



# Updated Guidance for Agencies on Vaccination Policies and Associated Dismissals

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*This advice is intended to support agencies to make consistent and robust decisions in implementing vaccination policies in their workplace. It does not replace the responsibility for agencies to make their own decisions based on their own agency circumstances and to seek legal advice, where needed.*

## Introduction

The recent High Court decision in *Yardley v Minister for Workplace Relations & Safety* ([link](https://www.courtsfnz.govt.nz/assets/cases/2022/2022-NZHC-291.pdf) (https://www.courtsfnz.govt.nz/assets/cases/2022/2022-NZHC-291.pdf)) (“*Yardley*”) held that the Public Health Response (Specific Work Vaccinations) Order 2021, which mandated vaccinations for Police and Defence Force staff, was unlawful. Whilst the judgment only considered the order relevant to the Defence and Police vaccine mandates, it provides a good reminder that agencies should continue to review the justifications for workplace vaccination policies and especially before key decisions, in reliance on them, are made.

We have confirmed with the Ministry of Health that its advice remains that vaccines, with the additional booster, combined with other COVID-19 precautions such as physical distancing, face masks, staying home if sick and hand hygiene will provide greater protection against both the spread of the omicron variant, and severe COVID-19 illness.

## Reviewing Vaccine Policies

The *Yardley* decision presents agencies with a timely reminder that health and safety risk assessments should be reviewed on a regular basis to maintain their currency and test the assessments against emerging or new advice.

At this time, we recommend that agencies review their health and safety risk assessment and vaccination policy in light of the confirmed health advice. Agencies are reminded of consultation expectations associated with the development of risk assessments and policies – see appendix one of the Public Service workforce guidance

(<https://www.publicservice.govt.nz/resources/public-service-workforce-guidance-for-the-covid-19-protection-framework/?e6967=7207-appendix-one-determining-if-vaccination-is-required-in-a-public-service-workplace>).

In re-assessing the risks and mitigations agencies should consider the:

- inherent risk to the community and to workers (including the consequences of the most credible worst-case scenario associated with the risk of infection with COVID-19 and the likelihood of transmitted infection occurring and it leading to that consequence)
- residual risk with current proactive controls (such as barriers, masks, handwashing, social distancing, and remote working)
- effect on the risk rating if all workers who work in that area were vaccinated and boosted.

Having undertaken this review, agencies may consider it necessary to update their policies to include boosters. We are currently updating our substantive guidance to provide advice for agencies in that eventuality. If agencies consider a need to make other substantive changes to their vaccination policies, please contact the Workforce and Employment Relations team.

## **Progressing with current vaccine policy-related decisions, including dismissal processes**

There are a number of agencies that are currently undertaking processes which may result in the dismissal of non-vaccinated staff as a result of a current vaccine policy. Dismissals should only occur after all reasonable alternatives have been exhausted and the rapidly changing nature of the environment will be a relevant consideration as to whether any alternative is reasonable. We therefore recommend that dismissal processes are paused whilst agencies review their health and safety risk assessment and vaccination policy.

Once this review is complete, we recommend agencies revisit their rationale for any proposed dismissals, to confirm that it remains current and justified, taking legal advice where necessary.

## **Progressing with current vaccine mandate-related decisions, including dismissal processes**

Whilst Yardley set aside the COVID-19 Public Health Responses (Specified Work Vaccinations) Order 2021, other mandates, such as the COVID-19 Public Health Response (Vaccinations) Order 2021 remain enforceable. Agencies must implement the law, and can rely upon the remaining vaccine orders in their dismissal processes. However, agencies are still advised to exhaust all reasonable alternatives prior to dismissing staff on the basis of a valid vaccine order.

### **Related Content**

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Public Service workforce guidance for the COVID-19 Protection Framework

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