

Fact sheet for transport industry

Mandatory workplace COVID-19 vaccination

Employers have duties under workplace health and safety (WHS) legislation to ensure, so far as reasonably practicable, the health and safety of their workers. Employers are also entitled to take steps to protect their business operations.

For these reasons, in a variety of circumstances, it will be lawful and reasonable for employers in the transport industry to require part or all of their workforce to be vaccinated against COVID-19.

Employees must comply with an employer's direction to be vaccinated against COVID-19 if it is lawful and reasonable. This is because of the employee's duty under WHS legislation to comply with an employer's directions about safety matters and their WHS duties to take reasonable care for their own safety and others' safety in the workplace. It is also because employees have a duty under their contract of employment (written or unwritten) to comply with their employer's lawful and reasonable directions.

Which employees can a transport industry employer direct to be vaccinated?

Generally, if employees are interacting with others in the course of their duties, whether other employees, contractors, and/or the general public, it is more likely that their employer can require them to get a COVID-19 vaccination. This may include drivers, warehouse workers, forklift operators and office staff. However, specific legal advice should be obtained by every business.

The Fair Work Ombudsman has released a guide with four tiers of employees who may/may not be given a lawful and reasonable direction to receive the COVID-19 vaccine. These tiers should be used as a guide only and you should seek specific legal advice about your business' circumstances. The four tiers are as follows:

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). It is reasonable to give such employees a direction to be vaccinated.

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). It is reasonable to give such employees a direction to be vaccinated.

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. It is more likely to be reasonable to give such employees a direction to be vaccinated but legal advice should be sought before giving the direction.

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). It is unlikely to be reasonable to give such employees a direction to be vaccinated.

It seems likely that transport industry workers would fall into Tier 3.

How to put in place a mandatory workplace vaccination policy

1. Have a vaccination policy in place (drafted by employment lawyers) which should:

- set out the employees to whom it applies and what is required of them
- state the dates by which employees must get their first and second vaccine doses (do not recommend any specific vaccine, this is unlawful)
- outline a process for dealing with legitimate exemptions, for example on legitimate medical or religious grounds, and
- explain why it is a lawful and reasonable direction and specify the consequences (termination) if an employee does not comply with the policy.

2. Consult with employees

- employers must consult about implementing the policy after making a decision to put it in place (although consultation does not mean employees must agree), and
- consultation obligations arise under enterprise agreements, awards and WHS legislation (which contains a duty for employers to consult with their workers when making decisions about workplace safety).

3. Privacy and dealing with vaccination information

- employers are entitled to require employees to provide information about whether they are vaccinated or not ('vaccination status') if they are putting in place a mandatory vaccination policy

- employers must still comply with privacy laws in relation to the collection, use, storage and disclosure of vaccination status information, like any employee information, and
- employers should ensure they have a proper (ideally electronic registers) system for collecting, storing and dealing with vaccination status information, so they can know who is vaccinated and can prove it if necessary. Such systems are commercially available but should only be obtained from reputable providers.

4. Employees who decline to be vaccinated

- assess exemptions to the vaccination
- do not make judgements about medical exemptions without asking for the opinion of an independent medical practitioner appointed by the employer
- seek legal advice, and
- take fair and reasonable disciplinary action if the employee cannot prove a valid exemption (a 'show cause' is process critical) – see below.

5. Employees who decline to provide information about vaccination status

- give them a warning and final opportunity to comply
- seek legal advice, and
- if they still fail to comply, proceed with a 'show cause' process (see below).

What happens if employees don't comply?

Employees who fail to comply with a lawful and reasonable direction can be subject to disciplinary action, including dismissal. You should seek legal advice from an employment lawyer before going down this path.

Like any dismissal, an employer must give an employee a fair and reasonable opportunity to respond to allegations ('show cause') before a decision is made to dismiss them. The employer must consider those responses and take them into account in reaching their decision about dismissal. Further, an employee should have a support person at any meeting where dismissal may be discussed.

Because mandatory vaccination is a new issue and confusing to many employees, an employer may wish to give an employee a written warning and a final opportunity to be vaccinated, before going to a 'show cause' process. The warning should tell the employee they may be dismissed if they do not comply.

What about masks?

In some States and Territories, public health orders mandate wearing of masks in the workplace, whether that be indoors or outdoors. There are some exceptions to these rules (for example, a driver alone in a cab *may* not need to wear a mask). If the rules apply to your workplace then you must direct workers to wear masks strictly in accordance with the rules. Employees must comply and can be disciplined (again, using a 'show cause' process) if they do not.

However, even if government rules do not require wearing of masks, transport industry employers may need to require wearing of masks in the workplace in order to meet their WHS duties. This is because it is a reasonably practicable step to reduce the risk of COVID transmission. Again, employees who fail to comply can be disciplined. Seek legal advice if you're unsure about your obligations regarding masks in the workplace and certainly before taking disciplinary action.

Getting rid of some myths

There are lots of baseless arguments floating around on the internet about mandatory workplace vaccinations. We cannot deal with them all here.

Imposing a mandatory vaccination policy is not 'forcing' employees to be vaccinated. Nobody can force another person to get a vaccine. However, an employer which gives a **lawful and reasonable direction** for employees to be vaccinated can expect its employees to comply. In other words, 'no jab, no job'.

Employers are not breaching any laws by requiring employees to be vaccinated.

Privacy laws do not prevent an employer from requiring employees to tell the employer if they have been vaccinated. If you impose a mandatory vaccination policy, it is lawful to require employees to tell you if they have been vaccinated.

It is not unlawful discrimination to dismiss an employee for refusing to be vaccinated. However, if an exemption applies, an employer must comply with discrimination legislation and should seek legal advice.

Employers should not be worried about being liable if employees suffer an adverse reaction to the vaccine. The Commonwealth government has established a claims scheme to reimburse people who suffer a moderate to significant impact following an adverse reaction to an approved COVID-19 vaccine:

<https://www.health.gov.au/initiatives-and-programs/covid-19-vaccine-claims-scheme>

Otherwise, workers compensation would likely apply in any event. Employees do not have a proper basis to sue employers if they suffer an adverse reaction to a vaccine.

Assistance

The information provided in this fact sheet is general in nature only and does not constitute legal advice. It is recommended that employers obtain legal advice from an employment lawyer before imposing mandatory vaccination requirements and/or taking disciplinary action against any employees.

If you need assistance in this area, please contact Joel Zyngier of Gilchrist Connell. Gilchrist Connell can also refer you to providers of systems for collating and storing employee vaccination status information.



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