

Can a practice mandate the COVID-19 Vaccine?

As COVID-19 continues to affect Australia, many practices are considering whether they can mandate the COVID-19 vaccine within the workplace. Some workers are required by law (usually a state-based public health order) to be vaccinated against COVID-19. These workers include aged care workers, quarantine workers, construction workers and some health care workers, however this differs between states. However, for workers that are not lawfully required to be vaccinated, whether an employer can mandate the COVID-19 vaccine will depend on a number of factors, including whether the direction is lawful and reasonable, and any associated workplace health and safety risks.

Is a direction lawful?

Whether a direction for employees to be vaccinated is lawful requires consideration of a variety of workplace laws. From a workplace health and safety perspective, having regard to an employer's obligation to provide a safe workplace (so far as is reasonably practicable), it is likely that a direction would be lawful.

However, practices must also consider Federal, and State based discrimination laws. For example, under discrimination laws, a person with a medical condition preventing compliance with the direction may argue that they have been indirectly discriminated against. As a result, if a practice were to mandate vaccination, it would need to accommodate for genuine medical exemptions.

Is a direction reasonable?

In determining if a direction for employees is reasonable, practices will need to consider several factors. These include:

- is there a Public Health Order or announcement that recommends workers in your industry be vaccinated?
- Are your staff exposed to a risk of infection by merely attending and performing their usual duties?
- Do your staff work with people who are especially vulnerable to COVID-19?
- What is likelihood of the virus spreading in your workplace?
- Do your staff interact with large numbers of other people in the course of their usual work i.e. suppliers and patients?
- What other control measures are in place and do these already minimise the risk of infection?

The Fair Work Ombudsman (**FWO**) has published additional guidance in the form of four 'tiers' of work to assist in assessing what 'lawful and reasonable' looks like in the context of mandatory vaccinations. These are:

Tier 1	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).
Tier 2	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).
Tier 3	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 (for example, stores providing essential goods and services).
Tier 4	Where employees have minimal face-to-face interaction as part of their normal employment duties (for example, where they are working from home).

Practices should consider that a workplace may have a mix of employees, with different employees performing work in different tiers, all of which could change. For example, an administrative staff member who works solely away from patients or even works remotely may fall into a different tier to staff who are patient facing. This raises a policy question as to whether

practices will need to consider different rules or directions based on the type of work performed by the employee.

Tiers 1 and 2 are likely to be covered by public health orders or other government directions, meaning vaccination will be mandatory. The FWO has provided guidance that for employees performing Tier 3 work, an employer must consider the following:

- where no community transmission of coronavirus has occurred for some time in the area where the employer is located, a direction to employees to be vaccinated is in most cases less likely to be reasonable
- where community transmission of coronavirus is occurring in an area, and an employer is operating a workplace in that area that needs to remain open despite a lockdown, a direction to employees to receive a vaccination is more likely to be reasonable.

Whether a practice and its staff fit within a specific tier may also depend on its location and the impact of Coronavirus (and associated community transmission) in that area.

Practices should be mindful that each employer will have to consider the circumstances of their workplaces and the suite of control measures that are already available before making any decision about this issue. Before implementing any mandatory vaccination policy, it is recommended that practices consult with employees regarding the proposed mandatory vaccination direction.

What if an employee refuses to be vaccinated?

If a practice has made a lawful and reasonable direction requiring that a worker be vaccinated, and the employee refuses, the practice may be able to take disciplinary action, including termination of employment. However, before taking disciplinary action, the employer should take steps to understand the reasons for the employee's refusal (such as a genuine medical reason) for their refusal and, where appropriate, encourage the employee to comply with the direction and provide them with additional opportunities to comply. Whether disciplinary action is appropriate will depend on the specific facts and circumstances and the practice will need to consider any

other rights and obligations arising out of an enterprise agreement or other agreement, modern award, workplace policy or state or territory public health order.

Practices should seek advice before undertaking disciplinary action or termination related to an employee's refusal to be vaccinated.

Disclosure of vaccination status:

Another question arising out of mandatory COVID-19 vaccinations for practices is the disclosure of vaccination status. If a practice has made a lawful and reasonable direction for employees to be vaccinated, it may ask the employee to provide evidence of vaccination. However, it will also need to consider the protection afforded to individuals under Health Record rules and the *Privacy Act 1988 (Cth)* ('**Privacy Act**') before considering or adopting a view on what type of evidence may be required to establish proof of vaccination. A person's vaccination status constitutes health information, and therefore it is 'sensitive information' under the Privacy Act.

Generally, most employers may only request and collect sensitive information where the individual consents to its collection, and the information is reasonably necessary for, or directly related to, one or more of the employer's functions or activities, as outlined under Principle 3 in the *Australian Privacy Principles* ('**APPs**').

The Office of the Australian information Commissioner (**OAIC**) has expressed a view that an organisation's 'functions or activities' may include preventing or managing COVID-19, but it must still be reasonably necessary for or directly related to the collection of the information.

In some instances, such as healthcare providers requesting employees to disclose their vaccination status to protect the safety of its patients whom the employees are required to directly interact with, or where a Government health order/direction requires workers in a particular area of concern or activity to be vaccinated, it will be more likely to be reasonably necessary to collect this information. However, requesting employee vaccination statuses on a "just in case" basis is less likely to be reasonably necessary, and therefore not permitted to be asked under the rules of the Privacy Act.

Before mandating the COVID-19 Vaccine, practices must undertake a robust assessment as to the reasonableness of the direction. Practices should seek specific advice before implementing mandatory vaccination policies and directions.

For more information or assistance please contact the AAPM HR Advisory Service
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