

COVID-19 coronavirus vaccination

A MEAA guide to your rights at work

Effective September 17, 2021

As the vaccination roll-out continues across Australia, we know that thousands of MEAA members have opted to be vaccinated.

In the past month, our representative bodies have come together to consider the position the union should put to members about vaccinations for work purposes.

The clear view of MEAA is that workers in our industries should be vaccinated where it is reasonable and safe to do so.

MEAA believes that the collective good and the vibrant future of our industries are best served by vaccination and the expert guidance of the Australian medical community.

During this time of change, we think it's important for you to understand your employment rights, to know where you stand and what you can do.

If you would like more information about your rights and obligations as an employee/contractor during this period, please do not hesitate to contact MEAA.

NOTE: *This is a fast-moving and incomplete area of law. It is subject to rapid change, including through decisions by the courts and by Australian governments. MEAA will update this resource to reflect what the law says.*

What is MEAA's position on vaccination in the workplace?

The clear view of MEAA is that workers in our industries should be vaccinated where it is reasonable and safe to do so.

There are different considerations in every workplace.

Your employer has a duty of care to you and your work colleagues, as well as the public. They must provide a safe workplace for you and your colleagues, as well as the public that may use that workplace. They also have a duty to not endanger the welfare of the audiences they serve. The best means of achieving this is to ensure very high levels of vaccination against coronavirus throughout the workforce.

Employers cannot rush this process. They must engage with employees and contractors and explain their situation respectfully and provide you with the resources you ask for.

Consultation is critical to ensure we are all informed and moving in the right direction.

MEAA supports vaccination, so that:

- Members have a significantly lesser chance of contracting coronavirus.
- Members have a significantly lesser chance of being hospitalised and intubated, where the coronavirus is contracted.

COVID-19 coronavirus vaccination: A MEAA guide to your rights at work

- Members can work in the knowledge that their colleagues are vaccinated and there is a markedly reduced chance the coronavirus can be transmitted.
- The industry projects a message that the public we entertain should feel safe when attending performances and worksites.

What about people/members who can't safely be vaccinated?

MEAA has members who are immunocompromised and/or who have other conditions which makes receiving the vaccine dangerous to their health. These members cannot be left behind. In the first instance, workers who cannot be safely vaccinated should be provided with personal protective equipment where it can be incorporated into their work practices.

We are talking with industry leaders about their duty not to discriminate against workers who can't safely be vaccinated and to ensure their welfare while risk levels require a vaccinated workforce. MEAA will assist members with advice about discrimination laws and claims.

What about conscientious objectors?

The only way our industries will be revived and remain viable in the long term, is if the best medical advice is followed. That advice is that everyone who can be safely vaccinated, should be vaccinated.

Does this mean MEAA won't help me if I object to vaccination?

If you object to being vaccinated on principle, MEAA will professionally and respectfully represent your interests. We know that all cases have to be dealt with on their own facts. You should contact MEAA for assistance if you think a direction to be vaccinated is unacceptable and/or compromises your welfare.

Can employers make employees take the vaccine?

An employer cannot make anyone take a medication or receive treatment. The issue really is: are there consequences if I refuse to be vaccinated?

At the moment, we know that:

1. Employers have a prevailing duty of care to all users of their premises.
2. Employers cannot assume that they can direct employees to take the vaccine under any circumstances.
3. Employers who do direct employees to take the vaccine will need to demonstrate that it is a *lawful and reasonable direction*, which will be determined on a case-by-case basis.

Governments have so far left it to individual employers to determine. Much will depend on your working situation.

If you are in regular contact with colleagues and/or the public, there is a strong argument that a direction to be vaccinated will be considered reasonable and lawful, but only a court or tribunal can establish this in the absence of laws compelling vaccination.

If you work alone and have no contact with others, a direction to be vaccinated may not be seen as reasonable or lawful.

When is a direction to take the vaccine lawful and reasonable?

You need to consider the individual circumstances of the business and the kind of work being

performed. Some relevant factors include whether:

1. The nature of the work carried out by the employee and the business is relevant. For example, does the employer's business involve circumstances which give rise to risks relating to coronavirus transmission?
2. The vaccine is required in order for the employer to meet their legal work health and safety obligations.
3. The vaccination is an inherent requirement of the employee's role.
4. It is discriminatory to require certain employees to receive the vaccine (e.g. due to religious beliefs or health requirements).
5. What alternative arrangements can be put in place to reasonably manage the risk relating to employees, who do not have the vaccine (e.g. working from home)?

In some circumstances it may be obvious when it is a lawful and reasonable direction in relation to the vaccine. For example, where employees have close and regular contact with other colleagues or the public or vulnerable classes of people, such as in direct care roles, or emergency workers.

However, for many Australian businesses, including in MEAA's areas of operation, such a determination may not be so clear, and care will need to be taken.

Is there an alternative to providing a direction to employees?

Yes. Employers have a range of reasonable options available to them, such as:

1. Incentivising employees to take the vaccine willingly, for example, by providing paid time off for the employee to take the vaccine, or allowing it to be administered during working hours.
2. Considering alternative working arrangements for employees who do not wish to take the vaccine, and for who it would be unlikely that a direction would be lawful and reasonable.

Employers can also increase other coronavirus safety measures, such as PPE, to account for employees who may choose to not take the vaccine.

What should employers do if they want me to get vaccinated?

Employers cannot and should not carelessly rush you into being vaccinated. It has to be safe for you and you need to know about the vaccines now in use. That is a conversation best held with your family doctor. In addition, you can also request additional information from your employer about the vaccination process and how it relates to your workplace.

Does an employer need to consult when implementing a workplace policy about coronavirus vaccinations?

Before implementing a new workplace policy or changing an existing policy about vaccinations, employers should consider their workplace and employees' circumstances and whether they need legal advice about their obligations.

Most workplaces are covered by either an award, enterprise agreement or another registered agreement. All awards and enterprise agreements have a consultation clause requiring employers to consult with employees and any representatives when an employer intends to implement significant workplace changes. Some registered agreements, employment contracts or existing workplace policies may also require employers to consult.

This means that before introducing or changing a workplace policy about vaccinations, employers should review any applicable workplace instrument, employment contract or existing workplace policy to find out:

COVID-19 coronavirus vaccination: A MEAA guide to your rights at work

1. Whether they need to consult under that document (as well as needing to consult under work health and safety laws).
2. Who they need to consult with (including any employee representatives or unions).
3. How they need to consult about the proposed workplace change.

Under work health and safety (WHS) laws, employers also have to consult with employees and their health and safety representatives (HSRs) about possible control measures to address WHS risks. This includes consideration of a new policy about coronavirus vaccinations or changes to an existing vaccination policy.

Employers must also provide employees and their HSRs a reasonable opportunity to express their views about the policy changes. Employers need to take these views into account when making a decision and advise employees and HSRs of their decision.

Do employees have to be paid for the time to get vaccinated against coronavirus?

There is currently no ironclad rule requiring employers to provide an employee with paid time off to get vaccinated.

Unions are campaigning for paid vaccination leave to be available to all workers as a basic workplace right alongside paid pandemic leave.

Where an employer requires an employee to be vaccinated against coronavirus (for example, because they have a mandatory vaccination policy in place), the employer should cover the employee's travel costs, as well as other out-of-pocket costs and give the employee time off work without loss of pay, if the appointment is during work hours.

Even where an employer doesn't require their employees to be vaccinated against coronavirus, they can still discuss work adjustments, leave arrangements or incentives with their employees to support them getting vaccinated. These arrangements could include:

1. Requesting and taking leave (for example, annual leave or unpaid leave).
2. Starting work later or finishing early (to help employees to attend a vaccination appointment around work hours).
3. Working from home (to help an employee attend a local vaccination appointment).
4. Providing paid time off for their employees to get vaccinated against coronavirus.

Can employees take paid time off if they feel unwell after being vaccinated?

Full-time and part-time employees can use paid sick leave if they can't work because they're unwell after being vaccinated.

If a full-time or part-time employee runs out of paid sick leave, they may be able to agree with their employer to access other paid leave entitlements, like annual leave, or to make other arrangements like taking unpaid leave.

Employers should also consider their obligations under any award, enterprise agreement or other registered agreement, employment contract or workplace policy, which could include extra rules about sick leave.

Can an employer insist that new/prospective employees be vaccinated?

The law is rapidly moving in the direction that employers can be presumed to have the right to insist on new employees being fully vaccinated. Where the prospective employee / contractor is unvaccinated or refuses to disclose their vaccination status, the employer would be entitled to terminate the recruitment process. In addition, if an employer completes the recruitment process

and the employee (or contractor) commences their employment, and then the employer discovers that the employee is unvaccinated, the employer may terminate that employment, so long as they could demonstrate that it was an condition of the employment and that it was communicated to the prospective employee at the outset of the recruitment process or clearly expressed in the contract of employment that was executed by the employee.

Can mandatory vaccination be discriminatory?

An employer's vaccine requirement must be mindful of Australian discrimination laws.

The *Sex Discrimination Act 1984* (Cth) (SDA) and the *Disability Discrimination Act 1992* (Cth) (DDA) make it unlawful to discriminate on the grounds of pregnancy and disability in many areas of public life, including in employment.

'Disability' is broadly defined in the DDA and includes past, present and future disabilities, as well as imputed disabilities.

For people who are pregnant or have a disability or underlining medical condition that prevents them being vaccinated, a blanket rule mandating coronavirus vaccination is likely to engage the 'indirect discrimination' provisions in the SDA and the DDA and therefore also pursuant to General Protections breaches under the *Fair Work Act 2009* (Cth) (FWA).

In broad terms, indirect discrimination occurs when a person is required to comply with a general requirement or condition (such as mandatory coronavirus vaccinations), and they are unable to do so because of their pregnancy or disability and it has the effect of disadvantaging them.

Under the SDA, DDA and FWA, indirect discrimination may occur if an employer requires, or proposes to require, that a person comply with a general requirement or condition. This means that an employer does not need to seek to enforce a mandatory coronavirus vaccination policy (e.g., by way of termination, suspension, or performance management) to engage in unlawful discrimination.

Whether a requirement by an employer that its employees receive coronavirus vaccinations is considered 'reasonable' by a court or tribunal is likely to be highly fact dependent, taking into account the particular workplace and the employee's individual circumstances.

What if I'm pregnant or planning pregnancy?

Australian governments have advised pregnant women to receive the coronavirus vaccine. Pfizer is the preferred coronavirus vaccine for women who are pregnant, breastfeeding or planning pregnancy. Research shows Pfizer is safe for pregnant and breastfeeding women and they can receive the vaccine at any stage of pregnancy.

The risk of serious outcomes from coronavirus is higher for pregnant women and their unborn baby. Pregnant women who get coronavirus have a higher risk of needing to go to hospital or needing intensive care. Their unborn baby has a slightly higher chance of being born prematurely (born before 37 weeks of pregnancy) and needing to go to a hospital for care.

Vaccination is the best way to reduce these risks.

Women who are pregnant or planning pregnancy, are ultimately responsible for navigating that pregnancy and determining the best approach for them and their family. As such, women who are pregnant or planning pregnancy, should consult their medical providers about coronavirus vaccination and discuss the best way forward for their respective pregnancy pathway.

Employers should exercise precaution when dealing with women in this category of employees, as

they can still find themselves in breach of the antidiscrimination framework, irrespective of the public health orders.

I'm an independent contractor, not an employee. Can a business refuse to provide me with work if I can't or won't verify my vaccination status?

With few exceptions, a company seeking to engage the services of a contractor can generally insist on the terms that they use to engage contractors. MEAA's best assessment is that a company can make a work offer contingent upon a contractor proving their vaccination status, remembering that a company has the same work health and safety obligations as any other employing entity.

If you are denied a contracting opportunity because you have not provided vaccination status information and you think your vaccination status has no bearing on the work you wish to perform, contact MEAA.

Can an employee refuse to attend the workplace because a co-worker isn't vaccinated against coronavirus?

Generally, it's unlikely that an employee could refuse to attend their workplace because a co-worker isn't vaccinated against coronavirus. The reasons for this include:

1. Where vaccination isn't mandatory for all employees and many workplaces won't be able to require their employees to be vaccinated.
2. The co-worker may have a legitimate reason not to be vaccinated (for example, a medical reason).

If an employee refuses to attend the workplace because a co-worker isn't vaccinated, their employer can direct them to attend the workplace if the direction is lawful and reasonable.

If an employee has concerns about the safety of the workplace, they should raise their concerns with their employer and MEAA as soon as possible.

Can an employer direct me to attend a coronavirus test?

The public health orders as administered by state and territory health departments mandate a range of circumstances where an employer can issue employees reasonable directions to undertake coronavirus testing. Members are directed to consult with their respective health departments to ascertain their precise position in relation to their state or territory's health department public health orders.

The directions ought to be lawful and reasonable. In other words, there has to be a sound basis for an employer requiring an employee to undertake a coronavirus test. It cannot be for the employer's convenience.

Undertaking the test must be linked to the inherent requirements of your job. The bottom line is that your health status has to be relevant to the work you perform and the environment in which you work.

Although the law is rapidly developing, it should be noted that a direction to be tested is more likely to be lawful and reasonable if a worker or contractor shows signs of ill-health associated with coronavirus, or the employee works in close proximity to other colleagues or the public.

Can an employer direct me to show whether I have been vaccinated?

An employer may require this information where it is valid part of ensuring that the workforce overall are not being put at risk of increased coronavirus transmission, but the law is not settled in this area.

If a workplace does not require you to be vaccinated, the grounds on which they can seek personal medical information (and therefore compromise your privacy) are not strong.

Can an employer insist on which vaccine is used?

This question has arisen from members concerned that visiting US productions may seek to use US screen sector vaccine-recognition rules. These rules recognise that the Pfizer vaccine has been approved at all levels in the USA, while the AstraZeneca vaccine has been approved for so-called 'emergency use'. (Pfizer only received full approval in the USA in August 2021. It is common for vaccines to be approved in stages and over a lengthy period of time.)

MEAA firmly believe that a production cannot discriminate against employees or contractors on the basis of which vaccine they have used, so long as the use of those vaccines has been approved by the relevant federal/state health authority. It is the health rules as they are in Australia that apply to productions taking place in Australia. In Australia, the Therapeutic Goods Administration (TGA) has approved 3 vaccines for use in Australia:

1. [Comirnaty \(Pfizer\) vaccine](#)
2. [Vaxzevria \(AstraZeneca\) vaccine](#)
3. [Spikevax \(Moderna\) vaccine](#)

If a production seeks to discriminate against MEAA members by insisting on one type of vaccine or giving one vaccine a higher value than another, affected members should immediately contact the union.

FURTHER INFORMATION

w meaa.org | **p** 1300 656 513 | **e** members@meaa.org
f facebook.com/withmeaa | **t** twitter.com/withMEAA

