

PRIVATE SECTOR BUSINESSES

Living with COVID-19 in NSW

6 December 2021

LANDER
& ROGERS



IMPORTANT INFORMATION

Latest changes

This guide was last updated *6 December 2021*

Recent updates include:

Page 4: News section updated with recent case outcome

Updates



Access the [latest version](#) or
subscribe to [email updates](#)

Homepage



Jump to COVID-19 guide
navigation homepage.

WE HEAR YOU

NSW private sector

Living with COVID-19 – vaccines and more

The NSW private sector is comprised of an assortment of employers of different structures and types, choosing to conduct their businesses in a variety of ways.

With such diversity, it is no wonder many businesses are concerned by the complexities associated with living with COVID-19, including whether to mandate vaccines for employees. It has been, and no doubt will continue to be, a challenge to navigate the various information being circulated by various sources.

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 private and public sectors to guide them through these issues. Based on the questions you are asking, we have developed the following guide to assist NSW private sector employers to navigate these issues.

The Fair Work Ombudsman (FWO) has also provided guidance on *COVID-19 vaccinations and the workplace* (published 26 January 2021 and most recently updated 1 October 2021), which can be accessed [here](#).

Key contacts

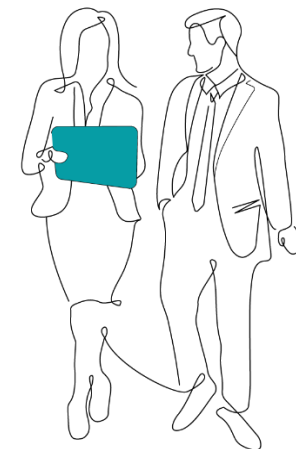
Sally Moten *Partner*
Workplace Relations & Safety

Robert Neely *Partner*
Data Privacy & Protection

Aaron Goonrey *Partner*
Workplace Relations & Safety

Neil Napper *Partner*
Workplace Relations & Safety

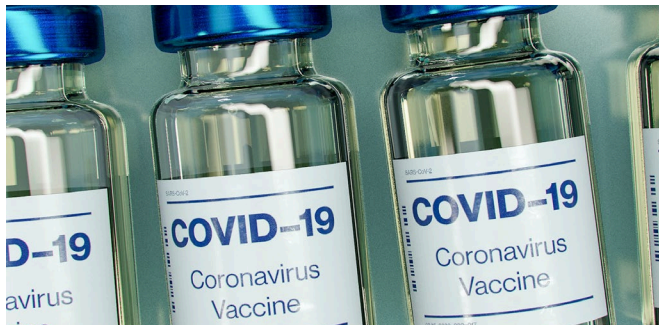
Luke Scandrett *Special Counsel*
Workplace Relations & Safety



Access COVID-19 news and information impacting businesses.

Case notes

Learn more about recent cases involving COVID-19.



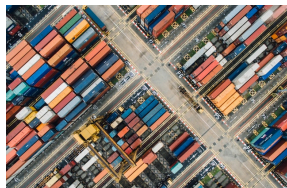
BHP COVID-19 vaccine mandate overturned

The Fair Work Commission has overturned a COVID-19 vaccination mandate by BHP, with important lessons for businesses.

[Learn more](#) about the Commission's decision and the implications for employers who are in the process of implementing, or have already done so, policies mandating COVID-19 vaccines.



Qantas mask mandate



DP World dismissal



Victorian public hospital nurses

In case you missed it

■ **Booster shots now available**

COVID-19 vaccine booster shots are now available to anyone aged 18 and over who received their second dose of a COVID-19 vaccination over six months ago. Booster vaccinations are available at GPs and pharmacies as well as NSW Health vaccination clinics, which now includes Granville Centre in Sydney's west, as Qudos Bank Arena has been reinstated as a sporting and entertainment venue.

■ **Court again rejects challenge**

On 10 November 2021, the Supreme Court of NSW rejected a challenge brought by paramedic John Larter against two public health orders mandating vaccinations. The Court found that it was open to the Minister for Health to make the public health orders, and that the Court did not have the power to determine what public health order could or should have been made.

KEY DATES



Construction workers must have had 1 dose of a COVID-19 vaccine ≥ 21 days ago OR 1 dose of a COVID-19 vaccine < 21 days ago + a negative COVID-19 test result within 72 hours prior.

Airport, quarantine and transport workers must have had 2 doses of a COVID-19 vaccine.

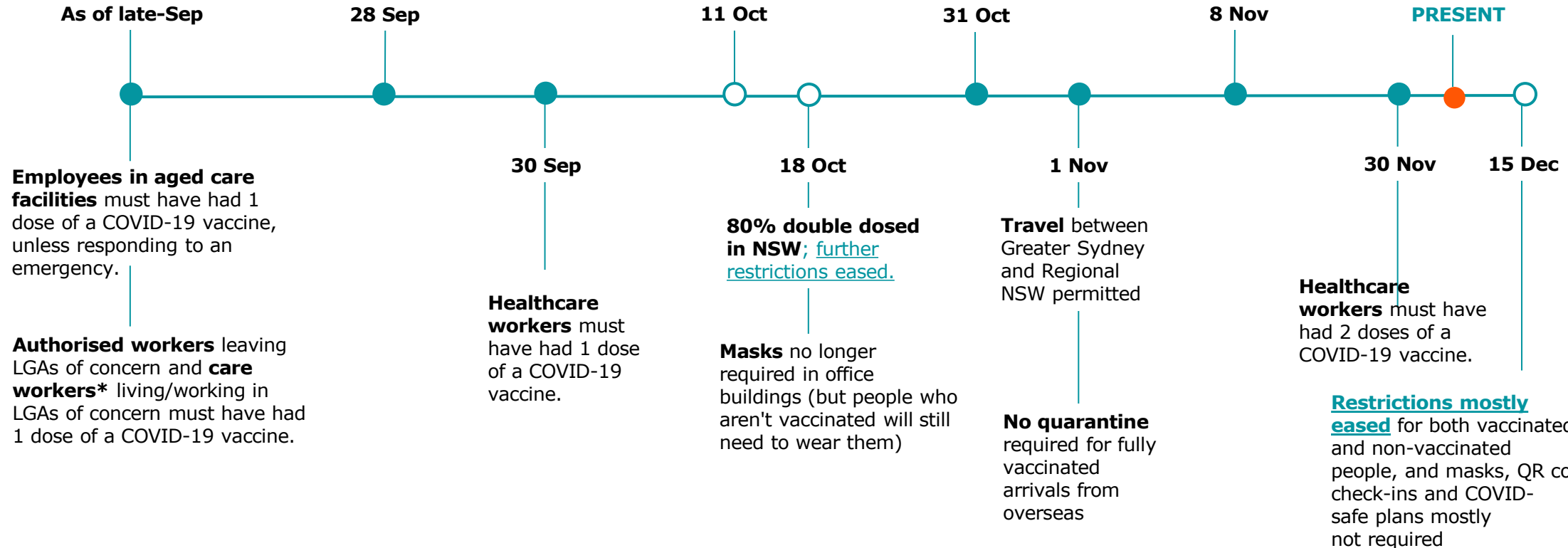
Workers in Regional NSW must have at least 1 dose of a COVID-19 vaccine to return to work

70% double dosed in NSW; [certain restrictions eased.](#)

Health practitioners or students working in aged care facilities must have had 1 dose of a COVID-19 vaccine, unless responding to an emergency.

Education and care workers* must have had 2 doses of a COVID-19 vaccine.

**Education and care workers are persons who work at a school or early education and care facility or who provide disability support service to a child.*



USING THIS GUIDE

Instructions

NSW private sector

Searching this document

Search this document in three simple ways:

- Keyword search
- Browse by question
- Preselected keywords

Navigation aids

Use these buttons to quickly and easily navigate this guide:



Home page



Key contacts



Submit question

Home page



► Search key term

Type here



► Browse by question

Click

► Key terms

Public health order

Mandating vaccination

Refusing vaccination

Special leave

Lawful & reasonable

Disciplinary action

Privacy legislation

Data collection

Incentives

Click the topic

► Case notes

Click

CONTENT



*Browse by question – **click** on the below*

Mandating vaccination

- ▶ Is disciplinary action available if an employee fails to follow a direction to vaccinate?
- ▶ Which employees are already covered by a mandate to obtain a vaccine in NSW under a public health order?
- ▶ Can an employer mandate COVID-19 vaccines for employees?
- ▶ In what circumstances is an employer's mandate to obtain the COVID-19 vaccine likely to be lawful and reasonable?
- ▶ What steps should an employer take before mandating that employees have the COVID-19 vaccine?
- ▶ Can employers institute a requirement that new employees have two doses of the vaccine as a condition of employment?
- ▶ What are the vaccination requirements as of 18 October 2021?
 - ▶ **Case note:** Challenge to public health orders mandating vaccination

Employee rights

- ▶ In what circumstances may an employee lawfully refuse to follow a direction to be vaccinated?
- ▶ Do employers need to offer special paid leave to employees getting a COVID-19 vaccine?

Protecting employees

- ▶ What measures could an employer consider to protect the health and safety of employees as lockdown restrictions lift?
- ▶ Can vaccinated employees refuse to work with non-vaccinated employees?

Other

- ▶ Do employers need to have a policy in place regarding requirements or preferences to have a COVID-19 vaccine?
- ▶ Can employers offer incentives to employees to get a COVID-19 vaccine?

Privacy and data collection

- ▶ What privacy legislation applies to NSW private sector employers when collecting vaccination information?
- ▶ What vaccination information can employers collect?
- ▶ How must health information pertaining to vaccination be collected?
- ▶ Is employee consent required to collect vaccine information?
- ▶ Could employers obtain information without it being "collected"?
- ▶ What other requirements apply when collecting vaccine information?

Risk management

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

CASE NOTES

Your guide

LANDER
& ROGERS



Recent cases involving COVID-19

■ Qantas mask mandate

On 22 October 2021, the Fair Work Commission found that a direction by Qantas to mandate the wearing of masks in October 2020 constituted a *"lawful and reasonable direction in the context of the COVID pandemic"*. The decision concerns a legal challenge to the mask mandate by a flight attendant that applied for an exemption on the basis of a medical certificate citing her anxiety as a ground. Qantas denied the exemption request. However, Qantas provided alternative options to the employee, including the wearing of a face shield instead, attending an independent medical examination, and completing "non-safety critical duties", all of which the attendant refused. The attendant then resigned. The attendant's representative argued that the resignation was in *"circumstances that made it constructive dismissal"*.

The Fair Work Commission considered the attendant's resignation and concluded that she was not, on any reasonable view, left with no other choice but to resign, which is required to amount to a constructive dismissal. This, together with the clearly documented exemption process implemented by Qantas, resulted in the mask mandate being held to be a lawful and reasonable direction.

View the judgement [here](#).

■ DP World dismissals

A union has commenced legal action against DP World regarding its decision to dismiss 22 employees that refused to accede to a COVID-19 vaccine mandate.

The vaccine mandate implemented by the company required all employees and contractors to have received one dose of a COVID-19 vaccine by 15 October 2021 and two doses by 15 November 2021. DP World argues that, as a tier 1 employer with essential workers interacting with vessel crews at ports of entry, its employees and their families have been eligible for priority access to vaccinations since March 2021. The litigation is ongoing.

■ Victorian public hospital nurses

On 3 November 2021, Justice Snaden of the Federal Court of Australia published his decision rejecting legal action brought by an unregistered union for an interlocutory injunction to halt disciplinary action by Monash Health against Victorian public hospital nurses for their non-compliance with a vaccination direction.

The union argued that the disciplinary action prevented the nurses from exercising their statutory occupational health and safety consultation rights on the mandatory vaccination policy.

His Honour dismissed the application on the basis that a state-wide vaccine mandate for nurses did not provide Monash Health with any alternative to implementing the vaccine mandate policy and taking corresponding disciplinary action against any employee who did not comply with the direction, regardless of whether they asserted a right to consultation or not.

View the judgement [here](#).



Kassam v Hazzard; Henry v Hazzard

Unsuccessful challenge to public health orders mandating vaccination

The Supreme Court of New South Wales has recently published the decision of Chief Justice Beech-Jones in *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320. The decision concerns a legal challenge to NSW public health orders (PHOs) by multiple plaintiffs, including, among others, aged care workers, a paramedic, a high school special education teacher and a construction worker (Plaintiffs).

The Plaintiffs are all persons who have refused to be vaccinated against the COVID-19 virus. They alleged that the PHOs are invalid on the following grounds:

1. the Minister for Health and Medical Research, Bradley Hazzard (Minister), did not undertake any real exercise of power in making the PHOs;
2. the PHOs are either outside of the power conferred by the Public Health Act 2010 (NSW) (PHA) or represents an unreasonable exercise of the power because of its effect on fundamental rights and freedoms;
3. the manner in which the PHOs was made was unreasonable;
4. the PHOs confers powers on police officers that are inconsistent with the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW);
5. the PHOs were made for an improper purpose; and
6. that in making the PHOs, the Minister:
 - i. failed to have regard to various relevant considerations;
 - ii. asked the wrong question or took into account irrelevant considerations;
 - iii. was obliged to but failed to afford them natural justice; and
 - iv. acted unreasonably.

His Honour stated that the Court is not required to determine the merits of the exercise of power by the Minister or the effectiveness of the COVID-19 vaccines. Those matters are for the decision-maker, i.e. the Minister. Instead, the Court's function is to determine the legal validity of the orders, which includes considering whether no Minister acting reasonably could have considered the PHOs necessary to deal with the risk to public health and its possible consequences.

One of the main grounds of challenge concerned the effect of the PHOs on the rights and freedoms, especially in respect of the bodily integrity of persons choosing not to be vaccinated. However, his Honour found that the PHOs did not interfere with such freedoms and, instead, curtailed the freedom of movement, which in turn affects a person's ability to work and socialise.

After reviewing the powers conferred by the PHA and making findings in respect of the Minister's decision-making processes (although, noting that the Minister did not give evidence directly yet the State provided evidence that the Minister was aware of the "Doherty Institute modelling"), his Honour rejected all of the asserted grounds of invalidity and dismissed the proceedings.

FREQUENTLY ASKED QUESTIONS

Your guide

LANDER
& ROGERS



Risk management

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

Key reasons why NSW private sector employers must take steps to eliminate or minimise the risks associated with COVID-19 in the workplace include:

- to comply with their obligations under the **Work Health and Safety Act 2011** (NSW) (WHS Act), which include to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by them. 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 business;
- 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 businesses who have adequate control measures in place.

In real terms, employers 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 work 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.²

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.

In a separate matter, on 6 October, it was announced that fruit producer SPC had been cleared of any wrongdoing by WorkSafe Victoria, following concerns being raised that SPC had not properly consulted with its workers prior to implementing a mandate for the COVID-19 vaccine. SPC commented that the timing of the investigation was unfortunate, as it occurred during a lockdown in Shepparton, Victoria.

Mandating vaccination

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

For some businesses, the question of whether to mandate vaccines has already been decided by a public health order.

Watch this space...

We expect the NSW Government to make further announcements in the near future, regarding the easing of restrictions.

| Employee | Public health order |
|--|---|
| Quarantine workers | Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021 |
| Designated airline workers | Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021 |
| Designated transport workers i.e. employees who provide a transportation service to a person that arrives in NSW by aircraft, including a flight crew member, and has been, or was on the same flight as a person who has been, in another country within 14 days prior to arrival. | Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021 |
| Construction workers* living in or temporarily staying in a <u>local government area of concern</u> , must not enter or remain at a construction site in Greater Sydney unless they comply with the rules for <u>COVID-19 vaccination requirements</u> . | Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 |
| Health care workers | Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 |
| Care service workers i.e. workers in aged care facilities and persons who provide disability services. | Public Health (COVID-19 Care Services) Order 2021 |
| Education and care workers | Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 |
| Authorised workers* in NSW LGAs of concern, including early education and care and disability support. | Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 |
| Workers in Regional NSW – from 11 October 2021, need at least one dose of a COVID-19 vaccine to return to work. | Public Health (COVID-19 General) Order 2021 |

*Please note that, from 11 October 2021, there will no longer be any LGAs of concern. Accordingly, vaccine mandates relevant only to LGAs of concern will no longer apply.

Mandating vaccination

What are the vaccination requirements as of 18 October 2021?

The Public Health (COVID-19 General) Order 2021 (General Order) has been in force since 11 October 2021, being the date on which certain restriction eased in NSW for the fully vaccinated population as a result of the state reaching its 70% target for eligible individuals to be vaccinated.

The General Order contains provisions requiring occupiers of certain business premises to ensure that persons on the premises are fully vaccinated.

The table notes the business premises at which patrons and staff are required to be vaccinated against COVID-19 under the General Order.

The General Order also contains provisions regarding working from home, workplace capacity limits, and conditions for leaving or entering restricted areas wearing masks, which since 11 October has not existed, pending changing circumstances.

There are also specific requirements for construction sites, albeit only in restricted areas, which has not existed as of 11 October, pending changing circumstances.

In respect of mask requirements, employees will need to wear masks in the workplace until 18 October 2021. Under the General Order, once NSW reaches its 80% target for vaccinations, masks will no longer be required in offices and will be optional.

Please note: the public health orders are continually being updated. We will provide further guidance and updates as they arise.

| Premises | Responsible party |
|--|------------------------|
| Holidays homes or short-term rentals (where patrons are not from the same household) | Occupier |
| Outdoor gatherings | Organiser of event |
| Vehicles and vessels (where persons are not from the same household) | Unvaccinated adults |
| Higher risk premises (i.e. entertainment facilities, major recreation facilities, hospitality venues, places of public worship, premises at which a significant event is held) | Occupier |
| Certain business premises (i.e. hairdressers, spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours) | Occupier |
| Indoor recreation facilities | Occupier |
| Public swimming pools | Occupier |
| Information and education facilities | Occupier |
| Retail premises that are not critical retail premises | Occupier |
| Workplaces where it is reasonably practicable to work from home | Unvaccinated employees |

FAQ



Mandating vaccination

Can an employer 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, employers must rely on their common law authority to do so.

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

If an employer 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, NSW Police has relied on this authority to issue a policy that requires its employees to be vaccinated against COVID-19.

Recent case in the Fair Work Commission

On 27 September 2021, the Full Bench of the Fair Work Commission issued a 2:1 decision that upheld the lawfulness of an employer's direction for all of its employees to have a flu vaccination (*Kimber v Sapphire Coast Community Aged Care*).

The majority, dismissing the appeal, concluded: *"We do not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement."*

A noteworthy aspect of the decision was a dissent from Deputy President Dean, which questioned the lawfulness of mandatory vaccination requirements, and concluded *"All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia"*.

It is expected that the decision will be appealed.



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 2022.³ This case is likely to deal with issues associated with discrimination.

In terms of what is "reasonable", having regard to guidance from the Fair Work Commission (FWC),⁴ the Fair Work Ombudsman (FWO)⁵ and advice received from the Solicitor-General,⁶ 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 WHS 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.



FAQ



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, employers should explore all options to minimise the impact of COVID-19 on the health and safety of employees.

It is important that employers conduct a risk assessment for their business. In that respect, Safe Work Australia has published a guideline titled "*Key considerations for undertaking a risk assessment - COVID-19*" to assist employers.⁷

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.

Risk-based approach

Some employers 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 employers may decide that certain groups present a higher risk than others, such as public-facing 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 model WHS law.

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 employers can implement to assist with discharging their obligations under the WHS Act and protect the health and safety of employees, in addition to mandating the COVID-19 vaccine, including:

- maintaining a current COVID-19 Safety Plan;
- ensuring COVID Safe Check-Ins 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;
- 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, which we would be happy to discuss with you.



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 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.

Employers 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, employers can potentially rely on an exception that exists under most anti-discrimination legislation that applies where the discrimination is necessary because the person would be unable to carry out the "inherent requirements" of their position.⁸ 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 outcome in the litigation involving a NSW Ambulance paramedic challenging the public health orders mandating vaccines as arguments regarding discrimination on religious grounds have been raised.

Disciplinary action

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

NSW private sector employers 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 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 an employer mandates 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 employer 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.

Measures other than disciplinary action include:

- considering redeployment to an alternative role that does not require a COVID-19 vaccine;
- 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?

Also from 11 October, employers must continue to allow an employee who is fully vaccinated to work from home if it is reasonably practicable to do so.

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

Generally, it is difficult to see how a vaccinated employee could lawfully refuse to work with an unvaccinated employee if the employer has otherwise taken appropriate steps to eliminate or minimise the transmission of COVID-19 in the workplace.

Of course, employers need to be mindful of their WHS obligations to all employees. Employers must comply with the public health orders coming into effect from 11 October which require them to keep unvaccinated employees working from home unless it is not reasonably practicable to do so.





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 unlawfully discriminatory, including that prospective employees be fully vaccinated against the COVID-19 virus.

However, unless the vaccine is mandated under a public health order, it is strongly recommended that an employer implement a process for employees to request an exemption from such a condition in certain circumstances, such as medical requirements, to avoid an indirect discrimination claim.

FAQ



Employee rights

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.

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

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 vaccine 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-19.²

Regardless of the approach being taken to COVID-19 vaccines, we recommend employers implement COVID-19 policies as they are a transparent way to communicate the employer's approach to managing COVID-19 in the workplace. A COVID-19 policy is a good accompaniment to a COVID-19 Safety Plan.



FAQ



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.

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).¹⁰

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.¹¹



Privacy and data collection

What privacy legislation applies to organisations when collecting vaccination information?

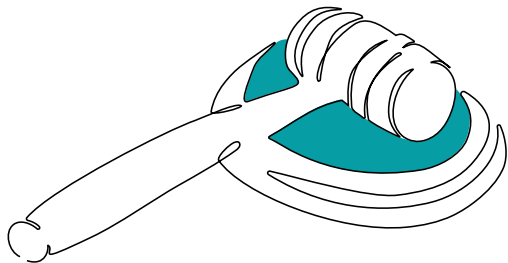
Private sector organisations in Australia that are 'APP entities' are governed by the *Privacy Act 1988 (Cth)* (**Privacy Act**). In Victoria and NSW health records legislation will also apply to private sector organisations in relation to the handling of health information, vaccination information qualifying as 'health information'.

An APP entity is defined under the Privacy Act as a company, partnership, trust or unincorporated association with an annual turnover of more than \$3m.

As information about an individual's vaccination status is 'personal information' under the Privacy Act, the legislation will govern the handling of COVID-19 vaccination information by organisations.

The 14 Australian Privacy Principles (APPs) under the Privacy Act are legal obligations, which APP entities must abide by when they collect, hold, use and disclose a person's personal information.

The Privacy Act also makes a distinction between personal information generally and what is considered 'sensitive information'. Sensitive information includes 'health information', which is likely to include a person's vaccination status.



Sensitive information

'Sensitive information' is subject to a higher level of privacy protection than other 'personal information' in the following ways:

- sensitive information may only be collected with consent, except in specified circumstances;
- sensitive information' must not be used or disclosed for a secondary purpose unless the secondary purpose is directly related to the primary purpose of collection and would be within the reasonable expectations of the individual;
- sensitive information cannot be used for the purpose of direct marketing without the individual's consent; and
- sensitive information cannot be shared by 'related bodies corporate' in the same way that they may share other personal information.

FAQ



Privacy and data collection

The exemption from compliance with the Australian Privacy Principles for 'employee records'

A private sector employer's handling of employee records in relation to current and former employment relationships is exempt from the Australian Privacy Principles (APPs).

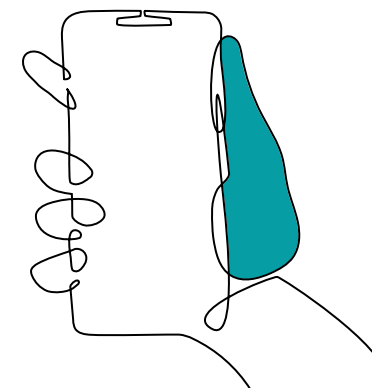
The exemption applies if the organisation's act or practice is directly related to:

- either a current or former employment relationship.
- an employment record held by the organisation relating to the individual.

Health information, including vaccination records, about an employee contained in an employment record will fall within the exemption.

The exemption does not apply to applicants for employment (unless they are subsequently employed) nor does it apply to third parties that handle an organisation's employee records, such as those providing recruitment or HR management services, or medical, training or superannuation services under contract to an employer.

Importantly, for employers in Victoria and NSW, state legislation relating to the handling of health records will continue to apply and is not subject to an 'employee records' exemption. While the NSW and Victorian requirements for handling health information are not identical to those under the Privacy Act, compliance with the Privacy Act will generally satisfy the state-specific requirements.



Privacy and data collection

How must health information pertaining to vaccination be collected?

An organisation must only collect personal information by lawful and fair means.

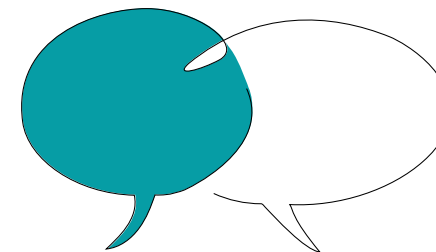
Unless it is unreasonable or impracticable to do so, an organisation must also collect that information directly from the individuals themselves, and not from a third party.

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

- the purposes for which the information is being collected;
- any other bodies or persons to whom the organisation usually discloses personal information of the kind collected;
- whether the information is to be disclosed to a person outside Australia; 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 organisation collect health information about an individual from a third party.



FAQ



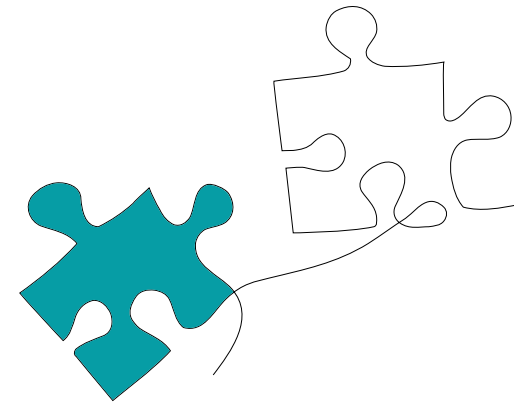
Privacy and data collection

Could organisations obtain information without it being “collected”?

The Privacy Act defines 'collection' by reference to the making of a 'record' containing the information.

Accordingly, merely asking a person to show their vaccination status without recording that status in any record of the organisation, would not constitute 'collection' for the purposes of the Privacy Act.

However, if relying on this construction, care would need to be taken to ensure that the information did not find its way, even indirectly, into a record of the organisation.



Privacy and data collection

Is consent required to collect vaccine information?

Unless an exemption applies under the Privacy Act, an organisation must obtain consent to collect, use or disclose the health information of an individual. Consent may be express or implied.

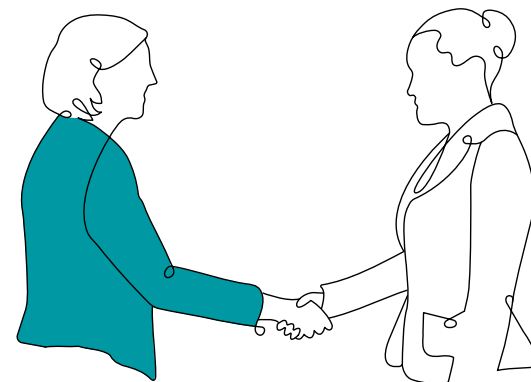
As noted previously, the collection of information to form part of an 'employee record' is exempt from the Privacy Act but covered by state legislation in NSW and Victoria.

In Victoria, consent is required to collect health information, including from employees. In NSW, consent is not required.

An organisation 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 organisation 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 organisation.

Organisations should ensure that their handling of this information complies with the [Australian 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 NSW Public Service Commission Workforce Profile Report 2020.
- 2 Regulator scrutinising employee's COVID-19 death, Workplace Express, 16 September 2021.
- 3 Silvia Chamoun v Australian Broadcasting Corporation & Ors, MLG4260/2020.
- 4 Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818; Barber v Goodstart Early Learning [2021] FWC 2156.
- 5 Fair Work Ombudsman, [COVID-19 vaccinations: workplace rights and obligations](#) (12 August 2021).
- 6 Department of the Prime Minister and Cabinet, [Transcript](#) - 6 August 2021 (6 August 2021).
- 7 Safe Work Australia, [Key considerations for undertaking a risk assessment - COVID-19](#) (27 April 2020).
- 8 See, for example, Disability Discrimination Act 1992 (Cth) section 21A.
- 9 Example: SafeWork NSW, COVID-19 (Coronavirus) [\(30 July 2021\)](#).
- 10 Australian Government Department of Health Therapeutic Goods Administration, [Therapeutic Goods \(Restricted Representations - COVID-19 Vaccines\) Permission \(No.3\) 2021 \(30 July 2021\)](#).
- 11 Australian Government Department of Health Therapeutic Goods Administration, [Communicating about COVID-19 vaccines](#) (11 August 2021).

KEY CONTACTS



Sally Moten

Partner

D +61 2 8020 7801
M +61 414 333 424
E smoten@landers.com.au

Sally 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 business of her clients to ensure she provides a practical and solutions-focussed approach.



Robert Neely

Partner

D +61 2 8020 7704
M +61 412 262 917
E rneely@landers.com.au

Robert is a highly experienced technology and regulatory lawyer and heads the firm's Technology and Digital practice.

His practice includes advising clients in the public and private sectors on privacy compliance and on the protection and use of data.



Aaron Goonrey

Partner

D +61 2 8020 7605
M +61 404 322 335
E agoonrey@landers.com.au

Aaron is an employment law specialist and is experienced in all areas of workplace relations and safety law.

Aaron works with clients to develop and implement strategic human resources, employee, industrial relations and workplace management goals.



Neil Napper

Partner

D +61 2 8020 7612
M +61 414 700 641
E nnapper@landers.com.au

Neil has specialised in workplace relations & safety since 1986.

His focus is on helping employers achieve their goals against a backdrop of ever-changing and increasingly complex workplace laws.



Luke Scandrett

Special Counsel

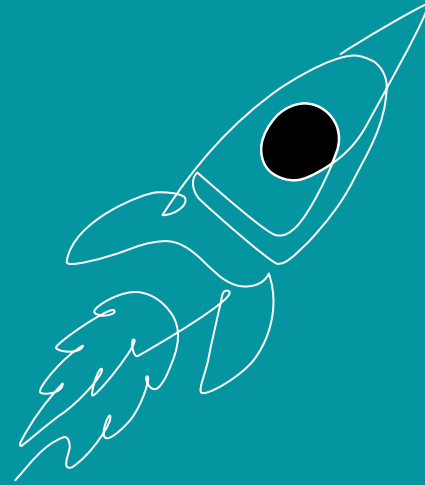
D +61 2 8020 7686
M +61 417 066 849
E lscandrett@landers.com.au

Luke is an experienced practitioner with expertise across a broad range of workplace issues, including representing and advising employers and individuals about employment, industrial relations, and work health and safety matters.

Luke also practices in the area of administrative law.

QUESTIONS

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



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

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.

Lander & Rogers advises corporate, government, not-for-profit and private clients in insurance law and litigation, family law, workplace relations & safety, real estate, corporate transactions, digital & technology and commercial disputes.

The firm is global in approach, working closely with a network of leading firms to provide advice to clients, both domestically and abroad. Lander & Rogers is also the exclusive Australian member of the world's leading independent network of law firms, TerraLex.

DISCLAIMER | This guide cannot be regarded as legal advice. Although all care has been taken in preparing this information, readers must not alter their position or refrain from doing so in reliance on this guide. Where necessary, advice must be sought from competent legal practitioners. The author does not accept or undertake any duty of care relating to any part of this presentation.



Melbourne

T +61 3 9269 9000
F +61 3 9269 9001

Sydney

T +61 2 8020 7700
F +61 2 8020 7701

Brisbane

T +61 7 3456 5000
F +61 7 3456 5001