

## Can an employer mandate that employees be vaccinated

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### Key Takeaways

- Whether employers can mandate vaccinations against COVID-19 for employees depends on the unique circumstances surrounding each workplace and whether it is lawful and reasonable.
- The Fair Work Ombudsman (**FWO**) has set out guidance for employers to determine when a direction for employees to be vaccinated may be considered reasonable.
- Other State and Federal laws such as anti-discrimination and privacy laws must still be adhered to when implementing a mandatory vaccine requirement in the workplace.
- The legal principles in this area are rapidly developing.

### Can employers make vaccines mandatory for employees?

There are three instances where an employer can direct an employee to get vaccinated:

- A specific law requires an employee to get vaccinated (such as a public health order).
- There is a requirement to get vaccinated in the employment contract, enterprise agreement or other registered agreement.
- It is lawful and reasonable for an employer to give their employees a direction to be vaccinated in that particular case.

### Specific laws requiring employees to be vaccinated

You can find an overview of the public health orders requiring certain workers to be vaccinated against COVID-19 across the states and territories at this website [here](#).

### What is lawful and reasonable?

The FWO has provided updated [guidance](#) as to when a direction to be vaccinated may be lawful and reasonable.

To be lawful, the employer must comply with the employment contract, any relevant award or agreement and Commonwealth, State or Territory law.

To be reasonable, numerous factors may be considered, including:

- **The workplace.**
  - Look at whether social distancing is possible.
  - How much contact is there with the general public?
  - Does the business provide an essential service and need to stay open?
  - Consider the ability to mitigate these risks through masks, sanitisation and other measures.
- **Community transmission** of COVID-19 in the location where the direction is to be given.
- **Health and safety obligations.** Ensure employers are adhering to their obligations to provide a healthy and safe workplace for employees.
- **Each employee's circumstances.** Whether the direction factors in an employee's individual circumstances or legitimate reason for not being vaccinated (such as for medical reasons).
- Vaccine availability.

These factors are to be considered on a case by case basis in determining whether an employer's direction to employees to get vaccinated is both lawful and reasonable.

### The Four Tiers of Work

The FWO has categorised the types of employment into four 'tiers' that may be useful in determining whether a mandate to get vaccinated is reasonable.

Tier	Description	Examples	Can the employer give a direction to employees to be vaccinated
Tier 1	Employees are required to interact with people with an increased risk of being infected with COVID-19	Border control and hotel quarantine	More likely to be reasonable to direct employees to be vaccinated
Tier 2	Employees are required to have close contact with people who are vulnerable to health impacts of COVID-19	Employees in health care or aged care	May or may not be reasonable depending on the extent of community transmission at the time
Tier 3	There is interaction or likely interaction between employees and other people such as customers, other employees or the general public	Stores providing essential goods and services	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
Tier 4	Employees have minimal face to face interaction	Employees are working from home	Unlikely to be seen as reasonable due to the low risk of transmission in the role

Ultimately, the reasonableness of an employer's direction to get vaccinated will turn on the individual circumstances of each workplace. Employers should seek legal advice prior to bringing in any form of vaccine policy, to ensure that it is both lawful and reasonable.

### Can an employer require an employee to provide evidence that they have been vaccinated?

An employer can only receive evidence of an employee's vaccination status where the employee consents to providing the same. Any request or direction to provide such evidence must be lawful and reasonable and, whether it is, will depend on the circumstances. If it is unclear whether a direction or the employee's refusal is reasonable, employers should seek legal advice.

Where an employee consents to giving information about their vaccination status, the employer should be mindful that collecting (ie. making a record or keeping a copy of) that information will give rise to privacy obligations, whereas simply viewing but *not* collecting that information, will not. An employer should not collect vaccination status information from an employee unless:

- the employee consents and the collection is reasonably necessary for the employer's functions and activities; or
- the collection is required or authorised by law (for example, a public health order applies or where it is necessary for the employer to meet their obligations under work health and safety laws).

### Other considerations for employers

Aside from whether it is lawful and reasonable for employees to be vaccinated, employers also need to factor in other considerations if they are deciding whether to make such a direction.

**Individual flexibility.** Lawful and reasonable mandatory vaccination policies should still account for the potential for an employee to give a legitimate reason for not being vaccinated. This could include things like medical conditions. The presence of a medical condition may classify the employee as having a 'disability' rendering anti-discrimination laws at State and Federal level applicable. In this scenario, the ability to arrive at alternative work arrangements between employer and employee should be sought before taking any disciplinary action. Alternative arrangements could include any change to work duties with the effect of reducing contact, and therefore the risk of COVID-19 infection, with other employees or customers.

**Paid vaccine leave.** The employer should cover the employee's travel costs and give the employee time off work without loss of pay if the appointment is during work hours.

**Privacy laws.** Employers should consider how they handle information and consents regarding employees' vaccination status in light of applicable privacy laws. As vaccine information is considered 'sensitive information', details about what information will be collected, its purpose, potential disclosure to third parties and if the information will be transferred overseas should be given to the employee.

**A changing landscape.** In the recent decision handed down by the Fair Work Commission in [Jennifer Kimber v Sapphire Coast Community Aged Care Ltd](#) [2021] FWCFB 6015<sup>1</sup> the Commission rejected an unfair dismissal claim after the employee (who worked as a receptionist at an aged care facility) refused to get a mandatory flu vaccination. The majority decided that there was not enough evidence to support the employee's claim that allergies prevented her from getting the flu vaccination as mandated by a public health order. The decision is likely to be the subject of a further appeal to the Federal Court. We eagerly await further guidance in this rapidly evolving legal area.

If you would like any further information or would like to discuss your legal obligations, please contact [Alison Rees](#) on 02 8235 1211 or your usual ClarkeKann contact.

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<sup>1</sup> <https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb6015.htm>

