

Article Information

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Webinar Q&As: Employment Relations National Seminar Series | The Final Phase: Managing and Dismissing Unvaccinated Employees

Piper Alderman provides the Answers in response to the Questions received during our Employment Relations National Seminar Series | The Final Phase: Managing and Dismissing Unvaccinated Employees webinar on 30 November 2021.

Some of your other questions may have been answered after the **Decision Time: Re-opening, Restructuring & Navigating Vaccination Restrictions** webinar. Please find the link to the Q&As from that [webinar here](#).

[To view the on demand webinar, please register here.](#)

Q1: How should we manage vaccinated employees refusing to work with unvaccinated employees or third parties, such as suppliers or customers?

A1: An employee is only able to refuse to undertake work (under work health and safety legislation) if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety from an imminent or immediate exposure to a hazard. That may or may not be able to be established in a particular scenario. Much will depend on whether it would have been reasonable for the employer to direct its staff to be vaccinated.

If, as part of your organisation's safety management processes, you determine that mandatory vaccination is **not** required and an employee refuses to attend for work, you will need to carefully consider whether a direction to attend for work is a lawful and reasonable. This will depend on a number of factors, including the health of that employee (or people to whom they are likely to transmit an infection), whether the employee can reasonably perform their role from home and whether there are any government directions in place preventing employers from requiring employees to return to the office. It will depend on the specific circumstances of that particular employee in that particular workplace.

Q2: Can we require third parties, such as suppliers, customers, visitors or sub-tenants to be vaccinated in order to receive service, care or enter our workplace?

A2: Generally yes, although it is important for both parties to comply with contracts or lease agreements in place and to ensure accommodations and arrangements are in place to manage discrimination issues, such as considering exceptions for those with a medical exemption. You should also confirm whether any public health directions apply in respect of your industry or workplace. If your organisation requires proof of vaccination, privacy legislation considerations will come into play.

Q3: When is a medical exemption valid and how do we manage employees with an exemption?

A3: If a public health order applies to your organisation, it will specify what constitutes a genuine medical exemption for the purposes of that particular public health order, and what form the exemption will take. For example, some directions state that a medical exemption is only genuine if it is issued by the Chief Public Health Officer of that jurisdiction.

The issue of medical incapacity in respect of a mandatory vaccination policy in the workplace only requires consideration

of an expanded range of factors and risks. A medical certificate which merely recommends an employee waits for Novavax or a different vaccine, without further information, is unlikely to qualify as a genuine medical reason to be considered exempt in order to allow an employee to continue to attend for work, particularly where a public health order is in place.

If your business has implemented a mandatory vaccination policy or would like to implement a mandatory vaccination policy, the policy should set out what constitutes a medical exemption.

To manage employees with a medical exemption we suggest following a COVID management policy that has been formed after undertaking a risk assessment and consultation process. The policy may include having the person work from home where possible and utilising other safety measures such as rapid testing and face masks. It is also possible that it may be lawful and reasonable that the employee can no longer continue working in their current role or continue their employment. This will need to be considered on a case by case basis.

Q4: Are public health orders enforceable and what happens when they lapse?

A4: If you wish for staff to be vaccinated, you should implement a process to introduce a policy addressing the issue of staff being vaccinated. Please refer to the answer to question 5 regarding implementation of a policy. Please reach out to our [Piper Alderman team](#) if you would like assistance with the implementation of an appropriate policy.

Q5: What does a risk assessment and consultation to introduce a vaccination policy or COVID management policy involve?

A5: We recommend introducing a policy addressing the issue of staff being vaccinated, whether or not public health directions apply to your business.

The business should undertake a risk assessment and consultation process before making a decision to implement a mandatory vaccination policy.

After the webinar aired, the Fair Work Commission has concluded in the Mt Arthur Coal decision that BHP's failure to consult on its vaccination policy meant the implementation of their policy was not reasonable. Consultation on any directions by your organisation to restrict workplace access to only those who are vaccinated will continue to be vital. Please note that where a public health order, or third party requirement, is being implemented, consultation may not be required.

Undertaking a risk assessment will assist your organisation to determine the approach the organisation should take. This may also result in the introduction or continuation of other safety measures, such as mask wearing, social distancing etc.

You will need to consult with your workforce and your contractors, and may also wish to consult with customers and clients, about the introduction of a policy. You will need to check applicable work health and safety legislation, awards and enterprise agreements to ensure compliance with consultation obligations.

Consultation should involve a reasonably detailed disclosure and engagement about the particular hazards that the organisation has identified and what control measures the organisation has considered to mitigate against the hazard. All relevant information should be provided to avoid the suggestion that the organisation has not consulted properly.

There is no legal obligation to consult on the safety or effectiveness of vaccines themselves, rather consultation is on how the risks of COVID-19 are to be managed in the workplace.

For medical questions, employees should really seek medical advice from their general practitioner (and be advised to do so by their employer where appropriate) or can be directed to government resources for information.

Regular reviews of the vaccination policy would be generally recommended, particularly as the risks associated with COVID-19 change. Material changes to policies, where they change how the risks are being managed, may require further consultation. We recommend that you obtain specific advice if you are uncertain.

Q6: How do we dismiss an employee for failing to be vaccinated or refusing to provide evidence of their vaccination status

A6: If an employee cannot lawfully attend for work or undertake their duties due because of a public health direction, this can be a valid reason to terminate their employment (after undertaking a procedurally fair process). The reason is that the employee is not capable of undertaking the inherent requirements of their role, because they cannot attend the workplace.

If no public health direction applies, a direction that an employee must be vaccinated in order to attend for work must be lawful and reasonable. It is more likely to be lawful and reasonable if the direction is made in accordance with a COVID vaccination policy that has been implemented after a risk assessment and consultation process, and such a direction is a “reasonably practicable” step to manage the risks of COVID-19 in the workplace, which will depend on that particular employee’s and organisation’s circumstances. If the employee fails to comply with the direction, their employment should only be terminated once a procedurally fair termination process has been followed. In that case the reasons for termination will include failure to comply with the policy.

At this stage, there is no blanket reason to delay a termination decision because an employee requests to wait for the Novavax vaccine or some other future uncertain event, but this must be considered. The validity of a decision to terminate is assessed as at the time of that decision. Later changes to the circumstances, such as an employee later becoming vaccinated, or another vaccine being available, may be relevant to the question of compensation or reinstatement.

In many cases, a failure to confirm vaccination status means the particular person will need to be assumed to be unvaccinated, or non-compliant with a public health order or workplace policy. The inability to attend the workplace then becomes the basis for any dismissal decisions, rather than the mere refusal to provide information. We deal with privacy considerations in Q7.

Q7: What are the privacy considerations if we ask for evidence of vaccination status from employees, contractors or third parties (suppliers, customers etc.)?

A7: If a government directive applies, consent to keep or make such records is not required, because the public health order essentially overrides the requirement for consent under the privacy laws.

In some cases, privacy laws would not apply at all due to ‘employee records’ exemptions but there are equivalent health records privacy regimes that would – privacy laws and health records regulation regimes do not require consent to requiring provision of information, where that is done under a law such as a public health order. Other requirements (such as information security and holding only the minimum necessary personal information) continue to apply.

In the absence of a government directive that removes the requirement for consent, an employer may make a record (either keeping a copy or making a note of the status) of an employee’s vaccination status or medical exemption so long as the employee provides consent to the collection and it is considered reasonably necessary for one or more of the employer’s functions or activities.

To collect evidence of vaccination from contractors and third parties, organisations need to ensure that privacy legislation is complied with. Compliance with privacy legislation will include obtaining consent, explaining why collection of the information is reasonably necessary for the business and only using vaccine information for that purpose, explaining how vaccine information will be dealt with and how it can be updated, and advising how the person can lodge a complaint in relation to the use of their vaccine information.

Such records need to be securely stored, and only kept for as long as required. If the information is required to be provided to an external party, this possibility will need to be advised to the person in advance of the information being supplied to your organisation, so that consent is fully informed. The use of properly-framed and thought out ‘privacy notices’ when collecting the information is an available mechanism.