**Relevant Covid-19 vaccination information for workplaces**

**For Community Organisations NOT subject to the Covid-19 Public health Response (Vaccination) Orders (Not Mandated)**

*The following information has been compiled from Worksafe, Employment NZ; MOH, MSD and the* [*Covid.govt.nz*](http://covid.govt.nz/) *websites as well as informal legal guidance. This is up-to-date as of 2 December 2021. This does not constitute legal advice. Organisations, employers and staff/workers are encouraged to use these websites for updated information as the Covid-19 environment evolves and Government response, statutes, case law and guidance changes (see list of links/resources at end of document).While we have made every attempt to ensure the information has been obtained from reliable sources, Socialink is not responsible for any errors or omissions or the results obtained from the use of this information.*

***Note:* Use of terms**

The terms 'businesses', 'workers', 'employees' and 'employers' are used because vaccination issues at work involve health and safety law and employment law. Health and safety law applies to PCBUs (Persons Conducting a Business or Undertaking, referred to as 'businesses' below) and workers (including employees and independent contractors). Employment law applies to employees and employers. The use of the term ‘business’ in this document covers not for profit organisations employing staff or using volunteers. The term ‘worker’ includes both paid and unpaid (volunteer) workers with regard to vaccinations, according to Volunteering NZ. Worksafe states its guidance on employees may also be useful for contracting or volunteer arrangements.

**NEW GUIDE For Social Service Providers released 1st December:**

***COVID-19 Protection Framework (traffic lights) – Guidance for Social Service Providers to be read in conjunction with general CPF Guidance***

This document has been released by the Ministry of Social Development and is available at the link below. It will be updated to reflect any changes in the COVID-19 Protection Framework Order. It provides advice for social service providers on operating under each traffic light (Red, Orange, Green); requirements on vaccine passes and staff vaccination and what providers should take into account when making decisions about operating.

The guide states settings differ depending on the services you provide.

[**https://msd.govt.nz/documents/about-msd-and-our-work/covid-19/guidance-for-providers/1-dec-2021-social-service-providers-covid-protection-framework-guidance.pdf**](https://msd.govt.nz/documents/about-msd-and-our-work/covid-19/guidance-for-providers/1-dec-2021-social-service-providers-covid-protection-framework-guidance.pdf)

**Deciding about Vaccination in the Workplace**

**Critical Points:** **Employers/Businesses not under the public health mandate should:**

* **undertake a risk assessment of every role,**
* **consider how to mitigate risks,**
* **comply with employment law,**
* **follow best practice procedure,**
* **act in good faith at all times*.***

Employers can require other work (that is not covered by the Public Health Order) to be done by a vaccinated employee, if a risk assessment identifies this is necessary for work health and safety purposes. That may be the case where the nature of the work itself raises the risk of COVID-19 infection and transmission above the risk faced outside work.

**Completing the risk assessment**

Businesses not subject to a government mandate will soon have a new prescribed assessment process they can follow to determine if work at their business needs to be done by vaccinated people.

The Government is consulting with business and workers representatives on this assessment process. According to Worksafe, from mid-December there will be a new vaccination assessment tool that businesses and services can use to decide whether they can require vaccination for different types of work.

This assessment will build on the guidance provided by WorkSafe (see below), which businesses can follow in the interim. The new process won’t override risk assessments that businesses have already done under this existing guidance.

Businesses cannot require any individual to be vaccinated. However, businesses can require that certain work must only be done by vaccinated workers, where there is high risk of contracting and transmitting COVID-19 to others. This risk depends on the COVID-19 situation domestically.

To decide that work needs vaccination for health and safety reasons, businesses must first assess their COVID-19 exposure risk. This applies to work done by all workers, whether employees or independent contractors. Businesses must involve workers, unions and other representatives in the risk assessment process.

Businesses need to consider if there is a high likelihood the person performing the role may be exposed to COvid-19 and that the consequences would be significant for other people (eg community spread).

Businesses should consider whether other public health measures (eg physical distancing, PPE usage) can minimise the risk of exposure and transmission of COVID-19.

Your focus in the risk assessment must be on the role – the work being done – rather than the individual performing the role.

If you want your employees to be vaccinated for reasons other than work health and safety that is an employment matter.

When completing the risk assessment, you:

* must complete it with employees and their representatives
* may like to get a health and safety professional to provide advice for your specific circumstances.

Worksafe have developed some questions to help you complete the risk assessment. There are likely to be other questions specific to your work that you should also ask. Discuss these questions with your employees. Think about what the work tasks look like for a typical day or week. Identify the risk rating indicated alongside each risk factor. Where a situation is not black and white, a judgement call will need to be made. Advice from a health and safety professional may help you do that.

If a role doesn’t require a vaccination you may still have staff who are concerned about working with someone who is unvaccinated. This is a factor that needs to be considered in the risk assessment i.e. staff safety as well as what mitigation measures can be put in place (managing COVID infection transmission risks in the workplace) as well as vaccination rates in your area.

If someone bullies or won’t work with someone who is unvaccinated, and the workplace has put in place steps to eliminate or minimise the risk ‘so far as is reasonably practicable’, an employer needs to set clear expectations regarding behaviour. If the bullying or disruptive behaviour continues you may need to consider other measures available under current employment law. Business should have policies around the importance of employees being respectful and not belittling or demeaning other staff members, including around attitudes around COVID 19 vaccination and other measures.

**Volunteers**

Volunteers as unpaid workers will require a similar approach to risk assessment as you would use with paid employees.

**Worksafe’s Risk Assessment:**

**1.** Consider these risk factors

* How many people does the employee carrying out that work come into contact with? (very few = lower risk; many = higher risk)
* How easy will it be to identify the people who the employee comes into contact with? (easy to identify, such as co-workers = lower risk; difficult to identify, such as unknown members of public = higher risk)
* How close is the employee carrying out the tasks in proximity to other people? (2 metres or more in an outdoor space = lower risk; close physical contact in an indoor environment = higher risk)
* How long does the work require the employee to be in that proximity to other people? (brief contact = lower risk; lengthy contact = higher risk)Does the work involve regular interaction with people considered at higher risk of severe illness from COVID-19, such as people with underlying health conditions? (little to none = lower risk; whole time = higher risk)
* What is the risk of COVID-19 infection and transmission in the work environment when compared to the risk outside work? (equal to outside work = lower risk; higher than outside work = higher risk)
* Will the work continue to involve regular interaction with unknown people if the region is at a higher alert level? (no = lower risk; yes = higher risk).
* Record your results.

2. Consider other controls. Identify any further infectious disease controls you and your employees could put in place to reduce the risk e.g. mask wearing, social distancing, hold meetings via zooms, or work remotely. While working remotely may be suitable for a period of time it might not be reasonable on a permanent basis due to impacts on work culture, innovation etc. The Ministry of Health has detailed information about how to prevent the spread of COVID-19 at work.

3. Assess the results of your risk factor discussion and the impact of any extra controls you will implement.

If your risk ratings tend toward higher risk and you are not able to reduce that risk by implementing more controls, you and your employees should consider whether the work should be performed by a vaccinated employee.

If your risk assessment is clear that the risk of COVID-19 infection and transmission through a particular work task is no higher than outside work, you may decide not to require the role to be performed by a vaccinated employee – but you can still act. Making it as easy as possible for your employees to get vaccinated is a great way to support New Zealand’s fight against COVID-19.

Risk assessments will need to be ongoing as risks change e.g. extent of community transmission in your region.

**Worksafe’s enforcement approach to this HSWA risk assessment**

We [Worksafe] recognise that:

* most businesses and services do not have infection control expertise and rely on direction and advice from public health experts
* the pace of change in the COVID-19 pandemic is unprecedented when compared with typical risks to work health and safety, and
* for these reasons, it will not always be easy for businesses and services to ‘get things right’.
  + Therefore, our expectation is that to decide whether work requires a vaccinated employee: you carry out an adequate risk assessment, and
  + engage effectively with workers and their representatives.

Where a business or service can demonstrate it has done this, Worksafe will not take prosecution action if Worksafe disagree with the decisions you made in your risk assessment. (This only applies to enforcement action within WorkSafe’s responsibilities.) We will instead take an education-first approach, so you understand what is reasonable to require in your circumstances and have the opportunity to act on it.

**Visitors to a workplace**

To determine if visitors to your workplace need to be vaccinated this will need to be addressed as part of the risk assessment e.g. do staff have underlying conditions, a small work space so can’t socially distance; or work with people who have health vulnerabilities

**Asking employees about their vaccination status and protecting personal information**

Collecting, storing and sharing information about people’s vaccination status must be done in accordance with the Privacy Act.

Generally, a worker does not need to disclose (or prove) their vaccination status to a business.

If certain work cannot be done by an unvaccinated worker, a business can ask a worker about the worker’s vaccination status. If the worker does not disclose (or provide evidence about) their vaccination status, the business may assume the worker has not been vaccinated for the purposes of managing health and safety risks. However, businesses should first inform workers of this assumption, and what will happen if the worker is not vaccinated or does not disclose their vaccination status.

Employees cannot be redeployed or disadvantaged for refusing to disclose their vaccination status, unless particular work cannot be done by unvaccinated employees.

**Asking candidates whether they are vaccinated during a job interview**

Businesses can only ask candidates if they are vaccinated when this is justified by the requirements of the role. For example, if a business decides, following a COVID-19 exposure risk assessment, that certain work cannot be performed by an unvaccinated worker, it may be reasonable to ask about an applicant’s vaccination status. This information will need to be collected and handled according to the Privacy Act.

**Protecting personal information**

Businesses must take reasonable steps to ensure information about vaccination status is collected lawfully, including that workers are aware of how this information will be used, and why it is being collected. Businesses must not pass on information about a worker’s vaccination status to others without the worker’s consent, or otherwise allowed by the Privacy Act.

**What to consider when work has been determined to require the employee to be vaccinated**

If certain work can only be done by vaccinated workers, businesses should set a reasonable timeframe for workers to decide if they will be vaccinated. If an employee cannot work during this time, special paid leave should be considered, especially in the short term while employers and employees discuss what happens next.

Businesses, workers and their representatives should communicate early and openly. The duty of good faith in employment relationships and consultation requirements under the Health and Safety at Work Act also apply to conversations about workplace vaccination issues. Businesses and workers can access support from MBIE’s Early Resolution Service to resolve employment problems early and informally.

Under upcoming legislation, workers will be eligible for paid time off to receive their COVID-19 vaccination. Employers are encouraged to offer this to employees now and all New Zealanders should consider getting vaccinated as soon as possible.

If there are practical barriers to accessing vaccination (eg travel or time off work is needed), businesses should help address these. Some workers will have individual health concerns or other reasons for needing support.

Unite against COVID-19 has posters, videos and flyers you can share with your staff to get them on board.

**Employment law continues to apply if work cannot be done by unvaccinated employees**

Law changes will clarify the process for situations where a worker chooses not to be vaccinated, but the work requires a worker who is vaccinated.

**New requirement for paid notice period when employment is terminated because of vaccination status**

The Government has passed legislation to provide a minimum four-week paid notice period when people have their employment agreements terminated because they are not vaccinated, and their work requires vaccination.

This change will only apply to employees who do not have a notice period, or whose notice periods are shorter than four weeks. If an employee has a notice period longer than four weeks in their employment agreement, that will continue to apply.

The Government plans to pass legislation that will clarify the grounds for requiring work be done by a vaccinated person.

Keep an eye on updates at<https://www.employment.govt.nz/>

Other aspects of employment law will not change, including that:

* Employees and employers must continue to deal in good faith.
* Employers must still consider all reasonable alternatives, such as finding other work within the business that does not require vaccination.
* Employees will also be able to challenge any decisions they think are unfair, for example by raising a personal grievance.
* Current employment law continues to apply

This information covers current law and will be updated to reflect change to the law expected in December.

Particular laws apply for employees and employers. The information in this section is for employment relationships where an employee does work that can only be done by a vaccinated worker, either:

* For health and safety reasons, justified by a COVID-19 exposure risk assessment, or
* Because their work is covered by the COVID-19 Public Health Response (Vaccinations) Order 2021.
* If employees are doing work that can only be done by a vaccinated worker, but are not vaccinated, employers will need to address any practical barriers to accessing vaccination (eg if travel or time off work is needed). Employers should do this before considering any of the options below.

Employers should take care to be fair and reasonable in their response, and work through processes with employees in good faith before deciding on any outcome.

**Changing work arrangements or duties**

Employers should consider how much of an employee’s work poses a high risk of exposure to COVID-19. Employees and employers can both agree to change work arrangements (eg location or hours of work) or duties (eg job content), which could mean a role no longer poses a high risk. This outcome should be mutually agreed.

Employers should also consider whether the tasks that require vaccination can be deferred. For example, if an employee has a particular reason for not being vaccinated (eg certain medical conditions, or existing medication regimes) then this might mean certain alternative arrangements can be agreed for the short term, with vaccination planned for a later date.

**Modifying employment agreements during COVID-19 response and recovery**

*Taking leave*

Employers and employees can together agree on a form of paid leave, either special paid leave or annual leave. Special paid leave should be considered, especially in the short term, when employers and employees are discussing whether an employee will be vaccinated and what will happen if the employee is not vaccinated.

If an employer and employee cannot agree, the employer may direct the employee to take annual leave (if the employee has leave entitlements available) with at least 14 days’ notice.

*Unpaid leave*

An employer cannot make their employee take unpaid leave without their consent. If an employer has directed their employee to take unpaid leave, this could be seen as the employer unlawfully suspending the employee.

*Restructuring work*

Employers may also consider restructuring, including redundancies, if most (or all) of a role carries an established high risk of exposure to and transmission of COVID-19. This could mean that the introduction of COVID-19 vaccines has changed the role to the extent that it can only be done by vaccinated employees. Employers may need fewer unvaccinated employees as a consequence. If so, employers should take care to act in good faith and consistent with any provisions in employment agreements. Employers are strongly encouraged to seek legal advice about this.

Redundancy must be the last option, after all other options (eg redeployment where possible or rearranging work) have been exhausted. An employer and employee may agree to a negotiated end of employment.

**Amending employment agreements and workplace policies during COVID-19 response and recovery**

*Amending existing employment agreements* Employers and employees (or their unions, for a collective agreement) can negotiate variations to existing conditions. This could include adding COVID-19 vaccination as a term of employment, if it is reasonable for the role (for example, required for health and safety reasons).

Businesses must engage with workers, unions and other representatives when creating or varying policies and use established processes where possible. Changes to workplaces policies must not result in inconsistency with employment agreements.

*Requiring vaccination for new employees*

Employers can require vaccination as a term of new employment agreements, but this must be reasonable for the role (for example, required for health and safety reasons). Once the law has changed, employers that find work should only be done by vaccinated people, using the prescribed assessment process, can include this term in new employment agreements. This must not be unlawful discrimination under the Human Rights Act.

The New Zealand Bill of Rights Act may also apply. Under this Act, everyone has the right to refuse medical treatment, including vaccination, though this right can be subject to justified limits.

*Right to stop unsafe work*

Workers have the right to stop work or refuse to carry out work if they believe that doing the work would expose them, or anyone else, to a serious risk to health or safety from an immediate or upcoming hazard.

In general, unless vaccination is needed for health and safety reasons, work is unlikely to be unsafe solely because it is done around unvaccinated workers.

*Flexible work arrangements*

Employees have the right to request a change to their work arrangements, which includes their place of work.

**Questions about health issues related to the vaccine**

Employers must be open and communicative and respond to workers in good faith where issues are raised by workers, including related to vaccination.

However, this does not mean employers/PCBUs need to debate or provide detailed answers to questions about the vaccination, its safety, and/or its effectiveness as a control against infection/transmission/severe illness.

Where detailed medical questions are raised, an employer/PCBU is able to rely upon expert public health advice for those matters (eg information on COVID-19 vaccines from the Ministry of Health NZ) and MedSafe approvals of vaccines, and should point workers who are concerned to that information.

Employers/PCBUs should consider providing a worker with access to someone who can deliver this advice in a way that is readily understood, if that was reasonable and practicable in the circumstances – this could include a medical practitioner.

An employer/PCBU can then focus any good faith conversation on whether a worker will be vaccinated to do work covered by the Vaccinations Order, or where the PCBU has required that specified work is only done by vaccinated workers for health and safety reasons, following a health and safety risk assessment.

**Sharing vaccine misinformation in the workplace**

Before any vaccine is approved for use in New Zealand, it must meet international standards and local requirements for quality, safety and efficacy. We should all play our part, by relying on trustworthy information about vaccines.

Sharing vaccine misinformation could, in some circumstances and in some workplaces, potentially amount to misconduct in the workplace. Such instances are likely to be rare. Employers should seek legal advice before taking any action for such conduct.

**For all workers**

Worksafe has provided the following advice for all workers while working during the COVID-19 pandemic:https://www.worksafe.govt.nz/managing-health-and-safety/novel-coronavirus-covid/covid-19-information-for-workers/

As a worker you must:

* take reasonable care of your own health and safety and ensure that your actions don’t cause harm to yourself or others
* comply with any reasonable instructions, policies or procedures on how to work in a safe and healthy way.

You should also follow all COVID-19 government advice in your personal life to reduce the risk to your co-workers or others at your work.

**Employer liability**

If an employee is injured from having a vaccination some have questioned if the employer is liable. This requires specific litigation advice as it is complex and no legal cases have arisen to date. It is possible ACC would cover in this scenario.

**Continuing with other public health measures**

Vaccines play a critical role in reducing risks of COVID-19 infection and transmission. They are something all businesses should consider as part of their health and safety activities and assessments. Vaccination supports, and does not replace, other infection prevention and control measures. Workers, representatives and unions should be involved in this process.

Businesses must take steps to eliminate or otherwise minimise risks, including the use of personal protective equipment and cleaning, where recommended under public health guidance.

Businesses and other organisations should continue to encourage use of the NZ COVID Tracer app by clearly displaying QR codes, and must follow Alert Level rules.

**Useful Links and sources of information**

**Ministry of Health**

Information on vaccines:

https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines

Guidance for workplaces that have a case of COVID-19

<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-health-advice-public/contact-tracing-covid-19/guidance-workplaces-have-case-covid-19>

Unite against COVID-19 has general information and specific information for businesses and services

<https://covid19.govt.nz/business-and-money/>

**Ministry of Social Development**

Has up to date information and answers to common questions from its social service providers

<https://www.msd.govt.nz/about-msd-and-our-work/newsroom/2020/covid-19/guidance-and-information-for-all-social-services.html>

Guide for social service providers:

<https://msd.govt.nz/documents/about-msd-and-our-work/covid-19/guidance-for-providers/1-dec-2021-social-service-providers-covid-protection-framework-guidance.pdf>

**Employment New Zealand (**It is the employment regulator within MBIE).

<https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/employment-nz-approach-to-covid-19/>

**Worksafe**

<https://www.worksafe.govt.nz/managing-health-and-safety/novel-coronavirus-covid/>

**Human Rights Commission**

Background to and FAQ on human rights and government obligations in relation to Covid-19, including employment, vaccines;

<https://www.hrc.co.nz/resources/human-rights-relation-covid-19/>