

# VICTORIA: MANDATORY COVID-19 VACCINATIONS FOR HEALTHCARE WORKERS

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13 October 2021.

The Victorian Government has introduced mandatory vaccination requirements for operators of healthcare facilities under the *Covid-19 Mandatory Vaccination (Specified Facilities) Directions (Directions)*.

Below is a high-level summary of the mandate and Directions made relevant to the Optometry. It is not intended to contain all the relevant information which can be found in the direction.

The Directions apply to operators and workers of healthcare facilities which is defined to include “allied health professional operated clinics” and “any retail or other facility operating within a healthcare facility”.

## DIRECTIONS

### [COVID-19 Mandatory Vaccination \(Specified Facilities\) Directions](#)

## VACCINATION MANDATE

Operators of healthcare facilities are obliged to collect, record and hold vaccination information of workers who are scheduled to work at the facility on or after 15 October 2021, including:

- If the worker is **unvaccinated**, whether they have a booking for the **first dose by 29 October 2021**;
- If the worker is **partially vaccinated**, whether they have a booking for the **second dose by 15 December 2021**.

On or after 15 October 2021, the operator must take all reasonable steps to ensure a worker who is unvaccinated does not enter or remain on the premises of the facility (does not include the worker’s ordinary place of residence) (**Premises**) for the purpose of work unless an exception applies.

Notably, where an operator does not hold vaccination information about a worker, the worker is to be treated as unvaccinated.

## EXCEPTIONS

A worker may be permitted to enter or remain on the Premises for the purpose of work if they:

- have a booking to receive the first dose of a COVID-19 vaccination by 29 October 2021 and wears PPE that includes a surgical mask and face shield at a minimum at all times;
- hold a medical exemption. A medical exemption is a certification from a medical practitioner that the authorised worker can’t receive a COVID-19 vaccination dose, due to a medical contraindication or due to an acute medical illness (including being diagnosed with SARS-CoV-2); or
- in the following limited exceptional circumstances for the period of time necessary to respond to the exceptional circumstance and provided the worker wears PPE that includes a surgical mask and face shield at a minimum at all time:
  - when necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance;
  - 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;
  - when required to attend the facility to respond to an emergency at the facility; or
  - when 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.

Please contact us for further information in the event of emergency or unforeseen circumstances.

## **SUMMARY OF OPERATORS OBLIGATIONS**

Operators must not permit a worker to enter or remain on the Premises for the purpose of work on and/or after 15 October 2021, unless the worker is vaccinated or has a booking for the first dose by the deadline and the operator holds vaccination information for the worker.

In addition, operators are required to collect, record and hold vaccination information and provide notice to the workers setting out particular information, as soon as practicable. Details are provided below.

### **VACCINATION INFORMATION EVIDENCE AND RECORD KEEPING**

In accordance with the Directions, operators must collect, record and hold vaccination information for workers who are scheduled to work on the Premises on and from 15 October 2021.

This information is to be collected as soon as is reasonably practicable.

Vaccination information is information about a person's vaccination status in relation to COVID-19, being information indicating if a worker:

- is fully vaccinated (received 2 doses of a COVID-19 vaccine);
- is partially vaccinated (received 1 dose of a COVID-19 vaccine and does not have a medical exemption);
- is unvaccinated (has not received a dose of a COVID-19 vaccination and does not have a medical exemption);
- holds a medical exemption.

If a worker is partially vaccinated or unvaccinated, the operator must also collect, record and hold information about whether the worker has:

- a booking to receive a second dose (for a partially vaccinated worker) by the deadline;
- a booking to receive a first dose (for an unvaccinated worker) by the deadline.

The Directions note that the vaccination information may be recorded in a variety of documents, such as a letter from a medical practitioner, a certificate of immunisation or an immunisation history statement obtained from the Australian Immunisation Register.

The operator is not required to obtain consent to collect the vaccination information because the collection is authorised by the Directions. However, we recommend taking reasonable steps to secure the vaccination information and protect it from unauthorised access, unauthorised disclosure, loss or interference. Please contact us if you have any questions.

### **NOTIFICATION TO WORKERS**

As soon as is reasonably practicable, operator must inform workers scheduled to work on the Premises on and after 15 October 2021 that:

- the operator is required to collect, record and hold vaccination information about the worker; and
- the operator must not allow unvaccinated workers to enter or remain on the Premises for the purpose of work unless an exception applies, on or after 15 October 2021.

The same notification requirement applies to workers engaged by the operator in the future for the duration of the Directions.

## **WHAT IF A WORKER DOES NOT PROVIDE THEIR VACCINATION INFORMATION?**

If a worker does not provide the operator with the required vaccination information, the operator must treat the worker as unvaccinated and not permit them to enter or remain on the Premises for the purpose of work on and/or after 15 October 2021.

## **WHAT IF A WORKER REFUSES TO BE VACCINATED?**

The Directions do not address how to manage a worker who refuses to be vaccinated outside of obliging the operator to not permit the worker to enter or remain on the Premises for the purpose of work.

However, if a worker refuses to be vaccinated, their employer should do the following:

1. ask the worker to explain their reason for refusing the vaccination;
2. if the worker has a legitimate reason (i.e. medical condition that prevents them from being vaccinated), consider whether there are any alternate options available (i.e. alternate work arrangements - working from home);
3. if the worker does not have a legitimate reason and/or there are no suitable alternate options available, the employee must not be permitted to enter or remain on the Premises for the purpose of work until circumstances change.

Whether or not the employer is obligated to pay workers who are absent from work because they are not permitted to enter or remain on the Premises in accordance with the Direction will depend on the individual facts and circumstances. Employers must consider the worker's employment contract, award or agreement and applicable laws in determining whether there is an obligation to pay the workers.

Generally speaking, casual employees can be removed from the roster for the relevant period and are not entitled to paid leave. However, permanent employees may come to an agreement with their employer to take a period of paid leave (i.e. annual leave or long service leave if available). Unless an alternate agreement is reached (i.e. to take paid leave), workers may not have a contractual entitlement to be paid for the relevant period if they are not ready or able to perform the services required under their contract of employment while not permitted to enter or remain on the Premises for the purpose of work in accordance with the Directions.

## **CAN AN EMPLOYER REQUIRE A WORKER TO BE VACCINATED?**

Employers can only require their workers to be vaccinated where:

- a specific law (such as a state or territory public health order) requires the worker to be vaccinated;
- the requirement is permitted by a registered agreement or employment contract; or
- it would be lawful and reasonable for the employer to give their worker a direction to be vaccinated, which is assessed on a case-by-case basis.

It is relevant to note the current Directions do not oblige the worker to be vaccinated. Instead, the Directions oblige the operator not to permit the worker to enter or remain on the Premises for the purpose of work.

Some contracts or agreements may contain terms relating to COVID-19 vaccinations. Employers must ensure that such terms comply with anti-discrimination laws otherwise they will not be enforceable.

Whether or not a direction to be vaccinated is lawful and reasonable will depend on the individual facts and circumstances and needs to be assessed on a case-by-case (worker-by-worker) basis. To be lawful, the direction must comply with any employment contract, award or agreement and applicable law (including anti-discrimination law). There are various considerations in determining whether a direction is reasonable including:

- the nature of the workplace (e.g. the extent to which workers need to work in public facing roles, whether social distancing is possible and whether the business is providing an essential service);
- the extent of community transmission of COVID-19 in the location where the direction is to be given, including the risk of transmission of the Delta variant among workers, customers or other members of the community;
- the terms of any public health orders (including the Directions);
- the effectiveness of vaccines in reducing the risk of transmission or serious illness, including the Delta variant;
- work health and safety obligations;
- each worker's circumstances, including their duties and the risks associated with their work;

- whether the worker has a legitimate reason for not being vaccinated; and
- vaccination availability.

The Federal Government and the Fair Work Ombudsman (**FWO**) have recently introduced a 4-tier system to assist employers in making individual assessments about the reasonableness of any directions to mandate COVID-19 vaccinations.

**Tier 1 work**, where workers are required as part of their duties to interact with people with an increased risk of being infected with COVID-19 (e.g. workers working in hotel quarantine or border control).

**Tier 2 work**, where workers are required to have close contact with people who are particularly vulnerable to the health impacts of COVID-19 (e.g. workers working in health care or aged care).

**Tier 3 work**, where there is interaction or likely interaction between workers and other people such as customers, other workers or the public in the normal course of employment (e.g. stores providing essential goods and services).

**Tier 4 work**, where workers have minimal face-to-face interaction as part of their normal employment duties (e.g. where they are working from home).

Most optometry practices will likely fall under Tier 2 or Tier 3. The FWO indicates:

- in relation to Tier 2 work, given the increased risk of workers being infected with COVID-19, or giving COVID-19 to a person who is particularly vulnerable to the health impacts of COVID-19, a direction to workers to receive a vaccination is more likely to be reasonable.
- in relation to Tier 3 work, where community transmission of COVID-19 is occurring in an area and an employer is operating a workplace in that area that needs to remain open to provide essential goods and services, a direction to workers to receive a vaccination is more likely to be reasonable.

If you are considering making vaccinations mandatory in your workplace, you should contact Industry Legal Group for advice.

## **CAN AN EMPLOYER TAKE DISCIPLINARY ACTION AGAINST A WORKER?**

Whether employers can take disciplinary action (including termination of employment) against a worker for refusing to be vaccinated, will depend on the individual facts and circumstances. An employer may be able to take disciplinary action against a worker if the worker's refusal to be vaccinated is in breach of a specific law (such as a public health order) or a lawful and reasonable direction requiring vaccination.

As mentioned above the current Directions do not oblige the worker to be vaccinated. Instead, the Directions oblige the employer not to permit the worker to enter or remain on the Premises for the purpose of work. As such, a worker's refusal to be vaccinated is not necessarily in breach of the specific law. However, it may be in breach of a lawful and reasonable direction by the employer requiring the vaccination (see above information on reasonable and lawful directions).

Workers have various protections against being dismissed and other adverse action. Before dismissing a worker, an employer must follow a fair process (i.e. provide procedural fairness including making it clear that non-compliance may lead to dismissal, providing an opportunity to respond and, if requested, permitting a support person to attend any meetings) and have a valid reason for termination. Otherwise, employers may be in breach of unfair dismissal or adverse action laws.

If you are considering taking disciplinary action, we recommend that you contact Industry Legal Group for advice prior to taking any action.

## **CONTACT US**

If you require further advice, please contact Industry Legal Group on **1300 101 391** or email [oa@industrylegalgroup.com.au](mailto:oa@industrylegalgroup.com.au).

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