

Briefing

Advice on maximising uptake of the border workforce testing register

Date due to MO: 26 February 2021 **Action required by:** 3 March 2021

Security level: IN CONFIDENCE **Health Report number:** 20210348

To: Hon Chris Hipkins, Minister for COVID-19 Response

Contact for telephone discussion

Name	Position	Telephone
Dr Ashley Bloomfield	Director-General of Health	s 9(2)(a)
Caroline Flora	Acting Deputy Director-General of Health, System Strategy and Policy	s 9(2)(a)

Minister's office to complete:

- | | | |
|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

Comment:

Advice on maximising uptake of the border workforce testing register

Security level: IN CONFIDENCE **Date:** 26 February 2021

To: Hon Chris Hipkins, Minister for COVID-19 Response

Purpose of report

1. This briefing responds to your request for advice on maximising uptake of the Border Workforce Testing Register ('the Register'), a record-keeping tool intended to support Persons Conducting a Business or Undertaking (PCBUs) to meet their obligations under the COVID-19 Public Health Response (Required Testing) Order 2020 (the Order).
2. It follows advice you have been provided on the frequency of testing border workers under the Order (HR20210339) and recommended additional groups to be included in the Order (HR20210284).

Summary

3. The Order requires relevant PCBUs to facilitate compliance with testing and medical examination requirements by notifying each affected employed or engaged person of the requirement for testing and the testing period that applies to them. PCBUs must not prevent the affected person from reporting for testing during working hours. PCBUs must also keep a record of the occurrence of the testing and medical examination and make the records available to an enforcement officer as soon as practicable upon request.
4. The Register is a tool created and made available by the Ministry of Health, free of charge, to support PCBUs to meet their obligations under the Order by facilitating a list of border workers, the testing cycle that applies to each, the date of their last test and details of any testing exemption that the worker has been granted. PCBUs are able to easily tell how many workers are soon due for their next test and who is overdue. The Register can also notify workers of when their next test is due. Use of the Register is currently voluntary and just over a third of PCBUs recently surveyed were using the Register.
5. We recently provided you with the full review of the Order, which noted that compliance by PCBUs and the workforce under the Order was generally good (HR20210284). We understand that the border workforce and PCBUs are generally meeting their respective obligations under the Order to be tested and keep records, respectively. However, there are possible pockets of non-compliance and cases where there is a lack of clarity of the records being kept.

6. As observed through the Papatoetoe community cases, when time is of the essence, contact tracers' access to PCBUs' record-keeping is critical in the task of preventing the spread or outbreak of COVID-19.
7. The Register has been developed to support employers in adhering to their record-keeping requirements under the Order, but there are opportunities to increase the uptake of the Register to give the Ministry, PCBUs, and the PCBU enforcement agency (WorkSafe) better visibility on the fulfilment of duties under the Order.
8. The Ministry has identified two options that we assess will maximise the uptake of the Register by PCBUs:
 - a. use of the Register is made mandatory through an amendment through the COVID-19 Public Health Response Act Amendment Bill (No.2) 2021, and
 - b. the Ministry continues communication, education, onboarding and support of PCBUs onto the Register.
9. s 9(2)(h)
[REDACTED]
[REDACTED]
10. Some agencies have raised concerns that making the Border Workforce Testing Register mandatory may require significant resources for PCBUs to manage and significant amendments to their business processes.
11. If you choose to make use of the Register mandatory, we can include this in the draft COVID-19 Public Health Response Act Amendment Bill (No.2) 2021.

Recommendations

We recommend you:

- a) **note** that the full review of the Order found that testing compliance by PCBUs and the workforce under the Order was generally good
- b) **note** that there is an opportunity to use the Border Workforce Testing Register to improve visibility of record-keeping for relevant PCBUs
- c) **agree** that officials progress making Register use mandatory for PCBUs through the COVID-19 Public Health Response Act Amendment Bill (No.2) 2021 **Yes** **No**
- d) **note** that the Ministry will continue efforts to communicate, educate, onboard and support PCBUs to use the Register
- e) **note** that some agencies have raised concerns that making the Border Workforce Testing Register mandatory may require significant resources for PCBUs to manage and significant amendments to their business processes
- f) **note** that if you agree to make use of the Register mandatory, we will consult with the Office of the Privacy Commissioner and the Ministry of Justice

- g) **agree** to share this briefing with Hon Michael Wood, Minister for Workplace Relations and Safety **Yes** **No**



Dr Ashley Bloomfield

Director-General of Health

Date: 26/02/2021



Hon Chris Hipkins

Minister for COVID-19 Response

Date: 27/2/2021

Given the urgent need to make sure we have access to accurate records of who has been tested and when, I would like the legislative amendment expedited. This could be done in a matter of weeks - not months! CH

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Advice on maximising uptake of the border workforce testing register

Background

1. The COVID-19 Public Health Response (Required Testing) Order 2020 (the Order) has been in place since 29 August 2020. The purpose of the Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by ensuring specified border workers at risk of exposure to COVID-19 are tested on a regular basis.
2. The Order requires relevant PCBUs to facilitate compliance with testing and medical examination requirements through:
 - a. notifying each affected employed or engaged person of the requirement for testing and the testing period that applies to them
 - b. not preventing the affected person from reporting for testing during working hours
 - c. keeping a record of the occurrence of the testing and medical examination and making it available to enforcement officers as soon as practicable upon request.
3. You have requested advice on options to maximise the uptake of the Border Workforce Testing Register (the Register). Your request is related to the latest community cases in Papatoetoe where LSG Sky Chefs New Zealand Ltd ('LSG Sky Chefs') was not using the Register. This made it difficult to access testing records for the border workforce in Case B's workplace over the course of a weekend when a positive test result arose.
4. Although Case B was not required by the Order to be tested regularly, the individual was being tested on a voluntary basis. Quicker access to the PCBU's testing records could have facilitated a faster investigation and decision-making process.

The Border Workforce Testing Register is a tool to support PCBUs to meet their obligations under the Order

5. The Border Workforce Testing Register ('the Register') has been developed to support employers in adhering to their record-keeping requirements under the Order. The Register is the automated secure online tool that tracks and records a border worker's COVID-19 swabbing dates and testing activity for the employer's record, not as a Ministry database. PCBUs using the Register can easily tell who is due to be tested and who is overdue. The Register and the support service are provided free of charge.
6. The Order does not require the use of the Register but it does require records to be kept by PCBUs. PCBUs are able to adopt the Register as a mechanism to meet their record-keeping duties under the Order. However, as a section 11 order under the COVID-19 Public Health Response Act 2020 cannot override the Privacy Act 2020 ('the Privacy Act'), the Order does not, and cannot, require PCBUs to use the Register.
7. To ensure worker privacy, the Register does not record the results of a test, only the date a swab was taken. It also keeps border workers and employers informed about when workers need to be tested next and whether they have completed their most recent test

required under the Order. The Register does this by matching a worker to their National Health Index (NHI) number so swab dates are automatically populated.

8. The Register was not intended as a compliance tool for the required testing under the Order, but as a tool to support PCBUs to meet their obligations.

Privacy

9. The Ministry's access to the information on the Register is limited and is governed by a Privacy Statement setting the parameters of use. The Privacy Statement authorises the Ministry of Health to have access to personal information on the Register only:
 - when required to provide Register system support
 - to match NHI numbers to assist with the testing process and enable swab dates to be shown in the Register
 - to forward specified information to the COVID-19 Immunisation Register (CIR), to create a vaccination dataset within the CIR, with worker name, date of birth, NHI, contact mobile phone and email details and PCBU; and
 - if a border worker tests positive, contact tracers may access the contact details of other workers who may be Close Contacts.
10. Only a small team of Ministry staff can see the anonymised information on the Register and produce reports to assist with the COVID-19 response.

Uptake of the border workforce testing register is variable

11. As of 24 February 2021, fifty-eight PCBUs are using the Register with some of these representing several thousand workers (eg, the Ministry of Business, Innovation and Employment as the overarching PCBU operating managed isolation and quarantine facilities). Other PCBUs keep their own records rather than using the Register (eg, the New Zealand Customs Service and Air New Zealand).
12. PCBUs are gradually joining the Register and increasingly the Ministry will get a more complete view of PCBUs affected by the testing regime. The Ministry has done and continues to do a significant amount of work to bring PCBUs onto the Register, having conducted 178 demonstrations and onboarding demonstrations for PCBUs and communicating regularly with those on the Register. Thirty PCBUs have joined in the month to 24 February 2021, and we anticipate the rate will increase following the focus on a border workforce PCBU in the contact tracing efforts in relation to Papatōetoe community cases.
13. However, not all PCBUs want to sign up to the Register because it may represent an unwelcome administrative burden for very small PCBUs and other PCBUs have developed their own systems, at significant cost to themselves, which they perceive are working well. There are indications that some PCBUs may be concerned about privacy aspects.
14. The Register was not intended as a compliance tool for the Required Testing Order.

The Register is a valuable tool to support contact tracing

15. Most of our community incursions of COVID-19 have been directly linked to the border. It became apparent through the contact tracing aspect of the recent investigation into the Papatoetoe community cases that the PCBU, LSG Sky Chefs, did not use the Register for the approximately 40 affected workers under the Order.
16. While Case B was not an affected worker under the Order so was not required to undergo routine testing, LSG Sky Chefs reported including laundry workers in its routine testing process that had been established for its affected workers, such as those working airside. However, because the PCBU was not using the Register there was a delay in accessing their testing records.
17. The Ministry has provided education and onboarding training previously, and since the incidence of the Papatoetoe community cases has supported LSG Sky Chefs onto using the Register.
18. When PCBUs keep separate records it is harder for the contact tracing investigative teams who process the data to understand the situation, and having the PCBUs and their affected staff on the Register would make analysis quicker and easier, with fewer errors, as the swabbing date is automated.
19. Having rapid access to a record of testing in the Register would have been useful for contact tracers, to be able to determine who had recently been tested at that PCBU. The Register could have informed which workers had been in direct contact with the border, and who had recently returned a negative test, to allow confirmation of Case B's contact with any of these workers. This could have contributed to earlier detection, faster case investigation, and the elimination of some earlier potential leads in the contact tracing investigation.
20. When time is of the essence, access by the contact tracers to PCBUs' record-keeping is critical in the task of preventing the spread or outbreak of COVID-19. The Privacy Statement for the Register provides that contact tracers may access the Register in the event that there is a case related to that workplace.

We have identified two key ways to maximise uptake of the Register

21. Use of the Register by PCBUs:
 - a. demonstrates engagement by the PCBUs with the required testing regime;
 - b. increases the accuracy of data held on the testing frequency due to its automation function linking (anonymously) the affected workers test results to their NHI;
 - c. increases the Ministry's visibility on whether PCBUs are fulfilling their other duties under the Order; and
 - d. is a valuable tool to support an investigation, as it supports early detection of potential transmission linked to an 'affected worker' during contact tracing, through provision of a list of close or casual work contacts who might also have been exposed to the same source.
22. The Ministry has identified two options that we assess will maximise the uptake of the Register by PCBUs.

Making use of the Register by PCBUs mandatory (amendment to primary legislation is required)

23. Under this option, officials would progress making use of the Register mandatory for PCBUs through the COVID-19 Public Health Response Act Amendment Bill (No.2) 2021 ('the Bill'), including through consultation with the Privacy Commissioner and the Ministry of Justice.

24. s 9(2)(h) [Redacted]

25. As primary legislation can override privacy principles, if you wish to make the use of the Register mandatory for PCBUs officials can progress this through the Bill which has a proposed timeline for commencement at the end of August 2021.

26. If you pursued the option to make the Register use mandatory, the Privacy Statement specifying the parameters of the use, and the principles under IPP11 would still apply but the Bill's mandatory requirement to use the Register would compel employers to provide an employee list into the Register. The Ministry's view of the Register would remain anonymised, and only appear as high-level data, unless a positive case justified access to the relevant personal data as provided for by the parameters of the Privacy Statement.

27. The key benefits of making use of the Register mandatory are:

- a. PCBUs can access an automated secure online database with provision for education and onboarding supported by the Ministry, assisting them to fulfil their duties under the Order.
- b. for the Ministry, mandatory Register use supports early detection in chains of transmission, and aids rapid contact tracing through identification of relevant workforce contacts and testing status (in conjunction with NHI linkage to test).
- c. providing the Ministry with a good data set (eg, number of PCBUs covered by the Order, number of affected workers in the border workforce). It would also provide confidence that employers are maintaining records of affected staff as per the Order.

28. If the Register use by PCBUs was mandatory, the ability to prevent transmission through early detection of COVID-19 is increased and the risks of non-compliance with record keeping requirements in the Order are reduced.

29. In the intervening period, from March until August, the PCBUs can use the Register to enter their affected workers under the Order to inform the COVID-19 Vaccination Register, as this is specified as a purpose for the organisation's collection of the information in the current privacy statement for the Register.

30. The drawbacks for this option are that PCBUs (small and large) will need to upload attendance data from pre-existing roster format, creating additional administration. The Ministry also does not have complete visibility on all the PCBUs with affected workers covered by the Order, so the Ministry will not easily be able to identify non-compliance with mandatory Register use, but the expectation would be that PCBUs would self-identify.
31. If you wish to proceed with this option, the Bill will include provisions which mandate the use of the Register for record-keeping and will include penalties for PCBUs who fail to do so. Officials will engage with the Office of the Privacy Commissioner and the Ministry of Justice to ensure that privacy considerations are addressed.

Continue stakeholder engagement through communications, education, onboarding and support

32. As previously noted, the Ministry has already been working closely with PCBUs to increase uptake of the Register, and there has been a notable increase in registrations since the recent community cases.
33. The Ministry will continue to provide communications, education, and onboarding of PCBUs to maintain records and use of the Register. It will also provide ongoing support to PCBUs using the Register.
34. The Ministry has already placed significant resource into the communications, stakeholder engagement, and education of PCBUs. While this has led to increased uptake, the fact that some PCBUs are still not using the Register suggests that this option alone will not achieve the objective of maximising uptake to 100%.

We also considered other options to maximise uptake of the Register

35. Officials also considered amending the Act to require PCBUs to submit records to the Ministry in any form (not just through the Register). There may be some benefits such as PCBUs are able to use their preferred form of record-keeping, and Ministry visibility on the uptake of border worker testing under the Order for data, analysis purposes; and visibility for PCBUs on whether their employees are getting tested.
36. However, the drawbacks are significant in relation to the additional administrative and compliance tasks on PCBUs to submit to the Ministry; the intensive requirements on the Ministry to manage the incoming information and input data for multiple PCBUs into the Register; and the related information security and privacy issues (Ministry and submitting PCBU). A new duty to submit record keeping would also require amendment to the primary legislation. We do not recommend this option.
37. We also considered asking WorkSafe to conduct spot-checks on PCBUs that do not use the Register, to ensure that record-keeping requirements are being met. This would require WorkSafe to proactively monitor compliance with record-keeping duty under the Order and this could be done in line with WorkSafe's education-focussed approach.
38. However, this would be a departure from the existing arrangement of the complaints-based regulatory system. Also, WorkSafe has indicated that this was not envisaged when it was designated as the enforcement officer for the Order and that the organisation is not resourced (financially or in personnel) to conduct this role. We do not recommend this option.

Equity

39. The impacts of COVID-19 are felt differentially across New Zealand communities. Māori and Pacific communities and those living with disabilities, in lower socio-economic groups and crowded or institutional settings bear a greater portion of both health and economic impacts and risks. The resurgence of COVID-19 in Auckland in August 2020 disproportionately affected Pacific communities. Since then, the mandatory border worker testing regime has been a key part of the response to prevent the outbreak or spread of COVID-19 to the community.
40. It is important that the Register can be easily used by all PCBUs to support their compliance with the Order. As part of the Ministry's stakeholder engagement we will ensure that support to use the register meets the needs of diverse PCBUs. This will also support PCBUs to better support their workers' compliance.

Consultation

41. Agencies with a large affected workforce have strongly indicated their concern at the concept of mandatory Register use. Their concerns are that:
 - a. a complex operating environment makes using the Register challenging;
 - b. using the register would require significant amendment to business processes;
 - c. it would take a significant amount of resource to manage;
 - d. some are verging on "regulatory overload", particularly for some of the smaller business involved;
 - e. prescription of a front-end input tool seems contrary to taking a proportionate risk-based approach;
 - f. it may be better to have a preference on the Register use but with the Ministry or Director-General of Health able to accept other systems that meet specific requirements; and
 - g. work needs to be done to ease the administrative burden placed on agencies with large workforces some of whom work a rotational roster and move between active and non-active border roles.
42. New Zealand Customs and the Ministry for Primary Industries in particular have raised concerns about the impacts that mandatory use of the Register may have on their operations.
43. Engagement with the Office of the Privacy Commissioner and the Ministry of Justice will be critical for understanding privacy matters that may arise from a mandatory approach. Officials will consult with the Office of the Privacy Commissioner and the Ministry of Justice in the next stages of development, if you choose to make use of the Register mandatory.
44. Officials are currently exploring possible ways for the data systems that have been created by PCBUs to interface with the Register (through an Application Programming Interface (API)). If you choose to make the Register mandatory, this approach could enable PCBUs to continue to use their own systems while also complying with mandatory use of the Register.

45. During any process to change the primary legislation there would be an opportunity for wider consultation with other Ministers and relevant affected sectors.

Next steps

46. Once we receive your decisions, we will work with agencies on implications and implementation planning and issue drafting instructions to the Parliamentary Counsel Office. If you agree to the proposals in this paper, we will include these in the draft amendment Bill currently being prepared.
47. The Ministry will continue to update you on the uptake of the Register, and on PCBU compliance to the testing requirements under the Order. We are also finalising an enforcement process for the Ministry to ensure individuals are complying with the Order.

ENDS.

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