



MONDAY, 11 OCTOBER 2021

COVID-19 MANDATORY VACCINATION (WORKERS) DIRECTIONS – WHO MUST BE VACCINATED?

On 7 October 2021 the Victorian Government issued the COVID-19 Mandatory Vaccination (Workers) Directions (Directions).

The constantly changing mandates and requirements are difficult for employers to understand, we have summarised the requirements under the Directions and set out some considerations which may be relevant for employers.

We outline who these Directions apply to, the limited exceptions that apply, and what action employers must take to comply with these Directions.

Who must be vaccinated?

The Directions, in conjunction with other directions that already apply to specified facilities, apply to almost every worker in Victoria who is not working from home. At the end of this article there is a link to the Directions that list these workers.

Please note that the Directions do not apply to residential aged care, freight, construction, health care or education providers as there are already separate vaccine mandates for these industries.

What does this mean for employers?

An employer is not permitted to allow their Workers to work away from their own home on or after 15 October 2021, unless they:

- are fully vaccinated;
- have received a first dose of a COVID-19 vaccine; or
- are scheduled in to receive a first dose of a COVID-19 vaccine by 22 October 2021;

unless the Worker has a valid medical exemption (that is available on very limited grounds that we discuss later).

By 26 November 2021, all Workers will need to be fully vaccinated in order to work onsite.

These Directions do not only apply to employees of the employer – they also extend to any person who the employer engages such as a labour hire worker or contractor. If a Worker is self-employed, the Directions will apply to them as if they were considered the employer.

Anyone whose vaccination status or booking is not confirmed is to be treated as being unvaccinated.

Please note, there are significant penalties and fines for non-compliance.

What if employees refuse to be vaccinated?

Given the mandatory vaccination requirements, if employees who are required to work away from home do not meet the requirements to be vaccinated by the required date (or provide proof of exemption), this will not give rise to a 'stand down'. Rather an employee cannot perform the 'inherent requirements' of their role.

While Workers cannot be forced to be vaccinated against their will, a failure to do so can have consequences for their employment. Obviously, an employer cannot permit the worker to be onsite as this would breach the Directions and could give rise to risk of significant fines.

It is our view that as a consequence of these Victorian Government Directions, employers can suspend or terminate employees from their employment if they do not meet the requirements. If a decision is made to suspend this can be without pay until they are vaccinated, (or the Directions change). During an unpaid suspension, employees do not accrue leave entitlements.

A key element of any contract of employment is that a party is able to adhere to their end of the bargain (ie: the employee being fit, ready and able to work). While unpaid suspensions are uncommon in Australia (in the absence of a contractual right), we are of the view that most employers will be able to suspend employees without pay if they are not vaccinated (or exempt) in accordance with the Directions. This is because the employee has in effect frustrated their employment contract and cannot perform their requirement of under contract due to their own decision not to be vaccinated.

Depending on the circumstances, employers may also consider termination of employment, provided a fair process is followed to manage legal risks including unfair dismissal claims.

Of course, employees don't have to suspend or terminate employment. There may be other options available such as enabling employees to work from home, or offering that employees take accrued leave (eg. annual leave or long service leave if applicable) or leave without pay. We can provide more information about these options if required and encourage employers to seek specific advice.

Please note, there may be other considerations where an employee who has a legitimate medical exemption, which we address further below.

Further if an employer's labour hire or contractors refuse to be vaccinated, the employer must cease engaging these workers onsite until they comply and may consider other sanctions such as terminating the engagement.

What are the exemptions?

Under the Directions, employees who have a legitimate medical exemption will still be able to work even though they are not vaccinated. Such employees will need to provide a medical certificate containing the details contained in the Directions before 15 October 2021. These are very limited exemptions, and the certificate is to be provided by specified medical practitioners.

There are also very limited exemptions where an unvaccinated worker may be permitted to work away from their home in an emergency. Once again, these exceptions are very limited.

How do employers collect vaccination information?

The Directions require employers to collect, record and hold vaccination information about the workers to confirm compliance with the directions. This includes obtaining evidence from all Workers that:

1. they are fully vaccinated against COVID-19 (both doses); or
2. if they are partially vaccinated, confirmation of the first dose they have received, and confirmation they have a booking to receive the second dose and when; or
3. if they are unvaccinated, confirmation of whether they have made a booking to receive the first dose by 22 October 2021; or
4. if they have a legitimate medical exemption from being vaccinated, appropriate evidence from a medical practitioner.

This has to occur “as soon as reasonably practicable” after 7 October 2021 but practically speaking should occur no later than 15 October 2021.

Vaccination information may be recorded in a variety of documents, such as a letter from a medical practitioner, a certificate of immunisation (eg: COVID-19 digital certificate) or an immunisation history statement obtained from the Australian Immunisation Register.

Employers will need treat employee’s disclosure of their vaccination status consistent with privacy obligations, as they would with any other health record.

As vaccination information includes information that is derived from a record of information made under the applicable Commonwealth legislation, rather than having to keep copies of all employee’s vaccination certificates, employers can choose to ‘sight’ proof of vaccination without collecting or storing or recording the evidence provided. In this case you would need to make a confidential record of the evidence sighted which is stored on a confidential/secure drive (eg: name of employee, evidence sighted, by whom sighted, signed).

Template communications for employees

To assist employers in meeting their obligations under the Directions, a freely accessible template initial communication to workers confirming the mandate and requesting them to provide confirmation of their vaccine status is available – see attached to this email word doc template.

HR Legal can also assist with further documentation should an employee not be vaccinated by the required date and termination letter should an employee not be vaccinated after being provided with the show cause letter.

What must employers do?

Employers must:

- notify all Workers of the requirements under the Directions as soon as practicable – employers can use our template communication for this purpose, which can be tailored for the business/organisation;
- ensure that vaccination information is obtained for all Workers (and that this information is treated appropriately);
- collect, record and hold vaccination information about the Workers as soon as practicable;
- communicate with any subcontractors and labour hire businesses and request them to provide vaccination information as soon as possible after 7 October 2021 and no later than 15 October 2021 to comply with the Directions; and
- ensure that no Workers are scheduled to work onsite after 15 October 2021 if they have not complied with the Directions.

This is a challenging time for employers (and their workforces). If you need any specific advice, please don’t hesitate to contact us.

Thankyou to HR Legal’s Managing Partner, Dan Feldman for providing this information.