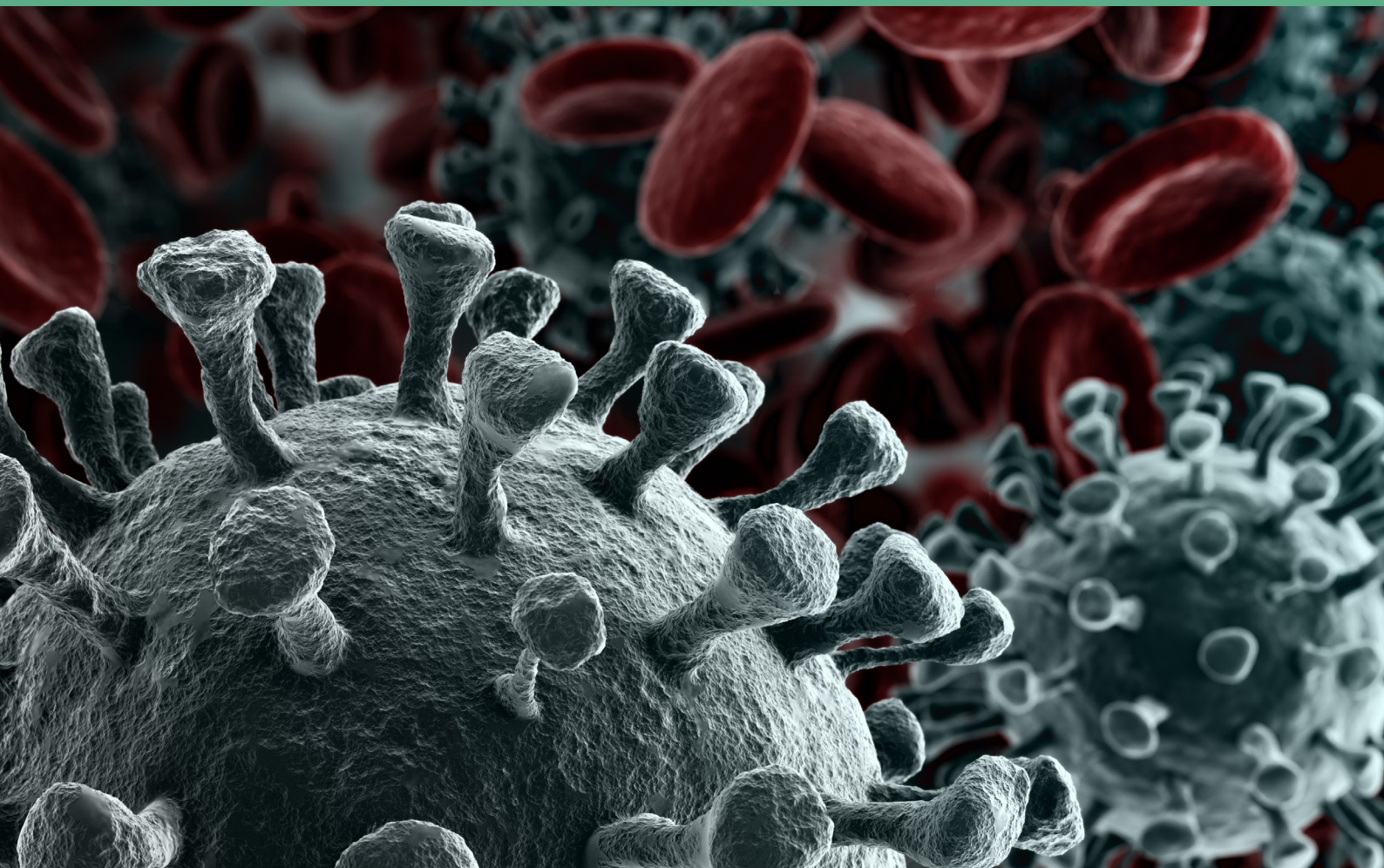




STAFF VACCINATION
SUPPORT SERVICE



Residential aged care COVID-19 vaccination guidelines for managing non-compliance

GUIDELINE OBJECTIVES

The purpose of these guidelines is to assist residential aged care facility providers to manage a situation where a worker (as defined in the relevant State/Territory directions/orders) (**Worker**) refuses to have a COVID-19 vaccination by 17 September 2021. These guidelines should be treated as an internal document and are provided as general guidance only. Providers should seek specific legal advice on individual situations, as dismissal may give rise to legal claims.

APPLICATION

These guidelines set out relevant considerations in relation to employees, contractors, labour-hire staff and volunteers who are Workers.

GUIDELINES

By 17 September 2021 all Workers are required to have had at least the first dose of a COVID-19 vaccination with the following exceptions:

- Workers who have provided satisfactory evidence of a genuine medical contraindication, verified by a registered health practitioner; and
- Workers who satisfy State/Territory-based exemptions as set out in the relevant State/Territory directions/orders, reflected in the Residential Aged Care Facility COVID-19 Vaccination Policy.

If a Worker does not have a genuine exemption for receiving a COVID-19 vaccination, from 17 September 2021 they **cannot attend** a residential aged care facility to perform their duties as a residential aged care worker.

There will be Workers who choose not to have a COVID-19 vaccination at all, for their own personal reasons.

If a Worker's physical presence at the residential aged care facility is required for them to be able to perform their role (for example, a Personal Care Attendant, a receptionist, a supervisor of direct-care workers), and they cannot access the site, they will not be able to perform the inherent requirements of their role.

Providers should not allow any Workers who have not complied with the mandatory vaccination requirements to work from 17 September 2021. It may be necessary to update rosters, consider alternative arrangements for services and suspend workers without pay until a final decision about their future engagement is made.

Employees

Employees may be employed on a permanent (full-time or part-time basis) or a casual basis.

For all employees who do not comply with the vaccination requirements, providers can be guided by the following considerations:

Consideration	Description
Understanding the employee's reasons	<p>A meeting should be arranged with the employee and their manager and/or a human resources representative, so that the employee can discuss their reasons for non-compliance and/or concerns.</p> <p>The provider should use this opportunity to listen to the employee and provide the employee with relevant information about the importance of receiving a COVID-19 vaccination and the reasons it is required in residential aged care facilities.</p> <p>The provider should make the employee aware that if the employee continues to refuse to comply with the vaccination requirements, they will not be able to fulfil the inherent requirements of their role as a residential aged care employee, and their employment may come to an end.</p>
Employment instruments	<p>The provider needs to consider the rules that govern the employee's employment and how these relate to the situation. This includes:</p> <ul style="list-style-type: none">• employment agreements;• any industrial instruments (such as an enterprise agreement or an award); and• any relevant workplace policies that apply as a contractual term;• (collectively, the "Employment Instruments"). <p>The Employment Instruments may require the provider to follow particular consultation procedures and/or termination procedures and will set out any relevant dismissal considerations such as notice on termination.</p>
Redeployment	<p>The provider may wish to consider whether the employee can be redeployed into another area of the provider's business, where vaccination is not required (i.e. not in the residential aged care facility). Providers do not have a legal obligation to redeploy employees in this situation, but it is an option for providers who want to retain the relevant employee.</p>

Consideration	Description
Redeployment (cont.)	<p>In determining whether the employee should be redeployed, the provider should take the following into consideration:</p> <ul style="list-style-type: none"> • The employee's skills and experience, and whether there are any other roles they can perform. • The employee's performance and conduct. • The employee's reasons for deciding not to be vaccinated. • Whether the redeployment is lawful in accordance with the Employment Instruments. The employee will need to provide consent to being redeployed to another role. • Overall safety obligations and consequences. For example, if the worker is a personal care worker, while vaccination is currently not mandated in home care, there may still be a high risk of COVID-19 in that environment and therefore redeployment to this area may not be appropriate. • Whether the redeployment will be on a temporary trial basis or a permanent basis. • How the move may be perceived by other employees. <p>If the employee is redeployed, the provider should ensure that the relevant documentation is in place, which may include a new contract of employment detailing the arrangement, and clarification of the duration of the redeployment (if it is not permanent).</p>
Leave	<p>In circumstances where the provider does not wish to terminate the employment relationship but redeployment is not an option, it may be an option to allow a permanent employee to use their accrued annual or long service leave. The employee will continue to accrue leave entitlements while they are on paid leave. Given the likelihood that vaccination will be a long term requirement on residential aged care facility workers, it is likely that unless the employee has a temporary exemption they will exhaust their leave balance, and remain unable to fulfil the inherent requirements of their position.</p>
Suspension	<p>Also in circumstances where the provider does not wish to terminate the employment relationship and redeployment is not an option, or if the employee has taken paid leave and their leave accrual is exhausted, it may be an option to suspend the employee from their employment on a temporary basis.</p> <p>The provider may justify an unpaid suspension on the basis that the employee cannot perform the duties of their position as they are unable to lawfully attend the residential aged care facility. The provider may also wish to consider temporary suspending the employee with pay based on their individual circumstances.</p> <p>The provider will need to review the Employment Instruments to determine if they provide a contrary position to the above, and to determine if they contain other options to suspend the employee, either with or without pay.</p>

Consideration	Description
Dismissal	<p>If an employee does not comply with the mandatory vaccination requirements, they will not be able to enter the residential aged care facility from 17 September 2021.</p> <p>If their role requires them to be physically present at the facility, they will not be able to lawfully perform their duties, and the provider may be able to terminate their employment.</p> <p>Before terminating employment, the provider should consider the following:</p> <ul style="list-style-type: none"> • If the employee has been employed for less than 6 months (or 12 months for an employer with less than 15 employees) or they are an irregular and non-systematic casual employee, they will not be eligible to make a valid unfair dismissal claim. On that basis, the provider could consider providing notice of termination of their employment (based on their Employment Instruments). • Where the first point above does not apply, or where they otherwise choose, the provider should ensure that they have: <ul style="list-style-type: none"> • consulted with the employee about the mandatory vaccination requirements; • provided the employee with information about the consequences if they don't comply with the mandatory requirements (including possible termination); • considered the reasons for the employee's decision not to be vaccinated; • considered the viability of redeployment or suspension; • considered the employee's period of service and their contribution to the organisation; and • given the employee an opportunity to respond to the reasons for the proposed termination. • After considering the above, the provider may determine that the employee's employment cannot continue because the employee cannot fulfil the inherent requirements of their role. If the provider reaches this conclusion, the employer should provide the employee with notice of termination of their employment based on the Employment Instruments.

Volunteers

Volunteers are usually not under any obligation to attend the workplace or perform work, and a genuine volunteer arrangement means that there is no legally binding employment relationship.

If the volunteer arrangement is genuine, the provider is under no obligation to offer the volunteer any work and should stop seeking the volunteer's services if they are not vaccinated after 17 September 2021.

Contractors

The provider should check the contractual arrangements that apply to the contractor's engagement. The relevant contract could be between:

- the provider and an individual contractor (such as a sole-trader); or
- the provider and a company, which provides one or more individuals to perform services pursuant to the contract.

If the contract involves the engagement of more than one individual, the provider may be able to request that only vaccinated workers are provided under the contract, or to exclude certain workers from providing the services, regardless of whether the applicable State/Territory directions are expressed to apply to contractors.

In many cases, the contractual arrangements may allow the provider to end the arrangement without giving any particular reason, by giving a period of notice, or without notice.

Where a reason to terminate the engagement is required, and the Worker has to attend the residential aged care facility to perform the services under the contract, the provider may be able to terminate the contract by relying on the fact that the Worker will not be able to fulfil their duties under the contract without attending the premises, or that they cannot lawfully perform the services.

Labour-hire workers

The provider should check the contractual arrangements that apply to the labour-hire engagement. In many cases, the provider should be able to indicate to the labour-hire provider that they can only accept vaccinated Workers from 17 September 2021 even if the applicable State/Territory directions/orders do not refer to labour hire workers.

Disclaimer

These guidelines are intended to assist providers in considering their options around dismissal. These guidelines contain general information, and should not be regarded as legal advice relevant to a specific situation. Providers are encouraged to seek legal advice if they are considering dismissal.



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