



RETURN TO WORK GUIDE

For businesses following the pandemic outbreak

MARCH 2022

Introduction

As businesses start returning to their workplaces following the most recent outbreak of COVID-19, BNSW is publishing this guide so businesses can easily navigate the myriad of laws that will impose obligations on employers returning workers to the workplace in NSW.

Important considerations that employers will need to grapple with include:

- How do I make the workplace safe for return?
- Can I require persons to become vaccinated to enter my workplace?
- How do I legally ascertain someone's vaccine status?
- How do I deal with employees who do not wish to return to the workplace?
- What isolation requirements apply if employees test positive to COVID-19?
- How do I respond if there is a COVID-19 case that attends my premises?
- What if some employees cannot become vaccinated or meet return to work requirements due to medical reasons - how do discrimination laws apply?

This guide addresses each of these issues separately.

We also attach some template documents that will help employers navigate some of the above issues.

The content of this guide is necessarily general and should not be relied upon as legal advice in relation to any business or its circumstances. Should you wish to obtain legal advice about your specific circumstances, you are welcome to contact BNSW or ABLA on the details outlined at the end of this guide.



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1. Employer obligations to make the workplace safe for employees

Addressing work health and safety obligations associated with COVID-19.

Work health and safety obligations generally

- 1.1 Under s 19 of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**), employers have a primary duty of care to ensure the health and safety, so far as reasonably practicable, of:
 - (a) employees engaged, or caused to be engaged by the person;
 - (b) employees whose activities in carrying out work are influenced or directed by the person, while the employees are at work in the business or undertaking; and
 - (c) other persons,so as to not put them at risk from work carried out as part of the conduct of the business or undertaking.
- 1.2 To determine what is reasonably practicable, an employer must consider:
 - (a) the likelihood of a hazard or risk occurring;
 - (b) the potential degree of harm that might result from the hazard or risk;
 - (c) what was known/reasonably ought to have been known about the hazard and ways of eliminating it;
 - (d) the availability and suitability of the ways to eliminate/minimise the hazard or risk; and
 - (e) costs.
- 1.3 Importantly, under s 27 of the WHS Act, an officer of the person conducting a business or undertaking must exercise “due diligence” to ensure that the employer complies with its work health and safety obligations.
- 1.4 Breaching these WHS laws may see businesses, individual workers or officers of a company fined.

The need to conduct risk assessments and to implement controls with respect to COVID-19

- 1.5 Risk assessments are a proactive method by which employers can ensure they are meeting their obligations under the WHS Act.
- 1.6 In the context of COVID-19, risk assessments involve considering what could happen if someone was exposed to the virus SARS-CoV-2 in the workplace and if humans become infected with COVID-19.
- 1.7 A risk assessment can help employers determine:
 - (a) how severe a risk is;
 - (b) whether any existing control measures are effective;
 - (c) what action should be taken to control the risk; and
 - (d) how urgently the action needs to be taken.
- 1.8 Ordinarily, risk assessments calibrate two concepts:
 - (e) the seriousness of consequence if a risk event transpires (eg. someone contracts COVID-19); and
 - (f) the likelihood of that event taking place.
- 1.9 A template risk assessment is provided at **Attachment 1** to this Guide.

The types of controls available to minimise risk

- 1.10 Employers must take a risk management approach (in consultation with employees) to determine the control measures they can implement to prevent workplace transmission of diseases, including COVID-19.
- 1.11 To comply with the obligation on employers to provide a safe workplace with respect to COVID-19, employers would need a safety regime in place that leverages off a variety of safeguards or safety “controls”, including (where practicable):
 - (a) a COVID-Safe plan;
 - (b) ventilation;
 - (c) physical distancing;
 - (d) wearing of PPE (masks);
 - (e) testing;
 - (f) restrictions on numbers of employees on site;
 - (g) sanitisation measures (eg hygiene and cleaning);
 - (h) clear procedures for managing exposure to a positive COVID-19 case;
 - (i) training; and
 - (j) possibly, vaccinations.
- 1.12 Each of the above controls should be considered to ascertain whether persons coming into contact with a business are adequately being protected from the risk of contracting COVID-19 and the risk of becoming seriously ill or dying from COVID-19.



2. Vaccination as a condition to enter the workplace

When will this be an appropriate work health and safety control?

Mandating vaccination for customers

- 2.1 In NSW, whether businesses require proof of vaccination for customers to enter a business is generally determined by the discretion of the business itself as, in most industries, vaccination is no longer a requirement to enter a workplace under public health orders.
- 2.2 Generally speaking, businesses may freely choose to refuse entry to unvaccinated customers as long as they comply with their obligations under anti-discrimination and privacy laws.
- 2.3 Having regard to anti-discrimination laws (which are discussed in greater detail in section 7), businesses should not generally refuse entry to persons who have a medical exemption from becoming vaccinated or because they are in an age group that has not had access to vaccination.
- 2.4 When asking to see proof that a customer has been vaccinated or has a valid reason for not being vaccinated, businesses should generally inform customers (either by a notice or verbally) why they are asking for that information (e.g., to manage work health and safety risk) and who might be provided access to any record made of their responses.
- 2.5 If any business records are kept that identify the vaccination status of a customer, a variety of privacy laws may apply to the collection of this information. These privacy obligations are addressed further at section 3 below.

Mandating vaccination for new employees

- 2.6 For new employees or new employment contracts, employers can relatively freely 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.
- 2.7 If implementing this type of condition, employers will again need to comply with obligations under Australian discrimination laws. Obligations relating to Australian discrimination laws are be outlined at section 7 below.

Mandating vaccination for existing employees

Consultation obligations

- 2.8 If an employer is considering mandating vaccination as a safety control, the work health and safety laws in each State contain prescriptive obligations to consult when assessing risks to health and safety and when making decisions about how to minimise those risks.
- 2.9 By way of example, section 47 of the WHS Act in NSW provides the duty to consult with employees. This duty is owed by the person conducting and business or undertaking to the worker who carries out work for the business or undertaking. The worker will need to be likely or directly affected by a matter relating to work health or safety for the duty to consult to apply.
- 2.10 The requirements of consultation as outlined in s 48 WHS Act require that:
- (a) relevant information about the matter is shared with employees;
 - (b) that employees be given a reasonable opportunity:
 - (i) to express their views and to raise work health or safety issues in relation to the matter; and
 - (ii) to contribute to the decision-making process relating to the matter;
 - (c) the views of employees are taken into account by the person conducting the business or undertaking; and
 - (d) that the employees consulted are advised of the outcome of the consultation in a timely manner.
- 2.11 In the recent Fair Work Commission (**FWC**) decision of *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 (**BHP Vaccine Case**), the FWC found that employers must consult before making a decision to introduce vaccination requirements.

The need for directions to be lawful and reasonable

- 2.12 Where employers are not covered by a public health order or express contractual right obliging employees to become vaccinated, vaccination can be made a pre-condition of working for existing employees, where the requirement to be vaccinated against COVID-19 amounts to a “lawful and reasonable direction”.
- 2.13 Generally speaking, employers have the right to issue lawful and reasonable directions to their employees, and employees are under an obligation to comply with such directions.
- 2.14 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.
- 2.15 In the *BHP Vaccine Case*, the FWC considered whether BHP’s mandatory requirement that employees be vaccinated to enter worksites was lawful and reasonable.
- 2.16 The FWC decision reinforced the importance of consulting with employees when assessing whether to implement mandatory vaccination requirements. BHP’s failure to consult rendered its direction unlawful in the *BHP Vaccine Case*.

- 2.17 However, aside from the failure to consult, the *BHP Vaccine Case* suggests that requirements for employees to become vaccinated often can be lawful and reasonable, so long as the direction is directed at protecting health and safety.
- 2.18 The FWC's decision ultimately landed on three key factual findings:
- (a) An unvaccinated person is more likely to contract COVID-19 from another unvaccinated person, rather than a vaccinated person.
 - (b) While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of COVID-19, they do not provide a substitute for the constant protection offered by vaccines. Other measures do not reduce the risk of developing serious illness from COVID-19 once somebody becomes infected.
 - (c) Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.
- 2.19 Having regard to the ongoing risk of COVID-19 in NSW, and the above factual findings, the FWC held that there would have been a "*strong case*" for introducing a vaccination requirement to enter its site, had BHP consulted properly.
- 2.20 The FWC held that a number of factors gave rise to the "*strong case*" in favour of BHP's vaccination requirement.
- 2.21 Taking these factors from the decision, employers should ensure that any vaccination requirement to become vaccinated:
- (a) is directed at ensuring the health and safety of workers of the sit
 - (b) has a logical and understandable basis
 - (c) is reasonably proportionate response to the risk created by COVID-19
 - (d) is developed having regard to the circumstances of the site
 - (e) is timed having regard to the spread of COVID-19 in the local area at the relevant time
 - (f) is implemented only after encouraging and facilitating vaccination for workers as much as practicable.
- 2.22 If an employer aligns their directions with the above factors, this will substantially assist in rendering any vaccination direction lawful and reasonable.

Electing to allow unvaccinated employees to enter the workplace

- 2.23 Employers can also elect to permit unvaccinated employees to enter the workplace.
- 2.24 However, as the *BHP Vaccination Case* identified, the risks posed by COVID-19 to an unvaccinated worker are far greater than those posed to a vaccinated person.
- 2.25 Accordingly, employers will need to ensure that they have particularly good controls in place to minimise the risk of transmission of COVID-19 if they are aware that persons coming into contact with their business will be unvaccinated.

3. How employers can ascertain employee vaccination status

Privacy Act 1988 (Cth) Obligations

- 3.1 The *Privacy Act 1988* (Cth) (**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).
- 3.2 Vaccination records are a type of medical record and constitute 'sensitive information', which is afforded a higher degree of protection under the Privacy Act.
- 3.3 If an employer is not regulated by the *Privacy Act 1988* (Cth), an employer will be able to collect records relating to an employee's vaccination status where they provide it voluntarily.
- 3.4 If an employer is regulated by the *Privacy Act 1988* (Cth), where a record of an employee's vaccination status is to be kept, the employer must ensure compliance with the Australian Privacy Principles (**the APPs**).

Obligations under APP 3

- 3.5 Under APP 3, there are two general scenarios where an employer will be permitted to collect vaccination records.
- 3.6 The first is where the collection of the information is 'required or authorised' by or under an Australian law or a court/tribunal order.
- 3.7 The second is where the employer has a reasonable necessity for one or more of the organisation's functions or activities and has obtained the employee's consent.
Required or authorised under Australian law
- 3.8 This scenario will apply where a 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.
- 3.9 An example of a when an employer would be required or authorised by law to collect records includes the *Public Health (COVID-19 Vaccination of Health Care Workers) Order (No 2) 2021*. Under the order, health care workers are obliged to provide vaccination evidence to their employer.

Employee consent and 'reasonable necessity'

- 3.10 Vaccine records may be collected where the individual employee consents to the collection. In addition to the requirement of consent, the information must be 'reasonably necessary' for one or more of the organisation's functions or activities.

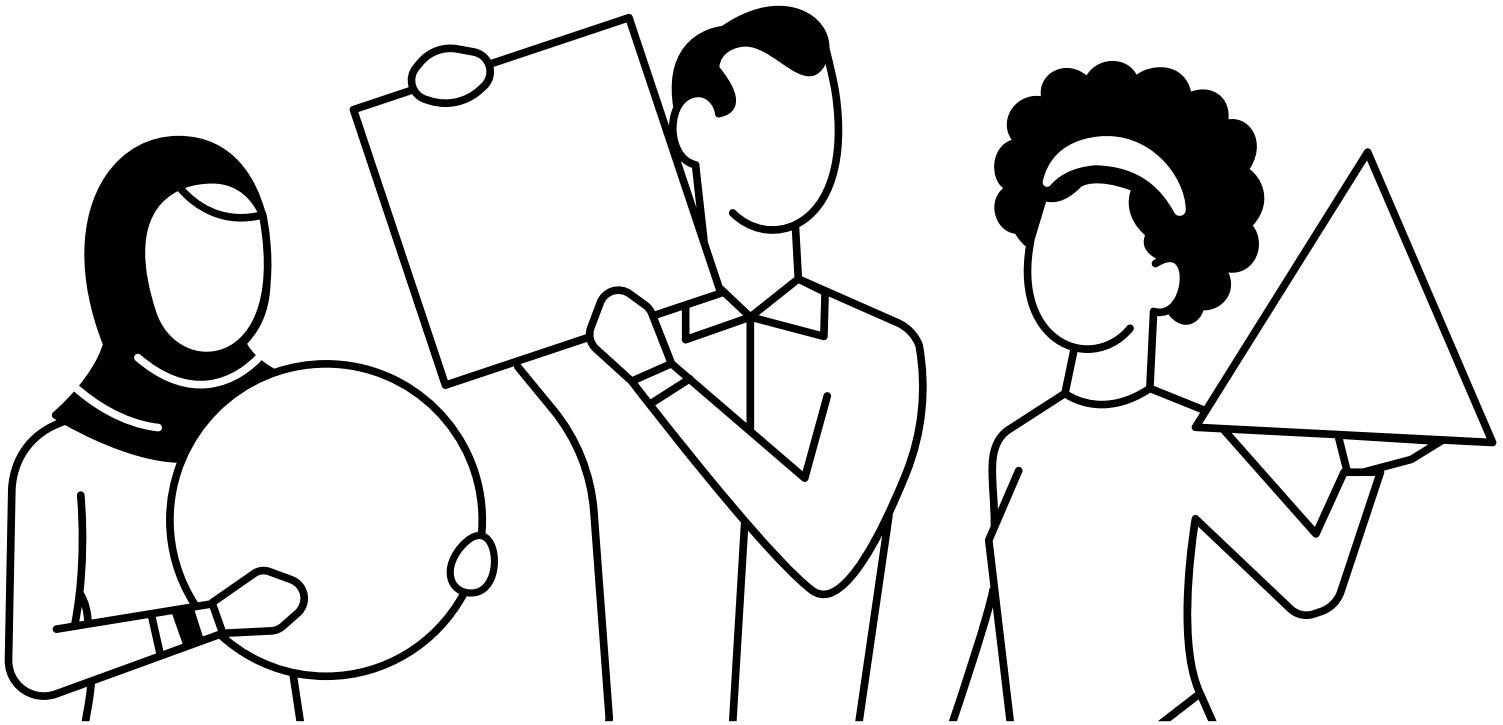
Consent

- 3.11 Consent must be freely given.
- 3.12 This means that employers cannot pressure or intimidate employees to provide information about their vaccination status. 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).
- 3.13 The Privacy Act specifically requires employers to advise employees of the following:
- (a) the purpose of collection;
 - (b) the consequences if the employee refuses to consent to the collection;
 - (c) if the collection is required or authorised by law;
 - (d) how the employer may use the information;
 - (e) that the employer's privacy policy contains details as to how employees can complain about any Privacy Act breaches;
 - (f) how privacy breaches will be handled by the employer;
 - (g) who the employer might disclose the information to; and
 - (h) whether the information will be disclosed to overseas recipients.

- 3.14 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.

Reasonably necessary for the relevant business

- 3.15 For the collection of vaccine records to be lawful, the employer will also need to demonstrate that the collection of the information is reasonably necessary.
- 3.16 To determine the whether the request is reasonably necessary, the employer needs to look to the purpose of requesting vaccine records.
- 3.17 If an employer is wanting to obtain the information on a 'just in case' basis, it is unlikely this will demonstrate that the collection is reasonably necessary.
- 3.18 On the other hand, employers may be able to argue that it is reasonably necessary to collect these types of records if it forms part of a system of control measures in place to comply with work health and safety obligations (for example, to ensure employees are vaccinated when dealing with the public, etc).
- 3.19 Another reason to collect vaccine records might be to comply with client requirements (for example, where a customer requires a business to only send vaccinated employees to them e.g., a trade-based employee performing work on a client site).



Difference between ‘sighting’ and ‘collecting’ vaccination information

- 3.20 “*Collecting*” information for the purposes of the Privacy Act involves creating a record of the relevant information (s 6 of the Privacy Act).
- 3.21 This can be distinguished from sighting a record of vaccination which is when an employer merely requests to view a vaccination record. The Privacy Act does not apply to sighting information.
- 3.22 Accordingly, compliance issues do not arise if an employer is simply wishing to sight the vaccination status of its employees but does not keep a record of this. For example, vaccination status could be sighted as a condition of coming onto an employer’s place of work.
- 3.23 If an employer plans on recording the information (e.g., recording it in a list or database) or retaining documentary evidence of the person’s vaccination status (e.g., a photocopy of their vaccination record), then an employer must satisfy the requirements of the Privacy Act and the APP 3.

What to do if an employee won’t provide their vaccination status

- 3.24 An employer cannot force an employee to hand over details of their vaccination status.
- 3.25 However, the employer can inform employees that, if they refuse to provide details of their vaccination status, then the employer will need to assume that they are unvaccinated.
- 3.26 The employees can be informed that this will result in the employee being treated in the same manner as other unvaccinated employees (which might prevent them being able to access certain sites or, in a worst case scenario, might prevent them from performing their job).

4. Managing employee refusals to return to the office

Whether employees can be compelled to return to workplaces

- 4.1 Most employees will have agreed to contracts of employment that specify a particular work location as their place of work (for instance, an office, warehouse or suburb location).
- 4.2 Subject to certain flexible working arrangement considerations discussed further below, employers can issue lawful and reasonable directions to require employees to return to the workplace, particularly where the workplace has been specified in a contract of employment.
- 4.3 In requiring employees to return to the workplace, employers will need to comply with their work health and safety obligations under WHS laws. For this reason, prior to issuing a direction for employees to return to the workplace, employers should ensure there are controls in place to mitigate the risk of COVID-19 to the health and safety of employees.
- 4.4 An employee cannot ordinarily refuse an employer's direction to perform work at the usual work location.
- 4.5 However, if the employee has a reasonable basis to demonstrate that returning to work give rise to an imminent risk to his or health and safety, they may be able to refuse a direction to return to the workplace. This reinforces the need to ensure that appropriate risk-mitigation plans are in place for COVID-19 before returning workers to the workplace.

Employee rights to make flexible work arrangement requests

- 4.6 Under the *Fair Work Act* 2009, certain categories of employees have the right to request flexible work arrangements, that could include the employee working from home.
- 4.7 For employees to have this right, the employees are required to have worked for the same employer for at least 12 months and they must fall into one of the following categories:
 - (a) they are the parent, or have responsibility for the care, of a child who is school aged or younger;
 - (b) they are a carer (under the *Carer Recognition Act 2010*);
 - (c) they have a disability;
 - (d) they are 55 or older;
 - (e) they are experiencing family or domestic violence; or
 - (f) they provide care or support to a member of their household or immediate family who requires care and support because of family or domestic violence.



- 4.8 Casual employees can also make a request for flexible working if they have been working on a regular and systematic basis for at least 12 months and have a reasonable expectation of continuing work with the employer on a regular and systematic basis.
- 4.9 Requests for flexible working arrangements have to be in writing and must explain the change requested and reason for the request.
- 4.10 An employer must consider a flexible working arrangements request.
- 4.11 The request can only be refused on reasonable business grounds. Reasonable business grounds include but are not limited to:
- (a) the new working arrangements requested by the employee would be too costly for the employer;
 - (b) there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
 - (c) it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
 - (d) the new working arrangements requested by the employee would be likely to result in significant loss of efficiency or productivity; and
 - (e) the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

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- 4.12 The flexible work arrangement provisions also overlap to some degree with indirect discrimination laws which protect workers with certain attributes (eg. carers, persons with disabilities, the elderly) from being exposed to requirements in employment that are unreasonable and with which they are less able to comply than the broader population.
 - 4.13 It is accordingly important that any requests for flexible working arrangements from the above identified categories of workers are considered seriously before any direction is issued to return to the workplace.
 - 4.14 Advice specific to your circumstances should be taken before refusing any request for a flexible working arrangement by these categories of workers.

How to handle employee concerns about working with unvaccinated employees

- 4.15 The WHS Act provides that an employee can only cease or refuse to carry out work if they have a reasonable concern that the work poses a serious health or safety risk involving immediate or imminent exposure to a hazard.
- 4.16 Having regard to these provisions, an employee will not generally be able to rely on work health and safety laws to refuse to work with an unvaccinated worker. This is because:
 - (a) vaccination is not mandatory for all employees and many workplaces and businesses are operating with a mix of vaccinated and unvaccinated employees;
 - (b) co-workers may have a legitimate reason not to be vaccinated (for example, a medical contraindication); and
 - (c) vaccination is not the only control that can prevent transmission of COVID-19. There are a myriad of controls available to manage the risks posed by COVID-19 and the decision by an employer to not implement a single control does not automatically render the workplace unsafe.
- 4.17 If an employee refuses to attend the workplace because a co-worker is not vaccinated, provided the employer has conducted a risk assessment of the workplace and implemented appropriate controls to minimise the prospect of transmission of COVID-19, the employer should ordinarily be able to direct the employee to attend the workplace.

5. Isolation and close contacts

- 5.1 In NSW, if an employee tests positive for COVID-19, they must immediately self-isolate once they have received their positive test result.
- 5.2 This is in accordance with the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

Health order requirements (as at 1 March 2022)

- 5.3 Under clause 7 (1)(a) of the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*, employees have an obligation notify their employer if they receive a positive result. The self-isolation period must last seven days.
- 5.4 Close contacts are those persons notified by NSW Health that they are a close contact and persons who reside in the same household of a positive case.

How to manage employees required to self-isolate

- 5.5 Full-time and part-time employees can take paid personal/carer's leave if they cannot work because they are ill with COVID-19.
- 5.6 If they have no paid personal/carer's leave left, they should arrange with their employer to take some other type of paid or unpaid leave.
- 5.7 Similarly, employees required to care for an immediate family or household member with COVID-19 may take personal/carer's leave.
- 5.8 However, if an employee cannot attend work simply because they need to isolate due to being a close contact, they will not be entitled to take paid personal leave. This is because they are not ill or injured and they are not absent from work in order to provide care or support to a member of their immediate family or household.
- 5.9 An employee who is required to quarantine or self-isolate because of an enforceable government direction should contact their employer to discuss leave options or flexible working arrangements. This could include:
- (a) annual leave
 - (b) unpaid leave; and
 - (c) other special paid leave the employer might consider offering

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- 5.10 Various modern awards allow employees covered to access up to two weeks of unpaid pandemic leave as an additional type of leave.¹
- 5.11 The entitlement to unpaid pandemic leave has a nominal end date of 30 June 2022. Some awards no longer provide unpaid pandemic leave, including the *Clerks – Private Sector Award 2020*, *Passenger Vehicle Transportation Award 2020* and the *Road Transport and Distribution Award 2020*.²

Government payments

- 5.12 Employees who do not have access to paid leave entitlements may be entitled to receive certain payments from the Australian Government or their state government.
- 5.13 To access these payments employees will need to be on unpaid leave. The Pandemic Leave Disaster Payment is available to eligible workers who do not have paid leave entitlements and cannot earn an income because they:
- (a) must self-isolate or quarantine due to a positive coronavirus case, or
 - (b) are caring for someone with coronavirus.

Close contact exemptions

- 5.14 An exemption to isolation requirements has been made which applies to certain critical employees whose absence from the workplace would pose a high risk of disruption to the service and who cannot work from home.
- 5.15 The exemption is subject to certain conditions, including the worker being approved by the employer and undergoing rapid antigen testing. If the worker develops any symptoms of COVID-19, they must not work until they get a negative PCR test.
- 5.16 Critical employees presently include employees working in the following industries:
- (a) public administration and safety;
 - (b) health care and social assistance;
 - (c) agriculture; manufacturing;
 - (d) transport, postal and warehousing;
 - (e) funerals;
 - (f) electricity, gas, water and waste services; and
 - (g) information, media and telecommunications.

1 A full list of the Awards allowing for unpaid pandemic leave can be found on: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-leave-and-stand-downs/unpaid-pandemic-leave-annual-leave-changes-in-awards>.

2 A full list of the Awards no longer allowing for unpaid pandemic leave can be found on: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-leave-and-stand-downs/unpaid-pandemic-leave-annual-leave-changes-in-awards/list-of-awards-where-unpaid-pandemic-leave-schedule-x-no-longer-applies>.

- 5.17 An exemption is also in place for certain staff of NSW Health, public health organisations and licensed private health facilities whose absence from the workplace has been identified by their employer as a critical risk to safe service delivery to patients and who has been identified by the employer as being unable to work from home.
- 5.18 The exemption permits the worker to leave self-isolation subject to certain conditions, including wearing a mask, travelling directly to and from work and complying with any risk mitigation strategies put in place by the employer.



6. Responding when a Covid-case visits your premises

- 6.1 Where a worker tests positive with COVID-19 and is in the workplace, you should implement the following steps:
- (a) Tell the worker who has tested positive for COVID-19 to return home directly and follow the advice from NSW Health.
 - (b) Ensure any immediate risk to the safety of the workplace and workers is addressed, for example, by cleaning and disinfecting all areas used by the person who tested positive for COVID-19.
 - (c) Assess how much contact other workers had with the person who tested positive for COVID-19, while that person was infectious in the workplace. Resources to make this assessment can be found at: <https://www.nsw.gov.au/covid-19/business/linked-with-positive-worker-case>
 - (d) Where your assessment of workplace risk indicates there are workers who have had high risk exposures or moderate risk exposures, direct the workers to the NSW Health advice in the [Managing COVID-19 contacts in the workplace factsheet \(PDF, 193 KB\)](#).
 - (e) Advise workers, contractors and customers of the situation in your workplace and your plans to return to normal working arrangements (including any measures taken to make the workplace safe).
- 6.2 NSW Health publishes an array of helpful materials on how to make the workplace safe again and these can be accessed at: <https://www.nsw.gov.au/covid-19/business/linked-with-positive-worker-case>.

7. Anti-discrimination legislation and when it will affect requirements to become vaccinated

7.1 This section explains the limited categories of employees and customers who could refuse to become vaccinated to enter a workplace and who might be able to seek relief under discrimination laws if they are refused access to a workplace or are refused service by a business.

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

Direct Discrimination

7.3 Mandating vaccinations for employees or making vaccination a condition of entry to a business would not ordinarily result in "direct discrimination" as an employee or customer's decision to choose not to be vaccinated is not a specific attribute protected by any Australian discrimination laws.

Indirect Discrimination

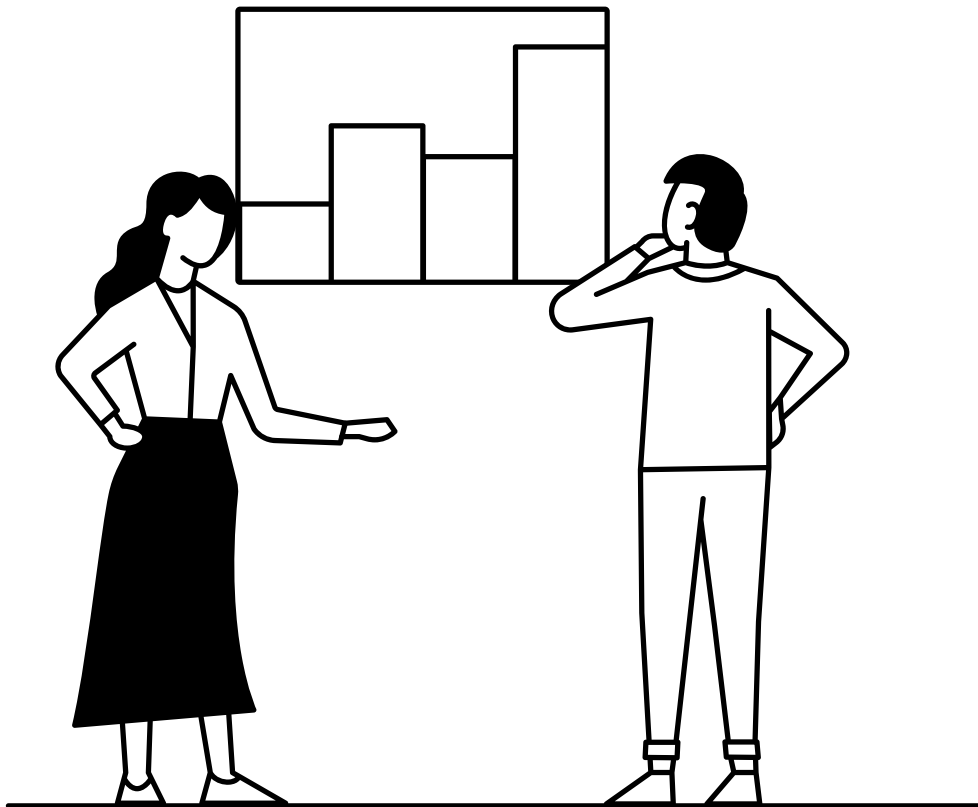
7.4 "Indirect discrimination" is also prohibited by discrimination laws.

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

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

(a) 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.

(b) Whether the requirement imposed is reasonable in the circumstances.



- 7.7 Whether a court considers it ‘reasonable’ for an employer or business to mandate COVID-19 vaccinations is likely to be highly fact dependent, considering the workplace and the employee’s individual circumstances as discussed above.
- 7.8 One way to ensure that a mandatory vaccine policy does not indirectly discriminate against any employees or customers is to develop a policy that has appropriate exceptions in respect of at least:
- (a) those with medical or physical conditions (such as women who are pregnant) or other contraindications (that is, persons whose medical conditions mean that vaccination may be harmful for them);
 - (b) those who otherwise have a disability that prevents them from being able to be vaccinated; and
 - (c) if relevant, employees or customers who have not been able to receive a ‘booster’ vaccination shot because of their age.

Health or Medical exemptions

- 7.9 Where an employee seeks to refuse to be vaccinated on medical grounds, the employee should provide appropriate medical evidence for this.
- 7.10 Where an employee establishes that they have a medical exemption, employers should consider whether:
- (a) having an unvaccinated worker can be accommodated, given that the majority of employees will be vaccinated;
 - (b) other measures can be adopted in conjunction with the employee being unvaccinated (for instance, a periodic testing regime); and
 - (c) it is possible to seek alternative duties for that person.

- 7.11 When there is no public health order or other law requiring a person to be vaccinated to enter premises and absent specific legal advice, a business should be cautious about deciding to exclude unvaccinated persons from its premises or to refuse them goods or services (where the person is unable to become vaccinated on account of health reasons).
- 7.12 To do so might amount to indirect discrimination against people who are unable to be vaccinated for medical reasons or because they have a condition, such as pregnancy or a disability.

Religious exemptions

- 7.13 Under Australian employment law, an employer cannot take adverse action against an employee or prospective employee or terminate the employment of a person because of that person's religion.
- 7.14 If an employee or future employee decides not to be vaccinated because of genuine religious belief, an employer should be cautious about terminating that person's employment or refusing to employ the person, or otherwise treating them less favourably.
- 7.15 An employer can ask for evidence to support the assertion for example, a letter from the religious institution and should seek specific advice about their circumstances before taking adverse action against an employee claiming the exemption, or terminating his/her employment or refusing to employ him/her.

'Inherent requirements' defence for employers

- 7.16 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, or while a public health order is in place, in education) 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.
- 7.17 However, employers should seek specific advice about their circumstances before dismissing an employee on these grounds.
- 7.18 In most cases, we anticipate that when employers accommodate the few employees who can genuinely refuse vaccination based on protected attributes such as medical grounds or religious belief, a policy mandating vaccination could otherwise be applied without breaching anti-discrimination laws (assuming it is a lawful and reasonable direction to mandate vaccination).

8. What happens if employees cannot work because they are required to be vaccinated by public health orders, but choose not to be vaccinated?

- 8.1 First, it is important to review the public health orders regularly as they are changing by the week and sometimes by the day.
- 8.2 Currently, in NSW, there are limited public health orders with COVID-19 vaccination requirements, relating to:
 - (a) aged care and disability services workers;
 - (b) education and care workers; and
 - (c) health care workers.
- 8.3 These public health orders prohibit certain employees entering or remaining at some work sites or performing certain work unless they are vaccinated with a COVID-19 vaccine and they also prohibit the occupiers of these work sites from allowing such employees from entering or remaining on such work sites.

- 8.4 If an employee is required to be vaccinated by a public health order, but is not vaccinated, two courses of action arise:
- (a) First, an employer can direct the employee to become vaccinated in order to work. 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.
 - (b) Secondly, the employer may be able to withhold pay (or ask if the employee wishes to use accrued leave entitlements or direct the person to work from home if possible) until the employee becomes vaccinated, depending on the contract of employment in place. 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 and although they may be ready and willing to work, they will *not be able to work*, likely resulting in an employee no longer having an entitlement to pay

Of course, the terms of each employee's employment contract will vary and it may be that some employees could do some of their duties or perform alternative work. Employers should seek individual advice about their circumstances before withholding pay.



9. Frequently asked questions

When can I mandate that my employees become fully vaccinated against COVID-19, including to take boosters?

An employer can only mandate existing employees to be vaccinated if they can issue a lawful and reasonable direction that they become so. The factors and steps set out in section 2 will be relevant to determining whether a particular business can issue a lawful and reasonable direction and to which segments of its staff.

Whether the direction can be extended to take booster shots may, apart from the factors identified above, depend on factors such as the availability of boosters, any relevant public health orders or public health advice.

Can my business make it a condition of employment for a new employee to be vaccinated or reserve the right to direct an employee to be vaccinated in future?

Yes, subject to the discrete anti-discrimination exemptions discussed at section 7 above, an employer will likely be able to include in contracts a condition requiring new employees to be vaccinated or reserving the right to direct them to be vaccinated at a later time.

How can I know whether my employees are vaccinated or not? What if an employee does not tell me his/her vaccination status?

Refer to section 3 above. The Australian Privacy Principles may be relevant to the collection and storage of the sensitive information that is a person's medical status.

A business can certainly ask for an employee *voluntarily* to disclose their vaccination status. However, unless a law (such as a public health order) requires or authorises an employer to collect or retain a record of vaccination, an employer bound by the APP may not be able to collect or retain a record of the information.

If an employee refused to disclose their vaccination status, you should treat the employee on the same basis as unvaccinated employees.

What if an employee chooses not to be vaccinated despite an employer mandate?

An employer may be able to take disciplinary action against an employee who chooses not to be vaccinated if:

- i). a vaccine mandate is a reasonable and lawful direction;
- ii). the employee has no medical or religious exemption, or other condition (such as pregnancy) protected by discrimination law; and
- iii). the employee cannot undertake alternative duties or otherwise work from home.

If an employer decides to take disciplinary action against an employee, it must ensure that it affords the employee procedural fairness and otherwise not act harshly, unjustly or unreasonably.

Can I compel my employees to return to the office?

Refer to section 4.

With appropriate work health and safety controls in place, an employer will ordinarily be able to direct an employee to return to the office, subject to taking a flexible approach to flexible work arrangement requests (where employees are entitled to make these requests) and genuinely considering employee safety concerns.

Can my business make being vaccinated a condition of entry to its premises for customers? Can my business refuse to provide goods and services to unvaccinated people?

Anti-discrimination law applicable in NSW do not specifically prohibit discrimination against customers based on a person's choice not to be vaccinated.

However, it prohibits indirect discrimination against a person on the basis of gender, race, disability, religion or age, and other attributes.

To avoid liability under anti-discrimination laws, businesses should be careful to avoid imposing a general rule excluding unvaccinated persons from their premises or refusing them goods and services, without providing exceptions for persons who choose not to be vaccinated for health reasons or because of a condition such as pregnancy.

10. Templates



Template COVID-19 WHS Risk Assessment

Standard Risk Assessment Form



Business:	Area:	Site:	
Team Leader:	Date:	Time:	Total Number of pages (including cover):
Observer/ Team Members:		Scope of Assessment:	

On completion of the Risk Assessment

Actions	By When	By Who
Authorised by:		

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Standard Risk Assessment Form



Hazard Identification, Risk Assessment and Controls

Activity / Area / Equipment	Hazards Identified <i>(use Hazard Prompt List attached)</i>	Raw Risk Rank / Score	Current Controls	Re-rank Risk/Score	Additional Controls Required	Anticipated Residual Risk Rank/Score

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Standard Risk Assessment Form

Hazard Prompt List (based on Mechanism / Agency AS1885.1 1990)

Description (mechanism of Incident / Injury)	What, where (agency and circumstances) - examples
General	
▪ Falls from height	Access / egress mobile plant, work platforms,
▪ Falls at same level (slips/trips)	In and around fixed plant, yard, car park, customer sites
▪ Struck by moving or falling object, entrapment	<u>Moving</u> vehicles, tools, equipment and plant
▪ Strike against object	<u>Fixtures</u> , structures
▪ Vehicle accident – off public road	Within work sites
▪ Vehicle Accident – on public road	On public roads
▪ Exposure to biological factors	Contaminated water, waste
▪ Rollover	Truck, mobile plant
▪ Engulfment (including drowning)	Material in bins, stockpiles, water in settlement ponds, slurry pits
▪ Mental stress exposure	Post incident trauma
Contact	
▪ Vibration	Mobile plant
▪ Noise	Explosives,
▪ Injection	In and around fixed and mobile plant
▪ Pressure	Hydraulic, air, water, explosive
▪ Electricity	Fixed plant, Mob
▪ Contact / exposure heat / cold	Weather conditions, fire
▪ Radiation	Densometers, working in sun
▪ Chemical / substance – single exposure	Hydrofluoric acid, bitumen
▪ Chemical / substance – cumulative exposure	Dust, hydrocarbons
▪ Chemical / substance – other contact	Spider and insect bites, stings
Manual Handling	
▪ Muscular stress – cumulative, repetitive	Repeated lifting (including own body weight into mobile plant), shovelling
▪ Muscular stress – single	Usually associated with excessive weight of object
▪ Other	Further categories may be added following analysis of this data

Risk Assessment Matrix

Consequence \ Probability	Insignificant (1)	Minor (2)	Moderate (3)	Major (4)	Catastrophic (5)
Almost Certain (5)	MEDIUM 20	HIGH 40	HIGH 60	EXTREME 80	EXTREME 100
Likely (4)	MEDIUM 16	MEDIUM 32	HIGH 48	HIGH 64	EXTREME 80
Possible (3)	LOW 12	MEDIUM 24	HIGH 36	HIGH 48	HIGH 60
Unlikely (2)	LOW 8	MEDIUM 16	MEDIUM 24	MEDIUM 32	HIGH 40
Practically Impossible (1)	LOW 4	LOW 8	LOW 12	MEDIUM 16	MEDIUM 20

Controls (Hierarchy of Controls)

Principle	Example
▪ Eliminate	Work not conducted at height
▪ Substitute	Change chemical to non / less toxic
▪ Engineering	Guards, handrails, dust extraction
▪ Administrative	Safe Work Procedures, training, signs
▪ Personal Protective Equipment (PPE)	High visibility clothing, masks, gloves

Template Privacy Collection Notice regarding Vaccination Status

[INSERT BUSINESS LETTERHEAD]

CONFIRMATION OF VACCINATION STATUS

[Insert business name] intends to collect information about which workers and prospective workers have been partially or fully vaccinated against COVID-19. This includes volunteers and prospective volunteers.

We confirm that our collection of information will be consistent with any Privacy Act obligations and that the following will apply:

- (1) The information will be collected by **[insert business name]** and is collected for the purposes of ensuring we are able to assess risks to our workers and volunteers and customers in our workplaces consistent with work health and safety obligations.
- (2) We do not intend to disclose the information to any other entities or persons, unless compelled to do so by law.
- (3) **[delete if no privacy policy is in place]** Our privacy policy contains information about how we deal with personal information, how you can access and correct your personal information held by **[insert business name]** and how you can complain about any breaches of the Australian Privacy Principles outlined in the Privacy Act. Our privacy policy can be found here: **[insert where privacy policy can be found, if there is one]**.
- (4) We will not be disclosing information collected to overseas recipients.
- (5) If you do not permit the collection of the vaccine information requested, **[insert business name]** may not be able to offer you employment, and if an employment relationship has already commenced, your employment may be terminated without notice.

Template Direction to become Vaccinated

[INSERT BUSINESS LETTERHEAD]

[INSERT DATE]

[INSERT ADDRESSEE]

Dear [INSERT NAME]

RE: Direction regarding vaccination

[Insert business name] has undertaken a work health and safety risk assessment regarding the risks posed to work health and safety by the COVID-19 pandemic. Consultations on this risk assessment were conducted with the workforce on [INSERT].

As a result of that risk assessment, we have decided to implement a policy whereby [INSERT Business name] requires its employees to become fully vaccinated with an authorised COVID-19 vaccination. For more detail regarding the policy and the exemptions to the requirement to be vaccinated, see [insert title of policy and where it may be accessed].

In accordance with [Insert business name]'s vaccination policy, [insert business name] is now directing you to:

- (a) obtain a first dose of an authorised COVID-19 vaccination (with authorised evidence) by [insert date] and a second dose an authorised COVID-19 vaccination by [insert date]; or
- (b) provide evidence of an exemption consistent with [Insert business name]'s vaccination policy.

Authorised evidence of your vaccine includes:

- Immunisation History from Medicare;
- COVID-19 Digital Certificate; or
- Medical exemption from a medical practitioner.

Naturally, should you have any concerns about the effects of a vaccine on your personal health, you should seek your own medical advice. Employees are able to obtain medical exemptions from the requirement to become vaccinated if vaccination is likely to give rise to significant adverse health effects for you personally.

Consequences for failing to comply with the direction

If you do not comply with the terms of the direction recorded above, we put you on notice that this could result in a finding that you have failed to comply with a lawful and reasonable direction.

A breach of this direction could result in disciplinary action up to and including termination of your employment.

Questions? If you have any questions, please contact XXXXX.

Yours sincerely



Contacts

Business NSW

David Harding
Executive Director
Policy and Advocacy, Business NSW
David.Harding@businessnsw.com

ABLA

Luis Izzo
Managing Director - Sydney Workplace
Australian Business Lawyers & Advisors
Luis.Izzo@ablawyers.com.au

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