

COVID-19 and workplaces

Mandatory vaccination of employees

Is COVID-19 vaccination mandatory?

The current advice from the Australian Government is that there is no requirement for mandatory vaccinations at this point, even for hotel quarantine workers, ICU workers, or aged care facility workers.¹

Regarding mandatory vaccinations by employers, the current position of Safe Work Australia and the Fair Work Ombudsman is that, in the absence of any government requirement or Public Health Orders, most employers will not be *required* to make vaccination of their employees mandatory.²

A statement endorsed by the ACTU also states that

“Unions believe that...[it's] public health experts, and not individual employers, that determine where any mandatory vaccination policies should apply in relation to high-risk workplaces”³.

However, there may still be some employers - particularly those in higher-risk industries, such as health workers - that will seek to mandate vaccinations amongst their employees. In most cases, whether that mandate is lawful will depend on whether the direction to be vaccinated is a “lawful and reasonable direction”.

It is important to note that in determining if an employer direction is “lawful and reasonable” that this will always depend on the facts of the case concerned.

When will a direction to get vaccinated be lawful and reasonable?

The Fair Work Ombudsman has noted that

“On its own, the coronavirus pandemic doesn't automatically make it reasonable for an employer to direct their employees to be vaccinated against coronavirus”.

Despite this, the Ombudsman also acknowledges that a mandatory vaccination direction may be reasonable if the employees are interacting with people who are at an “elevated risk” of being infected, such as quarantine workers, or if they work with vulnerable people, like the sick or elderly.⁴

So, whether an employer can require an employee to be vaccinated will very much depend on the facts of each case.

Some considerations in assessing whether an employer direction is reasonable may include:

- The risks of the employment - e.g. is the employee expected to come in to contact with new international arrivals?
- The employee's contact with vulnerable people - e.g. is the employee working with immunocompromised people?
- The employee's own vulnerability - e.g. are they themselves more vulnerable to serious illness resulting from COVID-19 infection?
- The criticality of the work performed by the employee - e.g. is the employee performing a key safety or emergency function?
- The disruptive impact of any COVID-19 infections in the workplace on the operations of the employer.
- The degree to which risk of COVID-19 infection or transmission can be mitigated by other control measures - e.g. wearing of masks, social distancing, remote working.

1 Australian Government Department of Health (2021): <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/getting-vaccinated-for-covid-19>

2 Safe Work Australia (2021): <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/vaccination>;
Fair Work Ombudsman (2021): <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/health-and-safety-in-the-workplace-during-coronavirus/covid-19-vaccinations-and-the-workplace>

3 Nick Bonyhady, The Age (10/03/21). *Bus drivers, teachers, retail staff: Unions want job priority for select workers*:
<https://www.theage.com.au/politics/federal/bus-drivers-teachers-retail-staff-unions-want-job-priority-for-select-workers-20210310-p579ia.html>

4 Fair Work Ombudsman (2021).

For further information, contact us today:

 **1800 810 812**

 **mauriceblackburn.com.au**

- The extent to which vaccines or any particular vaccine, prevents transmission of COVID-19.
- The extent and timing in which vaccines are available to be administered.
- The extent to which the direction provided for proper exemptions – e.g. exemptions for employees with bona fide medical conditions which create an unacceptable health risk from vaccination.
- The process by which the employer has assessed its risk – e.g. has it made the direction as a consequence of a proper risk assessment.
- The levels of community transmission of COVID-19, including assessments of the prospective level of community transmission when international border restrictions on entry to Australia are removed or loosened.

If in particular circumstances a direction is lawful and reasonable and the employee refuses to comply, then the employee may be subject to disciplinary action.⁵

What if a person can't have the vaccine?

There may be some circumstances in which an employee cannot have a vaccine for a bona fide medical reason. If an employee asserts that they cannot have a vaccine for a medical reason, it would assist if the employee was able to substantiate that position by obtaining medical evidence from their treating medical practitioner or an expert medical practitioner.

Engaging in disciplinary action against an employee who cannot be vaccinated for a medical reason may be prohibited by disability discrimination legislation.⁶ It may, depending on the circumstances, constitute a form of indirect discrimination.

However, situations may arise where the inherent requirements of an employee's role require them to be vaccinated against COVID-19. In those circumstances, it may be lawful for the employer to refuse to provide them with work or terminate the employment.⁷ Again, the facts of each case will be critical.

Ultimately, employees concerned about any employer directions on vaccines should get advice from their union or an employment lawyer. Similarly, employers should seek their own advice if they are considering making vaccinations mandatory in the workplace.

COVID-19 vaccinations and absenteeism from work

A worker doesn't want to go back to the office – can they work from home?

Under Workplace Health and Safety laws, employers have an obligation to provide a safe workplace. In respect of COVID-19, a number of formal restrictions have been recommended and/or mandated regarding spacing and distancing which may affect how work is performed.

Employers must implement applicable government regulations (including public health orders) regarding COVID-19 and workplace health and safety.

In most cases, where an employer is complying with government health and safety regulations, and takes reasonable steps to make the workplace safe, a direction to return to the office will likely be a reasonable and lawful one. Some categories of workers (e.g. workers with parental responsibilities) may have a right under the Fair Work Act or state equal opportunity law to seek a flexible work arrangement (which could include working from home).

If people are concerned about the safety of their workplace and are being asked to return to work, then they should get advice from their union or an employment lawyer. They can also consult with a workplace health and safety officer, or their state or Commonwealth work, health and safety regulator.

What if a worker has to take leave because of the vaccine?

There is no express obligation at law on employers to pay employees to obtain the vaccine. On its face, this means that if an employee's appointment to receive the vaccination will cause them to miss work, they will need to take leave, or make other arrangements with their employers. However, if an employer directs an employee to be vaccinated, it may be that attendance by an employee to obtain the employer-directed vaccination constitutes the performance of work and may be payable.

Federal government health advice indicates that some people may suffer minor side effects following vaccination and most side effects last no more than a couple of days with full recovery. Of course, if a person is unwell after vaccination and they are not fit for work, they may be entitled to access personal leave if they are in the category of workers eligible for personal leave.

⁵ Fair Work Ombudsman (2021): <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/health-and-safety-in-the-workplace-during-coronavirus/covid-19-vaccinations-and-the-workplace>

⁶ *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1991* (Qld).

⁷ See *Ms Maria Corazon Glover v Ozcare* [2021] FWC 231.

For further information, contact us today:

 **1800 810 812**
 **mauriceblackburn.com.au**

Employees and unions should consider the terms of applicable enterprise agreements, the NES or Awards to determine whether there is any entitlement to leave in any particular circumstance.

Privacy and other issues

Can businesses refuse entry to someone who has not had a vaccine, such as a café and can a business ask if someone has been vaccinated?

A business can set the conditions of entry to their premises and are entitled to do so.

However, a key issue to consider will be whether someone has a medical condition for which they can't be vaccinated, and if this is genuine and entry is still refused then that may be a case of indirect discrimination.

Can a workplace ask a visitor to their premises to prove they have been vaccinated?

It is unlikely that any WH&S laws require a workplace to ask visitors for proof of COVID-19 vaccination. However, some workplaces or businesses may still require this information as a condition of entry.

Employers and other workplaces should be cognisant of privacy laws in this area. In particular, they are only permitted to collect information if the person gives consent, and the information is "reasonably necessary" to prevent or manage COVID-19 in the workplace. For employers specifically, this means that they are only permitted to collect the *minimum amount of personal information* reasonably necessary to achieve that goal. There are other obligations in privacy laws which regulate the use and disclosure of this type of personal information regarding vaccination status.

If an employee made an agreement with their employer to reduce hours or rates of pay during COVID-19, can these be re-instated to pre-COVID hours or rates of pay?

If an employee made an agreement with their employer to reduce hours or rates of pay during COVID-19 and now wishes to return to their usual hours or rates of pay pre-COVID they will need to consider the following:

- The terms of their employment agreement or any modern award or enterprise agreement that applies to their employment, and
- Whether any agreement to reduce hours or rates of pay was made as part of any JobKeeper provisions under the Fair Work Act.

This may be a complex question depending on the individual circumstances, so any employee impacted is best to consult their union or seek advice from an employment lawyer.

Exposure to COVID-19 in the course of your employment

What if a worker contracts COVID-19 at work or because of their work, will they be covered by workers' compensation?

While the laws in each State and Territory differ slightly, the answer to this is probably yes.

- In Queensland, Western Australia, the Northern Territory and Victoria diseases are considered to be injuries in workers' compensation legislation and thus workers will be covered. In addition:
 - In Victoria diseases will be covered if you are working in a job that gives rise to a significantly greater risk of contracting that disease.
 - In Western Australia in certain circumstances there is a rebuttable presumption that a health worker who has contracted COVID-19 has sustained it at work.
- In NSW a worker will be covered if they contracted the virus (a "disease") in the course of their employment and their work activities were the "main contributing factor" to contracting the virus. Legislation has been introduced to make it easier to establish a link between certain types of work and contracting COVID-19, including those in retail and healthcare sectors, educational institutions, the cleaning and construction industry, hospitality and passenger transport.
- In South Australia, workers will be covered if they developed the virus "in the course of their employment" and if employment was "a significant contributing cause" of the injury.

A worker should not hesitate to lodge a workers' compensation claim in any jurisdiction if they believe they have contracted COVID-19 as a result of their job, even if they are not sure the exposure happened at work.

What if a worker contracts COVID-19 because they have been on public transport, will they be covered by TAC or a CTP scheme?

The answer to this in most states is no.

- In Victoria and Western Australia a worker will need to show their injury was caused by the driving of a motor vehicle.
- In Queensland the injury must have been caused by, through or in connection with a motor vehicle.
- In the Northern Territory a worker will need to show their injury was the result of a motor accident.

For further information, contact us today:

 **1800 810 812**
 **mauriceblackburn.com.au**

- In NSW:
 - Workers' compensation - if a worker is travelling to and from work on public transport they would not be able to bring a claim. If a worker is on public transport in the course of their employment (for example to attend a different site/conference) then they would be covered by workers' compensation provisions.
 - CTP - the injury must arise from the use or operation of a motor vehicle.
- In South Australia claims for compensation under the CTP scheme must be the result of someone else's negligent use of a motor vehicle.

It is possible there may be other remedies available to workers who have been exposed to COVID-19 while on public transport. To find out whether a worker might be eligible for compensation it is best to seek expert legal advice.

Does this change if the worker contracts COVID-19 on public transport on their way to work, will they be covered by workers' compensation?

While the laws in each State and Territory differ slightly, the answer to this in most states is no.

- In Victoria workers will not be covered, even if they were on their way to work when exposed.
- In Western Australia an injury sustained on the way to or from work is also not compensable. The situation may be different if the journey is between two work sites.
- In Queensland it is possible for a worker to be eligible for WorkCover if they can prove they contracted COVID-19 on public transport on their way to or from work.
- In the Northern Territory, as a general rule, workers' compensation does not cover workers if they contract a disease as part of their usual, everyday commute between home and work. However, these rules are complex so any worker concerned should speak to a lawyer.
- In NSW there are no journey claims under workers' compensation legislation.
- In South Australia it's possible for a worker to be eligible for workers' compensation if they can prove they contracted COVID-19 on public transport on their way to or from work (subject to certain exceptions).

It is possible there may be other remedies available to workers who have been exposed to COVID-19 while on public transport. To find out whether a worker might be eligible for compensation it is best to seek expert legal advice.

What if an employer makes it compulsory to have a COVID-19 vaccination to return to work, and a worker has an adverse reaction to that vaccine? Will they be covered by workers' compensation?

While the laws in each State and Territory differ slightly, the answer to this is probably yes.

- In Victoria, Queensland and the Northern Territory workers will be covered and will be able to receive benefits for any adverse reactions to the vaccine.
 - Case law makes it clear that activities that are "reasonably incidental" to employment will entitle a worker to compensation if they suffer injury.
 - In this scenario, the employer has induced or encouraged the employee to engage in the activity of undergoing the vaccination which has resulted in adverse reaction.
- In Western Australia this would depend on the circumstances in which the vaccination has been administered, but the adverse reaction would likely be covered if a worker can show that the employer mandated the worker to have the vaccine.
- In NSW it would be expected that such a claim would be successful if the injury was sustained "in the course of employment" and work was a "substantial contributing factor".
 - In these scenarios, the injury would be covered by workers' compensation.
 - This is a different test to that which applies to a worker who contracts COVID-19 at work, where a person's work activities would need to be deemed the "main contributing factor" to contracting the virus.
- In South Australia it would be expected that such a claim would be successful if the injury was sustained "in the course of employment" and if employment was "a significant contributing cause" of the injury.

This is general advice only. Any worker seeking specific advice should speak to their union or seek legal advice. | Information correct as at March 2021

For further information, contact us today:

 **1800 810 812**
 **mauriceblackburn.com.au**

