

# Mandatory Vaccinations, Flexible Working and Medical Incapacity

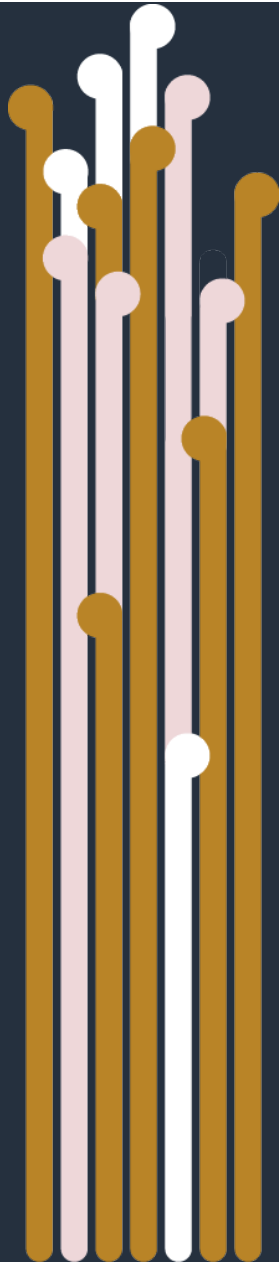
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# Agenda

- The impact on employer vaccination policies following the Governments' move to ease vaccination mandates
- Working in a COVID-19 world: managing working from home and flexible working arrangements
- Medical incapacity and COVID-19.



# Employer vaccination policies and easing of vaccination mandates

# Summary of recent changes

- **Vaccine Mandates**
  - From April 4 2022: vaccination mandates removed (except health, aged care, corrections, border and MIQ workers)
- **My Vaccine Passes and QR Codes**
  - From April 4 2022: My Vaccine Passes and scanning requirements removed
- **Amendments to Traffic Light Settings**
  - **Red:** Outdoor capacity limits removed, indoor capacity limits raised to 200, outdoor face mask requirements removed.
  - **Orange:** All restrictions removed, except face mask requirements.

# ***Yardley v Minister for Workplace Relations and Safety***

- Judicial review proceedings brought by Police and NZDF workers against Government decision to mandate vaccinations.
- High Court found the Vaccinations Order imposed an **unjustified limitation** under NZBORA, and limit was not **demonstrably justified**, including because:
  - ~1% of unvaccinated staff, so Order did not advance its **purpose** – to ensure continuity of services
  - **threat of Omicron**
    - existed for vaccinated (two doses) and unvaccinated staff
    - was temporary vs permanent dismissal
  - Order was a blunt instrument without the flexibility achieved under a workplace policy.

# What does this mean for employers?

- Employers need to revisit their health and safety risk assessments and reassess in light of Omicron
- Vaccination effectiveness for Omicron?
  - Less effective reducing transmission compared to Delta but booster still makes a difference
    - Two doses = 10% after 25 weeks
    - Booster = 65% initially, 40% after 15 weeks
- Without booster requirement, likely less of a justification to mandate vaccination in workplace.

# What does this mean for employers?

## Public Health Factors - relevant to risk assessment

- Is there a greater risk of worker being exposed to new variants at work than they would in the community?
- Level of interaction with vulnerable persons
- Level of interaction with unvaccinated persons
- Does the worker, work in a confined indoor space for ongoing periods?

## Other considerations?

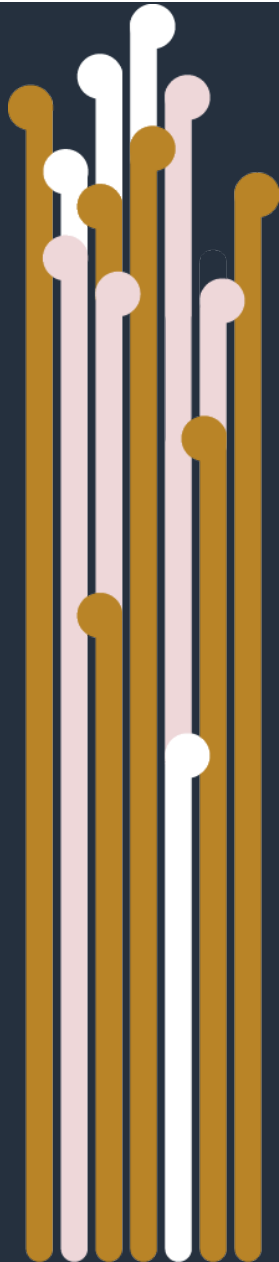
- Availability of other tools such as mask wearing, hand washing, RAT tests etc to limit the spread
- Proportion of staff who have had COVID-19 (90 day immunity) and vaccination (and booster) rates.

## Role Focused Assessment and Vaccination Requirements

# What does this mean for employers?

- **Partially implemented vaccination policies – created but not implemented?**
  - Caution - pause process, review safety risk assessment and what this means for your policy
  - Employers may continue with employer vaccination requirements where they need one to access third party sites
  - Encourage vaccination - engage with employees in good faith before deciding any outcome
- **Hiring future workers**
  - Vaccination requirement - should be a genuine requirement for role (health and safety or third party requirement)
  - Human Rights Act requirements.

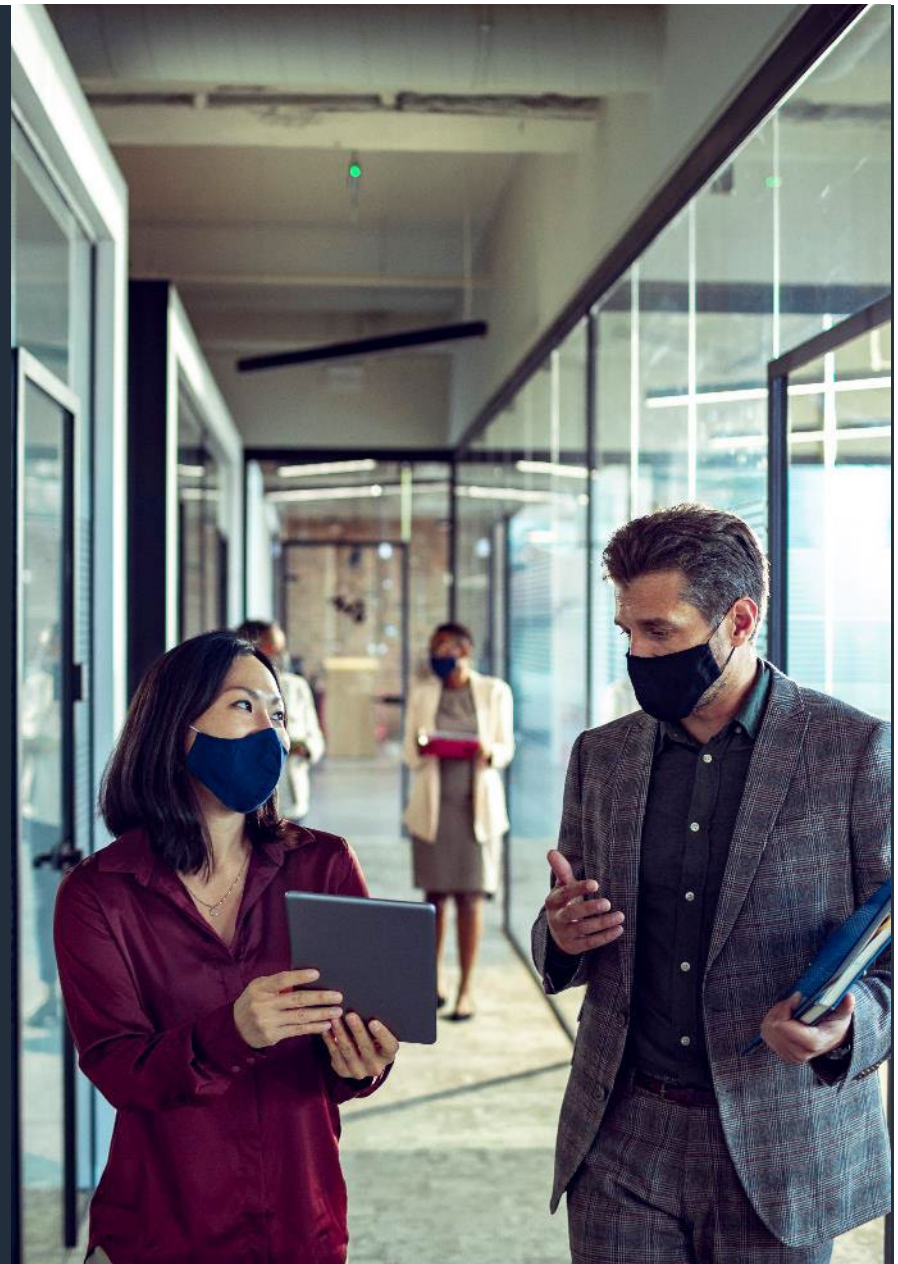




# Working in a COVID-19 world

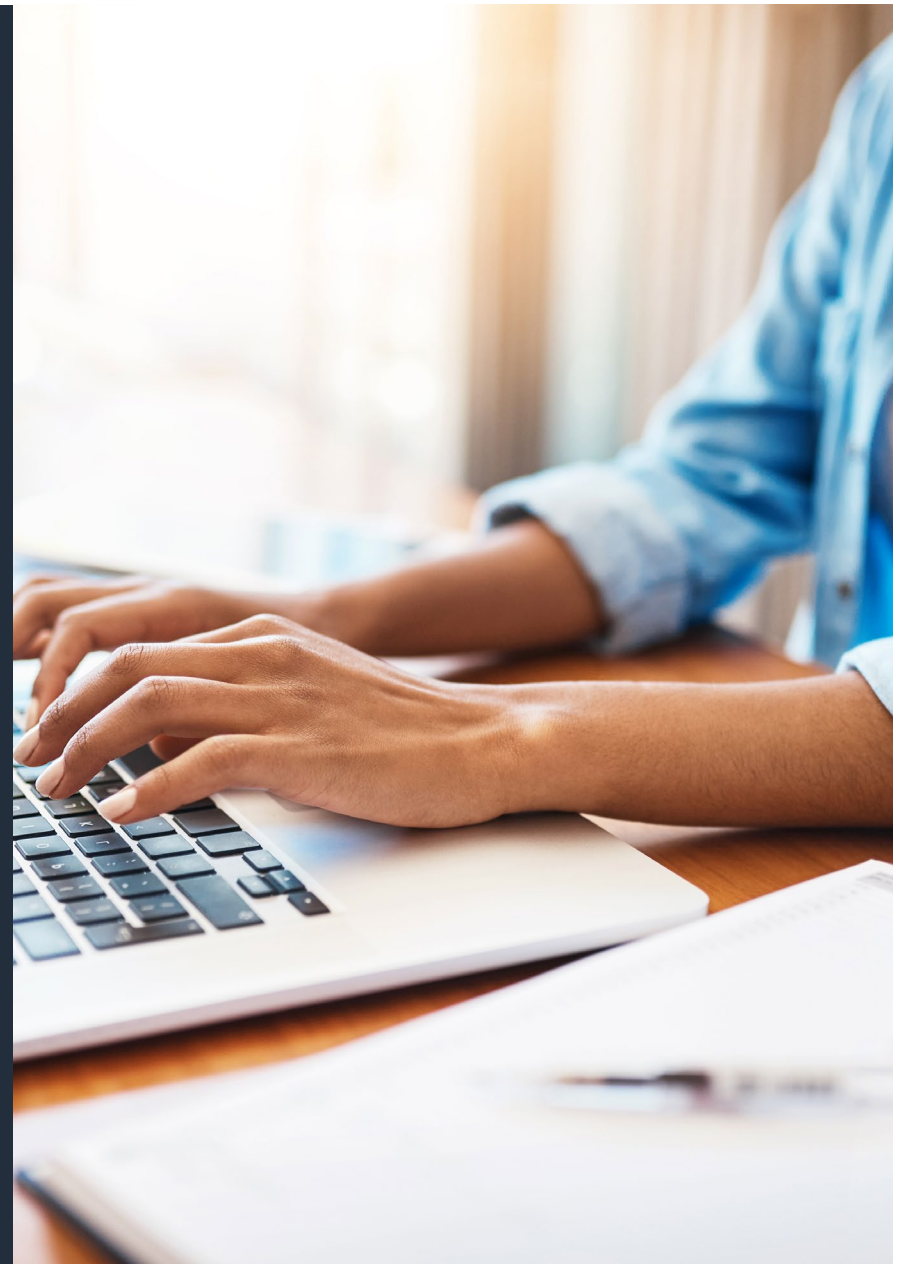
# Working in a COVID-19 world

- If employees are sick
  - take sick leave
  - indeterminate sick leave?
- Flexible working while “sick”
- Paying employees who can’t work from home.
  - able to work?
  - COVID-19 Leave Support Scheme.



# Flexible working policies

- Benefits?
  - potential for increased employee satisfaction
  - peace of mind for employees returning to work
  - increased productivity
  - reduced operating costs
- Set clear expectations
- Consult with employees
- Statutory regime redundant.





# Medical incapacity: mental health and long COVID

# Managing employees' mental health

- Regular check-ins with employees
- Maintain an open mind
- Follow medical advice
- Appreciate impact work obligations might have on mental health.



# Medical incapacity

- **What is it?**
  - Where an employee is so sick or injured that they are no longer capable of doing their job
- **Can you terminate for incapacity?**
  - Accommodations exhausted
  - Not expected to hold a position open forever
- But... **good faith** and **fair and reasonable dealings** remain of utmost importance
  - Can fairly “cry halt” where all reasonable.

# Preparing for long COVID

- Describes symptoms that continue or develop after COVID-19
- Off-work for extended period
- Dealt with similarly to other medical incapacities
- Gathering information will be key
- Ensure employment agreement has right to request medical examination.





**Pātai?**



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