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Implementing a mandatory vaccination policy

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Acknowledgment of Country

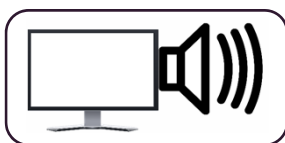


ELAA acknowledges the traditional owners of the land on which we live and work and pay our respects to Elders past, present and future.

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Administration

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Q&A FUNCTION – CHAT
IS DISABLED



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TIME AVAILABLE



TECHNOLOGICAL DISRUPTION



The Victorian Public Health Order (Pandemic Order)

Background:

- During the COVID-19 pandemic, the Victorian Government introduced mandatory vaccinations for the early childhood education and care sector.
- During 2020 and 2021, this was mandated through the State of Emergency and Directions from the Chief Health Officer.
- In December 2021, the Victorian Government introduced its pandemic management framework which includes Pandemic Orders.
- Each Pandemic Order is made by the Victorian Health Minister and is renewed on a three-month basis.
- The current **Pandemic (Workplace) Order No. 8** will be in place until 12 July 2022.

Refer to: [Workplace Order | health.vic.gov.au](https://www.health.vic.gov.au/workplace-order).



If the Government mandate ends

- There no longer exists a requirement for mandatory vaccinations for your staff, parent volunteers and Committee members.
- If you choose to continue with mandatory vaccinations, an employer can choose to take steps to implement a policy.
- You should aim to implement a policy before the government mandate is expected to end (**12 July 2022**).
- Can consider special paid leave arrangements.

Implementing a vaccination requirement:

- An employer can impose new obligations on employees during the employment relationship if the requirement is 'lawful and reasonable'
- Vaccinations do not need to be in the original employment contract.



Methods for mandating vaccinations

Method 1: Government Mandate (may expire)

Government Public Health Order (Pandemic Order) which makes it a legal requirement to be vaccinated to enter the premises for the duration of the Order.

Creates a legal requirement for the employee to comply as part of the inherent requirement of the role.

Method 2: Employer implements a mandatory vaccination policy (consultation with staff required).

This makes it a lawful and reasonable employer direction.

This means:

1. A mandatory vaccination policy once consulted and agreed by staff will cover all existing employees.
2. Prospective employees will sign contracts of employment with a mandating clause (as a condition of accepting employment).



What are your options?

Option A: Take no action

- Vic Government Public Health Order (Pandemic Order) expires.

Option B:

Implement a mandatory vaccination policy (after consultation with staff and their representatives).

- The employer is then responsible as it a lawful and reasonable direction for the duration the policy is in effect.
- ELAA has a template policy available for members.

Option C:

Implement a voluntary policy (requires consultation).

- This is an employer policy that strongly recommends but does not mandate COVID-19 vaccinations in the workplace.
- This means that unvaccinated staff will be permitted to return to work.

There is no right or wrong way. It is entirely the decision to make a proposal to staff by your Committee/management team. ELAA will not advise you of the decision to take.

When making your proposal, it is important to consider what is best for the needs of your staff, children and families.

What this means for you

Option A: Government mandate ends and no action is taken

Unvaccinated employees who have been stood down or on LWOP must be allowed to return to their **substantive (old) roles** and **contracted hours** with immediate effect. **Consultation may be required.**

Unvaccinated employees who are on **personal/carer's leave** will remain on the duration of their leave as determined by medical advice (medical certificates). **A medical clearance to return to work (fit to work) may be required.**

Employees who are on long service leave (LSL) or annual leave will remain on the specified/agreed period of leave.

There is no requirement to rehire an employee who has been lawfully terminated (dismissed) during the government mandate.

Update and review relevant policies (i.e. Infectious Diseases Policy/Illness Policy).

Option B: Implement a mandatory vaccination policy

What is a mandatory vaccination policy?

- A lawful and reasonable direction for your employees to be vaccinated against COVID-19.
- **Can apply to:**
 - employees directly employed by the employer;
 - **(Optional)** agency staff, visitors, CoM, volunteers and contractors.
- ELAA's policy template has been developed to mirror the current **Pandemic (Workplace) Orders** in effect by the Victorian Government.



Special paid leave may need to be considered for unvaccinated employees if there is a gap between the government mandate and the enactment of your policy.

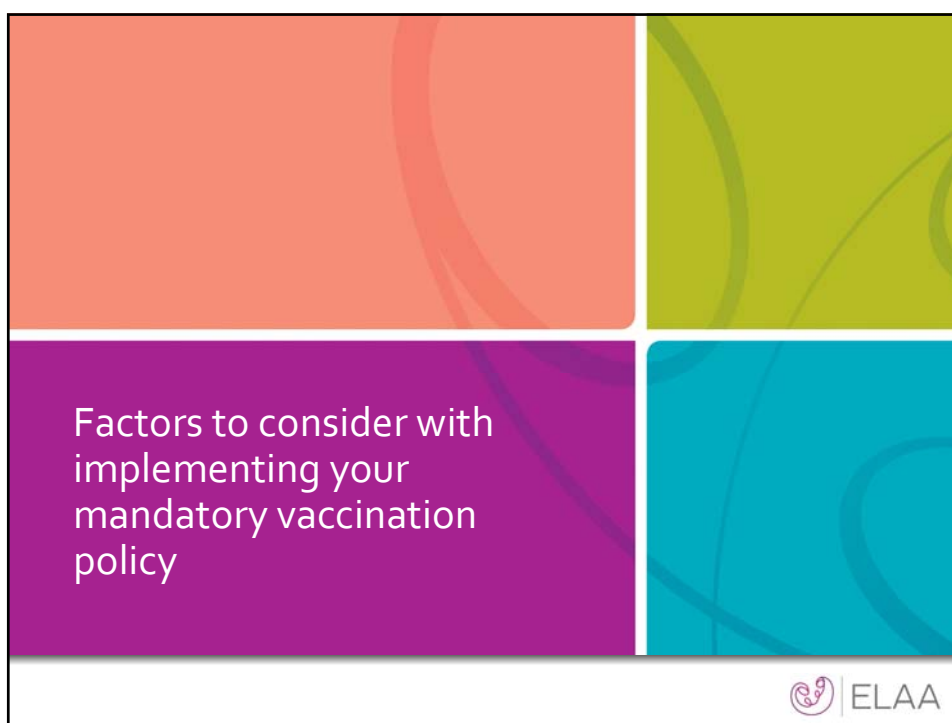


Option C: Introduce a voluntary policy



- May be used by ECEC services who do not wish to mandate vaccines by want to strongly recommend it.
- As a voluntary policy, it can be used to demonstrate the employer's position.
- Does not constitute a lawful and reasonable direction.
- Staff cannot be prevented from attending the workplace unvaccinated and must be permitted to return to work
- Should be a standalone policy.
- Consider implications on other existing policies (i.e., Infectious Diseases or Illnesses Policy).
- Consider if this is an effective option.





When can an employer require an employee to be vaccinated?

Employers/Committees can only require their teachers and educators to be vaccinated where:

1. a specific law (such as a state or territory public health order) requires it
2. it is permitted by an enterprise agreement, other registered agreement or employment contract, or
3. The employer implements a COVID-19 vaccination policy - is providing existing employees with a **lawful and reasonable direction to be vaccinated.**



What is a lawful and reasonable direction

An employer may still be able to give their employee a lawful and reasonable direction to get vaccinated in the form of a policy.

A direction is lawful if it complies with:

- Any employment contract, award or agreement terms.
- Commonwealth, state or territory law that applies (for example, an anti-discrimination law).

For a direction to be reasonable:

- Depends on the facts of the individual situation and needs to be assessed on a case-by-case employee basis.
- There is a range of factors that may be relevant when determining whether a direction for an employee to be vaccinated against COVID-19 is reasonable.



Factors to determine reasonableness:

- the nature of each workplace (are there vulnerable persons?)
- the tier of work the employee performs (**see Tier system**)
- the extent of community transmission of COVID-19 in the location
- the effectiveness of vaccines in reducing serious illness
- the availability and effectiveness of other control measures in the workplace (for example, physical distancing, limitations on visitors, ventilation, mask-wearing and testing)
- each employee's circumstances, including their duties and the risks associated with their work
- whether employees have a legitimate reason for not being vaccinated (for example, a medical reason)
- the availability of vaccines.



Tiers of work – Fair Work Ombudsman advice

Tier 1 work – likely to be reasonable

- Required as part of their duties to interact with people with an increased risk of being infected with COVID-19 (for example, employees working in quarantine or border control).

Tier 2 work – likely to be reasonable

- Required to have close contact with people who are particularly vulnerable to the health impacts of COVID-19 (for example, employees working in health care, early childhood or aged care).

Tier 3 work – depends on the levels of community transmission

- Likely interaction between employees and other people such as customers, other employees or the public in the normal course of employment (e.g., retail).

Tier 4 work – unlikely to be reasonable (not recommended)

- Minimal face-to-face interaction as part of their normal employment duties (for example, where they are working from home) (e.g., office workers).



Your consultation obligations

Consultation requirements

- Mandatory vaccination affects worker health and safety.
- This invokes consultation obligations under the Victorian *Occupational Health and Safety Act 2004* (**OH&S Act**).
- Consultation obligations may also apply under relevant enterprise agreements (EBA) and awards.

An employer must so far as is reasonably practicable consult with their employees who are likely to be affected by the proposed change.

Consultation involves:

- sharing information with employees about the matter
- giving employees a reasonable opportunity to express views
- taking those views into account.

This must be done at a stage where the employees can still influence the outcome.



Step 1: Meet with your Committee/management team to decide your approach

During this meeting, we recommend you:

- Plan the best method to consult with all staff
- Review the **ELAA Mandatory Vaccination Policy** and amend it as needed.
- **Do not make a final decision at this stage or vote on the policy.**
- You ideally need a policy in place before the Government mandate may expire on 12 July 2022.

Factors to consider:

- Are you going to require two doses or booster vaccinations?
- How will you manage exemptions?
- Will the policy apply to parent volunteers, relief staff and contractors as well as employees?
- What about prospective employees? Will you change your contract templates to include a mandatory vaccination clause? (ELAA can assist).

Example planning (guide only)

Suggested timeframes	Action	Who is responsible
Week of 6 th of June	Committee/Management team meets to discuss proposed plan	Executive CoM/ Management team
Week of 6 th of June/ Week of 13 th of June	Develop risk assessment	Executive CoM and/or key staff members. (e.g. Director/Nominated Supervisor/HR, OH&S Representatives).
Week of 13 th of June	All staff consultation meeting is held.	President Staffing/HR team to send an email outlining the proposal.
Week of 20 th of June	Hold follow up individual meetings Zoom meetings with absent staff, (if required)	CoM
Week of 11 th of July (on or after 12 th)	CoM to vote on policy Leadership team to confirm policy.	Executive CoM/ Management team

Step 2: Review your COVID-19 risk assessment to include mandatory vaccinations

A risk assessment will assist to:

- identify which workers, children and families are at risk of exposure to the hazard (i.e., COVID-19)
- determine what sources and processes are causing the risk
- identify if and what kind of control measures should be implemented (i.e. mandatory vaccinations), and
- check the effectiveness of existing control measures.



You will need to review your risk assessment if something new becomes known or if there is a failure in your control measures (e.g. another COVID-19 outbreak at the service).

Step 3: Begin consultation with staff

Prior to the meeting:

- Outline in writing to staff your proposed change (email is sufficient).
- Attach a copy of your draft mandatory vaccination policy and the risk assessment.

During the consultation meeting you will:

- Explain the reason for your proposal.
- Provide an opportunity for staff to present their views (e.g. in the staff meeting or in individually in follow up meetings)
- Consult with staff about the risk assessment and risk factors.
- Explain alternative control measures available and their effectiveness (hierarchy of controls).
- Explain how you intend to manage exemptions and protect staff privacy.

If you have a high number of objections, consider if your alternative control measures will be sufficient to meet your OH&S obligations.



Holding follow up individual meetings (as needed)

Individual consultation meetings via Zoom/Teams can be used for the following purposes:

- Consult with staff members who were unable to attend your staff meeting.
- Consult with staff members who are absent on leave (including parental leave).
- Consult with unvaccinated workers who are on leave without pay.

During these meetings, it is essential to:

- Provide a copy of your draft mandatory vaccination policy and risk assessment.
- Allow staff to provide their views.
- Meet with any Health and Safety Representatives and union representatives (if requested).
- It must be a confidential meeting to discuss concerns raised (with the opportunity to bring a support person/representative).



Step 4: Take staff feedback into account

Before your Committee/management team meets again, it is essential that staff feedback is taken into account **before** you implement your decision.

This may involve:

- Documenting any concerns raised in your consultation process.
- Re-reviewing your risk assessment. Does it support a mandatory vaccination policy?

Consider:

- Do you need to offer special paid leave to unvaccinated employees during any consultation period?
- Have you fully consulted with all staff? A policy may be reasonable but may be challenged on grounds the consultation was insufficient.

See: *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* (C2021/7023) ([link](#)) (the BHP case).



Step 5: Make your decision and implement the policy

This will involve:

- Conduct a final review of your tailored mandatory vaccination policy.
- Committee of Management voting on the policy in accordance with your service's processes.
- Endorse the policy in your leadership team/board.
- Determine review intervals as required (recommend 3-6 months).
- Determine when your policy will take effect.
- Confirm when and how you will notify parents, families and staff.





Developing your risk assessment

Presented by Zora Marko
OH&S and Road Safety Education Manager



Safe working environment

Under the Victorian OHS Act employers must:

- Where a risk is identified, employers must eliminate the risk, so far as is reasonably practicable.
- When elimination is not possible, reduce the risk so far as reasonably practicable through control measures.
- Consider the impact on children (your obligations to all persons attending your premises).

Sample risk assessments:

- **ACECQA Risk Assessment and Management Tool.** [Risk-Assessment-and-Management-Tool-RAM.pdf](https://www.childaustralia.org.au/Risk-Assessment-and-Management-Tool-RAM.pdf) ([childaustralia.org.au](https://www.childaustralia.org.au))
- **Safe Work Australia.** [Template and example COVID-19 risk register](https://www.swa.gov.au) | [Safe Work Australia \(swa.gov.au\)](https://www.swa.gov.au)



Is it reasonably practicable?

To determine whether to eliminate or minimise a risk is 'reasonably practicable' in the circumstances.

You must consider:

- the likelihood and degree of harm of the hazard or risk,
- the reduction in the likelihood and/or degree of harm that will result if the control measure is adopted, and
- the available ways of eliminating or minimising the risk.

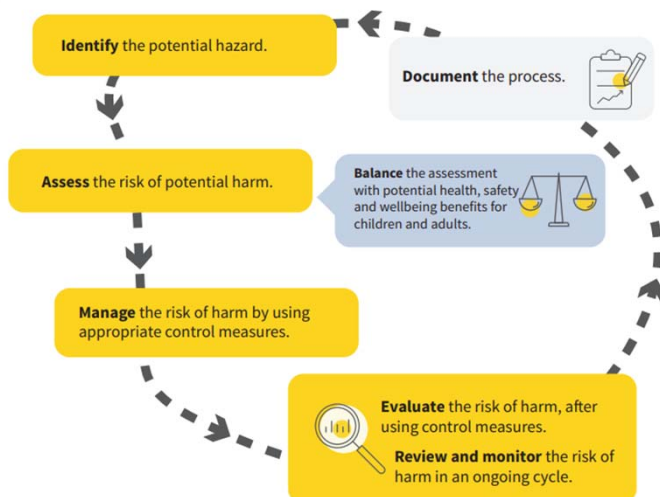
The more likely the hazard or risk, or the greater the harm that may result from it, the less weight should be given to the costs of eliminating the hazard or risk.



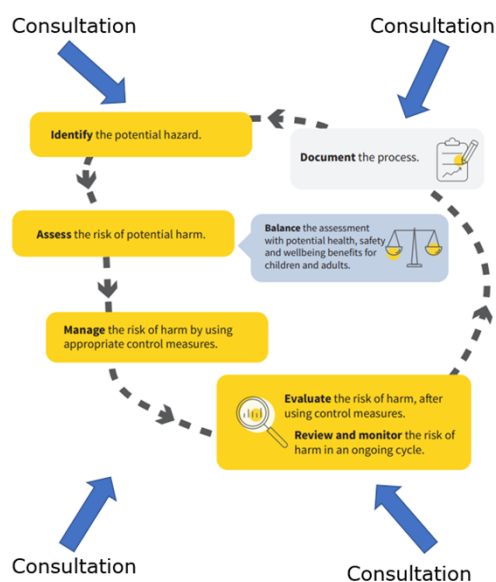
ACECQA Risk Management Tool



Risk Assessment and Management Cycle



Role of consultation in a risk assessment



Hierarchy of Control

These are the actions you can put in place to manage and reduce the risk.

Hierarchy of control		Explanations/examples of control measures
Level 1	Elimination	<ul style="list-style-type: none"> Remove the hazard, e.g. broken toy or damaged equipment. Change the practice, e.g. deliver goods directly to the kitchen to eliminate manual handling.
	Substitution	<ul style="list-style-type: none"> Replace heavy items with those that are lighter, smaller and/or easier to handle. Replace damaged equipment with new equipment.
Level 2	Isolation	<ul style="list-style-type: none"> Isolate unwell children from the whole group. Barricade off a wet floor until dry to avoid slip hazard.
	Engineering	<ul style="list-style-type: none"> Use ergonomic cots with a higher base height to reduce manual handling and back injuries for educators. Provide adult sized chairs for educators.
Level 3	Administrative	<ul style="list-style-type: none"> Rotate educators between different tasks to avoid repetitive strain. Arrange workflows to avoid peak physical and mental demands towards the end of a shift.
	Personal protective equipment	<ul style="list-style-type: none"> Use gloves for all hygiene issues. Wear closed-in shoes to avoid injury, and wear hats and sunscreen outside.



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Using a Risk Matrix in your Risk Assessment

Risk Matrix						
Consequences	Likelihood					
		Rare	Unlikely	Possible	Likely	Almost Certain
	Major	Moderate	High	High	Critical	Critical
	Significant	Moderate	Moderate	High	High	Critical
	Moderate	Low	Moderate	Moderate	High	High
	Minor	Very low	Low	Moderate	Moderate	Moderate
	Insignificant	Very low	Very low	Low	Moderate	Moderate

Sample risk assessment (simplified)

Service setting (affected persons)	Activities	Tier Level	Hazard (COVID-19) Risk Rating	What controls the risk?
Teachers and educators	Working in direct contact with children/families.	Tier 2	High	Mask wearing, RATs, hygiene, social distancing.
Administration staff on premises.	Working in the office, sometimes in contact with children.	Tier 3	High	As above
Head office staff (e.g. IT, People and Culture etc.)	No or minimal contact with children.	Tier 4	Moderate	As above
Children/families	Attending the premises	Tier 2	High – vulnerable children attending.	As above

Final considerations

Exceptions to a vaccination requirement

A policy is more likely to be considered reasonable if it has a transparent exception application process.



Exceptions to your policy should be consistently interpreted and applied equally.

- How do you intend to manage medical exemptions? Will you accept medical certificates (recommended)?
Protection on account of a temporary illness/injury.
- Staff who don't want to be vaccinated on religious grounds? **Consider anti-discrimination legislation.**
- Staff who are pregnant/ breastfeeding or have pregnancy intentions? **A protected attribute.**
- Employees who have anti-vaccination political views?
Not a protected attribute.
- Can the employee reasonably work from home instead?
(important for administrative staff).



Working from home

- Consider whether based on the staff member's current duties/job description they can reasonably continue to work from home.
- Requires an individual assessment of circumstances and the work location listed in their contract.
- Employer can direct employees to return to the workplace (*consider if they can reasonably perform their duties from home, and have been to date*).



Key cases (Fair Work Commission):

- [Karen O'Toole v Australian Community Support Organisation Ltd \(2022\) FWC 477](#). *Ability to continue working from home.*
- [Ursula Bernadette Gee v Eastern Health \(2022\) FWC 932](#). *The employee requested to work from home indefinitely.*



Managing non-compliance

- Employers may commence disciplinary action where a staff member fails to comply with a lawful and reasonable direction – **contact ELAA**.
- Further opportunities to provide acceptable certification for a medical/other exemption should first be provided.
- **Legal risks to consider:**
 - Unfair dismissal claims
 - General protections (adverse action claims)
 - Discrimination claim
 - Breach of contract

Key cases (Fair Work Commission):

- [Barber v Goodstart Early Learning \(2021\) FWC 2156](#). *The employer's vaccination requirement was a lawful and reasonable direction (without a government mandate).*
- [Maria Corazon Glover v Ozcare \(2021\) FWC 2989](#). *Failure to follow a lawful and reasonable direction (immunisation policy) was a valid reason for dismissal.*



Staff refusing to work with unvaccinated co-workers?

- Unlikely that an employee can refuse to attend their workplace because a co-worker isn't vaccinated against COVID-19.
- The reasons for this include that the co-worker may have a legitimate reason not to be vaccinated (a medical reason) or not all workplaces require mandatory vaccinations.
- Consider if a vulnerable person is a member of staff or a child attending the service as this will influence your risk assessment.

What can an employer/Committee do if an employee refuses to attend?

- Can direct them to attend the workplace if the direction is lawful and reasonable.
- Detail the steps they've taken to ensure a safe workplace (e.g., COVID-19 safe plan, risk assessment, other control measures).



What about new employees?

- You can impose a vaccination requirement on prospective employees as a condition of employment (in an employment contract).
- Committees/employers should consider their obligations and responsibilities carefully, for example, under anti-discrimination laws.
- Important to provide a clear process for submitting exemptions.

During the recruitment process:

- inform the prospective employee the organisation/service has a mandatory vaccination requirement (including in your job advertisement).
- provide a copy of the policy
- do not ask for particulars about the employee's circumstances or reason for exemption.

Updated contract templates are available for download in the ECMM v.3 – updated in 2022.



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How to download your mandatory vaccination policy

ELAA has a free policy now available for download for members.

For existing PolicyWorks subscribers, the policy can be accessed in your MyMembership Portal.

For ELAA members who do not have a PolicyWorks subscription, please email us at membersolutions@elaa.org.au.



MANDATORY COVID-19 VACCINATION

QUALITY AREA NO 2 AND 7. | ELAA VERSION 1.0

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Next steps

If you are choosing option A:

Unvaccinated employees who:

- have been stood down or on LWOP must be allowed to return to their substantive (old) roles and contracted hours with immediate effect.
Contact ELAA for further advice as it may involve consultation/redundancy.
- are on personal/carer's leave will remain on the duration of their leave as determined by medical advice (medical certificate).
- on long service leave (LSL) or annual leave will remain on the specified/agreed period of leave.
- have been lawfully terminated (dismissed) during the government mandate and are **not required** to be rehired.



If you have chosen option B (or C):

1. **Download copy of the ELAA Mandatory Vaccination Policy from PolicyWorks.** Tailor it to meet your service/organisation's requirements.
2. **Hold your Committee/management meeting to plan and review your options** (as per slide 7).
3. **Undertake the OH&S risk assessment.**
4. **Commence your consultation with staff and their representatives** before the end of term 2 (or as soon as practicable).
5. **Endorse your new mandatory or voluntary vaccination policy** (on or after 12 July 2022).
6. **Use the updated ELAA contract templates.** Available in the ELAA Early Childhood Management Manual (ECMM) 2019 v.3.



Questions:

Please write any questions using the Q&A function at the bottom of your screen.

Useful links:

- Fair Work Ombudsman. COVID-19 vaccinations: workplace rights and obligations. <https://coronavirus.fairwork.gov.au/>
- ACECQA. Risk Assessment and Management Tool. [Risk-Assessment-and-Management-Tool-RAM.pdf \(childaustralia.org.au\)](#)
- Safe Work Australia. Information for early childhood risk assessments. <https://covid19.swa.gov.au/covid-19-information-workplaces/>
- WorkSafe. Position on 'reasonably practicable'. <https://content.api.worksafe.vic.gov.au/sites/default/files/2018-06/ISBN-Reasonably-practicable-how-WorkSafe-applies-the-law-2007-11.pdf>
- Fair Work Commission. Vaccination related matters (case law). <https://www.fwc.gov.au/benchbook/vaccination-related-matters>



Thank you for attending

We are here to support you.

- Email us: membersolutions@elaa.org.au
- Call us on 03 9489 3500 (press 2) 10 am – 3 pm, Monday to Friday.



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ELAA full and subscriber members can contact us for advice on:

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- Human resource management
- Occupational health and safety
- Road Safety Education
- Policy and advice
- Professional Development and much more.

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