



# COVID-19 vaccines and what they mean for employers

The roll out of the Australian government's COVID-19 vaccination program brings hope there is light at the end of the tunnel in the fight against the pandemic. But it brings to the fore important issues for employers about how to manage the employment issues that now arise. Like all things COVID-19, this situation will be fluid.

We advocate a considered approach in how employers should respond.

## What we know so far

The Australian Government's [COVID-19 Policy \(COVID-19 Policy\)](#) was released at the end of last year, setting out the anticipated approach to rolling-out vaccines, including information on the vaccines themselves and the priority groups for access. The Therapeutic Goods Administration (TGA) has approved both the [Pfizer Vaccine](#) and [AstraZeneca Vaccine](#) for use.

The identification of priority groups has been informed by advice from the Australian Technical Advisory Group on Immunisation (ATAGI). Since the COVID-19 Policy, more information has been released and a phased [roll-out strategy](#) announced. Aged care and disability care residents, the elderly, younger adults with an underlying medical condition and Aboriginal and Torres Strait Islander people over a certain age have been prioritised. The categories of workers (and age groups) prioritised are set out below.

Phase 1a	<ul style="list-style-type: none"><li>• Quarantine and border workers</li><li>• Frontline health care workers</li><li>• Aged care and disability care staff</li></ul>
Phase 1b	<ul style="list-style-type: none"><li>• Other health care workers</li><li>• Critical and high risk workers including defence, police, fire, emergency services and meat processing</li><li>• Aboriginal and Torres Strait Islander people &gt;55</li><li>• Elderly adults &gt;70</li></ul>
Phase 2a	<ul style="list-style-type: none"><li>• Other critical and high risk workers</li><li>• Adults aged &gt;50</li></ul>

At this point, the [ATAGI](#) has identified people working in the “supply and distribution of essential goods and services such as food, water, electricity, telecommunication and other critical infrastructure” as ‘other critical and high risk workers’ in Phase 2a. The [advice](#) from the ATAGI, including in relation to the identification of priority groups, may change as more information becomes available.

According to the COVID-19 Policy, the vaccine will be free and the Australian Government will not be mandating that Australians receive it.

Importantly, the Prime Minister has acknowledged that public health orders can be issued at the state and territory level, which could potentially include a requirement that certain people be vaccinated.<sup>1</sup> The aim is for public health orders to be consistent nationally.<sup>2</sup>

### Industry consultation

Consultation has already been taking place between employers and unions for the health and aged care sectors. Wider industry consultation is underway.

From a union perspective, the Australian Council of Trade Unions (ACTU) has approached the Australian Government urging it to bring employers and unions together to discuss the vaccine roll-out in order to avoid a potentially ‘divisive public debate’.<sup>3</sup>

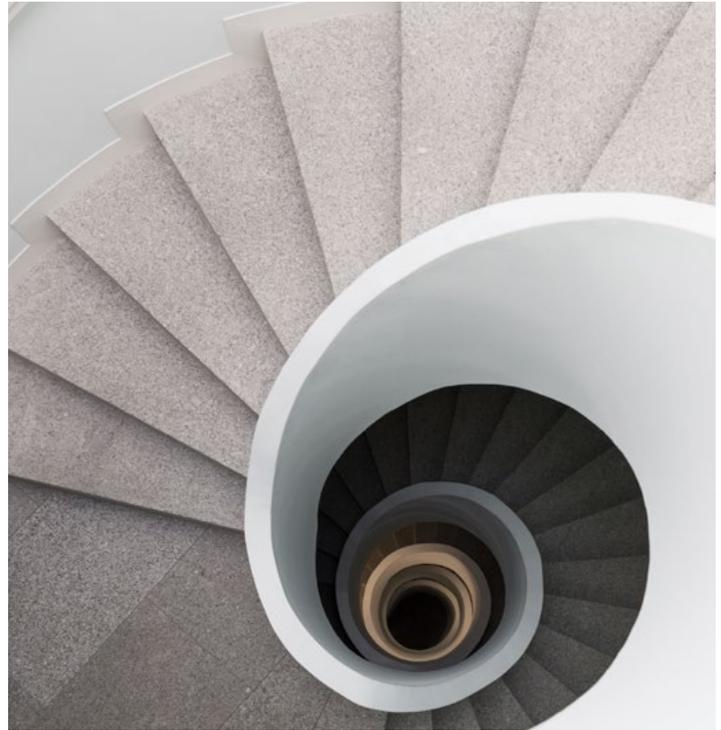
The Acting Secretary for the ACTU has acknowledged that vaccinations may be required in some industries, but otherwise confirms that the ACTU supports voluntary vaccinations, together with a ‘mass public education campaign’. More recently, Sally McManus has recognised that the medical advice will in certain circumstances be that a vaccination will be mandatory and we should follow this advice.<sup>4</sup>

The Prime Minister has indicated that guidance for “employees, employers, customers and industries” in relation to the vaccine will be available shortly.<sup>5</sup>

Safe Work Australia, the national policy body for work health and safety, has now established an [information webpage](#) in anticipation of the roll-out, which will continue to be updated as more information becomes available.

While there will be an incentive for many people to be vaccinated, roll-out in Australia is in its early stages and some may be reluctant to proceed until further information is known.

Other countries are further advanced with roll-out and Australia has an opportunity to learn from those. Those countries include the United States, United Kingdom, China, Singapore and India and many in the European Union.



## Can employers require employee and contractor vaccination?

The present position is no, but this may change for some employers.

Without a public health order, or an express obligation under existing terms of employment to support a requirement for a vaccination, a request to an employee is not likely to be a sufficient basis to make a directive lawful. Individual rights mean that employees have agency over whether or not they receive a vaccination.

That is the starting point, but not the end of the matter, because whether you are or not vaccinated has implications beyond yourself. There are safety and welfare considerations for all workers and these need to be balanced against the rights of individuals.

This balancing act is one that already takes place in some workplaces across Australia. The ACTU have recognised this. The latest indication is the ACTU will expect that there are public health orders to support any request for mandatory vaccinations. By making this concession the ACTU recognises that in some environments the medical and safety advice will be that vaccines are necessary. The most obvious examples are in health care environments and aged care. The critical high risk workers identified in general terms in Phase 1b may be the subject of health advice supporting mandatory vaccinations. Employers in these sectors should be planning to facilitate such a requirement.

1 Prime Minister Press Conference – Australian Parliament House – Transcript (7 January 2021).

2 Public health orders will be informed by advice from the Australian Health Protection Principal Committee (AHPPC). This committee has advised that “[w]hile AHPPC strongly encourages COVID-19 vaccination, at this time AHPPC does not recommend mandating COVID-19 vaccination for the aged care workforce”, AHPPC Statement (23 January 2021).

3 ‘Collaborate to avoid ‘divisive debate’ about compulsory vaccination, unions say’, SMH; Bonyhady, N (8 January 2021).

4 ABC, Insiders interview with Sally McManus, 14 February 2021.

5 Prime Minister Address – National Press Club Barton – Transcript (1 February 2021).

## Issuing directions

For employers who do not fall within the high risk groups, they should be carefully considering whether their risk profile can objectively justify a reasonable and lawful direction consistent with meeting their health and safety obligations.

Central to this issue is the duty of care employers have to their employees and others to ensure health and safety, so far as is reasonably practicable. Throughout the pandemic, employers have become accustomed to managing the health and safety risks associated with COVID-19 through the implementation of various control measures. None of these control measures however are likely to be as long lasting or effective as a vaccine, or as invasive.

At first blush, the long lasting and effective nature of a vaccine supports an argument for workplace directions. However, if your operations are not within the scope of a public health order, other factors (at least at this point in time) favour a more measured approach.

There are of course legal risks associated with giving a direction that is not lawful or reasonable. These include breach of contract, general protections and unlawful discrimination claims by those who refuse a vaccination if they are excluded from the workplace, treated unfavourably or they are otherwise able to assert a link between the refusal and a protected attribute (e.g. a medical condition or religious beliefs). Employers will need to be mindful of these considerations when determining the position they take.

At its core, a significant factor against workplace directions is that the decision about whether or not to be vaccinated is a personal one and arguably not for employers to make. Outside high risk workplaces, this factor becomes greater.

Therefore, a measured approach that considers the availability and utility of other control measures to manage COVID-19 risks in the workplace will be critical. This approach can acknowledge that we are at an early stage in the roll-out process with more information to come.

That said, for employers with businesses that involve high degrees of personal and non-electronic interaction (whether between colleagues, clients or members of the public), but are not the subject of public health orders, requiring employees to be vaccinated will be challenging as they are likely to confront the concern that an unvaccinated employee may be a threat to the health and safety of others.

## The case for being proactive

In circumstances where expert [medical opinion](#) is overwhelmingly to the effect that vaccination will strengthen immunity, which in turn will help protect against the virus, there is no impediment to employers being proactive about promoting vaccinations.

In short, provided what employers do and say about vaccinations is consistent with health and regulatory guidance, they can encourage vaccinations among their employees and facilitate access. For many workplaces, encouraging and facilitating vaccinations rather than mandating them will lead to more positive outcomes.

Importantly, as the topic of vaccinations becomes louder it will be appropriate to consult on the issue and this will be consistent with meeting workplace health and safety obligations under legislation.

We expect that because of the benefits of vaccination, workers will generally be incentivised to receive it regardless of whether a direction is made. Importantly however, there may be some workers who suffer illnesses or other medical conditions that put them at additional risk, or who otherwise adhere to beliefs that oppose vaccinations. Personal matters such as these will need to be taken into account.

So too will other considerations, such as the effects (if at all) vaccination has on community transmission – noting the present uncertainty about whether a vaccine is effective against transmission of COVID-19 – and further information about vaccine efficacy as roll-out continues.

In short, the more consideration that is given by employers to individual circumstances and prevailing medical opinion, the more likely it will be that any direction is lawful and reasonable.

There is of course a clear interest in an employer giving a direction to employees to receive the vaccine. A vaccinated or largely vaccinated workforce will align with corporate health and wellbeing strategy, help to reduce absenteeism and enhance workforce planning. The fact that the vaccine will be free supports the reasonableness of any such direction. If an employer facilitates access, potentially on paid time, that would support reasonableness as well.





### Facilitating access to vaccination

If an employer gives a lawful and reasonable direction to employees to be vaccinated, it follows that employees will need to make themselves available to receive it (or face potential disciplinary action if they don't).

Employers can facilitate access to the vaccine at the workplace or otherwise during work hours. The [COVID-19 Policy](#) contemplates that employees may have access at the workplace as "some larger corporations and high risk workplaces may establish workplace vaccination clinics" in partnership with health services or private providers.

[Initially](#), vaccines will be made available at hospital hubs but once the vaccine becomes more broadly available, workplace vaccination clinics could be established provided they meet strict conditions. Access though will be subject to supply and the phased roll-out strategy that has been announced.

If employees access the vaccine outside of the workplace, it is possible that they may ask to be reimbursed for reasonable costs incurred in doing so. Employers will need to consider their position in respect of that. The vaccine itself will otherwise be free.

### 'Proof of vaccination' certificates

Once a person has received the vaccine it will be recorded on the Australian Immunisation Register.

The Government Services Minister has announced that the intention is for the record to form the basis for a certificate, should people need proof. The certificate will be available in soft copy (via MyGov accounts and the Express Plus Medicare mobile app) and hard copy (printed on request).<sup>6</sup>

### Vaccination and data privacy

This is an important consideration. An employee's vaccination status or history is 'health information', triggering obligations under health records and privacy legislation. Health records requirements differ across Australian states and territories.

In general terms, the employer must obtain the employee's express consent to both collect that employee's vaccination information and disclose it to a third party. In seeking express consent, the company must fully inform the employee of the types of persons and organisations to whom the vaccination information is likely to be disclosed, and how it will be used. In states and territories that do not have legislation governing the collection of health information in the private sector, the *Privacy Act 1988* (Cth) (**Privacy Act**) applies.

Under the Privacy Act, there are certain exemptions that apply to a company's use of employee records provided the use is directly related to the employment relationship. This exemption does not apply to contractors, and cannot be relied upon by any third-party organisation receiving employee information.

Regardless of whether or not the Privacy Act applies, it is strongly advised that employers seek employees' express consent to collect, use and disclose vaccination information and adopt a consistent approach across Australian jurisdictions.

### Visitors to the workplace

Aside from employees, different people with different roles can visit and enter the workplace for different reasons.

Entry by other workers, clients and visitors will necessarily prompt questions as to what can (and cannot) be asked before they enter. These types of considerations were considered by many employers early on during the pandemic (e.g. in relation to temperature testing) and were largely informed by privacy laws.

Any visits by workers to other workplaces should prompt consultation with that other workplace about any vaccination policy in place.

<sup>6</sup> 'Jab and go: Morrison government readies rollout of vaccine certificates', SMH; Massola, J (7 February 2021).



## Rights of entry

Inspectors and union officials have rights to enter a workplace. Entry by union officials (i.e. permit holders) is subject to reasonable work health and safety requirements in the workplace.<sup>7</sup> Logically, this would extend to reasonable vaccination requirements. The position to be taken however by inspectorates and unions in this respect is not yet known.

## Current control measures still required

Employers have become accustomed to managing the health and safety risks associated with exposure to COVID-19 through the implementation of various control measures at the workplace. Notably, it has been nearly one year since the [World Health Organisation](#) characterised COVID-19 as a pandemic.

Regardless of whether or not vaccinations will be mandated, there will be a need for ongoing control measures, including for vulnerable people in the workplace as initially identified by the [Australian Health Protection Principal Committee](#). This approach has been reinforced by [Safe Work Australia](#), which recognised that the vaccine “will only be one part of keeping the community safe and healthy”. Detailed guidance from Safe Work Australia is expected.

## Conclusion

Vaccine roll-out brings new optimism for the road ahead. Employers have an opportunity to be proactive about vaccination and continue to play their part in fostering community good health.

At this early stage of the vaccine roll-out, we encourage employers to start planning for managing vaccinations. Now is the time to determine your operational stance to the requirement for vaccinations. It is likely to be nuanced and for those business operating globally, the position in Australia may well be different from what can lawfully be required elsewhere, in particular the United States.<sup>8</sup>

With this planning also comes the ongoing challenge of managing COVID-19 in the workplace. The challenge of managing vaccination is, though, a welcome one in the context of the previous 11 months.

<sup>7</sup> Section 128 of the Model WHS Act and section 491 of the *Fair Work Act 2009* (Cth).

<sup>8</sup> Corrs as a member of *Ius Laboris* has contributed to the Guide for International Employers on your pandemic response - [Guide for International Employers](#).

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