



COVID-19 & Vaccinations

Legal Positions as at 17 October 2021

Kaupapa | Purpose

This document shares publicly available legal opinions on vaccinations and employment to support members' understanding of this issue. This document is current as at 17 October, 2021.

NZCCSS is not a legal advisor. Information shared here is to support understanding and should not replace an organisation seeking professional legal advice.

Ture Whakatau | Relevant Legislation

The government has Te Tiriti o Waitangi and human rights obligations to protect social, economic and political rights.

Decisions about vaccinations involve balancing public health responsibilities with protecting individual rights. A Court decision may justify restriction of rights in favour of public health benefits.

There are four key laws in relation to Rights and Employment Obligations, as well as provision for Public Health Orders.

[The NZ Bill of Rights Act 1990](#) – protects the absolute right to life and cannot be restricted. COVID-19 vaccination is seen as an appropriate measure to protect life. Includes rights to freedom of expression and access to information. Any restrictions of individual human rights must be justified as legal, proportionate and necessary. No one can be compelled to take medication against their will.

[The Human Rights Act 1993](#)

Includes non-discrimination on the basis of health status and the right to privacy.

[The Privacy Act 2020](#)

Protects a general obligation not to use or disclose personal information, unless an exception applies. Exceptions include where an employee poses the risk of a serious threat to someone else's safety, wellbeing or health.

[Health and Safety at Work Act 2015](#)

Duties to provide safe and healthy working conditions. Workers have obligations to avoid causing harm to themselves or others. **Agencies have a duty of reasonable care to avoid causing harm to clients, consumers etc.**

The Health and Safety at Work Act requires employers to engage workers and their representatives on any decision that impacts worker health and safety. Good faith employment obligations require employers to consult with workers on matters that impact their employment.

Mana Whakahaere a te Kawanatanga | Vaccination Mandates

Public Health Orders

The government is able to mandate vaccination for employees across a variety of sectors using Public Health Orders.

Public Health Orders currently cover frontline MIQ and border workers.

Health and education mandates were announced 11 October, but actual Health Orders have yet to be publicly released. (The press release announcing these is [here](#))

We will update this document with links and commentary in relation to these orders as they become available.

Arataki a te Kawanatanga | Government Guidance

[Worksafe Guidance](#)

Businesses and services can't require an individual to be vaccinated. However, you can require a specific role to be performed by a vaccinated person if a health and safety risk assessment supports this.

Risk Assessments require:

1. The likelihood of a worker being exposed to COVID-19 while performing a role
2. The potential consequences of that exposure on others (community spread).

[MBIE Guidance](#)

1. Employers can make changes to an employee's duties for health and safety reasons if an employee is not vaccinated. Any such process must be fair and reasonable and carried out in good faith.
2. Employers and employees can negotiate variations to existing conditions of employment to require vaccination. Employers can also require vaccination as a condition for new employees, but this must be reasonable for the role.
3. MBIE has published [questions and answers](#) for employers on the employment implications of COVID-19 vaccination.

Tohutohu Ture me Ngā Whakawa | Legal Advice and Judgements

Below is some information that we have found helpful in shaping our understanding.

Rules and Rights re Vaccinated Work places. Newsroom Emile Donovan:

This podcast discusses the conflicting provisions of law, the Human Rights Act and the workplace safety legislation, and the vaccination mandates. It is complex for employers navigate this minefield?

<https://www.newsroom.co.nz/podcast-the-detail/employers-caught-in-conflicting-rights-over-vaccination>

Employment Relations Authority "landmark" ruling

The ERA ruled on 1st September that Customs New Zealand was justified in dismissing an employee who refused vaccination. The employee had argued that she was not in a frontline role and that her termination was a breach of the Bill of Rights Act 1990 which gives everyone the right to refuse medical treatment.

The ERA ruled that having a frontline worker unvaccinated presented a threat to fellow workers as well as to all those she came into contact within the course of her work, and therefore Customs was justified in dismissing her. Every employee has an obligation under the Health and Safety at Work Act to take "reasonable care that his or her acts, or omissions do not adversely affect the health and safety of others".

Employment law expert Michael Whitehead has said that the finding is a landmark ruling for employers and employees [in every industry](#).

Survey by Simpson Grierson, Lawyers

The law firm undertakes a regular survey of employers. Their latest survey found that COVID-19 issues, particularly those related to whether or not employees can be required to have a vaccine in order to keep their job, is now the second highest concern of employers. Vaccinations made compulsory, the

availability of MIQ and the shortage of skilled workers due to the pandemic were rated as in the top three concerns of employers by 51% of respondents to the survey.

<https://www.simpsongrierson.com/attachments/pdfs/Simpson-Grierson-Employment-Law-Top-Issues-Survey-2021.pdf>

Barnaby Locke Dundas Street, Lawyers

<https://dundasstreet.co.nz/insights/covid-19-vaccination-update-oct-2021/>, and
<https://dundasstreet.co.nz/assets/COVID-19-Update-Guide-2021.pdf>

Housing sector legal advisor offers an overview of the rights and responsibilities of employers when it comes to mandating the COVID-19 vaccination.

Human Rights have precedence in law. Rights to privacy and non- discrimination on basis of religious belief - except where person poses risk/ disruption to work.

The extent to which vaccines can be mandated are bound by Health and Safety Act and Human Rights legislation. Health and Safety include risk of harm to staff and obligations of employers to protect staff by requiring staff to be vaccinated if they are exposed to high risk.

Staff may refuse vaccination on the grounds of religious beliefs or health risk (if approved by Dr.)

Employers need to make reasonable efforts to ensure they can be employed without unreasonable disruption to the business or agency.

- Risk factors: social distancing difficult, high contact roles
- Risk assessment including explanations for roles with vaccination requirements, and options for redeployment if feasible for the organization.

Untested in law in New Zealand but in Australia federal courts have upheld mandatory vaccines.