

COVID-19 vaccinations – Privacy issues

SUMMARY

Many questions are being asked by employers about the requirements of the *Privacy Act 1988* (Cth) (**Privacy Act**) as it relates to the collection and storage of information about an individual's COVID-19 vaccination status.

This Employer Advice addresses some key questions that employers have been asking about privacy issues.

In Ai Group [Employer Advice Nat 207/21](#), many common questions about workplace relations issues associated with COVID-19 vaccinations are addressed.

This Employer Advice deals specifically with privacy issues.

Can an employer require an employee to provide evidence of their vaccination status?

If an employer intends to collect vaccination status information from an employee, the employer must be satisfied that this collection is permitted under Australian Privacy Principle 3 in the Privacy Act. Under this Principle:

- a business must only solicit and collect personal information that is reasonably necessary for its functions or activities; and
- an individual must consent to 'sensitive information' being collected by a business, unless an exception applies.

Vaccination status information falls within the definition of 'sensitive information' in the Privacy Act because it is 'health information about an individual'.

One exception where an individual's consent is not necessary is where the collection of sensitive information is required or authorised by or under an Australian law. 'Australian law' is defined in the Privacy Act as including: "an Act of the Commonwealth or of a State or Territory", "Regulations, or any other instrument, made under such an Act", or "a rule of common law or equity".

State and Territory public health orders/directions fall within the definition of an 'Australian law'. Some of these health orders/directions require employers to collect and store vaccination status information for their employees and require an employee to provide this information to the employer (e.g. the *COVID-19 Mandatory Vaccination (Workers) Directions*) issued by the Victorian Government). In these circumstances, both the employer and employee must comply with the public health order/direction.

In addition, an employer has a common law right to issue a 'lawful and reasonable' direction to an employee. What constitutes a 'lawful and reasonable' direction will depend on a wide range of factors (see [Employer Advice Nat 207/21](#)). If an employer has lawfully and reasonably directed an employee to be vaccinated, while not beyond doubt, it appears that an employer has the right to direct an employee to provide proof of their vaccination status. As mentioned above, an individual's consent to the collection of information is not required where the collection is required or authorised by or under an Australian law, including a rule of common law. The right of an employer to issue a 'lawful and reasonable' direction to an employee is recognised under common law.

It should be noted that the provisions of contracts do not fall within the definition of an 'Australian law'.

What are the requirements for genuine consent?

If a business is required to seek an individual's consent to collect vaccination status information about the individual because an exception under the Privacy Act does not apply (see above), the consent must be freely given. The business cannot pressure an individual to provide information about their vaccination status where the business is relying on consent as the lawful basis for collecting the information.

The business must provide the individual with adequate information about what information will be collected, why it is required and what it will be used for, prior to the individual giving consent. This includes advising the individual whether the information will be disclosed to any third parties.

Can an employer require prospective employees to provide vaccination status information?

Prospective employees can be required to supply vaccination status information if the employer is required to collect the information to ensure compliance with a relevant public health order/direction requiring vaccination.

In other circumstances, the prospective employee's genuine consent must be obtained in order to collect the information and the information must be reasonably necessary for the business to perform its functions or activities.

Can a business require its contractors and suppliers to provide vaccination status information?

A business can require its contractors and suppliers to supply vaccination status information if the business is required to collect the information to ensure compliance with a relevant public health order/direction requiring vaccination.

In other circumstances, the individual's genuine consent must be obtained in order to collect the information and the information must be reasonably necessary for the business to perform its functions or activities.

What can a business do with vaccination status information?

If a business is relying on consent as the lawful basis for collecting vaccination status information, it is important that such information is only dealt with or disclosed in a manner that the individual has agreed to. If a business deals with vaccination information in a way that an individual did not agree to, this will likely invalidate the consent provided.

If an individual is lawfully required to provide vaccination status information to a business, the information must not be used by the business for a purpose which extends beyond the lawful requirement, unless the individual has given consent for the use of the information for another purpose.

How should vaccination status information be stored?

Vaccination status information must be securely stored. The information should only be accessible to a limited number of people who need to know the information.

In addition to the requirements in the Privacy Act, the *Healthcare Identifiers Act 2010* (Cth) requires that businesses take reasonable steps to protect any 'healthcare identifiers' that the business holds from misuse, loss, or unauthorised access, modification or disclosure. An individual's full COVID-19 Digital Certificate contains the person's 'Individual Healthcare Identifier' and therefore this Act would apply. The Act includes civil and criminal penalties for the unauthorised use and disclosure of 'healthcare identifiers'.

What can an employer do if an employee refuses to provide information on their vaccination status?

Unless an exception applies under the Privacy Act (see above), genuine consent is required for an employer to collect an employee's vaccination status information. The business cannot pressure the employee to provide their consent.

If an employer is contemplating taking disciplinary action against an employee for refusing to comply with a direction to provide vaccination status information, 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 *Fair Work Act 2009 (FW Act)*.
- Would taking disciplinary action against the employee discriminate against the employee on the basis of some protected attribute (e.g. a disability in the form of a medical condition that prevents vaccination)? If so, this could breach anti-discrimination laws or the general protections in the FW Act.

How long should vaccination status information be retained for?

As mentioned above, Australian Privacy Principle 3 only permits a business to collect personal information that is reasonably necessary for its functions or activities. As soon as it is no longer necessary to collect and store the information, the information should be destroyed.

Where can I obtain more information about privacy requirements?

The Office of the Australian Information Commissioner publishes guidance for entities regulated by the Privacy Act. The Office 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