

Health Report

Routine mandatory COVID-19 testing of higher-risk border workers: update on the development of Phase 3 of the Required Testing Order

Date due to MO:	9 October 2020	Action required by:	N/A
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To:	Hon Chris Hipkins, Minister of Health		

Contact for telephone discussion

Name	Position	Telephone
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Action for Private Secretaries

Forward a copy of this report to the Minister of Finance and the Minister for Workplace Relations and Safety

Date dispatched to MO:

Return the signed report to the Ministry of Health.

Routine mandatory COVID-19 testing of higher-risk border workers: update on the development of Phase 3 of the Required Testing Order

Purpose

This report provides you with an update on the development of the third phase of the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020.

Summary

- Phases 1 and 2 of the mandatory routine testing of border workers through the COVID-19 Public Health Response (Required Testing) Order 2020 (the Order) have now been rolled out. Phase 3 will introduce new groups of workers required to undergo testing as well as new duties on both workers and the PCBUs employing them.
- Implementation of Phase 3 of the mandatory routine testing of border workers has been delayed pending decisions on some of the elements to be included in the amended Order.
- Ministerial consultation on Phase 3 focussed on how additional duties on Persons Conducting a Business or Undertaking (PCBUs) can be included in the Order to better support worker compliance with the mandatory testing regime.
- The key trade-off for Phase 3 is between legal certainty and the breadth of a general requirement on PCBUs. s 9(2)(h)
[REDACTED]
[REDACTED]
[REDACTED]
- We have been working with WorkSafe and agencies to discuss the proposals to be included in Phase 3 of the Order and agencies engaged with key sector stakeholders.
- Proposals canvassed with agencies and sector stakeholders were:
 - including additional workers in the Order
 - requiring workers to provide and update information to the PCBU that employs or engages them
 - requiring PCBUs to keep and maintain specific records for each affected person they employ or engage
 - requiring PCBUs to ensure that any affected persons they employ or engage are aware of their testing requirements
 - requiring PCBUs to either 'remove or reduce barriers' to testing or 'take appropriate measures to facilitate' testing.
- Agencies were generally supportive of these proposals and noted that many PCBUs were already fulfilling these roles.

- You requested advice on the creation of additional enforcement functions, such as the authorising of an enforcement officer, for the routine mandatory testing requirements.
- WorkSafe inspectors are currently authorised under section 18 of the COVID-19 Act to carry out the functions and powers of an enforcement officer, and could act in this capacity to respond to non-compliance with the Required Testing Order on an interim basis.
- To consider the scope of the enforcement function and who holds responsibility for it, there are several upcoming review points that offer the opportunity to do so. These include the interim and full reviews of the overall mandatory testing regime in October and December 2020 as well as the review of WorkSafe’s role in regulating COVID-19 measures in workplaces.
- In engaging with agencies on the proposals, there was concern from agencies and key sector stakeholders about the imprecision of the proposed requirement to ‘remove or reduce barriers’ to testing or ‘take appropriate measures to facilitate’ testing, especially as failure to comply would be a criminal offence. § 9(2)(h)
- The complexity of the decisions required to take Phase 3 forward would benefit from Cabinet consideration. The Treasury agrees that impact analysis should accompany this process as set out in Cabinet Circular 20(2), and have confirmed that they will support us to prepare this analysis.
- We will continue to work through these issues with agencies, Crown Law and WorkSafe to provide you with further advice about how to progress the next amendment to the Order.

Recommendations

We recommend you:

- Note** that Phases 1 and 2 of the mandatory routine testing of border workers through the Order have now been rolled out. **Yes/No**
- Note** that implementation of Phase 3 of the Order has been delayed pending decisions on some elements to be included in the amended Order. **Yes/No**
- Note** that the key work required to progress Phase 3 relates to how additional duties on PCBUs can be included in the Order to better support worker compliance with the mandatory testing regime. **Yes/No**
- Note** § 9(2)(h) **Yes/No**
- Note** that we have been working with WorkSafe and agencies to discuss the proposals to be included in Phase 3 of the Order and agencies engaged with key sector stakeholders. **Yes/No**
- Note** that there is general support among agencies for the Phase 3 proposals and many PCBUs are already fulfilling the proposed roles. **Yes/No**
- Note** that we will continue to work through these issues with agencies, Crown Law and WorkSafe to provide you with further advice about how to progress the next amendment to the Order. **Yes/No**

- h) **Note** that WorkSafe inspectors are currently authorised under section 18 of the COVID-19 Public Health Response Act 2020 to carry out the functions and powers of an enforcement officer. **Yes/No**
- i) **Note** that WorkSafe could act in their capacity as an authorised enforcement officer under the Act to respond to specific patterns of non-compliance with the Order. **Yes/No**
- j) **Note** that there are several review points in coming months that offer an opportunity to consider the scope of the enforcement function needed and who should hold responsibility. **Yes/No**
- k) **Note** that there was concern among agencies about the imprecision of the requirement to remove or reduce barriers' to testing or 'take appropriate measures to facilitate' testing, especially as failure to comply would be a criminal offence. **Yes/No**
- l) **Note** that the complexity of the decision required would benefit from Cabinet consideration and an impact analysis, and that the Treasury has confirmed that they will support this work. **Yes/No**
- m) **Indicate** if you wish Officials to start preparing a Cabinet paper and impact analysis to progress decisions required to implement Phase 3 of the mandatory testing regime. **Yes/No**
- o) **Forward** a copy of this report to the Minister of Finance and the Minister for Workplace Relations and Safety **Yes/No**



Dr Ashley Bloomfield
Director-General of Health

Hon Chris Hipkins
Minister of Health

Date: 9/10/2020

Routine mandatory COVID-19 testing of higher-risk border workers: update on the development of Phase 3 of the Required Testing Order

Background and context

1. The purpose of this report is to update you on progress made to date on confirming the scope of Phase 3 of the mandatory testing regime, and outline which issues need to be resolved before Phase 3 can be finalised.
2. On 16 September 2020 we provided you with advice about the duties and obligations involved in the roll out of routine mandatory testing of border workers, and you indicated that an explicit duty in the Order would be preferable [HR 20201578 refers].
3. On 22 September 2020, you asked that the Order incorporate a duty on PCBUs to facilitate testing based on a request from the Minister for Workplace Relations and Safety [HR 20201578 refers].
4. In response to this request, our suggested solution was the addition of a specific duty on PCBUs to keep records in relation to the mandatory testing regime. We suggested an obligation to keep records rather than a specific duty to facilitate testing because an Order made under section 11 of the COVID-19 Public Health Response Act (the Act) can only require specified measures or actions that are likely to contribute to preventing the risk of outbreak or spread of COVID-19. The need to keep records is most likely the only requirement in common for all PCBUs across various settings that employ workers who are subject to the mandatory testing requirement.
5. Although the record-keeping provision is not a broad duty to facilitate testing in such explicit terms, in practice it would serve as a good indication that the PCBU is taking the right steps to enable its workers to undergo testing.
6. Following feedback from agencies and Ministerial consultation, we worked towards including more explicit wording in the Order for the following requirements:
 - a. duty on workers to provide specific evidence to demonstrate they had undergone testing
 - b. duty on PCBUs to notify their workers of the testing requirements and the testing deadlines that apply to them
 - c. duty on PCBUs to facilitate testing and/or remove any barriers to testing.
7. You requested further advice on enforcement and compliance arrangements to support the mandatory testing regime on 22 September 2020 [HR 20201578 refers].

Progress made on the requested changes to Phase 3 to date

Consultation with relevant agencies on the rationale for the proposed duties

8. We have consulted with the Ministry of Business, Innovation and Employment (MBIE), Ministry of Transport, Ministry of Justice (MoJ), Ministry for Primary Industries, Police, Customs, Maritime NZ, Civil Aviation Authority, and WorkSafe to ensure the proposals for Phase 3 reflect their input as much as possible. Agencies also consulted with key sector stakeholders on the proposals, and a list of those engaged is included as Appendix 1. Conversations with agencies will continue as they consult further with their sectors and provide feedback.

Overall feedback

9. Agencies were generally comfortable with the proposed additions to the Order, but there was agreement that the Order and guidance must not leave any ambiguity about the roles and duties of workers and PCBUS where penalties for non-compliance will apply.
10. Employers are generally supportive of the mandatory testing regime and are already taking steps to ensure their workers comply with the testing requirements, such as by providing testing on site or allowing workers time off to get tested, depending on the measures that best fit their circumstances. However, some employers in the Maritime sector have questioned whether mandatory routine testing is a necessary long-term measure given no confirmed cases of COVID-19 have entered through the Maritime border.
11. There were mixed views from agencies about whether the proposed additional roles and duties on PCBUs are necessary, especially given that most PCBUs are already working to ensure that their workers are able to meet their testing requirements.

Duty on workers to provide information/evidence of a test to PCBUs that employ or engage them

12. Agencies were generally supportive of this proposal as it enables PCBUs to meet their complementary obligations.
13. A common theme in feedback was that clarity was needed about what would be considered 'information' or 'evidence' and that guidance and system solutions would be required to enable the easy sharing of information.
14. Guidance is prepared for all Orders and officials are actively working on system solutions to ensure that the obligation to provide evidence is not overly burdensome and workers have options. This includes the development of an IT solution that will provide automatic notifications of workers' testing to PCBUs. While this system is being developed and tested interim solutions are being put in place, including the use of QR codes at testing facilities and the provision of physical certificates.

Requirement on PCBUs to keep records of testing and medical examination

15. Agencies were also generally supportive of this proposal and it was noted that many PCBUs are already doing this.
16. Some stakeholders wanted clarification that this obligation would sit with the PCBU that employs or engages a worker. This is important as lead PCBUs have limited ability to

fulfil this role on behalf of other PCBUs. For example, Air New Zealand noted that it only has obligations to its employees, not the employees of its suppliers.

17. MIQFs present a different situation where MBIE wants to receive testing information from all workers on site and keep records on this, as the lead PCBU. This reflects that MBIE controls the MIQF environments in a way that is substantively different to an airport or port work environment. We will continue to work with MBIE on how it can receive the information it requires for the effective operation of MIQFs, including through the use of the privacy statement and protocols.
18. The policy intent is that the obligation to keep records sits with the PCBU that employs or engages an affected person to perform work on a paid or voluntary basis, including through a contract for services or a contract of service. We will ensure that this is clear in the Order and accompanying guidance.

Requirement on PCBUs to ensure that any affected persons that carry out work for them are aware of their testing requirements

19. Agencies were generally comfortable with this proposal and noted that many PCBUs are already fulfilling this role.
20. The Ministry of Justice (MoJ) noted that ensuring workers are made aware of their testing requirements is somewhat vague and that it could be difficult to show that this requirement has been met. As an alternative, MoJ suggested wording this requirement as an obligation for PCBUs to *notify* affected persons of their testing requirement. We agree with this approach and will incorporate it into the next version of the Order.

Requirement on PCBUs to facilitate testing or reduce or remove any barriers to testing

21. Agencies generally supported the concept of including an obligation on PCBUs to facilitate or remove/reduce barriers to testing, and once again noted that many PCBUs are already fulfilling this role.
22. Some agencies raised that this duty cannot fall solely on the PCBU as they rely on other aspects of the system being in place to get their workers tested. In particular, Aviation Security (AvSec) and MBIE noted that some barriers are outside of the control of the PCBU, for example, having testing available on site at appropriate times for 24/7 workforces.
23. Almost all agencies raised issues with the imprecision of the proposed 'facilitate' and 'remove or reduce barriers' wording. There was agreement across agencies that the wording in the Order needs to be precise and supported by explicit guidance and sector specific examples.
24. MoJ noted that it was unclear what would meet the standard of 'appropriate measures to remove or reduce barriers' and that it is important that this is clarified before being put in the Order as failure to comply would be a criminal offence.
25. MoJ also notes that the wording 'take appropriate measures to facilitate' also lacks clarity, but could be clarified by including a non-exhaustive list of actions a PCBU could take to meet this requirement, for example, giving workers paid time off work in order to get a test. § 9(2)(h)
[REDACTED]
26. The proposal to list specific actions would need to be balanced against the potential additional costs to PCBUs. The Ministry of Transport noted that stakeholders will be

37. Alternative options to achieve the outcome of ensuring all workers are supported by their PCBUs to comply may include more extensive guidance, amendments to primary legislation (i.e. the COVID-19 Public Health Response Act 2020), and potentially amendments to funding and contracting arrangements for some PCBUs.

Establishing WorkSafe's role in enforcement of the mandatory testing regime

General approach to compliance and enforcement

38. The purpose of agreeing an enforcement function is to ensure there is a process in place for addressing any potential non-compliance (by worker or PCBU) with the Order. As we do not anticipate significant levels of non-compliance with the Order, we do not expect that the enforcement function will need to be extensive or active.
39. We expect that the PCBU would follow up with their worker in the first instance where the worker fails to comply with the testing requirements or to provide evidence of their compliance to the PCBU that employs or engages them.
40. We expect that in the event non-compliance (by a worker or PCBU) is reported, any action by the enforcement officer would take a graduated approach beginning with education efforts.
41. The additional obligations to be placed on employers and workers must be fair and proportionate as there is no evidence to suggest workers are not complying with the testing requirements.

The Director-General may authorise enforcement officers under section 18 of the COVID-19 Act

42. Under section 18 of the COVID-19 Public Health Response Act 2020, the Director-General of Health may authorise a suitably qualified and trained person (or class of persons) who is employed or engaged by the Crown or a Crown entity, to carry out any functions and powers as enforcement officers. A Section 18 authorisation describes the class of people that are authorised as enforcement officers, the powers (available under the COVID-19 Public Health Response Act) that they may exercise, and the functions which they may carry out.
43. There is no enforcement officer role specified to ensure compliance with the Routine Testing Order, however an existing Section 18 Authorisation authorises WorkSafe inspectors to carry out functions and powers of an enforcement officer with respect to workplaces for which WorkSafe is the regulator. This includes ports, airports and Managed Isolation and Quarantine facilities (MIQFs).

Utilising WorkSafe as the enforcement officer in response to specific patterns of any non-compliance

44. The Ministry of Health, MBIE and WorkSafe have been working through the role of WorkSafe inspectors acting in their existing capacity as enforcement officers under the Act, as an option for enforcing the Required Testing Order. This option has the benefit of building on WorkSafe's existing skills and infrastructure, and co-locates complementary obligations (public health, and occupational health and safety) under the purview of a single entity.
45. WorkSafe has agreed in principle to act as the enforcement officer for the mandatory testing regime, at least on an interim basis.

46. Any enforcement of the Required Testing Order undertaken by WorkSafe inspectors would only be within the bounds of WorkSafe's existing enforcement approach to the COVID-19 regime, which includes education and graduated enforcement beginning with verbal or written directives. WorkSafe is not in a position to proactively monitor compliance with the Order. It would respond to complaints about non-compliance as they are notified, and are more likely to respond to systemic or sustained breaches of PCBUs subject to the Order, rather than breaches by individual workers.
47. If enforcement action is required in response to breaches by individual workers, this would be more appropriately undertaken by Medical Officers of Health. They are authorised as enforcement officers under the COVID-19 Act as well as having complementary powers under the Health Act. This may be an appropriate option if there is a need to respond to repeated breaches by individual workers.
48. WorkSafe advises that including the proposed new duties on workers and PCBUs in the Order is an appropriate way to support compliance with the Order, as it provides clear separation between a PCBU's public health obligations and its existing occupational health and safety obligations under the Health and Safety at Work Act 2015 (HSWA).
49. WorkSafe has prepared draft guidance for PCBUs that sets out how the proposed obligations in the Order sit alongside existing obligations under HSWA, as well as a set of enforcement scenarios about how the proposed suite of duties in the Order would be enforced in practice. These scenarios are included as Appendix 2.

There are plans to review the overall mandatory testing regime as well as WorkSafe's COVID-19 Response Act enforcement roles

50. WorkSafe has advised that it is not in a position to enforce the mandatory testing regime on an ongoing basis, as the regime exists for public health purposes that are outside the WorkSafe's core role. WorkSafe's expectation is that there will be a commitment to building appropriate enforcement capability elsewhere if the mandatory testing regime continues in the long-term. There will be several review points that provide an opportunity to consider any enforcement function that may be needed in the long-term.
51. On 1 September 2020, you agreed that the routine mandatory testing approach should be regularly reviewed, with an initial review by the end of October 2020 and a full review by December 2020. The initial review in October may provide insights into the level of compliance with the Required Testing Order on the part of workers and PCBUs, and the level of resource required to manage non-compliance. This can inform the approach to enforcement to be finalised as part of Phase 3 of the mandatory testing regime.
52. In May 2020 the Minister for Workplace Relations and Safety issued a direction to WorkSafe to undertake an additional function to monitor and enforce compliance with the COVID-19 Public Health Response Act 2020 in respect of work and workplaces for which WorkSafe is the regulator. The direction permitted WorkSafe to use its existing funding (collected through the Health and Safety at Work levy) to undertake enforcement activities under the COVID-19 Response Act.
53. The Minister for Workplace Relations and Safety has agreed with the Chair of WorkSafe to review this function in February 2021. The review will cover the effect of the function on WorkSafe's resources and its ability to continue to deliver both this function and its other work health and safety priorities. It will also consider the appropriateness of

continuing to use the health and safety at work levy to perform a public health function under the COVID-19 Public Health Response Act.

54. Each of these review points provide an opportunity to assess the level of non-compliance and the sufficiency of resources available to respond. At these points, assessments can be made about whether to continue with the approach to enforcement described in this paper, or whether to consider a more extensive response.

Operational solutions are well underway

The Ministry has developed a privacy statement to support the information sharing arrangements

55. On 18 September 2020, the Ministry outlined the background to the information sharing arrangements in relation to the COVID-19 Public Health Response (Required Testing) Order 2020 [HR 20201668 refers].
56. We noted that a privacy statement would be provided to support employers and workers to understand how their information will be shared as part of routine testing.
57. The Ministry has developed a privacy statement and consulted with the Office of the Privacy Commissioner about this statement, and it has been confirmed as suitable for use.
58. Further guidance is provided to employers when issuing the privacy statement for their distribution to affected workers to ensure that they are informed of their responsibilities for managing workers' information.

Border Testing Register

59. The Ministry continues to work on a digital solution to minimise the administrative burden on employers and help them ensure that their workers are being tested. This will be called the Border Testing Register (BTR) and work is progressing at pace.
60. A Proof of Concept (POC) commenced at Wellington Managed Isolation and Quarantine Facilities (MIQFs) the week of 5 October 2020, with the above-mentioned employer briefing and privacy statement provided to employers prior to the POC trial.
61. The first phase of the POC involves data gathering for the first cohort of Wellington MIQFs' workers (New Zealand Defence Force staff), and feedback loops remain open to ensure necessary improvements can be made. The BTR will then be incrementally rolled out to other sites, first to MIQFs in Christchurch and then the rest of New Zealand, closely followed by Customs staff. Engagement is also underway with Air New Zealand about rolling out the BTR to their staff.
62. The Ministry is working closely with PCBU operators and employers in the Maritime and Aviation sectors to ensure that the BTR meets their requirements. An engagement plan is underway to increase understanding of the BTR and buy-in from these stakeholders.
63. The Border Testing Taskforce, responsible for the rollout of the BTR, is working closely with Ministry of Health Policy to ensure that it aligns with the current and any future updates to the Order.

Equity

64. Ministry officials have discussed mandatory ongoing testing of border workers with the Ministry's Māori Health Monitoring Group. Feedback focused on the need for targeted communications for Māori communities to explain why mandatory testing of border workers is an important part of the general testing strategy, as well as the protective public health measures in place.
65. Pacific communities also face issues with language barriers and concerns around the stigma and flow on effects associated with testing positive (e.g. time taken off work and the impact on income). Communication with these groups will need to be targeted and aim to reduce the stigma around testing positive.
66. We intend to take a supportive approach to enable individual workers to meet their obligations under the Order, primarily through education, and Ministry officials do not recommend enforcement through warnings or the issuing of fines to individual workers.
67. As mandatory routine testing will continue for some time it is critical that there is regular engagement with Māori, Pacific and wider groups managing and supporting workers covered by the Order and Unions to ensure issues, risks and concerns are captured and where practicable, addressed through implementation arrangements.

Next steps

68. We'll continue to work through these issues with agencies, Crown Law and WorkSafe to provide you with further advice about how to progress the next amendment to the Order.
69. We will also provide you with separate advice on the framework for reviewing the mandatory testing regime.
70. We suggest you share this briefing with the Minister of Finance and the Minister for Workplace Relations and Safety.

ENDS.

Appendix 1: Key sector stakeholders consulted by agencies on draft proposals for inclusion in the next amendment to the Order

Agency	Organisations contacted by Agency
Ministry of Justice	Internal consultation only.
Ministry of Business, Innovation and Employment	<ul style="list-style-type: none"> • Hotel Providers • Government agencies and other PCBUs operating in MIQF: <ul style="list-style-type: none"> ○ NZ Police ○ Aviation Security Service (AvSec) ○ NZDF ○ Security firms ○ Transport operators • Unions: <ul style="list-style-type: none"> ○ Council of Trade Unions (CTU) ○ New Zealand Nurses Organisation (NZNO) ○ E tū ○ Unite ○ First Union ○ National Union of Public Employees (NUPE)
Ministry of Primary Industries	<ul style="list-style-type: none"> • Quarantine officers • Fisheries officers • Compliance staff
Ministry of Transport	<ul style="list-style-type: none"> • Aviation sector: <ul style="list-style-type: none"> ○ Airlines ○ Airports as PCBUs • Maritime sector (note engagement with this sector was managed by Maritime NZ) • Aviation Security Service (Avsec)
Maritime New Zealand	<ul style="list-style-type: none"> • Stevedoring companies • Other PCBUs on the port • Port companies • Unions and their workers • Shipping agents
Aviation Security Service	<ul style="list-style-type: none"> • Workforce planning • Frontline management • Frontline staff working at international airports • Frontline staff working in Managed Isolation Facilities (MIFs) • Frontline staff working in Managed Quarantine Facilities (MIQ) • Unions • Health and safety

PROACTIVELY RELEASED

Appendix 2: Draft enforcement scenarios for the proposed new duties in the Order (provided by WorkSafe)

Example of breach of proposed duty in Order	Means of detecting the alleged breach ¹	Potential compliance and enforcement responses (still being worked through with Crown Law)	Likely compliance or enforcement response from WorkSafe acting as enforcement officer
<p>Lack of record-keeping by PCBU</p> <p>A PCBU is not keeping the required records about workers subject to the testing Order</p>	<ul style="list-style-type: none"> Complaint² Media report As a result of a visit from an enforcement officer to respond to another matter 	<ul style="list-style-type: none"> Education – ensure PCBU is aware of the requirement Warning – can be verbal or written a direction given by an enforcement officer under s 21 of the <i>COVID-19 Public Health Response Act 2020</i> to comply with the requirement³ Infringement notice⁴ Prosecution under s 26(3) of the <i>COVID-19 Public Health Response Act 2020</i>⁵ 	<p>WorkSafe’s response will align with the AoG Graduated Response to COVID-19 enforcement.</p> <p>Education will generally be the most appropriate response when it is not clear that the dutyholder fully understands what the Order requires them to do, and non-compliance is likely to be a result of that. Clear, accessible guidance information will be key.</p> <p>WorkSafe considers a verbal or written direction to comply with the requirement issued under s 21 is likely to be sufficient to achieve compliance in the vast majority of instances.</p> <p>Infringement notices can be issued to PCBUs when the circumstances require a response at this level.</p> <p>Prosecution of infringement offences in court is not likely to be progressed unless there were extreme circumstances. Prosecutions of this type would involve a disproportionate burden on all parties, including the court.</p>
<p>Incomplete/inadequate record-keeping by PCBU</p> <p>The records held by a PCBU do not contain all the required information (e.g. some workers subject to the Order are not recorded, or there is no information about testing dates recorded)</p>	<ul style="list-style-type: none"> As a result of a visit from an enforcement officer to respond to another matter 		
<p>PCBU does not produce records on request</p> <p>A PCBU does not provide its records to an enforcement officer when requested</p>	<p>This breach would only occur in the presence of an enforcement officer who is asking for records to be produced</p>		
<p>PCBU does not provide information to workers</p> <p>A PCBU is not informing its workers that they are subject to the testing Order, and how often they need to be tested</p>	<ul style="list-style-type: none"> Complaint² Media report MoH will be able to identify lower than expected testing numbers from PCBUs as an indicator of non-compliance with this duty 		
<p>PCBU does not support workers to get tested</p> <p>A PCBU does not take appropriate measures to remove/reduce barriers to its workers being tested. Possible examples include:</p> <ul style="list-style-type: none"> refusing to allow workers time away from the job to get tested rostering them to work continuously over the time when their test is due, so they are unable to attend a testing centre during its opening hours not allowing sufficient time for workers to get tested at an on-site facility (e.g. providing a 15 minute break when the testing centre is a 10 minute walk away from where they’re currently working and not providing any faster means of transport) penalising workers who are being tested, or otherwise disincentivising its workforce from being tested (e.g. docking pay for taking longer than usual to recover/resume work after a test, or routinely allocating less desirable tasks to those being tested) refusing to provide workers with appropriate support when this is needed (e.g. assistance with understanding when their next test is due if they only work intermittently, managing language/literacy barriers, 	<ul style="list-style-type: none"> Complaint² Media report MoH will be able to identify lower than expected testing numbers from PCBUs as an indicator of non-compliance with this duty 	<ul style="list-style-type: none"> Education – ensure PCBU is aware of the requirement Warning – can be verbal or written a direction given by an enforcement officer under s 21 of the <i>COVID-19 Public Health Response Act 2020</i> to comply with the requirement³ Prosecution under s 26(1) of the <i>COVID-19 Public Health Response Act 2020</i>⁶ 	<p>WorkSafe’s response will align with the AoG Graduated Response to COVID-19 enforcement.</p> <p>Education will generally be the most appropriate response when it is not clear that the dutyholder fully understands what the Order requires them to do, and non-compliance is likely to be a result of that. Clear, accessible guidance information will be key.</p> <p>WorkSafe considers a verbal or written direction to comply with the requirement issued under s 21 is likely to be sufficient to achieve compliance in the vast majority of instances, particularly because PCBUs will be aware that prosecution under s 26(1) is an option.</p> <p>Prosecution under s 26(1) for breach of this duty would require WorkSafe to establish that the PCBU is <i>intentionally</i> not complying with it. This can be done when necessary by issuing a formal, written direction to comply under s 21 first, and then establishing at a later date that compliance has still not occurred before laying charges.</p>

¹ in the absence of a proactive compliance monitoring or assurance process

² received through the AOG COVID-19 compliance response process <https://forms.police.govt.nz/forms/covid-19-breach>

³ Section 21 directions can be verbal or written. It is an offence under s27(2) of the *COVID-19 Public Health Response Act 2020* to intentionally not comply with a s21 direction from an enforcement officer. This can result in a fine imposed by the court of up to \$4000 (or up to six months’ imprisonment, but that is not applicable to an entity such as most PCBUs).

⁴ This results in an ‘instant fine’ of \$300

⁵ This can result in a fine imposed by the court of up to \$1000

⁶ This can result in a fine imposed by the court of up to \$4000 (or up to six months’ imprisonment, but that is not applicable to an entity such as most PCBUs).

Example of breach of proposed duty in Order	Means of detecting the alleged breach ¹	Potential compliance and enforcement responses (still being worked through with Crown Law)	Likely compliance or enforcement response from WorkSafe acting as enforcement officer
supporting/responding to workers who have an adverse reaction to the tests)			Prosecution would be a last resort because of this process, but can and should be used if the circumstances require it. The attitude/willingness of the PCBU to comply and the severity/impact of the breach on workers presenting themselves for routine testing would likely be key factors in any decision to prosecute.
<p>PCBU has failed to comply with a legal requirement in the order in the context of evidence of COVID-19 transmission amongst the PCBU's workers, their contacts and the wider community.</p> <p>There is a spread of COVID-19 infections amongst workers and/or any other person as a result of potential exposure from the work carried out by the PCBU and this spread could have been identified and mitigated at an earlier point in the transmission chain through compliance with testing requirements by the PCBU.</p>	<ul style="list-style-type: none"> Retrospectively as a result of evidence of worker and/or community infection that is linked to the work activities of a PCBU subject to the testing order. 	<ul style="list-style-type: none"> As above under the testing order Prosecution under s 36(1) and/or 36(2) of the Health and Safety at Work Act 2015 (HSWA), with compliance with the testing order being a reasonably practicable action that the PCBU could have taken to minimise the risk of COVID-19 infection to workers and others. Other enforcement measures may be taken under HSWA to manage any ongoing and uncontrolled risks identified during the investigation e.g. improvement or prohibition notices. 	<p>WorkSafe's response to this type of scenario would be proportionate to the risk of harm or realised harm that resulted from any alleged breach, and align with its internal operational policies</p> <p>Enforcement action under HSWA would only be considered when there has been a clear failure of other preventative controls that led to the initial exposure of a worker or workers.</p> <p>Any failure to comply with testing requirements in the order that may have contributed to further infection would be seen as an additional facet of the broader HSWA investigation.</p> <p>In these circumstances, WorkSafe is likely to wish to consult with MoH before commencing any HSWA investigation or enforcement action.</p>
<p>Worker does not provide PCBU with proof of testing</p> <p>A worker does not provide their PCBU with evidence that they have been tested (even though they have been tested in accordance with the Order)</p>	<ul style="list-style-type: none"> Complaint² (most likely from PCBU) As a result of a visit to the PCBU from an enforcement officer to respond to another matter 	<ul style="list-style-type: none"> Education – ensure worker is aware of the requirement Warning – can be verbal or written 	<p>WorkSafe is not likely to enforce duties at an individual worker level.</p> <p>WorkSafe considers the existence of the duties and possible sanctions should generally be sufficient to achieve compliance, particularly when supported by the complementary duties on the PCBU.</p>
<p>Worker does not get tested</p> <p>A worker does not present themselves for testing at the frequency required by the Order</p>	<ul style="list-style-type: none"> Complaint² Media report 	<ul style="list-style-type: none"> a direction given by an enforcement officer under s 21 of the <i>COVID-19 Public Health Response Act 2020</i> to comply with the requirement³ Infringement notice⁴ Prosecution⁵ 	<p>Any enforcement function aimed at workers would be more appropriately undertaken (when needed) by Medical Officers of Health who hold the same powers under the COVID-19 Public Health Response Act 2020, as well as complementary powers under the Health Act to deal with this situation.</p>

Appendix 3: Crown Law advice (legally privileged)

Withheld in full under Section 9(2)(h) of the Official Information Act

PROACTIVELY RELEASED