

# COVID-19 vaccines and work

## Do I need a COVID-19 vaccine to keep my job?

You may have been told by your employer that you need to have a COVID-19 vaccine in order to keep your job. Your employer can only do this if:

- There is a specific law that says you need to be vaccinated. This *includes* NSW public health orders; or
- There is a vaccination requirement in your employment contract, award, enterprise agreement or other registered agreement; or
- Your employer's direction for you to get vaccinated is "lawful and reasonable".

## Vaccination required by law

Public health orders or other laws requiring vaccination might apply to the type of work you do or the industry you work in. At the time of writing there are public health orders which apply to frontline workers in sectors like healthcare, child care, transport, disability care and aviation. Most of these orders provide exemptions for people who have a medical contraindication certificate.

The Fair Work Ombudsman has published a list of orders for COVID-19 vaccinations across Australian states and territories. You can check this list to see if there is a public health order that applies to your work.

### **Fair Work Ombudsman – List of public health orders relating to the COVID-19 vaccine**

<https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-legislation-and-public-health-orders>

## Agreements or contracts relating to vaccination

You might have an obligation to get vaccinated under your employment contract, award, enterprise agreement, or other registered agreement. You should check your relevant employment documents.

## Lawful and reasonable direction to get vaccinated

Even if the previous two scenarios do not apply to you, your employer may still give you a direction to get vaccinated if it is *lawful and reasonable*.

A mandatory vaccination direction from your employer will usually be *lawful* if it does not breach an employment contract, award or other laws that apply to workplaces. Whether the direction is *reasonable* will depend on the circumstances. Some of the things that may be relevant in deciding whether a vaccination direction is *reasonable* in your workplace include:

- Whether you interact with people who have an increased risk of being infected with COVID-19 e.g., border control employees and health workers;
- Whether you are required to have close contact with people who are vulnerable to the impact of COVID-19 e.g., individuals with pre-existing health issues;
- The extent of community transmission of COVID-19 in the location whether the direction applies;
- Whether the job is a public facing role and whether social distancing is possible;
- Any public health orders where the workplace is located;
- Work health and safety obligations.

A vaccination direction might not be reasonable if, for example, you have very minimal face to face interaction with other people as part of your job description.

### **Case example – Amanda and childcare work**

*Amanda is a childcare worker. She has been directed by her employer to receive a COVID-19 vaccination. In Amanda's case the requirement to be vaccinated may be valid under a public health order applying to child care workers. It is also likely to be considered a lawful and reasonable direction because the safety of children will be considered a paramount concern, and close contact with other people is unavoidable in her job.*

### **What if I have a medical reason not to get vaccinated?**

If you have a medical reason not to be vaccinated you should speak to your doctor. To be exempt from most vaccination requirements in public health orders you will need medical evidence in the form of an approved certificate from a medical practitioner, available on the NSW Health website.

### **What about discrimination law?**

Discrimination law may be relevant because:

- A clause in your employment contract which requires vaccination might be unenforceable because the clause does not comply with discrimination law; or
- A direction from your employer to get vaccinated is unlawful because the direction breaches discrimination law.

Generally, discrimination law will not protect you if you choose not to be vaccinated due to a personal preference. Discrimination will be against the law only when a person is treated differently based on certain characteristics, such as a *disability, sex, age, or race*.

If you cannot be vaccinated because of a disability, you may be able to argue that a vaccination requirement by your employer *indirectly discriminates* against you because of your disability. You will need medical evidence that shows that you cannot comply with a requirement to get the currently available COVID-19 vaccines because of that specific disability. However, even under discrimination law your employer may still be able to argue that they can lawfully require vaccination if it is reasonable in the circumstances. This will depend on your workplace, your role, your contact with other people including members of the public, workplace safety requirements and whether any adjustments can be made for you so that you can remain in your work in a safe way. If the vaccination requirement is reasonable, in some cases there may be a possibility of negotiating with your employer for different duties, work location or leave options so that you can keep your job.

### **What if I do not get vaccinated?**

Your employer may take disciplinary action against you if they have given you a lawful and reasonable direction to get vaccinated **or** a law requiring vaccination applies to you, and you do not comply with the vaccination requirement. In some circumstances disciplinary action may include being dismissed from your job.

If you are dismissed from your job you will only have **21 days** to make a dismissal application to the Fair Work Commission (such as unfair dismissal or general protections dismissal) or to the NSW Industrial Relations Commission (if you are a NSW state employee).

Discrimination complaints to Anti-Discrimination NSW should be made within **12 months** of the discrimination happening.

Discrimination complaints to the Australian Human Rights Commission should be made within **6 months** of the discrimination happening (or within 2 years for certain sex discrimination complaints).

**You should get legal advice about the best option for you.**

**If you are a member of a trade union, you should contact your delegate for advice about your particular industry.**

If you live in NSW, you can contact **Kingsford Legal Centre for discrimination law advice on (02) 9385 9566 or 1300 722 795** or email us at [legal@unsw.edu.au](mailto:legal@unsw.edu.au).

For general employment law advice you can also contact the **Employment Rights Legal Service on 8004 3270**.

This factsheet is current as at 25 October 2021. It contains general information only and does not constitute legal advice.

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