Now that New Zealand has accelerated its rollout of the Pfizer Covid-19 vaccine, employers are turning their minds to whether they can ask their employees about their vaccination status and potentially, whether they can mandate for compulsory vaccinations within their workforce. This article examines some of these complex issues.

**Can employees ask employees about their vaccination status?**

The Office of the Privacy Commissioner issued guidance earlier this year clarifying that a person’s vaccination status is considered to be “*personal information*”, that is afforded protections in under the Privacy Act 2020. This means employers should approach the topic with a degree of caution.

Our view is that it is permissible to ask employees about their vaccination status, but that employers should be clear with employees about:

* Why they are requesting this information (for example, to enable the employer to assess health and safety risks related to Covid-19 at their workplace);
* Who the information will be shared with (for example, it will not be appropriate to share an employee’s vaccination status with their colleagues, unless there is agreement to do this); and
* Where this information will be stored (the information should only be accessible to the people who need it, such as managers in the business).

**What can employers do if an employee refuses to disclose their vaccination status?**

Our view is that an employer is not going to be able to compel a reluctant employee to reveal their vaccination status, except potentially in very limited circumstances.

When dealing with an employee who may be reluctant to answer that question, employers should approach the matter in good faith and reiterate why they are asking for the information, which may include that they require it to undertake a fully informed risk assessment of the employee’s workplace. Ultimately if an employee refuses to answer the question on privacy grounds, then this should be respected, however employers may wish to notify such employees that they will assume, based on the refusal to disclose, that this means they are unvaccinated and are not planning on being vaccinated.

Employers of employees who are required by law to be vaccinated under Government Orders will likely be able to require their employees to disclose their vaccination status, as they need to know that everybody in their workforce is vaccinated to ensure they are complying with the orders.

One question that has yet to be tested in the Courts is whether an employee could be breaching their good faith obligations by refusing to disclose their vaccination status. If an employee works in an occupation that may have a greater exposure to Covid-19 and/or where the consequences of them transmitting Covid-19 to others in the workplace might be more severe (for example an aged care facility) then an employer might be able to legitimately claim that the employee’s refusal to disclose is a breach of the employee’s good faith obligation to be responsive and communicative.

**Can employers force their employees to be vaccinated?**

It is important to remember that the NZ Bill of Rights Act allows individuals the right to refuse any form of medical treatment and vaccinations are captured within this definition. The short answer to this question is it depends on the type of work being performed by the employees. There are presently three relevant categories of employees:

1. Employees who are required to be vaccinated by way of Government Order – so far, this limited category includes port, border and MIQ workers.
2. Employees who work in a role where they are more likely to be exposed to Covid-19 and where it would create a serious health and safety risk to themselves or to others in that workplace if they are unvaccinated – such as aged care workers, hospital workers, Police.
3. Employees working in a role where they are less likely to be exposed to Covid-19 (everybody else).

**Category 1**

Employers will be justified in requiring employees in Category 1 to be vaccinated and will be breaking the law if they allow those employees to perform their usual duties unvaccinated.

The Employment Relations Authority recently found in the case of *GM v New Zealand Customs Service* that a border worker at a maritime port facility was justifiably dismissed for refusing to be vaccinated. Of course, we don’t know what the Authority would have decided if the worker was not covered by the Health Order.

**Category 2**

Employers of workers in Category 2 may be justified in requiring their employees to be vaccinated providing they have first undertaken a comprehensive risk assessment of the particular position and met their usual employment obligations such as adequate consultation and good faith.

The risk assessment should seek to determine whether it is necessary for the role to be performed by a vaccinated person. WorkSafe have advised that the risk assessment must include (but is not limited to) considering:

* The likelihood of workers being exposed to Covid-19 while performing that role; and
* The potential consequences of that exposure on others (e.g., community spread).

Employers will need to consider a range of other factors such as whether there are other measures that might provide employees with sufficient protection rather than mandatory vaccination, including regular testing, the use of PPE and other hygiene and sanitisation measures.

*What can an employer do if they decide that a particular role can only be performed by a vaccinated employee?*

If this is the result of a risk assessment, then it doesn’t automatically mean termination of employment will be justified. Employers will need to consider whether the unvaccinated employee can be redeployed to another area of the business that has less exposure to Covid-19 or where they don’t represent a Covid-19 risk to themselves or others. They will need to listen to the employee’s reasons for refusing the jab and see if an alternative solution can be reached.

If this is not possible then termination on the grounds of redundancy may be justified, as the employer can reasonably claim that the requirements of the employee’s role have now changed (the role can now only safely be performed by a vaccinated person) and the incumbent is no longer able to perform the role.

**Category 3**

Employers in category 3 will face significant challenges if they attempt to mandate vaccinations for their employees. What employers can do is communicate with employees about the benefits of vaccination and point them in the direction of reliable information (such as the Ministry of Health website) to enable them to make an informed decision about whether to get the vaccine.

**What about new employees?**

Employers recruiting new employees will be able to include a clause requiring the employee to be vaccinated providing they have a genuine reason for requiring this, which could include them deciding this is necessary after completing a risk assessment.

Employers should remember that existing or potential staff may have specific reasons why they do not wish to be vaccinated rather than just mere scepticism of the science, including for medical or religious reasons. Religious beliefs and political opinion are prohibited grounds of discrimination under the Human Rights Act 1993 so employers should tread cautiously if an employee or prospective employee cites one of these grounds as their reason for being unvaccinated, in order to avoid a potential discrimination claim.

**Further advice**

As always, what is appropriate for a certain workplace or category of workers requires a fact-based analysis. While this article provides guidance, employers and employees are encouraged to take legal advice on their specific circumstances.

Please contact Glenn Finnigan on 021 779 770 or Jeremy Ansell on 022 098 8736 if you need advice about the implications of the vaccine rollout on your workforce.