

# IMPLEMENTING A COVID-19 VACCINATION POLICY

GUIDANCE MATERIAL

11 NOVEMBER 2021

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AUSTRALIA



We have prepared the following guide to assist in formulating and implementing a COVID-19 vaccination policy and the steps your organisation should take.

The purpose of this guide is to assist you with some of the key issues to be addressed as part of implementing a mandatory vaccination policy. You may wish to consider your own legal advice when adapting your policy to your workforce - particularly given the likely evolving nature of case law and regulatory guidance on employers' rights regarding this issue.

This guidance material does not address whether or not you will mandate vaccination for your contractors, or for members of the public entering your workplace. These issues are individual to your workplace and you may wish to seek legal advice as to these issues.

## 1. Is there legislation or a public health order which requires employees to be vaccinated against COVID-19?

- 1.1 State and territory governments have made and are expected to continue to implement legislation and public health orders requiring certain workers to be vaccinated against COVID-19. For example, states and territories have required residential aged care workers to be vaccinated against COVID-19. Employers need to comply with any legislation or public health order that applies to them and ensure that any workers who are required to be vaccinated under such orders are not working in breach of the orders.
- 1.2 Because any such legislation or public health orders stand alone, the terms of a vaccination policy do not need to refer to or reflect their requirements. A vaccination policy will enable employers to make their own decisions about vaccination, which may be consistent with legislative requirements, or go further in the interests of health and safety in the context of the employer's operations.

A list of the current public health orders requiring vaccination in the states and territories is available at [webpage](#). The Fair Work Ombudsman will continue to update this information if new public health orders or directions are issued.

## 2. Conduct a risk assessment to determine COVID-19 vaccination requirements

Where there is no legislation or public health order requiring your employees to be vaccinated, your organisation should still conduct a risk assessment, in line with its health and safety obligations, to determine whether vaccination against COVID-19 is a reasonably practicable step available to minimise the risk that the COVID-19 presents.

- 2.1 Decision making in relation to whether to implement a mandatory or voluntary approach should be informed by a risk assessment in line with a risk-based, health and safety approach. For each role, or category of roles in your organisation, and in each location, a risk assessment should be undertaken to determine whether it is necessary that the person undertaking the role be vaccinated against COVID-19. You may also want to consider whether volunteers, contractors and suppliers to your organisation will be required to be vaccinated.
- 2.2 Factors to consider when undertaking a risk assessment include:
  - 2.2.1 The nature of the work.
    - (a) What is the extent to which the employee interacts with others?
    - (b) Is it a public facing role? Will employees work in a shared space with other employees who have a public facing role? Will employees be travelling to worksites where a vaccine passport is not required?
    - (c) Will the employee interact with people with an increased risk of being infected with COVID-19 (such as employees working at the airport or in a quarantine program)?
    - (d) Is the employee required to interact with people who are particularly vulnerable to the impacts of COVID-19 (such as employees working in health care, aged care or working with children who are unable to be vaccinated against COVID-19)?

- (e) Is the work an essential service such that it will continue to be performed during lockdown?
- (f) Does the employee visit multiple sites/clients such that if they were positive with COVID-19 they may transmit it to multiple people?

**2.2.2 The extent of community transmission of COVID-19 (including variants of concern) in the location where work is performed.**

**2.2.3 The severity of COVID-19 and the effectiveness of vaccines in reducing the risk of transmission or serious illness, including in relation to variants of concern.**

**2.2.4 Other control measures/ infection controls in place or available and their suitability.**

This will include the ability for physical distancing, face mask requirements, Perspex screens, rapid antigen testing etc. This needs to be considered for all aspects of work including where employees will eat and drink.

- 2.3 The risk assessment should also consider whether the role requires the employee to be vaccinated regardless of an exemption.
- 2.4 In addition to the specific risk to employees, you may also consider your business continuity risks if you were required to close your workplace for a period of time, and the risks of workers compensation claims.
- 2.5 A detailed and appropriate risk assessment will be the best evidence in support of a mandatory vaccination policy, if an employee challenges your approach. Accordingly, it is recommended that you record the risk assessment in writing and seek legal advice reviewing your completed risk assessment. Your organisation may also want to seek input from an occupational physician who specialise in these types of risk assessments.

### 3. Is it lawful and reasonable to require some or all of your employees to be vaccinated against COVID-19?

- 3.1 Where there is no legislation or public health order requiring your employees to be vaccinated, an employer can still direct employees to be vaccinated if the direction is lawful and reasonable in the circumstances.
- 3.2 In order for a direction that an employee is vaccinated against COVID-19 be lawful, it must:
  - 3.2.1 Comply with the terms and conditions of the employee's employment, contained in the employee's employment contract, or any award or enterprise agreement which applies to the employer. Employers should review these instruments for any terms and conditions which may impact on the implementation of such a requirement; and
  - 3.2.2 Comply with any other applicable Commonwealth, state or territory legislation such as anti-discrimination legislation.
- 3.3 Whether a direction is reasonable will depend on all of the circumstances and needs to be assessed on a case by case basis weighing all relevant factors to determine whether a direction to be vaccinated against COVID-19 is necessary in order to minimise the risk of COVID-19.

- 3.4 Factors which a Court or Tribunal will consider in determining whether a direction is reasonable include:
- 3.4.1 The issues considered as part of a comprehensive risk assessment process as detailed above;
  - 3.4.2 The employer's OHS/WHS obligations to eliminate (and if that's not possible, minimise) risks to health and safety of employees, other workers and the public who come into contact with its employees, so far as is reasonably practicable;
  - 3.4.3 The potential for criticism or legal challenge to the organisation if an employee, client/customer or member of the public contracts COVID-19 from an unvaccinated employee they come into contact with;
  - 3.4.4 Any contractual provisions which require compliance with directions or policies;
  - 3.4.5 The current availability of the vaccine; and
  - 3.4.6 How well adapted the policy is – i.e. does it allow for medical grounds to be fairly assessed, does the employer cover the cost of the vaccination?

## 4. Consultation

- 4.1 Employers are required under work health and safety laws to consult with workers and their health and safety representatives (HSRs) (if any), about risks and possible control measures to reduce the risks in relation to COVID-19. This will include consideration of introducing a policy requiring employees to be vaccinated against COVID-19 or updating an existing policy.
- 4.2 Employers must consult with employees (and HSRs) by sharing information with them, giving them a reasonable opportunity to express their views about a matter and taking into account those views. Employers in states or territories where the model WHS laws apply will also be required to provide feedback and this is recommended in other states.
- 4.3 Consultation under work health and safety laws may occur through HSRs and OHS/WHS Committees. You may also communicate through other means such as surveys and online meetings to both explain the 'why' of what you are doing and seek feedback and understand concerns. In our experience, the most effective way to roll out a mandatory vaccination policy is to take preparatory steps to educate your workforce about the vaccination in general and why it is an important part of a safe return to work.
- 4.4 Organisations should also consider whether they are required to consult about implementing such a policy under any applicable employment contract, award or enterprise agreement and comply with any consultation obligations arising from these instruments at the same time as consultation under work health and safety laws.

## 5. Medical Exemptions

- 5.1 You will need to consider what process you put in place for employees who seek a medical exemption from the requirement to be vaccinated against COVID-19. We recommend employers have a form for employees to submit which outlines the basis for their exemption.
- 5.2 You will need to consider how medical exemption applications are assessed. For example, a large organisation may follow a process by which:
  - 5.2.1 The employer requires medical evidence to support an exemption and will not accept statutory declarations;
  - 5.2.2 The employer offers to cover cost of obtaining the medical evidence;
  - 5.2.3 An exemption will be granted where the doctor gives clear advice that it is unsafe for the employee to receive a COVID-19 vaccination;
  - 5.2.4 If medical evidence is unclear or not specific, it can be referred to a panel (i.e. made up of executive management, HR, legal) to assess the medical evidence;
  - 5.2.5 If the panel is not satisfied, it can request additional evidence or clarification from treating doctor, and if that is still not satisfactory, direct the employee to see an independent specialist to confirm that it is unsafe for the employee to receive the vaccine;
  - 5.2.6 If the medical evidence does not show that it is unsafe for the employee to receive the vaccine, the application for an exemption can be rejected.

Smaller organisations may wish to have a more streamlined process.

Employees who are granted an exemption may be required to perform safe or alternative duties for periods of time, depending on the risk of exposure to COVID-19. You will need to consider whether additional control measures will be required for these employees such as working from home, testing and/or eating and drinking only in a specified location.

You may consider seeking your own legal advice if an employee claims an exemption on some other basis.

## 6. Process for implementing policy

- 6.1 Organisations who decide on the basis of their risk assessment that they will require some or all employees to be vaccinated against COVID-19 should only introduce a written policy after a consultation process has been undertaken.
- 6.2 The implementation of the policy should be accompanied by an effective communications plan and strategy, following on from the consultation process.
- 6.3 For employees who are required to be vaccinated under this policy and who do not comply with the requirement to be vaccinated, the organisation can consider the reasons the employee is refusing to comply, and depending on the circumstances may be able to take disciplinary action, including termination of employment against the employee. You should seek independent legal advice before terminating employment. A failure to comply with a lawful and reasonable direction is an accepted valid reason for dismissal but requires consideration of the particular context including any discrimination issues.

Organisations should also consider:

- 6.3.1 Compliance with any applicable privacy/health records legislation in collecting information, including health information regarding an employee’s vaccination status. A vaccination status privacy collection statement as part of your existing privacy policy may be useful in this regard. Guidance material in relation to privacy requirements and vaccination status information is available from the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff/>
- 6.3.2 How they will take reasonable steps to protect employee’s health information, including individual health care identifiers (IHI number) (which are included on MyGov vaccination certificates), from misuse, loss, unauthorised access, modification or disclosure. As it is not necessary for employers to view or store their employee’s IHI number, organisations may decide to issue a communication to employees which provides different options including:
- if employees provide the digital certificate from the MyGov site or Medicare app it has their IHI Number on it so they may redact the IHI before they provide the certificate;
  - employees can also take a screenshot or photo of the vaccination certificate available on their phone (via the Apple Wallet/ Android Wallet) which doesn’t contain the IHI;
  - if employees have previously sent a certificate with their IHI on it and would like to update it, they can request that the one they have previously sent is deleted and send a new one.
- 6.3.3 Whether they will provide employees with paid leave to receive their vaccination.
- 6.3.4 Whether they wish to offer incentives to employees to be vaccinated under your vaccination policy (for example additional leave, vouchers).

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