



## COVID-19 vaccinations – workplace relations and WHS issues

### SUMMARY

The roll-out of COVID-19 vaccinations by the Federal, State and Territory Governments has commenced. The roll-out is largely based on the age and vulnerability of individuals. This means that the employees of most businesses will have access to COVID-19 vaccinations at different times during this year.

The Fair Work Ombudsman (FWO) and Safe Work Australia (SWA) have issued guidance to employers and employees about their rights and obligations concerning COVID-19 vaccinations.

The FWO and SWA advice is consistent with the Federal Government's views on the relevant issues. The Federal Government's position is that most businesses will not be able to issue a direction to employees making COVID-19 vaccinations mandatory, as this would not be 'lawful and reasonable' in the circumstances of most businesses.

Employers considering making COVID-19 vaccinations mandatory in their workplace are urged to contact Ai Group for specific advice about their particular circumstances.

### The national roll-out of COVID-19 vaccinations

The national roll-out of COVID-19 vaccinations has commenced. The Federal Government aims to provide access to everyone in the population by late this year. The precise timing will depend on whether there are any vaccine supply disruptions.

People will have access to COVID-19 vaccinations in accordance with the following phases. Several of the categories referred to below have not yet been clearly defined by the Federal, State and Territory Governments.

#### Phase 1a

- Quarantine and border workers
- Frontline health care worker priority subgroups
- Aged care and disability care staff and residents

#### Phase 1b

- Adults aged 70 years and over
- Other health care workers
- Aboriginal and Torres Strait Islander people aged 55 and over

- Younger adults with an underlying medical condition, including those with a disability
- Critical and high risk workers including defence, police, fire, emergency services and meat processing

**Phase 2a**

- Adults aged 50-69 years
- Other health care workers
- Aboriginal and Torres Strait Islander people aged 18-54 years
- Other critical and high risk workers

**Phase 2b**

- Balance of the population aged 18 and above

**Phase 3**

- Young people aged less than 18 years (if COVID-19 vaccinations are recommended for this group)

**Workplace relations issues**

The FWO has published [guidance](#) for employers and employees on a range of workplace relations matters of relevance to COVID-19 vaccinations.

In summary, relevant advice from the FWO on whether an employer is able to mandate COVID-19 vaccinations for employees in its workplace includes:

- There are currently no laws or public health orders in Australia that mandate COVID-19 vaccinations. If public health orders are issued at a later stage, employers and employees will need to comply with any orders that apply to them.
- In the current circumstances, the overwhelming majority of employers should assume that they will not be able to require their employees to be vaccinated against COVID-19.
- There are limited circumstances where an employer may be able to require its employees to be vaccinated. However, this will depend upon the circumstances of particular workplaces and the circumstances of individual employees (e.g. if there is a medical reason why an employee cannot be vaccinated).
- Employers should obtain legal advice if they are considering making COVID-19 vaccinations mandatory in their workplace, or they operate in a COVID-19 high-risk environment (for example, health care or meat processing).

If an employer wishes to consider whether it would be 'lawful and reasonable' to issue a direction requiring an employee to have a COVID-19 vaccination, there are many relevant issues that need to be considered including:

- Whether a contract of employment or enterprise agreement that applies to the employee, contains a provision requiring the employee to have a COVID-19 vaccination.

- Whether there are any relevant public health orders in operation making COVID-19 vaccinations mandatory in the relevant industry or occupation. (Note: At this stage it appears that the Federal, State and Territory Governments have no immediate plans to issue any such public health orders).
- Federal and State anti-discrimination laws prevent discrimination on the grounds of disability (e.g. a medical condition), religion and various other specified attributes.
- The general protections in the *Fair Work Act 2009* (FW Act) prohibit an employer taking adverse action against an employee because of the employee's disability, religion or various other specified attributes.
- The unfair dismissal laws in the FW Act prohibit the dismissal of an employee without a valid reason and in circumstances where the dismissal would be harsh, unjust or unreasonable.
- Directing an employee to provide evidence of their vaccination is likely to raise privacy issues. Therefore, the terms of Privacy legislation need to be considered.
- Any reason that any employee gives for not being prepared to have a COVID-19 vaccination would need to be carefully considered.

In addition, the roll-out of COVID-19 vaccinations is largely based on the age and vulnerability of individuals. Therefore, at this stage most employees would be unable to comply with any direction to be vaccinated.

Employers considering making COVID-19 vaccinations mandatory in their workplace are urged to contact Ai Group for specific advice about their particular circumstances.

### **WHS issues**

SWA has published [guidance](#) for employers and employees on various Work Health and Safety (WHS) issues relating to COVID-19 vaccinations.

In summary, relevant advice from SWA includes:

- Employers have a duty under WHS laws to eliminate, or if that is not reasonably practicable, to minimise the risk of exposure to COVID-19 in their workplace.
- To meet their duties under WHS laws and to minimise the risk of exposure to COVID-19 in their workplace, employers must continue to apply all reasonably practicable COVID-19 control measures including physical distancing, good hygiene, regular cleaning and maintenance and ensuring that workers do not attend work if they are unwell.
- Employers must comply with any relevant public health orders made by State and Territory Governments. There are currently no public health orders that specifically enable employers to require their employees to be vaccinated against COVID-19.
- To reduce risks such as COVID-19 in their workplace, employers must:
  - undertake a risk assessment for their business;
  - consider the available control measures and how they will help manage the risks of COVID-19;

- consult with workers and Health and Safety Representatives;
- determine what control measures are reasonably practicable to implement in the workplace.
- It is unlikely that an employer will need to mandate vaccination as a control measure to comply with WHS duties. However, this will depend on the particular circumstances at the time the employer is undertaking the risk assessment.
- An employer should obtain advice if it is considering requiring its workers to be vaccinated. There are many issues to consider including workplace relations, discrimination and privacy issues.

**Do you require further advice?**

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

**Stephen Smith**  
**Head of National Workplace Relations Policy**