

# INFORMATION SHEET

## Mandatory Vaccines



### WHAT THIS INFORMATION SHEET COVERS

- Conditions of employment
- Legal obligations and considerations
- Useful resources

### Introduction

#### CONDITION OF EMPLOYMENT FOR EMPLOYEES AND VOLUNTEERS

NSW Public Health Orders require a range of workers to be vaccinated against COVID-19 (unless they have a medical exemption), including people providing services as part of:

- Ministerially approved NGO Grant Programs
- Program grants that involve the provision of health or clinical services
- Disability services, including services provided to a person with a disability, including (but not limited to) services provided under the NDIS.

While the Public Health Orders apply to many employees of community managed organisations (CMOs), they may not cover all employees. Most organisations are requiring their workers to be vaccinated against COVID-19 as a condition of employment to protect themselves and the people they support.

Mental Health Coordinating Council recognises these are challenging

issues for CMOs and the following information is provided to assist members. MHCC encourages any CMO considering the introduction of a mandatory vaccination policy for staff not covered by the Public Health Orders to seek legal and industrial advice.

### Useful resources

#### FAIRWORK OMBUDSMAN

The [Fairwork Ombudsman](#) provides a summary of current state and territory public health directions and has published guidance on [COVID-19 vaccinations and the workplace](#). This includes a helpful tiered approach to assessing whether a vaccination mandate is reasonable.

- Tier 1 covers employees with increased risk of COVID-19, such as hotel quarantine workers
- Tier 2 vulnerable employees, such as health care or aged care works
- Tier 3 employees with high interaction with others, such as retail workers
- Tier 4 covers employees with low contact, including people working from home

### THERAPEUTIC GOODS ADMINISTRATION

Your organisation may be able to encourage employees to get COVID-19 vaccinations by offering incentives in certain circumstances. For more information about when you can do this, see the [Therapeutic Goods Administration](#) website.

### JUSTICE CONNECT

[Justice Connect](#) has helpful information on their website. They have produced the following flowcharts:

- [Can you require an employee to be vaccinated?](#)
- [What can you do if an employee refuses to get vaccinated?](#)
- [Key employment-related legal requirements and considerations for COVID-19 vaccines](#)

### Advertising new roles

Information on advertising new roles that include a requirement for COVID-19 vaccination. Where a Public Health Order requires certain employees to be vaccinated against COVID-19, organisations should make COVID-19 vaccination a condition of employment when advertising new roles. This step will help ensure compliance with the Public Health Order and allow prospective employees to consider whether they are suited for the role in circumstances where they will be required to receive a COVID-19 vaccine.

In the absence of a Public Health Order requiring some employees to be vaccinated, organisations may still be required to implement a mandatory vaccination policy to comply with their work health and safety obligations. In these circumstances, organisations should also consider making COVID-19 vaccination a condition of employment when advertising a new role.

An employer may make employment conditional on any number of factors, including that prospective employees be fully vaccinated against COVID-19, provided the condition is not unlawfully discriminatory. If an organisation makes employment conditional on a potential employee's vaccination status, it must have the capacity to provide exemptions in appropriate circumstances, such as where a prospective employee is immunocompromised or has another medical contra-indication.

### Privacy obligations

The *Privacy Act* prohibits the collection of health information, including a person's vaccination status, unless it is reasonably necessary for one or more of the employer's functions or activities and the employees consent to its collection. Or where the collection is required or authorised by law, such as in accordance with a Public Health Order or, potentially, to ensure compliance with statutory obligations under work health and safety legislation. *The Privacy Act 1988* (Cth) (Privacy Act) covers organisations with an

annual turnover of more than \$3 million.

### **Varying employment contracts**

Information on varying employment contracts to add a provision for mandatory vaccine directions. Organisations should consider varying employment contracts for prospective employees to include provisions for mandatory vaccination, subject to appropriate exemptions as outlined above and subject to any necessary exceptions required to avoid contravention of anti-discrimination laws.

Organisations should also consider varying contracts for existing employees, provided:

- the policies have been the subject of consultation with staff and are based on a risk management approach,
- the policy terms are supported by the work health and safety obligations of the organisation and its staff, and
- the policies are likely to be upheld as lawful and reasonable directions.

### **Evidence of vaccine status**

Information on evidence of vaccine status organisations require from employees. Where there is a Public Health Order requiring certain employees to be vaccinated, organisations are entitled (and may be required) to obtain evidence from the employees of their vaccination status. Compliance with work health and safety obligations is a core function of any CMO. If knowledge

of an employee's vaccination status is reasonably necessary to achieve such compliance – and since it is for employees working with vulnerable people and other workers indoors – an organisation is entitled to ask for that information.

If an employee fails or refuses to provide the information, an organisation may, depending on the circumstances, be justified in taking disciplinary action up to and possibly including dismissal, on the basis that the employee's conduct is jeopardising the health and safety of the employee and others at work.

Where possible, organisations should seek legal advice before taking disciplinary action against an employee. If the collection of vaccination information about individuals is reasonably necessary for the prevention and management of COVID-19 in workplaces or public areas under the agency's control, then that collection should be permissible.

*Note: It is generally not justified to collect vaccination status information related to a particular individual purely for statistical or monitoring purposes.*

Evidence of COVID-19 vaccination should include either the COVID-19 digital certificate or immunisation history, accessible through employee Medicare accounts. Once details about an employee's vaccination status are collected, the employee records exemption under the Privacy Act will apply. This means that instead of the Australian Privacy Principles governing

the use and disclosure of the information, it will be dealt with under the general law, including workplace relations legislation, which contain less stringent privacy obligations. The most relevant workplace relations law is likely to be the *Fair Work Act 2009* (Cth).

### Recording vaccine status of service users

Information on recording the vaccination status of service users and evidence required. If evidence of a service user's COVID-19 vaccination status is required, that evidence should include either the COVID-19 digital certificate or immunisation history. Unlike employees, if details of a service user's vaccination status are collected, that information will continue to be covered by the *Privacy Act* and the *Australian Privacy Principles*.

#### Acknowledgments

Mental Health Coordinating Council acknowledges Justice Connect for making available its useful resources on mandatory vaccinations and the workplace and acknowledges their use in developing this resource. We acknowledge the Fairwork Ombudsman for its comprehensive information on workplace rights and obligations.

#### Disclaimer

This content is published in good faith by Mental Health Coordinating Council. All references are up to date at time of publication in November 2021 but changes to law, regulations, and ethical guidelines may affect organisational policy and practice. The Council does not accept legal liability for any injury, loss or damage incurred by the use of, or reliance on, this document.

### Volunteers and mandatory requirements

If your organisation has volunteers, you may want to consider your approach to the COVID-19 vaccine. This will depend on factors like who your service-users are, the size of your volunteer workforce, other COVID-19 precautions in place, and how volunteer work is currently being performed. If you want to put mandatory requirements in place, such as making vaccination a requirement for volunteering, we recommend you seek legal advice.

- **Volunteering Australia** has published an [information sheet](#) on how volunteers are included in the COVID-19 vaccination roll-out.
- The [Justice Connect](#) fact sheet [Volunteers and Covid 19 Vaccine Fact Sheet](#) has more information about volunteers and the COVID-19 vaccine.