



COVID-19 Vaccination Guide

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With the COVID-19 outbreak in New South Wales and Victoria worsening, and other States going into snap lockdowns to manage the spread of the Delta variant, businesses are increasingly asking about their rights and responsibilities when it comes to encouraging or ensuring that their workers are vaccinated.

ABLA's team of workplace experts have combined to provide a COVID-19 Vaccination Guide that will assist in navigating a number of grey areas.

Please bear in mind that the advice contained in this Guide is necessarily of a general nature and cannot be considered as legal advice for your business' individual circumstances. For tailored legal advice, please contact our team directly on the details found on the back page.

This Guide is set out in five parts:

1. What we *know* about coronavirus and COVID-19
2. What we *know* about vaccination
3. Employer rights and responsibilities with respect to ensuring employees are vaccinated
4. How can I lawfully collect information about employee vaccination status?
5. What happens when an employee who is not vaccinated cannot work by reason of Public Health Orders?

PART I: What we know about coronavirus and the COVID-19 disease

Terminology

At the outset, it's important to understand the terminology:

SARS-CoV-2 is a highly transmissible coronavirus. It belongs to a family of flu-like viruses.

SARS-CoV-2 has now mutated into several variants, the most common of which include the B.1.1.7 (Alpha), B.1.351 (Beta) and B.1.617.2 (Delta) variants.¹

The Delta variant is currently circulating in many states and territories and has higher transmissibility than the original coronavirus:²

- It is 100% more transmissible than the original virus
- It is 40-60% more transmissible than the Alpha variant

COVID-19 is the disease humans may suffer when they are infected with SARS-CoV-2 (coronavirus).

What we know about the virus

Highly infectious

The virus is highly infectious. It can transmit through:³

- respiratory droplets that can pass onto another person's nose and mouth
- droplets that are exchanged on hands, body parts and other surfaces
- fine airborne respiratory droplets.

The virus can circulate in silence. That is, it has been carried by a significant number of asymptomatic carriers. The United States Centre for Disease Control estimates that approximately 30% of persons infected with the virus are asymptomatic.⁴

¹ <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html>

² <https://asm.org/Articles/2021/July/How-Dangerous-is-the-Delta-Variant-B-1-617-2>

³ <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

Very dangerous

The virus is also very dangerous.

COVID-19 has high mortality rates for confirmed cases, with (by way of example):

- a 1.7% mortality rate in USA⁵
- a 2.1% mortality rate in the UK⁶
- a 2.7% mortality rate in Australia⁷

It can also give rise to other serious conditions such as organ failure.⁸

There is an emerging understanding that COVID-19 can expose sufferers to long term effects. This has been described as suffering 'long COVID' and can involve the following symptoms over many months:⁹

difficulty breathing or shortness of breath, tiredness or fatigue, symptoms that get worse after physical or mental activities, difficulty thinking or concentrating (sometimes referred to as "brain fog"), cough, chest or stomach pain, headache, fast-beating or pounding heart (also known as heart palpitations), joint or muscle pain, pins-and-needles feeling, diarrhea.

⁵ <https://coronavirus.jhu.edu/data/mortality>

⁶ <https://coronavirus.jhu.edu/data/mortality>

⁷ <https://www.abs.gov.au/articles/covid-19-mortality-0>

⁸ <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>

PART 2: What we know about vaccines

Vaccines highly effective at preventing serious illness and hospitalisation

Vaccines are highly effective in preventing someone with SARS-CoV-2 and early variants developing COVID-19 and significant illness arising from COVID-19:

- The Pfizer vaccine is:¹⁰
 - 91% effective in preventing symptomatic disease of COVID-19
 - 100% effective in preventing hospitalisation
- The Astra Zeneca vaccine is:¹¹
 - 82% effective in preventing symptomatic disease of COVID-19
 - 100% effective in preventing hospitalisation

Delta variant

Both vaccines are less effective against the Delta variant of coronavirus, but are still effective:¹²

- Pfizer is 93.7% effective against developing COVID-19
- Astra Zeneca is 67% effective against developing COVID-19

Early, emerging data suggests both vaccines are highly effective against hospitalisation (approximately 90% effective).¹³

Do the vaccines reduce transmission of SARS-CoV-2?

Whether the vaccines reduce transmission of SARS-CoV-2 by vaccinated employees is presently the subject of ongoing conjecture.

A Public Health England study of over 500,000 households released in June 2021 found that vaccinated persons who tested positive for COVID-19 were 40%-50% less likely to infect household members with SARS-CoV-2 compared to unvaccinated persons.¹⁴

The size of this study is considerable. However, this study pre-dated the arrival of the Delta variant in the UK.

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Pfizer-BioNTech.html><https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-confirm-high-efficacy-and-no-serious>

¹¹ <https://www.astrazeneca.com/media-centre/press-releases/2021/covid-19-vaccine-astrazeneca-confirms-protection-against-severe-disease-hospitalisation-and-death-in-the-primary-analysis-of-phase-iii-trials.html>; <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/learn-about-covid-19-vaccines/about-the-astrazeneca-covid-19-vaccine>

¹² <https://www.nejm.org/doi/full/10.1056/NEJMoa2108891>

¹³ <https://www.astrazeneca.com/media-centre/press-releases/2021/vaxzevria-is-highly-effective-after-one-dose-against-severe-disease-or-hospitalisation-caused-by-beta-and-delta-variants-of-concern.html>; <https://www.gov.uk/government/news/vaccines-highly-effective-against-hospitalisation-from-delta-variant>

¹⁴ <https://khub.net/documents/135939561/390853656/Impact+of+vaccination+on+household+transmission+of+SARS-COV-2+in+England.pdf/35bf4bb1-6ade-d3eb-a39e-9c9b25a8122a?t=1619601878136>

There are emerging reports coming from highly vaccinated countries such as Israel that suggest vaccinated persons are being infected by the SARS-CoV-2 Delta variant and transmitting the SARS-CoV-2 virus, notwithstanding their vaccination status.

Unfortunately, reliable studies on transmissibility of the Delta variant amongst vaccinated persons are not presently available.

The much publicised 'Doherty Report' which has been released by the Australian Government to model Australia's transition out of lockdowns has provided modelling assuming that vaccination will reduce the transmission of the Delta variant by approximately 65%.¹⁵ Unfortunately, the modelling does not reveal the studies or data upon which these assumptions have been made.

Equally, the Australian Technical Advisory Group on Immunisation has stated that:

*"[i]n addition to strict public health measures, providing a first dose of COVID-19 vaccine will contribute to interrupting transmission in affected areas. Evidence suggests that a first dose reduces symptomatic infection and transmissibility, with the protective effect starting 2-3 weeks after vaccination"*¹⁶

At a conceptual level, most commentators assume that vaccination will reduce transmission of the SARS-CoV-2 virus to some extent and this is a point that has repeatedly been made by State and Commonwealth Governments.

However, the truth is, at this stage at least, we just don't know how much of an impact vaccination will have on transmission.

¹⁵ <https://www.health.gov.au/resources/publications/doherty-institute-modelling-report-to-advise-on-the-national-plan-to-transition-australia-national-covid-response>

¹⁶ See: <https://www.health.gov.au/news/atagi-statement-regarding-covid-19-vaccines-in-the-setting-of-transmission-of-the-delta-variant-of-concern> (accessed on 16 August 2021).

PART 3 - Employer rights and responsibilities regarding encouraging or ensuring vaccination

Q: Can I require my employees to be vaccinated against COVID-19 in order to work?

A: The starting point for answering this question is to assess an employee's contract of employment.

For new employees or new contracts, employers could require vaccination as a pre-condition of employment, thereby mandating vaccination.

This will then serve to lawfully compel vaccination in order for employees to work.

There may be some limited instances where employees can legitimately refuse to be vaccinated pursuant to anti-discrimination laws (discussed further below), however, broadly speaking, once the obligation to become vaccinated is expressly recorded in a contract, this obliges the employee to become vaccinated.

Q: What if my contract of employment is silent on this matter?

A: Absent a Public Health Order or express contractual right obliging employees to become vaccinated, vaccination can be made a pre-condition of working where the requirement to be vaccinated against COVID-19 amounts to a "lawful and reasonable direction".

Employers have the right to issue "lawful and reasonable" directions to their employees, and employees are under an obligation to comply with such directions.

What is considered lawful and reasonable will typically require an examination of the relevant factual circumstances. It will be very context specific. What may be considered a lawful and reasonable direction in one case may not necessarily be considered a lawful and reasonable direction in another set of circumstances.

A recent Fair Work Commission (**Commission**) decision addressed the introduction of mandatory flu vaccinations by Goodstart Early Learning (**Goodstart**). Goodstart was involved in the provision of childcare services. In determining whether a mandatory influenza vaccination policy (which contained an exemption for mandatory vaccination on medical grounds) was reasonable, the Commission considered a range of relevant factual matters including:

1. government recommendations
2. the need to ensure safety and welfare of employees and those using the employer's services
3. the use of other control methods (which were found to be difficult to implement given the age and lack of maturity of children in care – hence the importance of employee vaccination as a control measure)

4. whether the vaccination policy was reasonably and appropriately adapted (taking into account the fact that there were medical exemptions permitted)
5. consultation and
6. the logistics of implementation (including the time provided to achieve compliance or raise an objection).

In finding that Goodstart's requirement for mandatory vaccination was reasonable, the Commission stated as follows:

Goodstart operates within a highly regulated environment, which creates statutory obligations beyond that of a normal employer; safety and quality care are of paramount importance and this is the environment in which Goodstart's policy must be scrutinised. The childcare industry faces unique organisational challenges which make other controls less effective, or impracticable. I am satisfied that it is reasonable for a childcare provider to mandate flu vaccination for those staff who deal with children on such a regular basis, and in such close proximity. While the policy requires mandatory vaccination, it does allow for medical exemptions and Goodstart covered the expenses associated with the policy and provided extended timeframes for Ms Barber to gain compliance. I am satisfied that 'a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy.' [346]

Having regard to the above and existing case law on lawful and reasonable directions, the types of factors that will determine whether an obligation to become vaccinated is lawful and reasonable include:

1. The nature of the workplace concerned, taking into consideration the extent to which employees need to work in public facing roles or otherwise have contact with the public.
2. Whether social distancing is practically possible in the working environment (amongst both employees and customers/clients).
3. The availability of other controls and their effectiveness, including:
 - (a) masks
 - (b) regular sanitisation
 - (c) regular COVID-19 testing (including rapid or non-rapid testing) and
 - (d) employer implemented contact tracing.
4. The extent to which the workplace serves vulnerable persons (including the elderly or persons with a disability).
5. The extent of community transmission of COVID-19 in the location where the direction is to be given, including the risk of transmission of the Delta variant among employees, customers or other members of the community.

6. Vaccine availability.
7. The extent to which vaccination can improve confidence or engagement with customers. By way of example, for airlines, having vaccinated workers may be seen as a key trigger to generate the confidence necessary to have passengers return to planes. The same might apply for some hospitality venues.

Naturally, there is no one-size-fits-all answer to whether a business can mandate vaccination and we urge employers to seek advice on their specific circumstances.

Having said that, as a general proposition:

- employers with high levels of interaction with the public in close proximity (eg. hospitality venues, some health care providers and passenger transport services)
- employers servicing vulnerable persons (eg. aged care, disability care and child care - where the children cannot themselves be vaccinated) and
- employers with limited ability to implement other risk minimisation controls,

are more likely than not to be able to introduce mandatory vaccinations.

Q: What is the recommended approach if requiring vaccination?

A: For employers considering making vaccinations mandatory, we recommend employers immediately do the following with respect to the existing cohort of employees:

1. **Conduct an assessment** of the workplace to determine the risk factors present and whether, taking into consideration all of the relevant circumstances of the workplace, the work performed and the risk factors present, mandatory vaccination will be a reasonable measure to introduce to better manage risk.
2. If the employer determines that mandatory vaccination is **unlikely to be lawful and reasonable given the** circumstances of the employer's business, the employer should consider what other measures could reasonably be implemented to manage risk, including measures such as:
 - (a) encouraging high rates of voluntary vaccination by way of incentives or special paid leave to attend vaccination appointments
 - (b) regular surveillance testing (discussed below)
 - (c) additional PPE and social distancing measures at work and
 - (d) working from home with alternate roster systems to ensure fewer people are at the workplace at any given time.

3. If it is **likely that mandatory vaccination will be a lawful and reasonable direction** to give to staff then the employer should:
- (a) Prepare a draft vaccination policy which at the very least will need to cover the following issues:
 - i the safety reasons/rationale for this approach
 - ii which departments or roles within the business are required to be staffed with employees who have been vaccinated
 - iii the timeframe for these employees to receive their first dose and thereafter be fully vaccinated
 - iv whether vaccination appointments will be allowed/accommodated during work time (recommended for mandatory vaccination)
 - v what type of evidence/proof of vaccination will be acceptable to the employer
 - vi any exemptions that may be applied to the requirement, what will be considered a legitimate reason for not being vaccinated, and how the employer will expect the employee to prove this
 - vii ongoing vaccination measures required such as regular booster shots, when these will be due, and evidence required and
 - viii the consequences for failing to comply with the policy.
 - (b) Engage in an extensive period of consultation with employees about the draft vaccination policy allowing employees to have an input and providing employees the opportunity to raise any concerns and have these concerns genuinely addressed by the employer.

Employers should also be aware there is a risk that allegations of discrimination may arise if an employee is terminated for failing to be vaccinated, when their reasons for not being vaccinated stem from protected attributes, including a serious medical condition (disability) or religious reasons. This is addressed separately below.

Q: Do some employees have the ability to refuse vaccination?

A: Under Australia's discrimination laws, it is unlawful to treat a person less favourably on the basis of protected attributes, including gender, race, disability or age.

Mandating vaccinations will not result in "direct discrimination" as an employee's decision to refuse vaccination is not an attribute protected by any Australian discrimination laws.

However, "indirect discrimination" is also prohibited by discrimination laws.

This is where there is a rule or policy that is the same for everyone but has an unfair effect on a group of people who share a particular protected attribute.

Whether indirect discrimination will be unlawful in the context of mandatory vaccinations will depend on:

- Whether groups of people with an employee's particular attribute are in fact less able to comply with the requirement imposed by the employer than the broader population. For instance, persons with some disabilities or of particular ages may simply be unable to obtain vaccination safely.
- Whether the requirement imposed is reasonable in the circumstances.

Whether a court considers it 'reasonable' for an employer to mandate COVID-19 vaccinations is likely to be highly fact dependent, considering the workplace and the employee's individual circumstances as discussed above.

One way to ensure that a mandatory vaccine policy does not indirectly discriminate against any employees is to develop a policy that has appropriate exceptions in respect of at least:

- persons for whom the vaccine has not been approved for use (this minimises age discrimination issues)
- those with medical or other contraindications (that is, persons whose medical conditions mean that vaccination may be harmful for them).

Health or Medical exemptions

Where an employee seeks to refuse to be vaccinated on medical grounds, the employee should provide appropriate medical evidence for this.

Where an employee does establish that they have a medical exemption, 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 (for instance, a periodic testing regime)
- it is possible to seek alternative duties for that person.

'Inherent requirements' defence

In the limited circumstances where an employer can demonstrate that being vaccinated against COVID-19 constitutes an inherent requirement of the role (for example where the employee works in hotel quarantine or in aged care) and that accommodating an unvaccinated employee's medical or other attributes will cause 'unjustifiable hardship' to the employer in these circumstances, then the employer may also have a defence against a general protections claim, unlawful discrimination claim or unfair dismissal claim if the employment is ceased on the basis that the employee is unvaccinated.

However, employers should seek specific advice on their circumstances before dismissing an employee on these grounds.

In most cases, we anticipate employers accommodating the few employees who can genuinely refuse vaccination based on protected attributes such as medical grounds or religious belief should be sufficient to otherwise have a policy applied.

PART 4 - How can I lawfully collect information about employee vaccination status?

The response to this question will depend on whether or not the *Privacy Act 1988* (Cth) applies to the business.

The Privacy Act applies to businesses with an annual turnover of more than \$3 million, as well as to certain other types of businesses regardless of turnover (such as public sector agencies).

Where the Privacy Act applies, vaccination records are a type of medical record and constitute 'sensitive information' so are afforded a higher degree of protection under the Privacy Act, and there are stringent requirements relating to the collection and use of such information.

If a business is not governed by the Privacy Act (for example, you are a small business with an annual turnover of less than \$3 million), there are less stringent requirements.

It is important that businesses determine whether or not the Privacy Act applies to them, as it will dictate the legal position applying to them.

Q: Can an employer ask employees to disclose their vaccination status?

A: There is no legal prohibition on an employer asking an employee to voluntarily disclose their vaccination status.

Where the Privacy Act applies, an employer will not contravene the Privacy Act provided that:

- an employee voluntarily discloses information about their vaccination status to you
- you do not 'collect' that information 'for inclusion in a record or generally available publication'.

For example, there is no issue if you simply wish to know their status but not keep a record of it. There would also be no issue if you requested to 'sight' evidence of an employee's vaccination status (for example, as a condition of them entering premises under a Public Health Order).

However, the position is different if you plan on recording the information (eg. recording it in a list or database) or retaining documentary evidence of the person's vaccination status (eg. a photocopy of their vaccination record).

If you are not regulated by the Privacy Act, you will be able to collect records relating to an employee's vaccination status where they provide it voluntarily.

Q: What if I am covered by the Privacy Act and want to keep a record of an employee's vaccination status?

A: If you are regulated by the *Privacy Act 1988* (Cth), where a record of an employee's vaccination status is to be kept you must ensure that you comply with the Australian Privacy Principles (the APPs).

Under APP 3, there are two scenarios where you will be permitted to collect vaccination records:

Scenario 1: Where the collection of the information is 'required or authorised' by or under an Australian law or a court/tribunal order.

This scenario will apply where public health orders or another type of Commonwealth or State/Territory law authorises or requires employers to collect such records.

In order for a law to authorise an employer to collect the record, the law must provide express permission to do this.

At this stage, the Public Health Order in NSW specifically permits employers in the construction sector to collect records about an employee's vaccination status where that employee lives in one of the affected LGAs in Sydney (often referred to as areas of concern). The Orders relating to the aged care sector will likely also include a similar authorisation.

Scenario 2: Employers are permitted to collect employee vaccination records where the individual employee consents to the collection of the information and the information is 'reasonably necessary' for one or more of the organisation's functions or activities.

Consent must be freely given and constitute valid consent. This means that employers cannot pressure or intimidate employees to provide information about their vaccination status. In order to obtain genuine consent, employers should provide employees with adequate information about why it is requesting the information and what it will be used for (including whether the information will be disclosed to any third parties).

Employers should advise employees of the following:

- the purpose of collection
- the consequences if the employee refuses to consent to the collection
- if the collection is required or authorised by law
- how you may use the information
- that your privacy policy details how employees can complain about any Privacy Act breaches and how they will be handled by your business
- who you might disclose the information to
- whether the information will be disclosed to overseas recipients.

Employers should provide employees with this information before they collect data about vaccination status or, if this is not practicable, as soon as practicable after collection occurs.

Even where employees are happy to give you their vaccination records, you may still contravene the Privacy Act if you collect such information and store it in any record. In order for the collection to be lawful, you will need to demonstrate that the collection of the information is reasonably necessary.

Therefore, the purpose for requesting the information is relevant. If you are wanting to obtain the information on a 'just in case' basis, it is unlikely you will be able to demonstrate that the collection is reasonably necessary.

Employers may be able to argue that it is reasonably necessary to collect these records to implement appropriate control measures and comply with their WHS obligations (for example, to implement greater control measures in respect of unvaccinated employees). However, whether such an argument would succeed will likely depend on the health and safety risks in the relevant business/industry. Another reason might be to comply with customer requirements (for example, where a customer requires a business to only send vaccinated employees to them eg. a trade based employee performing work on a client site).

Q: Can an employer compel employees to disclose their COVID-19 vaccination status, or provide proof of their vaccination status?

A: If your business is regulated by the Privacy Act and you intend to collect or retain a record of the information disclosed to you, at this stage the answer for most businesses is no. Employers are only able to require/compel an employee to provide information about their vaccination status (against their wishes) if the collection of this information is required or authorised by an Australian law.

As stated above, the Public Health Order in NSW specifically permits employers in the construction sector to collect records about an employee's vaccination status where that employee lives in one of the affected LGAs in Sydney. The orders relating to the aged care sector will likely also include a similar authorisation.

The Public Health Orders are constantly changing and the position is likely to continue to change in the future.

If you do not intend to collect and record the information, you will be able to require employees to disclose their COVID-19 vaccination status or provide proof of their vaccination status if the direction is lawful and reasonable, without Privacy Act issues arising.

Of course, where vaccination has been mandated by the employer in order for an employee to work, the employee's refusal to provide evidence of vaccination may have consequences for the employee's ongoing employment and the employer should obtain advice about the relevant circumstances to ascertain whether a basis exists to cease the employment.

PART 5 - What happens to an employee who cannot work because they are unvaccinated and are prohibited from working by Public Health Orders?

Firstly, it is important to review the Public Health Orders regularly as they are changing by the week and sometimes by the day. The Public Health Orders now prohibit certain employees entering or remaining at some work sites unless they have some vaccination status and they also prohibit the occupiers of these work sites from allowing such employees from entering or remaining on such work sites.

If an employee is required to be vaccinated by a Public Health Order, but is not vaccinated, two courses of action arise:

1. An employer can direct the employee to become vaccinated in order to work. This will particularly be relevant where the need to be vaccinated is likely to be for an ongoing period. The direction is likely to be lawful and reasonable, given the Public Health Order in place. Employees can be disciplined or ultimately have their employment terminated if they are unable to work because they have failed to comply with the direction.
2. The employer may be able to withhold pay until the employee becomes vaccinated. This will depend on the circumstances. For instance:
 - (a) If, because of their vaccination status, the employee is unable to leave their local government area or cannot enter their work premises to commence work, there are likely to be good grounds to withhold pay on the basis that the employee simply cannot present for work. If the employee cannot present for work, the obligation to pay does not ordinarily arise for most employers.
 - (b) On the other hand, if the employee can present to work but is unable to perform some of their work because of their vaccination status, then the employer's ability to withhold pay will depend on the contract of employment in place, the quantum of work activity that cannot be performed and the availability of alternative work.

Many contracts of employment contain a warranty or condition which requires employees to comply with all legal requirements necessary to perform their role. This is a requirement which employees would be unable to satisfy if they do not comply with relevant health orders.

If contracts are silent as to this matter, it is possible that such obligations can also be implied (for instance, there are cases that provide that employees must be ready, willing and able to perform work as directed). Where an employee has failed to meet Public Health Order requirements on vaccination, they may be unable to perform some elements of their role, which may disentitle them to payment.

However, the terms of each employee's employment contract will vary as will the types of scenarios that arise in this second scenario. Employers should seek individual advice about their circumstances before withholding pay.

This guide is intended to help you navigate this difficult time and decide what is right for your business. Please get in touch if you have a specific question or are uncertain with anything mentioned above.



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