

COVID TODAY

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Segregation of staff, Judicial Review and privacy!

Are you thinking of segregating your vaccinated and unvaccinated staff?

By Shazreen Hussain

Leo Molloy, an Auckland hospitality industry figure told the NZ Herald on 26 September 2021, that he is planning to segregate his staff when his restaurant, Headquarters in Auckland's Viaduct, re-opens under Alert Level 2.



The vaccinated staff will wear yellow T-shirts and work indoors directly with customers. Whereas the non-vaccinated staff will wear charcoal T-shirts and work outdoors only. Kitchen staff and cleaners will wear black T-shirts.

He has apparently based this decision on his own feelings - he would not want to be served by an unvaccinated staff member, so why should his customers? Molloy wants the customers to have the choice and believes they would be happy to know whether the staff member serving them is vaccinated or not.

Molloy said there is no clarity on what the Government is planning for future, so he is taking the initiative by creating different options for customers to feel safe. Interestingly, Molloy claims that his staff are 'on the whole' in agreement with his decision and understand the situation.

Kim Curtayne, Headquarters Manager agreed that the staff are receptive to the idea of segregation because they know it comes from a "good place" to protect the staff, look after customers, and expand the options for everyone.

In his interview, Molloy was not critical of the staff who have decided not to vaccinate. He fully appreciated that some were not vaccinated due to a pre-existing medical

illness or because they have simply made a rational decision.

Katherine MacNeil, General Manager for MBIE confirmed in a statement that a business can ask a worker about their vaccination status; this question is not unlawful. However, a worker does not have to answer the question unless either:

- their work is covered by the COVID-19 Public Health Response (Vaccinations) Order 2021; or
- because of health and safety reasons.

If a worker chooses not to disclose their vaccination status, then for the purpose of managing health and safety risks, the business owner may assume that the worker has not been vaccinated. Here, the business owner needs to inform the worker of the assumption and what will happen if they do not disclose their vaccination status. So in terms of Headquarters and Leo Molloy - he can ask his staff if they are vaccinated but cannot force them to answer. If any staff choose not to respond, then he can draw the assumption that they are unvaccinated but must inform them of his assumption; at that point he will no doubt offer them a charcoal T-shirt.

But is segregation lawful?

Whilst Molloy's idea is certainly an interesting approach, we're not entirely sure it's lawful. MacNeil (MBIE) said that collecting, sharing and storing data about vaccination status' must be done in accordance with the Privacy Act 2020.

With that in mind, instructing staff to wear different coloured T-shirts to reflect their vaccination status is potentially breaching their privacy! For example, if a person is served by a yellow staff member, then we automatically know he/she is vaccinated. Yet those staff members wearing the darker T-shirts may be unvaccinated for very justifiable reasons but feel stigmatized for their decision not to vaccinate.



An employer can be in trouble for disparity of treatment unless they can substantiate why segregation is necessary. Whilst New Zealand employment law doesn't specifically place a bar on segregation, employers must be mindful of their obligations under the employment, human rights and health/safety laws and make sure that their actions do not constitute a breach of their statutory duties.

Staff have the right to work pursuant to the terms set out in their employment agreement and so any changes to their role must be mutually agreed. They also have the human right of individual choice, together with the right not to be discriminated against.

For those roles which fall outside the COVID-19 Public Health Response (Vaccinations) Order 2021, staff cannot be presented with a job-or-job choice as this will encroach on their legal rights. Similarly, treating one group of staff differently due to a health choice could infringe on their rights. If Molloy really does intend on segregating his staff, then he needs to tread with caution because there are far too many pitfalls that he could easily fall into!

NZ Customs worker's unsuccessful application for judicial review



If a Minister has made a decision that affects you under a power granted to them by a piece of law, you may be able to apply to the High Court for a judicial review ("JR") of the decision. In JR, the Court will look at the process and decide whether the decision was correct. The purpose of JR is to make sure that the Minister acted within their statutory powers - more specifically, that they followed the process required by the law.

You may have heard across various media channels that a former Customs Services worker who challenged the loss of her job has lost her case in the High Court.

Cont'd page 2

COVID TODAY

The worker was dismissed on May 31 2021 because she chose not to get vaccinated. However, the Government issued COVID-19 Public Health Response (Vaccinations) Order 2021 (the “Order”), mandated all front-line workers to be vaccinated by midnight April 30 2021 to continue being employed with Customs Services. The worker fell within the mandate and was required to be vaccinated.

The worker claimed that the Order was too wide and encroached upon her rights and freedoms in the New Zealand Bill of Rights Act 1990 (“BORA”) - the right to refuse medical treatment. She also argued that the protections in ss9 of the COVID-19 Public Health Response Act 2020 (the “Act”), were not satisfied when the Order was signed off by the COVID-19 Response Minister.

In the JR decision, Justice Churchman dismissed the worker’s arguments, stating that the Order had been carefully considered prior to implementation. In making the Order, the Minister did consider social and economic factors and felt that the Order was entirely necessary. The worker’s claim that the Order could have resulted in “mass terminations of employment” was held to be an over-statement and incorrect.

JR also held that there was no requirement in the New Zealand BORA (or any other piece of legislation) that secondary legislation could not contain a provision that limits one or more rights set out in the BORA. Justice Churchman said that under s.11 of the New Zealand BORA everyone had the right to refuse to undergo any medical treatment, but the High Court’s duty is to balance the benefit of the vaccine and the risk of being unvaccinated against any discrimination concerning those affected. The Court dismissed the woman’s application and suppressed her name. The duty to vaccinate far outweighed any discrimination that the worker may have felt.



Key points:

- JR demonstrates the importance of considering the situation of people with medical conditions which prevent them from getting the vaccine; and
- confirmed that the purpose of the Act is to support a public health response to COVID, while the purpose of the Order is to prevent and limit the risk/spread of COVID by requiring certain work to be carried out by vaccinated people to protect the wider population.

Details on a contact tracing form used to pick up supermarket customer?!

The universal spread of COVID-19 has asked numerous privacy and compliance questions. These challenges are driving the need for businesses to ensure customer data is not only secure but also protected from unauthorised access.

In September last year, a North Shore woman was frightened after receiving a text message from a stranger who said he got her details from a contact-tracing form at a supermarket. The 23-year-old said she received a text message "with appalling grammar" from a number that she did not recognise two days later after visiting the store. She took immediate action to stop any further communication by blocking the number. This incident follows an earlier one last year when a North Shore Subway employee harassed a customer and made unwanted advances towards her after obtaining her details from a contact-tracing form. The woman was left feeling “gross” and "creeped out and vulnerable" after receiving emails, texts, and requests on Facebook/Instagram by the employee.

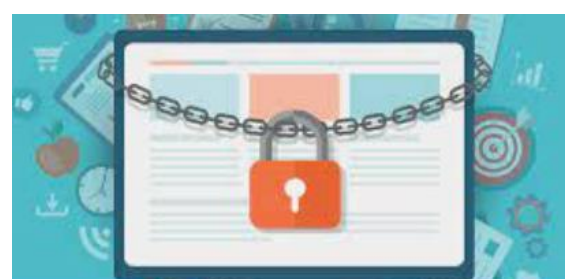
The employee was suspended, and Subway later executed a digitised contact-tracking system that was only accessible to the Ministry of Health.



What does this imply?

Businesses must treat customer data exclusively for pandemic management. If private customer information is abused by employees or customers, it undermines their obligations under the Privacy Act 2020 (the “Act”). The Act modernised the privacy laws from 1993, back when the internet was still in its initial stages. From that time, businesses have now become digital and so too has our data.

Below are some helpful guidelines to help businesses comply with the Act.



1. Is your business aware of all the data stored on customers? The simplest way to ensure your business is not collecting unwanted data is by limiting the information collected. If an address or mobile number is not required, do not ask for it. You must also know who collects personal information in the business.

2. Where is the information stored? It’s important to get a grasp on where customer data is stored so you can ensure it’s been properly secured with two-factor authentication (2FA) and passwords.

Please note: if you are relying on a third party or a cloud-based system to secure data, you must take steps to ensure they are following correct security protocols.

3. Who has access to data in your business? If your business is storing data on the company server, it is best to make sure that only authorised people are allowed access to the folders. The same applies to data stored in the cloud. You should do regular checks to see who has access to cloud data and cancel access to those who no longer need it.

4. Who is responsible to manage data? It’s important to allocate a go-to person for managing privacy. Having an employee who has been trained up on new policies, laws, and processes will be a key to improving data security. Likewise, a privacy programme is a great tool that can be used by the business to help identify personal data and follow rules for use.

5. Does your business have a plan to deal with data breaches? Data breaches can be a result of a cyber-attack, where a hacker steals sensitive information. The best means to prepare for a data breach is to create a crisis management plan and practice it when practicable. Also, remember to factor communications into your strategies as well. If a data breach occurs you must be well equipped to notify affected people, as well as the Privacy Commissioner.



Shazreen Hussain
Email: shazreen@monsellierlaw.com