



MANDATORY COVID-19 VACCINATION POLICIES

On 6 August 2021, all Australian States and Territories agreed to a [four-step National Plan](#) to open up the economy and the broader community, and to live with COVID-19 for the foreseeable future. The final stage will be reached when 80% of adults aged 16 and over are fully vaccinated. Based on current data, it is likely that Australia will reach the 80% target before the end of the year.

When restrictions are eased and COVID-19 is still circulating in the community, although at a socially acceptable level, most workplaces will be vulnerable to infection.

Many employers are asking us whether they can mandate the COVID-19 vaccination for their workers. This is a very difficult policy question.

An employer can require an employee to be vaccinated against COVID-19 if:

1. The employer is required to do so under a specific law (e.g. a public health direction);
2. There is a term in the employment contract or enterprise agreement requiring the employee to have the vaccination; or
3. It would be lawful and reasonable to give the employee a direction to be vaccinated, which is assessed on a case-by-case basis.

WA Government Public Health Directions

The WA government has already issued public health directions mandating the COVID-19 vaccination for hotel quarantine workers, aged care and health care staff, “mission critical” police and mining workers, truckies and port workers.

In preparing WA safely for the inevitable community transmission, Premier Mark McGowan has now introduced a [phased mandatory vaccination policy](#) for a majority of occupations and workforces in WA. Under the new rules, “High-risk” industries will need to be fully vaccinated by 31 December 2021. “Critical workers” will need to be fully vaccinated by 31 January 2022. The final group must be fully vaccinated to attend work in the event of a lockdown or similar restrictions. These new rules will apply to 75% of WA’s workforce. Similar mandates are or have been implemented across all other Australian jurisdictions.

Employees to whom the new rules apply, will be required to provide their employer with evidence that they are fully vaccinated (through a COVID-19 digital certificate, immunisation history statement or international COVID-19 vaccination certificate).

Employers will face a \$100,000.00 fine if they are found to have employees who are not vaccinated by the relevant deadlines. Individual employees will face \$20,000.00 fines.

What is Lawful and Reasonable Direction

All employees are under an obligation to observe the lawful, reasonable directions of their employer. In the absence of an express contractual term or public health direction, an employer can mandate the COVID-19 vaccination if it would be *lawful and reasonable* to give employees a direction to be vaccinated, which is assessed on a case-by-case basis.

It is well-established law in Australia that for a direction to be lawful, it must be consistent with any employment contract, award or industrial agreement and not fall foul of the law.

Whether a direction is “reasonable” will depend on the facts. The Fair Work Ombudsman (“FWO”) has emphasised that the pandemic does not automatically make it reasonable for employers to direct employees to receive COVID-19 vaccinations.

In determining whether a direction to be vaccinated is reasonable, the following factors need to be considered:

1. The nature of the employee’s role and the work being performed:

- (a) The extent to which the employee’s job involves contact with vulnerable people who have an “elevated risk” of serious illness from COVID-19.
- (b) The extent to which the employee interacts with people with an elevated risk of being infected with COVID-19 (e.g. medical professionals, flight crew, border control or hotel quarantine).
- (c) The extent to which the employee works in a public facing role such as with customers or clients.
- (d) The extent to which the employee can perform the inherent requirements of their job without being vaccinated (i.e. is there a public health order requiring the employee to be vaccinated to perform the job).

Level 2, 111 Wellington Street, East Perth WA 6004 • PO Box 6314, East Perth WA 6892

T: +61 8 9388 3100 • F: +61 8 9388 3105 • E: reception@murfett.com.au

ABN 74 120 362 825 • W: www.murfett.com.au

© Murfett Legal 2021 All rights reserved



2. The employee's working environment/industry:

- (a) Whether requiring a COVID-19 vaccination would be a “reasonably practicable” control measure for the workplace, including the degree to which the risk of COVID-19 exposure or transmission can be mitigated by other control measures.
- (b) The ability to rely on other control measures e.g. social distancing, regular COVID-19 testing, effective contact tracing, the provision of PPE and sanitisation.
- (c) The disruptive impact on any COVID-19 infection in the workplace on the operations of the employer (i.e. if the workplace is likely to be a more attractive place for customers to visit if its workforce is fully vaccinated, or less prone to interruptions or forced shutdowns, it is legitimate to take this consideration into account).

3. The public health environment:

- (a) Whether a public health order applies regarding the employees to be vaccinated.
- (b) Whether the employee has access to the vaccine (e.g. are currently entitled to be vaccinated);
- (c) The extent to which the vaccine prevents or reduces the risk of transmission of COVID-19.
- (d) The level of community transmission of COVID-19 occurring in the location where the employee's job is performed, including the risk of transmission of the Delta variant among employees, customers or other members of the community.

The FWO has adopted a tiered approach when undertaking this case-by-case assessment, based on the exposure risk of an employee:

- **Tier 1 Work:** where employees are required as part of their duties to interact with people with an increased risk of being infected with COVID-19 (e.g. 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 COVID-19 (e.g. 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 (e.g. stores providing essential goods and services).

- **Tier 4 Work:** where employees have minimal face-to-face interaction as part of their normal employment duties (e.g. where they are working from home).

The FWO's position is that 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 COVID-19, or giving COVID-19 to a person who is particularly vulnerable to the health impacts of COVID-19.

An employer's direction to employees performing Tier 4 work is unlikely to be reasonable, given the limited risk of transmission of COVID-19.

For employees performing Tier 3 work, where no community transmission of COVID-19 has occurred for some time in the area where the employer is located, a direction 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.

What if an Employee Refuses to be Vaccinated?

Employers are generally on solid legal ground in suspending or dismissing workers who refuse lawful and reasonable directions to be vaccinated to perform their jobs.

Whilst a failure to follow a lawful and reasonable direction to be vaccinated is likely to constitute a "valid reason" for termination, employers are still required to ensure that any disciplinary action is handled in a procedurally fair way.

Employers should first ask an employee who refuses to be vaccinated, to explain the reasons for their refusal. If the employee has a legitimate reason for declining the vaccination (e.g. those with medical or other contraindications) they should be asked to provide appropriate medical evidence. A medical practitioner must have treated the worker at some point for the allergy or condition in question or reviewed medical records that indicate the presence of the allergy or condition. A doctor's letter merely stating that the worker reports to have a certain condition is unlikely to be adequate to qualify for a medical exemption to a mandatory vaccination policy.

Where a worker establishes that they have a legitimate reason for refusing the vaccine, employers must make reasonable adjustments for the worker, unless it would impose an unjustifiable hardship on them. Employers should consider whether:

- having an unvaccinated worker can be accommodated, given that the majority of employees will be vaccinated;
- other measures can be adopted in conjunction with the employee being unvaccinated (e.g. a periodic testing regime); and
- it is possible to seek alternative duties for that person (e.g. working from home).

Where the requirement to be vaccinated is as a result of a public health direction or a term in the employment contract or enterprise agreement, an employer may terminate an employee who refuses to be vaccinated, on the basis that they are unable to perform the inherent requirements of their role. Before doing so, employers must still consider whether any reasonable adjustments can be made to accommodate the worker (e.g. work from home).

Employers should assess any non-compliance with their mandatory vaccination policy (if one is implemented) on a case-by-case basis and seek appropriate legal advice, to mitigate the risks of employee claims of discrimination, unfair dismissal or unlawful adverse action.

How we can assist

Employers that are considering implementing a COVID-19 vaccination policy must be aware of their obligations in relation to consultation with employees and the requirements under State and Federal anti-discrimination legislation and the Privacy Act 1988 (Cth). Employers will also need to consider their potential liability under workers' compensation legislation if an adverse reaction to a COVID-19 vaccination is a compensable workers' compensation claim. We can assist employers to navigate these obligations and can also help employees by clarifying their rights and obligations in relation to mandatory vaccinations.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

Author: [Janine Speirs](#) (Senior Associate: Employment & Workplace Relations)

Email: janine.speirs@murfett.com.au

Murfett Legal is a leading law firm in WA, providing services in litigation, corporate and commercial, employment and workplace relations, insolvency, debt collection, business restructuring, Wills & estates, property, leasing, settlements, liquor licensing and intellectual property.