



COVID-19

**VACCINATION
EDITION**

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New Zealand is entering a new phase of its Covid-19 response with the Delta-variant entering the community, and the Government strategy shifting away from elimination. There is a renewed focus on vaccinations as the primary means of protection. This poses challenges for employers across the motu, who want to ensure their staff are safe and protected from the virus.

This newsletter answers the most common questions we are being asked. Please note, this is general in nature and is not a substitute for legal advice.

Mandatory vaccines

Can I require or compel employees to be vaccinated?

Every person has the right enshrined in the New Zealand Bill of Rights 1990 to refuse to undergo medical treatment. This includes vaccinations. However, that does not mean that employees are protected from the consequences of their decision to forego medical treatment. Therefore, while an employer cannot compel an employee to be vaccinated, it may be able to dismiss one who refuses.

There are two groups of employees impacted:

- Those covered by the Governments' mandatory vaccinations order (COVID-19 Public Health Response (Vaccinations) Order 2021); and
- Other employees.

In either case, an employee refusing to be vaccinated may be subject to dismissal.

However, employers must remember:

- **Process is key.** The Employment Institutions have repeatedly stated that neither the pandemic or the lockdowns have altered or suspended employment law, and the case law starting to emerge on dismissals of unvaccinated employees underscores this.
- **Human Rights are still important.** Any decisions or policies implemented will also be subject to the constraints in the Human Rights Act 1993 – that includes the obligation not to discriminate on the basis of disability.

What if my workforce is covered by the Government's Vaccination Mandate?

The Government introduced the *Covid-19 Public Health Response (Vaccinations) Order 2021* ("the Health Order") in April this year, which mandated that "affected persons" (those working in MIQ and border facilities) were not able to continue performing their role, unless vaccinated.

On Monday 11 October 2021, the Government announced that the coverage of the Health Order would be expanded to include health professionals and teachers. This will significantly expand coverage of workers who are required to be vaccinated to perform their role.

If, as an employer, some of your workforce is covered by the Health Order, this will provide a legal basis for requiring your employees to be vaccinated to continue to perform work covered by the Health Order. However, you will still need to run a fair consultation process, which will include consulting with your employees about:

- Which roles you consider are covered by the Health Order and why
- How compliance with the Health Order will be monitored
- How the organisation will deal with employees who do not get vaccinated, including what redeployment options may be available, and ultimately whether they should be dismissed if they continue to decline to get vaccinated.

Employers who have employees covered by the Health Order are not prevented from also undertaking a separate risk assessment process of those employees not covered by the Health Order.

What if my workforce is not covered by the Health Order?

Employers have obligations under the Health and Safety at Work Act 2015. As part of complying with those obligations, employers will need to consider what reasonably practicable steps they could and should take, to maintain a healthy and safe workplace, with Delta in the community.

Employers are entitled to introduce lawful and reasonable workplace policies, consistent with an employer's right to manage its workforce and its duty to take reasonable, practicable steps to provide a safe workplace.

There is no case law relating to the dismissal of employees who are not subject to the Health Order, but our view is that an employer would be able to implement a mandatory vaccination policy *if sufficient risk is identified in the work undertaken by its employees*.

Mandatory vaccination is a complex issue. Each workplace will need to undertake its own **risk assessment**. Further, each role will need to be considered against the relevant tests – a blanket approach is unlikely to be sufficient.

Employers who are subject to restrictions on their ability to use unvaccinated staff, for example by reason of client requirements, may also be able to consider redeploying and/or dismissing an

employee who is unvaccinated. For example, where an employee works on a client's site, and that client refuses access to those who are unvaccinated.

What would a risk assessment entail?

If an employer is relying on health and safety concerns to implement a mandatory vaccination policy, they must establish that the nature of the work creates a sufficient risk of harm to employees. This risk assessment must determine whether ***the role and the work being done*** gives rise to such a risk that the employer may legitimately require it to be performed by a vaccinated worker, for health and safety reasons.

WorkSafe has issued [useful guidance](#) for employers who are considering requiring their employees to be vaccinated, including factors that should be taken into account in a risk assessment.

Who would carry out the risk assessment?

Internal health and safety representatives could undertake a risk assessment. However, to ensure that the findings are robust it would be open to employers to seek the assistance of external professionals to undertake the assessment and/or review an assessment undertaken internally.

The Health and Safety Association of New Zealand has [created a helpful table](#), which lists different health and safety professionals, the assistance they can provide businesses specifically in relation to Covid-19, and how to contact them.

Implementing a vaccination policy

What could be in a vaccination policy?

This will be specific to each organisation, and the type of Policy, but some common areas that could be included are:

- Who is intended to be covered by the policy, and why
- How the organisation intends to obtain information about vaccination status, and how that information will be dealt with
- What steps the organisation may take to facilitate access to vaccination
- What steps the organisation may take to deal with medical, or other exemptions
- Potential options for alternatives to vaccination

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- Possible consequences for non-compliance, including the process the organisation will follow in considering re-deployment or termination.

How can I introduce a vaccination policy?

Consistent with their obligations of good faith, employers must consult with any employees who will be covered by the policy prior to it being introduced, particularly if the policy may impact the ongoing employment of employees based on their vaccination status.

What would consultation look like?

Consultation will be different in each circumstance, depending on the size of the workforce, the proposed policy, and any applicable contractual obligations. However, such a policy will introduce a significant compliance burden on employees, therefore a robust consultative process should be followed. This should, at a minimum, involve providing employees (and in some cases unions) with:

- the reasons the vaccination policy is being introduced
- any evidence, advice or analysis being relied upon, including any risk assessments that have been completed
- a reasonable opportunity to provide feedback on the draft policy
- genuine consideration of the feedback received

Refusal to be vaccinated

After the introduction of a vaccination policy, employees who refuse to be vaccinated may be in breach of the policy. In that situation, an employer may be entitled to consider termination of the employee's employment. However, before making any decision an employer must engage with the employee to consider the reasons for their refusal to get vaccinated and explore alternatives to termination.

What about genuine reasons for refusing vaccination?

There may be some employees who have legitimate reasons for being unable or unwilling to receive the vaccine, including due to a pre-existing medical condition or a religious belief. Any mandatory vaccination policy will need to include specific provisions acknowledging the protections set out in the Human Rights Act 1993. Specifically, management of the prohibited grounds of discrimination, which include religious belief and disability. The employer does not have to accept an employee's

claim of entitlement to an exemption at face value, but would need to work through a fair process in considering it and asking for appropriate evidence in support.

There are also exceptions to these general principles. An employer is obliged to accommodate an employee's religious practice, subject to that practice **not reasonably disrupting the employer's activities**.

Likewise, an employer may treat someone differently based on a disability, where there is a risk of harm to that person or to others, **including the risk of infecting others with an illness**, it is not reasonable to take that risk, and the employer cannot take reasonable measures to reduce the risk to a normal level, without unreasonable disruption.

What alternatives must I consider?

Termination of employment should only be considered when all other reasonable alternatives have been exhausted. What is a reasonable alternative will vary between workplaces, but generally it may include:

- changing an employee's duties to reduce potential exposure to Covid-19
- redeploying the employee into an alternative role that has a low or lower risk of exposure
- changing the way an employee works to reduce the risk of exposure (including working from home or working from a different part of the organization)
- using rapid testing and PPE to reduce the likelihood of transmission by or to the employee

Can I use rapid testing?

Rapid testing is being used overseas, and there are indications that it will be approved for use in New Zealand soon. At least 25 large New Zealand employers have indicated they are looking at using it.

In our view, employers will be able to mandate rapid testing in certain circumstances on health and safety grounds, in the same way as they can for drug and alcohol testing. Just like vaccinations, we think a Policy based on a solid health and safety assessment, that employees have been consulted about, is a good approach. Such a policy should cover:

- when and why you will use testing
- how testing will occur
- what the process will be for a positive test
- how information will be collected, stored and used
- what the consequences of a refusal to be tested may be

If there are no reasonable alternatives?

Where alternative arrangements are not practicable or reasonable, because of the nature of the employee's role or resource constraints on the organisation, then dismissal may be considered. A fair and reasonable disciplinary process must be followed in every case.

Before taking this step, employers will want to be absolutely sure that:

- the risk assessment of the role is well-founded and supported by evidence; or, if the Health Order is being relied on, the assessment that the role is covered by the Health Order is sound; or if a client's restriction on access to its premises is being relied on, the assessment that it impacts the employee's role is accurate and that the employer has properly understood the restriction
- the employee has been consulted throughout the process
- sufficient information has been provided to the employee to make an informed decision
- the employee has been given an opportunity to respond and provide feedback in respect of any decisions, such as the introduction of a Policy, or application of the Order to their role
- the employer can demonstrate that reasonable alternatives, including redeployment options, have been genuinely and fairly considered
- the employee has been able to be represented throughout the process, including being accompanied to any formal meetings
- the employee has been advised in writing that their employment may be terminated, invited to a formal meeting to respond, and had the opportunity to discuss this with the decision-maker, before a decision is made to terminate their employment

Seeking information

Am I allowed to ask employees if they are vaccinated?

In general, the same rules apply to collecting information about vaccination status from employees, as apply to the collection of personal information generally – those are the rules in the Privacy Act 2020.

This includes:

- The requirement that the employer have a lawful purpose for collecting the information
- That it be collected directly from the individual concerned (unless one of the exceptions applies)
- That the information only be used in connection with the purpose for which it was collected

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- That the employee be told certain things when the information is being collected, such as the purpose of collection, the name and address of the entity collecting and storing the information, and the consequences of not complying with the request for the information

The Health Order has some specific provisions dealing with a vaccination register maintained by the Ministry of Health, which employers will also need to comply with if their employees are covered by that Order. Employees covered by the Health Order also have special information sharing obligations, which require them to disclose certain information for the purposes of keeping the Ministry of Health's vaccination register current.

Relevant case law

The issue of mandatory vaccination is relatively new, at least for New Zealand. The case law to date has been generally supportive of the Government's Health Order and the ability of employers to take action against employees who choose not to be vaccinated. A summary of these cases is set out below.

GF v New Zealand Customs Service

The Employment Relations Authority recently issued its first determination relating to the introduction of a mandatory vaccination policy, and subsequent termination of an employee who did not receive the vaccine in accordance with the policy.

New Zealand Customs Service employs a significant number of border workers, particularly those who work at ports. It undertook a health and safety assessment of its workplaces, which assessed each role individually to determine whether vaccinations were required due to risk of exposure to the virus. Customs then began a consultative process.

Before Customs completed the process, the Government introduced the Health Order, which covered its border workers. Customs then engaged with affected employees about the vaccine requirements, and in particular sought to engage with its staff who refused to be vaccinated to determine the basis for their refusal.

Customs undertook a process to consider reasonable redeployment options for those employees. Where redeployment alternatives were not identified, those employees were given notice of termination of their employment.

One employee challenged her dismissal and brought proceedings in the Employment Relations Authority. She sought reinstatement to her role, arguing that her decision not to get vaccinated does not affect any other person in the workplace.

The Authority resoundingly rejected the applicant's claim, noting that all employees have an obligation under the Health and Safety at Work Act 2015 to take reasonable care that their actions or omissions do not adversely affect the health and safety of others.

While the Authority did criticise Customs for being slow to respond to the employee's initial concerns, it found that the employee was given more than enough information and time to engage in the process.

Importantly, the Authority found that Customs was justified in finding that the woman's position required vaccination, given the thorough risk assessment Customs undertook for the role. The Authority even went as far as commending Customs for their approach in persuading an overwhelming majority of its employees to be vaccinated, at a time when *"society is bedeviled by various contentious sources of information on this subject."*

In this case, the high-risk nature of the work performed as well as the Government's Health Order, supported a finding that the employer was entitled to terminate the employment of an employee who refused to be vaccinated.

WXN v Auckland International Airport Limited & VMR & Ors v Civil Aviation Authority

In two further, separate, cases, workers at the Civil Aviation Authority and Auckland International Airport are taking their former employers to the Employment Relations Authority, following the termination of their employment for refusal to get vaccinated.

Neither case has been determined substantively, however the employees in both scenarios sought orders for interim reinstatement pending the substantive determination of the Authority, regarding their dismissals.

The circumstances of each case are strikingly similar:

- Both are large employers with employees covered by the Government Health Order
- Both employers undertook health and safety risk assessments
- Both employers sought to engage their staff over their vaccination status, warning that failure to be vaccinated may result in termination of employment
- For employees who refused to be vaccinated, the employers engaged in processes to consider alternative arrangements

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- When no suitable arrangements were identified, the employees were given notice of termination of their employment
 - The basis for the termination in each case was the Government Health Order.

Again, similar to the Customs case, both of these Authority decisions related to employees whose roles were covered by the Health Order. However, the Authority also makes two important points of general application:

- All employers and employees continue to have strong health and safety obligations, pursuant to the Health and Safety at Work Act 2015; and
- The process that is undertaken will be important to any consideration of an unjustified dismissal.

Regarding health and safety, in the Auckland International Airport decision, the Authority stated that:

A PCBU employer has a primary duty to ensure as far as reasonably practicable, the health and safety of its workers and those affected by its work. COVID-19 poses a risk to the health and safety of workers and those affected by the work. It poses a very real and serious risk to health and safety. It is a harm that all PCBU employers are required to manage.

Employees have an express duty to keep not only themselves safe at work, but also others too.

In relation to the process, the Authority in the Civil Aviation Authority determination stated:

The process generally involved provision of information, meetings and communications, consideration of alternatives to dismissal and exploration of redeployment options. On the untested affidavit evidence those actions were arguably what a fair and reasonable employer could have undertaken.

The Authority rejected the applications for interim reinstatement in both cases, however the substantive determinations are still pending. These cases, when determined, will provide clearer guidance on the issue of mandatory vaccination.

Judicial Review – *GF v Minister of COVID-19 Response*

The legality of the Health Order was recently challenged in the High Court after a Customs employee was dismissed for refusing to be vaccinated.

The applicant argued that the Order was not a “justified limitation on the rights and freedoms” under the New Zealand Bill of Rights Act.

Affidavit evidence for the Crown was adduced by Minister Hipkins (who was responsible for the Order), Associate Minister Verrall and Dr Ashley Bloomfield. In explaining why the Order was deemed necessary Minister Hipkins said that it was because the affected workers may be exposed to, and infected by, COVID-19 in the course of their work and subsequently become vectors for transmitting the virus more widely.

Minister Hipkins pointed to international studies which have shown that vaccination leads to a significant reduction in the rate of transmission and said that the public health advice he had received convinced him that there was a strong rationale for the Health Order.

The Court accepted that the Minister had properly considered the relevant factors in making this assessment.

Next the applicant claimed that because the Pfizer vaccine has only been granted provisional consent, requiring anyone to take it would amount to subjecting them to medical experimentation. Before medicines (including vaccines) can be used in New Zealand, they must be granted either provisional or full consent. Justice Churchman dismissed this argument finding that both forms of consent are valid. He also noted that the Pfizer vaccine has been granted full approval in the United States.

The applicant further argued that the Minister did not consider the social and economic consequences of making the Order and that it could result in “mass terminations of employment”. The Court found that this submission was “overstated” and that the Minister had considered the opportunity cost related barriers for workers and their household contacts and other employment related consequences.

The Court then considered whether the Minister had sufficient basis for determining that the Order was a justified limit on the rights and freedoms created by the New Zealand Bill of Rights Act. The rights and freedoms most likely to be negatively impacted were identified as the right to refuse medical treatment and the right to be free from discrimination, including on the grounds of disability, sex or religious belief.

Justice Churchman accepted that the Minister had considered whether the required outcomes could be achieved in a less intrusive way, based on public health advice. In reaching this finding the Court held that the Order achieved an important social objective, specifically to limit the risk of spread of a pandemic, and was proportionate. It also noted that the Order did not force any person to be vaccinated, but rather it resulted in consequences, including the potential loss of employment, for people who chose not to be.

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