



MAPIEN

Mandatory COVID vaccinations in the workplace?

FREQUENTLY ASKED QUESTIONS



What employers need to consider



With government-imposed lockdowns & restrictions, wide reporting of COVID-19 cases & the national push for vaccination, can employers mandate COVID-19 vaccinations in the workplace?

Q&A's:

Our clients are insisting only vaccinated employees attend their sites. How do we manage this?

This is still an emerging issue and care needs to be taken around possible discriminatory attributes. If the client is in an industry where mandatory vaccination is in place due to Government direction or Public Health Order, then this may be a lawful and reasonable requirement of the client to pass onto companies who work with their organisation and whose staff visit their sites.

If it is a requirement of an employee's role to be able to access the sites of clients, then careful consideration will need to be given to how this can be addressed based on the specific circumstances that apply.

Alternative options may need to be discussed in the first instance with any employees who are exempt or opposed to being vaccinated, and this requirement has been put in place. Options may include the employees wearing appropriate PPE such as a mask, physical distancing, performing other duties or taking a period of paid or unpaid leave if they can't undertake their role.

As per Dan Andrews' Road Map for Victoria, employees can only return to work if fully vaccinated. Therefore, no employer can have an unvaccinated (or exempt) employee at the workplace? Work from home if you can OR, go to work if you are fully vaccinated, or DQ2 for areas non-accessible to public?

Yes, that is correct employers and employees need to comply with any Public Health Orders or Government Directions that apply to them. There are, however, limited exemptions that employers will need to genuinely consider.



Under employment law, an employer can rely on a Public Health Order that requires their employees to be vaccinated to provide the employees a lawful and reasonable direction to get vaccinated or not to attend work unless they are vaccinated.

What is the obligation on landlords, making it a mandatory requirement that shop assistants in a shopping centre be vaccinated? Would it be better for that requirement to be left to the individual tenant/employer?

It depends on the scope of any Public Health Order or Government Directions in place but generally the obligation is on the individual tenant/employer. Further consideration would need to be given to the particular circumstances to provide more comprehensive advice.

As the hospitality industry opens up, employees who are a close contact of a COVID case are forced into self-isolation. Therefore, we are encouraging all our staff to get vaccinated so they minimise their risk of catching COVID, but also so they can return to work. However, in Sydney from 1st December the unvaccinated can enter hospitality venues which will increase the risk. As we continue to recruit new staff is it reasonable and lawful to only employ vaccinated staff?

An employer may be able to require that a prospective employee be vaccinated against COVID-19. Before making this a requirement employers should carefully consider their obligations and responsibilities under general protections and anti-discrimination laws.

Anti-discrimination laws generally prohibit discrimination against employees, or prospective employees, based on protected attributes, such as disability or pregnancy.

What are the legal and privacy obligations for requesting and storing employee vaccine status and information?

An employer may ask to view evidence of an employee's vaccination status without raising privacy obligations, provided they do not collect- that is make a record or keep a copy of- this information. An employer should not collect vaccination status information from an employee unless the employee consents and the collection is reasonably necessary for the employer's functions and activities.

However, consent for collection of this information is not required if the collection is mandated or authorised by law, for example a Public Health Order applies, or it is necessary for the employer to meet their obligations under Work Health and Safety laws.

There are also legal obligations and requirements governing the handling of personal information under the Australian Immunisation Register Act 2015 and the Privacy Act 1988 which need to be complied with.

What is the legal status of a Public Health Order? Can it be legally challenged?

This is still an emerging issue given current litigation currently underway. Current case law has found no legal basis for challenging public health orders. A very recent test case is *Kassam v Hazzard*; *Henry v Hazzard* before the NSW Supreme Court where the plaintiffs sought a judgement to invalidate public health orders for certain industries, such as healthcare, aged care, and construction. On Friday 15 October, the court delivered its judgement dismissing the cases.



Would you have some recommended training or resources for Managers who have to talk to employees about (government imposed) mandatory vaccination?

For managers speaking to employees about a Public Health Order that requires mandatory vaccination versus it being an open discussion about vaccination in the workplace, two areas of advice relate to:

- Information sharing to help employees remain informed.
- Discussions that can become more emotional due to the impact someone experiences from the requirement for, or consideration of, vaccination.

For information sharing, it's helpful for organisations to have "talking points" that summarise the intent (why), impact (how), and action required (what), with helpful "questions and answers" and who to call for additional questions.

For specific information, the federal government as a providing credible and updated information that can assist with information sharing, for example:

- <https://business.gov.au/risk-management/emergency-management/coronavirus-information-and-support-for-business/covid-19-vaccinations-and-your-business>
- <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces>

In relation to assisting managers who encounter more emotional reactions, some general advice to share is:

- **Regularly check-in:** Although COVID-19 and vaccinations can elicit emotions for team members, avoiding the topic can increase the likelihood of emotional reactions. By having "COVID update" as a recurring "business update and questions" topic when a team comes together it creates the expectation to discuss the topic and help identify any team members who may benefit from a follow-up discussion to help them through their personal thinking and experience.
- **Empathy first:** Everyone's experience is personal, and emotions arising within a team can range from helpless, disappointment, anxiety, frustration, and anger plus many more. Most can be driven by a place of fear. It is not a manager's role to be a counsellor or explore private matters underpinning stronger emotions, though the encouragement is a *coaching with empathy* approach to guide non-judgemental discussions that aligns well with:
 - Recognise the item is sensitive or uncomfortable
 - Explore the emotion or sentiment by picking a comfortable place and way to bring up a reaction that was noticed
 - Ask non-judgemental questions to understand the behaviour that was experienced in the workplace (e.g., when you said...what did you mean? when you said...or did...I wanted to circle back to check if you were ok.)
 - Listen for the emotion and perspective without judgement as this will reduce the level of emotion expressed which creates a window to re-visit the information discussed, what it means and where to from here.
- **Managers may need a chance to check-in:** such that often the reactions, questions, and concerns are experienced first-hand by managers or supervisors who will manage it on the spot and uncertain as to whether they did the right thing or what to do next. Again, as managers are team members too, having the space in their meetings to reach out to their managers or HR to chat will keep the conversations constructive, helpful, and with positive intent arising.



- ***Have a clear set of culture-driven principles behind your COVID policy:*** with so much continuous change and adjustment, having a set of principles that connect your culture with how an organisation responds to COVID-19 helps managers have a guide to work with when there is high uncertainty and can speed up the preparation of new information or rolling out of change.

For example, if a principle is “function over form” to align with an organisational value of excellence, this gives permission to share information more swiftly verbally and briefly to help team members push forward for their clients, rather than holding back information until it is perfect. This is also helpful to make it easy to acknowledge if some information shared was still being reviewed but what is known is being shared to help people get a sense of where we are at.

Is it reasonable, legally, to include in contracts (construction for example) as the principal a requirement for all contractor employees to be vaccinated to be able to attend site - or is this just passing the problem onto the contractors? Particularly interesting since construction is so vax hesitant and what potential IR/HR issues may arise in any case?

Careful consideration would need to be given as to whether this is lawful and reasonable in the circumstances, particularly in terms of Anti-Discrimination law obligations, and where the requirement is mandated not by the direct employer. This will depend primarily on whether there is a public health order or other Government direction in place for the construction industry that applies.

Has Mapien developed a specific COVID Policy, or does it sit within another policy?

Mapien has developed specific COVID Policies for clients and it is recommended that this is a separate policy. There is no off-the-shelf or template COVID Policy as the content needs to be tailored to the particular circumstances for each employer and depends on a number of factors such as workplace health and safety obligations, industry, location, and risks associated with the work.

Once all Public Health Orders are lifted, will this mandatory vaccination be a non-issue (e.g. similar to flu vax)?

This may depend on a number of factors, including the nature of the workplace and the type of work a particular employee performs. Currently, the requirement to be vaccinated against COVID-19 is not mandatory for all employees and this varies for different States and Territories. However, Public Health Orders and Directions and mandatory vaccination policies for some employers do make vaccination compulsory for certain employees and others in specific circumstances to be vaccinated.

Is there any understanding on the liability of an employer if an employee contracts COVID whilst working, despite safe work methods/PPE requirements in place? Particularly if employee chooses not to vaccinate.

An employee may be entitled to workers’ compensation if they contract COVID-19 out of or in the course of employment. In a recent case, a NSW Tribunal found that the widow of an employee who contracted COVID-19 and died whilst on a work trip in the USA was entitled to a lump sum benefit.



Irrespective of whether an employee is vaccinated or not, an employer must continue to implement all reasonably practicable control measures in the workplace to minimise the spread of COVID-19. This includes ensuring employees do not come to work when unwell, practising physical distancing, practising good hygiene, increasing cleaning and maintenance, and wearing masks where physical distancing is not possible.

What happens if we have employees who are unable to be vaccinated and we do not have a vaccine mandate. Could those people have a claim against the Directors for not protecting their health appropriately?

Employees may be entitled to workers' compensation if they contract COVID-19 out of or in the course of employment. In addition, if an employee contracts COVID-19 due to an employer's failure to provide a safe working environment, the employer may be liable for breaches of work health and safety laws.

This liability would only likely arise, for example, in circumstances where an employer disregards Public Health Orders or Directions. In the absence of a Public Health Order or Direction applying to the workplace, it is unlikely that an employer would breach work health and safety laws simply because it does not require employees to be vaccinated.

If we hire staff from a Labour Hire company, and that worker is not vaccinated, can we request indemnity from the Labour Hire company?

This will likely depend on the requirements of the workplace, the nature of the services provided by the contractor and the terms of the agreement between the employer and the Labour Hire company.

What do I do if employees who don't want to be vaccinated also tell me they have a mask exemption?

This will depend on the individual circumstances of the workplace and each employee. However, employers have a duty under the work health and safety laws to eliminate, or if that is not reasonably practicable, minimise, the risks of COVID-19 in the workplace so far as is reasonably practicable. To meet these duties, it will be important to consider all other reasonably practicable COVID-19 control measures. This may include, for example, requesting the employee wears a face shield as a substitute for a face mask or engages in physical distancing or work from home.

Without a mandatory approach, tensions between cohorts will inevitably increase and impact cultural cohesion. Does that represent a reasonable justification for instruction?

Making vaccination a condition of employment would need to be justified as a work health and safety control measure. Interpersonal grievances and tensions will not necessarily mean it is reasonably practicable for the business to require COVID-19 vaccination.

If workers compensation will apply in relation to COVID-19, does this not establish a significant precedent for any number of other conditions such as the flu etc?



Workers' compensation laws differ in each State and Territory. However, generally speaking, workers may be entitled to workers' compensation if they contract COVID-19 out of or in the course of employment. This is the case for all injuries or illnesses sustained out of or in the course of employment. However, 'injury' does not typically include minor and temporary side effects such as headache, fever, and fatigue, which are common side effects of the vaccine. Therefore, the extent of an employer's liability under workers' compensation laws will be case dependent.

Is it reasonable to ask an employee to sign a waiver/release against a claim on Company Directors, should a mandatory vaccination policy come in place?

Employees who suffer an illness or injury from an employer-mandated vaccination are likely to turn first to the No Fault COVID-19 Indemnity Scheme recently announced by the Australian Government. Legal advice would be needed based on the employer's particular circumstances as to whether such a waiver/release could be legally binding and is a reasonable request.

Given the nature of the Covid-19 situation where vaccinated and unvaccinated employees are both able to catch COVID-19, how would the FWC view the argument that both vaccinated and unvaccinated employees are equally exposed to catching and transmitting the virus in the workplace, yet the unvaccinated employee was stood down or terminated?

There is currently insufficient evidence about the impact of COVID-19 vaccines on transmission of the virus, as opposed to limiting the severity of COVID-19 on those who become infected with it. However, the circumstances in which an employer can require employees to be vaccinated are required to be reasonable and lawful.

If a specific law, such as a Public Health Order or Government Direction, requires an employee to be vaccinated, and the employee refuses to be vaccinated, the employer will be required to take all reasonable steps to ensure that the employee does not enter or remain on company premises. The employer will then need to determine how this will impact on the employee's ongoing employment. Consideration may need to be given, at least in part, to the reason that the employee has not been vaccinated.

Is there legal liability if an employee experiences an adverse reaction from a mandatory vaccination expectation?

Employers may face workers' compensation claims from employees who experience adverse side effects from the COVID-19 vaccine if the vaccine is taken at the employer's direction. This risk would only arise in circumstances where the vaccine is not otherwise mandatory, e.g., under a Public Health Order or Government Direction. Further, the adverse reaction must amount to an 'injury'. The risk of such claims may be mitigated if employers made exceptions for any employees with a medical contraindication against vaccination.

If an employee has provided medical contraindication evidence exempting them from being vaccinated, is the employer required to change the employee's duties?

In most circumstances, yes. In order to comply with work health and safety laws as well as anti-discrimination laws, the employer may have to make reasonable adjustments to an employee's role if they have provided



medical contraindication evidence indicating that they cannot be vaccinated against COVID-19. There are, however, a number of factors that would need to be taken into account when considering whether an adjustment is reasonable. An employer will not be required to make an adjustment to an employee's role if the costs or difficulties of making the adjustment would cause an unjustifiable hardship to the employer.

If you have staff who are under contract with place of work being Head Office, but have agreed to work on project site location as required and, who won't have the COVID vaccine, but are unable to work across the border without it, where does the organisation sit legally?

This will depend on a number of factors such as whether the employer has work available to those employees to perform at the Head Office or whether other reasonable arrangements could be put in place. Careful consideration will need to be given to the reason for why the employee is not vaccinated to ensure compliance with anti-discrimination laws.

If an employer mandates employees must get vaccinated with a provisionally approved and still under trial vaccine, before they can come to work and one employee has a serious adverse reaction, what is the employer's risk in terms of exposure to a no win no fee action for compensation brought on by the employee against their employer or a class action by a group of employees against their employers?

If an employee has an adverse reaction to a COVID-19 vaccination, they may be able to make a worker's compensation claim. The employee will need to prove they have suffered an injury, and that there is a sufficient connection between that injury and their employment. It's more likely that a claim will be covered if the employee was directed or encouraged to be vaccinated by their employer.

In addition, the Australian Government is developing a claims scheme to reimburse people who suffer a moderate to significant impact following an adverse reaction to an approved COVID-19 vaccine. Details of the scheme can be found here: <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccine-claims-scheme>

The scheme won't inhibit an employee from making a worker's compensation claim. However, it's likely that the scheme will provide a quicker and simpler way for employees to access compensation.

Is Mapien offering any workplace risk assessment service?

Mapien can provide practical guidance as to how to manage work health and safety risks through a risk assessment process. Key considerations to be taken into account will depend on the size and nature of the business.

Does an employer need to consult when implementing a workplace policy on vaccination?

Before implementing a new workplace policy or changing an existing policy about vaccinations, employer should consider their workplace and employee's circumstances and seek advice about their obligations.



Most workplaces are covered by either an award, enterprise agreement or another industrial instrument. All modern awards and enterprise agreements have a consultation clause requiring employers to consult with employees and any representatives when an employer intends to implement a significant workplace change. Some registered agreements, employment contracts or existing workplace policies may also require employers to consult.

Before introducing or changing a policy about vaccinations, employers should review any applicable award, agreement, employment contract or existing policy to find out:

- Whether they need to consult under that document (as well as under work health and safety laws);
- Who they need to consult with (including any unions or employee representatives);
- How they need to consult about the change (i.e., there a requirement for discussions, written correspondence etc).

Under work health and safety laws, employers also have to consult with employees and their health and safety representatives about possible control measures to address work health and safety risks. This includes consideration of a new policy or change to an existing policy for COVID-19 vaccinations.

Employers must also provide employees and their health and safety representatives a reasonable opportunity to express their views about the policy changes. Employers need to take these views into account when making a decision and advise employees and representatives of their decision.

Note:

The information contained in this FAQ document is general information only. It is not to be considered professional advice and no person should act, or refrain from acting, on the basis of the information provided. Appropriate professional advice should always be sought based on your particular circumstances.