

COVID-19 policies – time for review?

On 23 March 2022 the Prime Minister announced significant changes to New Zealand's COVID-19 response framework. The changes reflect a change in the perceived risk of the virus to New Zealanders. In light of the changes, employers should consider whether their COVID-19 policies remain fit for purpose.

The Government's changes will see the removal of vaccine pass requirements, most vaccine mandates, QR code scanning and outdoor gathering limits.

Businesses will still be able to use vaccine passes if they wish to, but the passes will not be required to operate with indoor guests.

The changes reflect a marked change in the Government's approach to the virus and occur against a background of (at the time of writing) >95% of the population having received two doses of the vaccine, >72% having received booster shots, and the less severe Omicron strain of the virus at play.

Additionally, the changes come in the wake of a number of challenges of vaccine mandates in the Courts, which have received much media coverage.

While these cases are of little to no general precedent value for private businesses, they serve as a warning that COVID-19 policies may be challenged by employees, and of the importance of ensuring these policies remain justified.

Test of justification

An employee may challenge a decision made by their employer by raising a personal grievance claim. An employer's defence to a claim depends on whether its

actions meet the "test of justification" contained at section 103A of the Employment Relations Act 2000.

The test is: "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".

The test is considered at the time of the dismissal or action i.e. when the decision takes effect or when a policy is applied. This means that a policy that was once justifiable can become unjustifiable by virtue of circumstantial changes. A "set and forget approach" to workplace policies is therefore risky, and employers that adopt this approach are likely to wind up on the wrong side of the law.

Fit for purpose?

COVID-19 policies are lawful provided the underlying purpose on which they were enacted remains valid.

The health and safety risk of COVID-19 has changed in light of the Omicron strain, high rates of vaccination, and more accessible testing measures (i.e. RAT tests). Policies founded on these reasons, and their underlying risk assessments, should be reviewed and amended if necessary.

Conversely, COVID-19 policies founded on commercial reasons i.e. vaccination requirements implemented in order to satisfy third party requirements (such as sub-contracting businesses that require vaccination to accord with head-contractors' site requirements) may remain legitimate. Nevertheless, employers should ensure such policies are being implemented only to the extent necessary.

Next steps

The Government's announcement does not necessitate private businesses scrapping COVID-19 policies altogether. Rather, it marks a prudent time for review, and the Government has specifically advised employers with vaccination requirements in place to review the

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underlying health and safety risk assessment in light of current circumstances,

COVID-19 policies (particularly vaccination requirements) by nature invoke complex legal considerations (and therefore risk) from a number of statutes including the Employment Relations Act 2000, New Zealand Bill of Rights Act 1990, Human Rights Act 1993, Health and Safety at Work Act 2015, and Privacy Act 2020 among others.

Want to know more?

If you have any questions regarding the justifiability of your COVID-19 policies, please get in touch with one of our [Employment Team](#).