



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Approval of COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022	Date to be published	17 June 2022

List of documents that have been proactively released

Date	Title	Author
4 May 2022	<i>Approval of COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022</i>	<i>Office of the Minister of Workplace Relations and Safety</i>
9 May 2022	<i>Approval of COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022</i> <i>CAB-22-MIN-0166.01 Minute</i>	<i>Cabinet Office</i>

Information redacted

NO

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In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Legislation Committee

Approval of *COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022*

Proposal

- 1 This paper seeks authorisation to submit the *COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022* (Revocation Order) to the Executive Council.

Executive Summary

- 2 The *COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021* (VAT Regulations) came into force on 15 December 2021 and provided a simple risk assessment process that employers could use to determine when vaccination could be required to perform certain work.
- 3 A review was undertaken of the VAT Regulations in light of recent Cabinet decisions to remove some workforce vaccination Orders and the mandatory use of My Vaccine Pass in specified circumstances. The review also took into account updated advice from the Ministry of Health (MoH) that the public health basis for requiring vaccination is stronger when the risk of contracting and transmitting Omicron in the workplace is higher than it is in the community.
- 4 Guidance on employer vaccination requirements reflecting the updated public health advice has been published by the Ministry of Business, Innovation and Employment (MBIE) and WorkSafe. This guidance stresses that there are likely to be significantly reduced circumstances where an employer vaccination requirement would be justified.
- 5 In light of this, officials advised, and Cabinet discussed revocation of the VAT Regulations as they are no longer consistent with public health advice. This paper seeks authorisation to submit the Revocation Order to the Executive Council.
- 6 I am seeking a waiver of the 28-day rule as in these circumstances it would be inappropriate to allow employers to continue to rely on the VAT Regulations. If this waiver is granted the Revocation Order can take effect on 12 May 2022.
- 7 Employers who wish to maintain an employer vaccination requirement, and who had introduced that requirement using the VAT Regulations, will now

need to undertake a full work health and safety risk assessment to determine whether this is an appropriate COVID-19 control for their circumstances.

Background

- 8 On 26 October 2021, Cabinet agreed to amend the *COVID-19 Public Health Response Act 2020* to introduce regulation-making powers to prescribe a risk assessment process to determine when employers (as persons conducting a business or undertaking) can require vaccination or testing [CAB-21-MIN-0436 refers].
- 9 On 22 November 2021, Cabinet agreed the detail of a risk assessment tool to be promulgated under these regulation-making powers [CAB-21-MIN-0495 refers].
- 10 On 13 December 2021, Cabinet authorised the submission of the VAT Regulations to the Executive Council [CAB-21-MIN-0533 refers]. These regulations came into force on 15 December 2021.
- 11 The VAT Regulations were made in response to concerns from employers about not having access to the public health knowledge and health and safety expertise to be able to carry out a work health and safety risk assessment, in order to determine whether it was reasonable to require vaccination to perform certain work.
- 12 This was in the context of the Government having mandated vaccination in order to perform certain work in a range of work settings, including at the border and where there was higher risk of contracting and transmitting COVID-19. At the time the VAT Regulations were promulgated, government vaccination mandates were estimated to cover approximately 30 percent of the workforce.
- 13 Employers were also able to impose employer vaccination requirements where they had conducted a work health and safety risk assessment that justified this as a workplace control related to COVID-19.
- 14 Employers wanted to be confident that the outcome (and therefore the actions they took as a result) met legal requirements, and properly managed the risk to their staff and customers of contracting COVID-19. Employers were also concerned that any vaccination requirement they imposed after undertaking a risk assessment would be subject to legal challenge.
- 15 On 21 March 2022, Cabinet agreed to remove vaccination Orders for the education sector and places where My Vaccine Passes could be required [CAB-22-MIN-0086 refers].
- 16 In relation to employer vaccination requirements, MoH provided advice that:

“the public health basis for requiring vaccination is stronger when the risk of contracting and transmitting Omicron in the workplace is higher than it is in the

community and this is the basis on which some Government vaccination Orders have been retained.”

- 17 Given the updated MoH public health advice and WorkSafe’s subsequent guidance which states “*WorkSafe considers that few workplaces will be able to justify an employer vaccination requirement for health and safety or public health reasons*”, MBIE advised that the simplified approach adopted in the VAT Regulations was no longer appropriate.
- 18 The public health advice is that vaccination requirements may continue to be appropriate in some circumstances. To maintain or implement an employer vaccination requirement, it should now be supported by a workplace health and safety risk assessment, that is specific to roles and the organisation’s circumstances. Given the prevalence of COVID-19 and risk of infection in the community, it is expected that the circumstances in which an employer vaccination requirement is justified are likely to be more limited than in the past.
- 19 The Vaccination Assessment Tool (the Tool) was developed at a time when New Zealand was still rolling out its vaccination campaign and community transmission was largely confined to Auckland. The primary variant of COVID-19 in the community at that time was Delta, which led to more severe outcomes than Omicron and was more responsive to vaccination. For many workers, it was more likely that they would contract COVID-19 at work than in the community.
- 20 As the risks of contracting and transmitting COVID-19 have materially shifted, in part due to the success of Government vaccination Orders and employer vaccination requirements, the factors in the Tool are no longer an appropriate reflection of the current public health advice. Given the prevalence of COVID-19 in the community, assessments of work health and safety risk needs to be much more nuanced, carefully weighing the risk of a worker contracting and transmitting COVID-19 in the workplace against the risk of them doing so outside of work.

Proposed regulations

- 21 This paper seeks authorisation to submit the Revocation Order to the Executive Council under the regulation-making power outlined above. The regulations will revoke the VAT Regulations for the reasons set out above.

Timing and 28-day rule

- 22 I propose the 28-day rule be waived in relation to the Revocation Order and that the revocation of the VAT Regulations take effect from 12 May 2022.
- 23 This accords with the following Cabinet Manual principles where it is appropriate to seek a waiver:
 - 7.97(a) relating to situations where a regulation has little or no effect on the public, or confers only benefits on the public.

- 24 The Revocation Order will not disadvantage any employer or worker, given that it will remove an optional risk assessment tool that no longer reflects current public health advice, and parties can continue using other risk assessment processes to determine what COVID-19 workplace controls are appropriate (e.g. by following the guidance published by WorkSafe).
- 25 I consider this exemption to be justified because employers urgently need certainty and guidance. While the VAT Regulations remain in place there is a risk that the simplified and binary approach in the Tool will enable businesses to require vaccination where this would not be supported by a more comprehensive work health and safety risk assessment. In addition to this, the Tool does not currently require employers to explore other controls short of requiring vaccination, whereas the current public health and WorkSafe guidance is clear that employers need to consider a hierarchy of controls, starting first with those that are the least rights-infringing.

Compliance

- 26 I consider that the Revocation Order (and revoking the VAT Regulations) complies with:
- 26.1 The principles of the Treaty of Waitangi;
 - 26.2 The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (BORA) or the Human Rights Act 1993 (HRA);
 - 26.3 The principles and guidelines set out in the Privacy Act 2020;
 - 26.4 Relevant international standards and obligations;
 - 26.5 The Legislation Guidelines (2018 edition).

BORA and HRA implications

- 27 Section 11 of BORA provides for the right to refuse medical treatment. Section 19 provides for the right to be free from discrimination on prescribed grounds contained in section 21 of the HRA. Revoking the VAT Regulations will remove a potential limitation on rights under sections 11 and 19 of BORA, to the extent that the VAT Regulations may have encouraged, incentivised or facilitated employers to make decisions that could limit those rights.

Regulations Review Committee

- 28 There are no anticipated grounds for the Regulations Review Committee to draw the Revocation Order to the attention of the House under Standing Order 327.

Certification by Parliamentary Counsel

- 29 Parliamentary Counsel Office has certified the Revocation Order as being in order for submission to Cabinet, subject to a waiver of the 28-day rule.

Impact Analysis

- 30 The Treasury's Regulatory Impact Analysis team has determined that the proposal to revoke the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations is exempt from the requirement to provide a Regulatory Impact Statement. The exemption is on the grounds that the proposal is intended to manage the direct actions taken to protect the public in response to the COVID-19 pandemic, and is required urgently to be effective (making a complete, robust and timely Regulatory Impact Statement unfeasible).

Publicity

- 31 MBIE announced the Government's intention to revoke the VAT Regulations on the business.govt.nz website on 6 April 2022. The announcement of this intention was appropriate to minimise the chance of employers relying on the Tool, where it was not consistent with public health advice, which could have created a risk of any employment actions taken being found to be unjustified.
- 32 MBIE will update its guidance when the VAT Regulations are formally revoked. Guidance is available from WorkSafe on how to undertake a fulsome work health and safety risk assessment.

Proactive release

- 33 I intend to proactively release this paper following Cabinet consideration.

Consultation

- 34 This paper was prepared by MBIE.
- 35 The following agencies were consulted on this paper: Crown Law, Department of the Prime Minister and Cabinet (PAG and COVID-19 Group), Ministry of Health, Ministry of Justice, Parliamentary Counsel Office, Treasury (RIA Team) and WorkSafe.

External consultation on the vaccination assessment tool

- 36 MBIE undertook targeted, informal consultation during the review of the VAT Regulations with BusinessNZ, New Zealand Council of Trade Unions, the Business Leaders' Health and Safety Forum, the Government Health and Safety Lead, Construction Health & Safety NZ and the Health and Safety Association of New Zealand. This consultation occurred in conjunction with discussions about the guidance that MBIE and WorkSafe were publishing on a revised approach to undertaking work health and safety risk assessments.

- 37 These groups indicated support for the guidance and there was no objection to the revocation of the VAT Regulations.

Recommendations

The Minister for Workplace Relations and Safety recommends that Cabinet Legislation Committee:

- 1 note that on 26 October 2021, Cabinet agreed to amend the COVID-19 Public Health Response Act 2020 to allow for a risk assessment process to be prescribed, which employers could then use to determine whether it is reasonable to require vaccination or testing for work [CAB-21-MIN-0436 refers];
- 2 note that on 13 December 2021, the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021 were promulgated;
- 3 note that on 4 April 2022, Cabinet discussed the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021 which are no longer consistent with public health advice;
- 4 agree to revoke the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021
- 5 note that the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022 will give effect to the decisions referred to in paragraph 4 above;
- 6 authorise the submission of the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022 to the Executive Council;
- 7 note that a waiver of the 28-day rule is sought:
 - 7.1 so that the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022 can come into force on 12 May 2022;
 - 7.2 on the grounds that they will have little or no effect on the public, or confer only benefits on the public;
- 8 agree to waive the 28-day rule so that the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations Revocation Order 2022 can come into force on 12 May 2022.

Authorised for lodgement

Hon Michael Wood
Minister for Workplace Relations and Safety