



BRIEFING

COVID-19 vaccination: Further policy decisions on vaccination assessment tool

Date:	16 November 2021	Priority:	Urgent
Security classification:	In Confidence	Tracking number:	2122-1846

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the design of the vaccination assessment tool and the inclusion of discretion factors in the COVID-19 Response (Vaccinations) Legislation Bill	17 November 2021

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

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

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 Withdrawn |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 advice on:

- options for ensuring that the decision of a Person Conducting a Business or Undertaking (PCBU) when using the vaccination assessment tool is reasonable and proportionate;
- the content and operation of the tool following consultation with WorkSafe and public health officials from the Ministry of Health (MoH).

Executive summary

Discretion factors to be considered in decision-making in relation to an outcome of the vaccination assessment tool

Legal professional privilege

We recommend that PCBUs should consider the discretion factors when making any decision pursuant to the outcome of the tool. While this would introduce more complexity in the decision-making, the discretion factors are those that will help ensure that a PCBU's decision is reasonable and proportionate.

We have proposed the following discretion factors for inclusion in the Bill:

- a. the outcome of applying the tool as prescribed in regulations;
- b. the level of vaccination across workers carrying out the work assessed under the regulations;
- c. whether there are any measures (apart from requiring vaccination) that could reasonably be put in place to minimise the risk associated with unvaccinated workers doing the work assessed against the tool (this would include, but not be limited to, testing requirements, implementing physical distancing measures, use of personal protective equipment, or re-designing roles); and
- d. the outcomes of the consultation process on the application of the tool and control measures.

Vaccination assessment tool

We have had strong feedback from the Ministry of Health and WorkSafe that the vaccination assessment tool should be indicative only and not determinative.

After further consultation with the Ministry of Health and WorkSafe, only three factors are recommended to be included in the tool: work environment, proximity to other people and length of time spent with other people. Public health advice was clear that it was necessary for the higher risk measures for all three factors to be present in a workplace in order for it to be reasonable for a PCBU to consider whether a vaccination requirement was needed. Based on public health advice we also recommend the binary option of the tool.

We have not included working with 'vulnerable' or 'hard to identify' people as part of the tool. PCBUs will still be able to undertake a health and safety assessment under HSWA if they would like to consider these factors in making a decision about whether to require vaccination.

Limitation on the ability to challenge a PCBU's choice of tool

You have indicated that how a PCBU chooses to assess whether work should be undertaken by vaccinated workers - using the tool or another risk assessment method under HSWA - should not be able to be challenged in Court. We are seeking legal advice and consulting with the Parliamentary Counsel Office (PCO) on whether we can capture this in the Bill.

Recommended action

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

- a **Note that** you are taking a paper to Cabinet on 22 November 2021 seeking decisions on additional vaccination mandates and a vaccination assessment tool to help employers decide whether it is reasonable to require vaccination for work.

Legal professional privilege

b

c

d

- e **Note that** feedback from the Ministry of Health and WorkSafe is that the tool should be used as an indicator as to whether it may be reasonable to require vaccination and that other relevant factors should also be considered.

Noted

f **Agree** to one of the following options for the exercise of PCBUs' discretion in relation to the tool:

<p><u>Option 1</u> – give PCBUs the discretion to implement the outcome of the tool as they see fit and do not provide any discretion factors to guide their decision.</p>	<p><i>Agree / Disagree</i></p>
<p>Legal professional privilege</p>	
<p><u>Option 3 (recommended)</u> - applies to any decision a PCBU decides to make pursuant to the tool - give PCBUs some discretion to consider factors beyond the tool (these would be set out in the Bill), with clearly defined parameters.</p>	<p><i>Agree / Disagree</i></p>

g **Agree** to include in the Bill the following matters that a PCBU must consider when making a decision on whether to require vaccination under the vaccination assessment tool, if you agree to option 2 or 3 in recommendation f above:

a. the outcome of applying the tool as prescribed in regulations;

Agree / Disagree

b. the level of vaccination across the PCBU's workers carrying out the work assessed under the regulations; and

Agree / Disagree

c. whether there are any other measures (apart from requiring vaccination) that could reasonably be put in place to minimise the risk associated with unvaccinated workers doing the work assessed against the tool (this would include, but not be limited to, testing requirements, implementing physical distancing measures, use of personal protective equipment, or re-designing roles); and

Agree / Disagree

d. the outcomes of the consultation process with workers on the application of the tool and control measures.

Agree / Disagree

h **Agree** to the binary option of the vaccination assessment tool and that all three risk factors must be present to indicate that a decision to require vaccination for a particular type of work is reasonable.

Agree / Disagree

- i **Note** that working with vulnerable or hard to identify people have not been included as factors in the tool.

Noted



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

16 / 11 / 2021

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

..... / /

Background

2. On 26 October, Cabinet agreed to create a clear, simple, easy-to-use risk assessment process for employers [CAB-21-MIN-0436]. This would be available to PCBUs to use where their work is not covered by a Government vaccination mandate. It would help them decide whether it is reasonable to require vaccination for work.
3. On 13 November 2021, we briefed you on matters to be covered in the paper you are taking to Cabinet on 22 November 2021, including some outstanding policy matters you then discussed with your Cabinet colleagues on 15 November 2021.
4. Some of these matters related to the proposed vaccination assessment tool (the tool) - in particular, which risk factors should be included in the tool and whether employers should be allowed to require vaccination for reasons other than those already permitted (such as to prevent undue disruption to their business).
5. Legal professional privilege

Applying the vaccination assessment tool

Interaction of the regulations with a PCBU's legal duties

6. HSWA requires PCBUs to manage the risk of COVID-19 in their business. Where a PCBU chooses to use the tool, their general duties under HSWA and Employment Relations Act 2000 continue to apply.
7. Legal professional privilege
8. Similarly, the Employment Relations Authority (or any early resolution or mediation processes) would take into account a PCBU's application of the tool, as prescribed in regulations, in relation to a challenge to a PCBU's decision to require vaccination under employment law (ie a personal grievance).

Ability for PCBUs to use discretion in requiring vaccination

9. Legal professional privilege
- 10.

11. The tool is designed as a 'one size fits all' decision making framework based on risk factors for particular types of work in the workplace. It will give an indication as to whether it is reasonable for a PCBU to consider requiring vaccination, but PCBU's will not be obliged to follow the outcome of the tool. This accords with the strong public health feedback from MoH and feedback from WorkSafe that a strict application of the tool would be inappropriate. They both consider that the tool should be used as an indicator as to whether it may be reasonable to require vaccination, but should not be determinative. They consider that PCBU's should consider other relevant factors, alongside the outcome of the tool in order to ensure that any vaccination requirement is reasonable in the context of a particular PCBU and its workforce.
12. There may be situations where a PCBU has good reason to make a decision that differs from what the tool score indicates should be the outcome. For example, when consulting workers, a PCBU may discover that a very high percentage of its workers are already vaccinated and that the unvaccinated workers can be redeployed or that with further information or incentives workers are likely to become vaccinated without a requirement to do so. In these circumstances, it may not be reasonable to require vaccination, even though the score indicates that the work is higher risk.

Options for addressing these issues

13. We seek your agreement to one of three options for ensuring that PCBU's are able to give appropriate consideration to all factors that may be relevant to their decision on whether vaccination should be required after they have applied the tool. These options are:
 - a. Option 1 – give PCBU's the discretion to implement the outcome of the tool as they see fit and do not provide any discretion factors to guide their decision;

Legal professional privilege

- c. Option 3 (recommended) – applies to any decision a PCBU decides to make pursuant to the tool - give PCBU's some discretion to consider factors beyond the tool (these would be set out in the Bill), with clearly defined parameters, to ensure that their decisions are reasonable and proportionate to help ensure compliance with HSWA and NZBORA obligations.

14. The discretion factors that we recommend under options 2 and 3 are as follows:
 - a. the outcome of applying the tool as prescribed in regulations;
 - b. the level of vaccination across workers carrying out the work assessed under the regulations;
 - c. whether there are any measures (apart from requiring vaccination) that could reasonably be put in place to minimise the risk associated with unvaccinated workers doing the work assessed against the tool (this would include, but not be limited to, testing requirements, implementing physical distancing measures, use of personal protective equipment, or re-designing roles); and
 - d. the outcomes of the consultation process on the application of the tool and control measures.

15. Legal professional privilege

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Limitation on the ability to challenge a PCBU's choice of tool

- 23. You have indicated that how a PCBU chooses to assess whether work should be undertaken by vaccinated workers - using the tool or another risk assessment method under HSWA - should not be able to be challenged in Court. We are seeking legal advice on this and consulting with PCO about whether we can capture this in the Bill.
- 24. We will update you on how this objective may be achieved in the Bill later this week, before seeking any necessary policy approvals in the paper for Cabinet on 22 November 2021.

Feedback from Ministry of Health and WorkSafe officials

- 25. As mentioned above, we have had strong feedback from MoH and WorkSafe that the tool should be indicative only and not determinative. Their advice is that a PCBU's decision whether to require vaccination should also be made in the context of wider factors, as set out in the earlier section.
- 26. Public health advice is that the Government vaccination mandates in place already cover the workplaces where there is a higher risk of COVID-19 exposure and transmission. There is also relatively high (and increasing) vaccination rates across the country and they expect that high vaccination coverage will reduce the impact of any workplace transmission. In addition,

the analysis of transmission patterns of outbreaks in New Zealand and overseas is that most transmission occurs within households. Given this context, they consider that any workplaces not subject to a Government vaccination mandate are generally lower risk.

27. After further consultation with the Ministry of Health and WorkSafe, only three factors are recommended to be included in the tool: work environment, proximity to other people and length of time with other people. These three factors accord with the Work Health Organization high-level advice on the factors that increase the risk of the exposure and transmission of COVID-19. The Ministry of Health considered that the factor relating to the number of people a worker was in contact with was not necessary if physical distancing could be maintained.
28. Public health advice was also clear that it was necessary for the higher risk measures for all three factors to be present in a workplace in order for it to be reasonable for a PCBU to consider whether a vaccination requirement was needed. If any of these higher risk measures were not present, it is their view that the characteristics of the workplace are not likely to increase the risk of exposure and transmission to a level sufficient to justify requiring vaccination, and therefore a vaccination requirement would not be proportionate. Public health advice is that a binary option is therefore appropriate, where vaccination can only be required if all three factors are present. They also consider that the binary option would also be easier to use.
29. Based on public health advice we recommend the binary option of the tool set out below. We also recommend that all three of the risk factors be present before it would be reasonable for a PCBU to consider requiring vaccination for particular work. Appendix One sets out indicative examples of how particular types of work would be assessed under the tool.

What type of environment is the work performed in?	
100m ² indoor space or greater, or outside	Less than 100m ² indoor space
How close does the person work to other people?	
At least 1 metre apart	Less than 1 metre apart
How long is the worker in proximity to other people?	
15 minutes or less	More than 15 minutes

We have not included working with ‘vulnerable’ or ‘hard to identify’ people as part of the tool

30. Under PCBUs’ primary duty of care under HSWA, they are required to consider the health and safety of other people who come into contact with the business. A number of people provided feedback during consultation on the tool that it should include working with vulnerable people as a factor.
31. We do not recommend including working with vulnerable people as a factor in the tool. If we were to do so, we would need to define ‘vulnerable’ in the regulations, which would be complex. We would also need to work through how this factor would interact with the public health-based factors. This would also be complex and would result in the tool no longer being easy to apply.
32. Any PCBU that works with vulnerable people will still be able to undertake a health and safety assessment under HSWA to determine whether they should require vaccination for particular types of work. As this is likely to be a more comprehensive exercise, and due to the potential complexity of considering the impact on vulnerable people, we consider that this may be more appropriate in this situation.

33. MoH's position is that the impact on vulnerable people is already taken into account in the tool through the factors.
34. We also received feedback that suggested that 'hard to identify' people or workers who were 'public facing' should be included as factors in the tool. While this may be important for contact tracing purposes, it is not relevant to the workplace characteristics that increase the risk of the exposure and transmission of COVID-19. Accordingly, we do not recommend including it as part of the tool.

Next steps

35. Depending on which option you choose in relation to the discretion factors and the content and operation of the tool we will include the proposals in the paper for Cabinet on 22 November 2021.
36. If you choose option 2 or 3, we will instruct PCO to include the relevant discretion provisions in the Bill (in advance of Cabinet decisions).
37. We will update you on the limitation on the ability to challenge a PCBU's choice of tool later in the week after we have received legal advice and consulted with PCO.

Vaccination Assessment Tool

Example occupations			What type of environment is the work performed in?	Can physical distancing be maintained?	How long is the worker in contact with other people?	Overall score	Is it reasonable to consider requiring vaccination?
Occupation	Description	Highest risk aspect of job	Greater than 100m ² indoor space, or outdoors (0) or Less than 100m ² indoor space (1)	At least 1m apart (0) or less than 1m apart (1)	15 minutes or less (0) or more than 15 minutes (1)		
Forestry harvester	A forestry harvester spends the majority of their day outside in the forest where they do not interact regularly with other people. To get to and from work, they use a shared van with colleagues. While it's a confined space, they are able to ensure physical distancing, however, the drives can be over an hour each way.	Periods of close confinement with colleagues during extended work transportation.	1	0	1	2	No
Builder	A builder works on a large commercial construction site which is currently open air. The builder consistently works in close physical contact with colleagues.	Being in close contact with colleagues.	0	1	1	2	No
	A builder specialises in kitchen and bathroom renovations. This means they work in confined spaces, often alongside other tradespeople.	Working in confined spaces in close proximity to others.	1	1	1	3	Yes
Meat packer	A meat packer works full time at a local plant. The area they work in is 83m ² and involves being close with their colleagues for extended periods of time. There is limited ability for physical distancing to be maintained.	The time spent close to colleagues in a small work environment.	1	1	1	3	Yes
Truck driver	A truck driver works shift work transporting goods between Auckland and Wellington. They usually work alone, and have limited contact with other people. Their truck cabin is a confined space.	Comes in to with different people for short periods when making deliveries.	1	0	1	2	No

Librarian	A librarian works part-time at a local library that is part of a wider complex, of which is 3,065m ² . The librarian is often out on the 'floor' with customers for short periods of interaction, while maintaining a physical distance.	The regular contact with customers.	0	0	1	1	No
Front counter bank staffer	A front counter bank staffer works part-time at a local bank. The job involves a mixture of front office support for customers, while also working in the back office from time to time. The back office workspace is 72m ² . They interact with multiple customers a day, and are able to physically distance themselves.	The regular contact with customers and working in a small office space.	1	0	1	2	No
Real-estate agent	A real-estate agent works full-time between their office, which is 78m ² , and home. They spend multiple hours a day meeting with clients, including visiting private homes and driving clients in their car. These meetings are a minimum of half an hour and can be multiple hours when visiting homes. They are operating open homes on a booking system.	Work in a small office environment and regular contact with clients, which can involve visiting private homes.	1	0	1	2	No
Economist	An economist works full-time in an office that is 206m ² . Within the office there is enough space for colleagues to be socially distanced. The job is primarily desk based, with a few client meetings scattered across the week. These client meetings are usually half an hour to an hour.	The contact the economist has with clients.	0	0	1	1	No
Motel receptionist	A hotel receptionist works full-time at a small motel. The front office space is 68m ² . They interact with customers regularly throughout the day for short periods of time, while maintaining a physical distance.	Regular contact with members of the public within a small front office space.	1	0	0	1	No
Nanny	A nanny works part-time for one family with two young children. As well as providing at home care, they also are responsible for taking the children to school and various activities in a vehicle. They spend extended periods of time with the children, in close contact where it is not possible to maintain a physical distance.	Regular close contact with a household, including children.	1	1	1	3	Yes
Livestock farmer	A livestock farmer works on a large dairy farm. They spend the majority of their day outside where they do not interact regularly with other people. To get to and from work, they use a shared van with colleagues. While a confined space, they are able to ensure physically distancing and the drives are short distances.	The periods of close confinement with colleagues during work transportation.	1	0	0	1	No