

Mandatory vaccination – Q & A Sheet

The information below has been prepared to assist with several common questions that RMTU delegates and organisers are regularly receiving from members.

The information below is offered by way of general guidance for RMTU members only – it does not constitute legal advice, and must not be treated as such.

Does the COVID-19 Public Health Response (Vaccinations) Order 2021 (“the Order”) apply to all workers?

No.

The Order only applies to workers who fall into certain groups – known as “groups of affected persons” – which are defined in Parts 1 to 9 of Schedule 2 of the Order itself. Broadly speaking, these groups include certain workers in the MIQ, border, health/disability, corrections and education sectors.

The Order does not yet cover the broader transport industry, including rail.

For border workers – including port workers – the Ministry of Health has issued a guidance document discussing/clarifying the scope of the Order, and giving several detailed examples of when the Order does and does not apply.

Can employers make “no-job, no-job” mandates for roles that aren’t covered by the Order (including roles within KiwiRail, Transdev and Toll)?

Yes – so long as that is justified for health and safety reasons. Any health and safety justification for limiting a role to vaccinated workers must be based on a properly-conducted risk assessment.

An employer’s risks assessment must show that a “no-job, no-job” mandate is needed for that employer to fulfil its statutory and contractual obligations to provide a healthy and safe workplace. An employer’s health and safety duties extend beyond its workers to anyone else who might foreseeably be put at risk by its Covid response policies.

Crucially, when undertaking its risk assessment an employer *must* engage with workers and their unions. This is an express statutory requirement – an employer will not likely be able to rely on any risk assessment which was produced without meaningful worker engagement.

Ultimately, if the risk assessment is properly constructed with worker engagement and confirms that (after all relevant considerations have been weighed up) the risks inherent in the role are such that a “no-job, no-job” mandate is a reasonable step to take, the employer will likely be justified in doing so.

Both Worksafe and the Council of Trade Unions have issued guidance on risk assessment relevant to “no-job, no-job” mandates.

Can employers access vaccination status information?

Yes – in relation to workers whose roles are either a) covered by the Order, or b) subject to a vaccination mandate arising from a health and safety risk assessment.

In relation to roles covered by the Order, the worker **must** allow the employer to access his/her vaccination record held by the Ministry of Health.

In relation to roles subject to a vaccination mandate arising from a risk assessment, the employer has a legitimate need to know the worker's vaccination status, and so is entitled to ask (or to seek permission to access the Ministry's record for that worker). If the worker withholds that information and does not allow the employer to access the Ministry's record, the employer is entitled to assume that the worker is unvaccinated. Importantly, employers should inform the worker of a) this assumption, and b) what it might mean for the worker's ongoing employment, prior to any decisions being made.

For workers whose roles are neither a) caught by the Order nor b) subject to a vaccination mandate arising from a risk assessment, there will not likely be any obligation on the worker to disclose his/her vaccination status, or allow the employer to access the Ministry's record.

If I lose my job as a result of mandatory vaccination, is my employer under a duty to redeploy me?

The RMTU's view is that – as a matter of good faith – where a person is justifiably removed from their role for no reason other than refusing vaccination, the employer should offer any suitable roles that are currently vacant.

If I am redeployed, then my old job is re-classified as no longer requiring mandatory vaccination, am I able to immediately move back to my old job?

No.

Once a worker is justifiably removed from a certain role, there is no legal right to be automatically returned to that role if circumstances change.

What ability do I have to refuse to work, if I am worried about the Covid-related risks that the work entails?

The Health and Safety at Work Act 2015 gives all workers the right to refuse work, if:

1. The worker believes that they will be exposed to an immediate or imminent hazard which poses a serious risk to their health or safety; and
2. The risk goes beyond that normally associated with the worker's duties.

If you refuse work on these grounds, you must immediately tell your employer why you're refusing and try to resolve the issue.

If the issue isn't resolved, you can continue to refuse – but only if that refusal is "reasonable". The best way to ensure that you're acting reasonably is to get the support of your Health and Safety Rep – if the Rep confirms that the work involves a serious risk, then your refusal will automatically be deemed "reasonable".

If I'm required to self-isolate/stay away from work but am not actually sick (for example, if I'm a close contact of a confirmed case or if I've visited a place of interest and am waiting on test results) will I get paid?

Employers should work together with workers and unions to ensure that compliance with isolation requirements does not cause financial hardship.

Options available to a self-isolating worker will depend on the relevant employment contract and applicable policies, which might provide for specific "Covid leave" entitlements, broader than usual sick leave entitlements, or set out circumstances where special paid leave is applicable. Even if the contract doesn't provide for either "Covid leave" or special paid leave, these should nevertheless be given consideration by the employer.

There are 2 forms of government payment for which employers can apply, in order to help support workers who are required to self-isolate. These are the Covid 19 Short Term Absence Payment, and the Covid 19 Leave Support Scheme. Both are administered by Work and Income. In the RMTU's view, it would be neither fair nor reasonable for an employer to refuse to pay a self-isolating worker, without first applying for these payments.

If a self-isolating worker is able to work from home, wages must be paid in the normal way.

Are there any exemptions from mandatory vaccination?

The Order does allow for exemption – but only in certain circumstances, and only for certain roles covered by the Order:

- A person may be exempted if they have *"... particular physical needs that a suitably qualified health practitioner (in the course of examining the person) determines would make it inappropriate for the person to be vaccinated"*. The Ministry of Health has publicly indicated that only a very small minority of people will have needs which would make vaccination genuinely inappropriate.
- In terms of port workers, this potential exemption only applies to those workers who come within Part 6 of Schedule 2: i.e. those who *"... handle affected items within 72 hours of removal of items from affected ships and who have contact with members of groups specified in Part 4 while both are working"*.
- The exemption *does not* apply to any other group of port worker covered by the Order – i.e. those in Part 4 of Schedule 2:
 - All workers who board affected ships;
 - Pilots and stevedores carrying out work on/around affected ships;
 - Workers who transport others to/from affected ships; and
 - Other port workers who interact with people who are required to be quarantined/isolated.

In terms of workers whose roles are not covered by the Order, but for whom the employer has made vaccination mandatory based on a risk assessment:

- Whether or not the worker can be exempted (and, if so, on what grounds) should form part of the risk assessment.
- If the risk is assessed as being significant enough, it would be open to the employer to rule out exemptions altogether.

If a) it is genuinely unsafe for a particular worker to be vaccinated, and b) that worker loses his/her job as a result, the RMTU is very strongly of the view that redundancy and/or medical retirement provisions should apply.

*Are port workers who handle mooring lines covered by the Covid **testing** Order?*

In addition to the Order regarding mandatory vaccination, there is also in place the COVID-19 Public Health Response (Required Testing) Order 2020 (“the Testing Order”).

Like the Vaccination Order, the Testing Order applies to certain, defined groups of workers. In terms of port workers, the roles covered by the Testing Order are broadly aligned with those covered by the Vaccination Order.

Both the Vaccination and Testing Orders apply to port workers who:

1. Handle “affected items” within 72 hours of those items being removed from affected ships; and
2. Have contact with other workers covered by the Order whilst both are working (i.e. face-to-face contact or being in a confined space, within 2 metres of each other, for 15 minutes or more).

The Ministry of Health has confirmed that mooring lines are “affected items”. So, workers who handle lines will be covered by the Testing Order if – in addition to handling the lines – they also have contact with another worker who is covered by the Testing Order, i.e.:

- Workers who spend more than 15 minutes in enclosed space on board affected ships;
- Pilots working on/around affected ships;
- Stevedores working on/around affected ships;
- Workers who board affected ships;
- Workers who transport others to/from affected ships; and
- Workers who interact with people who are in isolation/quarantine.

10 November 2021