

No Jab, No Job?

With the Delta variant of Covid-19 now circulating in New Zealand, all eyes are on the country's vaccine roll out as our best hope to get back to normal life. But one of the burning questions now is whether employers can require employees to get the Covid-19 vaccine.

For a very small group of employees who are subject to the government's directive to get vaccinated (i.e. those working at the border, in managed isolation or quarantine facilities and some cabin crew on aircraft) the answer is yes. For everyone else, it is less clear-cut, and may well depend on whether you are an existing employee or a new one.

Employers cannot require existing employees who fall outside the scope of the government's directive to be vaccinated. In New Zealand, we all have the right to refuse medical treatment, such as vaccination. We also have the right to be free from discrimination on the grounds of disability, pregnancy, religious or ethical belief, and medical conditions, all of which may be valid reasons why someone might choose not to get vaccinated.

Competing against these fundamental rights, are the duties under the Health and Safety at Work Act. Employers have a duty to ensure the health and safety of their workers, together with the health and safety of people at risk from the work of their business.

So, is vaccination against Covid-19 required to discharge these duties? The first step is to assess the risks of transmitting or contracting Covid-19 in the workplace. The next is to consider what steps could be taken to eliminate or minimize that risk (such as PPE like masks, use of hand sanitizer, and/or physical distancing). These assessments are best considered in consultation with employees.

If the risk is assessed to be high, and cannot be mitigated by other measures, then the business may require that certain work must be done only by vaccinated workers. If the risk is genuinely too high for an unvaccinated employee to perform the tasks, the employer may make changes to the employee's duties for health and safety reasons. Any such changes must be fair and reasonable, and carried out in good faith. Employers should consult with the unvaccinated employee on options such as changing work arrangements, undertaking alternative duties, redeployment to lower-risk role, or taking leave. If there are no alternatives available, and the employer is considering a redundancy process, it is important to seek legal advice at the earliest stage, as there will be a need to tread carefully: indications from the Ministry of Business, Innovation and Employment (MBIE) suggest that there will be few roles which would meet the threshold of requiring vaccination.

Existing employment agreements may be varied by agreement between employer and employee to insert a clause requiring vaccination, although that would likely only capture employees who are willing to be vaccinated. The better option for employers wanting their staff to be vaccinated is to simply incentivise it: paying for time off work to get the vaccination, paying for any travel costs, or paying a one-off bonus to those who receive the vaccination are all options that may assist in increasing uptake of the vaccine in a workplace.



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When employing new staff, it is possible to require new employees to be vaccinated. MBIE has confirmed that employers can make vaccination a requirement in new employment agreements. There is still a potential tension between the employer's right to include preconditions before employing someone and the employee's right not to be discriminated against if their reason for not vaccinating relates to one of the grounds under the Human Rights Act.

Given the big drive for vaccination and the desire to avoid a future alert level 4 lockdown due to the Delta (or some other) variant of Covid-19, it is likely that the vaccination issue will remain topical for some time. You can therefore expect this area of law to evolve quickly, and that it won't be long before the issue is before the Courts for determination. In the meantime, the best bet for businesses is to act fairly and reasonably, and consult with employees in good faith.



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