

# MANDATORY VACCINATION – PRIVATE SECTOR (APPLICABLE PUBLIC HEALTH ORDER) FACT SHEET



**BOOSTER UPDATE:** The introduction of the [Booster Vaccination \(Restrictions on Access\) Directions](#) (Booster Directions) mean that all persons subject to vaccination requirements under Public Health Orders are required to obtain a booster vaccination, in order to continue to access their workplace as per the applicable Directions, as follows:

- If eligible to receive a booster vaccination (as per ATAGI advice at the time) at the commencement of the Booster Directions on 24 December 2021, a person must obtain the booster vaccination by 5 February 2022;
- If not eligible for a booster vaccination as of 24 December 2021, then a person must obtain a booster vaccination either within one calendar month of eligibility (based upon applicable ATAGI advice at the time) or by the 5 February 2022, whichever is the latter.

The [Primary Health Care Worker \(Restrictions on Access\) Directions](#) (Directions) were issued by the Chief Health Officer (CHO) on 22 October 2021.

## 1. What primary health care facilities are covered by the Directions?

- General Practice;
- Medical specialist or Nurse operated health clinic;
- Prison or Detention centre clinic;
- Premise where COVID-19 related testing or COVID-19 vaccination occurs;
- Community health centre at which a health service is provided to patients;
- Aboriginal health service;
- Pharmacy;
- Dental surgery or practice;
- Human pathology centre (excluding pathology laboratories solely providing research services);
- Human medical imaging centre (including nuclear medicine);
- Blood donation centre;
- Mobile health vehicle;
- Health service provider office or site;
- A research institute where patients attend the premises for research purposes; and
- Allied health professional clinics (see the Directions for definitions).

## 2. Are all staff/contractors working at the specified health and medical facilities covered by the Directions?

Yes - all staff, students, volunteers, and contractors that undertake work within the primary health care facility are covered by the Directions including administrative staff, ancillary staff such as cleaners, gardeners, security officers, food preparation staff, and drivers who transport patients of the health/medical facility.

Tradespersons and delivery drivers who provide services on an adhoc basis to the primary health care facility (who may be contractors or employees of another business) are not covered by the Directions unless they are required to come within 1.5metres of patients at the primary health care facility.

An example where an employee/contractor might not be covered by the Directions could be a bookkeeper who does payroll for the practice but works off-site and does not undertake work at the health/medical facility itself. A sole primary health care worker providing health services by telehealth only where patients do not attend the premises (from which they are conducting the telehealth service) are also excluded from the Directions.

*Disclaimer: The AMA (WA) Workplace Relations team has made every effort to ensure that, at the date of publication, the information contained in this fact sheet is free from errors and omissions, consistent with applicable laws and guidelines, and that all opinions, advice and information drawn upon to compile it have been provided by professionals in good faith.*

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### **3. When do staff/contractors have to be vaccinated by?**

Staff/contractors covered by the Directions need to have at least one dose of a COVID-19 vaccine registered by the Therapeutic Goods Administration (TGA) by **1 November 2021** to be able to access the health/medical facility to undertake work.

The deadline to be fully vaccinated (2 doses) is **1 December 2021**.

### **4. How has this direction been given?**

As a public health state of emergency was declared by the Minister of Health on 23 March 2020 for COVID-19 under the *Public Health Act 2016 (WA)*, this empowers authorised emergency officers, including the Chief Health Officer (CHO), to exercise certain emergency powers and issue lawful directions to all persons in Western Australia deemed reasonably necessary to prevent, control or abate the serious public health risk presented by COVID-19 whilst the state of emergency is in effect. These powers include restricting access to certain premises (e.g., health care facilities) and requiring persons to provide information or answer questions for the purpose of investigating, preventing, controlling, or abating the serious public health risk (e.g., disclosing vaccination status).

### **5. As an Employer, am I lawfully required to consult with my workers about the introduction of mandatory vaccinations as a result of the Directions?**

You are not required to consult with your workers either, under applicable work, health, and safety (WHS) legislation, or to comply with notification and consultation for significant change requirements often included in awards and/or industrial agreements, where mandatory vaccinations are now required as a result of the Directions because you as the Employer have not made the decision to introduce this change.

However, engaging in clear communication and co-operative consultation as much as possible is recommended as best practice. The Fair Work Ombudsman (FWO) has provided some guidance for Employers on this available [here](#).

See Question 8 for further advice on WHS obligations regarding implementing any other risk mitigation control measures and requirements to consult.

### **6. What exemptions can apply to the requirement to be vaccinated?**

Exemption guidelines and application forms can be found online [here](#).

Approved medical exemptions must be recorded on the Australian Immunisation Register. The criteria for permanent medical exemption can be found on the Services Australia Government site [here](#).

Further guidance on temporary medical exemption criteria (e.g. individuals with certain acute major medical conditions) can be found [here](#).

Temporary exemptions can also be applied for (both by individuals or Employers) in extenuating circumstances, which are considered for approval on a case-by-case basis by the CHO, for example where a person has been vaccinated overseas with a vaccine not approved by the TGA, or where a practice is located in a remote area where vaccine availability is limited, and all efforts have been made to obtain a vaccine.

### **7. What do I do if one of my staff has not had the required vaccination by the nominated deadline under the Directions?**

Unless the employee has a temporary or medical exemption, they cannot access the health/medical facility to work after the nominated deadline without the required vaccination otherwise they would be placing themselves, and you as the Employer, at risk of breaching the Directions which can be punishable by a fine of up to \$20,000 for individuals and up to \$100,000 for corporate bodies.

It is important to firstly ascertain from the employee the reason for their unvaccinated status. If the employee does not have the required vaccination by the nominated deadline due to extenuating circumstances, e.g., availability of

vaccine, or they are going through the process of getting a medical or temporary exemption which has not yet been approved, you may wish to consider alternative work options, if possible, on a temporary basis, such as working remotely/from home.

If there are no reasonable temporary alternative work options (e.g. working from home), or the employee has clearly communicated that they do not intend to be vaccinated, then you are able to stand down the employee without pay as (although they may be willing to work) they are not ready and able to work, or able to be usefully employed, due to the operation of the Directions and the fact that they cannot access the facility to undertake their work.

Members can utilise a template stand-down letter produced by the AMA (WA) in this scenario.

You could agree to allow an employee to take any applicable accrued paid leave during this period if they request to do so, however, generally, you wouldn't be able to direct that paid leave entitlements be taken.

If an employee has clearly communicated that they do not intend to be vaccinated, we strongly recommend Members contact the Workplace Relations team for tailored advice before initiating any formal disciplinary process.

## **8. Can an Employer lawfully dismiss an employee for choosing not to be vaccinated (without an exemption) and not complying with the Directions and/or the Employer's reasonable and lawful direction to comply with the Directions?**

The area of law around the implementation of mandatory vaccinations and subsequent dismissal of employees for being unvaccinated is a relatively new and developing area.

Recent decisions appear to support an Employer if they were to decide to terminate an employee's employment who was unvaccinated (without an exemption) and was subsequently unable to access work premises and perform their job under the current Directions (public health order) and providing that working remotely or from home was not a reasonable and viable alternative.

In the matter of *Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818*, the Employer, a residential aged care facility, introduced a compulsory flu vaccination for all employees in March 2020 in response to a New South Wales (NSW) public health order that was in effect preventing persons from entering aged care facilities without a current flu vaccination.

In this matter, the employee, a receptionist, refused to be vaccinated and claimed to have suffered a severe reaction to a flu shot in 2016 however, despite further enquiries from the employer, the employee did not provide substantiated medical evidence to demonstrate a history of post-vaccination anaphylaxis. The Employer terminated the receptionist's employment, relying on NSW government advice at the time that the only absolute contraindication to a flu vaccination was a history of post-vaccination anaphylaxis, the use of certain cancer treatment drugs or Guillain-Barre' syndrome.

The decision handed down by the Fair Work Commission (FWC) on 29 April 2021 found that the dismissal was valid in that without the flu vaccination (or any evidence of the ability to work from home) the employee could not perform the inherent requirements of her job as she was not permitted to be on the aged care premises under the NSW public health order. The FWC also commented that whilst in this case, the employer hadn't formally directed the employee to be vaccinated, if they had it would have been considered a lawful and reasonable direction. In a 2/1 majority decision of the Full Bench of the FWC, handed down on 27 September 2021, the dismissal of Ms Kimber was upheld and her request for appeal dismissed.

We strongly recommend that Members contact the AMA Workplace Relations team for specific advice when seeking to initiate a disciplinary process or potential dismissal of an employee for any reason.

## **9. What about my workplace health and safety obligations as an Employer, particularly if I have medically exempt unvaccinated staff working alongside vaccinated staff?**

An employer has obligations under the relevant work, health, and safety (**WHS**) legislation to provide a safe workplace which extends to direct employees, contractors, volunteers, visitors, and patients. This obligation includes eliminating the risk of exposure to COVID-19 where practicable, or alternatively, minimising the risk as much as reasonably practicable. Workers also have an obligation to ensure, as much as reasonably practicable, the safety of themselves and others within the workplace.

Safe Work Australia (**SWA**) has put together a number of tools, fact sheets and resources to assist businesses with assessing and managing the risk of COVID-19 in the workplace including a [COVID-19 resource kit](#), industry specific information for [Health, guidance](#) and [templates](#) for undertaking risk assessments, as well as [consultation](#) and a small business specific [hub](#). The Federal Department of Health [website](#) also has a number of resources and information specific to the health industry, including guidance on the use of PPE, e.g. masks.

A thorough and documented risk assessment should be undertaken to assess the risk of COVID-19 within the specific workplace and to identify appropriate control measures to manage those risks. Control measures, other than vaccination, should be considered, where practicable, such as use of PPE (e.g., masks), physical distancing (e.g., staggering of meal breaks), hygiene and cleaning protocols, and regular testing where appropriate.

An employer is required to consult with workers on health and safety matters within the workplace and consultation should be undertaken when:

- conducting a risk assessment;
- making decisions on control measures to be implemented to manage the risk of COVID-19 in the workplace (e.g., decisions on remote working arrangements, social distancing, wearing of PPE etc);
- making decisions about the adequacy of workplace facilities to allow for certain control measures such as social distancing and hygiene measures;
- when you propose any other changes that may affect the health and safety of workers; and
- when you change any existing policies and procedures that have an impact on the WHS of workers.

In undertaking consultation, you must give workers (including any health and safety representatives) an opportunity to provide feedback, raise any WHS concerns, and you must take the views of the workers into consideration when making decisions and advise workers of your decision. You do not require consensus or agreement from workers, but you must include them in the decision-making process. Some Employers have utilised anonymous surveys of staff in the first instance as a consultation measure to assess support for other risk-mitigation measures.

## **10. What about other considerations, such as discrimination, privacy, and workers compensation?**

### **Discrimination:**

When seeking to comply with the Directions and/or seeking to implement any other COVID-19 risk mitigation measures, an Employer must also consider their obligations and responsibilities under anti-discrimination laws and ensure they are not directly, or indirectly, discriminating against an employee based on a protected attribute, such as disability, pregnancy, or age (noting that vaccination status in itself is not a protected attribute).

However, both State and Federal discrimination laws contain a number of exemptions and defences which consider for example if the action is 'reasonable in the circumstances', whether any Public Health Order applies, WHS obligations, the inherent requirements of the position and whether reasonable adjustments can be made (that would not impose an 'unjustifiable hardship' on the Employer). The Australian Human Rights Commission has published some guidance on federal discrimination law in the context of mandatory COVID-19 vaccinations which can be found [here](#).

### **Privacy:**

An Employer must also be conscious of their obligations under Federal privacy legislation in respect to collecting, using, storing, and disclosing employee health information such as vaccination status. The Office of the Australian Information Commissioner (**OAIC**) website contains guidance to assist employers understand their [privacy obligations](#) to their staff, as well as specific guidance in respect to [vaccination status](#) and privacy obligations.

Employers should ensure that they only collect, use, store and/or disclose their employee's vaccination status, particularly if the employee's consent has not been given, strictly in accordance with the Directions which sets out:

*7. A primary health care worker must produce evidence in the form approved by the Chief Health Officer of their vaccination status for inspection, recording and retention of a copy, if:*

*(a) **directed** to do so by an **emergency officer**; or*

*(b) required to do so by their employer or by the owner, occupier or person apparently in charge of a primary health care facility.*

*8. The employer, owner, occupier or person apparently in charge of a primary health care facility must:*

*(a) take all reasonable and lawful steps to:*

*i. collect and maintain a **record** of the **vaccination status** of each primary health care worker of the primary health care facility; and*

*ii. only roster on, or otherwise permit to work in a primary health care facility, a primary health care worker who is vaccinated in accordance with these directions;*

*(b) on request, provide any record of the kind referred to in paragraph 8(a)i that the employer, owner, occupier or person apparently in charge of a primary health care facility has collected and maintained to an **emergency officer** as soon as practicable after the request is made; and*

*(c) not use or disclose any record of the kind referred to in paragraph 8(a)i except:*

*i. as provided for in this paragraph 8; or*

*ii. as permitted or required by law, including any law of the Commonwealth; or*

*iii. for the purpose of ascertaining compliance with any employer direction restricting entry to a primary health care facility; or*

*iv. to the extent that the person expressly provided the person's vaccination status for a purpose other these directions, and*

*(d) take reasonable steps to protect any record it holds of the kind referred to in paragraph 8(a)i from:*

*i. misuse and loss; and*

*ii. unauthorised access, modification or disclosure.*

### **Workers Compensation:**

Employers should also be mindful that where an employee contracts COVID-19 in the course of work (likely to be assumed for health care workers), or develops complications, side effects, or an illness related to mandated vaccination under the Directions, the relevant workers compensation legislation will likely apply.

The Government has established a compensation scheme for people who suffer moderate to severe adverse reactions to a TGA approved COVID-19 vaccine – information on this scheme can be found online [here](#).