



BRIEFING

COVID-19 vaccination: paid time off and employment processes

Date:	15 October 2021	Priority:	Urgent
Security classification:	In Confidence	Tracking number:	2122-1374

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	<p>Provide feedback on paid time off for COVID-19 vaccination.</p> <p>Provide feedback on employment processes for unvaccinated employees doing work that requires vaccination.</p> <p>Forward this briefing to the Minister of Finance, Minister for COVID-19 Response, Minister for Social Development and Employment, Minister of Health, and Attorney-General.</p>	19 October 2021

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

The following departments/agencies have been consulted
Crown Law Office, Department of the Prime Minister and Cabinet, Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Social Development, Public Service Commission, Treasury

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 Withdrawn |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



BRIEFING

COVID-19 vaccination: paid time off and employment processes

Date:	15 October 2021	Priority:	Urgent
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Purpose

To inform decisions about:

- Paid time off for COVID-19 vaccination, and
- Employment processes when unvaccinated employees are doing work that requires vaccination.

Your feedback will guide the drafting of a paper to be discussed at Cabinet on 26 October 2021.

Executive summary

Paid time off for COVID-19 vaccination

Legislative entitlement

If you want to provide paid time off for COVID-19 vaccination, we recommend this take the form of a legislative entitlement to reasonable time off for vaccination, rather than creating a new form of statutory leave. We suggest basing this entitlement on provisions for union delegates representing employees during work, with an associated penalty or infringement fee for employers unreasonably refusing to provide paid time off.

Payment scheme

You have expressed interest in a scheme to pay employers for some of the costs they may incur as a result of any new entitlement to time off for vaccination. Based on implementation considerations, we recommend not proceeding with a payment scheme.

Many employers have already provided time off to workers to be vaccinated without any payment from the Government. If Ministers wanted to introduce a payment scheme, agencies' preference would be to do this as part of the redesign of the Leave Support Scheme and Short Term Absence Payment (STAP). Implementation timeframes would vary depending on the delivery agency for the redesigned scheme, but will likely take several months.

If a payment scheme needed to be set up to coincide with any legislative entitlement, this would have to be done by drawing on existing STAP settings. Some of these settings are hardcoded into the design of the system, and cannot be changed (eg the payment rate of \$359 per employee). This would be substantially higher than the likely costs to employers of allowing workers paid time off for a single vaccination or even two doses of vaccination. Employers would also not be able to receive the wage subsidy or apply for the Leave Support Scheme at the same time. MSD will also be unable to verify employee information and whether they have had time off from work to be vaccinated, which could present a high-risk of fraud.

We therefore recommend introducing a legislative entitlement to paid time off for vaccination, without an associated payment scheme.

Employment processes when unvaccinated employees are doing work that requires vaccination

Principles

We recommend any alternative approach must be grounded in good faith and allow parties to reach any lawful and mutually agreeable outcome. It should also provide certainty of process.

Suggested process

We recommend this process apply once a decision has been made that particular work requires vaccination, and an employee doing that work is not vaccinated (or does not disclose their vaccination status). The vaccination requirement can be imposed either by the Government, or by employers following the prescribed risk assessment process.

Parties must consider all options that could preserve an employment relationship. This includes leave, changing work arrangements, suspension/furlough and redeployment. An employer can only move to end an employment relationship if no viable or agreeable option exists. An employee could still bring a personal grievance in relation to the way the process was carried out.

We understand you prefer termination based on a restructuring model, potentially with a minimum entitlement to compensation. Whether this is a conventional redundancy situation is highly contested by legal commentators.

As the proposed approach would legislatively prescribe how termination could occur, it is possible to specify that termination would allow for existing contractual notice or redundancy compensation provisions to be accessed. There could also be a minimum entitlement to a paid notice period (eg four weeks), ensuring that all workers receive a “minimum standard” of compensation.

Recommended action

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

- a **Note** we are preparing a paper for Cabinet on 26 October 2021 seeking agreement to a range of matters relating to COVID-19 vaccination.

Noted

- b **Note** this paper could cover a legislative entitlement to paid time off for vaccination, and changes to employment processes when unvaccinated employees are doing work that requires vaccination.

Noted

Paid time off for vaccination

- c **Agree** to seek Cabinet approval to create a legislative entitlement to paid time off for COVID-19 vaccination.

Agree / Disagree

- d **Provide feedback** on the following proposed features of a legislative entitlement to paid time off for COVID-19 vaccination:

- Employees are entitled to reasonable paid time away from work to receive a COVID-19 vaccine, including travel to and from a vaccination centre.
- Before attending a vaccination appointment during work hours, an employee must notify their employer when they are intending to take time off and how long they expect it to take.
- If the amount of time is reasonable, an employer may only refuse if it would unreasonably disrupt the employer's operations.

- An employer must pay their employee for the time in question at the rate of pay that the employee would otherwise have received if the employee was performing their ordinary employment duties during that time.
- An employer who fails to allow an employee reasonable time off to be vaccinated is liable to a penalty imposed by the Employment Relations Authority or an infringement fee issued by a Labour Inspector (further work is required on which of these would be better suited).

Feedback provided / No feedback

- e **Note** agencies do not recommend introducing a payment scheme because if this were to coincide with the creation of a legislative entitlement, it would need to be based on hardcoded STAP settings, such as a payment rate of \$359 per employee. This would be significantly more than the costs employers might face in allowing employees to be vaccinated during work hours.

Noted

- f In relation to a payment scheme for employers allowing workers to receive COVID-19 vaccination during work:

EITHER

- i. **Agree** not to introduce a payment scheme.

Agree / Disagree

OR

- ii. **Discuss** whether a payment scheme should be introduced with the Minister of Finance and Minister for Social Development and Employment, particularly the relative priority of this scheme compared to other proposed economic support measures.

Agree / Disagree

Employment processes when unvaccinated employees are doing work that requires vaccination

- g **Provide feedback** on the advice at paragraphs 37 – 41 about an alternative prescribed process for employees and employers to follow when unvaccinated employees are doing work that requires vaccination.

Feedback provided / No feedback

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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15 / 10 / 2021

Background

1. On 13 October 2021, you made decisions and provided feedback on advice about legislation to support COVID-19 vaccination (briefing 2122-1302 refers). Two matters that could be included in that legislation are:
 - a. An entitlement to paid time off for employees to get vaccinated, and
 - b. Setting processes for unvaccinated employees doing work that requires vaccination.
2. This briefing provides further advice on these two matters. We will reflect your feedback and decisions in the paper we are preparing on legislative changes to support COVID-19 vaccination for Cabinet on 26 October 2021.

Reasonable paid time for COVID-19 vaccination

3. Ministers previously considered requiring employers to provide paid leave for vaccination appointments in early 2021, in the context of the border workforce. This work was not advanced because paid leave was likely to already be available to many of those employees.

Vaccination is now widely available to the general public

4. Workers are less likely now to face access barriers than at any previous point of the COVID-19 immunisation campaign. Most urban centres currently have walk-in vaccination or appointments at convenient hours to address public demand. However, some people in rural areas still have challenges accessing convenient vaccination sites. The availability of vaccination may also change as the COVID-19 Immunisation Programme shifts from mass vaccination to targeted catch-up approaches.
5. Business representatives have said most employers already allow employees to be vaccinated during working hours, and will sometimes take additional steps to facilitate this (such as providing transportation). This means a requirement to allow employees to be vaccinated during working hours is unlikely to be onerous for business.
6. For the public sector, the Public Service Commission has said that employees should be paid for time taken to go through the vaccination process, either by doing this during normal working hours, or through paid special leave. This also applies to public servants taking time during work to support their dependents to be vaccinated, or who may experience side effects.
7. The majority of eligible people in New Zealand have already been vaccinated. While vaccination rates are not available by employment type, as of 12 October 2021, approximately 560,000 people aged 20 to 64 (who are most likely to be in the workforce) are yet to receive their first dose of a COVID-19 vaccine. This represents about 19% of this age group. This number is currently decreasing by around 15,000 people a day.
8. Requiring employers to offer their employees paid time off to be vaccinated has the potential to support vaccination for those who have not been vaccinated, as well as any future programme to deliver vaccination boosters in 2022 and beyond. However, it is difficult to estimate the scale of the potential benefit, and any associated costs, for the following reasons:
 - a. We have limited information about the number of workers who have not already been offered paid time off for vaccination.
 - b. We have limited information about the barriers to vaccination being faced by workers.

- c. It would not increase access to vaccination for people outside the paid workforce or self-employed people.

Public health and equity rationale

9. Increasing access to vaccination appointments by requiring employers to provide paid leave could potentially support increasing vaccination rates among people in less flexible work, who may have limited options for vaccination outside of working hours.
10. Increasing access to vaccination supports equity as a greater proportion of those who are yet to be vaccinated, particularly young adults, are Māori. Requiring paid leave for vaccination appointments is most likely to benefit people working in jobs with limited flexibility.
11. Increasing vaccination rates supports New Zealand’s response to the COVID-19 outbreak by reducing the likelihood of severe illness among vaccinated people, and likely reducing the chances of catching COVID-19 and passing it on to others.

Designing a legislative requirement for reasonable paid time

12. There are two approaches to creating a legislative requirement to paid time off for vaccination, both of which would require primary legislation:
 - a. Providing the right to reasonable paid time to be vaccinated (eg similar to the approach taken with union delegates representing employees, voting, attending union meetings).
 - b. Creating a statutory category of paid leave for vaccination (eg similar to sick leave).
13. It is likely that creating a new statutory category of paid leave, especially if it includes a variable amount of time off, will be difficult to implement quickly into payroll systems. For that reason, we prefer requiring employers to allow employees reasonable time off to be vaccinated.
14. We propose the following schema, based on the model for union delegates representing employees under section 18A of the Employment Relations Act 2000:

<i>Legislation</i>	<i>Guidance or other notes</i>
Employees are entitled to reasonable paid time away from work to receive a COVID-19 vaccine, including travel to and from a vaccination centre.	This entitlement should only apply to publicly funded COVID-19 vaccinations, and could cover potential booster doses received while the entitlement exists in law. This would not apply to any other vaccinations (eg influenza, measles). What is reasonable time off will depend on factors including distance to the nearest vaccination centre, availability of transport, and nature of the work ie the question is what is reasonable in the employer and employee’s particular circumstances.
Before attending a vaccination appointment during work hours, an employee must notify their employer when they are intending to take time off and how long they expect it to take.	
If the amount of time is reasonable, an employer may only refuse if it would unreasonably disrupt the employer’s operations.	Guidance would need to make it clear that in these circumstances, parties would be expected to come to an agreement about a different time that would not be as disruptive.
An employer must pay their employee for the time in question at the rate of pay that the employee would otherwise have received if the employee was performing their ordinary employment duties during that time.	We may need to work with unions to identify what guidance should be provided in cases where this may be hard to establish (eg in some parts of the care and support workforce).

An employer who fails to allow an employee reasonable time off to be vaccinated should be liable to either a penalty imposed by the Employment Relations Authority, or an infringement notice issued by a Labour Inspector.	There is no specific penalty under section 18A of the Employment Relations Act. However, employers who fail to allow employees to attend union meetings are liable to a penalty, and employers who fail to allow employees to vote are liable to a fine on conviction.
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Penalty or infringement fee


16. Further work is required on whether employers should be liable for an infringement fee (notice of which could be issued by a Labour Inspector if designated under the COVID-19 Public Health Response Act 2020 [COVID-19 Act]), or a penalty imposed by the Employment Relations Authority.
17. We recommend one of these be provided for, to serve as a disincentive for employers who may fail to allow an employee reasonable time off to be vaccinated. We also think the Employment Relations Authority or Labour Inspectorate have the necessary experience to determine whether an employer is liable for a penalty or infringement fee.
18. If proceeding with a penalty imposed by the Employment Relations Authority, we may need to locate any entitlement to reasonable time off within the Employment Relations Act via an amendment to the COVID-19 Act, which will then:
 - a. Give the Authority jurisdiction to award a penalty according to the Employment Relations Act's provisions about jurisdiction and penalties (eg a maximum \$10,000 penalty for an individual or \$20,000 for a company/corporation), and
 - b. Allow the entitlement to be repealed when the COVID-19 Act as a whole is repealed according to its sunset clause, which will happen on or before 13 May 2022 (unless amended).
19. The COVID-19 Act already amends the Civil Defence Emergency Management Act 2002 and Oranga Tamariki Act 1989, and specifically states that those amendments will be repealed when the COVID-19 Act is repealed.
20. Alternatively, if the intent is for Labour Inspectors to be able to issue infringement fees, this entitlement can be contained within the COVID-19 Act. This might also avoid any negative impact on case volumes and resourcing of the Authority.

Disputes

21. Discussions between employees and employers about time off for vaccination must take place in good faith. MBIE's early resolution and mediation services will also be available to assist with any disputes.

Payments for employers whose employees get vaccinated during working hours

22. The policy rationale for any payment scheme is to provide some support to employers in light of an unanticipated need to give workers time off to be vaccinated, whether as a result of a legal entitlement or not. To date, many employers have allowed their workers to be vaccinated during work without financial loss (eg having to use leave or forego pay). We have not been able to ascertain whether any workers remain unvaccinated as a result of not being able to access vaccination during work hours.
23. We do not recommend introducing a payment scheme, given many employers have already provided time off without payment.

24. If Ministers wish to pursue this option, agencies' preference is to implement any vaccination payment scheme through the redesign of LSS and STAP. This would better allow for a choice of payment rates. Implementation timeframes would vary depending on the delivery agency for the redesigned scheme, but are likely to miss the immediate and critical period for vaccination rates to be increased.
25. If Ministers wanted to implement a payment scheme to coincide with the implementation of a legal entitlement to paid time off for vaccination, MSD would need to replicate STAP settings. However, there are some factors that are hardcoded into the design of STAP that would not be able to be changed at short notice:
- Payments are a flat rate of \$359 per employee. This would be substantially higher than the likely costs to employers of allowing workers paid time off for a single vaccination or even two doses of vaccination.
 - Employers cannot receive the Wage Subsidy or LSS and STAP for the same employee at the same time. This means employers receiving the Wage Subsidy for employees who then used a new legal entitlement to be vaccinated during work hours would be ineligible for this new payment.
 - MSD implements STAP using a high-trust model. Confidential advice to Government

 - STAP can only be applied for once in a 30-day period, unless a further application is made within that period because the employee has informed the employer that in order to comply with public health advice, they (or their close contacts) are being re-tested. Where a further application is made, the application is automatically flagged and requires manual processing.
26. The table below shows the potential call on any payment scheme:

<i>Number of employees applications are made for</i>	<i>Proportion of 20 – 64 population yet to be vaccinated</i>	<i>Payment per employee</i>	<i>Total payments (ie excluding costs of administering scheme)</i>	<i>Assumptions</i>
50,000	9%	\$140	\$7 million	Payment rate is based on LSS and STAP rates (\$35 per hour) ¹ : <ul style="list-style-type: none"> \$70 for two hours off work x two doses (long-term option).² \$359 if based on the existing STAP rate (short-term option). People already vaccinated do not need to receive additional doses while scheme exists.
		\$359	\$17.95 million	
125,000	22%	\$140	\$17.5 million	
		\$359	\$44.875 million	
250,000	50%	\$140	\$35 million	
		\$359	\$89.75 million	

¹ This rate is higher than median hourly earnings for employees (\$27.76) and self-employed people (\$24.93).
² The furthest a person needs to travel to a vaccination centre at present is 144 minutes one way in parts of the West Coast of the South Island.

Availability to self-employed people

27. While any legislative entitlement to reasonable time would only apply to employees, you could decide to make a payment scheme open to employers and self-employed people:
 - a. If you wanted to ensure consistency with a corresponding legal entitlement to paid time off, the scheme should only be available in relation to employees.
 - b. If you wanted to ensure consistency with other payment schemes (eg LSS and STAP), the scheme should be available in relation to employees and self-employed people.
28. On balance, given the importance of increasing vaccination rates, we consider the payment scheme should be available in respect of self-employed people.

Other considerations

29. If the payment per employee is \$140, we do not expect take-up to be high given the number of people who have been vaccinated already. The amount provided, particularly for employers with small number of employees taking up the entitlement, is unlikely to be worth the administrative effort of applying. On the other hand, if employers apply on an ad hoc basis as employees take time off to be vaccinated, this will have operational impacts on MSD managing existing schemes, and development of the longer-term LSS/STAP scheme.
30. Setting payment amounts based on LSS and STAP rates means some employers will not receive what they end up paying for some employees' time off to be vaccinated, and others will be receiving much more than it costs them to provide time off. However, we do not consider it feasible to operate a payment scheme that compensates employers for the exact amount it costs them to provide employees with paid time off for vaccination, given the time needed by each employee and their rates of pay will differ.
31. Introducing a payment scheme could cause some employers who have already given their employees paid time off to be vaccinated to feel like they have missed out. Some may even seek payment after the fact. For this reason, we do not recommend introducing a payment scheme *without* a legal entitlement to reasonable time off.

Implementation

32. In the time available, we have only been able to briefly consult MSD and Treasury. If you want to introduce a payment scheme for time off for vaccination, we will do further work with MSD and Treasury on scheme design and operational considerations.

Options for change

33. There are four permutations available:
 - a. Provide a legislative entitlement to reasonable time off to receive COVID-19 vaccinations. (recommended)
 - b. Provide a legislative entitlement to reasonable time off to receive COVID-19 vaccinations and compensate employers whose employees take up this entitlement.
 - c. Subsidise employers for allowing employees to receive COVID-19 vaccinations during working hours, without a legislative entitlement to reasonable time off.
 - d. Neither legislate nor subsidise employers in relation to COVID-19 vaccination during working hours.

34. We recommend introducing a legislative entitlement for paid time off to be vaccinated, without a payment scheme. This would effectively mean disincentivising employers from refusing employees time off for vaccination (with threat of a financial penalty), rather than incentivising them through a payment scheme.
35. If Ministers want to progress with a payment scheme, the recommended option would be folding any vaccination payment into the LSS/STAP redesign. However, this could mean a payment scheme is no longer needed by the time it is in place.

Employment processes for unvaccinated employees

36. In our previous advice (briefing 2122-1302 refers), we said it would be possible to establish a process in law for employees and employers to follow when unvaccinated employees are doing work that requires vaccination. In response, you expressed preference for a redundancy-based approach, with a minimum paid period.

Alternative process in law

37. Based on your feedback, we suggest any law change in this area aim to achieve the following outcomes.
 - a. Certainty of process: to be an improvement on the status quo, any process must be the only one for employers and employees to follow in this situation.
 - b. Parties must be required to act in good faith at all times. This suggests this process should be located in the Employment Relations Act 2000.
 - c. Parties should have the freedom to reach any lawful and mutually agreeable outcome at any time during the process.
 - d. An employee could still bring a personal grievance in relation to the way the process was carried out.
38. After a decision (either by Government, or by an employer following the prescribed risk assessment process) that work requires vaccination, we suggest parties must consider all options (eg taking leave, rearrangement of work, suspension/furlough, redeployment) that would preserve employment, before an employer can move on to considering ending an employment relationship.
39. The duty of good faith would also apply, requiring an employer to put a proposal to the employee for comment, providing access to any relevant information about the decision, and then considering any feedback provided before considering ending an employment relationship.
40. We understand you prefer termination be based on a restructuring model, potentially with a minimum entitlement to compensation. Whether this is a conventional redundancy situation is highly contested by legal commentators.
41. As the proposed approach would legislatively prescribe how termination could occur, it is possible to specify that termination would allow for existing contractual notice and redundancy compensation provisions to be accessed. There could be a minimum entitlement to a paid notice period (eg four weeks), ensuring that all workers receive a “minimum standard” of compensation. If that is the primary objective, along with fair consultation and engagement processes, it may not be necessary to definitively address or label the reasons for termination.

Next steps

42. We would like to discuss this with you on 18 October 2021 at your weekly meeting with MBIE officials.
43. We recommend you forward this briefing to the following Ministers: the Minister of Finance, the Minister for COVID-19 Response, the Minister for Social Development and Employment, the Minister of Health, and the Attorney-General.
44. We can reflect any feedback from you and other Ministers in the Cabinet paper we are preparing for lodging by 21/22 October 2021, for Cabinet on 26 October 2021.

Annexes

Annex 1: Redundancy provisions in collective agreements

Annex 1: Redundancy provisions in collective agreements

The following tables are from Blumenfeld, S., Ryall, S., & Kiely, P. (2021) *Employment Agreements: Bargaining Trends & Employment Law Update 2020/2021*.

Table 1: Redundancy notice by sector and selected industries

Industry	Weeks					Other (%)	Silent (%)	Coverage (000s)
	<4 (%)	4 (%)	5-8 (%)	>8 (%)				
All industries	4	66	22	4	1	4	328.1	
Private sector	8	71	13	2	1	5	118.1	
Central govt	1	61	28	5	2	3	195.8	

Table 2: Compensation for the first year of service by sector and selected industries

Industry	None (%)	Weeks					Other (%)	Silent (%)	Coverage (000s)
		1-3 (%)	4-5 (%)	6 (%)	7-10 (%)	>10 (%)			
All industries	3	4	15	40	30	4	4	2	328.1
Private sector	8	9	31	25	21	1	1	4	118.1
Central govt	0	0	5	49	35	6	5	0	195.8

Table 3: Compensation for subsequent years of service by sector and selected industries

Industry	None (%)	Weeks				Other (%)	Silent (%)	Coverage (000s)
		1 (%)	2 (%)	3-4 (%)	>4 (%)			
All industries	5	4	58	4	0	28	2	328.1
Private sector	12	9	55	3	0	17	4	118.1
Central govt	1	0	57	5	1	36	0	195.8

Table 4: Maximum compensation payable by sector and selected industries

Industry	None (%)	Weeks					Other (%)	Silent (%)	Unlimited (%)	Coverage (000s)
		1-13 (%)	14-26 (%)	27-39 (%)	40-52 (%)	>52 (%)				
All industries	2	9	28	8	35	7	7	4	0	328.1
Private sector	6	22	28	4	11	17	3	10	0	118.1
Central govt	0	1	30	11	48	1	9	0	0	195.8