



COVID-19 Vaccination Guide

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With the COVID-19 outbreak in New South Wales and Victoria worsening, and other States going

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 u-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) variants¹.

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
- ne 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

difficult breathing or shortness of breath, tiredness or fatigue, symptoms that get worse after physical or mental activities, difficult 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

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

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 (l b)-2.4 25.6d0.1 (u4(l)10 (l

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 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

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

3. If it is likely that mandatory vaccination will be a lawful and reasonable direction to

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

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:

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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 if they are in a regulated industry (e.g. health care, aged care, education, financial services, etc.).

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.

