

Ensuring your staff are vaccinated for COVID-19

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With the arrival of the Pfizer/BioN Tech vaccination, the Ministry of Health has initiated New Zealand's largest immunisation roll-out to date. With this, some employers are having to grapple with when mandatory COVID-19 vaccinations for their employees may be considered fair and reasonable, or whether they can operate by relying on their employees to choose to be vaccinated.

In short, mandatory vaccinations may be reasonable based on the parties' obligations under the Health and Safety at Work Act 2015. Where the risk assessment evidences a genuine and serious connection between the worker having the COVID-19 vaccine and being able to safely or effectively carry out their role, then a mandatory vaccination may be reasonable.

This seems to be supported by MBIE, who has advised that employers can require a specific role to be performed by a vaccinated person, provided employers complete a health and safety risk assessment, in collaboration with workers and unions (if applicable).

The employer should assess the nature of the work completed by the employee, the risk of exposure and effectiveness of alternative options to mitigate the risk of exposure or to accommodate the employee.

In addition, employers can require new workers to receive the vaccine, provided this is made a condition of their employment and, as above, the requirement is reasonable bearing in mind the position.

However, there are options short of mandatory vaccinations. Employers can choose to simply encourage their employees to be vaccinated by communicating openly about how or when workers can receive the vaccine. Employers can also set an expectation that employees be vaccinated, by ensuring the vaccine is available to all staff and setting out potential options, such as redeployment, for those who are not vaccinated and cannot safely perform their role. This is a requirement in respect of public sector agencies, as they are now expected to enforce a vaccination plan, irrespective of whether workplaces have priority groups on site. Alternatively, employers can seek agreement from existing employees to be vaccinated.

Issues of discrimination and privacy also arise in this context. Employers must take care not to treat employees or contractors, including prospective employees or contractors, differently or adversely based on any of the prohibited grounds of discrimination (including disability and religious belief). Where workers refuse to be vaccinated based on a health/medical condition or religious belief, claims may be available under the Employment Relations Act 2000 or the Human Rights Act 1993.

Above all, employers must adhere to their good faith obligations when considering issues related to the COVID-19 vaccine at work. While employers can encourage workers to be vaccinated, they should remain alive to the risk of legal challenge if they wish to make it a requirement but are unable to point to a robust rationale.

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