



Chamber of Commerce
and Industry WA

Western Australia COVID-19 Vaccination requirement in the Workplace – In the event of a lockdown

Employer Guidance

Helping employers navigate and understand the Western
Australian COVID-19 Vaccination Requirement

Edition 2

Current as at 18 November 2021





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Introduction

COVID-19 vaccination plays a vital role in protecting the health and wellbeing of people in Australia. Vaccination is both a means to manage and protect health systems from being overwhelmed, and to allow business to return to a state of normalcy.

On Wednesday 20 October 2021, the Western Australian Premier made announcements concerning mandatory vaccination for WA workforces. In the announcement, the Premier stated that specific occupations and industry workers will be required to be fully vaccinated against COVID-19 to attend work in the event of a lockdown or similar restrictions.

This requirement is likely to be managed on a case-by-case bases, meaning no Public Health Order and/or Directions will be implemented to manage the vaccination obligation until such time there is a lockdown or similar restriction.

Both workers and employers have obligations to ensure that directions are complied with. Businesses will also be responsible for gathering information to confirm compliance. They will also play a vital role in communicating those requirements to staff.

This guide aims to help you understand your obligations in relation to the announcement, as well as the proactive steps you can take in the wake of a lockdown or similar restrictions.

CCIWA also has a COVID-19 Vaccination Guide for Businesses available [here](#).

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A. Summary of COVID-19 vaccination requirement during a lockdown or similar restrictions

1. Who does the requirement apply to?

The Western Australian (WA) Government has announced vaccination requirements which prevent workers in specified occupations and industries from entering a prescribed workplace during a lockdown or similar restrictions, unless they are fully vaccinated.

It is expected that the below critical workers must be fully vaccinated to attend the workplace, to decrease transmission risk and prevent impact on the delivery of services:

- Other click and collect retail
- Bottle or liquor stores
- Newsagents
- Pet stores
- Wholesalers
- Conveyancing and settlement agents (time-critical legal matters)
- Government or local government services, if working from home not possible
- Administrative services to enable its employees to work from home
- Vehicle and mechanical repair services
- Journalistic and media services
- Members and staff of Members of Parliament of Western Australia
- Roadside assistance
- Forestry (for critical reasons)
- Primary industries (necessary to provide food to, and care of animals and maintenance of crops)
- Factories, manufacturing, production, distribution etc.
 - Factory or similar facility that is not able to shut down without causing damage or loss
 - Production and distribution of food and groceries, liquor, medical and pharmaceutical products
 - Commercial operations that supply goods or services for the implementation of measures to limit the spread of COVID-19
 - Necessary or related to defence or security industries.

2. Who is required to be vaccinated?

Critical workers specified by the WA Government are required to be fully vaccinated in the event of a lockdown or similar restrictions in order to attend work.

3. Do workers need to disclose their vaccine status?

Employers of critical workers may ask workers if they have been vaccinated against COVID-19, but at this stage workers can choose to disclose their vaccination status or not.

However, workers who do not disclose their vaccination status will not be able to attend the workplace for the duration of any lockdown or similar restrictions.

The collection, use and disclosure information must be handled in accordance with Australian privacy law.

4. What requirements are placed on the employer

We anticipate that in the event of a lockdown, employers will be required to take lawful steps to collect and maintain a record of the vaccination status of relevant workers.

Employers should notify affected employees of their requirement to be vaccinated to attend work in the event of a lockdown and ask employees to disclose their vaccination status. Employers will also be required to take steps to ensure that unvaccinated workers do not attend the workplace in the event of a lockdown or similar restrictions.

Employers need to be aware of their obligations under the relevant privacy legislation to ensure that this information is only used for the purpose of complying with the WA Government requirement and that all reasonable steps are taken to prevent unauthorised access, misuse or loss of this information.

B. Communicating with Staff

It is important that you take proactive steps to communicate with your staff about the likelihood of the authorised worker vaccination requirement applying to them. CCIWA members can access a template letter [here](#).

To ensure business continuity, it is important to obtain employees' vaccination status before the event of a lockdown or similar restrictions. This will allow you to assess whether you have enough vaccinated staff to maintain your operations.

CCIWA's HR Consulting service can assist organisations to develop tailored business continuity plans to deal with disruptive events, such as lockdowns. More information is also available in our **WA Category 3 PHO Business Continuity Plan** [here](#).

Where this is not the case you may need to consider options to promote vaccine uptake.

THE IMPORTANT LEGAL PROVISIONS YOU NEED TO KNOW WHEN COMMUNICATING ABOUT COVID-19 VACCINATIONS WITH EMPLOYEES

The Therapeutic Goods Administration (TGA), in recognition of the importance of responsible communication regarding the COVID-19 vaccination, has given legal permission that allows businesses (and others) to communicate about vaccinations so long as that communication:

- ✓ Is consistent with current Commonwealth health messaging regarding the national COVID-19 vaccination program, including content found on the Australian Government Department of Health website; and
- ✗ Does not contain:
 - any reference to the trade name, sponsor name or active ingredient or any other information that would identify specific vaccine brands (e.g. Pfizer or AstraZeneca);
 - any statement, or implication comparing different COVID-19 vaccines (or comparing vaccines with treatments such as medicines);
 - statements to the effect that COVID-19 vaccines cannot cause harm or have no side effects; or
 - any statement regarding COVID-19 vaccines that is false or misleading.

It is also important to remember that obligations under other laws, such as the Australian Consumer Law which includes the obligation not to mislead, continue to apply when communicating about vaccines.



C. Managing unvaccinated employees in case of lockdown

In the case of a lockdown or similar restrictions, the relevant directions are expected to restrict employees who are not fully vaccinated, or who have not advised you of their vaccination status, from entering the workplace.

In the event of a future lockdown it will be important for employers to carefully consider the relevant order to precisely determine how it will apply to your organisation and employees.

Some of the matters which will need to be considered are:

- **Can your business continue to trade?** Lockdown orders are developed to address the public health risks associated with a particular outbreak and as such not all specified industries may be able to operate. Where all staff, irrespective of vaccine status, are unable to attend the workplace employers will need to consider options for remote work, relevant stand-down provisions, or other alternatives for all affected employees.
- **Can unvaccinated employees work remotely?** Where vaccinated staff are able to attend work, you will need to consider whether unvaccinated staff* are still able to perform their role through other means (e.g. working from home). This should be accommodated where possible.
- **What if they can't work?** Where unvaccinated staff* are unable to perform their duties, they will generally not be entitled to any payment for the period where they are unable to work because of a lockdown order. Requests for employees to access annual leave should be considered in accordance with the requirements of the National Employment Standard, relevant industrial instrument or organisational policy.

* Including employees who have not disclosed their vaccination status.

D. COVID-19 Vaccination Policy

Unlike the mandatory vaccinations directions that apply to other industries, employees who fall in this group are not required to be vaccinated, unless there is a lockdown. As a result, there is less incentive for employees to get vaccinated

This places a greater onus on employers to develop a proactive policy to support and encourage employees to be vaccinated.

In doing so employers should consider the following:

- **Auditing your vaccination needs** and whether they differ across your business (e.g. which workers are required to be on site to perform work or are able to work remotely for discrete periods).
- **Developing a system for internal communications** about vaccinations (e.g. flagging key government or regulator websites). Further information on communicating with staff is available through our [COVID-19 Vaccination Guide](#).
- **Developing support systems to assist employees become vaccinated** (e.g. accommodating employees getting vaccinated during working hours, access to paid time off, providing assistance to help employees make appointments).
- **Reviewing your policies** to assess whether changes are needed to better manage ongoing issues and to proactively address issues the business may face in the future (e.g. health and safety policies, leave policies, stand-down policies, home working policies).
- **Consider the overall risks to health and safety** and whether COVID-19 transmission can be managed through encouraging employees to obtain vaccinations rather than mandating them.
- What **practical and proactive** steps can you take now to get 'ahead' of the issues as much as possible.
- **Reviewing employment contracts** for relevant clauses (e.g. inserting clauses that make employment conditional on having required vaccinations for new employees) and, if appropriate, consider whether you should attempt to agree variations with existing employees.
- **Requiring existing employees to be vaccinated** as a lawful and reasonable direction based on quantifiable health, business and/or commercial grounds. The validity of an employer-initiated direction is highly case-dependent and as such it is vital that you seek legal advice.

CCIWA can help you develop a COVID-19 Policy specific to your business; contact us on 1300 422 492 for more information.

E. Collecting information about an Employee's Vaccination Status

Asking employees about their vaccination status

In most employment circumstances, employers asking their employees whether they are vaccinated or not is permissible.

However, as an employee's vaccination status is considered sensitive health information under the Privacy Act, higher privacy protections will apply to the actual collection of this information from employees who choose to disclose their vaccination status to their employer.

The Privacy Act provides that employers are able to collect health information (including information about whether or not they are vaccinated) if:

- The information is reasonably necessary, or directly related to, one or more of its functions or activities (which may include preventing or managing COVID-19); and
- The employee consents.

It would appear that information about vaccination status would be generally considered to be reasonably necessary, or directly related to, an employer preventing or managing COVID-19 in the workplace, so would satisfy the above test. The health and safety risks in your work sector, applicable workplace laws and contractual obligations, as well as any public health advice will assist employers in determining whether collection of vaccination status information would be considered reasonably necessary for their specific activities or functions.

Employee consent

When a Public Health Order does not apply to business, the employer must freely obtain the employee's consent to collecting information about their vaccination status. Employers must ensure they satisfy the following 4 key elements of consent:

1. The employee is adequately informed before giving consent, and understands why you need to collect this information and what you will use it for;
2. The employee gives consent voluntarily (employers should not use pressure or coercion or any form of intimidation or deception);
3. The consent is current and specific; and
4. The employee has the capacity to understand and communicate their consent.

Notification of the collection of vaccination status information

If an employer decides that they can collect vaccination status information, they must take reasonable steps to notify the employee of a number of matters as set out in the relevant privacy principles, including the purposes of collection and the ways in which the information may be used or disclosed.

These full range of matters includes the following:

- The employer's identity and contact details
- The fact and circumstances of collection
- Whether the collection is required or authorised by law
- The purposes of the collection
- The consequences if vaccination status information is not collected
- The employer's usual disclosures of vaccination status information
- Information about the employer's APP Privacy Policy
- Whether the employer is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located.

Note that for each of the above matters, the employer must consider whether notifying the employee is reasonable in the circumstances. This means that it may be reasonable for an employer to notify some but not all of these matters. For example, it may be reasonable not to notify an employee of the employer's identity where this is obvious from the circumstances.

For further details on notification requirements, see the Office of the Australian Information Commissioner's webpage on [Notification of the collection of personal information](#).

Obligations to keep records safe

An employer must take reasonable steps to protect records of an employee's vaccination status safe from:

- misuse and loss; and
- unauthorised access, modification or disclosure.

Consequently, these records need to be kept in a secure manner with access limited to only those who are necessary.

Disclosure of a worker's vaccination status is also limited to what is necessary to ensure compliance with these directions.

An employee records exemption applies to private sector employees in many instances after information has been obtained about employees. This means that the privacy principles under the Privacy Act will not apply to the handling of information, once it has been collected and is held in an employee record, where it is directly related to the employee relationship. This would appear to apply to vaccination status information. As mentioned above, however, CCIWA recommends all employers follow best practice privacy best practice in relation to this sensitive information, set out below.

This **does not** however apply to prospective employees, contractors, sub-contractors and volunteers. Employers must comply with the remainder of the Privacy Principles under the Privacy Act when dealing with the personal information of these individuals ensuring that they:

- accurately record the information that they collect, keep it up-to-date and store it securely;
- limit the use and disclosure of employee vaccination status information to what is necessary to prevent and manage COVID-19. Employers should not disclose vaccination status among colleagues unless they have a legitimate and compelling reason to do so; and
- regularly review whether they still need to retain vaccine status information.

COVID-19 digital certificates and immunisation history statements contain a person's Individual Healthcare Identifier (IHI). There are specific rules regarding the collection, storage and sharing of this number. It is recommended that employers do not record the IHI as part of their vaccination records.

F. Vaccinations and Employer Liability

Can employers be liable for any adverse reactions to the vaccine suffered by employees, when subject to a mandate to get vaccinated under COVID-19 vaccination policy?

The various COVID-19 vaccinations are not without some risk, and it is possible an employee may have an adverse reaction to receiving the vaccine, though extreme adverse reactions are rare.

Under WA Workers' Compensation legislation, a worker may be entitled to workers' compensation if they sustain an injury due to the COVID-19 vaccine and **the injury occurred out of or in the course of the worker's employment.**

The vaccine may be considered to have occurred out of or in the course of employment if they work in an industry where an employer imposes the vaccine, and the employer has:

- recommended or organised the vaccination onsite or at another location; or
- subsidised the vaccination.

It is possible that the requirement to connect the COVID-19 vaccine injury or disease to the worker's employment would be satisfied where the vaccine is a mandatory requirement or condition of the worker's employment.

However, it is important to note that this is an unclear area of law, and it is not possible to provide definitive advice about the effect of mandatory vaccinations on an employer's liability to pay compensation for a COVID-19 vaccine-related injury or disease. Employers are encouraged to seek legal advice in relation to any workers' compensation laws that may arise from COVID-19 vaccinations.

No fault COVID-19 indemnity scheme

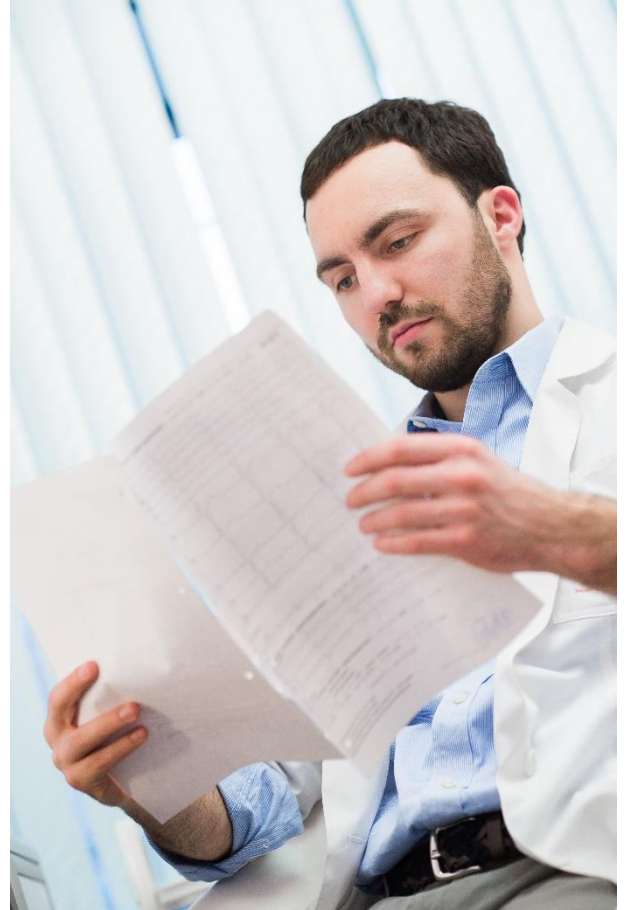
On 6 September, the Commonwealth Government introduced a No Fault COVID-19 Indemnity Scheme. Under the scheme, workers who suffer injury or loss of income due to the administration of a COVID-19 vaccine or due to an adverse event that is considered to be caused by a COVID-19 vaccine, will be able to register their intent to claim from the scheme.

The scheme will cover the costs of injuries above \$5,000 due to a proven adverse reaction to a COVID-19 vaccine. The TGA will provide guidance on recognised adverse reactions as part of their established surveillance program, and claims will be assessed by independent experts, with compensation paid based on their recommendations.

The scheme will be backdated to 22 February 2021 and will be administered by Services Australia.

While potential claimants who access the scheme will still have the option of pursuing action through a court judgement if that is their preference, the scheme reduces the commercial risk involved with mandatory COVID-19 vaccinations in the workplace, particularly as a result of public health orders.

This scheme is intended to reduce the risk of workers' compensation claims in the event of an adverse reaction.



Who and where to contact for further assistance?

KEY CONTACTS

Have a question or situation that isn't covered by this guide? CCIWA is here to help and answer any questions you might have.

For general information contact our Employee Relations Advice Centre on 9365 7660.

For legal advice contact our workplace relations lawyers on 1300 422 492.

KEY RESOURCES

The following are links to government websites and other key information on the mandatory vaccine, public health orders and COVID-19.

Public Health Orders/Directions:
[Publications](#)

WorkCover WA: [COVID-19 Information](#)

Department of Health – [COVID-19 Vaccine FAQ's](#)

Work Safe WA – [COVID-19 Coronavirus](#)

CCIWA – [Responding to COVID-19](#)

Fair Work Ombudsman – [Coronavirus and Australian workplace law](#)

Therapeutic Goods Administration –
[COVID-19 vaccines](#)

Office of the Australian Information Commissioner – [COVID-19: Vaccinations and my privacy rights](#)

COVID-19 Vaccinations: [Understanding your privacy obligations to your staff](#)