

COVID-19 vaccinations – FAQs for New Zealand employers

OCTOBER 2021

With the outbreak of the Delta strain in Auckland and beyond, there has been an increased focus on vaccination as the way out of lockdowns and the path to safely opening up New Zealand.

Until this week, there has been limited legal mandate requiring vaccination of employees, other than border workers, via the COVID-19 Public Health Response (Vaccinations) Order 2021 (**the vaccination order**). That changed on 11 October 2021 when the New Zealand Government announced extension of the vaccination order to require:

- high risk workers (as yet undefined) in the health and disability sector to be fully vaccinated by 1 December 2021, and to receive their first dose by 30 October 2021, and
- school and early learning staff and support people who have contact with children and students to be fully vaccinated by 1 January 2022, and to receive their first dose by 15 November 2021.

The New Zealand Government’s vaccination order, and the increased risk of COVID-19 transmission in New Zealand, raise many questions for employers about what they have to do and what they can do to comply with their obligations. We answer some of the frequently asked questions.

CAN EMPLOYERS, WHO ARE UNAFFECTED BY THE NEW VACCINATION MANDATES, DIRECT EMPLOYEES TO BE VACCINATED?

No, employers not affected by the vaccination order cannot direct individuals to be vaccinated. However, they can require that certain roles be carried out only by vaccinated workers, including employees and independent contractors.

Employers who are concerned about the contraction and transmission of COVID-19 within their workplace must undertake a detailed risk assessment for each employee role (as they should for other risks under the Health and Safety at Work Act 2015) to determine whether the duties of the role need to be carried out by a vaccinated worker. WorkSafe has produced [guideline questions](#) to assist employers in undertaking these risk assessments. The risk assessments will vary depending on a range of factors including what the employer does, the employee’s role and where the employee is based. Employers should consult on the risk assessment with affected employees and unions.

CAN EMPLOYERS DISMISS UNVACCINATED EMPLOYEES?

Yes, but only when the dismissal is justified by either the Government’s vaccination order or a risk of COVID-19 contraction or transmission that cannot be otherwise effectively minimised. Employment law still applies, as does discrimination law.

Employers’ obligations under the Employment Relations Act 2000, Human Rights Act 1993 and Health and Safety at Work Act 2015, and under duties of good faith, require a fair process to be followed. This includes:

- providing the employee(s) with information about the reason(s) for the need to be vaccinated
- consulting with the employee(s), and
- genuinely considering any feedback/response(s) received.

Employers will also have to consider accommodating the unvaccinated status of the employee by:

- where reasonably practicable, modifying ways of working, work arrangements or duties so that the role no longer poses a risk regarding COVID-19 contraction and/or transmission, and
- redeployment to alternative roles that do not require vaccination.

Employers will need to meet these obligations to justify any dismissal, as shown by the recent Employment Relations Authority case of *GF v New Zealand Customs Service*. While it concerned an employee affected by the vaccination order, *GF v New Zealand Customs Service* suggests the Employment Relations Authority will support employers insisting a role be vaccinated, if they follow a fair process and there is demonstrable COVID-19 exposure and transmission risk.

WHAT ARE EMPLOYERS' PRIVACY OBLIGATIONS REGARDING VACCINATION STATUS?

Vaccination status is personal health information as defined by the Privacy Act 2020 and Health Information Privacy Code (**HIPC**).

Employers can ask workers about their vaccination status if they are in roles affected by the vaccination order or if the employer has a legitimate purpose in requesting the information, such as the worker undertaking a role that is deemed at risk from COVID-19. Asking employees about their vaccination status in any other circumstance risks breaching the Privacy Act 2020 and the HIPC.

Employees are not required to disclose their vaccination status to their employer, even if their role is subject to the vaccination order. If an employee decides not to tell the employer, the employer can assume the worker is unvaccinated, but they need to tell the employee that.

Employers who collect information about employees' vaccination status will need to ensure that information is stored securely.

WHAT IF VACCINATED EMPLOYEES DO NOT WANT TO WORK WITH UNVACCINATED EMPLOYEES?

Employees, contractors and other workers have the right to stop or refuse work if they believe that doing the work would expose them, or others, to a serious risk to health and safety. However, before doing so, they need to raise their concerns, the reasons for them and their intention to stop work with their employer.

Employers have an obligation to minimise risks for employees so far as reasonably practicable, which will include following Ministry of Health guidelines and any WorkSafe guidance. This may include the use of physical distancing, providing correct PPE and advising staff with COVID-19 symptoms to stay home. Employees can also request a change to their work arrangements, for example, varying their hours, days or place of work.

If vaccinated, it is unlikely that a worker would be unsafe solely because they are working with an unvaccinated person.

We recommend employers seek specific advice if these issues arise as they require careful management.



CAN EMPLOYERS ONLY HIRE VACCINATED PEOPLE AND FILTER CANDIDATES ON THIS BASIS?

Yes, but only if there is a legitimate purpose for asking the applicant about their vaccination status and a there is good reason for doing so. Employers need to be aware that the Privacy Act 2020 applies to a job applicant's vaccination status and, without a good reason for asking about it, they risk discriminating against unvaccinated applicants under the Human Rights Act 1993. Good reason could include that a detailed risk assessment has established the role has COVID-19 contraction and transmission risk.

If employers ask applicants about their vaccination status, they also need to ensure it could not be reasonably inferred they seek the information for discriminatory purposes as prohibited by the Human Rights Act 1993 (e.g. on grounds of religious, political or ethical belief or disability).

If an applicant does not disclose their vaccine status an employer can assume they are unvaccinated, but the employer needs to explain that to the applicant.

Need to know more?

If you have any questions about vaccinations and the workplace, contact one of Wotton + Kearney's employment lawyers.



Rebecca Scott

Partner (Auckland)

T: +64 9 377 1871

E: rebecca.scott@wottonkearney.com



Murray Grant

Special Counsel (Wellington)

T: +64 4 260 4632

E: murray.grant@wottonkearney.com



Melissa Castelino

Associate (Auckland)

T: +64 9 929 2384

E: melissa.castelino@wottonkearney.com

© Wotton + Kearney 2021

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Company no 3179310. Regulated by the New Zealand Law Society.