

## CTU COVID Vaccination policy

### Introduction - Vaccinations and work

This policy has been developed at a time when workplaces are responding to the challenges of operating within an environment where NZ is combating the spread of COVID 19. It reflects both the CTU's intention to proactively support the national vaccination roll-out, while also providing information for Unions on the fundamental legal principles around vaccines. This policy sits alongside affiliates' own policies on vaccination. Given the rapidly evolving situation and understanding that exists about COVID, it is likely that this policy will require review over time.

Vaccinations are a key control measure against contracting and transmitting COVID-19 and will contribute significantly to keeping working people and their whanau safe. The CTU strongly encourages all working people receive a COVID-19 vaccination who are able to.

Vaccination is however one of many control measures, and it needs to be properly located withing a wider suite of risk management and workplace controls. Workplaces create and connect the bubbles of employees and are therefore areas where COVID transmission is of concern.<sup>1</sup>

Currently, mandated vaccination is limited only to those roles outlined in public health orders (currently those roles that engage the frontline border such as MIQ, and ports), and this appropriately reflects the fact that outside of the border, the circumstances in which a business can require a vaccine upon workers are very limited.<sup>2</sup>

However, businesses outside of the border are now turning their minds to implementing workplace vaccination policies. Reports of no jab no job policies are arising.<sup>3</sup> The CTU does not support any adoption of a blanket 'no jab/no job' strategy. Our policy promotes a different approach, one that maximises vaccination take up, while protecting and balancing the rights of working people.

#### **1. Vaccination is easy - Supporting working people to get vaccinated**

A workplace policy regarding vaccinations should be aimed at supporting as many people as possible to get vaccinated, as soon as possible.

To best enable a high vaccination uptake, workplaces need to make it as easy as possible to get vaccinated. That means making it easy to access and receive the vaccine during work hours, this includes the time waiting after receiving the vaccine, and time off for side effects.<sup>4</sup> All workers need to be able to

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<sup>1</sup> <https://thespinoff.co.nz/society/31-08-2021/siouxie-wiles-covid-is-different-this-time-our-level-four-lockdown-needs-to-be-too/>

<sup>2</sup> <https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/covid-19-vaccination-and-employment/>

<sup>3</sup> <https://www.tvnz.co.nz/one-news/new-zealand/some-businesses-starting-implement-no-jab-job-policy>

<sup>4</sup> Common side effects are mild, in some cases workers may not be comfortable or able to work for a day or so after receiving the vaccine – this should be covered as paid time (special leave) rather than requiring sick leave.

get released from work, or be vaccinated at work, or transported to a vaccination centre in paid time and returned to work.

It is fundamental that the vaccine rollout is built on a high-trust model which is supportive and not coercive. Employers need to be following the Government's "educate, expect, support" approach, by providing official information and enabling workers to access employer funded support (such as their GP or health practitioner).

Coercive approaches are likely to create resentment and resistance and ultimately inhibit the overall aim of increasing the vaccination uptake. Employers must not unilaterally impose "no-jab no-job" policies. This undermines the Government's vaccine rollout and creates distrust. Mandatory vaccination is only appropriate where it can be properly demonstrated through a risk assessment that certain work can only be undertaken safely by a vaccinated worker.

## **2. Supporting the vaccine effort through clear and accessible information**

Unions have a central role to play in ensuring that good quality, clear, and accurate official information about the vaccination and its planned roll-out is readily available. This includes translated<sup>5</sup> information where appropriate. Unions, workplace health and safety reps (HSRs), and employers should work together to support working people (and their whanau) to gain an accurate understanding of the vaccination process and its benefits.

We strongly discourage any individual (employer, employee or otherwise) from sharing or spreading 'anti-vax' misinformation. There is a list of links at the end of this document to a variety of reliable sources of vaccine information.

## **3. Engagement with working people and their unions**

### *Engagement generally*

Workplace engagement plays a pivotal role in ensuring that workplace policies are fair and get buy in from the workforce.

The Health and Safety at Work Act requires employers to engage workers and their representatives on any decision that impacts worker health and safety. In addition to good faith employment obligations to consult with workers on matters that impact their employment. To ensure high vaccinations rates it will be important to ensure a high level of engagement with the workforce and their unions.

### *Engagement on workplace risk assessment*

Before a business decides to require that work be undertaken only by a vaccinated worker, the task must be risk assessed. In doing so, it must be demonstrated that a worker does in fact require a vaccination to carry out the role. This risk must still exist after all other appropriate controls have been implemented.

Only where a business has undertaken such a risk assessment with their workforce (and their unions), and the parties agree that the assessment shows there to be a high risk of workers contracting and/or

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<sup>5</sup> Both in plain English and other languages

transmitting COVID, after all other appropriate controls have been implemented,<sup>6</sup> would it be acceptable to implement a policy which could require certain work tasks to be undertaken by a vaccinated worker. Again, justification that these circumstances have been met will be challenging.<sup>7</sup>

Further work into ensuring consistency across workplaces and sectors in regards to the risk assessments, and who will have responsibility for this is being considered.

Requiring vaccination for work should only be considered for work tasks, and never be applied to an employee directly.

#### *Employee concerns*

If an employee remains apprehensive about getting the vaccine, their concerns should be heard, and where possible addressed through officially sourced information or a funded opportunity to speak with their health provider. Agreed policies on alternative duties or other work for those who cannot receive a vaccine or do not wish to receive the vaccine should be established through workplace engagement, agreed with unions.

#### **4. H&S remains a key focus**

While the vaccine is one of the most effective control measures for keeping workplaces safe from COVID-19, it is not the only one. It is vital that as the vaccine rolls out through workplaces, that proper H&S practices are maintained in the workplace. This includes:

- Meeting all up-to-date infection prevention controls (IPC)
- Complying with all public health requirements and guidance
- Identifying risks and eliminating, or otherwise controlling them as reasonably practicable
- Ongoing engagement with working people and their unions on all matters impacting their H&S
- Ongoing support for mental health needs.

Vaccination is not a substitute for other control measures. All workers need their employers to continue to implement all reasonably practicable control measures and to be compliant with all control measures required through public health orders and other Government sources.

#### **5. Privacy**

Vaccination information is health information held securely on the National Immunization Register; therefore, privacy rights and obligations apply. An employer may request that a worker disclose their vaccination status only where there is a valid Health and Safety reason to do so. This will likely only be valid if the work has been risk assessed as requiring a vaccinated worker to undertake it.

Workers have the right to privacy with respect to their medical record and may choose not to disclose it. In such situations an employer may reasonably treat the worker as if they are unvaccinated. Any actions taken by an employer must follow proper employment processes and employers should seek legal advice to ensure that workers are treated in a fair and reasonable manner.

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<sup>6</sup> What is reasonably practicable in the circumstances

<sup>7</sup> Risk assessments should be standardised through tripartite design

Any vaccination information employers hold must be kept confidential and held securely.

## **6. Fair treatment regardless of vaccination status**

### *a. Unable to vaccinate*

If an employee cannot be vaccinated due to a health reason, the employer must take all reasonable steps to ensure that the worker is accommodated to continue working. Failure to treat any worker fairly and lawfully may amount to unlawful discrimination that is in breach of the Human Rights Act.

If a situation arises whereby:

- a risk assessment shows that work needs to be undertaken by a vaccinated worker; and
- a worker cannot undertake their role because they cannot get the vaccine (as established through the risk assessment of the work).

Then all redeployment opportunities should be considered and offered to the worker including retraining, if necessary, as well as any other relevant options. Ending employment can only be the last resort if redeployment is impossible and after following a proper employment process.

Again, ending employment due to medical incapacity should not be viewed resulting from fault, and disciplinary actions are not appropriate. Instead, any finding of medical incapacity should follow a specific process that is fair, reasonable, and conducted in good faith.

### *b. Refusal to vaccinate*

People who do not have a health-related reason not to be vaccinated but choose not to be vaccinated need to be treated fairly and lawfully. This decision is protected under the Bill of Rights Act 1990, as well as the Human Rights Act, meaning they cannot be unlawfully discriminated against for that choice.

If there is a good Health and Safety reason for requiring that certain work be done by a vaccinated person, then the employer may ensure that this happens. This may mean that a worker who refuses vaccination may no longer be able to carry out the role. However, an employer should consult with the worker, follow all employment law processes, and ensure that any reasonable redeployment opportunities are made available.

Whenever a worker's employment is ended an employer must ensure that it is justifiable. Termination of a worker's employment because they refuse to be vaccinated and, where the nature of the job requires a vaccinated worker to perform the work cannot be viewed as an 'at fault' dismissal. Thus, disciplinary meetings, warnings and similar processes are not appropriate as it is a change in the requirement of the role that has led to the end of employment [not the worker's fault].

## **7. Customer and co-worker concerns**

Customers/clients, co-workers or other service users cannot demand that an employee disclose their vaccination status. Assurances for these groups that workers are safe for work lie with the employer. Employers must not disclose the vaccination status of workers to other parties.

Any customer and co-worker concerns over vaccination status of individual employees should be considered through the lens of an employer's health and safety obligations, however they are not

determinative on their own. The views of the worker who is subject to the concern should also be considered along with any additional and/or contextual information.

Employers also have the obligation to ensure that workers are protected against harassment

## **8. Employment Rights are maintained**

Employment rights and protections must remain intact. Fundamentally this means that workers should be engaged in 'good faith' and all actions taken by the employer must be 'fair and reasonable'.

Good faith is legally defined, and means:

- that a worker should be consulted on any decision that might affect their continued employment.
- that processes should be transparent and open; and
- that parties to the relationship should be 'active and constructive' with each other.

An important aspect of this is that employers must not predetermine decisions that affect a worker's employment before giving the worker an opportunity to review all the details of proposals and respond.

The duty to act as a fair and reasonable employer is also defined in law and means that all processes should be proper and sufficient. It also means that any decisions and actions taken by the employer with respect to a worker should meet the legal standard of 'reasonableness.'

All fundamental rights and protections remain in place, including protection against unlawful discrimination and the right to privacy. Accordingly, employers should seek advice to ensure that any actions taken are consistent with the Human Rights Act 1993, the Privacy Act 2020, and any other relevant legislation.

## **9. New employees**

Some employers may wish to adopt a hiring policy, whereby any job offers made to new employees will be contingent on the applicant's vaccination status.

This is acceptable if there is a legal requirement to have vaccinated workers, or, if the business can show that there is a legitimate health and safety requirement that the work being offered must only be carried out by a vaccinated individual. In such cases, the nature of the work sets the limitation on who can perform the work.

### *Legal requirement*

Where the Government has determined that a subset of workers must be vaccinated through the imposition of a Public Health Order. New employees for these roles can be required to show they are vaccinated.

### *Legitimate health and safety reason*

Businesses not covered by a health order requiring vaccines can only make vaccination a requirement for new employees where there is a legitimate health and safety reason. This would be shown by a

proper and sufficient risk assessment which defines particular jobs as requiring vaccination.<sup>8</sup> As there are significant Health and Safety implications stemming from these assessments, employers have a duty in good faith to consult with existing workers and unions over what work must be carried out by vaccinated workers.

#### *Other situations*

In situations where it is not clear that work must be done by unvaccinated individuals, employers must not breach the Human Rights Act which prohibits unlawful discrimination against job applicants. Issues around unlawful discrimination of job applicants due to vaccination status have not yet been tested in the Human Rights Tribunal or the Courts. However, denying employment to a job applicant due to vaccination status may potentially give rise to a cause of action for discrimination on grounds of, health, disability or religious, political, or ethical belief.

Employers should also consult with workers and unions to ensure that such hiring policies are clear and reflect worker concerns around health and safety and human rights.

Where there is a lawful reason for requiring that certain work be carried out by vaccinated employees, an employer may request that job applicants for that role confirm their vaccination status as a pre-condition of employment. The job applicant has a right to refuse disclosure, however an employer may be entitled to treat such an applicant as if they were not vaccinated in determining their suitability for the role.

Where there is not a lawful reason for requiring a prospective employee to confirm their vaccination status, an employer who asks for such disclosure may potentially expose themselves to liability under Human Rights Act for unlawful discrimination.

## **Resources and References**

COVID19.govt: <https://covid19.govt.nz/covid-19-vaccines/>

MBIE official vaccination guidance: <https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/covid-19-vaccination-and-employment/>

Ministry of Health – getting the vaccine: <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-getting-vaccine>

Karawhiua (Ministry for Māori Development led unifying campaign): <https://karawhiua.nz/>

Public Health Response (Vaccinations) Order:

<https://www.legislation.govt.nz/regulation/public/2021/0094/latest/LMS487853.html>

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<sup>8</sup> As shown above in this policy

WorkSafe – assessing whether a specific role needs to be performed by a vaccinated worker: <https://www.worksafe.govt.nz/managing-health-and-safety/novel-coronavirus-covid/assessing-whether-a-specific-role-needs-to-be-performed-by-a-vaccinated-worker/>

Immunisation Advisory Centre – How the Comirnaty vaccine works: <https://covid.immune.org.nz/covid-19-vaccines-nz/comirnaty-mrna-pfizerbiontech-vaccine/how-comirnaty-vaccine-works-and>

Building trust in the vaccine: <https://www.theworkshop.org.nz/publications/how-to-talk-about-covid-19-vaccinations-building-trust-in-vaccination-a-guide-2021>

Public Service – Te Kawa Mataaho: <https://www.publicservice.govt.nz/resources/covid-19-vaccination-roll-out-guidance/>