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COVID-19 Vaccinations and the Workplace

Employer Guide

Helping you and your business navigate the Australian COVID-19 vaccine rollout in an ever-changing landscape

Edition 1

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Summary

Businesses play a vital role in helping to support staff in getting the COVID-19 vaccine. Below are the five things you can do right now to play your part as an employer in the vaccine rollout.

FIVE THINGS EMPLOYERS CAN DO RIGHT NOW

1. **Communicate, encourage and support** your workforce to get vaccinated by providing employees with access to reliable and accurate information about the vaccine and where employees can get vaccinated.

Want to know more*: Part 1 - Communicating with Employees* covers communicating with your employees as well as tips and tricks and easy to use resources.

2. **Assist your employees to get vaccinated** where possible by being as flexible as you can be when it comes to staff getting the vaccine. For some employers this could include things like allowing employees time off or moving around shifts to allow employees to attend vaccination appointments.

Want to know more: *Part 2 - Assisting your employees get vaccinated* includes different options for employers and guidance around promotions and giveaways.

3. **Have sensible conversations with your workforce**. While some employers may need to consider mandating vaccinations, all employers should have sensible conversations with their workforce about how the workplace will be approaching vaccinations and ensuring all staff are kept safe.

Want to know more: *Part 3 - Employment and Work Health & Safety Law Vaccine Workplace Considerations covers vaccines, employment and work health and safety law issues, including mandating and managing existing and new staff***.**

4. **Keep accurate and up to date records.** Employers can legally ask staff about their vaccination status, though it is up to individual employees as to whether they choose to share this information or not. If an employee chooses to disclose their vaccination status, all employers should know and understand their privacy obligations in relation to the collection, use and disclose of this sensitive health information.

Want to know more: *Part 4 - Vaccines and privacy law covers how employers can sight, collect, use and disclose information about employee vaccination status.*

5. **Continue to take preventative measures to ensure the health and safety of everyone in the workplace.** Employers have a legal obligation under WHS Law to as far as is reasonably practicable ensure the health and safety of workers in the workplace. Employers should continue to take precautions to prevent the spread of COVID-19 in the workplace.

Want to know more: *Part 5 - Work Health and Safety* covers your WHS obligations as an employer and steps you can take to reduce the risks in your workplace.

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Overview

COVID-19 vaccines will play a critical role in protecting the health and wellbeing of people in Australia. Over time, this will enable our social, economic and cultural recovery.

Businesses play a vital role in helping support their staff in getting the COVID-19 vaccine and making access to vaccines as easy as possible. Only through collective effort, will we help people to make well informed decisions and encourage as many people as possible to get the COVID-19 vaccine.

This guide aims to help you understand how to communicate about the vaccine, what your obligations are when it comes to vaccinations for your staff, based on employment law and work health and safety, as well as answer some of the more common questions employers may have around the vaccine and its impact on workers and the workplace.

This document will continue to be updated with new editions as the COVID-19 Vaccination Programme and government advice progresses.

The content of this publication has been prepared based on material and information available to date (August 2021). The information in this guide is of a general nature and does not constitute legal advice and should not be relied upon as such. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. Some information contained in this publication may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

PART ONE: Communicating with Employees

The most important thing you can do as an employer is to communicate with your employees, about the COVID-19 vaccine.

THE ROLE OF EMPLOYERS

Businesses play a vital role in helping to support and encourage their staff in getting the COVID-19 vaccine. Only through collective effort, will we help people to make well informed decisions and encourage as many people as possible to get the COVID-19 vaccine.

WHAT CAN EMPLOYERS DO TO COMMUNCATE, ENCOURAGE AND SUPPORT EMPLOYEES TO GET THE COVID-19 VACCINE?

- Provide employees with access to reliable and accurate information about the vaccine.
- Run an awareness campaign in your organisation by using some of the resources available at the back of this guide to communicate with staff about the vaccine rollout.
- Share the Q&A document and expert advice videos to explain the vaccine and answer common questions employees may have (see resources available).
- Urge staff to be cautious of misinformation and encourage them to use trusted sources like health.gov.au if they are searching for information or answers to questions about the vaccine.
- Create employee advocates by encouraging staff to discuss their vaccine experiences and share accurate information with colleagues, family and friends.

KEY MESSAGES

- Vaccines are the way out of this pandemic. Vaccines are the best way to protect yourself and those around you from the virus.
- It is important that everyone arm themselves again COVID-19 as soon as they can.
- The COVID-19 vaccine has already saved thousands of lives by preventing the spread of the virus.
- Vaccinated people are far less likely to get symptoms from COVID-19. They are even more unlikely to get seriously ill, be admitted to hospital or die from it. There's growing evidence that vaccinated people are also less likely to pass the virus to others.
- The first dose of the vaccine offers good levels of protection, but to get maximum protection everyone must get a second dose, so we are urging all people to come back.
- There are many resources available to people who have questions about the vaccine. The Government urges everyone to be cautious of misinformation. Use trusted sources like health.gov.au to answer any questions.

IDEAS FOR COMMUNCATING WITH STAFF

As an employer there are numerous ways of communicating with employee about the vaccine. Here are some options you may wish to consider:

- Sending an email to staff with the key government messages and information about the rollout. Consider also sharing the vaccine information videos in your correspondence.
- Update your email signatures and website with the Arm Yourself banner
- Use your company newsletter or social media channels to share trusted government information about the vaccine.
- Put up the COVID-19 campaign materials around the workplace.
- Lead by example. Get vaccinated at your earliest opportunity, and let your employees and workers know you did.

THE IMPORTANT LEGAL STUFF YOU NEED TO KNOW WHEN COMMUNICATING ABOUT COVID-19 VACCINATIONS WITH EMPLOYEES

The Therapeutic Good Administration (TGA) in recognition of the importance of responsible communication regarding the COVID-19 vaccination has given legal permission that allows businesses (and others) to communicate about vaccinations so long as that communication:

✓ Is consistent with current Commonwealth health messaging regarding the national COVID-19 vaccination program, including content found on the Australian Government Department of Health website; and

✗ Does not contain:

- any reference to the trade name, sponsor name or active ingredient or any other information that would identify specific vaccine brands (e.g. Pfizer or AstraZeneca);
- any statement, or implication comparing different COVID-19 vaccines (or comparing vaccines with treatments such as medicines);
- statements to the effect that COVID-19 vaccines cannot cause harm or have no side effects; or
- any statement regarding COVID-19 vaccines that is false or misleading.

It is also important to remember that obligations under other laws, such as the Australian Consumer Law which includes the obligation not to mislead, continue to apply when communicating about vaccines.

Resources Available

There are a variety of resources available to help you engage employees in different ways to spread the message far and wide in your internal channels including:

COVID-19 vaccination – Business Kit Brochure – Are you eligible?

This brochure provides information on eligibility, making a booking, where to go to get vaccinated and financial help.

Vaccine Campaign posters

Arm yourself poster

Don't hesitate to vaccinate

Living the new normal

Signature Blocks

Arm yourself signature block

Arm your workmates signature block

Campaign Logos

JPEG Arm Yourself band aid images you can add to email signatures, branded documents, communications.

Web banner

Arm yourself web banner

Vaccine information videos

Arm yourself against COVID-19

Why vaccines are important

Stay Home during Sydney outbreak

Tailored Resources

The government has also produced a range of resources around the COVID-19 vaccine tailored specifically to certain individuals including:

- Information for service provides, workers and people with disability
- Information for Aboriginal and Torres Strait Islander peoples
- Information for non-English speakers

The Vaccine Rollout in Australia

Australia's COVID-19 vaccine program commenced in late February 2021 as key to Australia's strategy to protect against the spread and severity of the evolving COVID-19 virus.

While the Australian Government has committed to providing all Australians with access to a COVID-19 vaccine, Australia's COVID-19 vaccines are being made available to people in phases, with those identified as being in higher risk categories or those with unique considerations being eligible first, relevantly for employers these categories include the residential aged care workforce, health care workers, workers related to the disability cohort (e.g. disability service providers), quarantine and border workers.

For further information on priority groups for the vaccine rollout see the Federal Government's Operation COVID Shield – National Vaccine Campaign Plan. State and Territories can also sub-prioritise cohorts as required to meet local needs.

! The phased roll-out approach means that the vaccine is not yet available to all employees (or that an employee's preferred vaccine may not yet be available to them). Employers must keep this in mind when considering their approach to vaccines in the workplace. Employees can use the COVID-19 vaccine eligibility checker to find out when and where individuals can receive a COVID-19 vaccine.

Booking in for a vaccination

Employees can check their eligibility to receive the vaccine at https://covid-vaccine.healthdirect.gov.au/eligibility. If they are eligible, they will be able to view vaccination locations and book an appointment.

For those not yet eligible they can register their interest so that they can be notified when they are able to book.

Vaccine uptake

The Department of Health has developed the Arm Yourself campaign to encourage Australians to vaccine to protect themselves, their loved ones, the people they care about, and the wider community by getting the COVID-19 vaccine.

The Government is aiming to motivate eligible Australians to receive at least the first dose of the COVID-19 vaccination by **December 2021**.

The vaccine is free, and the Australian Government is generally not mandating that Australians receive the vaccine outside of a very limited number of high-risk sectors such as aged care.

The latest figures at the time of writing indicate that more than 26% of Australians aged 16 years and over are now **fully vaccinated** including more than 37% of over 50-year olds and more than 52% of Australians over 70 years of age.

Tips for conversations with staff about the COVID-19 vaccine

Listen more than you talk

It's conversation, not a debate. Remember it's not the job of employers to convince people to get vaccinated. Rather, you're sharing information to help employees make their decision. Be positive, inviting and respectful. Acknowledge "the choice is theirs to make with their doctor or healthcare provider."

Lead with empathy

This is a new vaccination program, and these are new vaccines. Respect people's concerns and acknowledge that it's ok for everyone—even you—to have questions about vaccines. Don't talk down to people, lecture or make people feel guilty. Instead, try to be understanding, positive and helpful.

Be inviting and as authentic as possible

As more people get vaccinated, ask them to share their stories with others. Hearing from someone who's already been vaccinated is one of the best ways to put others at ease. Share why you're getting vaccinated (if you are) and why it's important to you.

Facts are important when it comes to safety

Urge staff to be cautious of misinformation and encourage them to use reputable sources like health.gov.au if they are searching for information or answers to questions about the vaccine. Remember, you should never give medical advice, so encourage people with more advanced questions to talk with their doctor or healthcare provider.

PART TWO: Assisting employees to get vaccinated

Assisting employees to get vaccinated is not without some risk. We strongly encourage all employers who are considering any of the below to also review the 'Vaccination Liabilities' Section in this part of the Guide.

Once an employee has decided to get vaccinated, employers can further help by removing barriers that may prevent an employee from following through and in some circumstances by offering incentives to support and encourage vaccination.

Some businesses may not be able to afford all, or even some, of these proposed methods of assistance and incentives set out below and that's okay. The following ideas and examples are only provided by way of example of some ways you might consider supporting employees and workers, to the extent you are able. Employers should adopt an approach that fits their business models

Some options to assist employees to get vaccinated

- Offer **internet access** or **language support** services to help employees and workers schedule appointments. Note it is important that the vaccination still be arranged by the employee and administered at a site of their choosing.
- Be **accommodating** so employees can attend vaccine appointments around work. This could include changing work start and finish times to enable employees to get to vaccination appointments outside of their work hours or allowing employees to work from home to help them attend a local vaccination appointment.
- **Provide (unpaid leave, annual leave or paid leave) time off** to employees and workers so they can go and get vaccinated. Some employers are offering between 2-3 hours for each dose of a vaccine an employee or worker receives.
- Cover **out-of-pocket** expenses associated with vaccination. This could include offering to cover transportation, a small stipend for lunch or reimbursement for child care.
- When it becomes a viable option consider offering **on-site vaccinations** to employees and workers.
- **Consider providing rewards or incentives** (i.e. bonuses, gift cards, coupons, discounts) to employees and workers who get vaccinated (see more detail on Vaccine Promotions and Giveaways later on in this section).
- **Relieve any concerns about costs** for vaccine. The federal government is providing vaccines free of charge to all people living in Australia.

Vaccination Liabilities

By offering incentives to vaccinate or facilitating vaccinations onsite/offsite, employers are seeking to contribute to public health efforts and protect the well-being of their employees, which in turn, of course, will protect the health of their businesses.

However, the various COVID-19 vaccinations are not without some risk and it is possible an employee may have an adverse reaction to receiving the vaccine, though extreme adverse reactions are rare. If the reaction can be defined as an "injury" under workers' compensation legislation and there is a link to employment ("in the course of employment"), then it is possible that the employee could make a compensable claim.

Below we present four scenarios to consider in relation to this question.

"CAN A WORKER'S ADVERSE REACTION TO A COVID VACCINE BE CONSIDERED A COMPENSABLE WORKERS' COMPENSATION CLAIM?"

Increasing strength of link to employment

Scenario 1: If an employer promotes voluntary vaccination and shares government information

Where an employer shares government advice or campaign materials relating to the COVID-19 vaccine and its availability through company email and signage, then an adverse reaction is unlikely to be compensable as there would be no or only an extremely weak link to employment.

Scenario 2: If an employer promotes voluntary vaccination and provides an incentive or reward for vaccination

Where an employer encourages their employees to get vaccinated through incentive or reward, then an adverse reaction may be compensable as the incentive scheme creates a link to employment.

Scenario 3: If an employer organises the voluntary vaccination onsite or at another location for employees

Where an employer arranges voluntary COVID-19 vaccines and advertises its availability through company emails and signage, whether the vaccination occurs at the workplace or away (such as a Medical Centre), then an adverse reaction may be compensable, even if vaccination is voluntary and not mandated by an employer, due to a link to employment.

Scenario 4: If an employer 'mandates' (implements a vaccination policy) that employees must be vaccinated and an employee has an adverse reaction to the vaccine

In most cases yes, it is likely that an adverse reaction would be found compensable.

Note: For every scenario, each claim will be dependent on the facts of the individual claim and considered in the context of the relevant state or territory workers' compensation law.

Vaccine Promotions and Giveaways

As the race to vaccinate the Australian population against COVID-19 continues, some employers may be considering what addition role they can play in incentivising staff and others to get vaccinated.

The following outlines what is permitted under Australian law.

The Therapeutic Goods Administration (TGA) has granted a Permission allowing employers and others to lawfully provide communications about COVID-19 vaccines to support and encourage the Government's COVID-19 vaccine roll-out (TGA Permission).

The TGA Permission, which will be in place until December 2022, allows businesses to offer vaccine rewards to employees, subject to meeting certain conditions.

TGA conditions for employers offering a reward to encourage COVID-19 vaccination

TGA Permission allows employers to offer valuable consideration (cash or other rewards) to people who have been fully vaccinated under the Government's national COVID-19 vaccination program.

The offer of rewards to encourage COVID-19 vaccination is allowed provided the offer:

- is only made to people who have been fully vaccinated (i.e. two shots);
- states that vaccination must be undertaken on the advice of a health practitioner;
- refers only to COVID-19 vaccines generically (i.e. without referencing a particular vaccine);
- is made to all eligible people who have been fully vaccinated (i.e. the offer cannot be made to only those people vaccinated from the date of the offer, it must also apply retrospectively to those who have completed their vaccination prior to the offer being announced);
- does not include tobacco or medicines (other than listed medicines); and
- does not contain an offer of alcohol that: (i) encourages excessive or rapid consumption of alcohol; and (ii) has a strong or evident appeal to minors (must also comply with the Responsible Service of Alcohol requirements).

Any communication related to the promotion or giveaway must also be consistent with current Commonwealth health messaging and there cannot be any reference to the trade name, sponsor name or any other information that would identify a particular vaccine. There also cannot be any statement comparing vaccines nor any statements to the effect that COVID-19 vaccines cannot cause harm or have no side effects.

Who can employers offer a vaccine promotion and giveaway to?

An offer can be made to a certain group, for example the employees of your business, or members of the business, or to all members of the public.

The offer must just meet the TGA Permissions (set out above) including that the offer be made to all eligible people in the group who have been fully vaccinated (i.e. the offer cannot be made to only those people vaccinated from the date of the offer, it must also apply retrospectively to those who have completed their vaccination prior to the offer being announced).

Additional risks employers need to consider before offering promotions and giveaways to encourage vaccination

Because the TGA Permission does not extinguish the responsibilities that employers have under other relevant employment laws employers should consider what steps they should take to mitigate any risks associated with such an offer.

On top of ensuring all communication complies with the TGA requirements, it is also recommended that employers make it abundantly clear to their employees that:

- vaccinations **must** be undertaken on the advice of a health practitioner.
- their obtaining of the vaccination is **completely voluntary**, and they maintain the right to choose whether to receive a vaccination or not (if this is the case);
- the vaccination is **not mandated** by the employer or incidental to the terms of their employment (if this is the case);
- they are to arrange their own vaccination, and have it administered at a site of their **choosing**.
- any employer incentive associated with obtaining the vaccination is merely a benefit of vaccination and **should not in any way be considered a subsidy**.
- ask employees taking advantage of an incentive scheme to sign an acknowledgement document that raises the above issues.

In addition, employers will need to seek advice on any anti-discrimination implications of an offer and compliance with privacy laws if health information (such as evidence of vaccination) will be collected.

Need help navigating the various legal obligations when preparing strategies and communications for COVID-19 vaccination incentives? See ‘Who and where to contact for further assistance?’ at the back of this Guide.

PART THREE: Employment and Work Health & Safety Law Vaccine Workplace Considerations

The pathway out of the current public health emergency will be for employers to take the lead on vaccinations and engage with their workforce on the utility of vaccines and why vaccination is an important measure to prevent the spread of COVID-19.

For some employers this may raise questions of managing and mandating employee vaccination. It is extremely important to consider such matters in the current context where not all employees are currently entitled to the opportunity to receive the vaccine or their preferred vaccine method.

It is also important to realise that the rollout of any COVID-19 vaccine does not alter anything in current Australian employment and work health and safety law. Unfortunately, for many of the issues canvassed in this section there is no easy answer to the issues that will arise, just as there is no one-size-fits-all approach applicable to all workplaces. Employers must be conscious of the specific circumstances of their workplace and their workforce, and give real consideration to whether their legal obligations allow them, or indeed require them, to direct their workers to be vaccinated.

Ultimately however employers will need to ensure that regardless of whether they (or a public health order) decide to make the COVID-19 vaccine mandatory, they follow a structured risk-based approach when determining what steps to take, which may need to be scaled up or down depending on the public health situation at a given time.

If this section raises concerns for you and your workforce you can find the contact details for additional assistance in the 'Where and who to contact for assistance' page at the back of this guide.

The following topics are covered in this section:

A. IMPLEMENTING A COVID-19 VACCINATION WORKPLACE POLICY

B. GENERAL COVID-19 WORKPLACE VACCINATION ISSUES

C. MANDATING COVID-19 VACCINATIONS IN THE WORKPLACE

D. WORKPLACE DISPUTES REGARDING VACCINATIONS

A. IMPLEMENTING A COVID-19 VACCINATION WORKPLACE POLICY

1. WORKPLACE VACCINATION CONSIDERATIONS

In making decision around the workplace and vaccinations employers should consider the following:

- **Auditing your vaccination needs** and whether they differ across your business (e.g. how many customer facing employees as opposed to back room employees). Employers should also consider whether you should extend any vaccine policy to cover other visitors to your workplace such as volunteers, visitors, contractors, students etc.
- **Developing a system for internal communications** about vaccinations (e.g. flagging key government or regulator websites).
- **Reviewing your policies** to assess whether changes are needed to better manage ongoing issues and to pro-actively address issues the business may face in the future (e.g. health and safety policies, leave policies, stand down policies, home working policies).
- **Reviewing employment contracts** for relevant clauses (e.g. inserting clauses that make employment conditional on having required vaccinations for new employees) and, if appropriate, consider whether you should attempt to agree variations with existing employees.
- **Consider the overall risks to health and safety** and whether COVID-19 transmission can be managed through encouraging employees to obtain vaccinations rather than mandating them.
- What **practical and proactive** steps can you take now to get 'ahead' of the issues as much as possible.

2. IMPLEMENTING A VACCINE POLICY

If as an employer you have decided that you wish to implement a workplace policy in relation to COVID-19 vaccinations, whether that be in relation to mandating or other issues, we suggest that you make sure you consider the matters below.

Even if you decide not to mandate the vaccine in your workplace it is still prudent to ensure you have a vaccine policy that clearly articulates how you will deal with relevant issues as they arise in your workplace.

i. Comply with Work Health and Safety Consultation Obligations

If you are considering introducing a vaccination policy in your workplace, you must consult with your employees (workers) and any safety and health representatives (if your workplace has one). You must also ensure that any required vaccination program is lawful and reasonable for the specific circumstances of your workplace. This is further addressed at Section C below.

In conducting consultations you must give your workers an opportunity to express their views and raise any concerns so that they contribute to the decision-making process relating to the introduction of the policy. You must take the employees views into account before finalising any policy.

Consultation must occur using the established consultation procedures at your workplace. Otherwise, consultation may occur broadly, for example, through staff messaging or more directly, through small group discussions, depending on the size and nature of your business.

If workers are represented by a work health and safety representative, the consultation must involve that representative.

ii. Comply with any consultation obligations in any applicable Modern Awards, Enterprise Agreements or employment contracts

Employers should review any applicable modern awards, enterprise agreements or contractual obligations to ensure that they fulfil any obligations under these documents to consult employees. Consultation should be genuine and not perfunctory.

iii. Determine a process for managing refusals

Consider the likelihood of employees refusing vaccination and the process you will take to respond to this, e.g. including discrimination considerations and assessing the potential impact on an employee's ability to carry out the key requirements of their role.

In general we recommend considering a system that acknowledges specific exemptions from vaccination and sets out evidence requirements (e.g. persons claiming medical conditions may need to provide a medical certificate supporting that).

In all communications regarding the vaccination policy, employers should also make sure to clearly outline any potential consequences of workers refusing to comply with the policy.

iv. Determine how you will manage recordkeeping and privacy

You will need to consider your privacy policy as well as the Privacy Act in relation to vaccinations, including how you will handle any collection, use or disclosure. See *Part 4 – Vaccines and privacy law* for further detail on the interaction between privacy law and vaccinations in the workplace.

v. Provide information regarding vaccinations in your policy

Where you are implementing a requirement to be vaccinated as a safety control measure due to the outcomes of your risk assessment, then your vaccination policy should include information and guidance on the COVID-19 vaccine. This should include government information on what the vaccines are and how they work.

B. GENERAL WORKPLACE COVID-19 VACCINATION ISSUES

1. ACCOMMODATING EMPLOYEES GETTING VACCINATED

i. Do employers have to pay employees for time off to get the vaccine?

Unless an employer has mandated that their employees must be vaccinated, an employer is not obliged to provide an employee with paid leave to get the vaccine. However, employers can still discuss work arrangements, leave arrangements or other incentives to support their employees getting vaccinated, see *Part 2 - Assisting employees to get vaccinated* for further details**.**

Employers who can and have required their employees to be vaccinated against COVID-19 should cover the employee's travel costs and give their employees time off work without loss of pay if the appointment is during work hours. This is because it may be that attendance by an employee to obtain the employer directed vaccination constitutes the performance of work and may be payable.

Employers should also comply with any relevant obligations in respect of these issues that are included in any applicable awards, enterprise agreements, employment contracts or workplace policies.

ii. Can employees take sick leave to get the vaccine?

No, employees generally can't use sick/personal leave to get vaccinated against COVID-19. The entitlement to sick leave under the Fair Work Act is only applicable when an employee is not fit for work due to an illness or injury. Being vaccinated is not considered an illness or injury.

However, we recommend employers review any applicable awards, enterprise agreements, employment contracts or workplace policies as they may include details about additional type or days of leave that may be accessed for the purposes of preventative medicine.

In addition, employers can still discuss work arrangements, leave arrangements or other incentives to support their employees getting vaccinated, see *Part 2 - Assisting employees to get vaccinated***.**

2. EMPLOYEES WHO EXPERIENCE ADVERSE VACCINATION SIDE EFFECTS

i. Can a worker take sick leave if they feel unwell after their COVID-19 vaccination?

Full time and part-time employees can use available paid sick leave if they are unfit for work because they are unwell after their COVID-19 vaccination. Similar to personal leave taken for other reasons, employers are entitled to ask employees to provide reasonable evidence that they are unfit for work, such as a medical certificate or statutory declaration if an employer deems it appropriate or necessary.

In addition, employers should also review any applicable awards, enterprise agreements, employment contracts or workplace policies as they may include extra rules about sick leave and reasonable evidence.

Casual employees are not entitled to paid sick leave under the Fair Work Act. This is because they are paid a casual loading (usually 25%) in lieu of entitlements such as sick leave.

ii. What if an employee has run out of paid sick leave?

If any full or part-time employee has run out of paid sick leave, an employer may agree to the employee accessing other paid leave entitlements, like annual leave, or to make other arrangements such as taking unpaid annual leave. See *Part 2 - Assisting employees to get vaccinated* for more information.

Employers should also check any applicable awards, enterprise agreements, employment contracts or workplace policies as they may include extra rules about sick leave and reasonable evidence.

***BE AWARE*:** If there is a link to employment and the employee receiving the vaccine, an employee may be able to make a workers compensation claim for the time off and any associated medical expenses (see employer liability in *Part 2 - Assisting Employees to Get Vaccinated*).

3. MANDATORY TESTING

i. Can employers require staff to undergo mandatory testing for COVID-19 in the workplace?

Most probably, depending on how regularly and why employees are being asked to be tested.

A direction for an employee to undergo mandatory testing for COVID-19 similar to mandatory vaccines would of course need to be assessed as to whether it would be a lawful and reasonable direction.

For cause testing: If an employee displays COVID-19 symptoms in the workplace, it is likely to be lawful and reasonable to direct that employee to have a COVID-19 test in order to determine whether the workplace had been exposed to the virus. COVID-19 testing is sufficiently analogous to routine drug and alcohol testing to be almost certainly permissible under Work Health and Safety laws as a reasonable control measure.

Periodic testing: The ability to require employees to periodically be tested for COVID-19 is more likely to be susceptible to challenge, depending on how often the tests are conducted, whether the tests are performed during 'paid time' and the types of persons employees come into contact with during their work. Where employees are likely to come into contact with vulnerable persons and they are being tested during work time, the basis for issuing a direction to be tested periodically will be increased.

There is precedent that has held that issuing directions to have an employee's health assessed would be lawful and reasonable in circumstances where an employee's health status is relevant to their employment and there is an absence of credible information pertaining to their health. For example, in Thompson v IGT (Australia) Pty Ltd [2008] FCA 994 an employer was held to have issued a lawful and reasonable direction to an employee to have a medical assessment in circumstances where he had been chronically absent for physical ailments.

Employers should also be aware that they have a work health and safety duty to minimise the risk of workers and others in the workplace being exposed to COVID-19, so far as reasonably practicable. If you reasonably suspect someone could have the virus, or has been exposed, this creates a health risk at your workplace, and you will need to isolate the person from others and notify your state or territory health officials and follow their advice around testing requirements.

4. ASKING AN EMPLOYEE ABOUT THEIR VACCINATION STATUS

i. Can employers who have mandated vaccination ask employees about their vaccination status?

If an employer has provided a lawful and reasonable direction for an employee to be vaccinated against COVID-19, the employer can ask the employee about their vaccination status.

Employers should also be aware of their obligations under Privacy Law, which dictates how this information can be collected, used and disclosed. See *Part 4 – Vaccines and Privacy Law* for more information.

ii. Can an employer require proof of vaccination where mandated?

Where an employer legally imposes a requirement for particular employees or employees to be vaccinated, then the employer can require those workers to provide confirmation or evidence that this has occurred. Employers will need to consider, and make clear to those workers, the evidence that is acceptable.

The basis for requiring proof is twofold:

i) If there is a valid basis to issue a lawful and reasonable direction to employees to vaccinate, it follows that an employer would have a reasonable basis to ensure compliance with the direction.

ii) Under work health and safety laws, employees have a duty to take reasonable care to ensure that their acts or omissions do not adversely affect the health and safety of other persons. Employees must also comply, so far as they are reasonably able, with any reasonable instruction that is given by an employer conducting the business or undertaking to allow the employer to comply with their duty to minimise the risk of exposure to COVID-19.

iii. Can employers who have not mandated vaccination ask employees about their vaccination status?

There is no law against asking employees whether they have been vaccinated. However, employers will need to ensure they comply with privacy obligations regarding how they collect this type of information. See *Part 4 – Vaccines and Privacy Law*.

If an employer is wishing to direct an employee to provide information about their vaccination status, an employer must make an assessment whether it is lawful and reasonable to compel an employee to disclose their vaccination status. This may include considerations about whether this information is necessary to implement any COVID control measures. See Mandating Vaccines in the Workplace below in relation to lawful and reasonable directions.

Some employees may also have a duty to disclose their vaccine status where it would be captured under the Work Health and Safety Act duty to take reasonable care of their own health and safety and reasonable care to not adversely affect the health and safety of others. For example if an employee is aware that they are working alongside or coming into contact with vulnerable people in the workplace this duty may be enlivened.

Employers should also be aware of their obligations under Privacy Law, which dictates when and how this information can be collected, used and disclosed. See *Part 4 – Vaccines and Privacy Law* for more information.

5. EVIDENCE OF VACCINATION

i. Can employers who have mandated vaccination ask employees for evidence of vaccination?

If an employer has provided a lawful and reasonable direction for an employee to be vaccinated against COVID-19, the employer can ask the employee to provide evidence of their vaccination.

In terms of privacy law considerations, an employer may generally ask to view evidence of an employee's vaccination status without raising privacy obligations provided they do not collect (i.e. make a record or keep a copy of) this information. If an employer does wish to make a record or keep a copy of this information, employers should familiarise themselves with privacy obligations, see *Part 4 - Vaccines and Privacy Law.*

ii. Can employers who have not mandated vaccination ask employees for evidence of vaccination?

There is no law against *asking* employees whether they have been vaccinated. However, employers will need to ensure they comply with privacy obligations regarding how they collect this type of information. See *Part 4 – Vaccines and Privacy Law*. If an employer in these circumstances does wish to mandate evidence of vaccination, they must consider whether this is lawful and reasonable. This will depend on the circumstances, including the employer's reason for seeking evidence of vaccination.

In relation to the basis for issuing any directive, two considerations arise:

i) the benefit of identifying levels of COVID-19 vaccination in the workplace as an element of your risk assessment process to inform the review of, or need for, other controls to minimise risks of transmission of COVID-19.

ii) employees may also have a duty to disclose their vaccination status where it would be captured under their Work Health and Safety Act duty to take reasonable care of their own health and safety and reasonable care to not adversely affect the health and safety of others. For example, if an employee is aware that they are working alongside or coming into contact with vulnerable people in the workplace this duty to disclose during consultations with an employer may be enlivened.

In terms of privacy law considerations, an employer may ask to view evidence of an employee's vaccination status without raising privacy obligations provided they do not collect (i.e. make a record or keep a copy of) this information. If an employer does wish to make a record or keep a copy of this information, employers should familiarise themselves with privacy obligations, see *Part 4 - Vaccines and Privacy Law*.

C. MANDATING COVID-19 VACCINATIONS IN THE WORKPLACE

1. WHEN CAN AN EMPLOYER LEGALLY REQUIRE EMPLOYEE/S TO BE VACCINATED?

✓ **Written permission:** Where there is a term in an applicable employment contract or enterprise agreement requiring an employee/s to have the COVID-19 vaccination.

If you do not yet have a COVID-19 vaccination clause in your contracts or agreement you may wish to seek to vary them to include such a term where possible.

Even where your contract or an agreement has a term about coronavirus vaccinations, employers should consider and ensure that the term complies with anti-discrimination laws. A term that is contrary to anti-discrimination laws isn't enforceable (to the extent it breaches relevant laws). See section 2.2 below for details on discrimination law.

OR

✓ **Lawful and Reasonable Direction:** Employers can direct their employees to be vaccinated if the direction is '*lawful and reasonable'*. Whether a direction is lawful and reasonable will be depend on the facts and needs to be assessed on a case-by-case basis. See below for how to assess whether such a direction would be reasonable and lawful in your circumstances.

2. LAWFUL AND REASONABLE EMPLOYER DIRECTION

Australian employers have a right to issue directions to employees which must be obeyed or followed, provided the directions are lawful and reasonable.

If as an employer you want to require your employees to get the COVID-19 vaccination to work in your workplace, whether this is legal will depend on whether your direction to employees to get vaccinated is considered "lawful and reasonable".

A vaccination is a physically invasive procedure and hence, an employer mandate for employees to receive the injection must be justifiable, with supporting evidence to show that the vaccination is either necessary or important to ensure the safe performance of an employee's duties.

Employers should be aware that there are of course legal risks associated with giving a direction that is not lawful or reasonable. These include breach of contract, general protections and unlawful discrimination claims by those who refuse a vaccination if they are excluded from the workplace, treated unfavourably or they are otherwise able to assert a link between the refusal and a protected attribute (e.g. a medical condition or religious beliefs). Employers will need to be mindful of these considerations when determining the position they take.

The following section outlines when a direction might be considered reasonable and lawful.

2.1 WHEN WILL AN EMPLOYER DIRECTION TO BE VACCINATED BE CONSIDERED "REASONABLE"

The coronavirus pandemic doesn't automatically make it reasonable for employers to direct employees to be vaccinated against the virus.

Whether an employer direction to get the COVID-19 vaccination is reasonable is a question of fact to be determined in the circumstances of each case weighing up a range of factors that may be relevant when determining whether a direction to an employee to get the COVID-19 vaccination on balance is reasonable or not.

Things employers should take into consideration include:

1. The nature of the employee's role and the work being performed

- The extent to which the employee's job involves contact with vulnerable people who have an 'elevated risk' of serious illness from COVID-19 (e.g. people working in aged care, disability care, health care, people over 60, young children who can't be vaccinated or people with respiratory conditions).

  For further details on this see: Reasonableness Factor: High Risk Sector

- The extent to which the employee interacts with people with an elevated risk of being infected with COVID-19 (e.g. medical professionals, flight crew, border control or hotel quarantine workers).

  For further details on this see: Reasonableness Factor: High Risk Sector

- The extent to which the employee works in a public facing role such as with customers or clients.
- The extent to which the employee can perform the inherent requirements of the job without being vaccinated (e.g. is there a public health order/direction requiring the employee to vaccinated to perform the job).

2. The employees working environment / industry

- The employer's work health and safety obligations. Whether requiring a COVID-19 vaccination would be a 'reasonably practicable' control measure for the workplace, including the degree to which risk of COVID-19 exposure or transmission can be mitigated by other control measures.

  For further detail on this see: Reasonableness Factor: Work Health and Safety Control Measure Vaccine Assessment

- The ability to rely on other control measures other than vaccination. By way of example, to what extent is social distancing, regular COVID-19 testing, effective contact tracing, the provision of PPE and sanitisation available and likely to be effective in reducing the risk of infection of COVID-19? In particular, in some industries, effective social distancing may not be possible. In others, it might be quite effective.

  For further detail on this see: Reasonableness Factor: Work Health and Safety Control Measure Vaccine Assessment

- The disruptive impact of any COVID-19 infection in the workplace on the operations of the employer, e.g. is the employee working in a key industry where infection would shut down an essential service such as logistics.

3. *The public health environment*

- Whether a public health order applies requiring the employee to be vaccinated.

  For further detail on this see: Reasonableness Factor: Public health orders/directions requiring employee to receive the COVID-19 vaccination)

- Whether the employee has access to the vaccine (e.g. is currently entitled to be vaccinated).
- The extent to which the vaccine prevents or reduces the risk of transmission of COVID-19 (please note that empirical evidence regarding the effectiveness on vaccines against the Delta variant of coronavirus is still evolving).
- The level of community transmission of COVID-19 occurring in the location where the employee's job is performed, including the risk of transmission of the Delta variant among employees, customers or other members of the community.

Reminder: Employer directions must be both reasonable and lawful. See section 2.2 below for details on when a direction will be considered "lawful".

2.1.1 REASONABLENESS FACTOR: PUBLIC HEALTH ORDERS/DIRECTIONS REQUIRING EMPLOYEE TO RECEIVE THE COVID-19 VACCINATION

i. State public health orders/directions mandating vaccination in workplaces

State and territory governments have made and may continue to make public health orders requiring workers in certain industries and occupations to be vaccinated against COVID-19 in their state or territory. Employers and workers are required by law to comply with any public health orders that apply to them.

ii. Impact on reasonableness consideration of public health orders/directions

Where an employer directs an employee to get the vaccine as a result of a public health order/direction, the employer direction is extremely likely to be considered reasonable in the circumstances as having a COVID-19 vaccination would become an inherent requirement of the job at law under the directions/order.

The only exception to this may be where an employee has a valid reason not to comply and is granted a ministerial exemption from the orders/directions.

Case example

In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818, the Fair Work Commission found a flu vaccination policy implemented as a result of a NSW Public Health Order was a lawful and reasonable direction. An employee who could not attend work because of a refusal to receive a flu vaccine in compliance with the PHO, could not perform the inherent requirements of their role and was lawfully dismissed.

STATE	WORKERS REQUIRED TO RECEIVE THE COVID-19 VACCINE*	PUBLIC HEALTH ORDERS / DIRECTIONS
NSW	Quarantine workers Transportation provider employees who transport quarantine persons and international flight crew Construction workers who live in declared areas	Public Health (COVID-19 Air Transportation Quarantine) Order (No 2) 2021 Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021
QLD	Health service employees Queensland Ambulance Service employees Hospital and health service contractors Queensland Health employees in residential aged care facilities operated by Queensland Health Quarantine facilities workers	Queensland Government – Designated COVID-19 Hospital Network Direction (No. 3) Queensland Health Residential Aged Care Facilities (COVID-19 Vaccination) Direction Requirements for Quarantine Facility Workers Direction (No. 4)
SA	Quarantine system workers including in airports, medi-hotels, health-care settings and transportation Staff, contractors and volunteers in residential aged care facilities	Emergency Declaration and Directions (SA) Emergency Management (Supervised Quarantine No 10) (COVID-19) Direction 2021 Emergency Management (Residential Aged Care Facilities No 40) (COVID-19) Direction 2021.
WA	Quarantine centre workers Residential aged care facility workers	WA Government – Access to Quarantine Centres Directions WA Government – Residential Aged Care Facility Worker Access Directions

*Current as at 16 August 2021. We'll continue to update our information if new public health orders or directions are issued by states or territories.

2.1.3 REASONABLENESS FACTOR: WORK HEALTH AND SAFETY CONTROL MEASURE VACCINE ASSESSMENT

i. When will an employer need to include mandatory vaccination as a control measure to comply with their work health and safety duties?

Whether an employer needs to include mandatory vaccination as a control measure to comply with their work health and safety duties is highly fact dependent and takes into account the workplace and each employee's particular circumstances. Furthermore, it will depend on the particular circumstances at the time the WHS risk assessment is undertaken.

Employers need to:

1. *Determine the current risk by undertaking a risk assessment*, and
2. *Determine if COVID-19 vaccines are a 'reasonably practicable' control measure for the workplace*.

1. Undertaking a risk assessment

When undertaking your risk assessment and developing your COVID-19 safety plan, some factors you should consider include:

- Current public health orders or directions.
- Is the Australian Health Protection Principal Committee recommending COVID-19 vaccinations for all workers in your industry?
- Will your workers be exposed to the risk of infection as part of their work? For example, healthcare workers will be at higher risk of exposure when their work duties place them in contact with people who may be infected with COVID-19.
- Do your workers work with people who would be vulnerable to severe disease if they contract COVID-19?
- What is the likelihood that COVID-19 could spread in the workplace? For example, do work tasks require your workers to work in close proximity to each other and are there other ways to carry out these tasks?
- Do your workers interact with large numbers of other people in the course of their work that could contribute to a 'super-spreading' event if your workers contract COVID-19?
- What other control measures are available and in place in your workplace? Do those control measures already minimise the risk of infection, so far as is reasonably practicable?
- Would a requirement to be vaccinated be unlawful in the circumstances? For example, would it discriminate against a class of employees or an individual?

You should review your risk assessment on an ongoing basis as circumstances can change quickly.

2. Determining if COVID-19 vaccines are a 'reasonably practicable' control measure for a workplace.

There are two elements to what is 'reasonably practicable'. You must first consider what can be done—that is, what is possible in the circumstances for ensuring health and safety. Then you must consider whether it is reasonable in the circumstances to do all that is possible.

How to determine what is reasonable?

Just because something can be done does not mean that it is reasonably practicable for the duty holder to do it. What is required is an assessment of what a reasonable person in the position of the duty holder would do in the circumstances, taking a careful and prudent approach.

To determine what is reasonably practicable an employer (PCBU) must take into account all relevant matters, including:

- the likelihood of (exposure to COVID-19) occurring; and
- the degree of harm that might result from (exposure to COVID- 19); and
- what the person concerned knows, or ought reasonably to know, about (exposure to COVID-19), and about the ways of eliminating or minimising the risk; and
- the availability and suitability of ways to eliminate or minimise the risk; and the cost associated with available ways of eliminating or minimising the risk.

Other matters which might also be relevant are:

- the duty holder's ability to rely on the skill and expertise of others and what is required for that reliance.
- the extent to which each possible control measure or combination of control measures lowers the likelihood or degree of harm.
- the capacity to influence and control the particular activity.

When considering each control or combination of controls, a duty holder must take into account the likelihood of a particular control being effective.

Some examples of reasons that may make it unlikely that a requirement will be reasonably practicable in a workplace at this point in time may include:

- because at present, public health experts, such as the Australian Health Protection Principal Committee may not have recommended a vaccine be made mandatory in your industry;
- there may not yet be a vaccine available for all your workers; or
- there is insufficient evidence about the impact of COVID-19 vaccines on the transmission of COVID-19 and variants.

However ultimately whether you should require your workers to be vaccinated will depend on the particular circumstances at the time you are undertaking your risk assessment.

2.1.2 REASONABLENESS FACTOR: HIGH RISK SECTORS

Impact on reasonableness consideration of public health orders/directions

High risk sectors are those in which an employee is either:

- in contact with vulnerable people who have an elevated risk of serious illness from COVID-19 (e.g. people working in aged care, disability care, health care, people over 60 or people with respiratory conditions); OR
- interacting with people with an elevated risk of being infected with COVID-19 (e.g. medical professionals, flight crew, border control or hotel quarantine workers).

In general, employers in these sectors are likely to be able to reasonably justify mandating the COVID-19 vaccine where employees don't choose to vaccinate voluntarily (and subject to the employee having no specific circumstance that makes vaccination more dangerous for them or not possible – e.g. some immune-compromised employees may not be able to be safely vaccinated).

This is arguably a necessary WHS and infection control measure which allows employees to be able perform their duties safely while protecting their clients and patients.

Case examples

In *Bou-Jamie Barber v Goodstart Early Learning* [2021] FWC 2156 the Fair Work Commission accepted that it was not practical in the childcare environment to consider alternative methods of managing disease prevention beyond the flu vaccine such as social distancing and strictly-enforced hygiene controls.

In *Maria Corazon Glover v Ozcare* the Fair Work Commission found it was a reasonable and lawful workplace direction that all workers that provided in-home aged care for a provider be vaccinated against the flu because they had the potential to become "super spreaders".

2.2 WHEN WILL AN EMPLOYER DIRECTION TO BE VACCINATED BE CONSIDERED "LAWFUL"

i. An employer direction to get the COVID-19 vaccination will be lawful if:

- it does not breach any terms of the employment contract, any applicable award or enterprise agreement; and
- it does not breach any applicable Commonwealth, state or territory law (for example, anti-discrimination laws – see below), that apply to the employees.

ii. How might a direction to require vaccination constitute discrimination prohibited by Australia's anti-discrimination regime?

Under Australia's anti-discrimination law, it is unlawful to treat a person less favourably on the basis of protected attributes, including gender, race, religion, disability or age.

Mandating vaccination will not result in "direct discrimination" as an employee's decision to refuse vaccination is not an attribute protected by any Australian discrimination laws.

However, "indirect discrimination" is also prohibited by discrimination laws.

Important: Each Australian jurisdiction has its own discrimination law/s and they are not uniform. There are differences between the Commonwealth, State and Territory laws which affect what will be considered unlawful discrimination and what exceptions may exist.

Indirect discrimination

Some employees may be unable or unwilling to take a vaccine because of the higher risks associated with the vaccine being dispensed to them or because of their religious or political beliefs.

Imposing a general requirement or condition on employees to take a vaccine could potentially result in an employer engaging in 'indirect discrimination' in breach of discrimination law. This means unlawful discrimination can arise from the general imposition of a requirement, even if the employer did not intend to specifically discriminate against specific demographics of employees.

Whether unlawful indirect discrimination arises will particularly depend on:

- whether groups of people with an employee's particular attributes are in fact less able to comply with the requirement imposed by the employer than the broader population;

  AND

- whether the requirement imposed is reasonable in the circumstances.

Whether a court considers it 'reasonable' for an employer to mandate COVID-19 vaccinations is likely to be highly fact dependent, considering the workplace and the employee's individual circumstances.

One way to ensure that a mandatory vaccine policy does not indirectly discriminate against any employees is to develop a policy where possible that has appropriate carve outs in respect of at least:

- persons for whom the vaccine has not been approved for use (age discrimination); AND
- those with medical or other contraindications (disability discrimination).

Health or Medical exemptions

Where an employee seeks to refuse to be vaccinated on medical grounds, the employee should provide appropriate medical evidence. A medical practitioner must have treated the worker at some point for the allergy or condition in question or reviewed medical records that indicate the presence of the allergy or condition. A doctor's letter merely stating that the worker reports to have a certain condition is unlikely to be adequate to qualify for a medical exemption to a mandatory vaccination policy.

Where a worker does establish that they have a medical exemption, employers should consider whether

i) having an unvaccinated worker can be accommodated, given that the majority of employees will be vaccinated;

ii) other measures can be adopted in conjunction with the employee being unvaccinated (for instance, a periodic testing regime); and

iii) it is possible to seek alternative duties for that person.

The duty to provide reasonable adjustments

Disability discrimination laws have an explicit duty for employers to make 'reasonable adjustments' for people with disability, including at work.

Depending on the circumstances of the case, a 'reasonable adjustment' may include exempting workers with disabilities, who have a medical reason for not being vaccinated, from a general rule requiring COVID-19 vaccination or using alternative control measures (e.g. periodic testing).

Employers are not required to make adjustments for people with disability if the adjustments would impose an unjustifiable hardship on them. Unjustifiable hardship is a high test, and it recognises that some hardship on businesses and employers may be needed and justifiable to reduce discrimination against people with disability.

Inherent requirement of the role exception

In responding to a complaint of discrimination, an employer may seek to rely upon the defence of the COVID-19 vaccine being an 'inherent requirement' of the role. As would be the case in circumstances where the requirement to be vaccinated was as a result of a public health order/direction. In those circumstances, it may be lawful for an employer to refuse to provide an employee with work or terminate the employment.

However, absent the imposition of public health orders/directions, employers should be very cautious in assuming that vaccination is an inherent requirement of an employee's role. In most cases, employees would have ably performed work in the past without vaccination and the onset of the pandemic is unlikely to change the contractual requirements associated with a position after a contract has been formed.

Additionally, even if the inherent requirements of the role include being vaccinated (for instance, in newly issued contracts), an employer must also exhaust reasonable accommodations before terminating an employee. For instance, can effective social distancing, wearing a mask at work, keeping a temperature log and submitting to periodic COVID-19 testing provide other means for the employee to safely work without vaccination.

Reminder: Employer directions must be both reasonable and lawful. See section 2.1 above for details on when a direction will be considered "reasonable".

3. CONTRACTORS IN THE WORKPLACE AND THE VACCINE

Can employers mandate that contractors in their workplace get the vaccine?

The ability of employers to direct a contractor to receive the COVID-19 vaccination will largely depend upon the terms of the agreement between the employer and the contractor. For all new contractors we suggest making this an express term of the contractor agreement where necessary.

In order to implement a vaccination requirement for contractors and consultants, it would be necessary to consider the existing contractual arrangements with these parties, and whether they would support enforcing a vaccination policy, or whether contractual variations would be required.

It is also important to be aware that some anti-discrimination laws may apply for types of contract workers (particularly employees of an independent contractor). As a result, employers should consider imposing a vaccine requirement only where it is reasonable to do so having regard to the nature of the services provided by the contractor and that matters discussed previously in relation to employees.

4. PROSPECTIVE EMPLOYEES AND THE VACCINE

Can I make it a job requirement that all new employees I hire be vaccinated?

Employers can contractually require that a prospective employee be vaccinated.

However, despite being a legitimate term of employment in a contract, such a requirement can still enliven discrimination claims if the prospective employee refuses and is subsequently not offered employment.

The same “indirect discrimination” principles discussed at section 2.2 above will apply to refusing employment to prospective employees.

Importantly though, if an employer can establish that being vaccinated is an inherent requirement of the job and any adjustments allowing the prospective employee to meet the inherent requirements of the job would impose an unjustifiable hardship on the employer then you may still have grounds to disregard the applicant on the basis of their refusal to vaccinate, as this would likely provide a defence to any subsequent claim of unlawful discrimination.

D. WORKPLACE DISPUTES REGARDING VACCINATION

Employers should approach with caution disputes regarding the COVID-19 vaccine and should try to avoid 'jumping the gun' particularly on the issues covered below, as being too quick to take such action could (likely) mean a very costly personal grievance win for an employee in the Fair Work Commission.

1. EMPLOYEES WHO REFUSE TO WORK WITH UNVACCINATED CO-WORKERS

i. Can an employee refuse to work with or refuse to attend work because of an unvaccinated co-worker?

Under the Work Health and Safety Act 2011, "A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard."

In an ordinary work setting, it is unlikely that this threshold would be met by the mere presence of an unvaccinated co-worker. This means where an employer is complying with government health and safety regulations and gives a direction to an employee to attend the workplace it will likely be a reasonable and lawful one that an employee has a duty to follow.

However, like most of these questions, it is likely to depend on the circumstances, and it may well be the case that:

- in certain workplaces (e.g. those with greater risk exposure to COVID or others who may have COVID),
- with employees with certain characteristics, (e.g. those with greater risk exposure to COVID),

exposure to unvaccinated co-workers may justify a worker refusing to carry out tasks under the Work Health and Safety Act. In this case however, employers may direct the worker to carry out suitable alternative work at the same or another workplace until it is safe to return to normal duties.

If an employee has concerns about the safety of the workplace, they should raise their concerns with their employer as soon as possible. Employers should also consider sharing information about any steps they've taken to ensure a safe workplace, to help manage employee concerns.

2. MANAGING EMPLOYEES WHO REFUSE TO BE VACCINATED

i. Does the employee have a valid reason for refusing?

How you respond to an employee who refuses to comply with a direction to get the COVID-19 vaccination will depend on all of the circumstances, including the reason (if any) for the refusal. Employers should have clear policies and procedures for managing employees who refuse or seek to be exempt from mandatory vaccination policies.

In general, we recommend any requirement or mandatory vaccination policy for workers be subject to sensible and confined carve-outs for individuals who decline the vaccine on the basis of medical advice/health reasons or other legitimate reasons (e.g. persons for whom the vaccine has not been approved for use or who have a bona fide religious objection to vaccination), in order to mitigate the risk of discrimination claims.

There will however be workplaces where such accommodations may undermine the employer's overall vaccination policy and will therefore not be possible. For an example in an aged care home, where the risk is simply too great to allow unvaccinated workers in, and such exemptions may put vulnerable lives at risk. In such circumstances anti-discrimination laws may allow for disciplinary consequences for employees refusing vaccination where it would impose an unjustifiable hardship on the employer to require it to accommodate the employee's belief or condition, the employer will likely be protected from liability.

ii. Steps to take and considerations where an employee refuses to be vaccinated

As a first step, if an employee refuses to be vaccinated (contrary to an agreement or contract that requires vaccination, or after receiving a lawful and reasonable direction), you should ask the employee to explain their reasons for refusing the vaccination.

Some grounds for refusing the vaccination may include:

1. Persons with a medical contraindication to vaccination (e.g. people with a history of severe allergic reactions, and immunocompromised individuals);
2. Persons for whom the vaccine has not been approved for use (e.g. people who are less than 16);
3. Persons with a religious, political or conscientious objection;
4. Refusal for no given reason – "I simply don't want to".

Whether a refusal is based on legitimate grounds and reasonable accommodation should be made will to some extent be fact specific and will depend upon the individual employee's circumstances and whether the direction is reasonable taking into account all the circumstances, including having regard to the risks in the workplace.

Reasonable accommodation may be such things as the employee doing alternative duties, wearing a mask at work, keeping a temperature log and submitting to regular COVID-19 testing.

iii. Can an employer require employees who have not been vaccinated, to work from home?

A direction to work from home may be a lawful and reasonable direction in certain circumstances, such as where an employee does not wish to receive the vaccination. However a reasonableness assessment will need to be untaken considering the facts and circumstances of the specific workplace, the employee/s involved and the employer's work health and safety obligations to minimise the risk of exposure to employees, to make a definitive determination.

Employers should however exercise particular caution with this approach where an employee has reasonable grounds for refusing the vaccination e.g. medical or religious reasons. In such instances where an employee has reasonable grounds for refusing vaccination, they may allege that a direction to work from home amounts to a detriment which constitutes a form of unlawful discrimination. Similarly, if they are dismissed for not complying with the direction to work from home they may have grounds to allege unfair dismissal.

3. TAKING DISCIPLINARY ACTION IN THE CASE OF AN EMPLOYEE REFUSAL

Where an employee disobeys a requirement properly given under an express or implied term of a contract, or a lawful and reasonable direction without providing a legitimate reason then he/she may legitimately be the subject of disciplinary action including dismissal. However, disciplinary action (particularly termination of employment) will only be defensible to the extent that the original direction to be vaccinated was reasonable and lawful.

However, enforcing compliance with any vaccination requirement should be carefully managed, to minimise the prospect of claims.

Any vaccination policy should set out a series of graduated steps before an employee is disciplined for refusal to be vaccinated. The starting point would be discussions with the employee aimed at determining the reasons for refusal and obtaining suitable substantiation (details about religious membership and beliefs, health issues or concerns etc.). There would follow steps of consultation to see whether a mutually satisfactory solution can be reached. Disciplinary action in the form of changed work duties, barring from the offer or termination would be resorted to only after those efforts had proved unfruitful.

MANDATING EMPLOYEE VACCINATIONS IN THE WORKPLACE CONSDIERATIONS CHECKLIST

☐ As an employer can you legally require your employee/s to be vaccinated?

- ✓ **Written permission:** Is there a term in an applicable employment contract or enterprise agreement requiring an employee/s to have the COVID-19 vaccination?

  OR

- ✓ **Lawful and Reasonable Direction:** Consider whether or not it will be '*lawful and reasonable'* for you as an employer to give an employee a direction to be vaccinated in the circumstances.

  a. Consider whether a direction will be '*reasonable'* in the circumstances

     i. **Is the employee's job subject to a public health order/direction requiring COVID-19 vaccination?**

        - **Yes** – direction to employee extremely likely to be considered reasonable in the circumstances (subject to no ministerial exemption applying to the employee e.g. a medical exemption).
        - **No** - move to ii.

     ii. **Is the employee working in a high-risk sector?** (where they are required to have close contact with people with an increased risk of being infected or who are particularly vulnerable to the health impacts of COVID-19).

        - **Yes –** consider all reasonableness factors giving particular weight to the nature of the employee's role and the work being performed. Consider availability of other protection measures. In most cases a direction to employee likely to be considered reasonable in the circumstances, provided no other measure is available to effectively minimise transmission risk
        - **No –** move to iii.

     iii. **Is the employee's role public-facing / does it typically involve interaction with the public** (such as with customers or clients)?

        - **Yes** - consider all reasonableness factors giving weight to the public health environment, and work environment including the safety assessment. Consider availability of other protection measures.
        - **No** - move to iv.

     iv. **The rest of the working population** - Consider all reasonableness factors. Direction may not be reasonable where there is limited risk of transmission of COVID-19 and where other effective controls are available (distancing, masks, periodic testing).

b. Consider whether a direction will be '*lawful*'

i. Does a direction requiring an employee to get a COVID-19 vaccination breach any applicable Commonwealth, state or territory law (for example, would the direction breach any discrimination laws), that apply to the employee?;

- **If Yes** – Not a lawful direction.
- **If No** – Lawful direction.

ii. Does a direction requiring an employee to get a COVID-19 vaccination breach any terms of the employment contract, any applicable award or enterprise agreement?

- **If Yes** – Not a lawful direction.
- **If No** – Lawful direction.

☐ **Have you met the consultation obligations under Work Health and Safety Law?**

If you are considering introducing mandatory vaccinations in your workplace, under work health and safety law employers must consult with employees (workers) and any safety and health representatives (if the workplace has one).

☐ **Have you met any applicable consultation obligations under any applicable Modern Awards, Enterprise Agreements or employment contracts?**

Employers should review any applicable modern awards, enterprise agreements or contractual obligations to ensure that any employee consultation obligations under these documents are fulfilled. Consultation should be genuine and not perfunctory.

☐ **Have you considered the possible workers compensation liabilities that may arise where you 'mandate' employee vaccination in the workplace?**

Under various state workers compensation schemes, compensation is payable in circumstances where a worker suffers an 'injury' arising out of or in the course of any employment. Where an employer has mandated vaccination as a condition of employment and an employee has an adverse reaction to the vaccine (sustains an 'injury') this is likely to be considered to have satisfied this test.

☐ **Have you considered the potential long-term impacts/costs of mandating the vaccine**

There is a risk that mandating the vaccine may lead to long term ongoing costs where the vaccine is required on an ongoing yearly basis or booster shots are required and the vaccine is no longer fully subsidized by government. Any access to time off to get vaccinated for employees subject to the mandate or direction will also likely create an ongoing cost/obligation on employers.

PART FOUR: Vaccines and Privacy Law

APPLICATION OF THE PRIVACY PRINCIPLES

Vaccines and employee privacy is governed by the Privacy Act. This covers private sector organisations (as well as Australian government agencies). Some small business operators (organisations with an annual turnover of $3 million or less) are exempt under the Privacy Act. However, it would be prudent for those employers to also take note of the below information in determining their approach to collection of employee vaccination status information.

PRIVACY LAW KEY TAKEAWAY

In general, employers will able to ask their staff if they have been vaccinated against COVID-19. If the employee chooses to disclose their vaccination status, the collection, use and disclosure information must be handled in accordance with Australian privacy law (see below).

SIGHTING, COLLECTING, USING AND DISCLOSURE OF INFORMATION ABOUT AN EMPLOYEES VACCINATION STATUS UNDER THE PRIVACY ACT

1. SIGHTING VACCINATION STATUS WITHOUT 'COLLECTING'

The Privacy Act applies to the collection of information for the purpose of inclusion *in a record*.

That is, obtaining information without in any way recording it (i.e. sighting information) is not governed by the Privacy Act.

With this in mind, employers can ask or require employees to demonstrate their vaccination status without triggering any Privacy Act obligations, provided that the fact that the employee is vaccinated is then not recorded in any form.

By way of example, managers could require employees to demonstrate vaccination (through vaccination passport images) on commencement and then proceed to employ without raising any Privacy Act concerns.

2. DETERMING WHETHER AS AN EMPLOYER YOU CAN LAWFULLY COLLECT VACCINATION STATUS INFORMATION UNDER THE PRIVACY ACT

In most employment circumstances, employers asking their employees whether they are vaccinated or not is permissible.

However, as an employee's vaccination status is considered sensitive health information under the Privacy Act, higher privacy protections will apply to the actual collection of this information from employees who choose to disclose their vaccination status to their employer.

The Privacy Act provides that employers are able to collect health information (including information about whether or not they are vaccinated) if:

- The information is reasonably necessary, or directly related to, one or more of its functions or activities (which may include preventing or managing COVID-19); AND
- The employee consents.

It would appear that information about vaccination status would be generally considered to be reasonably necessary, or directly related to, an employer preventing or managing COVID-19 in the workplace, so would satisfy the above test. The health and safety risks in your work sector, applicable workplace laws and contractual obligations, as well as any public health advice will assist employers in determining whether collection of vaccination status information would be considered reasonably necessary for their specific activities or functions.

If an exception applies, there may be circumstances where an employer may collect health information without consent (see next page).

i. When might collection not be appropriate?

An employer must have clear and justifiable reasons for collecting employees' vaccination status information. Therefore, if an employer has no specified use for the information, is recording it on a 'just in case' basis, or if they can achieve the purpose without collecting this information, an employer would be unlikely to be able to justify that reasonable collection is necessary.

For example, if an employer decides to collect vaccination status information for monitoring purposes only, it will be difficult to demonstrate the necessity of collecting this information. It would also appear difficult to demonstrate the necessity of collection this information in relation to workers who work entirely at home with no interaction with clients or other employees.

ii. Employee consent

Employee consent to collecting information about their vaccination status must be freely given to constitute valid consent. Employers must ensure they satisfy the following 4 key elements of consent:

1. The employee is adequately informed before giving consent, and understands why you need to collect this information and what you will use it for
2. The employee gives consent voluntarily (employers should not use pressure or coercion or any form of intimidation or deception)
3. The consent is current and specific, and
4. The employee has the capacity to understand and communicate their consent.

iii. Exceptions to gaining employee consent

There are some limited circumstances where employers may collect vaccination status information without consent. This includes where collection is required or authorised by Australian law.

This could also include state and territory public health orders, which are continually being updated in response to the COVID-19 pandemic. **Current state and territory public health orders requiring employees to be vaccinated have been summarised on the Fair Work Ombudsman's website, available here.** Employers should monitor these and review the requirements of any relevant orders or directions to determine their obligations to collect vaccination status information from employees.

In situations where employee consent is not required under Privacy law, employers should still ensure they approach the matter in an appropriate manner the collection of vaccination status information may be a sensitive issue.

3. 'COLLECTION' OF VACCINATION STATUS INFORMATION

i. Notification of the collection of vaccination status information

If an employer decides that they can collect vaccination status information, they must take reasonable steps to notify the employee of a number of matters as set out in the relevant privacy principles, including the purposes of collection and the ways in which the information may be used or disclosed.

These full range of matters includes the following:

- The employer's identity and contact details
- The fact and circumstances of collection
- Whether the collection is required or authorised by law
- The purposes of the collection
- The consequences if vaccination status information is not collected
- The employer's usual disclosures of vaccination status information
- Information about the employer's APP Privacy Policy
- Whether the employer is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located.

Note that for each of the above matters, the employer must consider whether notifying the employee is reasonable in the circumstances. This means that it may be reasonable for an employer to notify some but not all of these matters. For example, it may be reasonable not to notify an employee of the employer's identity where this is obvious from the circumstances.

For further details on notification requirements, see the Office of the Australian Information Commissioner's webpage on Notification of the collection of personal information.

ii. When should these steps be taken?

An employer must take these reasonable steps before, or at the time it collects personal information. If this is not practicable, reasonable steps must be taken as soon as practicable after collection.

iii. How can notification be provided?

While it is acceptable for an employee to be notified or made aware of the above matters through a variety of formats (including verbally), ACCI recommends that this information be provided in writing to employees.

4. HANDLING, USE AND DISCLOSURE OF VACCINATION STATUS INFORMATION

Under the Privacy Act, different requirements apply based on whether the information is collected in relation to current employees, prospective employees, or other workers such as contractors and volunteers. However, given vaccination status information is a sensitive matter, ACCI recommends all employers follow privacy best practice.

i. Current employees

An employee records exemption applies to private sector employees in many instances after information has been obtained about employees. This means that the privacy principles under the Privacy Act will not apply to the handling of information, once it has been collected and is held in an employee record, where it is directly related to the employee relationship. This would appear to apply to vaccination status information. As mentioned above however, ACCI recommends all employers follow best practice privacy best practice in relation to this sensitive information, set out below.

ii. Prospective employees / contractors / volunteers

The employee records exemption does not apply to prospective employees, contractors, sub-contractors and volunteers. This means that employers must comply with the Australian Privacy Principles when dealing with the personal information of these individuals.

Where an employee records exemption does not apply, employers **must**:

- Accurately record the individual's vaccination status information and ensure that it is complete and kept up-to-date
- Provide employees with an opportunity to access their information and request correction if the information is inaccurate

PRIVACY BEST PRACTICE – PRACTICAL TIPS FOR EMPLOYERS

As a matter of best privacy practice, employers should ensure that they:

1. Accurately record the information collected, keep it up-to-date and store it securely.

2. Limit the use and disclosure of employee vaccination status information to what is necessary to prevent and manage COVID-19. Employers should not disclose vaccination status among colleagues unless there is a legitimate and compelling reason to do so.

3. Regularly review whether this information needs to be retained as the vaccination roll-out progresses and more people receive the vaccine. This should include, for example, monitoring the latest government health advice about the vaccine roll-out and COVID-19 restrictions.

PART FIVE: Work Health and Safety

Work Health and Safety Laws: The information below relates to employers' obligations under the *model WHS laws* and how these relate to COVID-19 and COVID-19 vaccines. The model WHS laws have been implemented in all jurisdictions except Victoria and Western Australia.

We use the term 'employers' for ease of understanding however, under the model WHS laws, duties apply to any person conducting a business or undertaking (PCBU) which includes employers, but also others who engage workers.

WORK HEALTH AND SAFETY KEY TAKEAWAYS

- Employers have a duty under WHS laws to eliminate, or if that's not reasonably practicable, to **minimise the risk of exposure to COVID-19 in their workplace**.
- To minimise the risk of exposure to COVID-19 in the workplace, and meet their duties under WHS laws employers must apply all 'reasonably practicable' COVID-19 control measures. 'Control measures' are steps that an employer may take to minimise work health and safety risks in the workplace (e.g. physical distancing, regular cleaning, wearing masks etc.). The COVID-19 vaccine is considered one possible 'control measure' for minimising the risk of COVID-19 in the workplace.
- Employers must consult, cooperate and coordinate with workers and Health and Safety Representatives in the workplace about COVID-19 and relevant control measures, including the vaccine.

1. TAKING PREVENTATIVE MEASURES TO ENSURE THE HEALTH AND SAFETY OF EVERYONE IN THE WORKPLACE

The COVID-19 vaccine is considered one possible 'control measure' for minimising the risk of COVID-19. No single measure however, including a vaccine, is currently considered sufficient on its own to prevent the spread of COVID-19 and some control measures may not be 'reasonably practicable' at the time of your assessment.

To meet your workplace health and safety duties, keep doing all the other things you have already put in place, including physical distancing where possible, good hygiene and regular cleaning and maintenance, and making sure your workers know not to attend work if they are unwell. You must also comply with any public health orders or directions that apply to you and your workplace.

The controls an employer uses will vary depending on the situation, as well as the availability and suitability of controls for each workplace.

i. What control measures should I have in place to reduce the spread of COVID-19?

- Physical distancing - maintaining a physical distance of at least 1.5 metres from others where possible
- Physically isolating, for example by allowing employees to work from home where it is reasonably practicable
- Regular cleaning and maintenance
- Everyone practising good hygiene by regularly washing their hands or using hand sanitiser
- Wearing a face mask when required, unless a lawful exception applies
- Ensuring employees who feel unwell do not go to work – they should get tested at a nearby testing location and return home immediately
- Ensuring employees notify you if they are travelling to any COVID-19 hot spots

You must also continue to comply with any public health orders and all quarantine requirements that apply to you and your workplace.

2. WILL I BE HELD LIABLE UNDER WORKPLACE HEALTH AND SAFETY LAWS IF I DO NOT MAKE MY WORKERS GET VACCINATED AND ONE OF THEM GETS COVID-19?

There is currently insufficient evidence about the impact of COVID-19 vaccines on transmission of the virus which means that it may be possible for a worker to get COVID-19 even if they are vaccinated. The circumstances in which an employer may require their employees to be vaccinated are limited. Whether an employer can require employees to be vaccinated against COVID-19 depends on the individual circumstances of the workplace and each employee. It is therefore unlikely that you would breach workplace health and safety laws simply because you do not require your workers to be vaccinated.

However, if a public health order or direction for vaccination is in place for your workplace, penalties will be in place under that law.

National Cabinet discussed how state and territory safety regulators could amend their 'statements of regulatory intent' to ensure that businesses who made vaccinations voluntary would not be breaching workplace health and safety laws. Employers should monitor any relevant changes that apply in their jurisdiction.

Who and where to contact for further assistance?

Key Contacts

Have a question or situation that isn't covered by this guide? CCIQ is here to help and answer any questions you might have.

CCIQ HR Advice Line

Telephone: 1300 135 822

Email: advice@cciq.com.au (With 'Questions from the vaccine advice guide' in the subject line)

Key resources

The following are links to government websites and information on the vaccine rollout.

National Coronavirus Helpline: 1800 020 080

COVID-19 Eligibility Checker

Department of Health – Coronavirus

Fair Work Ombudsman – Coronavirus and Australian workplace law

Safe Work Australia – COVID-19 Information for workplaces

Therapeutic Goods Administration – COVID-19 vaccines

Office of the Australian Information Commissioner
- COVID-19: Vaccinations and my privacy rights
- COVID-19 Vaccinations: Understanding your privacy obligations to your staff

This guide was written and edited by Tamsin Lawrence, Ingrid Fraser and Jennifer Low.

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