

COVID-19 Mandatory Vaccination Order – Health and disability & Education sectors

NOVEMBER 2021

AT A GLANCE

- The COVID-19 Public Health (Vaccination) Order (the order) has been extended to include workers in the health and disability and education sectors.
- Affected workers are required to have their first dose of the vaccine by 11.59pm on 15 November 2021 and be fully vaccinated by 1 January 2022 – unless they have an exemption.
- Exemptions have been tightened up. As of 8 November 2021, a new exemption application process and time limit applies.
- The order raises the spectre of a rise in employment/EPL claims, however there are some actions employers can take now to minimise their risk.

INTRODUCTION

From 26 October 2021, the order was extended to include workers in the health and disability and education sectors.

The lack of time between the announcement, publication of the order and the deadline for vaccination first dose – as well as confusion over who is affected and who can obtain an exemption – is causing sector employers significant concern. The order may increase employment/EPL claims, as there is currently no immunity from a personal grievance where the mandate applies.

This article highlights some of the issues that arise from the order and provides guidance on how employers can minimise or avoid their exposure to employment/EPL claims.

WHO IS AFFECTED?

The scope of the order is wide and is aimed at covering anyone who works in a healthcare or residential care setting or anyone who might come into contact with children or students in the education sector.

In the health and disability sector affected workers include:

- registered health practitioners who provide health services to patients in person

- support staff in healthcare or residential care facilities, and
- contractors who provide services to healthcare or residential care (depending on length of visit and proximity to other workers or the public).

In education, affected workers are those who work in:

- licensed early childcare services (but not playgroups)
- registered schools (state, state integrated and private)
- hostels (boarding establishments), and
- home-based education and care services (i.e. anyone who provides education services or care services to children in a home-based setting).

It includes principals, teachers and support staff (whether paid, unpaid or volunteers). It also includes contractors who provide services to schools when children or students are present.

WHAT IS THE EFFECT OF THE ORDER?

Affected workers are required (unless they have an exemption) to:

- have their first dose of the vaccine by 11.59pm on 15 November 2021, and
- be fully vaccinated by 1 January 2022.

If workers are not vaccinated by 15 November 2021, they will be unable to work from 16 November 2021. If an unvaccinated worker has an exemption, the order does not prevent them working in their role.

EXEMPTION FROM VACCINATION

There are now two routes by which an exemption may be issued. Both are likely to be limited in number.

Medical Exemption

From 8 November 2021, the Director-General of Health may exempt a worker from vaccination. Previous exemptions have expired, and workers needing exemption will now need Ministry of Health sign off.

A medical practitioner (registered with the Medical Council and having a current practising certificate) or nurse practitioner (registered with the Nursing Council and with a current practising certificate) can apply to the Director-General of Health for a vaccination exemption on behalf of a patient. The patient must meet the specified COVID-19 vaccination exemption criteria. An exemption, if issued, is valid for the period specified, but no longer than 6 months.

The Government intends the number of exemptions to be minimal and the vaccination exemption criteria are therefore narrow – limited to:

- severe allergic reaction to ingredients in the vaccine or previous dose of the vaccine;
- cardiac conditions such as myocarditis and heart failure;
- and where the patient is unable to tolerate administration of the vaccine due to risk to themselves or others such as patients with a severe neurodevelopmental condition.

Exemption from Minister for COVID-19 Response

There is also a limited power for the Minister for COVID-19 Response to issue exemptions on application including to prevent significant disruption to the provision of health services, operation of learning in schools and the essential operations of hostels. The power to issue exemptions in the education sector is revoked on 1 January 2022.

PROCEDURAL REQUIREMENTS

Vaccinated or Unvaccinated

PCBUs/employers need to determine which staff are vaccinated and unvaccinated. They should:

- ask their staff confidentially about their vaccination status and, if unvaccinated, whether they intend to receive a first vaccination by 15 November 2021, and
- ask their unvaccinated staff whether they intend to obtain, or have obtained, an exemption from vaccination.

If a staff member refuses to provide this information, employers can assume the staff member is unvaccinated, but should inform them of this assumption.

Under the order, PCBUs must keep and maintain a record of their workers' vaccination status. The information obtained should be stored securely and in line with the *Privacy Act 2020*.

Exemption or No Exemption

The process will differ for unvaccinated affected workers who have an exemption (or indicate an intention to obtain one) and for those who do not. It will also differ between employees and contractors. For employees, the individual or collective employment agreement or contract should be referred to for guidance on the process.

Employees

a) No exemption

If no exemption applies, employers should provide information about the order and its potential impact on the employee's employment, including any potential stand down/suspension if they are unvaccinated from 16 November 2021.

Employees should be consulted on the potential impact of the order and whether there are any alternatives (such as modifications to their job description).

If no alternatives exist, and the employee intends to remain unvaccinated, termination of their employment may follow.

b) Exemption

Employers should verify that any exemption is supported by a written or electronic copy of the exemption issued by the Director-General of Health.

Where an exemption applies, employers may allow unvaccinated workers to work. But the order does not remove an employer's obligations under the *Health and Safety at Work Act 2015*.

Employers may, notwithstanding the exemption, consider that the worker's role requires vaccination. If that is the case, then employers will need to conduct a risk assessment of the role the worker undertakes, to determine whether there is a risk to health and safety for that person or others, and to determine the measures necessary to eliminate or minimise that risk so far as is reasonably practicable.

Employees should be provided with the risk assessment, the proposal that the role be vaccinated, including reasons, and potential outcomes if the proposal is adopted. They should be consulted, ie employers should seek and consider employee feedback. Alternatives to vaccination should be explored, including other measures to reduce the risk.

Termination may be justified if there are no reasonably practicable, effective alternatives.

Contractors

Whether there is an exemption or no exemption, the rights and obligations flow from the contract. It is important that those engaging contractors adhere to the requirements of the contract.

If a contractor is unable to perform the contract because they are unvaccinated and do not have an exemption, it may be possible to terminate the contract immediately under the *Contracts and Commercial Law Act 2017*. Alternatively, it may be possible to terminate within the terms of the agreement.

SEEK ADVICE

Mandatory vaccination for the health and disability sector raises unique questions and issues. Further regulatory change is possible. We suggest that employers, including those who engage contractors, seek employment legal advice at the earliest opportunity to help them navigate this minefield.

Employers should speak to their broker and/or check their employment practices cover for any special requirements or exclusions that may apply, and whether they are entitled to pre-claim advice.

Should you require further advice on any of the employment issues raised by the vaccination order, or any general advice on employment and HR issues, our specialist team is available to assist.

Need to know more?

If you have any questions about vaccinations and the workplace, contact one of Wotton + Kearney's employment lawyers.



Rebecca Scott

Partner (Auckland)

T: +64 9 377 1871

E: rebecca.scott@wottonkearney.com



Murray Grant

Special Counsel (Wellington)

T: +64 4 260 4632

E: murray.grant@wottonkearney.com



Melissa Castelino

Associate (Auckland)

T: +64 9 929 2384

E: melissa.castelino@wottonkearney.com

© Wotton + Kearney 2021

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Company no 3179310. Regulated by the New Zealand Law Society.