



## BRIEFING

### Decision-making framework: Determining whether work needs to be done by vaccinated workers

<b>Date:</b>	29 October 2021	<b>Priority:</b>	Urgent
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1530

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Agree that officials consult with stakeholders on the decision-making framework set out in this briefing  Forward this briefing to the Minister for COVID-19 Response, the Minister of Health and the Attorney-General	1 November 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	✓

The following departments/agencies have been consulted
Ministry of Health, WorkSafe, Public Service Commission

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 Withdrawn           |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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This briefing provides advice on the potential categories and criteria for a decision-making framework that a Person Conducting a Business or Undertaking (PCBU) can apply to determine whether work needs to be done by vaccinated workers.

It seeks agreement to test and get feedback on this framework from stakeholders.

### Executive summary

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1. Cabinet agreed that the Government would mandate vaccination for work in any settings where a COVID-19 Vaccination Certificate may be required, as well as in other areas, such as to preserve overseas market access, or critical infrastructure, or to maintain trust in public services (CAB-21-MIN-0436).
2. Cabinet also agreed to develop a risk assessment process for PCBUs to apply where there is no Government vaccination mandate, that would reflect health and safety and public health reasons for requiring vaccination or testing, and could also encompass other reasons such as planning for future Alert Levels or settings in the COVID-19 Protection Framework (CAB-21-MIN-0436).
3. This briefing provides advice on each of the following categories that could be included in a decision-making framework that PCBUs can apply to determine whether work needs to be done by vaccinated workers:
  - risk assessment for the safety of work and customers (this sets out a framework to consider public health and health and safety reasons for requiring vaccination)
  - preparation for a change in setting of the COVID-19 Protection Framework
  - third party requirement, ie overseas market access, domestic customer request
  - risk of undue disruption.
4. Our advice on each of the categories reflects our initial view based on preliminary public health advice from the Ministry of Health (MoH) and limited initial stakeholder engagement. Following your feedback, we would like to test the framework with key stakeholders to check whether the categories are appropriate, the criteria are easy to apply, that there is consistency, and that they produce sensible outcomes.
5. Once we have information from stakeholders we will be able to make recommendations on the content and operation of the framework to inform the development of a Cabinet paper which is due to be lodged on Friday, 8 November.

6. The Government is also considering whether further vaccination mandates are required for work necessary for protecting critical infrastructure and essential services. We will need to consider whether these categories should be included in this framework, if the Government considers that they will not be sufficiently covered by mandates.

## Recommended action

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

- a **Note** that Cabinet agreed that the Government would mandate vaccination for work in any settings where a COVID-19 Vaccination Certificate may be required, and avoid the statutory framework to allow future mandates for reasons such as to preserve overseas market access, or critical infrastructure, or to maintain trust in public services (CAB-21-MIN-0436).  
*Noted*
- b **Note** that Cabinet agreed to prescribe a risk assessment process that PCBUs must follow when determining whether certain work requires vaccination or testing (CAB-21-MIN-0436).  
*Noted*
- c **Note** that Cabinet noted that the risk assessment process will reflect health and safety and public health reasons for requiring vaccination or testing, and could also encompass other reasons such as planning for future Alert Levels or settings in the COVID-19 Protection Framework (CAB-21-MIN-0436).  
*Noted*
- d **Note** that where the work of any PCBU is not covered by any Government mandate, they will be able to use the decision-making framework set out in recommendation e below to require vaccination for certain work.  
*Noted*
- e **Note** that we have provided advice on the following categories that could be included in the framework:
- i. risk assessment for the safety of work and customers (this sets out a framework to consider public health and health and safety reasons for requiring vaccination)
  - ii. preparation for a change in setting of the COVID-19 Protection Framework
  - iii. third party requirement, ie overseas market access, domestic customer request
  - iv. risk of undue disruption.
- Noted*
- f **Note** that there are two options to structure the risk assessment process for the safety of work and customers:
- i. a points-based framework
  - ii. a checkbox framework (officials' preliminary view is that this is the preferred option if stakeholder testing shows that it produces similar outcomes to the points-based framework).
- Noted*
- g **Note** that officials consider that when PCBUs apply the risk assessment for the safety of work and customers, they should consider other controls which may be implemented to limit the spread of COVID-19 and that they should consult with their workers on their proposed approach.  
*Noted*
- h **Agree** that officials consult key stakeholders to test:

- i. both options for the structure of the risk assessment for the safety of work and customers, including the scoring threshold
- ii. whether there are particular types of work or circumstances that should be considered under an undue disruption or third party requirement category, given that these categories could have broad application (see recommendations I and j).

*Agree / Disagree*

- i **Note** that officials consider that the undue disruption category should only apply in limited situations, for example, in relation to work necessary for protecting critical infrastructure or essential services (refer to recommendation I) as it could otherwise be applied too broadly, but this needs to be tested with stakeholders.

*Noted*

- j **Note** that officials consider that the third party requirement category could be applied too broadly and that it will be important to test this view with stakeholders to determine whether there are any situations where this category may be warranted.

*Noted*

- k **Agree** that if PCBUs will be able to require their workers to be vaccinated to comply with a change in setting of the COVID-19 Protection Framework, they will be able to do so without needing to apply the risk assessment for the safety of work and customers.

*Agree / Disagree*

- l **Note** that officials are preparing advice on whether further Government vaccination mandates are required for work that is necessary to protect critical infrastructure and essential services, and maintaining trust in public services

*Noted*

- m **Indicate** whether you have initial views on any aspects of the decision-making framework set out in this briefing.

*Yes / No*

- n **Agree** to forward this briefing to the Minister for COVID-19 Response, the Minister of Health and the Attorney-General.

*Agree / Disagree*

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

29 / 10 / 2021

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

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## Background

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7. On 26 October 2021, Cabinet agreed to mandate vaccination for work in any settings where a COVID-19 Vaccination Certificate may be required, and avoid the statutory framework to allow future mandates for reasons such as to preserve overseas market access, or critical infrastructure, or to maintain trust in public services (CAB-21-MIN-0436).
8. Cabinet also agreed, that where work is not subject to a Government vaccination mandate, PCBUs would be able to apply a prescribed risk assessment process when determining whether certain work requires vaccination or testing (CAB-21-MIN-0436). The framework could also encompass other reasons such as planning for future Alert Levels or settings in the COVID-19 Protection Framework. PCBUs would need to consult workers and their representatives when using the risk assessment process.
9. Currently, roughly 15 percent of the workforce is covered by existing proposed vaccination requirements (border, MIQ, health, education and corrections) and about 30 percent could be undertaking work subject to a vaccination mandate once work in COVID-19 Vaccination Certificate settings is included. Further Government mandates that are being considered, and the ability of the Director-General for Ministry of Primary Industries to direct that vaccination can be required to facilitate access to overseas markets, will add to the total proportion of the workforce covered by mandates. Any PCBUs whose work is not covered by these Government mandates will be able to use the risk assessment process to require vaccination for their workers.
10. Cabinet directed that the risk assessment process be as simple and clear as possible. The Minister of Health suggested three categories for the framework which we have considered: safety of work and customers, risk of undue disruption and third party requirement.
11. This briefing provides advice on each of the following categories that could be included:
  - risk assessment for the safety of work and customers
  - preparation for a change in setting of the COVID-19 Protection Framework
  - third party requirement, ie overseas market access, domestic customer request
  - risk of undue disruption.
12. Only the first category involves a risk assessment based on public health and health and safety grounds. Accordingly, we refer to the framework as a whole as a decision-making framework (we refer to the risk assessment process for the safety of work and customers as the 'risk assessment process'). The decision-making framework will establish a clear legal basis for PCBUs to require vaccination.
13. Our advice on each of the categories reflects our initial view based on preliminary public health advice from MoH and limited stakeholder engagement. Before providing our recommendations on the content and operation of the framework, we would like to test it with key stakeholders to check whether the categories are appropriate, the criteria are easy to apply, that there is consistency, and that they produce sensible outcomes.
14. We are also preparing advice on whether further Government vaccination mandates are required for work that is necessary for:
  - protecting critical infrastructure and essential services
  - maintaining trust in public services.
15. We will only need to consider whether these categories should be included in this framework

if the Government considers that they will not be sufficiently covered by mandates. Advice on further Government mandates is due to be discussed at Cabinet on 15 or 22 November. The potential timeframe for Cabinet discussion of the decision-making framework is set out in the 'next steps' section.

16. While the decision-making process is designed to help determine whether work should be done by vaccinated workers, Cabinet agreed that it could be used for testing requirements as well (CAB-21-MIN-0436). If Government decided to provide a process for businesses to support their decision-making on this, a separate decision-making process would likely need to be created for this. The authorising provision for regulations will allow this to be done in the future, but we do not envisage needing to use this element of it at this stage.

## **Objectives**

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17. The suggested categories for this decision-making framework recognise both public health and health and safety reasons for requiring vaccination for certain work (ie the risk assessment for the safety of work and customers), as well as other reasons, such as compliance with a Government mandate (ie under the COVID-19 Protection Framework), or economic or business reasons (ie undue disruption, third party requirements).
18. The objective of the framework is to provide more certainty to a PCBU and workers about when requiring vaccination for workers can be considered reasonable. This may increase the number of PCBUs that implement vaccination mandates in their workplaces. The intent is for the framework to be as simple and easy to use as possible.

## **Risk assessment for the safety of work and customers**

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19. Currently, PCBUs can follow WorkSafe's risk assessment process for determining whether work needs to be performed by vaccinated workers. However, PCBUs do not consider they have, or have easy access to, the public health knowledge to be able to carry out a risk assessment where they can be confident that the outcome (and therefore the actions they take as a result) meets legal requirements, and properly manages the risk to their staff and customers of contracting COVID- 19.
20. PCBUs are also concerned that any vaccination requirement they impose after undertaking a risk assessment may be subject to challenge. The New Zealand Council of Trade Unions (the CTU) has indicated that they agree with a public health-led response which provides greater certainty for businesses when deciding whether to require vaccination in order to reduce the risk of challenge.
21. We have developed two options for the structure of a simplified risk assessment process for the safety of work and customers:
  - Option 1 is a points-based framework where PCBUs will need to reach a particular number of points, based on certain factors, to meet the threshold to be able to require vaccination.
  - Option 2 is a checkbox framework using similar (but fewer) factors compared with option 1.
22. We consider that option 2 would be simpler to apply than option 1, but there would be less ability to tailor it to a PCBU's particular characteristics, as there are fewer factors to consider. Our preliminary view is that option 2 is preferred, if testing shows that it produces similar outcomes to option 1.

23. MoH has provided a preliminary public health view on the factors<sup>1</sup> under each option but further consultation is required to confirm that they are appropriate and work in tandem. MoH considers that this risk assessment framework should only be an interim measure until we have high and equitable vaccination coverage across the community. They suggested aligning any expiry with the future review of COVID-19 Vaccination Certificates. Our current drafting approach is for the regulations containing the decision-making framework to expire when the COVID-19 Public Health Response Act 2020 is repealed.
24. There are trade-offs to consider with providing PCBUs with a simplified approach to decision-making in this area. A PCBU who would like the assessment to produce a particular outcome may be able to more easily manipulate information to either sit above or below the required threshold, compared with applying a standard health and safety risk assessment approach. Rather than provide more certainty, this could increase debate among workers and PCBUs if they don't agree with how the process is applied or the outcome.

### Option 1: Points-based framework

Work environment		
0	1	2
Mostly done outside	Mostly done in an indoor space greater than 100m <sup>2</sup>	Mostly done in an indoor space less than 100m <sup>2</sup>
Nature of work		
0	1	2
Non-public-facing	Public facing, people easily identifiable (eg same people every day)	Public facing, people not easily identifiable
Ability to maintain physical distancing		
0	1	2
Always able to maintain physical distancing	Able to maintain physical distancing of at least 1 metre	Close proximity
Length of time (per day) with other people who are not easily identifiable		
0	1	2
Brief contact, ie minutes	20 minutes to a few hours	More than a few hours

#### Threshold

25. There are options for the number of points needed to consider whether a vaccination requirement was reasonable, for example:
- High: 6 points or more across any of the categories.
  - Medium: 3-5 points across any of the categories.
  - Low: 0-2 points across any of the categories.

<sup>1</sup> We have not included a criteria in either of the options relating to working with vulnerable people. People who work in education and health care are already covered by Government vaccination mandates. Many further public and essential services are also likely to be covered by mandates on this basis as officials progress this work.

## Option 2: Checkbox framework

Work environment
A - Mostly done outside
B - Mostly done inside
Nature of work
A - Non-public-facing
B - Public facing
Ability to maintain physical distancing
A - Able to maintain at least 1 metre physical distancing
B - Unable to maintain at least 1 metre physical distancing
Length of time (per day) with other people who are not easily identifiable
A - Brief contact with people
B - More than brief contact with people

### Threshold

26. There are options for the number of number B factors required in order to be able to consider a vaccination requirement to be reasonable, for example:
- High: 3 / 4 number B factors.
  - Low: 1 / 2 number B factors.
27. Once we have tested both options with stakeholders, we will be able to make recommendations on the thresholds for the scores that should be applied to justify whether requiring vaccination is reasonable. Where the threshold is set will reflect Ministers' risk tolerance for requiring vaccination.

### Control measures

28. Identifying and implementing control measures, to eliminate or minimise risk, is part of the risk management process under the Health and Safety at Work Act 2015. In relation to minimising the exposure to and transmission of COVID-19, control measures may include physical distancing, hygiene measure or working from home. Many PCBUs are already likely to have implemented these requirements (we do not have information on the proportion of PCBUs that would have done this). There are three options as to how or whether control measures should be considered when applying the risk assessment process for the safety of work and customers.
29. We currently recommend option 1 below, but need to test this with stakeholders before confirming.

#### *Option 1: PCBUs should consider other controls and consult with their workers*

30. PCBUs should consider other controls which may be implemented to limit the spread of COVID-19 when they apply the risk assessment process for the safety of work and customers, and they should consult with their workers on their proposed approach.



31. This option is recommended as it requires the consideration of controls, in consultation with workers, to investigate whether there are any alternative measures which could reduce the need for vaccination. However, the option does not require PCBUs to implement any controls identified, which ensures that the process to make a decision as to whether vaccination is required is simplified and more certain.
32. Any disagreement will be subject to challenge under the Employment Relations Act 2000, likely as a personal grievance for unjustified disadvantage. Contractors may need to use any dispute clause in their contracts, or cancellation clauses if relevant.

*Option 2: PCBUs must implement other controls before applying the risk assessment process*

33. Under this option, PCBUs would be required to carry out a standard health and safety risk assessment process, and implement any identified controls, in advance of carrying out the risk assessment process for the safety of work and customers.
34. This option is better health and safety practice compared with option 1, in terms of implementing controls that may be reasonable in the circumstances. However, it provides less certainty. PCBUs would not be able to access the risk assessment process for the safety of work and customers, until they had done a full health and safety risk assessment. Businesses have signalled the health and safety risk assessment is difficult to do without public health and health and safety expertise and this is the reason why the risk assessment process for the safety of workers and customers is being developed.
35. Option 2 also elevates the general health and safety risk assessment process above the risk assessment process for the safety of work and customers - we would not recommend this option on that basis.

*Option 3: PCBUs do not need to consider controls*

36. Under this option, PCBUs would not be required to consider any alternative controls as part of the process to decide whether vaccination is required for workers.
37. This option has the advantage of certainty but it is not best practice in comparison with options 1 and 2 as any reasonable or easily implemented alternate controls would not be required to be considered. Vaccination is a fairly heavy-handed control, as it is requiring a medical procedure. Accordingly, it would be more in line with human rights for PCBUs to first consider alternative controls that have a lesser impact on people's rights – we therefore do not recommend this option.

## **Enforcement and record keeping**

38. WorkSafe has advised that they will take an educative approach to situations where PCBUs have taken steps in good faith to follow the process.
39. We consider that there should be guidance stating that it would be good practice for PCBUs to keep a record of the information they used to apply the risk assessment process and information on consultation (ie who they met with, dates and form of consultation).
40. The risk assessment for the safety of work and customers will not be mandatory to apply (ie PCBUs may choose to undertake a different method of risk assessment) but businesses should be able to be more confident and certain in the outcomes of their decision-making if they do use it. This process will not override decisions that PCBUs have already made based on undertaking a standard health and safety risk assessment.
41. We intend to state that a Court may have regard to the regulations (which set out the risk assessment process) in determining whether it is reasonably practicable to require vaccination for work.

42. The greater the level of detail in the risk assessment process for the safety of work and customers, the less necessary it is to insulate PCBUs from legal challenge – the framework will also be supported by guidance. This is particularly so where PCBUs have followed the prescribed risk assessment process and reached reasonable conclusions to require vaccination (or not require vaccination), and have followed reasonable, good faith employment processes.
43. Employees who consider a PCBU has not appropriately assessed risk according to the risk assessment process would be able to challenge this in the employment institutions (eg the Employment Relations Authority), and other workers would be able to access the civil system.

## **Preparing for a different setting of the COVID-19 Protection Framework**

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44. The briefing *COVID-19 vaccination: Work in settings where CVCs must be used* (briefing number 2122-1586) seeks your confirmation on when a Government vaccination mandate applies at the Orange and Red levels of the COVID-19 Protection Framework, following Cabinet consideration of this issue (CAB-21-MIN-0436). It also notes that MBIE will consult stakeholders in the coming weeks on whether a Government vaccination mandate should apply at the Green level.
45. PCBUs will need to require workers to be vaccinated in order to prepare for a shift to the COVID-19 Protection Framework, where this is a setting under which work in their business must only be done by vaccinated workers.
46. We recommend that, if PCBUs require their workers to be vaccinated to comply with a change to a Protection Framework setting, they should be able to do so without needing to apply the risk assessment for the safety of work and customers.

## **Third party requirements**

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47. Cabinet agreed that PCBUs could require vaccination for work where the Director-General of the Ministry for Primary Industries has determined this is necessary in order to facilitate access for specific products or classes of product to overseas markets.
48. There may be other situations where either domestic or overseas customers require workers of their suppliers or people who provide services to be vaccinated, for example:
  - a contract could stipulate that services or products were required to be provided by vaccinated workers
  - an employment agency could be asked to supply vaccinated workers only to a client
  - only vaccinated workers could be allowed on site at a customer's workplace.
49. It is possible that many business customers put requirements in place for their suppliers, or people who provide services, to be vaccinated and that this category becomes too easy for PCBUs to access, avoiding the need to undertake a risk assessment for the safety of work and customers.
50. Some third party requirements for vaccination will already be picked up through a PCBU's own risk assessment, ie plumbers or sales representatives who are public facing. Other customers may have done a risk assessment and determined that their workers are required to be vaccinated. This factor would then be picked up by a PCBU's own risk assessment if they needed to send their workers to a customer's site where workers were required to be vaccinated (based on the outcome of a customer's risk assessment).

51. However, there may be a few areas where a third party requirement for vaccination may not easily be able to be incorporated into a PCBU's own risk assessment, eg:
- if a third party required that anyone entering one of their sites had to be vaccinated, but this was an exercise of their property rights, and not based on a risk assessment
  - where a customer required businesses in its supply chain to ensure that all workers supplying products to them were vaccinated.
52. It is MBIE's initial view that this would be too broad an application of the ability for PCBUs to require their workers to get vaccinated without the need to undertake a risk assessment for the safety of work and customers. However, we will need to test this view with stakeholders to determine whether there are any situations where this category may be warranted, for example, there may be a situation where a PCBU could lose all its business (if its own workers weren't vaccinated) as every customer requires face-to-face interaction and has a site entry vaccination requirement.
53. We would also need to consider what qualifies as a customer requirement for a PCBU's workers to be vaccinated as this could range from, a number of individual customers requesting that people providing a particular service are vaccinated, to a requirement for workers to be vaccinated set out in a contract with another business.

## **Risk of undue disruption**

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54. This category relates to the risk of absenteeism or business shutdown due to an outbreak of COVID-19 among workers or where a number of workers have to self-isolate.
55. Currently, there is no difference between recommended self-isolation times for vaccinated and unvaccinated people following exposure. However, work is progressing very quickly on this and we understand this advice is likely to change in the very near future. It is expected that these changes will mean that those who are vaccinated will be able to spend less time in self-isolation than those who are unvaccinated. Therefore, self-isolation requirements will have less of an impact on a business where workers are vaccinated.
56. There is a risk that including this category may result in PCBUs seeing it as an easier option compared with applying the risk assessment process for the safety of work and customers. Given that it would enable PCBUs to require vaccination where a risk assessment had not been undertaken, officials consider it should only be able to be used in limited situations, eg where necessary for the protection of critical infrastructure and essential services, and should not be included as a category on its own. If the Government decides that these categories will be sufficiently covered by Government mandates, there would be no further need to give PCBUs a legal basis for requiring vaccination for such work.
57. If the Government decides that the protection of critical infrastructure and essential services should be included in this decision-making framework (following the consideration of Government mandates for this category at Cabinet on 15 or 22 November), then the undue disruption category should be subsumed under that.
58. Officials will test this view with stakeholders to ensure that there are no residual types of work that should fall under this category, particularly if Government decides that the protection of critical infrastructure and essential services is not required in this framework.

## **Next steps**

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59. We would like to discuss this briefing with you on 1 November 2021 at your weekly meeting with MBIE officials.

60. Officials will then engage with key stakeholders to test and get feedback on the decision-making framework set out in this briefing.
61. A Cabinet paper is due to be lodged on Friday, 5 November.