



## BRIEFING

### COVID-19 vaccination: Enforcement of employer's requirement to provide reasonable paid time off work to be vaccinated

<b>Date:</b>	3 December 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-2065

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	<b>Agree</b> that it is not necessary to designate breaches of paid time off provisions relating to COVID-19 vaccination as an infringement offence under the Employment Relations Act 2000.  <b>Forward</b> this paper to the Minister for COVID-19 Response.	6 December 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

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 Withdrawn           |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: Enforcement of employer's requirement to provide reasonable paid time off work to be vaccinated

<b>Date:</b>	3 December 2021	<b>Priority:</b>	High
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#### Purpose

To seek your agreement to a revised proposed compliance and enforcement approach in relation to an employer's requirement to provide reasonable paid time off work to be vaccinated.

#### Executive Summary

When Cabinet agreed that employers should provide reasonable paid time off for employees to be vaccinated against COVID-19, with any breaches of this enforced by the Labour Inspectors, the provisions were proposed to form part of the *COVID-19 Public Health Response Act 2020* (the COVID Act).

Enforcing the 'reasonable paid time off' provision via the COVID Act would have meant the Labour Inspectorate were confined to the powers established under the COVID Act. This necessitated the use of an infringement notice, which are available for breaches of the COVID Act and COVID-19 Orders where expressly stated.

Legal professional privilege

Infringement offences are only appropriate in circumstances where there are large number of strict liability offences committed (high volumes on a regular basis), the conduct involves straightforward issues of fact that can be easily identified and a "one size fits all" approach to penalising conduct can achieve a proportionate deterrent effect.

We do not recommend proceeding with an infringement offence for breaches of the requirement to provide employees paid time off to get vaccinated from COVID-19 because:

- The Labour Inspectorate already has lower-level tools available to them to assist with any non-compliance of the requirement. These tools provide the ability for the Labour Inspectorate to provide a nuanced and fact-specific approach to any breaches of the requirement.
- There are unlikely to be a high number of offences committed.
- Any breach is unlikely to involve a straightforward issue of fact. The employer is able to refuse to allow an employee to take paid time off where they are satisfied, on reasonable grounds, that providing paid time off would unreasonably disrupt the employer's business or the performance of the employee's employment duties. This means, each breach will be fact-specific.

Employment Services advise that without the new offence, the expected enforcement approach will consist of information and education by the MBIE Service Centre or a Labour Standards Officer. The Labour Inspectorate has advised they will be unlikely to take enforcement action without the

offence. The Inspectorate considers an infringement notice would be the only effective enforcement tool to use in these circumstances, where there is a time-sensitive issue to be resolved and the risk of incurring a fine is likely to incentivise action, relative to the cost of paid time off.

On balance, we consider that the availability of existing enforcement tools, and the expected enforcement approach signalled by the Labour Inspectorate, are appropriate enforcement responses to the nature of the breach. We do not consider an infringement offence is necessary or proportionate. This also corresponds with the approach to section 18A of the ER Act (reasonable paid time for union delegates), which was the basis for vaccination time off provisions. A failure to comply with section 18A is not an infringement offence.

## **Recommended action**

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

- a **Note** Cabinet agreed that employers should provide reasonable paid time off for employees to be vaccinated against COVID-19, with any breaches of this enforced by Labour Inspectors [rec 21, CAB-21-MIN-0436 refers].

*Noted*
- b **Note** the approach to enforcement for breaches of the requirement agreed by Cabinet was necessarily constrained due to the provisions at that time being proposed to be included in the COVID-19 Public Health Response Act 2020.

*Noted*
- c **Note** it was subsequently agreed that the matters concerning employment law would be provided for in the Employment Relations Act 2000, and as a result we have reassessed the most appropriate compliance and enforcement approach for breaches of the requirement to provide paid time off work to get vaccinated.

*Noted*
- d **Agree** it is not necessary to designate breaches of paid time off provisions relating to COVID-19 vaccination as an infringement offence under the Employment Relations Act 2000.

*Agree / Disagree*
- e **Note** if you agree with recommendation d this will be a change in approach to that agreed at Cabinet. You have been authorised by Cabinet to make decisions on any issues that arise during drafting, in consultation with the Minister for COVID-19 Response [rec 33, CAB-21-MIN-0436 refers].

*Noted*

- f **Forward** this paper to the Minister for COVID-19 Response and consult with him on the proposed recommendations in this paper.

*Forwarded*



Anna Clark  
**General Manager**, Workplace Relations & Safety  
Policy, MBIE

3 / 12 / 21

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

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## Background

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1. On 26 October 2021, Cabinet agreed that employers should provide reasonable paid time off for employees to be vaccinated against COVID-19, with any breaches of this enforced by the Labour Inspectors [rec 21, CAB-21-MIN-0436 refers].
2. When Cabinet agreed to this recommendation, the provisions for paid time off for vaccination were proposed to form part of the *COVID-19 Public Health Response Act 2020* (the COVID Act).
3. Enforcing the 'reasonable paid time off' provision via the COVID Act would have meant the Labour Inspectorate were confined to the powers established under the COVID Act and orders. This necessitated the use of an infringement notice, which are available for breaches of COVID-19 Orders where expressly stated. In the Cabinet paper, we had noted that a breach of the requirement to provide reasonable paid time off could broaden the scope of infringement notices and enforcement provisions of the COVID Act, and may involve having to authorise Labour Inspectors as "enforcement officers" under the COVID Act.
4. Legal professional privilege
5. This briefing provides advice on whether an infringement offence is warranted for breaches of the requirement to provide paid time off and proposes an alternative compliance and enforcement approach.

## The Labour Inspectorate already have lower-level compliance tools to ensure compliance with employment law

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6. Part of the Labour Inspectorate's role is to determine whether the provisions in the Acts within their jurisdiction are being complied with and taking reasonable steps to ensure compliance. In most instances where there is an isolated instance of a breach of a provision in an Act, a lower-level enforcement tool will be used:
  - a. **Improvement notices:** if the Labour Inspectorate believe on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts they may issue an improvement notice that requires the employer to comply with the provision. This notice must have the steps the employer could take to comply and a timeframe for compliance.
  - b. **Enforceable undertakings:** a Labour Inspector and the employer agree in writing that the employer will undertake, by a specified date, actions to rectify a breach of any provision of the relevant Acts, or pay money owed to an employee under a provision of the relevant Act or take any action that the labour inspector determines is appropriate. The undertaking can be withdrawn or varied with the consent of the Labour Inspector.

*If an employer fails to act on the improvement notice or enforceable undertaking, a Labour Inspector may seek a compliance order to seek arrears or/and a penalty*

7. If an employer fails to improve or take an action from an enforceable undertaking within the specified timeframe the Labour Inspector may apply to the Employment Relations Authority to seek a compliance order.

## **Infringement offences are used sparingly in the ERES system to support compliance with Minimum Entitlement Provisions**

8. Infringement offences are a subset of criminal offences that do not result in criminal convictions. The purpose of an infringement offence is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law.
9. Under the ER Act a Labour Inspector may issue an infringement notice where there are reasonable grounds for believing that the person committed an infringement offence as prescribed in the ER Act or regulations. The infringement notice contains an infringement fee of \$1000 per offence (up to a maximum of \$20,000 in a three-month period).
10. A Labour Inspector may only do so for four matters in the ERES system. These are if an employer has failed to:
  - a. retain a copy of the employee's employment agreement or the current terms and conditions of employment, or failed to retain a copy of the intended employment agreement – section 64(1) or (2) ER Act; or
  - b. have a *written* individual employment agreement - section 65(1)(a) ER Act;
  - c. keep a wages and time record – section 130(1) ER Act; or
  - d. keep a holiday and leave record – section 81(2), Holidays Act.
11. These records are considered critical for the Labour Inspectorate to be able to establish whether an employer has complied with the minimum entitlement provisions (e.g. minimum wage, leave provisions) in the relevant Acts. A breach is also clear-cut, in that the employer either has the record or they do not.
12. As a result of inconsistent treatment of infringement offences across regulatory regimes, the Ministry of Justice has produced guidelines, approved by Cabinet, on the development of infringement schemes. The guidelines say that an infringement penalty may be appropriate if:
  - a. large numbers of strict liability offences are committed in high volumes on a regular basis;
  - b. the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer;
  - c. a "one size fits all" approach to penalising conduct can achieve a proportionate deterrent effect;
  - d. identifying actual offenders is not practical (for instance, in relation to parking, speed cameras or toll road offences), but liability may be attributed to the person most able to exercise control of the offending (such as the owner of the vehicle that is found speeding or illegally parked).

## **Infringement offences are not an appropriate tool for breaches of the requirement to provide paid time off to be vaccinated against COVID-19**

13. We do not consider that a breach of the requirement to provide paid time off meets the criteria for when an infringement offence is considered appropriate for the following reasons:
  - a. The Labour Inspectorate already has lower-level tools available to them to assist with any non-compliance of the requirement. These tools provide the ability for the Labour Inspectorate to provide a nuanced and fact-specific approach to any breaches of the requirement.



- b. There are unlikely to be a high number of offences committed.
- c. Any breach is unlikely to involve a straightforward issue of fact, as an employer is able to refuse to allow an employee to take paid time off where they are satisfied, on reasonable grounds, that providing paid time off would unreasonably disrupt the employer's business or the performance of the employee's employment duties. This means, each breach will be fact-specific.

### **We consider that the existing lower-level enforcement tools are sufficient for the Labour Inspectorate to enforce breaches of the requirement**

- 14. The Labour Inspectorate may take lower-level compliance and enforcement action now in relation to breaches of the requirement, including by issuing an improvement notice or an enforceable undertaking that requires the employer to comply with the requirement to provide paid time off to enable employees to be vaccinated against COVID-19. If an employer fails to improve or take an action from an enforceable undertaking within the specified timeframe the Labour Inspectorate may apply to the Employment Relations Authority to seek a compliance order.
- 15. Employment Services advise that without the new offence, the expected enforcement approach will consist of information and education by the MBIE Service Centre or a Labour Standards Officer. The Labour Inspectorate has advised they will be unlikely to take enforcement action without the offence, as where an employer is willing to comply this is unnecessary. Where an employer will not comply, an Enforceable Undertaking or Improvement Notice is ineffective as an enforcement tool for a temporary and easily remedied breach, given the requirement to seek a compliance order from the Employment Relations Authority. This typically takes 1-2 years and tens of thousands of dollars of resource from the Crown. The Inspectorate considers an infringement notice would be the only effective enforcement tool to use in these circumstances, where there is a time-sensitive issue to be resolved and the risk of incurring a fine is likely to incentivise action, relative to the cost of paid time off.
- 16. On balance, we consider the available tools and expected enforcement approach are an appropriate response to the nature of the breach and do not recommend proceeding with developing a regulation for an infringement offence where the requirement to provide paid time off to be vaccinated for COVID-19 has been breached. This corresponds with the approach to section 18A of the ER Act, which requires employers to provide reasonable paid time for union delegates, and which the vaccination time off provisions are modelled on. A failure to comply with this section is not treated as an infringement offence.

### **If you would like to proceed with an infringement offence, this would require amending existing regulations**

- 17. If you consider it necessary to proceed with introducing an infringement offence for the requirement to provide paid time off for COVID-19 vaccinations, this will require amending the Employment Relations (Infringement Offence) Regulations to introduce the offence. This would happen in the new year.

### **Next steps**

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- 18. Cabinet authorised you, as Minister for Workplace Relations and Safety, in consultation with the Minister for COVID-19 Response, to make decisions on any issues that arise during the drafting process [rec 33, CAB-21-MIN-0436 refers]. As such, we recommend that you consult with the Minister for COVID-19 Response in line with Cabinet's authorisation.

19. Officials will advise the Labour Inspectorate of your decisions, to inform their compliance and enforcement approach in relation to breaches of the requirement to provide paid time off for COVID-19 vaccinations.