



BRIEFING

COVID-19 vaccination: Further policy decisions on vaccination assessment tool and consultation feedback

Date:	3 December 2021	Priority:	Urgent
Security classification:	In Confidence	Tracking number:	2122-1918

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree that PCBUs must consider the discretion factors set out in this briefing when the outcome of the vaccination assessment tool is that vaccination is reasonable and the PBCU does not want to require vaccination	6 December 2021

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

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 Withdrawn |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



BRIEFING

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Purpose

The purpose of this briefing is to:

- confirm your decision on requiring a Person Conducting a Business or Undertaking (PCBU) to consider discretion factors beyond the factors included in the vaccination assessment tool in the situation where the threshold in the tool is met (ie vaccination would be a reasonable requirement) and the PCBU seeks not to require vaccination
- set out the consultation feedback we received on the vaccination assessment tool and further considerations of the factors in the tool (see Appendix One).

Recommended action

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

a **Agree** that PCBUs must consider the following discretion factors in the situation where the threshold in the tool is met (ie vaccination would be a reasonable requirement) and the PCBU seeks not to require vaccination:

a. whether there are any other measures that could reasonably be used to minimise the risk associated with unvaccinated workers doing the work;

Agree / Disagree

b. the outcomes of the consultation process on the application of the assessment tool and control measures under section 33AB(3) of the COVID-19 Public Health Response Act 2020;

Agree / Disagree

c. any other factors the PCBU considers relevant.

Agree / Disagree

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

Hon Michael Wood
Minister for Workplace Relations and Safety

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3 / 12 / 2021

Background

1. The regulations for the vaccination assessment tool are in the process of being drafted. They are due to go to Cabinet for approval on 13 December.
2. This briefing seeks to confirm your agreement to include discretion factors that a PCBU must apply in the situation where the threshold in the tool is met (ie vaccination would be a reasonable requirement) and the PCBU seeks not to require vaccination so this can be included in the regulations.
3. This briefing also sets out stakeholder feedback on the tool as well as considerations that have arisen during the drafting process. We do not recommend any changes to the tool.

Discretion factors in relation to the vaccination assessment tool

4. In the 16 November briefing *COVID-19 vaccination: Further policy decisions on vaccination assessment tool* (tracker number 2122-1846) you agreed that PCBUs should consider discretion factors in the situation where the threshold in the tool is met (ie vaccination would be a reasonable requirement as three out of the four factors are met) and the PCBU seeks not to require vaccination. This was to address Crown Law advice that it would be useful to include principles or factors to guide PCBUs' exercise of discretion in this situation.
5. We need to confirm your decision as the delegated Cabinet authority to make any decisions on issues that arise as part of the drafting process came into effect after the 16 November briefing.
6. Accordingly, we recommend that you reconfirm that a PCBU must consider the following factors in a situation where the outcome of the tool was that a vaccination requirement would be reasonable:
 - a. whether there are any other measures that could reasonably be used to minimise the risk associated with unvaccinated workers doing the work;
 - b. the outcomes of the consultation process on the application of the assessment tool and control measures under section 33AB(3) of the COVID-19 Public Health Response Act 2020;
 - c. any other factors the PCBU considers relevant.
7. We do not recommend including the following factors we originally suggested in the 16 November briefing relating to:
 - the outcome of the tool (on reflection we do not consider this is necessary as a relevant factor)
 - the vaccination rate of the workforce (we consider that this factor would be too difficult to apply and can be considered if the PCBU thinks it is relevant).

Consultation feedback on the vaccination assessment tool

8. During this week we have consulted industry and business groups on the Government vaccination mandates and the vaccination assessment tool. The groups we consulted include:
 - Auckland Business Group
 - tourism industry

- BusinessNZ and stakeholders
 - New Zealand Council of Trade Unions and other unions
 - electricity sector
 - WorkSafe Ginger Group including the construction sector and the Health and Safety Association of New Zealand.
9. The main points from the consultation relating to the vaccination assessment tool and our response are set out in the table at Appendix One (as well as further consideration of the factors that have arisen during the drafting process).
 10. We have consulted with the Ministry of Health and WorkSafe and do not recommend any changes to the tool in light of the feedback.
 11. An overarching theme from industry groups and businesses were that they were keen for the Government to facilitate a decision to require vaccination for their workers either via a Government mandate or through a vaccination assessment tool with a low threshold. Some stakeholders were also concerned that employees would use the information from the tool (if it produced a 'no' outcome, ie that vaccination would not be considered reasonable) to challenge a vaccination requirement made under an alternative health and safety risk assessment process.
 12. We will discuss with WorkSafe an appropriate way to link to industry-specific health and safety risk assessment tools where these are developed with union representatives.

Next steps

13. We will advise the Parliamentary Counsel Office of your decision on the discretion factors. They have already drafted these in advance of your approval.
14. The draft Cabinet paper seeking approval to the regulations which we have provided to your office today notes that you have made this decision.

Appendix One – Summary of consultation feedback

Feedback	Response
<p>Where a PCBU has conducted its own risk assessment process (ie not using the tool) and decided that vaccination is required, if using the tool would have produced a 'no' outcome, employees could use that information in a personal grievance where they did not want to get vaccinated. The construction sector was particularly concerned about this.</p>	<p>We advised stakeholders that businesses are free to use alternative risk assessment processes that they consider to be more fit-for-purpose and if they undertake a robust risk assessment and follow proper processes they should be confident in their decision on whether vaccination is required.</p> <p>In addition, a PCBU cannot be challenged on the tool it chooses to use for determining whether vaccination is required (ie the vaccination assessment tool or an alternative process).</p> <p>We consider that the real issue is that some stakeholders do not want personal grievances to be allowed for decisions relating to requiring vaccination. The Government has ruled this out.</p>
<p>The risk tolerance of the tool was considered to be high. Some stakeholders considered that only two out of four factors should be needed to meet the threshold rather than three out of four.</p> <p>For example, the meatworkers industry would like to have the legal certainty that the tool provides but is unlikely to meet the threshold. While workers work in close proximity all day they usually work in factories larger than 100m².</p>	<p>We have followed public health advice in designing the tool. Their view is that all three factors relating to the transmission of the virus should apply (ie work environment, proximity, time). The Government has decided on the threshold in light of the public health advice and other considerations, such as ensuring that vulnerable populations are considered.</p> <p>Again, PCBUs can choose to use a risk assessment process that is more suited to their business if they prefer.</p>
<p>The tool did not include a consideration of consequence or other factors that would be important to include in order to undertake an adequate risk assessment. There was a consistent view that industry-specific risk assessment tools were superior and included factors that were important for businesses in that industry to consider.</p> <p>Some stakeholders also said that they preferred the WorkSafe guidance as it included more factors that they considered were relevant.</p>	<p>The Government asked for a simplified tool to be developed that could easily be applied by businesses that may not have the expertise or resources to undertake a more comprehensive risk assessment process.</p> <p>Guidance on the tool will emphasise that businesses are free to use alternative risk assessment processes that they consider to be more fit-for-purpose. For example, PCBUs can continue to apply the factors in the WorkSafe guidance if they consider it better suits their purposes.</p>
<p>There was some concern that the tool was not designed to be applied to an entire workplace and that vaccinated and unvaccinated workers may intermingle. The</p>	<p>Applying the tool to the work that a person performs aligns with the current approach to undertaking risk assessments under HSWA. Some roles will be higher risk than</p>

Feedback	Response
Employers and Manufacturers Association raised this as an issue.	<p>others which will mean that a vaccination requirement may not be necessary across all roles. This will ensure that decisions on requiring vaccination are more likely to be reasonable and proportionate. This will be made clear in the regulations and guidance.</p> <p>The Ministry of Health has advised that any mixing of vaccinated and unvaccinated colleagues should be able to be managed by using general public health measures.</p>
There was a query about whether 'providing services to vulnerable people' included any work that is public facing?	We are using an existing definition for who is considered vulnerable. We will ensure that guidance is clear that this can include workers who interact with the public.
<p>Consideration arisen during drafting process (not from stakeholder feedback):</p> <p>The higher risk time factor cannot be met unless the higher risk proximity factor is met.</p> <p>There were also queries about whether the 15 minute indicator was per interaction.</p>	<p>The regulations will make it clear that the higher risk time factor can only be met if a person is unable to maintain 1 metre physical distancing and that the 15 minute factor applies per interaction.</p> <p>We will also make this clear in guidance.</p>