



FAQs – COVID-19 Public Health Response (Vaccinations) Order 2021

On 22 October 2021, the Government updated the [COVID-19 Public Health Response \(Vaccinations\) Order](#) to require certain roles in the health care and education workforces to be filled by people who have received a first dose of a COVID-19 vaccine by 15 November 2021 and a second dose by 1 January 2022. In addition, the Order requires certain roles in prisons, including those carried out by NZNO members, to be filled by people who have received a first dose by 6 November 2021 and a second dose by 8 December 2021.

NZNO supports the government's policy of requiring health care workers to be vaccinated. Most health care workers are already vaccinated, and this order will provide reassurance and certainty to both health care workers and the public accessing health care services.

The safety and wellbeing of health care workers is the key to overcoming the Covid-19 crisis and high levels of community vaccination will also help keep NZNO members safe.

For clarity, a mandatory vaccination order simply means the Government has decided that Covid-19 vaccination is essential for people filling the affected roles. It does not mean that anyone can be forced to get a vaccine.

It is NZNO's view that members who are covered by the Order and decline the vaccine are potentially putting their jobs at risk. Being vaccinated is becoming a legal expectation of health care workers. Based on recent case law, NZNO does not see a wide range of options for members who choose not to be vaccinated for reasons other than any legal exemption.

- [NZNO Position Statement: COVID-19 \(mate korona\) Vaccinations, 2021](#)
- [NZ Nursing Council Guidance Statement: COVID-19 vaccine and your professional responsibility](#)
- [NZ Nursing Council FAQs on the new government policy on Covid-19 vaccination](#)
- [Midwifery Council position on mandatory COVID-19 vaccination for midwives](#)

Should you have a medical reason for not being vaccinated against Covid-19 and/or be concerned about termination of your employment being under consideration by your employer please contact NZNO for advice or support on 0800 28 38 48.

Who is covered by the mandatory vaccination order?

The COVID-19 Public Health Response (Vaccinations) Order 2021 has been updated to require the following people working in the health and disability sector to be fully vaccinated.

- Health Practitioners including
 - nurses
 - general practitioners
 - pharmacists
 - community health nurses
 - midwives
 - paramedics
- people performing non-regulated healthcare work in settings such as:
 - hospitals
 - aged residential care
 - home and community support services
 - kaupapa Māori health providers
 - Pacific Health Providers
 - non-government organisations who provide health services
 - all healthcare workers in sites where vulnerable patients are treated
- roles undertaken by people who:
 - are in frequent contact, face-to-face contact, or are in close proximity to healthcare workers providing a health service
 - work where a health service is being provided
 - do not necessarily provide a health service, but their role requires frequent contact/engagement with those providing health services and is considered tied to a role within a healthcare setting.

Are there any exemptions from the mandatory vaccination order?

On 7 November 2021, the Order was updated as follows:

Health practitioners who conduct consultations with patients only by remote means (for example, on-line or by telephone) are not required to be vaccinated unless they are also required to enter a workplace for the purpose of face-to-face meetings or work with other staff or patients.

A suitably qualified medical practitioner or nurse practitioner may apply to the Director-General of Health on behalf of an affected worker for a temporary exemption from the requirement to be vaccinated on the ground that they meet the [specified COVID-19 vaccination exemption criteria](#).

There are no other grounds for exemption set out in the Order.

Can I be dismissed if I have a medical exemption from vaccination?

If you think you have a medical reason where you cannot be vaccinated, you should consult a suitably qualified health practitioner or nurse practitioner and be examined by them. If they consider that you cannot be vaccinated on medical grounds, they must apply to the Director-General of Health on your behalf for an exemption.

Should you be granted an exemption, your employer must take all reasonable steps to ensure you are accommodated to continue working. This includes carrying on in your usual role if risks can be

appropriately managed. A failure to treat such an employee fairly may amount to a breach of the Human Rights Act, under the ground of disability. All redeployment opportunities should be offered, including retraining, if reasonably possible. Ending such an employee's employment should be the last resort and only after following an employment process that is fair, reasonable, and conducted in good faith.

Exemptions are only valid for up to six months and need to be recertified after that time.

A dismissal for a failure or refusal to be vaccinated is not necessarily an 'at fault' dismissal.

What about employees not affected by a mandatory vaccination order?

In other cases, where a worker is not one of those affected by a mandatory vaccination order, an employer can require a specific role to be performed by a vaccinated person if, following a risk assessment, it is deemed to be required.

Your employer must assess an employee's risk, if they remain unvaccinated, and the risk posed to other employees, patients, clients, and the public, as required by the Health and Safety at Work Act 2015. Employers are obliged to eliminate or minimise that risk. If an employer identifies that a role needs to be carried out by vaccinated employees, they have:

- a responsibility to consult with the affected workforce and NZNO and hear their views,
- a responsibility to work with their employees and NZNO to develop a plan and a timeline for implementing a move to a vaccinated workforce if, after consultation, vaccination is found to be necessary for the roles.

Can I be dismissed if I decline to be vaccinated and do not have a verified health exemption?

NZNO considers that health employees who do not get vaccinated and are not exempt for medical reasons potentially run the risk of losing their jobs. The risk is even greater for workers covered by the mandatory vaccination order/s.

NZNO will work with employers and affected workers to ensure that those who cannot be vaccinated for a verified health exemption or choose not to be vaccinated for other reasons are offered reasonable information about vaccination and their options, and offered redeployment opportunities, if possible, to roles that have not been identified as vaccine essential. That could include a change of your role, hours of work or location.

However, it may be that if employees decline vaccination, and cannot be redeployed, employment in the existing role or with that employer is no longer appropriate.

Each case will need to be assessed on its own facts in deciding whether there are viable options to remain employed or whether termination of employment could be justifiable.

In addition, employers must still undertake a reasonable process when engaging with unvaccinated employees when encouraging those employees to be vaccinated and deciding on what consequences may flow from an employee not being vaccinated.

Employers must always be able to justify a dismissal and act fairly, reasonably and conduct any process in good faith.

A dismissal for a failure or refusal to be vaccinated is not necessarily an 'at fault' dismissal. Therefore, disciplinary meetings, warnings and other similar processes may not be appropriate as it is a change

in the requirement of the role that may lead to the end of the employment. Meetings to discuss the issues for individual workers with their union's support and employers clearly setting out their requirements and reasonable timeframes are likely to be part of a fair process.

However, for roles in health where an employer is bound by the mandatory vaccine order or has made a reasonable risk assessment and decided a role must be undertaken by a vaccinated person, a refusal to be vaccinated might be characterised as a failure to follow a reasonable and lawful instruction, in which case the usual fair dismissal processes should be adhered to.

Please also see the [CTU COVID Response Policy](#).

What has happened in NZ courts so far?

In the first NZ decision on this issue, on 1 September 2021, the Employment Relations Authority decided that the NZ Customs Service had justifiably dismissed a border worker at a maritime port who had told her employer that she would not be vaccinated. The employee was not a health worker. Border workers are subject to the COVID-19 Public Health Response (Vaccinations) Order 2021 requiring all roles set out in the Order to be performed by vaccinated workers after 30 April 2021.

The Customs Service considered her to be an affected worker under the border workforce mandatory vaccination order.

The Employment Relations Authority decided that the worker:

- was justifiably dismissed;
- was not unjustifiably disadvantaged by the process used that ended in her dismissal;
- that the Customs Service had not breached its duty of good faith to her.

NZNO understands that the employee has challenged the Authority's decision and the case will be heard by the Employment Court.

NZNO cannot rule out that any health employee deciding not to be vaccinated could be justifiably dismissed because of their vaccination status. That is even more so the case if you are one of the affected workers covered by the border work force order or the new health work force mandatory vaccination order.

Can an employer ask my vaccination status?

Yes, an employer can ask you as a part of carrying out a risk assessment and risk management programme or as part of its responsibility to ensure its workforce is vaccinated. If you decide to answer your answer must be accurate.

Employees have the right not to disclose their vaccination status. However, the employer can assume the worker is unvaccinated and take measures to mitigate risks for that employee and others.

Generally, employers are not entitled to access information from your health records, including the Covid Immunisation Register, without your specific consent. However, the Ministry of Health has given permission to DHBs since the 2021 Delta outbreak to get vaccination status information directly from the Covid Immunisation Register.

Is treating unvaccinated or presumed unvaccinated workers differently from vaccinated workers discrimination?

There is a difference between being treated differently because of your status of being non-vaccinated, or your employer not knowing your status because you decline to tell them and being discriminated against.

Your employer has health and safety obligations to you and to your co-workers.

You also have health and safety obligations to your co-workers.

The Human Rights Act 1993 and the Employment Relations Act 2000 provide protection for employees who are discriminated against in their employment by being disadvantaged because of or dismissed on any of the prohibited grounds of discrimination. These grounds do not include vaccination status but do include disability.

Some employees may have religious reasons for not wanting to be vaccinated. There is protection in the Human Rights Act from discrimination on the basis of religious belief. Objective and verifiable proof of that religious belief and how it prevents you being vaccinated would have to be provided. An employer would have to make reasonable accommodation for a person who could not be vaccinated because of their religious belief. However, if there is no reasonable availability of redeployment or if an employee intended to advise others not to be vaccinated because of their personal religious belief continued employment may not be possible.

[What are my rights under the NZ Bill of Rights Act 1990?](#)

This Act sets out some rights we all have. Section 11 of the Act states everyone has the right to refuse to undergo medical treatment. A Covid-19 vaccine is a medical treatment.

The right to refuse medical treatment, at its most literal, means you cannot be treated against your will. That is, you cannot be forcibly vaccinated. It does not mean that you could never be moved to another area of work or dismissed, in certain circumstances, if you decline to be vaccinated.

In addition, section 5 of the NZ Bill of Rights Act says that the rights in the Act must be upheld, except when they are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

That means that the government can make laws that conflict with rights in the NZ Bill of Rights Act (NZBORA).

The border worker vaccinations Order, that means that only vaccinated workers can undertake certain roles since 30 April 2021, has been considered by the High Court to test whether it is an example of such “reasonable limits” under s 5 of the Act. On 20 September 2021, Justice Churchman considered a challenge to the COVID_19 Public Health Response (Vaccinations) Order 2021 that affected only border workers as at that date (*GF v Minister of COVID-19 Response, Associate Minister of Health and Attorney General* [2021] NZHC 2526). GF challenged the Order and said that it was unlawful on the basis that it did not meet the conditions required under section 9 of the Public Health Response Act 2020 and that the Order was irrational, and therefore unlawful, principally because of the consequences it has for unvaccinated employees. GF also said that the Order unreasonably infringed on her rights.

In upholding the legality of the Order and concluding “to the extent that requiring affected workers to be vaccinated before carrying out certain duties might amount to discrimination, the benefits of that requirement outweigh any discrimination and that limitation is proportional and demonstrably justified” Justice Churchman decided that:

- the Order was made within the parameters of the Public Health Response Act 2020;
- the Pfizer vaccine was not experimental;
- The Minister took into account that there was a sufficient public “health rationale for making the Order, and that the reduction in risk achieved by the Order was material and could not be achieved in any other less rights-intrusive way, and that the Order would be justified from a NZBORA perspective.”;
- In balancing “the benefit of the vaccine and the risk of being unvaccinated against any discrimination in relation to those affected” the Court stated that “if the benefits outweigh the potential discrimination, the limitation is proportionate and demonstrably justified under s 5 of the NZBORA.”

NZNO considers that it is highly likely that if the Order mandating vaccination for the health workforce is judicially reviewed the High Court would reach the same conclusion.

Should you have a medical reason for not being vaccinated against Covid-19 and/or be concerned about termination of your employment being under consideration by your employer please contact NZNO for advice or support on 0800 28 38 48.