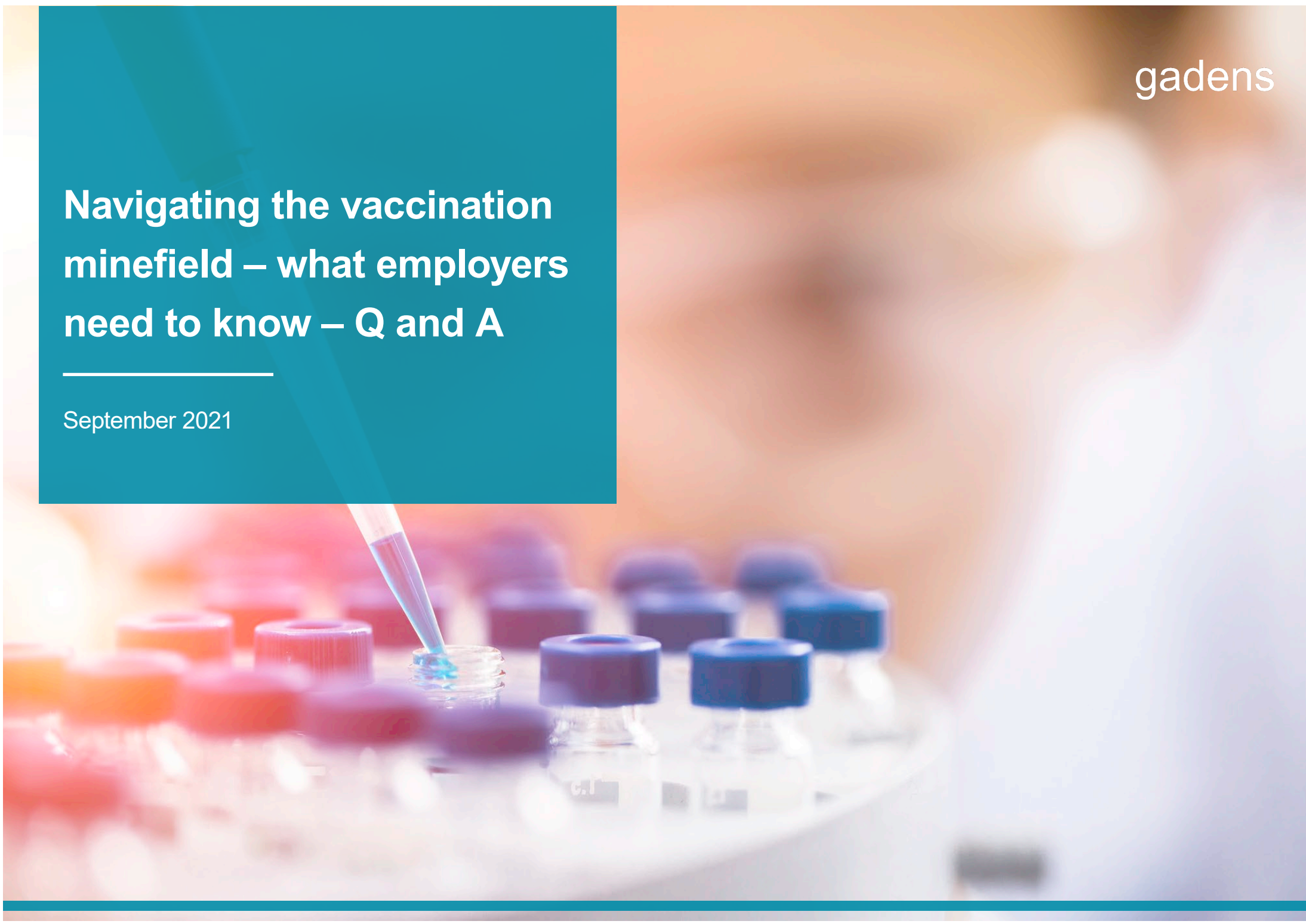


Navigating the vaccination minefield – what employers need to know – Q and A

September 2021



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(revised as at 17 September 2021)

Following our recent webinar, in this easy-to-download PDF we have put together a list of answers to some of the most commonly ask questions for employers navigating the COVID-19 vaccination minefield. This guide will serve as an essential tool in helping employers understand what the COVID-19 vaccination means for their business and employees.

If you need any further guidance or advice regarding mandatory vaccination and the workplace please reach out to our team.

Employment Advisory

We work alongside clients to help them build and maintain sustainable workplaces, with the necessary flexibility to meet fast changing and competitive market conditions. By leveraging our experience, we help clients anticipate, manage and resolve people and workplace issues throughout the employment lifecycle – from hiring to firing.

Gadens provides advisory and litigation services covering issues such as employee and industrial relations disputes, bullying and harassment, work health and safety, workplace investigations and the full range of contested employment matters.

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This update is based on the law as at 17 September 2021, however the legal position in this area is rapidly evolving. This update does not constitute legal advice and should not be relied upon as such. It is intended only to provide a summary and general overview on matters of interest and it is not intended to be comprehensive. You should seek legal or other professional advice before acting or relying on any of the content.

The below answers have been authored by Brett Feltham (Partner), Diana Diaz (Special Counsel) and Claire Duggan (Associate) from the Employment Advisory Team.

Navigating the vaccination minefield – what employers need to know – Q and A

Question		Answer
1	Can an employer require an employee to be vaccinated?	<p>There are some industries where mandatory COVID-19 vaccination requirements are in place or where there are prohibitions that prevent non-vaccinated employees from working (in the form of public health orders or directions). Those public health orders vary between States and Territories but cover workers in high-risk industries such as health care, quarantine facilities, workers involved in transporting quarantined people, and in some cases where workers are required to move in and out of areas of concern or across State borders. Outside of those industries and sectors, employers can only require employees to be vaccinated if it is lawful and reasonable for an employer to give that direction.</p> <p>As Australia increases its general vaccination rates and moves closer to a post COVID-19 normal, it is expected that more larger and high-profile employers will move to make vaccinations mandatory for their employees and broader public health orders requiring vaccinations can be expected to be introduced.</p>
2	What is the position for employers in the residential aged care facility sector?	<p>All workers in the residential aged care facility sector must have received at least one dose of a COVID-19 vaccine by 17 September 2021. This requirement applies to all people working at a facility, including volunteers, those who are responsible for resident care, and those who provide support services for residents, including maintenance and administration workers. There is currently no obligation on visitors to those facilities to be vaccinated against COVID-19.</p>
3	When is it lawful and reasonable for an employer to direct its employees to be vaccinated?	<p>Whether or not such a direction will be reasonable will be very fact specific and requires a balancing of a range of factors. Those factors include:</p> <ul style="list-style-type: none"> • the work – the work an employee performs and how they perform it, the potential for employees to socially distance and/or wear a mask, and whether employees are required to interact with other people who may be at an elevated risk of infection or to have close contact with other people who may be vulnerable to the health impacts of COVID-19; • the workplace – whether the workplace involves employees working in close proximity to each other and customers, and whether the employer's business is an essential service that needs to continue to operate for the public good; • health and safety – the obligation on employers to ensure the health, safety and welfare of their employees and others at their workplace, to the extent that it is reasonably practicable to do so; • community transmission – the extent to which there is community transmission in the immediate or surrounding location where employees work, and as a result the risk of transmission between employees, to customers or the wider community is higher • vaccines – the availability and effectiveness of vaccines against COVID-19; and • individual circumstances – each employee's individual circumstances, including whether an employee may have a legitimate excuse for not becoming vaccinated, for example a medical contraindication supported by appropriate evidence.

4	<p>Is there guidance to assist employers to determine what is reasonable?</p>	<p>The Fair Work Ombudsman has released general guidance based on a four tier system as follows:</p> <ul style="list-style-type: none"> • Tier 1 work – this is where employees are required as part of their duties to interact with people with an increased risk of being infected with COVID-19. This would include employees who work in the areas of hotel quarantine and border control; • Tier 2 work – this is where employees are required to have close contact with people who are particularly vulnerable to the health impacts of COVID-19. This would include employees working in health care or aged care industries, and may potentially extend to those working in the areas of childcare and disability services; • Tier 3 work – this covers those employees where in the normal course of employment there are interactions or there are likely to be interactions between those employees and other employees, customers, or members of the general public. This may include, for example, employees working in stores which provide goods and services; and • Tier 4 work – this is where employees have minimal face-to-face interaction as part of their normal employment duties and would include those employees who are working or can work from home. <p>Most employers will employ workers who fall into more than one of these tiers, and workers may move from one tier to another over time. As a result it may be difficult for an employer to adopt a ‘one size fits all’ approach.</p>
5	<p>What is the position for Tier 1 and 2 employees?</p>	<p>A direction requiring employees to be vaccinated is more likely to be reasonable for those employees in Tier 1 or Tier 2, than for other employees. At its most basic level, this is because those employees are generally at the greatest risk of contracting COVID-19 and/or of transmitting COVID-19 to vulnerable persons.</p>
6	<p>What is the position for Tier 3 employees?</p>	<p>For those employees within Tier 3, where an employee is working in a workplace which needs to remain open despite any lockdown and there is current community transmission, a direction to be vaccinated is more likely to be reasonable. However, this is clearly the most difficult category of employees to assess on the basis of reasonableness.</p>
7	<p>What is the position for Tier 4 employees?</p>	<p>Any direction to employees in Tier 4 that they must be vaccinated is unlikely to be reasonable, taking into account the lesser risk of transmission for those employees.</p>
8	<p>Can an employer issue a blanket direction to all employees to be vaccinated?</p>	<p>Even where employers are able to issue a lawful and reasonable direction to employees to be vaccinated, there will be very limited circumstances where that direction can be a blanket direction to all employees. For example, differences in the roles that employees perform within a workplace, their relative exposure to the general public and other employees, and personal circumstances may mean that it may be reasonable for an employer to direct some employees, but not others, to be vaccinated.</p>

<p>9</p>	<p>What happens if an employer mandates vaccinations and an employee refuses to be vaccinated?</p>	<p>There may be numerous reasons why an employee refuses to receive a vaccination, including on the basis of medical, religious and/or political grounds. An employer should ask an employee for their reason for refusal and be ready to discuss that reason with them.</p> <p>If the employee maintains their refusal, an employer will need to carefully consider the individual employee’s circumstances and their reason for refusal, and may need to consider whether there are any alternative work arrangements which could be agreed to with that employee, such as changes to their duties, reducing contact with other employees and customers, and/or potentially working from home arrangements.</p> <p>In many circumstances it will be very difficult for employers to determine whether an employee’s refusal is reasonable given their stated reason and evidence provided, and in light of those matters whether they can lawfully terminate an employee. Employers will need to proceed with caution.</p>
<p>10</p>	<p>Can an employer require an employee to provide evidence that they have been vaccinated?</p>	<p>If an employer has mandated that an employee must be vaccinated, then it follows that an employer must be able to request evidence from an employee as to their vaccine status.</p> <p>If an employer has not mandated vaccinations, then an employer can still ask employees for their status, but may not be able to insist depending on the public health orders in place at the relevant time.</p> <p>Immunisation history statements or COVID-19 digital certificates are likely to be considered sufficient evidence of vaccination and can be obtained through myGov accounts, the Australian Immunisation Register, and the Express Plus Medicare mobile app.</p> <p>Before employers ask for evidence of vaccination status, they should first consider what they will do with that information. Health information is considered ‘sensitive information’ under the <i>Privacy Act 1988</i> (Cth) (Privacy Act) and is subject to additional protections, meaning that not only will employers need to obtain employee consent to collect the information, but they will need to be able to show that the information is reasonably necessary for one or more of its functions or activities. If employers have no need to collect or record the information once the vaccination evidence has been sighted, this may be a good way to avoid privacy law issues.</p>
<p>11</p>	<p>What should an employer do if its customers / clients want to know the vaccination status of an employee?</p>	<p>Employers who collect employee vaccination status information will need to carefully consider whether they can lawfully disclose that information to third parties such as customers / clients.</p> <p>For instance, although the employee records exemption in the Privacy Act can apply to vaccination status information, the exemption will not apply to an organisation’s acts or practices that are outside of the scope of the employment relationship.</p> <p>Employers should assume that they cannot disclose the vaccination status information of their employees unless they are confident that they can lawfully make the disclosure in the circumstances or an employee expressly consents to that disclosure.</p>

12	<p>Can an employee refuse to attend the workplace because a co-worker isn't vaccinated against coronavirus?</p>	<p>Generally an employer will be able to direct an employee to attend the workplace in those circumstances. This is because, other than for those industries and occupations where there is a clearly mandated position or where it is reasonable to mandate vaccinations, whether an employee becomes vaccinated remains a personal choice. There may also be legitimate reasons as to why any employee may not have been vaccinated.</p> <p>A possible exception to this would be where the employee who objects to working with unvaccinated persons is able to provide evidence that they are at higher risk due to a medical condition. In those circumstances, the employer would need to consider whether any reasonable adjustments could and should be made to accommodate the employee. This will also depend on how significant the risk is – for example, whether there is a current local outbreak of COVID-19 or not.</p>
13	<p>Where an employee has been working from home and an employer now wishes them to return to the workplace, can the employee refuse on the basis that a co-worker has not been vaccinated?</p>	<p>Whether an employer can direct an employee to return to the workplace will depend on whether the direction is lawful and reasonable in all of the circumstances. In most cases however, such a direction will be both lawful and reasonable.</p> <p>Vaccination against COVID-19 is unlikely to be mandated in most workplaces, and even where it is, there may be legitimate reasons why an employee has not been vaccinated. Employers should however consider whether the employee subject to the direction has legitimate reasons for refusing to return and may ask for evidence of such reasons.</p>
14	<p>Can an employer put in place different restrictions for vaccinated / unvaccinated employees at the workplace?</p>	<p>Unless an employer is in an industry where public health orders mandate specific restrictions, employers are unlikely to be able to place different restrictions on vaccinated and unvaccinated employees.</p> <p>Legislation at both Federal and State levels makes it unlawful to discriminate against an employee on various protected grounds including (but not limited to) pregnancy, disability and age. Given that these protected grounds may be linked to an employee's vaccination status, employers should be careful not to act in a way that may constitute unlawful discrimination.</p>

<p>15</p>	<p>If an employer mandates vaccinations, could they be liable if an employee suffers side effects?</p>	<p>If an employee has an adverse reaction to a vaccine, their ability to make a workers' compensation claim will depend on the link between the vaccination and their employment. The reaction would have to be defined as an 'injury' and be sufficiently linked to employment. The likelihood of a claim being accepted by an insurer will increase where the employer:</p> <ul style="list-style-type: none"> • took steps to arrange for its employees to receive the vaccine; • encouraged its employees to get vaccinated in order to obtain benefits for its business; • permitted or directed employees to receive a vaccination during ordinary working hours; or • provided instructions to employees relating to the administration of the vaccine. <p>The necessary link will be easier to establish where a worker is influenced by their employer's requirement to get vaccinated or is subject to a public health order.</p> <p>The Federal Government has also announced the COVID-19 Vaccine Claim Scheme, aimed at covering the cost of injuries as a result of moderate to significant adverse reactions to COVID-19 vaccinations. From 6 September 2021, the scheme will cover claims of \$5,000 and above regardless of where the vaccination occurs. The new scheme will allow injured individuals to seek compensation without the expense of litigation. It is not yet clear how the scheme will interact with State and Territory workers' compensation schemes.</p>
<p>16</p>	<p>Can an employer encourage its employees to be vaccinated? If so, what can an employer say (and should not say)?</p>	<p>Rather than mandating vaccinations, an employer may choose to simply encourage its employees to be vaccinated. There is no reason why an employer cannot adopt this position, and many employers are doing so already. Encouragement can take many forms, including giving approved information to employees and directing them to links to government and recognised health information, providing employees with an opportunity receive vaccinations including during work hours, providing additional paid leave, and also offering valuable consideration to employees who are fully vaccinated.</p> <p>The Therapeutic Goods Administration (TGA) has released guidance on what employers should communicate in relation to COVID-19 vaccinations. Communications should not reference any company / vaccine brand name or active ingredient, compare different brands of vaccines or their effectiveness, contain statements to the effect that vaccines cannot cause harm or have no side effects, or include any statement that is false or misleading. The Federal Government has released various brochures, kits, videos and other material which employers can use for the purpose of communicating with their employees.</p>

17	Can employers reward employees who choose to be vaccinated?	The TGA has issued permission to employers to offer valuable consideration (cash or other rewards) to employees who have been fully vaccinated, provided that certain conditions are met. Rewards to employees are allowed, provided that they are made available only to persons who are fully vaccinated (two doses), they contain a statement to the effect that vaccination must be undertaken on the advice of a health practitioner, they do not include tobacco or medicines, and if the rewards include alcohol then the offer does not encourage excessive or rapid consumption or appeal to minors. Any such reward offers must also apply retrospectively to employees vaccinated prior to the making of the offer. Employers should consider requiring employees to acknowledge that those conditions have been met in order to receive the reward.
18	Can an employer require a prospective employee to be vaccinated before starting work?	Yes, but this will be easier for an employer to justify if they have mandated vaccinations for existing employees, or where it is required for a specific role. This could be achieved by inserting appropriate wording in an employment contract or via a vaccination policy.
19	What is the position in relation to contractors?	Whether a company can require its contractors (or their employees) to be vaccinated will largely depend on the terms of any agreement between the parties.
20	Should an employer implement a vaccination policy?	Whether an employer decides to mandate vaccinations, or simply chooses to encourage employees to do so, it is prudent for them to implement a vaccination policy.
21	Does an employer need to consult with its employees before implementing a vaccination policy?	Yes, generally an employer will be required to consult with their employees prior to implementing such a policy. Those consultation obligations may arise from any modern award or enterprise agreement applying to the employees, and in any case, consultation obligations will arise under work health and safety legislation given that COVID-19 creates a health risk.
22	What should a vaccination policy cover?	The nature of an employer's business and the industry in which they operate will be relevant to determining what should be in a vaccination policy. A policy should specifically cover, as a minimum, the reasons for the vaccination requirements (if mandatory) and key dates, exemptions and the process for applying for an exemption and evidence, carve outs (at least in respect of persons for whom the vaccine has not been approved for use), evidence required to prove vaccination, and the consequences of non-compliance.
23	Do employees have to be paid for the time to get vaccinated against COVID-19?	Where a mandatory direction is in place, the employer should cover the employee's travel costs and give the employee time off work without loss of pay if the appointment is during work hours. Where employer does not require employees to be vaccinated, they can still discuss work adjustments, leave arrangements or incentives with their employees to support them getting vaccinated.

24	Can an employee take sick leave to get vaccinated against COVID-19?	Not usually, as the entitlement to sick leave under the <i>Fair Work Act 2009</i> (Cth) (Fair Work Act) is only available when an employee is unfit for work because they are ill or injured. Employers should also consider any obligations under awards, enterprise agreements, employment contracts, or workplace policies, for extra rules about sick leave.
25	Can employees take paid time off if they feel unwell after being vaccinated?	Casuals are not entitled to paid sick leave under the Fair Work Act. Full-time and part-time employees can use paid sick leave if they are unwell after being vaccinated. Employers should also consider any obligations under awards, enterprise agreements, employment contracts, or workplace policies, for extra rules about sick leave.
26	What is rapid antigen testing and how does this fit in with vaccinations?	Rapid antigen testing is not a substitute for a vaccination, but can be used in conjunction with vaccinations as part of a broader safety strategy. Rapid antigen testing is a screening tool to help detect COVID-19 in people without any symptoms. It involves a nasal or throat swab (using a small cotton bud) that is placed into a chemical solution. Employers can use testing in their workplaces but must use a health practitioner to conduct or oversee the testing process and to interpret the results. Only TGA testing devices can be used and screening must be conducted in line with TGA and other government advice. While results are generally known within 15 to 20 minutes, these tests are not as accurate as the standard COVID-19 tests (PCR) used at testing clinics. Where an employee tests COVID-19 positive, then they will need to be safely transported to a PCR testing facility and remain isolated until a definitive result is achieved.
27	Can an employer administer vaccinations itself?	As part of the continued expansion of Australia's vaccine rollout programme, the Federal government has created a new scheme to allow larger employers to combine with health care providers to administer vaccinations in the workplace. In order to do this, vaccination providers will have to seek accreditation to administer vaccines at workplaces (similar to that which operates in relation to annual flu vaccinations) and those providers must be capable of administering a minimum of 500 vaccines per week, unless this is precluded by the delivery model or location. The Federal government will pay those accredited vaccination providers a fixed price per vaccine dose.

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