

# VICTORIAN & LOCAL GOVERNMENT

*Living with COVID-19*

4 Oct 2021

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# IMPORTANT INFORMATION

## Version

This guide was last  
updated *4 Oct 2021*

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# WE HEAR YOU

## *Victorian & Local Government*

### Living with COVID-19 – vaccines and more

The Victorian Government is one of the largest employers in Australia. Victoria's local governments also have a large workforce and when contractors are added into the mix, the size of the workforce grows exponentially.

With such a sizeable workforce, it is no wonder Victorian government agencies and local governments are working hard to develop holistic responses to the complexities associated with living with COVID-19, including whether to mandate vaccines for employees.

Mandatory vaccinations raise questions around work health and safety obligations, employment and industrial issues, along with those arising under discrimination and privacy law.

### Supporting you

Lander & Rogers is partnering with many clients in the public and private sectors to guide them through these issues. As part of this support, we have developed this guide to assist Victorian & local government organisations to navigate complexities with greater clarity and certainty.

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# KEY DATES



**Hotel quarantine workers (including staff transporting people between airports and hotels)** must be fully vaccinated (after being required to have had 1 dose of a COVID-19 vaccine by 8 April).

**Construction workers** must have had 1 dose of a COVID-19 vaccine (relevant date: 30 September).

**Commercial freight workers** must have 1 dose of a COVID-19 vaccine.

**Healthcare workers\*** must have 1 dose of COVID-19 (relevant date: 15 October).

**Employees in residential aged care facilities** must be fully vaccinated.

**Healthcare and Education workers\*** must be fully vaccinated.

**5 November** (anticipated): 80% Victorians over 16 y.o. fully vaccinated: further restrictions eased.

**26 October** (anticipated): 70% Victorians over 16 y.o. fully vaccinated: certain restrictions eased, including removal of reasons to leave home and curfew, travel limit increased to 25 km.

**19 November** (anticipated): 80% Victorians over 12 y.o. fully vaccinated: restrictions eased in accordance with National Cabinet plan.

## Additional information

**\*Education workers** are persons who work in schools (including principals, teachers, administration and education support staff, casual relief teachers and pre-service teachers), or early childhood education and care (including outside school hours care services).

**\*Healthcare workers** are persons engaged by a healthcare operator to perform at a healthcare facility: healthcare services, administrative or ancillary roles, ambulance and patient transport services and work at a retail business operating within a healthcare facility. A healthcare facility is defined to mean (amongst other things): hospitals, community health centres and services, general practices, dental surgeries, health clinics, pharmacies, diagnostic and imaging centres, blood donation services etc.

**Authorised workers** are listed [here](#).

**Relevant date** means the date from which the operator of a facility must collect vaccination information about the worker, and prevent entry to premises of an unvaccinated worker (or

worker who has not supplied their vaccination status) unless the worker holds a booking to receive their first dose vaccination before the first dose deadline and is required to wear personal protective equipment.

All deadlines are subject to exceptions for employees with **medical contraindications** and in **exceptional circumstances** – learn more [here](#).

### Additional requirements for construction:

- Operators in the construction industry will be required to attest that they have implemented the public health directions prior to reopening at 25 per cent capacity on 5 October 2021.
- Every site must have an up-to-date vaccination register available for compliance checks at all times.
- Fully vaccinated workers can travel between metropolitan Melbourne and regional Victoria in order to work onsite.
- See [roadmap](#) for more information.

# FREQUENTLY ASKED QUESTIONS

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# FAQ

## Risk management

### Why is it important to take steps to eliminate or limit the transmission of COVID-19 in the workplace?

Key reasons why Victorian state and local governments must take steps to eliminate or minimise the risks associated with COVID-19 in the workplace include:

- to comply with their obligations under the **Occupational Health and Safety Act 2004 (Vic) (OHS Act)**, which includes ensuring, so far as is reasonably practicable, the health and safety of employees. There are also obligations to other persons to ensure (so far as is reasonably practicable) their health and safety is not put at risk from work carried out as part of the conduct of the Victorian Government agency;
- to limit the risks associated with workers' compensation claims; and
- from an operational perspective, various commercial factors such as:
  - reducing the risk of being adversely affected by a COVID-19 event; and
  - a preference or requirement by clients or customers to deal with organisations who have adequate control measures in place.

In real terms, Victorian state and local governments must either eliminate the risk of transmission of COVID-19 in the workplace, or if that is unable to be achieved, take all steps that are reasonably practicable to minimise exposure to it.

#### **Risk of occupational health and safety investigations and prosecutions**

Recently, it has been reported in the media that WorkSafe Victoria commenced an inquiry into the COVID-19 death of an employee after his workplace became a Tier 1 exposure site.

The Australian Services Union called for and supported the investigation on the basis that all employers should be held accountable for breaches of workplace safety standards.<sup>1</sup>

It is foreseeable that similar investigations will take place for other instances of COVID-19 transmission in a workplace, which may also lead to prosecutions.





## Mandating vaccination

### Which employees are already covered by a mandate to obtain a vaccine in Victoria under a public health order?

For some Victorian government agencies and local governments, the question of whether to mandate vaccines has already been decided by a public health order.

#### Watch this space...

There are currently several court challenges to similar public health orders in Victoria and New South Wales, including from:

- a Victorian casual relief teacher, Belinda Cetnar and her husband, Jack Cetnar, a horticulturalist employed by CREST Education;
- a NSW Ambulance Paramedic, John Larter;
- a NSW Police Officer, Belinda Hcroft; and
- a group of Jewish, Baptist and Presbyterian religious leaders.

These different cases allege various reasons why the public health orders should be set aside, including that the government allegedly does not have the power to coerce people into being vaccinated, but to date none of them have been successful.

Employee	Public health directions
<b>Quarantine workers</b> (including staff transporting people between airports and hotels)	Condition of employment for all new starters and Mandatory Vaccination Policy; also introduced in <i>COVID-19 Mandatory Vaccination Directions (No 5)</i> on 1 October 2021
<b>Residential aged care facility workers</b>	Introduced in <i>COVID-19 Mandatory Vaccination Directions (No 1)</i> on 7 September 2021; last updated in <i>COVID-19 Mandatory Vaccination Directions (No 5)</i> on 1 October 2021
<b>Construction site workers</b>	Introduced in <i>COVID-19 Mandatory Vaccination Directions (No 2)</i> on 17 September 2021; last updated in <i>COVID-19 Mandatory Vaccination Directions (No 5)</i> on 1 October 2021
<b>Education and care workers</b>	Introduced in <i>COVID-19 Mandatory Vaccination Directions (No 4)</i> on 29 September 2021; last updated in <i>COVID-19 Mandatory Vaccination Directions (No 5)</i> on 1 October 2021
<b>Healthcare workers</b>	Introduced in <i>COVID-19 Mandatory Vaccination Directions (No 4)</i> on 29 September 2021; last updated in <i>COVID-19 Mandatory Vaccination Directions (No 5)</i> on 1 October 2021
<b>Authorised workers</b>	Announced 1 October 2021 – Public health orders yet to be released

NB. The public health orders are subject to exceptions for employees with **medical contraindications** and in **exceptional circumstances**.

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## Operator obligations

### What are the obligations for operators?

The obligations imposed on operators in the industries that are subject to the *COVID-19 Mandatory Vaccination Directions (No 5)* (**Directions**) include an obligation to:

- collect, record and hold vaccination information; and
- take reasonable steps to prevent entry of unvaccinated workers onsite

#### Collecting, recording and holding vaccination information

Under clause 4 of the Directions, operators must collect, record and hold vaccination information as soon as practicable after the commencement of the relevant date directions and before the date the mandatory vaccination requirements are imposed.

This includes:

- proof of full vaccination
- proof of partial vaccination and a booking for a second dose by the relevant deadline; or
- proof of no existing vaccination but a booking for a first dose by the relevant deadline.

Employers who collect vaccination information in accordance with the public health directions are authorised to collect and use the information for the purposes of privacy and health legislation. The directions also permit disclosure of information to the operator of a site or authorised officers under the *Public Health and Wellbeing Act 2008* (Vic), where necessary.

#### Taking reasonable steps to prevent entry of vaccinated workers onsite

Under clause 5 of the Directions, after the specified dates, operators must take reasonable steps to prevent entry onsite, or the remaining onsite, of:

- unvaccinated workers who have not received their dose or, in some instances, obtained a first dose booking by the relevant deadlines; or
- workers who have not provided their vaccination information or proof of a valid exception

unless there is an emergency situation or critical unforeseen circumstance requiring the worker to be onsite.

Aside from the requirement for mandatory vaccination of authorised workers, it is

currently unclear what specific obligations will be imposed on authorised providers, as the public health directions underpinning the vaccination mandate for authorised workers is yet to be released.

We anticipate that they will be similar to the obligations imposed on operators in the industries that are subject to the Directions.

## Exemptions or exceptions

### What exemptions or exceptions apply regarding vaccination and operator obligations?

The Directions provide for exceptions for "excepted persons" and in "exceptional circumstances".

#### Excepted persons and medical contraindications

The Directions provides for the following categories of "vaccination status":

- fully vaccinated
- partially vaccinated
- unvaccinated
- excepted person

An excepted person is a person who has obtained certification from a medical practitioner that they are unable, due to a medical contraindication, to receive a dose, or a further dose, of a COVID-19 vaccine.

An excepted person does not have the vaccination status of "unvaccinated" (or "partially vaccinated"), and an operator is not subject to an obligation to exclude them from entry.

A medical contraindication is defined as meaning one of the following contraindications to the administration of a COVID-19 vaccine:

- anaphylaxis after a previous dose
- anaphylaxis to any component of the vaccine, including polysorbate or polyethylene glycol
- in relation to AstraZeneca:
  - history of capillary leak syndrome; or
  - thrombosis with thrombocytopenia occurring after a previous dose
- in relation to Comirnaty (Pfizer) or Spikevax (Moderna):
  - myocarditis or pericarditis attributed to a previous dose of either Comirnaty or Spikevax; or
- the occurrence of any other serious adverse event that has been attributed to a previous dose of a COVID-19 vaccine by an experienced immunisation provider or medical specialist (and not attributed to any another identifiable cause); and been reported to State adverse event programs and/or the Therapeutic Goods Administration

#### Exceptional circumstances

Under the Directions, operators of work premises are exempt from complying with both the requirement to collect, record and hold vaccination information; and the requirement to take reasonable steps to prevent entry of unvaccinated workers, if one or more of the exceptional circumstances specified below apply:

- a worker is required to perform work or duties at the facility that is or are necessary to provide for urgent specialist clinical/medical care due to an emergency situation or a critical unforeseen circumstance; or
- a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or continue essential operations at the facility due to an emergency situation or a critical unforeseen circumstance (e.g. if a work premises has a large number of workers furloughed due to exposure at a Tier 1 site, or a medical practitioner is required to attend the premises on short notice due to an emergency situation); or
- a worker is required to attend the facility to respond to an emergency at the facility; or
- a worker is required to perform urgent and essential work at the facility to

protect the health and safety of workers or members of the public, or to protect assets and infrastructure (e.g. securing a crane due to impending high winds, or where works are required at a construction site to make the construction site safe for continued operation).

If any of the last three exceptional circumstances apply, the operator must take all reasonable steps to ensure the worker remains upon the premises of the facility only for the time necessary to respond to the exceptional circumstance.

**Critical unforeseen circumstance:** means a circumstance that the operator of a work premises could not reasonably have foreseen nor planned for, which results in a critical need for staff.

**Emergency situation:** means a situation where it is reasonably apparent to the operator of a specified facility that medical treatment is necessary, as a matter of urgency, to:

- save a person's life; or
- prevent serious damage to a person's health; or
- prevent a person from suffering or continuing to suffer significant pain or distress

# FAQ



## *Exemptions or exceptions*

### What exemptions or exceptions are likely to apply to Authorised Workers?

Until the public health directions underpinning the vaccination mandate for Authorised Workers are released, the precise nature and extent of any exemptions or exceptions is unclear. However, [guidance published by the Government](#) states that:

...limited exemptions apply, including medical exemptions and for the consular and diplomatic corps in limited exceptional circumstances, an operator can approve unvaccinated workers to continue working if it is necessary, including:

- for a worker to provide for urgent specialist clinical or medical care at the work premises due to an **emergency situation** or a **critical unforeseen circumstance**; or

- for a worker to fill a vacancy to provide urgent care, to maintain quality of care and/or continue essential operations at the work premises due to an emergency situation or a critical unforeseen circumstance; or
- for a worker who is required to attend the premises to respond to an emergency at the work premises; or
- for a worker to sustain human or animal health, safety and wellbeing where a vaccinated worker cannot be sourced in a timely manner; or
- for a worker to make a premises safe and secure, or to perform urgent and essential work to protect assets and infrastructure where a vaccinated worker cannot be sourced in a timely manner.

It, therefore, seems likely that the exceptions will reflect those under the Directions.





# FAQ



## Mandating vaccination

### Can an agency mandate COVID-19 vaccines for employees?

In the absence of a public health order that requires employees to be vaccinated, or specific powers provided under their enabling legislation, Victorian government agencies and local government must rely on their common law authority to do so.

#### In simple terms

In short, yes, an agency or council may issue an employee a direction to have a COVID-19 vaccine provided that the direction is both lawful and reasonable.

If an agency or council purports to issue a direction to an employee that does not satisfy both of these requirements, the employer must not take disciplinary action against an employee for failing to follow that direction.

In recent weeks, many private sector and some public sector employers, including COVID-19 Quarantine Victoria and St Vincent's Hospital have relied on this authority to issue a policy that requires its employees to be vaccinated against COVID-19.



*lawful + reasonable = valid direction*

## *Mandating vaccination – factors to consider in your risk assessment*

### **In what circumstances is a mandate to obtain the COVID-19 vaccine likely to be lawful and reasonable?**

There is currently no law that specifically prevents an employer from requiring an employee to be vaccinated against COVID-19. However, whether doing so would be unlawful under Commonwealth, state and territory anti-discrimination legislation in particular circumstances has not yet been tested. There is currently a general protections case before the Federal Circuit Court of Australia that deals with a face mask mandate implemented by the ABC, which is expected to proceed to hearing later in 2022.<sup>2</sup> This case is likely to deal with issues associated with discrimination.

#### **What is reasonable?**

In terms of what is "reasonable", having regard to guidance from Fair Work Commission (**FWC**) decisions,<sup>3</sup> the Fair Work Ombudsman (**FWO**)<sup>4</sup> and advice received

from the Solicitor-General,<sup>5</sup> a direction for an employee to receive a COVID-19 vaccination will likely be reasonable based on numerous factors, some of which include:

- whether there is a public health order that requires the employee to be vaccinated;
- the type of work that the employee is engaged in and who they will have contact with, noting the following four tiers adopted by the Prime Minister and FWO:
  - **Tier 1:** employees who are at risk of acquiring the virus through direct contact;
  - **Tier 2:** employees working with vulnerable people;
  - **Tier 3:** employees with public facing roles; and
  - **Tier 4:** employees who are not often in close contact with others;
- whether vaccination is necessary for the employer to discharge their obligations under the OHS Act;

- whether the direction is sufficiently connected with the employees' employment - i.e. it is within the scope or subject matter of the employees' employment;
- the availability and effectiveness of the COVID-19 vaccine in limiting the transmission of the virus;
- the availability and effectiveness of any alternative control mechanisms that are able to be utilised.

There are various other factors relevant to this assessment, which Lander & Rogers is pleased to discuss with you.

## Mandating vaccination

### What steps should an employer take before mandating that employees have the COVID-19 vaccine?

Before implementing a mandatory COVID-19 vaccine policy, so as to ensure that any such direction is lawful and reasonable, Victorian government agencies should explore all options to minimise the impact of COVID-19 on the health and safety of employees.

It is important that agencies conduct a risk assessment for their organisation. In that respect, Safe Work Australia has published a guideline titled "*Key considerations for undertaking a risk assessment - COVID-19*" to assist employers.<sup>6</sup>

In addition to conducting a risk assessment and [implementing other safety measures](#), employers should consider entitlements available to employees to provide flexibility necessary to get the COVID-19 vaccine, such as paid vaccination leave, prior to mandating that employees have the COVID-19 vaccine.

### Charter considerations

Any mandatory direction to be vaccinated will be a decision for the purposes of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**). As such, the decision maker will need to assess which Charter rights are engaged and whether any limitations on those rights are justified and proportionate.

To the extent Charter rights are engaged, it will be necessary to undertake a reasonableness and justification analysis, including considering:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

### Risk-based approach

Some agencies and councils may determine that it is appropriate to have a "one-size fits all" approach and issue a direction that applies equally to all employees. Other agencies and councils may decide that certain groups present a higher risk than others, such as frontline workers, and adopt a tiered approach to mandatory vaccinations, depending on risk factors.

Lander & Rogers is here to assist you with making these complex assessments. Don't forget that the approach can be fluid and should be continuously reviewed and updated as the risk profile changes.



# FAQ



## *Protecting employees*

### **What other measures could be used to protect the health and safety of employees as lockdown restrictions lift?**

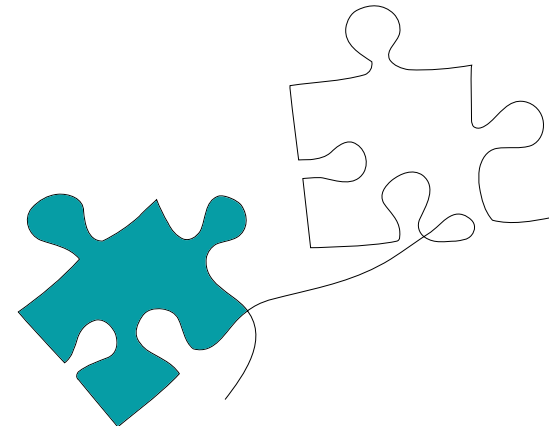
Vaccines are considered to be a high order control mechanism, meaning that they are very effective at managing the risks associated with the transmission of COVID-19 in the workplace. For this reason, where other high order control mechanisms are not able to be utilised (such as working from home) and there is otherwise a high degree of risk having regard to the factors set out above, mandatory vaccination policies may be a necessary measure for employers to discharge their obligations under the OHS Act.

This is particularly the case in circumstances where the safety regulators appear to be increasing their focus on how employers are managing this risk.

There are multiple controls that Victorian government agencies can implement to assist with discharging their obligations under the OHS Act and to protect the health and safety of employees, in addition to mandating the COVID-19 vaccine, including:

- maintaining a current COVID-Safe Plan;
- ensuring Service Victoria COVID-19 QR codes are available at the workplace;
- making rapid antigen testing available and/or implementing compulsory COVID-19 testing;
- restricting access to the workplace for those who are not vaccinated (employees and others);
- requiring employees to work from home;
- implementing density and physical distancing requirements;
- requiring employees to wear face masks or gloves in the workplace;
- frequently cleaning and disinfecting high touch points;

There are many other control measures, that we would be happy to discuss with you.





# FAQ



## Employee rights

### In what circumstances may an employee lawfully refuse to follow a direction to be vaccinated?

An employee may refuse to be vaccinated where it is reasonable for them to do so.

Common examples may include:

- the employee is immunocompromised and is unable to be vaccinated;
- or their occupation is generally low risk and other control measures are reasonably available to them.

The Federal Government has revealed that a COVID-19 vaccine exemption certificate will be available for those with a legitimate medical reason as assessed and lodged by a GP, paediatrician or infectious disease physician.

A legitimate medical reason may be one of the following:

- anaphylaxis after a previous dose of a vaccine
- anaphylaxis after a dose of any component of a vaccine
- significantly immunocompromised – for live vaccines only

Legitimate medical reasons do not include a blood clotting disorder, history of stroke and/or heart attack or various allergies.

Only individuals who are allergic to both polyethylene glycol and polysorbate 80 cannot get any of the three COVID-19 vaccines available.

The Victorian public health orders refer to a medical contraindication as meaning a *"contraindication to the administration of a COVID-19 vaccine as determined by the Australian Technical Advisory Group on Immunisation's (ATAGI) clinical guidance on the administration of COVID-19 vaccines in Australia"*.

The existence of this Federal vaccine exemption scheme reduces the disability discrimination risk exposure for employers, as it clearly sets out which medical conditions the Federal Government considers do or do not warrant an exemption from vaccine mandates.

Agencies and councils should be mindful of anti-discrimination legislation that could impact on the lawfulness of a direction, such as in circumstances where employees have particular health conditions. However, agencies can potentially rely on a range of exceptions that exist under most anti-discrimination legislation, including because the person would be unable to carry out the "inherent requirements" of their position.<sup>7</sup> An "inherent requirement" is more than an employer's preference that an employee be vaccinated, and must relate to an essential element of the employee's role.

Keep an eye out for the outcomes in the litigation involving a Victorian casual relief teacher and a NSW Ambulance paramedic challenging the public health orders mandating COVID-19 vaccines as arguments regarding discrimination on religious grounds have been raised.

# FAQ



## *Disciplinary action*

### **Is disciplinary action available if an employee fails to follow a direction to obtain a COVID-19 vaccine?**

Victorian Government agencies are already grappling with how to respond to a handful of employees who have refused to obtain COVID-19 vaccines required under public health orders.

While these employees have not been allowed to attend work or have been assigned alternate duties, questions are emerging about how to respond to their refusal to comply with the requirement to be vaccinated on an ongoing basis.

Similar questions will emerge if agencies or councils mandate COVID-19 vaccines in their policies, and an employee refuses to comply with that direction.

If the direction is **lawful and reasonable**, and the employee does not have a lawful and reasonable excuse for non-compliance, an agency or council may be able to take disciplinary action against the employee.

This could potentially include termination of employment, noting that relevant procedural fairness requirements and employee protections against being dismissed will still apply.

It is, however, recommended that employers explore all options available before taking disciplinary action.

### **Alternative measures**

Measures other than disciplinary action include:

- considering redeployment to an alternative role that does not require COVID-19 vaccination;
- considering if the employee can perform all of their duties while working from home;
- standing down the employee with pay for a short period to allow the employee to obtain the vaccine;
- access to paid leave entitlements; or
- leave without pay.

## *Disputes between employees*

### **Can vaccinated employees refuse to work with non-vaccinated employees?**

As workplaces emerge from lockdown, it is only natural that strongly-held views will emerge between those vaccinated and unvaccinated against COVID-19.

Generally, assuming that there is no relevant health advice preventing attendance and the agency has otherwise taken appropriate steps to eliminate or minimise the transmission of COVID-19 in the workplace, it is difficult to see how a vaccinated employee could refuse to attend their workplace where a co-worker isn't vaccinated against

coronavirus or where they may be required to work with clients or members of the general public, because:

- vaccination is not generally mandatory, except for certain prescribed workplaces (e.g. COVID-19 frontline quarantine workers, residential aged care, construction) and most workplaces won't be able to require their employees to be vaccinated, nor is it likely vaccines will become mandatory for the general population.
- the co-worker, client or member of the general public may have a legitimate reason not to be vaccinated (for example, a medical reason).

If an employee refuses to attend the workplace because a co-worker isn't vaccinated or because they do not wish to work directly with clients or members of the

public, an agency can direct them to attend the workplace if the direction is lawful and reasonable. Whether a direction is lawful and reasonable depends on all of the circumstances, including the agency's occupational health and safety obligations, and whether the employee has a particular vulnerability.

If it is unclear whether a direction or an employee's refusal is reasonable, agencies should seek specific advice before taking disciplinary action.



## *Mandating vaccination – condition for new employees*

### **Can employers institute a requirement that new employees require two doses of the COVID-19 vaccine as a condition of employment?**

An employer may make employment conditional on any number of factors, provided they are not discriminatory, including that prospective employees be fully vaccinated against the COVID-19 virus.

However, there must be a process for an employee to request an exemption to such a condition in certain circumstances, such as a medical contraindication.

The *COVID-19 Mandatory Vaccination Directions (No 5)* of 1 October 2021 define a **medical contraindication** as meaning one of the following contraindications to the administration of a COVID-19 vaccine:

- anaphylaxis after a previous dose;
- anaphylaxis to any component of the vaccine, including polysorbate or polyethylene glycol;
- in relation to AstraZeneca:
  - history of capillary leak syndrome; or
  - thrombosis with thrombocytopenia occurring after a previous dose;
- in relation to **Comirnaty (Pfizer)** or **Spikevax (Moderna)**:
  - myocarditis or pericarditis attributed to a previous dose of either Comirnaty or Spikevax; or
- the occurrence of any other serious adverse event that has
  - been attributed to a previous dose of a COVID-19 vaccine by an experienced immunisation provider or medical specialist (and not attributed to any another identifiable cause); and
  - been reported to State adverse event programs and/or the Therapeutic Goods Administration.



## Employee rights – vaccination leave

### Do employers need to offer special paid leave to employees getting a COVID-19 vaccine?

Traditionally, sick leave is only available when an employee is unfit for work because they are ill or injured. However, an award, enterprise agreement, other registered agreement, employment contract or workplace policy may include extra rules about using sick leave.

The Victorian Government strongly encourages all employees to be vaccinated and has introduced a guidance note regarding supports for Victorian Public Service and the Victorian Public Sector employees getting a COVID-19 vaccination.<sup>8</sup>

This makes clear the Victorian Government's expectation that all public sector employers assist employees in receiving a COVID-19 vaccination, subject to operational requirements.

Employee group	Available supports
<b>For employees required to be vaccinated because of a public health order or at the direction of their employer due to the nature of their role/work</b>	<ul style="list-style-type: none"><li>• Time off without loss of pay to travel to and from a vaccination centre (if required to travel away from the usual place of work) and be vaccinated</li><li>• If it is not practical or possible to receive the vaccination in paid time, employers should use their discretion to identify and provide supports to employees to receive the vaccination outside of their ordinary working hours by providing up to half a day's pay or by agreement up to half a day of time off in lieu on a case-by-case basis</li><li>• Employers should also consider supporting the reimbursement of any reasonable travel expenses, where significant travel is required by an employee to access a vaccination site</li><li>• Long-term casuals who have been working with their public sector employer on a regular and systematic basis, and who are anticipated to continue to be employed on a regular and systematic basis may also have their attendance at a vaccination site facilitated within ordinary hours and without loss of pay.</li></ul>
<b>For all other employees</b> (including casuals)	Employers may facilitate an employee's attendance at a vaccination site (including reasonable travel time) by providing access to paid time off of up to half a day for employees (including long term and/or regular rostered casuals but excluding other casuals) to attend a vaccination appointment. An equivalent payment at base rate of pay or by agreement up to half a day of time off in lieu may also be considered if appropriate. This incorporates reasonable travel time.

Accordingly, while employers are not required to offer special paid leave to employees getting a COVID-19 vaccine, it is recommended.

In determining how the available supports are implemented, employers should have regard to:

- operational requirements
- work location, including regional locations
- employees' working hours, including shift work
- vaccination roll-out options available to an employee.

## *Employee rights – leave arrangements (adverse reactions)*

### **Do employers need to offer special paid leave to employees unable to attend work due to an adverse reaction to COVID-19 vaccination?**

The Victorian Government's guidance note regarding support for public sector employees getting a COVID-19 vaccination includes the following information:

#### **Employee group**

**Employees who become unwell or experience adverse reactions** as a result of receiving the vaccine

#### **Available supports**

- Personal/carers leave
- For casual employees, flexible allocation of rostered shifts
- Employers may use their discretion to provide paid leave to employees who do not have paid leave entitlements.

**Employees who are required to provide care and support** for a member of their immediate family or household to support them to receive the vaccine or because they become unwell or experience adverse reactions as a result of receiving the vaccine

- Personal/carers leave
- For casual employees, flexible allocation of rostered shifts.



# FAQ



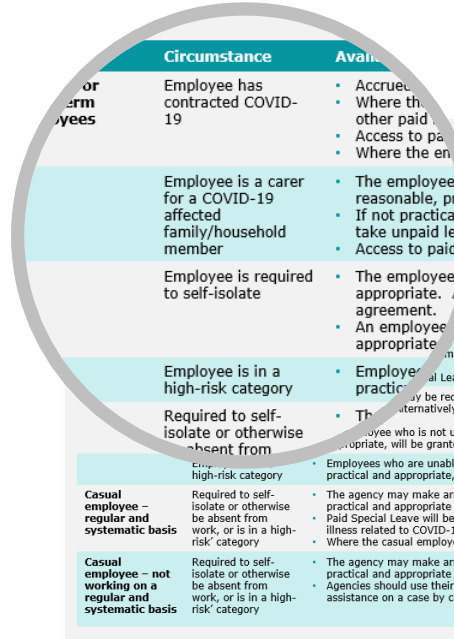
## Employee rights – leave due to COVID-19 infection or exposure

### Do employers need to offer special paid leave to employees unable to attend work due to COVID-19?

Recently, the Victorian Government introduced a guidance note for the public sector that deals with payment during absence from work due to a COVID-19 risk,<sup>9</sup> including:

- where employees have contracted COVID-19,
- are caring for an affected family/household member,
- are required to self-quarantine, or
- are in a higher-risk category.

It applies to all employers and employees in the Victorian Public Service (including employees covered by the *Victorian Public Service Enterprise Agreement 2020*) and Victorian Public Sector (including TAFEs), except employers and employees employed in the Victorian Public Health Sector, Schools Sector, Victoria Police and other emergency services.



	Circumstance	Available leave
For term employees	Employee has contracted COVID-19	<ul style="list-style-type: none"><li>• Accrued personal leave</li><li>• Where the employee has other paid leave</li><li>• Access to paid Special Leave</li><li>• Where the employee is in a higher risk category</li></ul>
	Employee is a carer for a COVID-19 affected family/household member	<ul style="list-style-type: none"><li>• The employee's leave is reasonable, practical and appropriate</li><li>• If not practicable, the employee may take unpaid leave</li><li>• Access to paid Special Leave</li></ul>
	Employee is required to self-isolate	<ul style="list-style-type: none"><li>• The employee's leave is reasonable, practical and appropriate</li><li>• An employee who is unable to attend the workplace due to their higher risk status, and where working from home is not reasonable, practical and appropriate in light of the caring responsibilities of the employee, may either access their accrued personal/carer's leave entitlement or another type of accrued leave or Special Leave</li></ul>
	Employee is in a high-risk category	<ul style="list-style-type: none"><li>• Employee's Special Leave is to be considered appropriately by agencies on a case-by-case basis.</li></ul>
	Required to self-isolate or otherwise absent from work	<ul style="list-style-type: none"><li>• The employee may be required to work from home for some or all of the self-isolation period where reasonable, practical and appropriate. Alternatively, employees may access any specific leave entitlement available to them under the applicable enterprise agreement.</li><li>• An employee who is not unwell but is required to self-isolate and where working from home is not reasonable, practical and appropriate, will be granted paid Special Leave to cover the required self-isolation period.</li></ul>
Casual employee – regular and systematic basis	Required to self-isolate or otherwise be absent from work, or is in a high-risk category	<ul style="list-style-type: none"><li>• Employees who are unable to attend the workplace due to their higher risk status, and where working from home is not reasonable, practical and appropriate, may access paid Special Leave, and other accrued paid and unpaid leave.</li><li>• The agency may make arrangements with the employee to work from home for some or all of the relevant period where reasonable, practical and appropriate in light of the health or caring responsibilities of the employee.</li><li>• Paid Special Leave will be provided to cover any required period of self-isolation or period required to be absent from work due to illness related to COVID-19.</li><li>• Where the casual employee falls into a 'higher risk' category, the employee will be entitled to paid Special Leave</li></ul>
Casual employee – not working on a regular and systematic basis	Required to self-isolate or otherwise be absent from work, or is in a high-risk category	<ul style="list-style-type: none"><li>• The agency may make arrangements with the employee to work from home for some or all of the relevant period where reasonable, practical and appropriate in light of the health or caring responsibilities of the employee.</li><li>• Agencies should use their discretion in assessing appropriately whether or not to provide paid Special Leave or other financial assistance on a case by case basis.</li></ul>



Click to enlarge

# FAQ



## *Is a COVID-19 policy necessary?*

### **Do employers need to have a policy in place regarding requirements or preferences to have a COVID-19 vaccine?**

A COVID-19 vaccination policy is not necessary in the workplace. However, some state and territory regulators have signalled that as the vaccine becomes more widely available, it is likely to be "recommended" to employees in occupations with a high risk of exposure to COVID-19.<sup>10</sup>

Regardless of the approach being taken to COVID-19 vaccines, we recommend Victorian government agencies implement COVID-19 policies as a transparent way to communicate the agency's approach to managing COVID-19 in the workplace.

A COVID-19 policy is a good accompaniment to a COVID-Safe Plan.





## *Incentives for vaccines*

### Can employers offer incentives to employees to get a COVID-19 vaccine?

Employers can offer incentives to their employees to get vaccinated against COVID-19. However, this may potentially lead to an increased risk of workplace injury claims in the event that an employee suffers adverse reactions to the vaccine.<sup>11</sup>

However, any claim would depend on its individual merits, and significant adverse reactions to the vaccine are extremely rare.

This risk can, however, be mitigated by following the 2021 permission by the TGA (**2021 Permission**).<sup>12</sup>

Pursuant to the 2021 Permission, any party can offer valuable consideration (cash or other rewards) to people who have been fully vaccinated under the Government's national COVID-19 vaccination program, subject to the following conditions:

- The offer can only be made to people who have been fully vaccinated, which currently means two vaccinations.
- The offer must contain a statement to the effect that the vaccination must be undertaken on the advice of a health practitioner.
- Any reward provided must not include tobacco or medicines (other than listed medicines).
- The offer must only refer to COVID-19 vaccines generically.
- The offer must be made to all eligible people who have been vaccinated.
- An offer of alcohol must not encourage excessive or rapid consumption of alcohol, have a strong or evident appeal to minors and must be served consistent with the Responsible Service of Alcohol arrangements.<sup>13</sup>



# FAQ



## *Privacy and data collection*

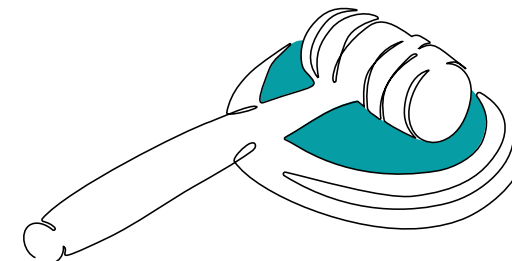
### **What privacy legislation applies to Victorian public sector agencies when collecting vaccination information?**

Agencies are governed by the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) and the *Health Records Act 2001* (Vic) (**HR Act**).

In relation to the handling of health information, the HR Act is the relevant regulation ('health information' as defined in the HR Act is excluded from the definition of 'personal information' under the PDP Act).

As information about an individual's vaccination status is 'health information' under the HR Act, that legislation will govern the handling of COVID-19 vaccination information by agencies.

The 11 Health Privacy Principles under the HR Act are legal obligations, which Victorian public sector agencies must abide by when they collect, hold, use and disclose a person's health information.



## *Privacy and data collection*

### **What vaccination information can employers collect?**

Agencies must only collect health information that is reasonably necessary for one or more of their functions or activities.

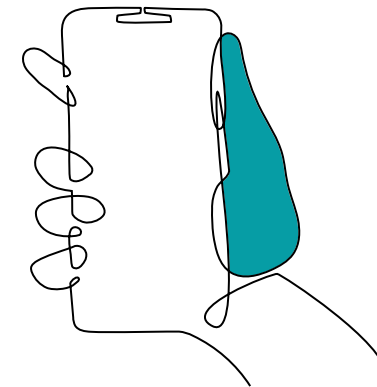
Agencies must therefore have clear and justifiable reasons (such as workplace health and safety) for collecting their employees' vaccination information.

Those reasons may include compliance with legal obligations to provide a safe workplace and do all that is reasonably practicable to ensure the health and safety of their employees, clients and visitors.

If the collection of vaccination information about individuals is reasonably necessary for the prevention and management of COVID-19 in workplaces or public areas under the agency's control, then that collection should be permissible.

However, not all agencies or councils, and not all workplaces, are the same so agencies should carefully consider whether this information is reasonably necessary in the particular circumstances.

It will generally not be justified to collect vaccination status information (which is referable to a particular individual) purely for statistical or monitoring purposes.





## *Privacy and data collection*

### **How must health information pertaining to vaccination be collected?**

An agency must only collect health information by lawful and fair means and not in an unreasonably intrusive way.

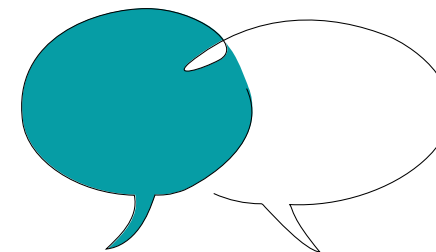
Unless it is unreasonable or impracticable to do so, an agency must collect vaccination information directly from the individuals themselves and not from a third party.

At or before the time of collection, the agency must take steps to ensure that the individual is made aware of the following information:

- the purposes for which the information is collected;
- to whom the agency will disclose information of that kind; and
- the main consequences (if any) for the individual if all or part of the information is not provided.

This will normally take the form of a privacy collection notice.

Only in very limited circumstances may an agency collect health information about an individual from a third party.



## *Privacy and data collection*

### **Is employee consent required to collect vaccine information?**

Unless an exemption applies under the HR Act, an employer must obtain consent to collect, use or disclose the health information of its employees. Consent may be express or implied.

An agency will need to be careful in framing any request for employees to provide vaccination information to ensure that the request cannot be interpreted as a requirement or direction.

If any health information is collected, an agency must take reasonable steps to:

- make sure that the health information it collects, uses, holds or discloses is accurate, complete, up to date and relevant to its functions or activities;
- protect the information from misuse and loss, and from unauthorised modification and disclosure; and
- destroy or permanently de-identify the health information if it is no longer needed for the purpose for which it was collected or any other purpose authorised by law.



## *Privacy and data collection*

### **What other requirements apply when collecting vaccine information?**

Vaccine information must be managed in the same manner as any other health information collected by the agency.

Agencies should ensure that their handling of this information complies with the Health Privacy Principles, including that health information is:

- stored securely, not kept any longer than necessary, and disposed of appropriately
- protected from unauthorised access, use or disclosure
- only used for the purpose for which it was collected or for a directly related purpose, which a person would expect, unless an exception applies or the individual consents, and
- only disclosed for the purpose for which it was collected, or for a directly related purpose that a person would expect, unless an exception applies or the individual consents.





## *Sources of information*

- 1 Regulator scrutinising employee's COVID-19 death, Workplace Express, 16 September 2021.
- 2 Silvia Chamoun v Australian Broadcasting Corporation & Ors, MLG4260/2020.
- 3 *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818, [2021] FWCFB 6015; *Glover v Ozcare* [2021] FWC 2989; *Barber v Goodstart Early Learning* [2021] FWC 2156.
- 4 Fair Work Ombudsman, [COVID-19 vaccinations: workplace rights and obligations](#) (12 August 2021)
- 5 Department of the Prime Minister and Cabinet, [Transcript](#) - 6 August 2021 (6 August 2021).
- 6 Safe Work Australia, [Key considerations for undertaking a risk assessment - COVID-19](#) (27 April 2020).
- 7 See, for example, *Disability Discrimination Act 1992* (Cth) section 21A.
- 8 Industrial Relations Victoria, [Supports for Victorian Public Service and the Victorian Public Sector employees getting a COVID-19 vaccination](#) (NB. This [Guidance Note](#) applies to all departments and agencies of the Victorian Public Service and the Victorian Public Sector and their non-executive level employees).
- 9 Industrial Relations Victoria, [Coronavirus \(COVID-19\) guidance note for the Victorian Public Service and Sector](#)
- 10 See, for example, SafeWork NSW, COVID-19 (Coronavirus) [\(30 July 2021\)](#).
- 11 See, for example, *Sara v G & S Sara Pty Ltd* [2021] NSWPIIC 286.
- 12 Australian Government Department of Health Therapeutic Goods Administration, [Therapeutic Goods \(Restricted Representations - COVID-19 Vaccines\) Permission \(No.3\) 2021 \(30 July 2021\)](#).
- 13 Australian Government Department of Health Therapeutic Goods Administration, [Communicating about COVID-19 vaccines \(11 August 2021\)](#).

# KEY CONTACTS



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Kaitlyn has extensive experience working with clients in the public and private sector, in the areas of employment law, industrial relations, safety, discrimination and administrative law.

She prides herself on understanding the issues confronting her clients to ensure she provides a practical and solutions-focussed approach.



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Daniel has been practising in all areas of workplace relations and employment law for nearly 20 years. He focuses on solving clients' issues to help them achieve business success.

Daniel has been a trusted adviser to both Victorian and local government entities for many years.



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Derek leads our international practice and practises in all areas of workplace relations and safety law. He is our firm's relationship partner for the Victorian government and has acted for the Parliament of Victoria for over 15 years.

Derek is regularly sought out by employers when matters are sensitive or where media interest will be high.



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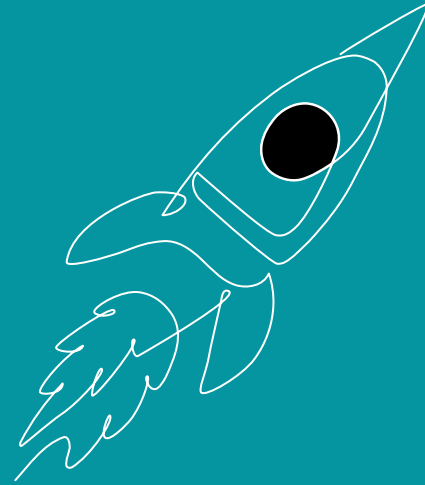
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Cameron has over 20 years experience as an OHS and criminal law practitioner. Cameron was Telstra's in-house health and safety legal counsel for 9 years prior to joining Lander & Rogers.

Cameron prides himself on providing practical and expert advice to clients in relation to regulatory investigations and prosecutions.

# QUESTIONS

Click [here](#) or scan below to submit a question.

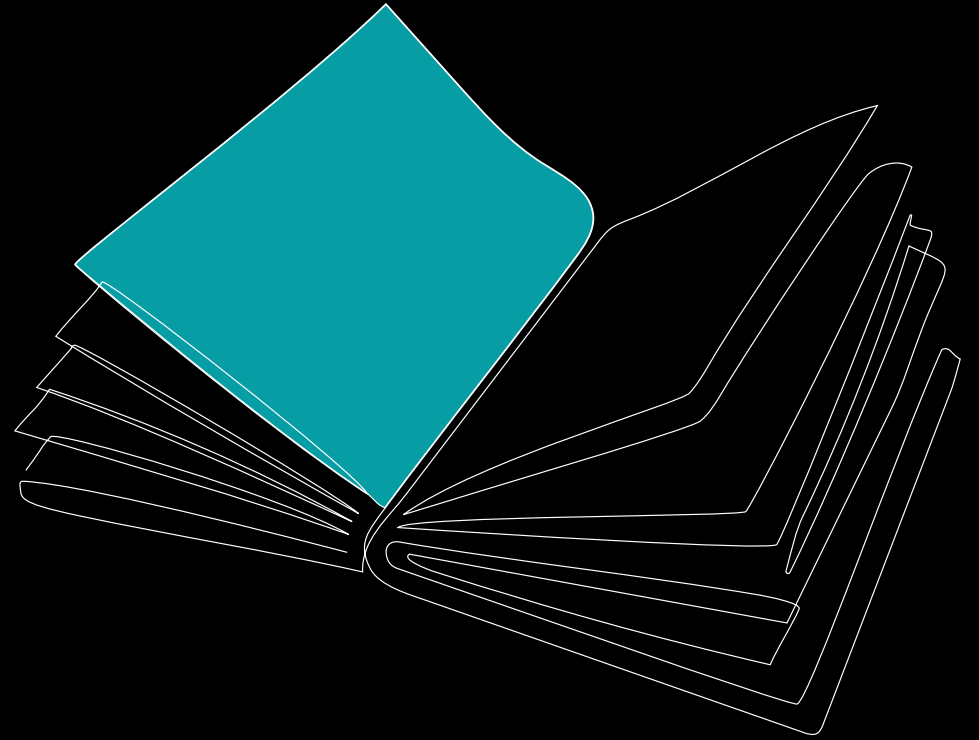


<https://forms.office.com/r/T5ADyAtFpW>



# APPENDIX

Additional information



## *Employee rights – leave due to COVID-19 infection or exposure*

Collapse  
and return



Cohort	Circumstance	Available supports
<b>Ongoing or fixed-term employees</b>	Employee has contracted COVID-19	<ul style="list-style-type: none"> <li>Accrued personal/carer's leave entitlement in accordance with the relevant enterprise agreement that applies to their employment.</li> <li>Where the employee does not have enough accrued personal leave to cover a period of absence associated with a COVID-19 infection, other paid leave entitlements (e.g. annual or long service leave) can be used or unpaid leave can be taken.</li> <li>Access to paid Special Leave is to be considered appropriately by agencies on a case-by-case basis.</li> <li>Where the employee has contracted an illness in the course of their duties, the employee may lodge a WorkCover claim.</li> </ul>
	Employee is a carer for a COVID-19 affected family/household member	<ul style="list-style-type: none"> <li>The employee may make arrangements with the agency to work from home for some or all of the self-quarantine period where reasonable, practical and appropriate in light of the caring responsibilities of the employee.</li> <li>If not practicable, the employee may either access their accrued personal/carer's leave entitlement or another type of accrued leave or take unpaid leave.</li> <li>Access to paid Special Leave is to be considered appropriately by agencies on a case-by-case basis.</li> </ul>
	Employee is required to self-isolate	<ul style="list-style-type: none"> <li>The employee may be required to work from home for some or all of the self-isolation period where reasonable, practical and appropriate. Alternatively, employees may access any specific leave entitlement available to them under the applicable enterprise agreement.</li> <li>An employee who is not unwell but is required to self-isolate and where working from home is not reasonable, practical and appropriate, will be granted paid Special Leave to cover the required self-isolation period.</li> </ul>
	Employee is in a high-risk category	<ul style="list-style-type: none"> <li>Employees who are unable to attend the workplace due to their higher risk status, and where working from home is not reasonable, practical and appropriate, may access paid Special Leave, and other accrued paid and unpaid leave.</li> </ul>
<b>Casual employee – regular and systematic basis</b>	Required to self-isolate or otherwise be absent from work, or is in a high-risk' category	<ul style="list-style-type: none"> <li>The agency may make arrangements with the employee to work from home for some or all of the relevant period where reasonable, practical and appropriate in light of the health or caring responsibilities of the employee.</li> <li>Paid Special Leave will be provided to cover any required period of self-isolation or period required to be absent from work due to illness related to COVID-19.</li> <li>Where the casual employee falls into a 'higher risk' category, the employee will be entitled to paid Special Leave</li> </ul>
<b>Casual employee – not working on a regular and systematic basis</b>	Required to self-isolate or otherwise be absent from work, or is in a high-risk' category	<ul style="list-style-type: none"> <li>The agency may make arrangements with the employee to work from home for some or all of the relevant period where reasonable, practical and appropriate in light of the health or caring responsibilities of the employee.</li> <li>Agencies should use their discretion in assessing appropriately whether or not to provide paid Special Leave or other financial assistance on a case by case basis.</li> </ul>

# ABOUT US

*Founded in 1946, Lander & Rogers is one of the few remaining truly independent Australian law firms and a leader in legal tech innovation.*

With offices across the eastern seaboard of Australia, Lander & Rogers has grown organically resulting in a unified firm with a strong focus on client and staff care.

We believe legal services involve more than just the law – practical, commercial advice and exceptional client experience are equally important to our clients and to us.

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