

# COVID-19 Vaccinations in the Workplace : A Guide for Employers

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# COVID-19 vaccinations are being rolled out for all New Zealanders from now into 2022 based on the Government's identification of those most at risk.

This guide aims to help you understand what your obligations are when it comes to vaccinations for your staff, based on employment law and health and safety.

### Roll-out

<b>GROUP 1</b>	Border and managed isolation and quarantine (MIQ) workers and the people they live with. <b>Underway.</b>
<b>GROUP 2</b>	High-risk frontline workers and people living in high-risk places. <b>Underway.</b>
<b>GROUP 3</b>	People who are at risk of getting very sick from COVID-19.
<b>GROUP 4</b>	General population. Estimated start date: <a href="#">July 2021.</a>

## Health and safety at work

Your obligations under the **Health and Safety at Work Act** means you need to do everything you can to reduce the risk to the health and safety of your people.

With COVID-19 that means doing as much as is reasonably practical to reduce its spread, just as you would with the flu or any other infectious disease.

This usually includes staying home when sick and having good hygiene practices in the workplace and providing people with information on public health orders, Alert Levels 1 to 4 and to enable them to make an informed choice on vaccinations.



**Vaccinations are not mandatory and under New Zealand's Bill of Rights Act 1990 people have the right to refuse them.**

## What should you do?

You should have good workplace procedures in place if one of your people has been at risk of contracting COVID-19, has required a test, or has been confirmed as having COVID-19.

This will mean following your Business Continuity Plan or Business Interruption Policy, and adhering to [Government guidelines detailed here](#).

### What does best practice look like?

- Provide COVID 19 training and awareness programmes
- Maintain personal hygiene and social distancing
- Encourage staff (and their families) to get vaccinated
- If possible provide on-site vaccinations\*
- Encourage employees to inform you if they have been vaccinated
- Pay for their vaccination time off
- Accommodate those workers who cannot or will not get vaccinated in a sensible and practicable manner
- Encourage COVID 19 jabs as an annual event like the flu
- Review your Safety Plans for Alert Levels 1 - 4
- [Government Guidelines](#).

## Testing and COVID-19 'passports'

The Government-funded nasal swab testing is available free of charge whether your people have symptoms or not and regardless of your citizenship, immigration status, nationality or level of medical insurance.

Workplaces can also consider private saliva testing as an early warning option, which is easier to administer and the results available quicker, but it is at their own cost and again would be on a voluntary basis.

Vaccine 'passports' are not in effect now but may become relevant if your people travel overseas for work, and to come back into the country. At the moment this is the Government's advice about getting a [pre-departure COVID-19 test](#).



## Privacy

If you ask your people at the pre-employment stage – which you can do – or existing employees if they have had the COVID-19 vaccine, you must keep this information private and you cannot discriminate against people as a result of their response. They can choose not to answer that question.

Privacy law must be taken into account if you are considering keeping a vaccine register.

## Who pays and what support is available during testing?

In the first instance you need to have an open conversation with your staff member about their particular circumstances and come to an agreement in good faith. This may be around what kind of leave they could use, or a contract variation if they cannot work from home.

This needs to be considered in conjunction with Government support that is available to you for your people who are in self-isolation and awaiting a test result. There are a number of options including:

- **Resurgence Support Payment** – for businesses at Alert Level 2 or about for seven or more consecutive days.
- **COVID-19 Short-Term Absence Payment** – for you to help pay your people who cannot work from home while waiting for a test result.
- **COVID-19 Leave Support Scheme** – for you to help pay your people who need to self-isolate and cannot work from home.





## All you need to know from EMA Legal No Jab No Job?

One of the hottest topics in relation to COVID-19 vaccination is the ability of an employer to decline to make an offer of employment or to terminate existing employment on the basis of the applicant or employee's refusal to have the vaccination (and/or advise whether or not they have had it). While there is ample speculation floating around, what are the facts and what is the current legal position in New Zealand?

Vaccination is classed as a form of medical treatment, for which all New Zealand citizens, residents and visitors have the right to decline. This is provided for in section 11 of the Bill of Rights Act 1990.

But can employees and/or prospective employees be treated adversely for declining to be vaccinated on request and/or after being 'encouraged' to do so? And do employees even have to tell employers if they have been vaccinated?

### **For new employees**

On the face of it, an employer may choose to require that new applicants provide proof of vaccination prior to offering employment. However, this must:

- Be relevant to the role being applied for (i.e., as a legitimate health and safety risk); and
- Is subject to consideration of whether such a requirement may unlawfully discriminate against someone who declines vaccination on particular grounds provided for under section 21 of the Human Rights Act 1993.



Grounds under section 21 may include but not be limited to sex (which includes pregnancy) religious belief, ethical belief, and/or disability. There is one exception to this question of discrimination. Namely, whether a decision to proceed to hire despite a declined request for vaccination (or evidence of) would pose an unreasonable risk to the employer's operations. As part of this assessment, an employer must also consider whether a refusal to be vaccinated (or provide evidence of vaccination) will pose a health and safety risk that the employer cannot reasonably accommodate. If the answer is that they cannot, then it may be possible to legally discriminate in accordance with the Human Rights Act 1993. However, if an employer can take reasonable measures to reduce the risk of the degree of harm to a "normal" level, it is unlikely that this will meet the required threshold to permit discrimination in these circumstances. Of course, what is a "normal" level will be open for debate to a degree.

While the above may seem like an 'easy' exception to apply, in reality this will require a detailed health and safety assessment and it is likely that a majority of New Zealand employers will not meet this threshold. The concept of an unacceptable risk is to be measured objectively, and this is more likely to fit the category of an employer who operates almost entirely in a COVID-19 high risk sector which presents an imminent risk of harm (for example, aged care facilities) – and even in these categories, we do not have clear case law or legislation on this yet.

The summary for new hires is this: subject to an assessment of relevance to the role and any risk as to discrimination as set out above, an employer may be able to decline to hire a new employee if employment is subject to proof of vaccination, which they refuse to. If there is a possible issue of discrimination, an employer may still be able to proceed with their decision, subject to an assessment as to whether hiring such new applicant will pose an unacceptable health and safety risk, which cannot be reasonably accommodated. This will always require a case-by-case assessment.

## For existing employees

For people already employed, it is extremely unlikely that they can have their employment altered or terminated for declining vaccination due to the legal protections that exist in terms of employment law.

The above being said, the question on everyone's minds is whether the position is the same for particular categories of employer who work in high-risk sectors as referred to above. In these sectors there may be cases to be made if the health and safety risks are severe. In such circumstances it may be possible for an employer to consider taking serious action if an employee is not vaccinated and/or refuses to provide such information, and there is no other alternative other than to consider redeployment, altering terms of employment, or ultimately, termination.

To add a further complication, as the Ministry of Innovation, Business and Employment (MBIE) has recently stated on its Employment New Zealand website, "workers do not have to tell their employer if they have been vaccinated or why they are unable or choose not to be vaccinated". This is correct; in reality an employee cannot be forced to disclose such information, and, such information is private and is subject to the Privacy Act 2020 – which comes with its own (at times, complex) considerations for employers. This of course adds a further complication as to whether an employer can then proceed to take any action without knowing for sure whether someone has been vaccinated, where they refuse to provide such information. In these circumstances, there may be an ability for an employer to act on the assumption that an employee is not vaccinated, however this must be advised to the employee and handled carefully (ideally with professional advice).

In general, termination of employment for refusing to be vaccinated is at high risk of being found to be an unjustified dismissal. This being said, it may be possible to alter someone's terms of employment, for example, by redeploying them into another role on a temporary or permanent basis. This would require a fair consultation process and current law would most likely require their agreement. Further, such changes may not be appropriate in many circumstances – again, this will be a case-by-case situation, which will require undertaking a thorough health and safety risk assessment and should be considered with professional advice.





## Considerations and suggestions

When assessing the potential impact of the above issues on your business, our suggestion is to start with these 'big picture' considerations:

- **What in reality has or will change the risk profile of a particular role in your business, post the COVID-19 vaccination roll out?**
- **How does the COVID-19 vaccine rollout compare with the influenza vaccination programme in New Zealand (for which there is also no ability to enforce vaccination or require disclosure of the same, and from which hundreds of people die from every year)?**
- **What practical and proactive steps can you take now to get 'ahead' of the issues as much as possible?**

It is important to realise that the rollout of the COVID-19 vaccine does not alter anything in current New Zealand employment law. It is equally important to take stock of the fact that many New Zealand businesses have continued to operate without a vaccine over the past year. This is a relevant consideration in any case to be made that an applicant/employee may have their employment status altered for declining to be vaccinated/provide proof of vaccination.

It will be very easy for some employers to 'jump the gun' on these issues, and many employers may be under the mistaken impression that they can (in particular) unilaterally alter existing employment and reshape a job on the concept of the unreasonable and/or unacceptable "risk", without having a clear understanding of what "risk" means in this context and the threshold to be met. Being too quick to take such action could (likely) mean a very costly personal grievance win for an employee in the Employment Relations Authority. Equally, a misstep in the hiring process as above could mean a successful claim in the Human Rights Review Tribunal for a breach of the Human Rights Act on the basis of unlawful discrimination.

We are yet to see case law (and/or legislation) which provides us with clear guidance as to the ability to alter the terms of someone's employment based on a rejected vaccination request/instruction (or information request), let alone termination of employment on this basis.



In terms of the more specific issues with particular roles, we suggest ensuring that you are clear on what your business needs in respect of vaccination, what health and safety risks are relevant to your business and/or roles within your business (and the severity of these), and then discussing this with a professional advisor to see what realistic options may be available to you, and how to implement these.

As part of that conversation, some of the questions for discussion may include the following:

- Whether a job can be reshaped with an employee's agreement so that the duties being undertaken reduce any unacceptable risk
- Whether redeployment is a possible option for certain employees
- Whether an employee can temporarily work from an alternative location e.g. home.
- Whether termination may be possible
- How to prepare and implement the required documents for preemployment requiring proof of vaccination.
- For those who will be vaccinated - how will the business address the five-week period between the initial injection of the vaccine and anticipated immunity? (e.g. will that person be expected/able to work).

***To discuss any of the above in more detail and/or concerns you may have regarding how COVID-19 impacts your business, please contact the Legal Team on 09 367 0994, or alternatively; our AdviceLine on 0800 300 362.***

<sup>1</sup> The New Zealand Ministry of Health website advises that the current vaccination protocols require an initial injection followed by second injection three weeks later; any degree of protection only then applies a further two weeks after the second injection. Accordingly, there is a five-week period before someone is anticipated to be immune (complete immunity has not been stated to be a definite result by the Ministry)

## Frequently asked questions:

Question	Answer/opinion
Are employees required to be vaccinated?	No. The Bill of Rights Act 1990 gives individuals the right to decline medical treatments and vaccinations are deemed medical treatments. There is currently a discussion whether employers may be able (in accordance with the Health and Safety at Work Act 2015) to require employees to be vaccinated, however this is not yet settled. Visit <a href="http://www.covid19.govt.nz">www.covid19.govt.nz</a> for more information.
Is it recommended that employees are vaccinated?	The Government has recommended that everyone is vaccinated.
Who pays for the vaccination?	The Government is paying for all COVID-19 vaccinations.
Are employers required to put in place other preventative measures for non-vaccinated employees?	Yes, as per any Public Health Order from Alert Level 1- 4. In addition, employers are required under the Health and Safety at Work Act 2015 to take all reasonable and practicable steps to ensure the health and safety of employees at work. What such steps may look like depends on the particular circumstances and must be assessed on a case-by-case basis.
In a case of workers being vaccinated and another Alert Level 3 is applied, would restrictions apply to those workers/workplaces?	Yes, because the Alert Levels are Regulations which must be adhered to within workplaces.
Does an employer need to develop a COVID-19 vaccination policy?	No. There is no requirement or need to create a policy as the pandemic and vaccinations are a general public health issue not a workplace or work-related issue. However, for the time being it is recommended that employers communicate clear expectations to employees regarding required levels of hygiene in the workplace and not attending work if unwell. This could be by way of a policy, or just a A4 factsheet that is displayed at work.
Can an employer organise for vaccinations to be given at a workplace?	If the Minister of Health agrees to workplace-based vaccinations, large employees may be able to arrange this.
What would be a nominal time required to have off to undertake a vaccination procedure?	There is no prescribed time to give a vaccination, however given travel times and compulsory 30 min rest following the vaccine, it would be prudent to expect 2-3 hours away from work.
Do employers pay for time off while employees have their vaccinations?	If the vaccinations are encouraged by the employer, then as the law stands currently the employer should have to pay for that time. Government and employer organisations are suggesting employers pay for time off to get the vaccine. Deducting sick leave could be an option if the employee is indeed unfit for work due to illness or injury. In the absence of this, employers should pay employees their normal wages/salary and apply for the Short-Term Absence Payment to cover this cost.
What information is available to employers and employees regarding the vaccine programme?	The most factual and up-to-date information can be found at <a href="http://www.covid19.govt.nz">www.covid19.govt.nz</a> or <a href="http://www.health.govt.nz">www.health.govt.nz</a> .
Is an employer required to accommodate a non-vaccinated employee by providing other work or duties?	Yes, as with any other condition(s). Employers are required to provide accommodations to work, work tasks and work times that are fair and reasonable, unless such accommodations cause unreasonable disruption to the employer (e.g. causing excessive cost, operational disadvantages, etc).
What might constitute a safety critical job requiring an employee to be vaccinated or highly recommended to do so?	<ol style="list-style-type: none"> <li>Someone who works in a known COVID-19 environment and is in close contact with other persons (e.g. border-related jobs or in the health sector.)</li> <li>Someone who works with others at high risk, e.g. elderly in rest homes or those who are compromised or immune deficient.</li> </ol>
Can an employer direct/ require a staff member to be vaccinated?	No. Employers are only able to educate and encourage an employee to be vaccinated. However for new employees an employer could make an offer of employment subject to the applicant verifying their immunity status for a known high risk area. Employers are also required to monitor staff immunity status for recognised occupations where a vaccine is highly recommended, plus make an offer for a vaccination.

<b>Is there an optimal number (%) of staff to be vaccinated?</b>	No, not within a workplace but nationally the Government is encouraging everyone to be vaccinated towards herd immunity.
<b>Can I enquire as to an employee's vaccination status?</b>	Yes, however the employee has no obligation to inform you one way or another. An employer may respond to a non-disclosure position by assuming the employee has not been vaccinated and therefore require them to use/wear additional PPE e.g. a face mask while working if they are working in a high risk area.
<b>Would an employer be required to inform other staff if another staff member is not vaccinated?</b>	No, this would be a breach of the Privacy Act 2020.
<b>Could being vaccinated form part of an offer of employment 'subject to being vaccinated'?</b>	Yes, but most likely only in very specific circumstances that warrant such condition (e.g. a health-sensitive workplace), as otherwise it may conflict with the Human Rights Act 1993.
<b>If an employee chooses not to be vaccinated based on medical/religious grounds, is an employer required to make note of this situation?</b>	There is no legal reason to do so and there is no legal requirement for the employee to inform the employer. However, an employer must take the usual precautions to ensure staff safety.
<b>Does an employer need to keep a Register of vaccinated and non-vaccinated staff?</b>	There is no legal requirement to do so, nor any requirement for the employee to inform the employer whether they have or have not been vaccinated.
<b>Do employers need or are they required to provide training and information regarding the public roll out of vaccines?</b>	There is no legal requirement, however it is strongly recommended that employers and H&S Reps make information available to their staff. Visit <a href="http://www.covid.19.govt.nz">www.covid.19.govt.nz</a> or <a href="http://www.health.govt.nz">www.health.govt.nz</a> .
<b>If an employee has a rare adverse reaction to the vaccine requiring more time off, how would an employer account for that time?</b>	This would be taken as normal sick leave as the criteria for that leave is met. Employers may potentially apply for the Short-Term Absence Payment or the Leave Assistance Payment Scheme, subject to eligibility.
<b>Can an employer stop someone who does not believe in the vaccination from spreading their messages within the workplace?</b>	Yes. While employers cannot generally restrict an employee's freedom of speech (and opinion), such opinion must not jeopardise the employer's reputation and/or 'state of peace' in the workplace. The employer can set expectations and standards regarding acceptable behaviours, lawfully and reasonable instruct an employee not to 'broadcast' such opinion in a way that may disrupt the workplace.
<b>Can employees choose where they are vaccinated or would the closest to work be the default choice?</b>	An employer could suggest and encourage their employees to use a local provider, however the employee has the right to choose where they get treated/vaccinated.
<b>Can employees have both the winter flu jab at the same time as the COVID-19 vaccination?</b>	No. medical advice indicates that the two vaccines must not be given together at the same time.
<b>Would staff required to travel overseas be required to be vaccinated before they leave or before they return from overseas.</b>	Vaccination passports are being explored around the world and in some places used. These are not in place at this time and much work needs to be completed before we see any such provisions. However, in accordance with their health and safety obligations under the Health and Safety Act 2015, employers may direct employees not to travel overseas if this would enhance the risk of infection.
<b>Can an employer provide on-site saliva testing for staff?</b>	Yes. This is cheaper, less invasive than a nasal swab, easier to administer and results are available quicker. Providers are ready to go, however the Government is still requiring more testing and validation of the process. Saliva testing is used around the world, and is currently available privately in New Zealand.
<b>Who should not get vaccinated?</b>	It is not recommended that those under 16 years of age are vaccinated. Research into this age group continues.
<b>Is it safe to get vaccinated if I have COVID-19?</b>	It is recommended that people wait until they are symptom free before getting vaccinated. Find out more at <a href="http://www.covid19.govt.nz">www.covid19.govt.nz</a> or <a href="http://www.health.govt.nz">www.health.govt.nz</a> .
<b>How long before the vaccines takes effect?</b>	Protection begins following the first jab however full protection is only achieved after the final jab, and usually within one month following the vaccine.



**This document will be updated regularly as new and updated information comes to hand. It is always recommended that advice is sought for specific circumstances.**

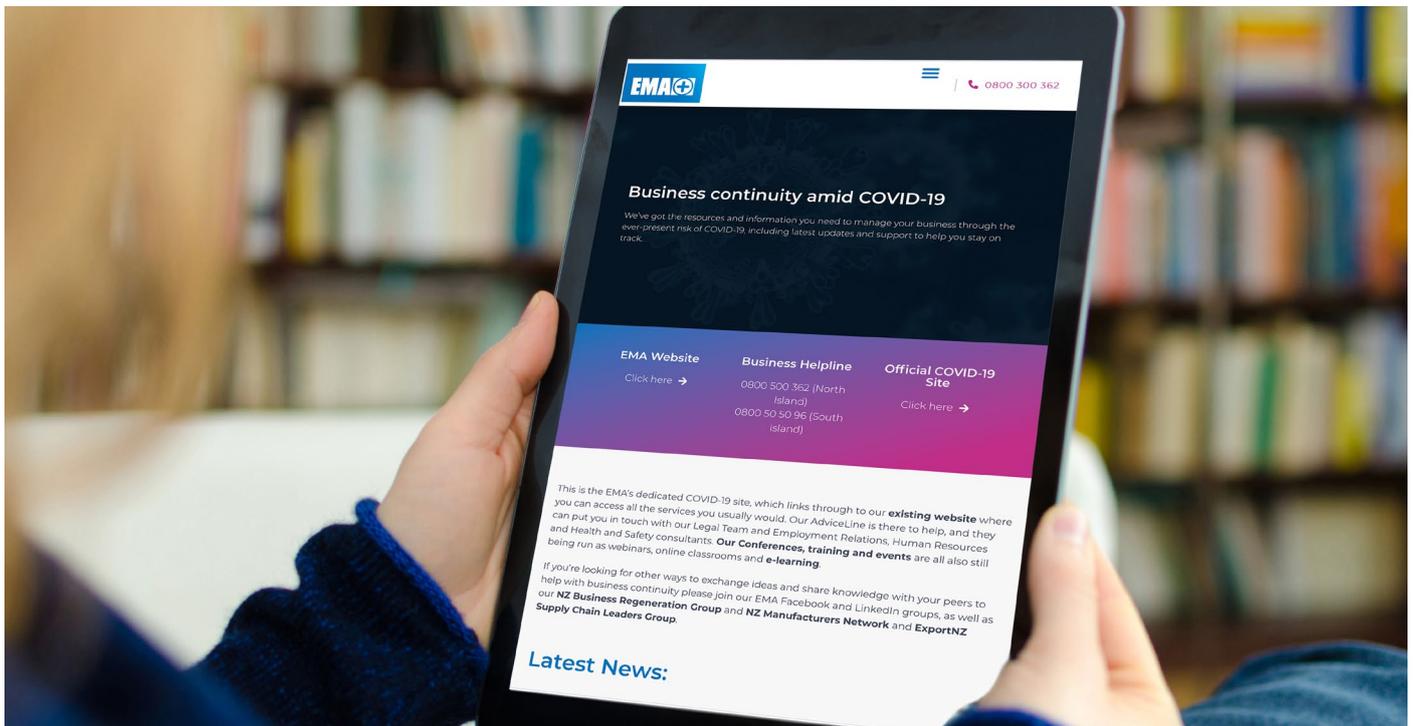
## Have more COVID-19 related questions?

We've got the resources and information you need to manage your business through the ever-present risk of COVID-19, including latest updates and support to help you stay on track.

- News & Updates
- Web Series
- Resource packs and checklists

[Visit covid19.ema.co.nz for more](https://www.covid19.ema.co.nz)

If you're looking for other ways to exchange ideas and share knowledge with your peers to help with business continuity please join our **EMA Facebook** and **LinkedIn groups**, as well as our **NZ Business Regeneration Group** and **NZ Manufacturers Network** and **ExportNZ Supply Chain Leaders Group**.



## Want to know more about what we do?

The EMA has been supporting employers for over 134 years and we know what it takes to create a strong business that lasts.

### Our services include:

- Legal & consulting
- Advocacy and networking
- Exporting and manufacturing
- Payroll
- Health and safety
- Learning & development



Please do not hesitate to contact our **AdviceLine on 0800 300 362** and get in contact with our **human resources and employment law experts** if you need any further information, we are here to help.

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