

JAB OR JOB?



Vaccine Mandates – What Employers Need to Know

29 NOVEMBER 2021

As we move towards the Covid protection framework (otherwise known as the ‘Traffic Light System’), a number of businesses may find that they are covered by a vaccine mandate. Under the vaccine mandate, all employees carrying out specific work must be vaccinated against Covid-19 or have a valid medical exemption.

In this newsletter, we have guidance for employers who may be affected by this requirement. Please note that this guidance is current as at the date of publication and should not be relied on as legal advice.

Is your Business Covered by the Vaccine Mandate?

Under the Traffic Light System, a number of industries can only fully operate at Level Red and Orange if they require customers to produce a Covid-19 vaccination certificate. If those businesses choose not to require vaccination certificates, they face restrictions on the way they operate (such as the ability to open or the amount of customers they can have in the workplace). As at the date of this newsletter, the businesses covered by this requirement include hospitality, close contact businesses such as hairdressers and others providing personal services, gyms, and events. As time goes on this group, may expand.

If you are a business operating in one of these industries and you want to continue to operate with the least amount of restrictions during Levels Red and Orange, then you must require your customers to produce a vaccination certificate when entering the workplace. You also must require all your workers (including contractors) to be vaccinated or have a valid medical exemption. The businesses affected by this must also keep an up to date record of the status of workers’ vaccinations. Businesses that breach these obligations may be subject to a fine.

Workers in these businesses also have duties under the new legislation. An affected worker has an obligation not to carry out work if they are unvaccinated and must supply evidence of vaccination status (otherwise they will be treated as an unvaccinated person).

Other businesses, such as retail, may elect to require vaccination certificates from customers. In this situation, it appears that it is unlikely that these businesses will be covered by the vaccination mandate. If those businesses wish to require their employees to be vaccinated, they must undertake a risk assessment and introduce a vaccination mandate policy.

What is the Risk Assessment Tool?

The Government is currently creating a risk assessment tool which businesses can use to determine whether or not it is reasonable to require workers to be vaccinated against Covid 19. This risk assessment tool should be available mid December.

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- 1. Whether the workplace is less than 100 square meters;**
- 2. Whether workers are in close proximity to others;**
- 3. How long the workers will be in close proximity to others; and**
- 4. Whether the business provides services to those who are vulnerable to an adverse outcome from COVID-19.**

The businesses will need to meet three of the four risk factors in order to establish a vaccine mandate.

Businesses can either use this risk assessment tool, or create their own. The benefit of using the Risk Assessment Tool is that there will be greater legal certainty that the business has taken in account the appropriate risk factors (therefore making it more difficult that aspects of the process could be challenged in Court). As an alternative, Worksafe currently have a number of factors for businesses to consider when undertaking a risk assessment on their website or the business can create their own criteria.

When undertaking a risk assessment and introducing a Covid-19 vaccination mandate, businesses must, as far as reasonably practical, consult with their staff and their workers’ representative (most likely the appropriate Union). However, there are rules around how much personal information can be provided to workers’ representatives.

If you are considering undertaking a risk assessment or introducing a vaccine mandate, we encourage you to seek legal advice to ensure that you are following a good process.

What Happens if my Business is Covered by a Vaccine Mandate and I Have Employees Who Are Not Vaccinated?

For businesses that are covered under the vaccine mandate, their workers will need to get their first vaccine by 3 December 2021 and their second by 17 January 2022.

If your business is covered by a vaccine mandate, you must give your employees paid time off during work hours to get the vaccine. However, a business can refuse if this would unreasonably disrupt the employer’s business or the employer’s employee’s ability to carry out their duties. The employee must also give their employer prior notice if they are intending to take leave to get vaccinated.

Prior to termination, the employer must consult with the employee and consider whether there are any reasonable alternatives to termination. Just like with any other termination, a good process should be followed. The employer should meet with the employee (and their representative if they choose to have one) to discuss whether there are any alternatives to termination.

If the employee refuses to be vaccinated and there is no alternative, then the employer may terminate the employment on no less than four weeks’ notice. This notice period must be paid.

If the employee is vaccinated within the four week notice period, the termination is revoked and their employment continues in the normal fashion. Employees still retain the right to bring a personal grievance in respect of their dismissal, therefore it is crucial that employers follow a fair consultation process.

If you believe that your business is affected by a vaccine mandate, or you wish to introduce one, contact the Employment Team; Claire Mansell, Aimee Ella and Mathew Martin.