar to what we are currently seeing.

**More extensive stakeholder engagement**

34. There is scope for a work-based campaign to boost vaccination rates, building on government engagement to date with business and worker organisations. This could involve:
  - a. Working with social partners to facilitate vaccination, including messaging and reaching out to workers who may be hesitant to be vaccinated, arranging on-site vaccination at large workplaces, and encouraging employers to remove any barriers to vaccination (eg by providing paid time off to be vaccinated).
  - b. Industry leadership and position statements about the importance of vaccination, workplace approaches to vaccination, and the design of any vaccination requirements for health and safety reasons.
35. The CTU's vaccination policy adopts this approach. It is also taking a leadership role to support its affiliates to have a consistent approach to promoting and encouraging vaccination.

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<sup>1</sup> COVID-19 vaccination can be a condition of employment for new employees, as long as there is basis for this and it does not amount to unlawful discrimination (the boundaries of which are fact-specific and will be established over time through litigation), and justified for the role. For existing employees, vaccination can be made a condition of employment with all parties' agreement. Employers may also use workplace policies as a means of requiring vaccination, but will need to consult employees and unions when developing these policies. These policies would still need to be linked to health and safety risk, and their justifiability can be tested.

*Mechanism for achieving this*

36. This option would not require legislation. Depending on the scale of this endeavour or campaign, it could require either funding or reprioritisation of other work.

## **Next steps**

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37. We are available to discuss this briefing, and what options you would like to pursue, at tomorrow's WRS policy meeting.
38. We recommend forwarding this briefing to the Prime Minister, Minister for COVID-19 Response, Minister of Health and the Attorney-General.

## **Annexes**

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Annex 1: Summary of options

Annex 2: Other options

## Annex 1: Summary of options

	Option	Description	Mechanism
Recommended by MBIE	Creating a public health risk-based framework to determine requirements (eg vaccination, testing) for all work	A framework could be created, grounded in public health advice, about risk levels for different work. This would either determine or guide requirements for vaccination and/or testing for different work based on risk levels. This could also set clear exemption grounds and exception processes for each risk level, linked to the corresponding public health advice.	Primary or secondary legislation.
	Forming a Government view on grounds for requiring vaccination other than public health and health and safety	Businesses are asking whether they can require vaccination for economic reasons (eg to market a fully-vaccinated workforce or enjoy looser restrictions at a higher Alert Level). Thus far, government guidance has been that vaccination can only be required for public health reasons (ie under an Order) or for health and safety reasons following a risk assessment process.	Guidance or primary legislation.
	More extensive stakeholder engagement	This could involve working with social partners to facilitate vaccination, including messaging and reaching out to workers who may be hesitant to be vaccinated, arranging on-site vaccination at large workplaces, and encouraging employers to remove any barriers to vaccination (eg by providing paid time off to be vaccinated).	Engagement, and potentially funding.
No initial MBIE view	Amending the health and safety risk assessment process	It is possible to strengthen the risk assessment process using tools under HSWA, such as an approved code of practice or safe work instrument, or developing further guidance.	Regulatory tools under HSWA, or further guidance.
	Standardising employment processes when unvaccinated employees are in roles requiring vaccination	This could set a process in law for employers to follow. If employment cannot be preserved, employers could be required to treat this as a restructuring/medical incapacity situation, rather than termination on the basis of employees not being "ready, willing and able".	Primary legislation.
	Creating an entitlement to paid leave for vaccination	This would give employees the right to paid leave to be vaccinated, and potentially also funding for appointments with health professionals to discuss vaccination.	Primary legislation.
	Promoting future-proofing of physical work environments	This would involve working with industry leadership to develop guidelines (eg for ventilation systems), or supporting industries to do so themselves.	Engagement and/or guidance.
Not recommended	Giving employers the right to impose vaccine mandates	This would enable employers to require vaccination, without needing to establish health and safety reasons for doing so.	Primary or secondary legislation.
	Requiring workers to disclose their vaccination status	This would allow PCBUs/employers to know their workers' vaccination status. Workers currently do not have to disclose their vaccination status.	Primary or secondary legislation.

## Annex 2: Other options

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### Options that could be explored

#### *Strengthening the risk assessment process using legislative tools under HSWA*

1. At present, to decide whether certain work can only be done by vaccinated workers, WorkSafe suggests PCBUs consider two main things:
  - a. The likelihood of workers being exposed to COVID-19 while doing that work, and
  - b. The potential consequences of that exposure on others (eg transmitting COVID-19).
2. When considering the above, PCBUs need to collaborate with workers and their representatives. If PCBUs decide that the risk of COVID-19 exposure is such that particular work can only be done by a vaccinated worker, they then need to consider what reasonably practicable steps they can take to eliminate or mitigate risks. These steps can include infection prevention and control measures (eg vaccination and testing), as well as those for work health and safety more generally.
3. WorkSafe is currently expanding their guidance to give more detail and support to businesses assessing their COVID-19 exposure risk. However, because risk assessment is a process rather than a list of prescriptive requirements, it will not stipulate the outcome for each PCBU. As a result, we expect there to be continuing calls for certainty on what businesses need to do for their specific circumstances. For example, guidance about factors that PCBUs should or should not consider, and more specific examples of industries, sectors, occupations or types of work that would be most likely to require vaccination.
4. If a public health risk-based framework is created that can be applied to all work, we think this will likely be sufficient in combination with WorkSafe's guidance.
5. If not, it is possible to give greater strength to the risk assessment process by using tools under HSWA. There are two ways to provide risk assessment guidance under HSWA: either an approved code of practice (ACOP) or a safe work instrument (SWI). While these could contain detailed requirements for PCBUs, neither will determine particular outcomes for PCBUs. Both an ACOP and SWI also require varying levels of consultation before they can be used, and a SWI in particular would require secondary legislation change.

#### *Standardising employment processes when unvaccinated employees are doing work that requires vaccination*

6. If unvaccinated workers are doing work that requires vaccination, employment or contract law accordingly determines their outcomes. This is regardless of whether the requirement for vaccination comes from the Vaccinations Order, or has been determined by a PCBU following a 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 the employment context. They will also need to navigate workers' vaccination status generally being personal information and subject to privacy law. Employers, employees and unions must act in good faith.
7. There is no prescribed process for employers and employees having these conversations. We have provided guidance, including a hierarchy of options, but ultimately it is for the parties themselves to choose their course of action. This can cause significant uncertainty, particularly against the backdrop of vaccination requirements in law and an ever-changing COVID-19 risk (and regulatory response) landscape.

8. It is possible to set a process in law for all employers to follow when unvaccinated employees are doing work that requires vaccination. This may include timeframes (eg for consultation) and required steps, with options to be considered in sequential order. It would also need to protect personal information about employees' vaccination status. In the absence of all other options that could preserve an employment relationship, it is possible to require employers to treat this as a restructuring/medical incapacity situation, rather than termination on the basis that employees are not "ready, willing and able" to work.
9. This will be a big step for the employment regulatory system. Typically, employment law provides a framework and conduct rules for parties (eg the duty of good faith, and resulting consultation obligations). Case law also adds a significant amount of detail, for example in the areas of alcohol and other drug testing. Setting detailed steps in law for employers to follow in this situation could create an expectation of similar regulation for other areas of employment law in the future, or in relation to other vaccinations.
10. Primary legislation is needed to create binding and standard processes when unvaccinated employees are doing work that requires vaccination. Guidance from the regulator (ie Employment New Zealand) about employment processes may help mitigate some uncertainty in the short term. This guidance is unlikely to meet the expectations of industry groups that are calling for legal assurances from the government to minimise the risks of legal challenges.

#### *Creating an entitlement to paid leave for vaccination*

11. To encourage vaccination, the CTU has suggested employers be required to provide paid time off for vaccination, so that employees can be vaccinated during work hours if necessary. The CTU has also said this could extend to funded appointments with healthcare providers, if employees want to discuss vaccination.
12. If this option is to be pursued, it should be done urgently, or its value will be marginal.
13. This would require legislation. A COVID-19 Order may be sufficient to require PCBU/employers not to prevent workers from being vaccinated during working hours (as the Vaccinations Order does). However, creating an entitlement to paid time off would require primary legislation.
14. There will likely be calls for the Government to reimburse employers for this paid time off. To ensure maximum benefit, any such entitlement to time off would need to be wide in scope, which in turn could mean that more people access this entitlement than those who actually require it to be able to get vaccinated. This may be seen as a reasonable investment if it increases vaccination rates. Conversely, notice of this law change could mean some people choosing to delay vaccination appointments in anticipation of paid time off.
15. If this proposal also extended to funded appointments with healthcare providers, there will likely be calls to reimburse employers for these appointments, or ensure access to free appointments through DHB and primary health networks.

#### *Promoting future-proofing of physical work environments*

16. This suggestion was raised by the COVID-19 Ginger Group (convened by WorkSafe). It involves exploring improvements to the physical design of workplaces to either lower the risk of COVID-19 transmission (eg by improving ventilation systems) or ease operations at higher Alert Levels (eg separate entrance and exit points, and fit-outs that accommodate physical distancing requirements).
17. We consider this option to have a longer time horizon than the others discussed above. This will likely involve working with industry leadership to develop guidelines, or supporting industries to do so themselves.

## Options we do not recommend

### *Giving employers the right to impose vaccine mandates*

18. The law does not explicitly enable employers to unilaterally impose vaccine mandates at their workplaces. To do so, they either need to go through health and safety risk assessment process or obtain employees' consent.
19. We consider it preferable to reach a Government view on the specific reasons for which employers can (or cannot) require vaccination, rather than enabling any employer to impose vaccine mandates. That is because it could be seen as legislative over-reach at this stage of our COVID-19 response. The current requirement for mandatory vaccination in certain workplaces is based on strong public health reasons. Broadening this out to enable employers to unilaterally require vaccination is not consistent with human rights and will likely have an impact on social licence and cohesion.
20. Enabling any employer to introduce a vaccine mandate would likely require either primary or secondary legislation. It is arguable whether this could be done through a COVID-19 Order, because this will depend significantly on the prevalence of COVID-19 in New Zealand and vaccination rates. If not, primary legislation would be needed.

### *Requiring workers to disclose their vaccination status if asked by PCBU/employer*

21. Workers do not have to share their vaccination status with their employer, colleagues or customers at their workplace. The only exception is for work covered by the Vaccinations Order, which requires certain workers to allow PCBUs to access their COVID-19 vaccination record. Even when work requires vaccination for health and safety reasons, this does not entitle an employer to know their employees' vaccination status. Employers can ask their employees if they are vaccinated, but employees do not have to respond. If employees do not respond, employers can then treat them as unvaccinated, as long as they inform them about this and the potential consequences of being unvaccinated or refusing to respond.
22. Employers cannot respond to queries from the public or other workers in a manner that would directly or indirectly disclose a worker's vaccination status without that worker's authorisation. What employers can do is:
  - a. If all workers are vaccinated and consent to this being disclosed, employers can state to customers or clients in general terms that their workforce (or their public-facing workforce, or their workforce who may visit other PCBUs' workplaces) is vaccinated.
  - b. If the relevant workforce are not all vaccinated, or if employers do not know, they can inform customers or clients that they have taken steps to ensure safety and protect public health (in addition to actually taking those steps where reasonably practicable).
23. It is technically possible to amend the law to require workers to disclose their vaccination status, or shield employers who disclose their workers' vaccination status. This would require primary legislation to over-ride the Privacy Act, or a code of practice issued by the Privacy Commissioner under the Privacy Act. At this stage, we do not consider the social licence exists for these sorts of changes. This may change over time, particularly if CVC use becomes widespread, and as a consequence changes attitudes towards information about vaccination status. This would also set a precedent for other vaccinations (eg measles, influenza) and potentially other health conditions that impact the workplace (eg Hepatitis A in the hospitality sector). Any such change needs to balance against a person's right to keep their health status and medical information private.

