

COVID-19 Vaccinations

Guidance for PCBUs engaging with workers regarding vaccinations

Background

1. People working at the border have a high risk of being exposed to and transmitting COVID-19. The Ministry of Health has advised that vaccination provides a significant additional control to reduce the risk due to COVID-19 for workers.
2. On 8 July 2021 the Minister for COVID-19 Response approved the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021 which expanded the scope of specified work which can only be performed by vaccinated workers.
3. **The amended Order:**
 - requires that specified work at the border be performed only by vaccinated workers from specified dates, unless the worker has an exemption or is covered by an exception
 - requires there be a register that records COVID-19 vaccinations of affected persons, requires a PCBU to update the register with details of persons who are affected workers and to check if those workers have been vaccinated, and requires affected workers to inform PCBUs of their vaccination status.
4. **Both** “person[s] conducting a business or undertaking” (or PCBUs as defined under of [section 17](#) of the Health and Safety at Work Act 2015) and workers have obligations under the Order.
5. **PCBUs and workers also have obligations** under the Health and Safety at Work Act 2015 (HSWA) to take all reasonable, practicable steps to eliminate, or otherwise control, known risks. Those HSWA obligations need to be considered in light of the scope of the amended Order and cannot override the requirements of the Order.
6. **This guidance provides information about how PCBUs can take an employment approach to ensure relevant workers:**
 - are offered the vaccination as part of a package of protections, along with their households to prevent the risk of transmission of COVID-19 in New Zealand
 - will be engaged in a fair, reasonable and consistent manner with employment processes undertaken based on risk, where they do not take up (or decline to confirm) vaccination.
7. **Note: This guidance material uses the terms ‘PCBUs’, ‘workers’, ‘employees’ and ‘employers’.** This is because vaccination issues at work involve health and safety law and employment law.
 - Health and safety law applies to PCBUs (and workers (including employees and independent contractors)).
 - The Order imposes duties on PCBUs and affected workers.
 - Employment law applies to employees and employers. Conversations about employment impacts of vaccination status in light of the duties in the Order are likely to be between employers and employees.

Overarching Principles

8. **PCBUs:**
 - must ensure specified work¹ at the border be performed only by vaccinated workers from specified dates (unless the worker has an exemption or is covered by an exception)

¹The work specified in the COVID-19 Public Health Response (Vaccinations) Order 2021.

- should educate, expect, and support all affected workers to get vaccinated
- must notify a worker who is an affected person that they have a duty to be vaccinated to perform specified work
- must update the register to confirm that a worker is an affected person before employing or engaging that worker to carry out specified work (and must update the register as appropriate)
- must check the register, or ask the Ministry of Health, to confirm if a worker is vaccinated
- should hold individual conversations with all affected workers (and relevant union representatives) to:
 - verify their vaccination status (as recorded in the register) or whether the worker has an exemption or is covered by an exception
 - provide additional support to workers who are not vaccinated to encourage uptake
- should work with workers and relevant union representatives to ensure that specified work at the border be performed only by vaccinated workers (or workers with an exemption or workers covered by an exception) from specified dates
- must ensure that they comply with the Privacy Act in relation to a worker’s vaccination status, including by not disclosing (directly or indirectly) a worker’s vaccination status to other workers or persons unless legally required or permitted to do so, e.g. with the worker’s consent, where it is necessary in the circumstances². Note: PCBUs can legally collect, access and provide information as set out in the Order or as otherwise permitted under the Privacy Act.

9. Workers must:

- not perform specified work at the border from specified dates unless the worker has been vaccinated, has an exemption or is covered by an exception
- notify a PCBU of whether the worker is vaccinated or has an exemption
- allow a PCBU to access any COVID-19 vaccination record that the Ministry of Health has for the worker.

Timeline specified in the amended Order

10. The following timeline is specified in the amended Order. The dates below are the dates by which an affected worker, who was not vaccinated at 11.59 pm on 14 July 2021, must have their 1st vaccination injection. These workers must have their 2nd vaccination injection no later than 35 days after their 1st injection.

Date	Description
14 July 2021	Order approved and gazetted
12 August 2021	Power of Minister to grant exemptions comes into effect
From 11:59pm Thursday 26 August 2021	Specified work can only be performed by vaccinated workers who are wider government workers
From 11:59pm Thursday 30 September 2021	All specified work can only be performed by vaccinated workers (ie Order also applies to workers who are not wider government workers)

²Office of the Privacy Commissioner | The COVID-19 vaccination and privacy rights

11. Where a worker becomes an affected person after 26 August 2021 or 30 September 2021 (as applicable), then for the 35 days after they become an affected person, they must be treated as if they are vaccinated if they have had 1 injection. After 35 days, the worker can only continue to perform specified work at the border if the worker has had their 2nd vaccination injection, has an exemption or is covered by an exception.
12. PCBUs and employers should continue to encourage all workers to get vaccinated. Helpful information is available for employers on the Ministry of Health website at <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines>.
13. Employers are recommended to have completed individual conversations with workers to understand their vaccination status and verify that they have been vaccinated by the dates below (three weeks before the Order applies to the worker). This period will allow for affected workers to have a reasonable opportunity to obtain their first vaccination before the Order requires that specified work can only be performed by vaccinated workers:

Date	Description
By Thursday 5 August 2021	Recommended date to have completed individual conversations with wider government workers performing specified work
By Thursday 9 September 2021	Recommended date to have completed individual conversations with all workers performing specified work (ie conversations should also have been completed with workers who are not wider government workers)

Sharing vaccination status

14. Under the amended Order, an affected worker must:
 - notify a relevant PCBU of whether the worker is vaccinated, as soon as practicable, including the dates the worker received any vaccination injections, **or**
 - notify a relevant PCBU that the worker has an exemption, as soon as practicable, and must provide written confirmation of the exemption to the PCBU (and an enforcement officer on request), **and**
 - provide a relevant PCBU with the affected worker’s full legal name, date of birth and a telephone number by which the affected person can be contacted as soon as practicable, and ensure that the information is updated as soon as practicable after it changes, **and**
 - allow a relevant PCBU to access any COVID-19 vaccination record that the Minister of Health has for the worker.
15. Relevant PCBUs must:
 - update the register to confirm that a worker is an affected person before employing or engaging that worker to carry out specified work (and must update the register as appropriate, as soon as practicable), **and**
 - check the register, or ask the Ministry of Health, to confirm if an affected worker is vaccinated, **and**
 - notify a worker who is an affected person that they have a duty to be vaccinated to perform specified work, and notify the worker that the PCBU has checked the worker’s vaccination record, **and**
 - ensure the register, for any affected worker that the PCBU employs or engages, contains the affected worker’s full legal name, date of birth and a telephone number by which the affected worker can be contacted.

16. Where a relevant PCBU after following the guidance above is unable to verify an affected worker's vaccination status, the PCBU may assume that the worker is unvaccinated and should communicate this to the worker concerned.
17. The Director-General of the Ministry of Health **must** ensure that a register that records COVID-19 vaccinations of affected persons is kept, maintained, and monitored.
18. The Ministry of Health **must** provide a relevant PCBU with access to the register in respect of an affected person if the relevant PCBU has provided written confirmation that the relevant PCBU employs or has engaged the affected person to carry out certain work.

What happens if a worker is not vaccinated or will not confirm their vaccination status?

19. If an affected worker is not and will not be vaccinated by the required date (or a relevant PCBU is unable to confirm an affected worker's vaccination status), and does not have an exemption or is not covered by an exception, then:
 - a. the PCBU **must** advise the affected worker they have a duty to be vaccinated and will not be able to continue performing the affected work if they are not vaccinated, or do not confirm the affected worker has an exemption, from the required date.
 - b. the PCBU **should**:
 - i. provide the worker with an assessment which shows the worker's role involves performing affected work and advises of any alternative options that the PCBU has identified
 - ii. engage with any union that represents workers performing affected work
 - iii. consider arranging to meet individually with affected workers and relevant union representatives to discuss the assessment and alternative options.
 - c. for employees, the PCBU (as an employer) **must discuss in good faith** the assessment and alternative options, including leave (with or without pay), changes to the employee's role (including location at work is performed) to ensure it does not include affected work, redeployment to a role that does not include affected work or any other agreed option.

Where an employment agreement specifies processes for good faith consultations, then the PCBU (as an employer) **must** follow those processes. . Otherwise the PCBU (as an employer) must follow established statutory and common law principles of good faith consultation.
20. PCBUs (as employers) and workers (with their unions) **must** try to reach an agreed outcome on proposed changes, and **should** document any agreed outcome.

What happens if agreement cannot be reached?

21. Where a PCBU and a worker or group of workers cannot reach an agreed outcome, then:
 - a. the PCBU **may** initiate a change for health and safety grounds to the work arrangements (eg location) and to a worker's duties (including moving to another role)– specifically, in this case, on the grounds that the worker is unvaccinated. To do so, a PCBU that is an employer is recommended to also have completed a risk assessment, taking into account the expanded coverage of the Order, which supports the employers actions (follow the guidance at [Assessing whether a specific role needs to be performed by a vaccinated worker | WorkSafe](#)).
 - b. If the PCBU (who is an employer) has unvaccinated employees who are unable to be redeployed or reach agreement, then the PCBU (as an employer) **may** consider initiating change processes, which may include a restructuring process – if an employer is doing so, they should follow the guidance at:

[Modifying employment agreements during COVID-19 response and recovery](#) - Employment New Zealand
[Overview of workplace change](#) - Employment New Zealand
and [Terminating employment agreements during COVID-19 response and recovery](#) - Employment New Zealand.

- c. **Employers who follow other processes, for example termination or a negotiated end of employment, must** ensure they adhere to all legal requirements and the relevant terms and conditions of employment, which could include notice periods and compensation, and are **strongly encouraged** to seek specialist advice.
22. PCBUs are **encouraged** to contact the Ministry of Social Development for employment support for unvaccinated workers who are unable to be redeployed or reach agreement. MSD can provide support for impacted workers to look for and prepare for other work. MSD's teams can assist by helping people to update their CVs and find jobs that match their skills. MSD has a range of services and products that can also help people when they do find new work. The teams can meet with people individually, or as a group if there are a large number of workers requiring support. Email MSD at BWVO_Employment_Support@msd.govt.nz to be connected with the team in your region
23. **Public Service employers**, who have unvaccinated workers who are unable to be redeployed or reach agreement (under paragraph 21.b above), **must also** engage with the Te Kawa Mataaho (Public Service Commission) Workforce Mobility Hub. Further information for Public Service employers is available on the [website of Te Kawa Mataaho](#).

Do PCBUs have obligations for workers employed by other PCBUs?

24. The Order does not include any explicit duties for PCBUs in shared workplaces to consult, co-operate and co-ordinate with each other as required by HSWA. However, those PCBUs continue to have obligations under the HSWA and need to be clear with workers what approach the PCBUs are taking to meet the obligations of both the Order and HSWA.
25. **For example, PCBUs may provide assurances** to each other that they have complied with the Order and may choose to restrict access to a workplace if they aren't assured the Order has been complied with. PCBUs in shared workplaces should also consider what processes they will use to raise any concerns about the operation of the workplace and how they will communicate with each other on potential risks.
26. **The sharing of information about worker's vaccination status** can only be done in specific circumstances. PCBUs will need to ensure that they comply with privacy obligations before doing so – see paragraphs 38 to 41 below.

What happens if a worker does not agree they are doing specified work?

27. **If a worker does not agree** that they are doing specified work, then they **should** advise the PCBU what the basis for their belief is. The worker, relevant union representatives and PCBU **must** discuss the workers' belief in good faith.
28. **The PCBU is responsible for its assessment** of whether a worker is performing specified work and for ensuring no specified work is performed by unvaccinated workers.
29. PCBUs **do not** have any ability to change the definition of specified work set in the Order.

Are there any exceptions?

30. The Government wants everybody who is carrying out work at the border (or handling affected items) to be vaccinated. There are very few exceptions to this, and they only apply in extraordinary circumstances:
- An unvaccinated person may be permitted to enter and carry out work covered by this Order, if the work is unanticipated, necessary and time-critical and cannot be carried out by a person who is vaccinated; and must be carried out to prevent the place from ceasing operations.
 - An authorization to carry out work in these circumstances may only be given by the responsible chief executive³.
 - A person who is not vaccinated may enter a place without approval if they need to enter to preserve or protect a person's life, health or safety in an emergency; or are authorised or required to by law.
 - A PCBU may apply to the Minister for an exemption if it is necessary to:
 - promote the purpose of the COVID-19 Public Health Response Act 2020; and
 - prevent significant disruption to essential supply chains; and
 - the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.
 - A worker who handles affected items may be exempt from the requirement to be vaccinated to carry out certain work if:
 - the worker has particular physical or other needs a suitably qualified health practitioner (in the course of examining the person) determines would make it inappropriate for the person to be vaccinated; and
 - the relevant PCBU has provided the register with written confirmation that a suitably qualified health practitioner has examined the affected person; and has determined that vaccinating the affected person would be inappropriate.

What happens if a PCBU does not follow good faith consultation processes or a worker does not agree with a PCBU's actions?

31. If a worker considers that a PCBU who is their employer (or a controlling third party as defined in the Employment Relations Act 2000) has not acted justifiably, including not following good faith consultation processes, then the worker can seek assistance from MBIE or can raise an employment relationship problem.
32. MBIE's Early Resolution Service is a free phone-based service for employees and employers providing assistance to resolve a workplace issue early, quickly, and informally, before it becomes too serious or needs a more formal process.
33. If Early Resolution does not resolve an issue or is not suitable, then a worker can raise a personal grievance with their employer. Information on how to raise a personal grievance is available from [Employment.govt.nz](https://www.employment.govt.nz).
34. EmploymentNZ can be contacted on 0800 20 90 20.
35. **Note:** MBIE (including EmploymentNZ and the Early Resolution Service) cannot determine whether a worker is performing specified work. PCBUs must form their own decisions about this and must engage in good faith with workers and unions about this assessment.

³The responsible chief executive is:

- in relation to a worker at a managed isolation facility or a managed quarantine facility, means the chief executive of the Ministry of Business, Innovation, and Employment;
- in relation to a worker who is not a service worker and who works at an affected port or on board an affected ship, means the Director of Maritime New Zealand;
- in relation to a worker who is not a service worker and who works at an affected airport or on board an affected aircraft, means the Director of Civil Aviation;
- in relation to any other worker, means the chief executive of the relevant PCBU.

What happens if PCBUs or affected workers do not comply with the Order?

36. A breach of the requirements of the Order by PCBUs or affected workers is an infringement offence for the purposes of section 26(3) of the COVID-19 Public Health Response Act 2020. Infringement offences may result in an infringement fee of \$300 or a fine imposed by a court not exceeding \$1,000. Where a person intentionally fails to comply with the Order, then they are liable on conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding \$4,000.
37. WorkSafe New Zealand is responsible for enforcement of the Order in relation to duties on PCBUs.

How do PCBUs ensure they comply with privacy obligations?

38. A worker's vaccination status, and other information required to be provided or able to be accessed under the Order, is personal information. This means that PCBUs must comply with the Privacy Act, including the information privacy principles (IPPs) in the Act, when handling that information. PCBUs must not pass on information about a worker's vaccination status to others without the worker's consent, or otherwise allowed by law.
39. The Privacy Act provides that an action taken by an agency does not breach IPPs 1 to 5, 7 to 10, or 13 if the action is authorised or required by or under New Zealand law; and that nothing in IPP 6, 11, or 12 limits or affects a provision contained in any New Zealand enactment that authorises or requires personal information to be made available.
40. The amended Order requires that the Ministry of Health provide relevant PCBUs with access to the register to check an affected worker's vaccination status. Affected workers must allow a relevant PCBU to access any COVID-19 vaccination record that the Ministry of Health has for the affected worker.
41. PCBUs who have concerns about their privacy obligations are strongly encouraged to seek specialist advice.

Does an employer need to engage with worker questions about health issues related to the vaccine as part of discussions about whether a worker will be vaccinated, where the work they perform is covered by the COVID-19 Public Health Response (Vaccinations) Order 2021 (Vaccinations Order) or a PCBU has required that specified work is only performed by vaccinated workers for health and safety reasons, justified by a COVID-19 exposure risk assessment under the Health and Safety at Work Act 2015 (HSWA)?

42. Employers must be open and communicative and respond to workers in good faith where issues are raised by workers, including related to vaccination.
43. However, this does not mean PCBUs need, within a HSWA context or in relation to the application of the Vaccinations Order, 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.
44. Where detailed medical questions are raised a PCBU is able to rely upon expert public health advice for those matters (eg the information on COVID-19 vaccines | Ministry of Health NZ) and MedSafe approvals of vaccines, and should point workers who are concerned to that information. PCBUs should consider providing a worker with access to someone who can deliver it this advice in a way that is readily understood, if that was reasonable and practicable in the circumstances – this could include a medical practitioner.
45. A PCBU can then focus any good faith conversation on whether a worker will be vaccinated to continue to perform work that is covered by the Vaccinations Order or where the PCBU has required that specified work is only performed by vaccinated workers for health and safety reasons, justified in accordance with the PCBUs risk assessment.