

COVID VACCINATIONS AND THE WORKPLACE

Many employers are seeking clarity on whether they can require their employees to obtain the COVID-19 (coronavirus) vaccine

The answer currently is, it depends on the facts, taking into account the particular workplace and each employee's individual circumstances.

While the Australian Government aims to have as many Australians as possible vaccinated, receiving a vaccination is currently voluntary.

According to the Fair Work Ombudsman (FWO) relevant factors employers should consider when determining whether they may require their employees to be vaccinated against coronavirus include:

- whether a specific law exists (eg. a state or territory law or public health order) requiring an employee to be vaccinated;
- whether a registered agreement or employment contract includes an enforceable provision about requiring vaccinations;
- if no law, agreement or employment contract applies that requires vaccination, whether it would be lawful and reasonable for an employer to give their employees a direction to be vaccinated (assessed on a case-by-case basis);
- whether employees have a legitimate reason for not being vaccinated (eg. medical reason); and
- the application of protections for employees under anti-discrimination laws.

Laws requiring vaccination

At the time of writing this article, there are no laws or public health orders in Australia that specifically enable employers to require their employees to be vaccinated against coronavirus.



However, states and territories may make public health orders that require some workers to be vaccinated (eg. those considered to be working in high-risk workplaces). Employers and workers will be expected to comply with any public health orders that apply to them.

Agreements or contracts requiring vaccinations

Some agreements or contracts may contain terms relating to vaccinations especially. An employer may be able to enforce the term if it applies to the coronavirus vaccine and complies with anti-discrimination laws. If in doubt, employers should obtain legal advice.

Lawful and reasonable directions

Employers may direct their employees to be vaccinated if the direction is lawful and reasonable. To be lawful, the direction needs to comply with any applicable agreement, contract, award or law (eg. an anti-discrimination law).

Determining whether a direction is reasonable is more complex. A relevant factor includes whether the direction is a reasonably practical measure to eliminate or minimise risks to work health and safety (WHS) under WHS laws.

Employers have a duty under WHS laws to eliminate, or if that is not reasonably practicable, minimise the risk of exposure to coronavirus in the workplace.

According to Safe Work Australia, most employers will not need to make vaccination mandatory to comply with WHS laws.

However, employers should do all that is reasonably practical to minimise the risk of coronavirus and vaccinations as a coronavirus control measure should be considered in the context of a range of control measures including but not limited to physical distancing, good hygiene and regular cleaning.

A direction may be more likely to be reasonable where an employee interacts with people with a high risk of infection or has close contact with people who are vulnerable to the impact so infection (eg. employees in health or aged care).

Anti-discrimination laws

Anti-discrimination laws generally prohibit discrimination against employees based on a protected characteristic.

Relevantly, this may include a disability, pregnancy, or religious belief. Employers should obtain legal advice before requiring employees to



be vaccinated and consider federal and state or territory discrimination laws as well as the general protections provisions under the Fair Work Act.

Employee refuses to be vaccinated

An employer may be able to take disciplinary action against an employee for refusing to be vaccinated if the refusal is in breach of a specific law, an enforceable obligation under an agreement or contract, or a reasonable and lawful direction by the employer.

However, if an employee refuses to be vaccinated, the employer should first seek to understand why the employee is refusing and whether the employee has a legitimate reason (eg. medical condition). If there is a legitimate reason, the parties should consider other options to keep the workplace safe instead of vaccination (ie. alternative working arrangements).

Whether disciplinary action can be taken highly depends on the circumstances and we strongly recommend employers obtain legal advice before taking any action.

Please note: This article contains high-level information on the rights and obligations of employers. However, this information is subject to change if new laws or public health orders are made. Employers are encouraged to obtain legal advice about their individual circumstances.

AAAA Member Benefits

Employer Assist can provide advice to members on employment law matters.

If you require assistance, we encourage you to contact Employer Assist on 1300 735 306 or at aaaa@employerassist.com.au