



Guide to Assist the Development of a COVID-19 Vaccination Policy



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Introduction

The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

The Law Society acknowledges and thanks its Employee Relations Committee and the Law Council of Australia's Industrial Law Committee and Federal Litigation and Dispute Resolution

Section for their assistance in the preparation of this Guide to Assist with the Development of a COVID-19 Vaccination Policy (Guide).

While care has been taken in the preparation of this Guide, the Law Society of Western Australia does not warrant the accuracy, reliability or completeness or that the material is fit for any particular purpose.

The contents of any page of the Guide does not constitute legal advice and should not be relied upon as such. The information in this Guide is current at the time of writing (December 2021).

Guide to Assist the Development of a COVID-19 Vaccination Policy

COVID-19 Risks

1. COVID-19 is a disease caused by a form of coronavirus (the SARS-CoV-2 virus). Most people infected with the virus will experience mild to moderate respiratory illness and recover without requiring special treatment. Some people, such as those with underlying health conditions and older people, are more likely to suffer from more serious symptoms of the disease. Those that are unvaccinated are at greater risk of suffering serious symptoms if they catch the disease. However, anyone can get sick with COVID-19 and is then at risk of becoming seriously ill or death.¹
2. The Australian, state and territory governments consider the COVID-19 vaccines available for use in Australia to be a key component of protecting Australians.
3. It is important to note that a vaccinated person may unknowingly carry and spread the virus to others around them, including workers

and others in their workplace and therefore businesses or undertakings would not rely only on a policy that mandates vaccination, but also implement other reasonably practicable COVID-19 control measures.

4. A five member Full Bench of the Fair Work Commission recently accepted the following principles in relation to COVID-19:
 - COVID-19 involves a high burden of disease, greater than influenza.
 - Any infected person is at risk of developing serious illness from the virus, which may lead to death.
 - The risks posed by COVID-19 have changed with the rapid rise of the Delta variant which is more infectious and has more severe health effects than previous variants.
 - All COVID-19 vaccines currently available in Australia are effective at preventing symptomatic infection, including from the Delta variant.
 - All COVID-19 vaccines currently available in Australia substantially reduce the risk of serious illness or death, including from the Delta variant.

1 Department of Health (Cth), 'What you need to know about coronavirus (COVID-19)'

<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/ongoing-support-during-coronavirus-covid-19/what-you-need-to-know-about-coronavirus-covid-19>;

World Health Organisation, 'Coronavirus disease (COVID-19)' <https://www.who.int/health-topics/coronavirus#tab=tab_1>; 'Safe Work Australia, About COVID-19' <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/about-covid-19?tab=tab-toc-employer>.



- All COVID-19 vaccines currently available in Australia are safe and any adverse effects are usually mild. There is a much higher risk of developing serious complications and dying from acquiring COVID-19.
- An unvaccinated person is more likely to acquire COVID-19 from another unvaccinated person, rather than a vaccinated person.
- While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of COVID-19, the effectiveness of these measures depends on people applying them consistently or correctly. They do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness once somebody acquires an infection.
- Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.
- Even with high vaccine rates in the community, COVID-19 will remain a significant hazard in any workplace in which there is a possibility that people will interact or use the same common spaces (even at separate times).²

Need for a policy

5. State and territory governments have made public health orders (**PHOs**) requiring certain workers to be vaccinated against COVID-19 in their state or territory. Each state and territory has taken a different approach to drafting and implementing PHOs. Employers and workers need to comply with any PHOs that apply to them. The Fair Work Ombudsman provides a useful summary of the current PHOs in relation to vaccination of workers on its [website](https://www.fwc.gov.au/documents/decisionsigned/html/2021fwcfb6059.htm).
6. It is appropriate that businesses and undertakings have a policy that reflects the requirements of any relevant PHO.
7. Western Australia's occupational safety and health laws are in a period of transition. When this document was created, the *Occupational Safety and Health Act 1984 (WA)* (**OSH Act**) was in force. It is expected that the OSH Act will be wholly replaced by the *Work Health and Safety Act 2020 (WA)* (WHS Act) in around March 2022. Both statutes have the effect of requiring employers to provide, as far as is reasonably practicable, a safe working environment for employees, contractors, and visitors to the workplace.
8. Given the health risks associated with COVID-19, reasonably practicable steps may need to be taken that reduce the risk COVID-19 being caught by workers or other persons arising from the business or undertaking.
9. In particular, when developing policies regard should be had to:
 - (a) the increased likelihood that a person who is not vaccinated being infected and then passing on the infection; and
 - (b) the risk to an unvaccinated worker of more severe illness if they were to catch COVID-19 in the workplace (noting the obligation of the employer to ensure safety extends to protecting workers who might endanger themselves).
10. Given the potential for COVID-19 to be transmitted to a person arising from the activities of the business or undertaking, it may be appropriate to have a policy that:
 - (a) requires all workers to be vaccinated; and/or
 - (b) requires all visitors to a workplace to be vaccinated.
11. The need for such a policy may vary depending on the circumstances in the location(s) where the business operates and the nature of the work done.
12. For example, at the time of writing (December 2021) such a policy may be considered unnecessary in a law office located in Perth, necessary in an aged care home in the same city, and necessary in a law office in Melbourne.

² <https://www.fwc.gov.au/documents/decisionsigned/html/2021fwcfb6059.htm>

Nature of the policy

13. Where policies are needed, there are three types that should be considered:

- (a) a policy that applies to staff;
- (b) a policy that applies to visitors; and
- (c) a policy or guideline for internal use, to guide what is to occur where a staff member does not comply.

Staff policy

14. In developing a staff policy, the following tips should be borne in mind: ³

Tip 1. Who is mandating the vaccination?

Tip 2. Socialise the requirement with employees in advance (if possible)

- (a) If it is the employer, the direction needs to be both lawful and reasonable. Any direction needs to (at a minimum) be based on work health and safety (WHS) risk considerations, implemented following consultation and be reasonable in terms of the timeframe by which employees must be compliant and any medical contraindication.
- (b) If the requirement is imposed by way of a PHO (or equivalent), be clear about precisely who is covered by the requirement.
- (a) If time permits, consult with the workforce about the WHS benefits of being vaccinated before issuing more formal communications to them about the requirement. This will increase the likelihood of identifying potential objections at an early stage and having an opportunity to have further discussions with those who object or express reservations.

Tip 3. Does the employee have a permitted exemption (also known as a medical contraindication)?

- (a) if valid evidence is provided – consult with the employee about the implications of the contraindication. This needs to factor in the controls that you have identified as part of your COVID-19 risk assessment process;
- (b) If the evidence provided is unclear / not satisfactory:
 - (i) request further information from the employee and, if needed, consider directing them to attend an independent medical examination;
 - (ii) determine whether they are to remain on leave pending resolution (and, if so, what kind of leave) or whether alternative arrangements will be put in place to enable them to perform work (taking into account the controls identified as part of your COVID-19 risk assessment process)

Tip 4. Privacy considerations

- (a) Information about a person's vaccination status is sensitive health information and needs to be treated as such in accordance with the *Privacy Act 1988* (Cth) and the employer's privacy policy.
- (b) An employer can require an employee to disclose information about their vaccination status if:
 - (i) such disclosure is required under the relevant PHOs; or

³ These tips have been reproduced with the permission of Kingston Reid. See Dominic Fleeton and Christa Lenard, Kingston Reid, 'Tips for Managing COVID-19 Vaccinations' (7 October 2021) <<https://kingstonreid.com/insights-news/managing-covid-19-vaccinations-guidelines/>>.



- (ii) the information is reasonably necessary for one or more of the employer's functions or activities (e.g. to assist in a WHS risk assessment, to discharge other WHS obligations, to ensure compliance with a PHO or vaccination policy).
- (c) In most cases (other than when required by law or a PHO), the employee will need to give their consent (express or implied) to the disclosure.
- (d) When requesting proof of vaccination status from an employee, the employee should be informed of:
 - (i) the reason for the request;
 - (ii) what is being requested (for example, is it a copy of an immunisation status or COVID vaccination certificate?);
 - (iii) the consequences if the employee refuses to provide the information; and
 - (iv) whether the information will be disclosed to any third parties.

15. The policy should make clear, if this is the intention, that non-compliance may lead to disciplinary action, including ultimately dismissal.

Managing staff who refuse to be vaccinated

16. Larger businesses which are implementing a mandatory vaccination policy are reporting that a small minority of employees (in the order of 1 per cent) are refusing/avoiding vaccination, despite having no medical reason to be exempted.
17. Once a policy is in place, an employer can direct employees to comply with it, provided it is lawful and reasonable. Whether it is reasonable to demand vaccination will vary depending on the circumstances (being the same circumstances discussed above, under 'Need for a policy').
18. Assuming that a policy is lawful and reasonable, non-compliance may lead to disciplinary action. When considering disciplinary action, the following tip should be considered:

Tip 5. What if an employee is not exempt and is failing or refusing to be vaccinated?

- (a) Consider the employee's grounds for not complying and consult with them about those grounds.
- (b) If there is scope to allow the person an exemption, consider whether or not to grant an exemption and the terms of that exemption.
- (c) If there is no scope to allow an exemption, or an exemption is not to be granted:
 - (i) consider giving the person a limited period of time to comply and determine what leave arrangements will be put in place during that period; and
 - (ii) if the individual remains non-compliant:
 - if the employer is mandating the vaccination – explore other options (for example, extended leave of absence with no guarantee of being able to return; arranging a telehealth appointment with a GP to explain the pros and cons of vaccination) and, if considered appropriate, commence a disciplinary process; or
 - if the vaccination requirement is imposed by PHOs – consider whether the employee's non-compliance is sufficient to bring the employment relationship to an end.

Visitor policy

19. A business or undertaking has the right, subject to discrimination laws, to determine whether persons can enter premises that they control.
20. PHOs may require certain businesses and undertakings to impose certain policies in respect of visitors (for example, in respect of catering).
21. In Western Australia, the mandatory vaccination rules for particular sites and occupations can be found in a suite of directions issued by the Chief Medical Officer. Those directions are constantly being added to and amended. As such, it is important that members stay up to date with the requirements set out in the various directions. An up-to-date copy of the directions can be accessed at the following website address:

<https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-mandatory-vaccination>
22. In addition to any PHOs, businesses and undertakings may decide that, in order to protect staff, and to reduce the risk of the workplace being a source of infection for visitors, it has a policy that prevents those who are not vaccinated from attending a workplace.
23. In developing a vaccination policy for visitors, a business or undertaking should carefully consider discrimination and human rights legislation which may apply nationally or in their jurisdiction. For example, a blanket requirement that all visitors be vaccinated, without an exemption for those with a medical contraindication may give rise to issues under such legislation.



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