



Vaccinations in the Workplace

April 2022



Introduction

The public health justification for requiring vaccination is stronger when the risk of COVID-19 infection and transmission at work is higher than it is in the community. Therefore, it is important that employers are aware of their employment and health and safety responsibilities in relation to vaccinations.

Workplace vaccination obligations

Employers have a health and safety duty, as far as reasonably practicable, to reduce the risk of a hazard occurring in the workplace. Therefore, employers must consider what control measures can be implemented to reduce the risk of infectious diseases in the workplace (eg COVID-19, Influenza, Hepatitis). This may include implementing an immunisation program either encouraging, or in some cases requiring, employees to get vaccinated.

The Government may require certain work in specific industries and workplaces to be undertaken by employees who have received up-to-date vaccinations.

If your workplace isn't covered by a government vaccination mandate, you may undertake a risk assessment to determine if you can require work to be carried out by vaccinated workers, on health and safety grounds. Employer imposed vaccination requirements should be used carefully and based on up-to-date public health advice.

Check the below websites for information on infection control and vaccinations:

- Ministry of Health:
<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines>
- Unite against COVID-19:
<https://covid19.govt.nz/covid-19-vaccines/how-to-get-a-covid-19-vaccination/vaccinations-and-work/>
- WorkSafe's guidance on COVID-19:
<https://www.worksafe.govt.nz/managing-health-and-safety/novel-coronavirus-covid/covid-19-controls-at-work/>

Risk assessments and meeting your obligations

Conduct a risk assessment in consultation with your workers to identify the level of risk in the workplace and consider the extent to which other controls can manage that risk. Consider your business' operations and industry, public health advice and if there are legislative or regulatory guidance on control measures.

Employers are encouraged to regularly review their risk assessment to consider how things may have changed in their business alongside any new public health advice. A risk assessment should never be carried out with an end goal in mind.

Controls measures can include:

- An immunisation program, whether encouraged or mandated. This may be an effective control measure to reduce the likelihood of infection and its spread throughout the workplace, depending on the outcomes of your risk assessment. However, other control measures are still required to adequately meet your health and safety obligations.
- Control measures such as providing Personal Protective Equipment (PPE), practicing hand hygiene, physical distancing, engineering controls such as screens or barriers etc. may be enough to meet your obligations without requiring employees to get a vaccination, depending on the outcome of your assessment.
- Consider implementing a detailed infection control policy which addresses vaccinations and an immunisation program.
- Where your risk assessment identifies vaccination as a reasonable control measure, but it cannot be implemented for whatever reason, additional control measures will need to be developed and implemented.
- Keep confidential records of those who have been vaccinated against particular diseases and other control measures implemented to reduce the risk of infection spread, subject to privacy obligations.

The Government previously had a COVID-19 vaccination assessment tool available for businesses however this has since been revoked and businesses are no longer recommended to use the assessment tool. However, any employment decisions (such as terminating the employment of unvaccinated workers) that were previously made using the Government's vaccination assessment tool remain valid. Going forward, a full health and safety risk assessment should be used to determine whether an employer-imposed vaccination requirement is reasonable.

Please keep in mind that the 'reasonableness' of a direction to vaccinate may change over time. For example, the changing nature of the COVID-19 pandemic means the risks posed by the disease may be reduced (or increased) as circumstances change and new public health advice becomes available about COVID-19 and its variants. Therefore, it is important to monitor and review your risk assessment in light of changing or new guidance.

Directing an employee to get vaccinated

The ability to direct an employee to get vaccinated will be situational, fact-dependent, and require a case-by-case assessment of all factors concerning the workplace, employees' circumstances, and the nature of the work performed.

Generally, there are two circumstances where it is likely that the employer can require an employee to be vaccinated:

- there is legislation requiring the employee to be vaccinated against a particular disease in order to work in a specific field,
- if no legal requirement exists, where the direction to vaccinate is considered lawful and reasonable following a risk assessment and in all of the circumstances (including on health and safety grounds).

Information and rules regarding workplace vaccinations are subject to change and evolving government guidance and cases in this area.

Legal requirement to be vaccinated

If a public health direction requires a particular employee to be vaccinated, then it is reasonable for a business to enforce this. Notify employees of vaccination requirements under government law or public health order and follow the relevant guidelines.

It's important to note that employment law still applies, and employers are obligated to follow a fair and reasonable consultation process with any employee that refuses to get vaccinated, even where there is a public health direction in place mandating vaccination. Part of

this process should include considering whether alternatives to termination are available to the employer such as redeployment into a role that does not require vaccination.

Vaccination exemptions may exist for some employees, such as on medical grounds. If an employee is exempt, obtain evidence of their circumstances and put in place measures to mitigate the risk of infection transmission. If it is still unsafe for the employee to perform their duties, call the Advice Team on 0800 675 697 to discuss your options.

No legal requirement to be vaccinated

In the absence of a legal requirement to be vaccinated, you can only require an employee to be vaccinated if the direction is considered lawful and reasonable. It is important to note that in most cases, employer-imposed vaccination requirements are unlikely to be a reasonable first response for managing the risk.

A direction may be considered lawful if it is not contrary to an individual employment agreement or collective agreement, or Government law that applies.

What is reasonable will likely depend on a number of factors, including:

- whether there is a greater risk of the worker being exposed to new variants of the infectious disease at work than there is in the community, and
- the nature of the workplace (is there a possibility that employees can come into contact with the disease, for example interacting with members of the public or working in close proximity to other employees for extended periods?)
- the employee's circumstances, including the nature and risks of the duties they perform in an environment which may be prone to infection spread or where close contact with vulnerable people is required
- whether the worker regularly interacts with people who are less likely to be vaccinated against COVID-19, and
- the effectiveness of other measures to successfully mitigate the risk of infection spread, and
- whether the employee has a valid reason (eg medical) for refusing the vaccine.

To establish the reasonableness of a direction to get vaccinated, businesses should undertake a health and safety risk assessment that includes following any existing industry guidance.

The assessment should always be conducted in consultation with workers. If you determine that you cannot reasonably direct an employee to be vaccinated, consider encouraging employees to receive a particular vaccination.

If an employee refuses to get vaccinated for any reason, contact the Advice Team on 0800 675 697 for specific advice on your circumstances.

Paid notice period

Employers are required to provide a minimum four-week paid notice period for employees who have their employment terminated because they are not vaccinated, and their work requires it.

If the notice period in the employee's employment agreement is longer than four weeks, they will be entitled to this instead. The notice period must be paid, including in most circumstances where the employee is unable to work.

The entitlement applies to both employees who are covered by a public health order mandating vaccination in a specific field and employees whose employer has determined the employee must be vaccinated to carry out their work.

It is important to take into consideration that the legislation also requires an employer to cancel the termination and allow the employee to come back to work if they get vaccinated during their notice period, except for in very limited circumstances.

Please contact the Advice Team on 0800 675 697 if you have specific queries on notice periods and your obligations.

Cost of vaccination and paid time off to get vaccinated

If the vaccination is required or mandated for your employees, you must pay the cost (if any). The Government has confirmed the COVID-19 vaccine is free of charge.

Employers are legally required to provide reasonable paid time off for all employees to get vaccinated against COVID-19.

Generally, reasonable paid time off should include the time taken to travel to the nearest, or other reasonably close, vaccination site and back to work, as well as at least 30 minutes spent at the site. However, keep in mind that some employees may be required to stay for longer than usual monitoring after receiving the vaccination (eg due to health reasons) and this should be included in paid time off.

Before taking paid time off, employees should notify you of:

- The date(s) and time(s) they intend to receive a dose of a COVID-19 vaccine; and
- The amount of time they wish to take as paid time off (including travel time).

You may be able to safely decline an employee's request to take time off in limited circumstances. If you wish to decline an employee's request for time off for any reason, please contact the Advice Team on 0880 675 697 to get specific advice.

Third parties requiring vaccination

Even where your risk assessment determines it would be inappropriate to implement a vaccination requirement in your business, you might deal with clients or third parties that make vaccination a condition of your contract with them and your employees accessing their site(s).

It is reasonable to structure your business to meet your clients' requirements. Generally, it would be lawful for you to require vaccination for employees who are assigned to work with clients who make it a condition of doing business with them and entering their sites.

In these circumstances, you may be required to restructure your operations if you have unvaccinated employees. As part of this process, you should consider whether options, such as reorganising staffing or redeployment are available with redundancies being a last resort.

If you are unable to reorganise your workforce to meet client requirements, contact the Advice Team on 0800 675 697 to discuss the appropriate process.

Making vaccinations a condition of employment

Making vaccinations a condition of employment may be reasonable but depends highly on the circumstances. Consider whether:

- there is a legal requirement for employees to get vaccinated in your business or industry
- it is an inherent requirement of the role that a prospective employee will perform, or
- if unvaccinated, will the employee present a risk to the health and safety of themselves or others.

You could be exposed to a successful discrimination claim if you do not engage a prospective employee because they have not been vaccinated on medical or religious grounds.

BrightHR VaccTrack

Employsure clients with access to BrightHR can now access the VaccTrak feature which allows employers to record when employees have received their COVID-19 vaccine and provide staff with information on the vaccination process through COVID-19 e-learning courses.

If you would like further information, please contact our Bright team on 0800 675 707.

More questions?

Call the Advice Team on 0800 675 697 or email advice@employsure.co.nz for specific advice on your employment and health and safety responsibilities in relation to vaccinations in the workplace.