

12 November 2021

Concerned customer
Via email

Email: fyi-request-17497-b2b17d46@requests.fyi.org.nz

Dear Customer

REQUEST FOR INFORMATION UNDER THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 - MANDATORY VACCINATION

Your request

On 9 November 2021, we received your request asking the following three questions regarding Watercare's mandatory vaccination policy for all workers and members of the public entering Watercare grounds.

1. *Is the blanket mandate lawful and if so what law has Watercare used to justify the mandate.*
2. *Where is the risk assessment that needs to be completed to determine if a role needs to be completed by a vaccinated person?*
3. *What law has been used to mandate the vaccine for all visitors?*

Our response

Question 1: Is the blanket mandate lawful and if so what law has Watercare used to justify the mandate.

Vaccine mandates are currently being introduced by many companies and organisations in New Zealand. Whether they are legal or not will depend on the circumstances of each case.

Watercare, in introducing the policy, engaged with employees over health and safety risk assessments which concerned the risk of Covid-19 transmission and infection in the workplace. This was undertaken in accordance with the Health and Safety at Work Act 2015, Employment Relations Act 2000, guidance from the Government, WorkSafe and Case Law. Watercare also consulted with employees in good faith over the proposed policy before implementing it.

We set out below the law and guidance Watercare relies on to justify its policy. We also outline Watercare's process in introducing a mandatory policy.

Health and Safety at Work Act 2015

Under the Health and Safety at Work Act 2015 (**HSWA**), employers, as persons conducting a business or undertaking (PCBU) must engage with employees on all health and safety matters.

Watercare also has a primary duty of care to ensure so far as reasonably practicable the health and safety of its workers and other persons. "Other persons" under the HSWA would include visitors to any site and the public at large.

Under section 30 of the HSWA, Watercare must eliminate risks to health and safety so far as reasonably practicable and if that is not reasonably practicable to minimise those risks. This duty extends to all matters which Watercare has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate.

Employment Relations Act 2000

Under section 4 of the ERA, employers must act in good faith to consult with employees over any decision which may impact on their employment. Consultation includes a requirement for employers to put the proposal to employees, hear employees' responses with an open mind, and make any necessary amendments to the proposal before finalising any decision.

Government guidance

On 26 October 2021, the Government announced that it backs business to vaccinate workforces and it intends to introduce law to set out clearer and simplified risk assessment process for employers to follow when deciding whether they can require vaccination for different types of work. It has indicated that these changes are likely to come into force at the same time as the Covid-19 Protection Framework (i.e. the traffic light system when all of New Zealand's District Health Boards reach 90% fully vaccinated of eligible population).

WorkSafe guidance

Following the Government's announcement on 26 October 2021, WorkSafe updated its website to include the following statement in relation to its approach to the HSWA risk assessment. It states that it recognises that:

- "most businesses and services do not have infection control expertise and rely on direction and advice from public health experts"
- the pace of change in the Covid-19 pandemic is unprecedented when compared with typical risks to work health and safety; and
- for these reasons, it will not always be easy for businesses and services to 'get things right'."

WorkSafe then outlines that its expectation is that to decide whether work requires a vaccinated employee organisations should:

- (a) carry out an adequate risk assessment; and
- (b) engage effectively with employees and their representatives.

WorkSafe's website also states that:

"Where a business or service can demonstrate it has done this, we will not take prosecution action if we disagree with the decisions you made in your risk assessment. (This only applies to enforcement action within WorkSafe's responsibilities). We will instead take an education-first approach, so you understand what is reasonable to require in your circumstances and have the opportunity to act on it."

Recent guidance released from WorkSafe and case law also suggest that it is likely that the Employment Relations Authority or Employment Court would find any implementation of a mandatory vaccination policy to be justified {provided a health and safety risk assessment and consultation with employees, unions and health and safety representatives (as applicable) has first taken place}.

Case law guidance

The case law on this topic highlights the risks associated with unvaccinated employees contracting and transmitting Covid-19.

Recent New Zealand case law has only considered the position of employers who are covered by the Covid-19 Public Health Vaccination Order 2021, with the most recent decision finding in favour of the employer (refer to Media Release of 9 November 2021 regarding the High Court decision in **Four Aviation Security Source Employees v Minister of Covid-19 Response** attached at **Attachment 1**).

While Watercare cannot rely on an Order in making its decision to mandate vaccination, the High Court made some very useful findings in this case, which align with Watercare's considerations in deciding to implement a mandate, namely:

- **Para 69:** *I'm satisfied by the evidence on the point that vaccination is likely to materially contribute to minimising the risk of outbreak or spread. However, as some of the scientific papers I have considered point out, including those referred to by Dr Febery and Dr Thornley, reliance should not be placed on vaccination alone. Other measures are important. One might have expected the Order to refer not only to vaccination, but also to other requirements such as physical distancing, PPE and regular testing. The last matter might be of importance given the greater potential for asymptomatic transmission of the Delta variant, a matter expressly referred to in the purpose provision of the Act – refers Covid-19 Public Health Response Act. s 4(a).*
 - It must be noted, that even with the introduction of the Policy, Watercare will continue to rely on other measures such as distancing, PPE and testing to ensure the health and safety of staff, contractors and visitors.
- **Para 102:** *“But the protection that the vaccine provides at an individual level does not by itself provide justification for requiring compulsory vaccination of border workers. In the fluoride debate addressed in New Health, the public benefit was derived from the benefit to the community overall in addressing bad oral health. Here, the **workers** at the border are not being required to be vaccinated because of the benefit of the health system that may follow from avoiding the demands on the system from their own Covid-19 infection. The measure is only justified if it provides a wider public benefit. And in the end that comes down to a single issue — whether the vaccine contributes to suppressing the transmission of the Delta variant of Covid-19.”*
 - Having everybody at Watercare sites vaccinated benefits the community overall – if a significant number of our people were to succumb to symptomatic infection and the detrimental effects of the Delta variant, we may not be able to properly operate sites or undertake water and wastewater activities – and this could lead to health risks for the wider community.

In summary, the legal position is that employers can require work to be done by a vaccinated employee, if a risk assessment identifies this is necessary for work health and safety purposes.

Watercare's process in introducing the mandatory Policy

Watercare as a water and wastewater service provider is a Lifeline Utility under the Civil Defence Emergency Management Act 2002 and we are recognised under the Covid-19 Public Health Response Orders an essential service. We are expected to operate throughout the pandemic. As part of the duties of a Lifeline Utility we need to "Incorporate risk management principles to form part of normal business operations".

Accordingly, before introducing any mandatory policy on vaccination, in line with the guidance from the government, WorkSafe and case law, we ensured that the company first:

- carried out an adequate risk assessment;
- engaged with employees over the risk assessment. This is in accordance with our engagement obligations under the HSWA; and
- consulted with employees over the proposal to mandate vaccinations for the workplace and certain roles as it may affect their employment. This is in accordance with our obligations under the Employment Relations Act 2000 (ERA).

The steps Watercare took before introducing the Policy

Watercare's justifications for introducing a mandate policy on vaccination are set out in the consultation pack (**Attachment 2**) and the draft risk assessments provided to staff (**Attachment 3**) during the engagement and consultation process.

1.1 We undertook a Risk Assessment

Watercare's approach to its risk assessment was to categorise employees into Similar Exposure Groups (**SEG**) for the purpose of the assessment and engagement and consultation.

The draft risk assessment clearly details the current methods of control being used by Watercare to minimise risk to employees (and accordingly Watercare's ability to provide essential water and waste-water services to its customers) and any limitations identified in relation to each approach.

The draft risk assessment also explains the risk that Covid-19 currently poses in particular in the Tāmaki Makaurau/Auckland region. It sets out the hazard that Covid-19 cases in the community are continuing to rise which means there is a heightened risk of exposure for its teams and contractors. In addition, it refers to the impact Covid-19 could have on Watercare's ability to provide essential water and waste-water services to its customers (as it is a lifeline service provider). Therefore, why the additional protection of vaccination is a reasonable step.

Importantly, employees were consulted over the draft risk assessment and it was not finalised until Watercare carefully considered all feedback.

1.2 We consulted and engaged with employees on the proposed Policy

Watercare provided employees with relevant information in relation to its proposal to develop the Policy and provided opportunity for unions and employees to engage in the process, listened and responded to feedback throughout the consultation process, and considering written feedback.

As a result of the consultation process, Watercare made a few key changes to the policy, which was then introduced on 8 November 2021, namely:

- we set new (later) cut-off dates for vaccination which are **1 December to receive first dose and 14 January 2022 to be fully vaccinated**,
- we have expanded the policy to include all vaccines approved by the World Health Organisation (to cover those vaccinated overseas),
- we have also included any vaccine boosters approved by MOH as part of the requirement to be fully vaccinated, and
- we have extended our special Covid-19 leave provisions which covers all employees; this means staff can use the special Covid-19 leave for getting vaccinated, to recover from any side-effects of getting the vaccine and in the rare instance that a staff member gets infected with Covid-19, they will be covered by this special leave. This is to ensure that no one is financially disadvantaged by getting vaccinated.

1.3 We obtained legal advice

Before the Policy was finalised and announced by the CE on 8 November 2021, Watercare had its lawyers conduct a review of Watercare's draft risk assessment, as well as the engagement and consultation process and our progress to date. This legal advice is privileged and confidential.

2. Where is the risk assessment that needs to be completed to determine if a role needs to be completed by a vaccinated person?

As noted above, as part of the engagement and consultation process, Watercare prepared a draft risk assessment, which was provided to employees for feedback (covering Infrastructure, Laboratory, Maintenance Sites, Office Sites, Operations and MD Sites). These are already attached as **Attachment 3** above.

In preparing this the draft risk assessment Watercare categorised its workforce into Similar Employment Groups (SEGs). A SEG is a group of employees which undertake similar tasks, schedules, materials used and methods. Therefore, these employees are exposed to a similar level and type of risk. Watercare then consulted on the draft risk assessment with all of its workforce and unions.

Watercare's draft risk assessment includes current control measures in place to minimise risk to employees and comments on whether they are adequate to protect against the risk of Covid-19.

Watercare’s draft risk assessment lists in one column the hierarchy of controls as set out under section 6 of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.

Hierarchy of controls, include:

- 1.1 First elimination but if that is not possible then minimise risks.
- 1.2 To minimise risks a PCBU must either:
 - (a) substitute;
 - (b) isolate;
 - (c) engineering controls;
- 1.3 If the risk remains, then implement administrative controls.
- 1.4 If the risk remains, then the use of PPE.

Next to the hierarchy of controls, Watercare has listed the actions, details and limitations of each of the control measures in place. For example, next to “isolate” Watercare has referred to the use of intra-site bubbles which includes segregate work groups, separate toilets and facilities, no shared facilities, no shared resources, inability to identify non-work activities that may compromise work groups on Watercare sites.

Next to that column it includes limitations of this including fatigue, the bubbles are challenging to maintain and success requires constant conscious effort and discipline for individuals to comply (and hence risk of fatigue and therefore non-compliance). Watermarked across all risk assessment are the words “draft for consultation”.

Another example of the risk assessment includes:

Operations – Infrastructure Sites			
Controls	Actions	Details	Limitations
Eliminate	Locking sites down from any community contact	Workers/contractors/management live on site Drive-in, drive-out residential camp Potential long term rotational shifts 3-1	This works for short term, emergency lockdowns. This approach is not sustainable over a longer term because there is a significant risk of fatigue.
	Eliminate non-critical work	Many sites closed	Again, this is not sustainable

It was appropriate for Watercare to categorise employees into SEGs for the purpose of the draft risk assessment and consultation and observed that the draft risk assessment clearly details the current methods of control being used by Watercare to minimise risk to employees (and accordingly Watercare’s ability to provide water and wastewater services to its customers) and any limitations identified in relation to each approach.

The draft risk assessment also explains the risk that Covid-19 currently poses in particular in the Tāmaki Makaurau/Auckland region. It sets out the hazard that Covid-19 cases in the community are continuing to rise which means there is a heightened risk of exposure for its teams and contractors. It also refers to the impact Covid-19 could have on Watercare's ability to provide essential water and wastewater services to its customers (as it is a lifeline service provider). Therefore, the draft risk assessment explains why the additional protection of vaccination is a reasonable step.

It was noted that employees who work at the wastewater plants must already be vaccinated against a range of viruses due to potential exposure when performing their role. The requirement to be vaccinated against Covid-19 is analogous to that long-standing requirement.

3. What law has been used to mandate the vaccine for all visitors?

Watercare, as the owner and occupier of various sites and buildings, has a common law right to refuse entry to any person.

Watercare recognises that vaccination against Covid-19 is a significant means to assist in bringing the spread and impact of the disease under control. Vaccination is our best protection against the adverse impacts of Covid-19, including the potentially serious health impacts to our team, which could in turn, result in disruptions to the essential services we provide to the community. Vaccination limits the spread of Covid-19 where our people have contact and interact with each other and/or members of the public.

The mandate for all visitors aims to provide employees, suppliers (includes contractors and consultants) and customers with protection against Covid-19 in in our workplaces. It is a reasonable additional control for our employees against exposure to Covid-19 and limiting transmission from our employees to others.

We trust this meets your requirements. Please feel free to contact us if you require more information.

Yours faithfully



Rob Fisher

Company Secretary