

Photo: Teagan Methhorst, Riverstage, Brisbane 2021

LPA Roundtable: COVID-19 Vaccinations in the Workplace

26 August 2021



1

Agenda

- 1 Guidance: Employment and WHS law – vaccine considerations (overview)
- 2 Mandatory COVID-19 vaccinations for the live performance, exhibition and cinema industries?
- 3 What can we do now? *Consultation and cooperation is key*
- 4 The need to engage with the national vaccine rollout
- 5 Questions



2

1. Guidance: Employment and WHS law – vaccine considerations

There are three circumstances in which an employer may require an employee to be vaccinated against COVID-19 and to provide proof of vaccination:

- 1 Required by law or a Public Health Order
- 2 Permitted by employment contract, enterprise agreement or award
- 3 It is “lawful and reasonable” to give a direction to be vaccinated



3

Public Health Orders

- ➔ State and territory governments do have the power to make laws or issue Public Health Orders which require workers to be vaccinated against COVID-19.
- ➔ So far, the only industries where vaccines have been mandated are ‘high-risk’ industries, such as:
 - Aged care (all states)
 - Transport workers (NSW)
 - Airport workers (NSW)
 - Quarantine workers (NSW, QLD, SA, WA)
 - Health service employees (QLD)
 - Limited construction workers (NSW in declared LGAs)



4

Permitted by a contract, agreement enterprise agreement or award

- Where there is a term in an applicable employment contract or enterprise agreement requiring an employee/s to have the COVID-19 vaccination.
- Even where a contract or an agreement has a term about COVID-19 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).



5

When is a direction lawful and reasonable?

To undertake the assessment, the Fair Work Ombudsman has suggested dividing work into 4 broad categories:

- 1 To interact with people with an increased risk of being infected with COVID-19 (e.g. hotel quarantine, border control) → *reasonably likely*
- 2 Where employees are required to have close contact with people who are particularly vulnerable to the health impacts of COVID-19 (e.g. aged care) → *reasonably likely*
- 3 Where there is likely interaction between employees and other people, such as customers, other employees or the public in the normal course of employment (e.g. retail workers providing essential services) → *depends on the circumstances*
- 4 Where employees have minimal face-to-face interaction as part of their normal duties (e.g. working from home) → *reasonably unlikely*



6

When is a direction reasonable?

There is no easy answer! This will depend on the facts and needs to be assessed on a case-by-case basis.

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

- Interaction with vulnerable people
- Risk of being infected with COVID-19
- Extent of interaction with the public
- Can the employee perform the inherent requirements of their role without being vaccinated?

2. The employee's working environment / industry

- Employer WHS obligations
- Control measures other than vaccination: social distancing, regular COVID-19 testing, PPE
- Disruptive impact of COVID-19 infection on the operation of the business (e.g. key industry where essential services would be shut down)

3. The public health environment

- A public health order is in place
- Access to vaccines
- Effectiveness of vaccine against current strain of COVID-19
- Community transmission in area where work is performed



7

When is a direction lawful?

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It does not breach any terms of the employment contract, award or enterprise agreement

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It does not breach any Commonwealth state or territory laws – such as discrimination laws

3

It is a reasonably practicable measure to manage WHS risks



8

Work Health Safety Considerations

Under WHS laws, employers have an obligation to ensure as far as reasonably practicable the health and safety of their employee or other workers, such as contractors, by eliminating or reducing risks as far as is reasonably practicable.

This requires employers to:

- Determine if the risk is current by undertaking a risk assessment
- Determine if COVID-19 vaccines are a 'reasonably practicable' control measure
- Develop a workplace safety plan by consulting with employees



9

Hazard Identification and Risk Management

The Risk Management Process: 4- Step Process



10

Duty to Consult

- ➔ The WHS legislation makes consultation with workers a legal requirement
- ➔ Consultation is a -way process of informed communication prior to a decision being made



11

Avoids Discrimination

- Imposing a requirement may discriminate against some employees because they are unable or unwilling to have the COVID-19 vaccine due to medical risks, it is not available to their age group or conflicts with personal beliefs, including religious reasons.
- To ensure that a contract of employment or mandatory vaccine policy does not indirectly discriminate against any employees, a policy may need to provide exemptions 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).

12

Risks if a direction is found not to be lawful and reasonable?

An employer mandate for employees to receive a COVID-19 vaccine 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. Otherwise, risks include:

- 1 Breach of contract
- 2 General protections claims – prospective employee and current employees
- 3 Unlawful discrimination claims – prospective employee and current employees
- 4 Unfair dismissal claims



13

Workers Compensation liabilities

Consequences of an adverse COVID-19 vaccination reaction linked to employment

If an employer mandates COVID-19 vaccination, and an employee suffers an adverse reaction, and that reaction can be defined as an 'injury' under workers compensation legislation and there is a link to employment, then it is possible that the employee could make a workers compensation claim.

- 1 If an employer promotes voluntary vaccination and shares government information → **Not likely to be compensable**
- 2 If an employer promotes voluntary vaccination and provides an incentive or reward for vaccination → **May be compensable if the incentive scheme is linked to employment**
- 3 If an employer organises the voluntary vaccination onsite or at another location for employees → **May be compensable – even it is voluntary**
- 4 If an employer 'mandates' (implements a vaccination policy) that employees must be vaccinated and an employee has an adverse reaction to the vaccine → **Yes, an adverse reaction may be compensable**



14

Vaccines and the Privacy Act

- ✓ Employers can ask their employees if they have been vaccinated against COVID-19.
- ✓ When a lawful and reasonable direction has been given for an employee to be vaccinated, an employer can also require proof.

- If an employee discloses their vaccination status, the collection, use and disclosure of that information must be handled in accordance with Australian privacy laws.
- Employers can ask to sight vaccination status. If no record is made, the Privacy Act will not apply.
- Vaccination status is a health record.
- Employees must consent to an employer “collecting” or keeping a record of their vaccination status. Consent must be:
 - Informed
 - Voluntary
 - Current and specific
 - Given by an employee who has the capacity to do so



15

Vaccines and the Privacy Act cont...

Best practice considerations

- ✓ Accurately record the information collected, keep it up-to-date and store it securely.
- ✓ Limit the use and disclosure of employee vaccination status information to what is necessary to prevent and manage COVID-19.
- ✓ Do not disclose vaccination status among colleagues unless there is a legitimate and compelling reason to do so.
- ✓ Regularly review whether this information needs to be retained as the vaccination roll-out progresses and more people receive the vaccine.



16

2. Mandatory COVID-19 vaccinations for the live performance industry, exhibition and cinema industries?

No clear answer

- It is unlikely that a direction to be vaccinated against COVID-19 would be considered a “reasonable and lawful” direction or a necessary control measure to meet WHS obligations
- Employers must:
 - Consider the specific circumstances of their workplace and workforce
 - Follow a structured risk-based approach to develop a policy

New Employees

- Include terms in the contract of employment, which refer to the COVID-19 vaccination policy

Current Employees

- Consult, communicate and cooperate to develop a policy to ensure any direction to get a COVID-19 vaccination is lawful and reasonable



17

3. What can we do now? *Consultation and cooperation is key*



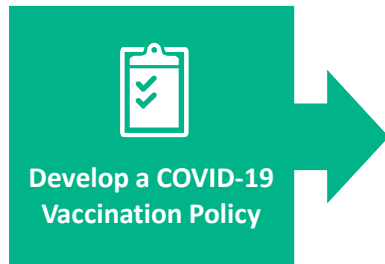
- ✓ Encourage employees to get vaccinated
- ✓ Provide reliable information about vaccines, and information about where they can get vaccinated
- ✓ Assist employees to get vaccinated (e.g. allow time off to get vaccinated)
- ✓ Have conversations with employees about how the workplace will approach vaccination
- ✓ Continue to take COVID Safe measures to ensure health and safety at work



18

3. What can we do now?

Consultation and cooperation is key



- ✓ Consult with your employees
- ✓ Undertake a risk assessment
- ✓ Consider WHS obligations
- ✓ Consider consultation obligations under awards, enterprise agreements and employment contracts
- ✓ Consider whether mandatory vaccination is required, and lawful and reasonable
- ✓ Consider a process for managing refusals
- ✓ Determine how you will manage record keeping and privacy



19

3. What can we do now?

Consultation and cooperation is key





- ✓ Consider including a COVID-19 vaccination term in contracts of employment
- ✓ Such a term may refer to a policy rather than prescribing vaccination in the contract
- ✓ Ensure such a term complies with anti-discrimination laws




20

4. The need to engage with the national vaccine rollout

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The phased roll-out approach means that vaccines are not yet available to all employees. Employers must keep this in mind when considering their approach to vaccines in the workplace.
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Employers should continuously undertake a risk assessment to ensure their COVID Safe measures align with the public health advice as more of the population is vaccinated, and if new strains of COVID-19 emerge
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Peak employer bodies and unions agree that, at this stage, all employees should be encouraged to be vaccinated rather than implementing mandatory vaccine policies in the workplace.



21

5. Questions

1. Can we only employ people who are 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 discrimination principles discussed above will apply to refusing employment to prospective employees.

Employers should have clear policies and procedures for managing employees who refuse or seek to be exempt from mandatory vaccination policies.



22

5. Questions

2. Do employees who are working with children need to be vaccinated?

When considering whether a direction is reasonable, employers should consider “the nature of the employee’s role and the work being performed”.

This assessment should include 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).

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).

This is arguably a necessary WHS and infection control measure which allows employees to be able perform their duties safely while protecting the children they work with.

However, the full context of the circumstances would need to be considered - we note that it is not mandatory for school teachers in Australia to be vaccinated.*

* Following this presentation the NSW Government announced that teachers in NSW would be required to be fully vaccinated by 8 November 2021. All public health orders requiring COVID-19 vaccination in NSW include medical exemptions.

