

COVID-19

TRAFFIC LIGHT SYSTEM

RISK ASSESSMENT TOOL

COVID-19 RESPONSE (VACCINATIONS) LEGISLATION ACT

24 November 2021

dundas street employment lawyers

dundas street

The Government has made some important announcements this week about what the traffic light system will mean for employers, and has also indicated that it will provide guidance for employers in the form of a risk assessment tool for determining whether vaccination is required for certain work.

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.

Covid-19 Response (Vaccinations) Legislation Act

On Tuesday 23 November 2021 the Minister of Workplace Relations and Safety Michael Wood announced the introduction of the Covid-19 Response (Vaccinations) Legislation Bill, which was passed today under urgency.

The new legislation proposes major changes in three areas:

1. It broadens the powers of the Minister under the Covid-19 Public Health Response Act 2020 to make Covid-19 Orders;
2. It introduces a framework for a 'Risk Assessment Tool' to be introduced, providing employers greater certainty about requiring vaccination on health and safety grounds;
3. It amends the Employment Relations Act 2000 to make specific reference to situations where an employee is terminated due to their vaccination status.

Changes to the Covid-19 Public Health Response Act 2020

The Act amends the process and relevant factors that the Minister must consider in making a Covid-19 Order extending mandatory vaccination requirements. The Act also introduces a number of new duties where a Covid-19 Order has been made, such as:

- The requirement for a Person Conducting a Business or Undertaking ("PCBU") to keep records of the vaccination status of affected workers;
- Empowering a PCBU to request information that verifies an affected worker's vaccination status;
- Upon receipt of information regarding vaccination status, a PCBU must inspect the document and return it immediately and only take copies if that is reasonably required for the purpose of ensuring compliance with their duties;
- A PCBU must not prevent an affected worker from being vaccinated during their normal working hours;

-
- Providing for the ability of a PCBU to conduct a risk assessment of the work carried out by workers to determine whether it is reasonable to require them to be vaccinated;
 - Enabling the Minister to introduce regulations regarding the Risk Assessment Tool, which will provide guidance to employers in undertaking such assessments;
 - Providing that a PCBU has “absolute discretion” to determine whether to use the Risk Assessment Tool or to conduct its own risk health and safety risk assessment.

Changes to the Employment Relations Act 2020

The Act includes a number of changes to the Employment Relations Act 2000, specifically:

- Reasonable paid time off for employees to get vaccinated;
- A minimum 4-week paid notice period for termination if the work requires vaccination but an employee is unvaccinated;
- A requirement that notice be withdrawn if, during the notice period, an employee gets vaccinated, unless doing so would unreasonably disrupt the employer’s business;
- Specifying that an employee is still able to bring a personal grievance in respect of their dismissal.

Traffic Light System

What is the Traffic Light System?

The Traffic Light System is part of the new Covid-19 Protection Framework introduced by the Government to manage Covid-19 in the community, which will reflect the ability of the health system to deal with any outbreaks of Covid-19.

The system has three levels:

- **Green** – limited community transmission and manageable hospital levels
- **Orange** – increasing community transmission with increased pressure on the health system
- **Red** – health system facing unsustainable number of hospitalisations

The Government has indicated that the factors for considering shifts between the levels will include:

- Vaccination coverage
- Capacity of the health and disability system
- Testing rates
- Contact tracing and case management capacity
- Transmission of Covid-19 within the community

Each level will have different restrictions that businesses and individuals must comply with, such as capacity limits, social distancing, face covering and contactless operation. The Ministry of Health has released a useful guide to the restrictions that apply at each level, which [can be found here](#).

How will Covid Vaccine Certificates work?

Covid Vaccine Certificates (“CVCs”) are proof of an individual’s vaccination status.

Each traffic light level will have different restrictions that businesses must comply with, depending on whether or not they require Covid Vaccine Certificates (“CVCs”) to be used in their workplace.

Requiring the use of CVCs in certain workplaces will be “opt in” and a decision to be made, following consultation, by the employer. However in practice, the framework is going to require a large number of businesses to mandate vaccinations, if they wish to continue operating at certain levels.

For example, at Orange there are no capacity limits for **close contact businesses** (such as hairdressers) if they do choose to require CVCs for customers and employees. However, a close contact business will not be able to operate at all at Orange, if they do not use CVCs.

Where a business does decide to make use of CVCs, they will be required to apply that vaccination requirement to both their customers **and** employees.

While each level of the Traffic Light System will impose different requirements on businesses, there are only specific sectors/businesses that will face further restrictions depending on whether or not they use CVCs. These are:

- Hospitality
- Indoor/outdoor events
- Gyms
- Gatherings (Weddings, places of worship, marae)
- Close contact businesses
- Tertiary education

How do I implement the use of CVCs in my workplace?

Deciding to implement the use of CVCs in the workplace is a genuine business decision. For certain businesses, requiring CVCs will enable them to continue operating with greater capacity and certainty as the Traffic Light System is introduced.

However, it will also impose a new requirement on the employees of that business to be vaccinated. Therefore, an employer is obliged to undertake a fair and reasonable consultation process with its employees, before a decision is made to implement the use of CVCs (and therefore also mandatory vaccination).

Consultation in these circumstances should follow a similar approach to that undertaken in a restructuring context, where:

- A business consults with its employees about a proposal for change
- The reasons for the proposed changes, and any relevant information, is communicated to employees
- The potential implications, if the proposal is confirmed, are outlined to employees
- Employees are provided an opportunity to feedback on the proposal
- Following consideration of the feedback received, a final decision is made and implemented by the employer.

When do I need to start this process?

The government has stated that no part of the country will immediately move to Green in the Traffic Light System, which means that regions will start in at least Orange (with Auckland operating at Red).

This means that for certain businesses, such as gyms, close contact businesses and events, they will not be able to operate from **3 December 2021** unless they are implementing the CVC system, and their staff have received at least the first dose of an approved vaccine.

To meet this deadline, affected employers will need to begin the required consultation process as soon as possible.

If I use the CVCs, do I need to undertake a health and safety risk assessment?

The short answer is no. CVCs and risk assessments provide different justifications for the requirement for work to be performed by a vaccinated employee.

A business that requires CVCs in the workplace is making a commercial, business decision, rather than one specifically based on health and safety. Because a business is able to operate with greater freedom and certainty under the Traffic Light Framework if it uses CVCs, it is within an employers right to determine, following a fair and reasonable consultation process, that this is a justifiable business decision.

However, where CVCs are not required in order to operate, an employer must undertake a risk assessment, and base its decisions on health and safety grounds. That is, the risk assessment has

determined that it would be unsafe for an unvaccinated person to perform this role and therefore, consistent with obligations under the Health and Safety at Work Act 2015, an employer is now requiring that only a vaccinated individual can carry out this role.

Risk Assessment Tool

What is the Risk Assessment Tool?

In our previous Covid-19 Guidance Update, we discussed how employers may introduce mandatory vaccination policies by undertaking a health and safety risk assessment. We noted that as yet there is no case law relating to the dismissal of employees who are not subject to mandatory vaccination under the Order, but that in our view an employer would be able to implement a mandatory vaccination policy *if sufficient risk is identified in the work undertaken by its employees*.

The Government has now indicated that it is implementing a Risk Assessment Tool to guide employers in undertaking risk assessments and to provide guidance on what factors should be taken into account.

Note that the information provided below is based on the information released to date by MBIE; however the final form of the Risk Assessment Tool is to be confirmed in Regulations issued under the Order, likely in December.

How does the Risk Assessment Tool work?

The Risk Assessment Tool (as currently advised by MBIE, and subject to confirmation in Regulations) sets out four primary questions for an employer to consider, to assess the risk of infection and transmission in their workplace.

The tool has four criteria, at least three of which must be met before a business can require vaccination:

- Workers are in an area with less than 100m² indoor space
- Workers work less than 1m apart from other people
- Workers are routinely near others for more than 15 minutes
- Workers provide services to people vulnerable to Covid-19

Note that each individual role needs to be assessed against these factors – a blanket approach should not be taken.

As noted in our previous Covid-19 Guidance Document, an employer will still be required to consult on the application of the Risk Assessment Tool and the introduction of a mandatory vaccination policy.

What if I disagree with the outcome of the Risk Assessment Tool?

The outcome of a risk assessment is not necessarily determinative of the course of action an employer must make. However, there are some obligations an employer will need to consider when deciding **not** to act consistently with the outcome of a risk assessment.

Assessment outcome: high risk

Where the outcome of a risk assessment is that there is a high risk of infection or transmission of Covid-19, an employer would need a reasonable justification **not** to then implement a mandatory vaccine requirement.

The Health and Safety at Work Act 2015 (“HSWA”) imposes a primary duty of care on a Person Conducting a Business or Undertaking (“PCBU”) to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, or workers whose activities are influenced or directed by the PCBU.

Where an assessment has identified a high risk, and an employer has not taken all reasonably practicable steps (including mandatory vaccine requirements) to mitigate that risk, an employer may be subject to claims that it has failed to meet its primary duty of care.

Assessment outcome: low risk

Where an assessment has determined that there is a low risk of infection or transmission of Covid-19, an employer is unlikely to be justified in implementing a mandatory vaccine policy, unless:

- It undertook another risk assessment process, using a different framework, which established that there was a high risk; or
- The employer was able to rely on the implementation of CVCs in the workplace to justify the requirement for workers to be vaccinated.

Absent either of the above alternatives, an employer would be at a high risk of legal challenge where there is an insufficient basis to justify a decision to mandate vaccinations.

Do I have to use the Risk Assessment Tool?

No, employers are not required to use the Risk Assessment Tool. An employer is entitled to carry out its own health and safety risk assessment. There may be good reason not to use the Risk Assessment Tool. For example, where factors that are not included in the Risk Assessment Tool are critical to your organisations consideration of mandatory vaccinations.

The Covid-19 Response (Vaccinations) Legislation Act provides an employer will have “absolute discretion” to determine whether to use the Risk Assessment Tool or another risk assessment and the decision cannot be challenged by employees.

What could be in a vaccination policy?

This will be specific to each organisation, and the type of Policy, but some common issues that could be covered 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 support employees in being vaccinated
- What steps the organisation may take to deal with medical, or other exemptions
- Potential options for employees who will not be vaccinated
- Possible consequences for employees who will not be vaccinated, 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 approach, and any applicable contractual obligations. However, introducing mandatory vaccination will impose a significant compliance burden on employees, therefore a robust consultative process should be followed. This should, at a minimum, involve providing employees (and relevant unions) with:

-
- the reasons the imposed vaccination policy is being introduced
 - any evidence, advice or analysis being relied upon, including the outcome of the Risk Assessment that has 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.

A recent decision of the Employment Court, *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205, emphasises that an employer must genuinely engage with any alternatives proposed by the employee and allow reasonable time for this consultation to occur.

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. 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 organisation)
- using rapid testing and PPE to reduce the likelihood of transmission by or to the employee

Can I allow an unvaccinated employee to work from home?

This is an operational decision for an employer. If a risk assessment indicates that a role cannot be performed by an unvaccinated worker from the workplace, it would be open to an employer to consider varying the role (with the employee's agreement) to allow them to work from home.

Where this occurs, an employer will need to consider what measures it may need to put in place to ensure the employee's health and safety.

An employer is not required to allow an employee to work from home if it may adversely impact the business.

Can I use rapid testing?

In our view, employers will be able to mandate rapid testing in certain circumstances on health and safety grounds, as they can for drug and alcohol testing. As for vaccinations, 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

However, if you are requiring your staff to be vaccinated because you are implementing CVCs in the workforce, rapid testing is unlikely to be able to be used as an alternative to vaccination.

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

What notice do I have to give an employee who has been terminated?

Where an employee is terminated because the employer requires them to be vaccinated in order to perform their role, they must be provided at least 4 weeks' paid notice (unless your employment agreement provides for more than this).

Should the employee get vaccinated at any point during the notice period, an employer is required to withdraw the notice unless doing so would cause unreasonable disruption to the business.

Want more advice?

Feel free to get in touch with the team at Dundas Street.



You want the multi award winning Dundas Street team in your corner!

New Zealand Specialist Employment Law Firm of the Year 2016, 2017 & 2019.

Expert, practical advice when you need it. Don't just take our word for it – our clients say:

"They are trusted advisers and I cannot fault their expertise, responsiveness and value for money – other counsel just do not compare."

Source Legal 500 2019



dundas street
employment lawyers

04 471 2013
enquiries@dundasstreet.co.nz