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EMPLOYMENT LAW

Museums Aotearoa COVID-19 Workshop

Presenters

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Under New Zealand's current elimination strategy vaccines are a hotly discussed topic. The Government has expressly stated it will not make the COVID-19 vaccination mandatory. It is up to employers to consider whether or not they will require their employees and volunteers to be vaccinated. This is particularly relevant for organisations who have customer facing employees and volunteers or may be dealing with vulnerable people.

This workshop will examine the responsibilities on employers in the COVID-19 era and what type of obligations can be placed on an employee or volunteer regarding vaccination.

It is important to note in the absence of legislation, it is likely to be unlawful for Museums Aotearoa Members to mandate all your employees and volunteers be vaccinated. However, there is a potential exception where individual roles need to be carried out by a vaccinated employee, or in relation to new staff. In order to meet health and safety requirements, Museums Aotearoa Members need to be setting clear expectations around vaccinations, ensuring you consult with staff and have a supportive environment to discuss concerns and opinions.

You should also bear in mind considerations of culture and ensure all actions taken are respectful and sensitive to people's differences.

Existing Employees

Employers cannot compel existing employees to be vaccinated. Vaccines constitute medical treatment, which every person has the right to refuse to undergo (New Zealand Bill of Rights Act 1990, s 11). Employment agreements obviously do not currently contain provisions regarding COVID-19 vaccination. Therefore, any attempt to compel current employees to be vaccinated or insert such provisions into policies or employment agreements will represent an unlawful unilateral variation to employees' terms and conditions of employment. Vaccines should not be described as mandatory, or employees threatened with adverse employment consequences if they decline vaccination. This would expose Museums Aotearoa Members to legal challenges.

In order to encourage voluntary uptake of vaccinations, Museums Aotearoa Members should engage and consult with employees and volunteers. Education is one of the most valuable steps in encouraging staff to be vaccinated. The Ministry of Health provides significant resources on its website regarding the vaccine, which will be the best source of information. Museums Aotearoa Members should allow employees reasonable paid time away from the workplace to be vaccinated.

An employee does not have to disclose whether they are vaccinated. If an employee refuses to disclose whether they have been vaccinated, you may assume they are unvaccinated. This assumption should be put to employees, to allow them an opportunity to correct it. You should not share an employee's vaccination status with other employees without consent. This also applies to volunteers.

If engagement and education has not been successful in encouraging employees and volunteers to be vaccinated, you can take the following steps in relation to unvaccinated employees/volunteers.

Issues relating to unvaccinated employees/volunteers in the workplace

First, Museums Aotearoa Members must undertake a health and safety risk assessment to determine if it is reasonable for it to be a requirement for an employee performing a specific role to be vaccinated. For example, it would likely be justifiable to require staff working in high-risk areas to be vaccinated such as those where social distancing is not possible, and they have exposure to high volumes of people. However, this should not be automatically assumed, given public facing businesses, such as museums and art galleries, have operated successfully to date using other appropriate measures (e.g. PPE, hygiene measures, distancing, infection controls and other health and safety practices). A vaccine will supplement these practices, but will not replace these measures. Vaccinated people can still catch Covid and can still spread it.

For an administration employee who can take other reasonable health and safety measures it may not be reasonable to require vaccination. Each role would need to be assessed on a case-by-case basis. Risk assessments will change over time. For example, community spread, or open borders may impact a risk assessment.

If the risk assessment determines it is reasonable to require an employee to be vaccinated to perform the role, and an employee is not vaccinated, you must undertake a good faith consultation process with the employee before making any changes to their role or how they work.

The employee should be provided with all relevant information, including the risk assessment for comment. Museums Aotearoa Members should engage with the employee regarding their decision not to be vaccinated. If the employee remains unwilling to be vaccinated, you should engage with the employee regarding alternative options. Potential options could include working from home (if the role allows it), reassignment or redeployment to alternative duties.

Dismissing an employee who has not been vaccinated would only be justified in extremely rare circumstances, where there was an imminent health and safety risk and all reasonable alternatives to dismissal had been explored. You would need to engage with the employee in a good faith consultation process and you should get specific legal advice prior to considering dismissal.

Care should be taken where an employee refuses to be vaccinated. There may be a number of reasons why employees elect not to take up a vaccine. These reasons could include various prohibited grounds of discrimination under the Human Rights Act 1993, for example, religious belief, disability grounds (e.g. medical conditions), or pregnancy. Each employee should be engaged with on an individual basis to prevent allegations of discrimination.

Good faith consultation and other requirements contained in the Employment Relations Act 2000 need to be complied with in undertaking any process with existing employees. Vaccines are currently mandatory for employees in certain at-risk sectors, and there have already been legal challenges. In *GF v New Zealand Customs Service* [2021] NZERA 382 the Employment Relations Authority upheld their decision that the former Customs employee had not been unjustifiably dismissed and will not get her job back, after being dismissed following refusing to get the vaccine, with no other redeployment options available. The former employee is now challenging the powers of the order mandating vaccines for front line workers before the High Court.

This case clearly demonstrates the importance of communication and consultation between employers and employees, the importance of health and safety assessments in any decision relating to vaccination and addressing each matter on the basis of its own merits.

Recruitment Issues

Now the vaccine has become available to **all** New Zealanders (over 12), and people have had a reasonable opportunity to have it, Museums Aotearoa Members can make it a condition of employment for a new employee to be vaccinated.

Prospective employees may have legitimate reasons not to be vaccinated. These reasons could include various prohibited grounds of discrimination under the Human Rights Act 1993, for example, religious belief, disability grounds (e.g. medical conditions), or pregnancy.

Refusing to employ someone who is unvaccinated due to a prohibited ground of discrimination could be unlawful (although there may be exceptions on health and safety grounds).

We recommend assessing each case on its own merits as broad policies (e.g. *'no jab, no job'*) could amount to direct or indirect discrimination. If, but for being unvaccinated, the prospective employee would have progressed in the application process, Museums Aotearoa Members should seek to understand the prospective employee's reason for being unvaccinated. Consider whether the role requires the person to be vaccinated on health and safety grounds, or if other safety measures (e.g. PPE, hygiene measures, infection controls) would suffice. The reason for not hiring the person should be carefully recorded, with any health and safety assessment noted. If a prospective employee has not been vaccinated but intends to, you may impose a clause stating they must have received their first vaccine within a reasonable period of time, such as four weeks.

Volunteers

Museums Aotearoa Members rely heavily on the labour and goodwill of a volunteer workforce. Under the HSWA volunteers are considered workers. Museums Aotearoa Members therefore have a duty to keep them healthy and safe. Volunteers do not have the same employment rights and protections as employees. Good faith consultation requirements do not apply. However, given the reliance on the volunteer workforce and the value these volunteers bring to Museums Aotearoa, you should still engage and consult with volunteers about the vaccine and the risks to volunteers of not being vaccinated.

Museums Aotearoa Members may wish to adopt policies whereby only vaccinated volunteers have close contact with visitors and the public visiting their facilities.

Health and Safety obligations

As a PCBU under the Health and Safety at Work Act 2015 (**HSWA**) employers have an ongoing responsibility to ensure the health and safety of workers and other people within their services. Employers have duties to eliminate, or minimise as is reasonably practicable, risks to health and safety. This includes working with other PCBUs, engaging with workers and monitoring risks. While employees may be exposed to COVID-19, this alone would not justify a policy whereby employees must be vaccinated. The legal ramifications of unilaterally varying an existing employee's employment agreement to impose a new condition of vaccination on the employee must also be considered. These two overarching considerations must be taken into account when considering vaccination in the workplace.

In order to meet these HSWA obligations, you do not need to mandate COVID-19 vaccinations for all employees, rather this may be in breach of the employees' employment rights. However, you will need to ensure that you have carried out a careful risk assessment and put reasonable safeguards in place to reduce

employee's exposure to COVID-19. Under the HSWA there is a duty to take positive steps which could look like:

- encouraging and supporting employees/volunteers to get vaccinated by offering incentives and making it easy to get vaccinated, such 'vaccination paid leave';
- engaging constructively and regularly with employees/volunteers, unions and health and safety representatives around vaccinations; and
- fostering a culture in which vaccination becomes an expectation from leaders at Museums Aotearoa, and be a role model yourself by getting vaccinated.

As part of exercising due diligence, Museums Aotearoa Members should also ensure that they:

- stay up to date with the nationwide vaccine roll-out, vaccine concerns and developments;
- introduce a vaccination requirement for new employees (as discussed this should be on a case-by-case basis so as to avoid liability under discrimination laws);
- collect and maintain employee/volunteer information about vaccination status (where employees/volunteers freely provide this) in accordance with the Privacy Act 2020;
- undertake a regular health and safety risk assessment of the workplace, and ensure steps are taken to mitigate remaining risk factors wherever possible (for example, by mandating PPE be worn in customer facing roles);
- ensure cultural awareness and respect in all interactions;
- be aware some people have compelling health (including psychological reasons) for an exemption eg wearing masks may be a genuine problem for some people;
- undertake regular health and safety risk assessments in relation to particular roles that may require a vaccinated person to perform them due to the potential risks of being exposed to COVID-19 for that role, such as in direct exposure with overseas tourists and where social distancing is not possible;
- maintain existing work from home policies and social distancing protocols up to date and that the Museums Aotearoa Members foster a supportive environment for staff who need to self-isolate or do not feel safe coming into work;
- require other COVID-19 response measures, such as requiring the use of personal protective equipment and encouraging regular washing of hands; and
- seek legal advice if you are unsure of your obligations and how to meet them.