

Important changes to the construction industry in response to COVID-19

Under the Public Health and Wellbeing Act 2008, the Chief Health Officer (**CHO**) has issued a COVID-19 Mandatory Vaccination Directions (No 3) for residential aged care and construction industry sectors to prevent the spread of COVID-19 (**Directions**). This paper focuses on construction industry sectors only however, similar Directions apply for residential aged care sectors. A failure to comply with the Directions without reasonable excuse is an offence.

What construction industry sectors need to know	Commentary
<p>What is a construction site?</p>	<ul style="list-style-type: none"> • Construction site is a work premises at which civil works, building or construction activities take place and nearby work premises in which work relating to the operation of construction site is undertaken.¹ • Work premises is defined as premises in which work is undertaken, including any vehicle whilst being used for work purposes. • Construction activities are not defined. However, regulation 321 of the <i>Occupational Health and Safety Regulations 2017 (OHS Regulations)</i> provides 'constructions work' to mean: <ul style="list-style-type: none"> ○ any work performed in connection with construction, alteration, conversation, fitting out, commissioning, renovation, refurbishment, decommissioning, or demolition of any building or structure or similar activity; ○ installation, testing, maintenance, and repair work performed in connection with the construction work; ○ the removal from the workplace of any product or waste resulting from the demolition; and ○ the prefabrication or testing elements. • The definition of construction work under the OHS Regulations may extend to the definition of construction activities for the purposes of the Directions.
<p>Who is an operator of a construction site?</p>	<ul style="list-style-type: none"> • An 'operator' means the principal contractor for the construction site.² • The term 'Principal contractor' has the same meaning under Regulation 333 of the OHS Regulations. That is, the owner of the construction project (unless the owner appoints a principal contractor). • Construction project is defined under the OHS Regulations as a project involving construction work and includes preparation and planning of the proposed construction work.

¹ COVID-19 Mandatory Vaccination Directions (No 2), [COVID-19 Mandatory Vaccination Directions \(No 2\) .DOCX \(dhhs.vic.gov.au\)](#)

² Ibid at clause 9

Who are workers?	<ul style="list-style-type: none"> In relation to a construction site, those that are construction site workers. Construction site workers include volunteers and persons who perform work at a construction site, whether or not employed or engaged as a contractor by the operator of the construction site or a third party.³
Are contractors and suppliers also required to comply with the Directions?	<ul style="list-style-type: none"> The broad definition given to workers capture contractors and suppliers who may be required to enter the construction site. In this scenario contractors and suppliers must also comply with the Directions otherwise an operator of the construction site may refuse for contractors or suppliers to enter or to remain at the construction site.
Construction site must have COVID Marshalls	<ul style="list-style-type: none"> On or after 18 September 2021, a construction site must have COVID-Marshalls to monitor compliance with COVID-19 requirements including the construction site's COVIDSafe Plan. In order to be a COVID Marshall, they must complete basic infection control training. Online training is available at the Department of Health COVID-19 Infection Control Training. When appointing a COVID Marshall, an employer must consult with its health and safety representatives.
What must an operator of a construction site do on and from 24 September 2021?	<ul style="list-style-type: none"> An operator of a construction site must inform workers who perform or intended to perform work, at the operator's construction site, that the operator will be requesting from the workers information and evidence that, the workers have⁴: <ul style="list-style-type: none"> received a full COVID-19 vaccination; received a partial COVID-19 vaccination; not received any doses of a COVID-19 vaccine and have made a booking to receive a dose of COVID-19 vaccine by 2 October 2021; or evidence that they have a medical condition that exempt them from receiving a COVID-19 vaccination.
An operator of a construction site must collect and store information and sight evidence	<ul style="list-style-type: none"> An operator of a construction site must collect and store information and sight evidence from workers who perform or intend to perform work at a construction site, whether they have⁵: <ul style="list-style-type: none"> received a full COVID-19 vaccination; received a partial COVID-19 vaccination;

³ Ibid

⁴ Ibid at clause 5(3)

⁵ Ibid at clause 5(4)

	<ul style="list-style-type: none"> ○ not received any doses of a COVID-19 vaccine and have made a booking to receive a dose of COVID-19 vaccine by 2 October 2021; or ○ a medical condition that exempt them from receiving a COVID-19 vaccination. <ul style="list-style-type: none"> • While a worker may refuse to or decline to produce evidence, in this situation, the worker will be deemed to be unvaccinated. Therefore, the worker cannot enter or remain in the construction site.
An operator of a construction site must take all reasonable steps on or after 24 September 2021	<ul style="list-style-type: none"> • An operator of a construction site must take all reasonable steps to ensure that workers do not enter or remain on premises if the workers have not⁶: <ul style="list-style-type: none"> ○ received or made a booking to receive a dose of COVID-19 vaccine by 2 October 2021; or ○ provided evidence that they have received a full or partial COVID-19 vaccination, made a booking by 2 October 2021 to receive a dose of COVID-19 vaccine, or they are exempt from receiving a COVID-19 vaccine due to a medical condition.
Circumstances when an operator of a construction site is <u>exempt</u> from complying with the Directions	<ul style="list-style-type: none"> • There are only limited circumstances where an operator of a construction site is not required to comply with the Directions, as follows⁷: <ul style="list-style-type: none"> ○ a worker who is required to attend the premises to respond to an emergency at the work premises; or ○ a worker who is required to perform urgent and essential work at the work premises to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.
What happens if a worker refuses to comply with the Directions?	<ul style="list-style-type: none"> • The Fair Work Ombudsman (FWO) has released a guidance material on <i>COVID-19 vaccinations: workplace rights and obligations</i>. Ultimately, how an employer may deal with this situation will be assessed on a case by case basis. • Under the Directions, employers can lawfully direct its workers to be vaccinated unless they are exempt due to medical grounds. In circumstances where a worker fails to comply with the Directions without reasonable excuse, an employer may consider disciplinary action. Whether disciplinary action is appropriate will need to be judged on the circumstances of each worker.

For more information, please contact:

Luisa Gonzaga | Partner
E: luisa.gonzaga@madgwicks.com.au
T: +61 3 9242 4709

⁶ Ibid at clause 6

⁷ Ibid at clause 8