

COVID-19 vaccinations in the workplace: take a shot or take a hike?, 23 April 2021

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As the COVID-19 vaccination roll-out begins to ramp up across New Zealand, employers and employees alike are faced with important and complex questions about the relationship between the need to ensure the workplace is safe for all workers and the individual rights of workers to refuse medical treatment including vaccinations.

The New Zealand Government has not made the requirement to be vaccinated against COVID-19 mandatory, although it is strongly encouraging New Zealanders to take the vaccine as it becomes available. So, in the workplace, particularly those where workers could be exposed to a higher risk of COVID-19 infection, employment relationships and issues about vaccination will have to be carefully managed.

Because the circumstances are continually evolving, there is some uncertainty about the legal position regarding employers requiring employee vaccinations. However, in most situations requiring vaccination is unlikely to be lawful. This article discusses the potential tension between the competing interests of employers and employees and the obligations of both parties.

Managing risks associated with COVID-19/Employer and Employee obligations under the Health and Safety at Work Act 2015

Employer obligations

Under the Health and Safety at Work Act 2015 (“HSWA”), a Person Conducting a Business or Undertaking (“PCBU”) is obliged to manage risks such as COVID-19 in the workplace. PCBUs have a primary duty to ensure as far as reasonably practicable, the health and safety of its workers, which includes both employees and contractors.

There are many ways employers can manage the health and safety risks of the virus, such as by enforcing mandatory mask wearing, hand washing, social distancing, and remote working. Other positive steps to mitigate COVID-19 risks may include workplace encouragement to be vaccinated, active and constructive engagement with employees and/or unions about vaccination, and providing employees with options for flexible working.

Employers need to ensure they have given due consideration to feasible measures of managing the COVID-19 health and safety risk in the workplace. What is “feasible” will require a case-by-case analysis and

is dependent on factors including the risks of COVID-19 in the particular workplace, staffing requirements of the business, and the practicality of making changes to ways of working.

Worker obligations

Workers also have a duty under the HSWA to ensure that they:

- take reasonable care of their own health and safety;
- take reasonable care that their actions or omissions do not adversely affect the health and safety of other persons;
- co-operate with any reasonable workplace health and safety policy or procedure that the business has; and
- comply with any reasonable instructions given by the business.

This means that workers should co-operate reasonably with PCBUs to ensure their own safety and the safety of other workers in the workplace. It is in everybody's interests to ensure a safe and healthy working environment.

Can an employer direct or require staff to have a COVID-19 vaccine?

The key point is that an employer direction to instruct staff to do something must be both lawful and reasonable. Any requirement for employees to be vaccinated must be balanced with their right to make individual choices and their bodily autonomy which would normally include a right to refuse medical treatment, such as a vaccination.

As a result, it is likely that an employer cannot require staff to be vaccinated in the vast majority of workplaces and roles.

What is considered "reasonable" could change over time and is affected by evolving risk factors (such as the recent implementation of the Trans-Tasman bubble), and the general risk of exposure and COVID-19 infection in the community. Given the low or non-existent rates of community transmission in New Zealand, there is much less justification to impose mandatory workplace vaccinations.

What is considered "reasonable" will also vary across the different groups who, due to the nature of their roles, are either at high-risk (frontline border workers or healthcare staff) or low-risk (such as the vast majority of New Zealand workers who do not have contact with the border).

Overall, because a direction to take the vaccine would cut across an employee's individual choice to be vaccinated, a direction could only possibly be considered "reasonable" if there were serious and significant risks to the workplace. As there is currently low risk of community transmission in New Zealand, it is hard to see many workplaces where this would apply.

Current government guidance from the Ministry of Business, Innovation and Employment (MBIE) reflects this, and provides that employers must first have completed a health and safety risk assessment to support a requirement that a particular role should be done by a vaccinated employee. This assessment should be done in collaboration with employees, unions, or other representatives, and involves considering at least 2 factors:

- a) the likelihood of a worker being exposed to COVID-19 while performing the role; and
- b) the potential consequences (degree of harm) of that exposure for others.

The situation may be different with respect to new employees. Advice from MBIE provides that employers can require vaccination as a condition for new employees, but any requirement must be reasonable for the role.

Finally, whether it is lawful for employers to mandate COVID-19 vaccinations is a distinct issue to "reasonableness". Requiring employees to have a vaccination would most likely not be contrary to anything in an employee's employment agreement not least because employment agreements contain a stated or implied requirement for the employee to comply with health and safety obligations. Therefore, it is likely that the most important issue will always be whether requiring vaccination is reasonable.

What can an employer do if the employee is unwilling to be vaccinated?

Guidance from MBIE provides that if the health and safety risk assessment identifies that the employee's role is one which requires a COVID-19 vaccination, but the employee is not vaccinated, then temporary or permanent changes may be made to the employee's duties on the basis of health and safety reasons. As part of this process, employers and employees should consult with each other in good faith and alternative options should be explored by the parties. These may include moving the employee into a lower-risk role, flexible working arrangements, or unpaid leave.

The parties may negotiate variations to their existing employment agreement, such as the requirement to vaccinate. The guidance from MBIE further provides that parties may also agree to a negotiated end of employment; however, employers should be mindful that MBIE's opinion, based on the current circumstances, is that any dismissal on the grounds of refusal to vaccinate is unlikely to be found to be justifiable.

Does an employee have to disclose their vaccination status to an employer?

MBIE guidance provides that employers can ask an employee if they are vaccinated, but employees do not have to tell their employers if they are vaccinated. If employees do not tell employers whether they have been vaccinated, then employers may assume they are not vaccinated but should inform them of this assumption.

Under the Privacy Act 2020, employers also have an obligation to protect personal information about employees' vaccination status and cannot share this information (including with other employees) without that employee's consent.

Human Rights Act 1993

An employer should also be mindful of broader statutory obligations. In addition to a possible personal grievance claim under the Employment Relations Act, the employer may be vulnerable to claims under the Human Rights Act ("HRA") if:

- the employer requires a vaccination; and
- the employee refuses; and
- the employer disadvantages the employee or dismisses the employee.

In these circumstances, the employee could bring a claim under one of the protected grounds under the Human Rights Act, which prevents discrimination on grounds of:

- Religious beliefs;
- Ethical beliefs; and
- Disabilities and other medical conditions.

The employee could claim discrimination under one of these grounds if they had a religious, ethical or medical reason for refusing the vaccine. Therefore, an employer should tread carefully when changing an employee's role because of a refusal to be vaccinated.

Summary

Whether an employer can require a worker to be vaccinated requires careful analysis of the competing interests between the employer's health and safety obligations and the rights of the individual worker. This issue is further complicated by the absence of any direct guidance from the courts about how these rights and obligations should be balanced.

This issue requires careful consideration and good faith dialogue between employers and workers. Any decision must be grounded in the needs of individual workplaces, the rights of workers and a thorough analysis of the risks involved.