

02 March 2021

Follow up: The Federal Government's perspective on an employer's mandate to vaccinate

[Home](#) / [Insights](#) /

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This article was written by [Philip Willox](#), [Emily Cossgrove](#) & [Darcy Harwood](#).

Following on from our recent article '[Mandate to vaccinate: can employers make employees roll up their sleeves for the COVID-19 vaccine?](#)', the Federal Government has now released guidance to help businesses and employees better understand their rights and responsibilities in relation to the COVID-19 vaccination in the workplace.

In line with our recent article, the general consensus of the guidance materials released by the Fair Work Ombudsman (**FWO**) and Safe Work Australia (**Safe Work**) (collectively, **Guidance Materials**) is that in most cases, employers are unlikely to be able to mandate COVID-19 vaccinations for their employees.

The Guidance Materials are helpful for employers and employees, providing answers to many of the questions which are likely to arise in the workplace in relation to the vaccine. However, they are designed to only provide generic guidance, and in the case of the FWO guidance, apply broadly across industries. This means employers must still carefully consider the Guidance Materials in the context of their business.

This article outlines the key takeaways from the Guidance Materials and unpacks what it means for employers navigating the COVID-19 vaccine rollout.

FWO's stance

The FWO has stated that the 'overwhelming majority of employers' should assume that they cannot require their employees to get the COVID-19 vaccine. However, there may be **limited circumstances** where an employer may be able to or should require employees to be vaccinated.

Relevant factors in determining whether such a situation arises include any rights or requirements under legislation (i.e. state or territory public health law), applicable industrial instruments (enterprise agreements and modern awards) and employment contracts. In the absence of any direct right to mandate the vaccine, the question from the FWO's perspective boils down to whether any direction to be vaccinated would be lawful and reasonable.

We addressed this issue in our recent article and our comments accord with the FWO's guidance. Helpfully, the FWO has now pointed to two particular circumstances where it says such a direction would be reasonable:

- where the employee interacts with people with an elevated risk of being infected with the virus (e.g. working in hotel quarantine or border control); or
- where the employee has close contact with people who are most vulnerable to the virus (e.g. working in health or aged care).

When dealing with employees who refuse to be vaccinated where it is otherwise considered reasonable, the FWO recommends employers:

- first ask the employee to explain their reasons for refusing the vaccination (including whether they have a legitimate reason for not being vaccinated);
- consider and discuss alternative options available to the employee instead of the vaccine to address the risk posed by COVID-19;
- consider any right to stand down or suspend the employee under their employment contract or industrial instruments (although unlikely);
- assess the reasonableness and appropriateness of any disciplinary action in the circumstances; and
- as a final option, take disciplinary action, including termination of employee, although be wary of anti-discrimination laws and an employee's general protection from adverse action.

The FWO has stated that employers who have provided a lawful and reasonable direction to an employee to be vaccinated may also request for an employee to provide proof of their vaccination, provided such direction is also lawful and reasonable. Interestingly, the FWO has indicated that employers may also have an ability to require employees to provide evidence of the reason for any refusal to be vaccinated in circumstances where an employer has provided a lawful and reasonable direction.

The FWO also raises some interesting collateral issues, including how employers deal with employees who refuse to attend workplaces where co-workers are not vaccinated and whether an employer can require prospective employees to be vaccinated before starting work.

Safe Work Australia's perspective

Safe Work has published industry-specific direction on managing the COVID-19 vaccine in the workplace in the context of employer's WHS duties.

Similar to the FWO and our recent article, Safe Work's position is that, at this stage in the vaccine's rollout, it is unlikely that a requirement for employees to be vaccinated will be reasonably practicable, particularly in low risk workplaces and where the vaccine may not be available to workers (as a result of them not being in one of the high priority groups).

However, whether an employer should require their workers to be vaccinated, particularly once it is readily available, will require a risk assessment. This assessment should include:

- the risk of exposure to COVID-19;
- whether the employee is working with people vulnerable to the disease;
- the effectiveness of existing control measures; and
- the likelihood of spreading COVID-19 throughout the workplace.

Providing some comfort for employers, Safe Work has suggested that it is unlikely any workplace will be found to have breached model WHS laws if they do not require employees to be vaccinated. Rather, it is sufficient for the purposes of satisfying WHS laws if an employer encourages its workers to get vaccinated while continuing to implement other control measures to address the risk posed by COVID-19.

Ultimately, the thrust of Safe Work's guidance centres around assessing whether a COVID-19 vaccine is a reasonably practicable control measure to manage the risks of COVID-19 in the workplace. As we discussed in our initial article, the guidance highlights the fact that the vaccine is just one measure against COVID-19 and employers must implement all reasonably practicable control measures to satisfy their WHS duties, including physical distancing, good hygiene and regular cleaning.

An interesting consideration from a WHS perspective raised by Safe Work is whether workplaces can require customers and visitors to prove they have been vaccinated before entering the workplace and whether workers can refuse to attend the workplace because another co-worker isn't vaccinated.

It is important to remember the Guidance Materials are simply guidance – it is not law and should not be interpreted by employers as providing a lawful basis to underpin any decision, including to mandate employees receive a vaccine. It is likely that as the responses to the pandemic continue

to evolve, and particularly as the vaccine rollout advances, the Guidance Materials will become more nuanced and detailed.

Ultimately though, there is unlikely to be a clear-cut answer and the individual situation of workplaces and employees will remain important in assessing reasonably practicable steps to ensure workplace health and safety.

Employers should continue to monitor the Guidance Materials and review the particular circumstances of their workplace.

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Key contacts



Philip Willox

Partner

Perth

T +61 8 9269 7053

M +61 409 867 817



Ruth Rosedale

Special Counsel

Perth

T +61 8 9269 7213

M +61 419 367 930