

# COVID-19 vaccination in aged care

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# Overview

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- > Vaccination requirements in residential aged care
- > Vaccination requirements in community care
- > Implementing requirements in the workplace
- > Dealing appropriately with unvaccinated staff

# Vaccination requirements in residential aged care



# Health Orders/Directions

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- > From 17 September 2021, workers cannot attend residential aged care facilities or perform certain duties unless
  - > they have had at least their first vaccination dose; or
  - > they have an exemption

# Who is a worker?

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## At a high level

- > All staff and contractors – ACT, NSW, NT, Qld, Tas
- > People who work or provide goods and services at an aged care facility, including transport – SA, WA
- > Volunteers – ACT, Qld, SA, Tas
- > TBA – Victoria

# What exemptions apply?

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## At a high level

- > Cannot receive vaccination due to medical contraindication – ACT, NSW, Qld, SA, Tas, WA
- > Not able to receive the vaccine – NT
- > Vaccination is not reasonably available – ACT, Qld, SA
- > To deal with an emergency – NSW, Qld, WA

# What exemptions apply? (continued)

- > Written exemption from the Chief Health Officer – NSW
- > Booked in for a vaccine – Tas
- > Pregnancy – SA
- > TBA – Victoria

## But is it lawful?

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- > Is it contrary to section 51(xxiiiA) of the Constitution?
- > Is it contrary to the Nuremberg Code?
- > Didn't the Prime Minister say that we don't have mandatory vaccinations?
- > What about the Charter?



# Actions leading up to deadline

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- > Communicate with staff about requirements
- > Encourage and support
- > Seek information about uptake
- > Publish policy
- > Only roster staff beyond 17 September if they have a vaccination or meet an exemption
- > Consider issuing a direction to staff

Document references:

*Residential Aged Care Facility COVID-19 Vaccination Policy*

*COVID-19 MEDICAL CONTRAINDICATION FORM*

# Flu vaccination case law

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*Kimber v Sapphire Coast Community Aged Care*  
[2021] FWC 1818

- > Public health orders required vaccination of all aged care facility staff (medical contraindication exempt)
- > Employer introduced a mandatory vaccination policy
- > Receptionist refused
- > FWC held that employer could give a lawful and reasonable direction to be vaccinated
- > FWC held that receptionist could not perform inherent requirements of the role

# Volunteers, contractors, labour hire

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- > Not your employees
- > No obligation to allow a volunteer to attend
- > Contractor agreements and labour hire agreements should:
  - > Require compliance with safety instructions
  - > Specifically require vaccination?
  - > Allow suspension of access to premises
- > Should not be any obstacle to vaccination requirements

# Vaccination requirements in home and community care



# When is a vaccination requirement lawful?

- > You can implement a vaccination requirement if:
  - > there is a legal requirement that workers in your sector be vaccinated; or
  - > it is lawful and reasonable for you to direct staff to be vaccinated

# Legal requirements - NSW

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- > Public health orders mandate vaccinations for:
  - > Anyone leaving an area of concern for work
  - > Disability support workers living or working in areas of concern
- > Exemption – medical contraindication
- > This will pick up some home care workers
- > Requirements commence 6 September

# Legal requirements – everywhere else

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- > No specific legal requirements (today) for vaccination of home/community care workers
- > Health and safety laws – is requiring vaccination a reasonably practicable step?
  - > Significant risk to health
  - > Particularly vulnerable clients
  - > Likelihood of risk depends on location
  - > What alternative measures are there?
  - > Are alternative measures effective?

# When is a direction lawful and reasonable?

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- > “Lawful” means “not unlawful”
- > “Reasonable” requires a consideration of all of the circumstances
  - > Safety considerations
  - > Nature of role
  - > Location of work
  - > Alternative measures
  - > Consistent with contracts, policies, enterprise agreements



# Fair Work Ombudsman guidance material

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*“Tier 2 work, where employees are required to have close contact with people who are particularly vulnerable to the health impacts of coronavirus (for example, employees working in health care or aged care)....*

*“The coronavirus pandemic doesn’t automatically make it reasonable for employers to direct employees to be vaccinated against the virus.*

*An employer’s direction to employees performing Tier 1 or Tier 2 work is more likely to be reasonable, given the increased risk of employees being infected with coronavirus, or giving coronavirus to a person who is particularly vulnerable to the health impacts of coronavirus.”*

# Flu vaccination case law

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## *Glover v Ozcare* [2021] FWC 2989

- Health directions required vaccination for residential aged care staff (contraindication exemption)
- Ozcare imposed a vaccination requirement which covered home care staff
- Glover refused, citing allergy
- No solid medical evidence of contraindication

# *Glover v Ozcare* continued

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- > FWC determined that the direction was lawful and reasonable – even though it did not contain any exemptions
- > Given time to reconsider
- > Allowed to use leave
- > Vulnerability of clients
- > Potential super-spreader

# Implementing a mandatory vaccination requirement



# Implementation

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- > Consider any enterprise agreement requirements
- > Consultation
  - > Not consent
  - > Survey?
- > Equip staff with the information they need to get vaccinated (and counter disinformation)
- > Remove economic obstacles
  - > Paid time off to attend appointments, recover

# Implementation (continued)

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## > Exemptions

> What happens to the exempt?

## > Policy

## > Workforce considerations

Document references:

*Residential Aged Care Facility COVID-19 Vaccination Flowchart*

*Residential Aged Care Facility COVID-19 Vaccination Message to Staff*

*Residential Aged Care Facility COVID-19 Vaccination Policy*

# Evidence of vaccination (and privacy)

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- > Direction to provide evidence is reasonable
- > Direction must comply with privacy laws to be lawful
- > Vaccination status is sensitive information
- > Can only collect sensitive information if:
  - > authorised by law; or
  - > collection is reasonably necessary for one or more of the organisation's functions, AND the worker consents
- > Privacy policy, collection statement

**Unvaccinated staff**





# Unvaccinated staff categories

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- > Workers who can't access a vaccination by the required date
- > Workers who have a genuine medical contraindication
- > Workers who have another legal exemption
- > Workers who do not have a legal exemption

Document references:

*Residential Aged Care Facility COVID-19 Vaccination Flowchart*

*Guidelines for Managing Non-Compliance*

## Workers who can't access a vaccination by the required date

- > Seek information from the worker about their access issues
- > Assist the worker to access a vaccination where possible
- > Consider whether this results in a legal exemption
- > Review redeployment options
- > Consider suspension or leave

# Workers with a legal exemption

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- > Seek information from the worker about their exemption
- > Allow the worker to continue working
- > Consider additional safety measures
- > Consider redeployment if relevant

Document reference: *COVID-19 Vaccine Medical Contraindication Form*

# Workers without a legal exemption

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> Find out why:

- Medical concerns
- Religious beliefs
- Just plain anti

> Alternative roles or duties

> Suspension (with or without pay)

> Paid or unpaid leave

> Dismissal

# Alternative roles or duties?

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(Assuming there are any to be found)

- > Contract may give scope to adjust employees' duties and location of work
- > If not, no right to unilaterally change
- > Can offer alternative duties
- > For how long?

# Leave or suspension?

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- > Unable to lawfully perform duties
- > Paid or unpaid – consider the circumstances
- > Use of leave entitlements?
- > For how long?

# Dismissal?

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- > Valid reasons
  - > Unable to lawfully perform duties
  - > Failure to comply with a lawful and reasonable direction
- > Procedural fairness
- > Alternatives
- > Contracts, policies, enterprise agreement

Document reference: *Termination Letter for Vaccination Non-Compliance*

# Risks

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- > Unfair dismissal
- > Discrimination
- > Workers' compensation
- > Negligence



# Volunteers, contractors, labour hire

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- > Should be able to simply exclude access
- > Limited legal risk

**Questions**



# Disclaimer

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The information contained in this presentation was intended as general commentary only and should not be regarded as legal advice specific to your situation.

Should you require specific advice on the topics or areas discussed, please contact the presenters directly.

# Contacts

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