

Below is an overview of the recent Victorian Directions relating to the construction industry and guidance on an employer's obligations relating to mandating COVID-19 vaccinations.

Until **11:59 pm on 23 September 2021**, the most recent and applicable Directions for the Construction industry are [Workplace \(Additional Industry Obligations\) Directions \(No 46\)](#) (Workplace Directions) and the [COVID-19 Mandatory Vaccination Directions \(No 3\)](#) (Vaccination Directions).

Changed powers for site operators under the Directions

Under the Workplace Directions the Site Operator is not only required to request the Worker (employees and subcontractors) vaccine information above, but also to:

- collect and store the Worker vaccine information;
- to sight evidence of the vaccination status, booking status, or medical certificate provided with the Worker vaccine information; and
- to keep a record of the site operator having 'sighted' the evidence.

We also recommend site operators inform Workers that their information and records will be kept and may be produced to demonstrate the site operator's compliance with the Directions.

Please note, with the government directives:

- it is now lawful for you to request a Worker to provide evidence of a vaccination status, and
- you must take all reasonable steps to ensure that Workers who refuse to provide vaccination evidence do not enter or remain on the premises.

There are now provisions specifically granting authorisation to request, collect, store and use information for the purposes of complying with the vaccination requirements on construction site and in other mandatory industries.

The record of (Vaccine) information can be derived and stored under the *Australian Immunisation Register Act 2015* (Cth).

Interaction with the *Privacy Act 1988*

The base line position under the *Privacy Act* is that medical information is what is termed sensitive information, which attracts a higher level of privacy protection under this legislation.

In usual circumstances, a Worker must consent in order to collect vaccination status information and the collection of this information must be reasonably necessary for one or more of your functions or activities, unless an exception applies

One of the exemptions is if the collection and storage of health records is required or authorised by law – such as a public health order.

This is the current situation in the construction industry. As such, the public health order overrides the privacy legislation, in relation to requiring the consent of Workers to provide vaccination status.

Storage of sensitive information for employees

An 'employee record' is 'a record of personal information relating to the employment of the employee' (section 6 of *Privacy Act*) and includes vaccination records.

Employees in large private organisations are subject to the employee records exemption.



The exemption means that the Privacy Principles of the *Privacy Act* will not apply to the handling of employee records. These Privacy Principles dictate very strict rules regarding storage and access to an employee's sensitive information.

However, best practice guidelines should still be followed, including accurately recording the information that is collected, keeping it up-to-date and storing it securely.

Storage of sensitive information for contractors and suppliers

Contractors and suppliers are not employees and are not covered by the employee records exemption, this means that the Privacy Principles of the *Privacy Act* would generally apply.

It has not been stated as yet whether the Workplace Directions override the storage provisions of the privacy legislation along with the provisions regarding requiring consent for collection.

Until this is clearly articulated, we recommend that you follow the requirements of the privacy legislation to minimise the risks of legal action being taken against you for breaches. These requirements are as follows:

You:

- must accurately record the vaccination status information and ensure that the record is complete and kept up-to-date;
- must provide the contractor or supplier with an opportunity to access the information and request correction if the information is inaccurate;
- must have appropriate security systems to protect vaccination status information from misuse, interference, loss, unauthorised access, modification or disclosure; and
- should limit the use and disclosure of vaccination status information to the purpose for which it advised the information was collected. should destroy the information when it is no longer required.

More information about Privacy Principle obligations in relation to storage and access is available [here](#).

More information

For more information on the current requirements by employees on COVID-19 vaccination, or for advice, please contact a member of our Employment and Workplace Relations team:

Rosa Raco, Special Counsel
(03) 8600 8829 or rraco@kcllaw.com.au

Daniel Bean, Senior Associate
(03) 8600 8825 or dbean@kcllaw.com.au

Nadeem Hekmat, Associate
(03) 8600 8849 or nhekmat@kcllaw.com.au

Author

This Employment and Workplace Relations update was authored by Daniel Bean, Senior Associate.

Note: *This update is a guide only and is not intended to constitute legal advice.*