

## COVID-19 Vaccinations – Workplace Relations Issues

### SUMMARY

Numerous workplace relations issues have been arising regarding COVID-19 vaccinations. It is important for employers to understand the rights and obligations of employers and employees in relation to COVID-19 vaccinations.

This advice deals with various common questions that employers have been asking.

### **If an employee is required by a public health order/direction to be vaccinated in order to carry out work in a particular industry, occupation or area, does the employer need to pay the employee if the employee is not vaccinated?**

If an employee is required by a public health order/direction to be vaccinated in order to work in the relevant industry, occupation or area, and the employee is not vaccinated, the employee is not “ready, willing and able” to work and hence is not generally entitled to be paid by the employer. In circumstances where an employee needs more time to arrange a vaccination, the employee may wish to take any accrued annual leave or long service leave.

There is no need for an employer to apply the stand down provisions in the *Fair Work Act 2009* (**FW Act**) in these circumstances. The employee is unable to attend work due to the Government’s public health order/direction.

Employers should note that public health orders/directions provide an exemption to the requirement for an employee to be vaccinated if the employee has a recognised medical contraindication supported by the required medical evidence as specified in the public health order/direction. For example, various NSW public health orders exempt employees from a requirement to be vaccinated if the employee has been issued with a medical contraindication certificate, defined in the public health orders as:

**medical contraindication certificate** means a certificate issued by a medical practitioner—

- (a) in a form approved by the Chief Health Officer, and
- (b) certifying that because of a specified medical contraindication, the person to whom the certificate has been issued cannot have a COVID-19 vaccine.

### **Can an employer direct an employee to have a COVID-19 vaccination?**

In circumstances where a relevant public health order/direction is in place requiring an employee to be vaccinated, there is no need for the employer to issue a direction to the employee. A direction from the employer is unnecessary because the Government has already ordered the employee to be vaccinated through the public health order/direction.

In circumstances where there is no relevant public health order/direction in place, an employer is able to direct an employee to be vaccinated if such a direction is “lawful and reasonable” in the circumstances. In determining what is lawful and reasonable, the circumstances of both the employer and the employee need to be considered. Of course, if an employee has a genuine medical reason for not being vaccinated, backed up by the appropriate medical evidence, it would not be reasonable for an employer to direct the employee to be vaccinated.

The Fair Work Ombudsman (**FWO**) has issued [guidance](#) on the circumstances in which it may be lawful and reasonable for an employer to direct an employee to be vaccinated. The advice includes the following extract:

*There are a range of factors that may be relevant when determining whether a direction to an employee is reasonable. Things to take into consideration include:*

- *the nature of each workplace (for example, the extent to which employees need to work in public facing roles, whether social distancing is possible and whether the business is providing an essential service)*
- *the extent of community transmission of COVID-19 in the location where the direction is to be given, including the risk of transmission of the Delta variant among employees, customers or other members of the community*
- *the terms of any public health orders in place where the workplace is located*
- *the effectiveness of vaccines in reducing the risk of transmission or serious illness, including the Delta variant (find out more at the Department of Health: [statement from ATAGI](#))*
- *work health and safety obligations (find out more at [Safe Work Australia](#))*
- *each employee's circumstances, including their duties and the risks associated with their work*
- *whether employees have a legitimate reason for not being vaccinated (for example, a medical reason)*
- *vaccine availability.*

*When undertaking this case-by-case assessment, it may also be helpful as a general guide to divide work into 4 broad tiers:*

- **Tier 1 work**, where employees are required as part of their duties to interact with people with an increased risk of being infected with coronavirus (for example, employees working in hotel quarantine or border control).
- **Tier 2 work**, where employees are required to have close contact with people who are particularly vulnerable to the health impacts of coronavirus (for example, employees working in health care or aged care).
- **Tier 3 work**, where there is interaction or likely interaction between employees and other people such as customers, other employees or the public in the normal course of employment (for example, stores providing essential goods and services).
- **Tier 4 work**, where employees have minimal face-to-face interaction as part of their normal employment duties (for example, where they are working from home).

*A workplace may have a mix of employees, with different employees performing work in different tiers, all of which could change over time.*

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

*An employer's direction to employees performing Tier 1 or Tier 2 work is more likely to be reasonable, given the increased risk of employees being infected with coronavirus, or giving coronavirus to a person who is particularly vulnerable to the health impacts of coronavirus.*

*An employer's direction to employees performing Tier 4 work is unlikely to be reasonable, given the limited risk of transmission of the coronavirus.*

*For employees performing Tier 3 work:*

- *where no community transmission of coronavirus has occurred for some time in the area where the employer is located, a direction to employees to be vaccinated is in most cases less likely to be reasonable*
- *where community transmission of COVID-19 is occurring in an area, and an employer is operating a workplace in that area that needs to remain open to provide essential goods and services, a direction to employees to receive a vaccination is more likely to be reasonable.*

The FWO's guidance stresses that it is important for employers to obtain their own legal advice if they are considering directing an employee to be vaccinated.

### **Can an employer direct an employee to have a COVID-19 vaccination if the employee is required to enter a customer's premises, and the customer is only allowing vaccinated persons to enter their premises?**

As explained above, an employer is able to direct an employee to be vaccinated if such a direction is "lawful and reasonable" in the circumstances. If an employee is required to enter a customer's premises (e.g. to carry out maintenance tasks) and the customer is only allowing vaccinated persons to enter their premises, this circumstance will weigh in favour of an employer direction to the employee to be vaccinated being "lawful and reasonable", but all the circumstances of the employer and employee need to be considered.

### **Does an employer need to consult with employees before implementing a policy mandating COVID-19 vaccinations for employees?**

All awards and enterprise agreements contain a consultation clause requiring employers to consult with employees and any representatives about any major workplace changes that will have a significant effect on employees. The introduction of a policy mandating COVID-19 vaccinations for all or some employees would likely be regarded as a change that requires consultation in accordance with the terms of these clauses.

In addition, under work health and safety laws, businesses that decide to introduce a policy mandating COVID-19 vaccinations typically take this step as one of a number of control measures (along with physical distancing, mask wearing, good hygiene and regular cleaning) to minimise the risk of their workers being exposed to COVID-19 in the workplace. Employers and other persons conducting a business or undertaking must consult with their workers when identifying hazards, assessing risks and deciding on measures to eliminate or minimise those risks.

Before announcing a definite decision to introduce a policy mandating COVID-19 vaccinations, an employer should consult with employees and any representatives about the proposed policy.

**Can an employer decline to offer employment to a person who is not vaccinated or include a vaccination requirement in each new employee's contract of employment?**

An employer who wishes to take these steps will need to be mindful of anti-discrimination laws. It is unlawful to not employ a person on particular protected grounds.

The main ground that is potentially relevant to COVID-19 vaccinations is disability. If a person has a genuine medical reason for not being vaccinated, backed up by the appropriate medical evidence, it would likely be discriminatory not to employ the person on the basis of their disability.

The other ground that may have relevance in a very small number of circumstances is religion. If a person genuinely follows a particular religion and that religion prohibits vaccination by its followers, it may be discriminatory not to employ the person on the basis of their religion. However, it should be noted that none of the main religions oppose vaccinations.

**What can an employer do if an employee fails to comply with a public health order to be vaccinated?**

If an employee is required by a public health order/direction to be vaccinated in order to work in the relevant industry or occupation, and the employee is not vaccinated, as discussed above the employee is not "ready, willing and able" to work and hence is not generally entitled to be paid unless the employee takes any accrued paid annual leave or long service leave.

An employer is not required to hold an employee's job open indefinitely if the employee is unable to fulfil the requirements of the job. However, if an employer is contemplating terminating the employment of an employee in these circumstances, the employer should contact Ai Group for advice before taking any action. Specific issues that should be considered by employers in such circumstances include:

- Would terminating the employee's employment be harsh, unjust or unreasonable? If so, such action could breach the unfair dismissal laws in the FW Act.
- Would termination of employment discriminate against the employee on the basis of a disability (e.g. a medical condition) or religion? If so, terminating the employment could breach anti-discrimination laws or the general protections in the FW Act.

**What can an employer do if an employee fails to comply with an employer direction to be vaccinated?**

If the employer has issued a direction to an employee requiring the employee to have a COVID-19 vaccination and the direction is "lawful and reasonable" (see above), the employer will be able to take disciplinary action if the employee fails to comply with the direction. However, if an employer is contemplating terminating the employment of an employee in these circumstances, the employer should contact Ai Group for advice before taking any action. Specific issues that should be considered include:

- Would terminating the employee's employment be harsh, unjust or unreasonable? If so, such action could breach the unfair dismissal laws in the FW Act.
- Would termination of employment discriminate against the employee on the basis of a disability (e.g. a medical condition) or religion? If so, terminating the employment could breach anti-discrimination laws or the general protections in the FW Act.

**Can an employer ask an employee for proof of vaccination status?**

An employer is able to ask an employee for proof of their vaccination status if the collection of the information is reasonably necessary for business functions or activities.

An employer is only able to collect and store vaccination status information if an employee consents, except where a relevant exemption applies under the *Privacy Act 1988* (Cth). One exception is where the collection is required or authorised by law (e.g. authorised by a public health order).

If vaccination status information is going to be collected, the employer must advise each employee how this information will be handled at the time of asking for the employee's consent, including advising the employee of whether the employer intends to disclose the vaccination status information to any other persons (e.g. to clients or customers). Reasonable steps need to be taken to keep the information secure and the information should only be accessible to a limited number of people who need to know the information.

The Office of the Australian Information Commissioner has issued [guidance](#) on various privacy issues relating to COVID-19 vaccinations.

**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 and the recovery from the pandemic.

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

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