

Alert

EMPLOYMENT LAW

Eliminating COVID-19 Risk From Australian Workplaces

We can now prevent people from developing COVID-19, but when is it lawful and reasonable for employers to direct employees to undergo vaccination against COVID-19?

By Patrick Walsh

In May last year, I published an article entitled "[Work Health and Safety During a Pandemic: The Issue of Vaccination for Businesses](#)". In that article, I outlined the duty of care that employers or a person conducting a business or undertaking owed to the wider community and, in particular, their employees.

I also outlined the importance of all businesses complying with the relevant sections of the *Work Health and Safety Act 2011* (Cth) ("**the WHS Act**"), which, although previously untested in Australia against a pandemic, has since emerged as a significant issue for Australian businesses.

Some of the practices that various organisations have adopted over the last year, which have now become the "new normal", include:

- accommodating work from home arrangements;
- reducing the number of staff in premises to adhere to social distancing guidelines;

- ensuring important staff/teams do not interact to prevent cross-contamination in the event a worker is infected; and
- providing PPE sanitiser for the use of workers and other people.

Until this week, workplaces in Australia were still reliant on administrative controls and personal protective equipment to manage the risk of workers and other persons developing COVID-19. An obvious limitation of this was that the success of these measures was dependent upon the people present at all businesses abiding by the policies introduced by their respective employers and governments.

It's well advertised, however, that there is light at the end of the tunnel. The Australian Government has entered into 5 agreements with vaccine manufacturers and has invested a reported \$3.3 billion to ensure

that Australia is well-positioned to access safe and effective vaccines.

The rollout commenced yesterday with doses of the recently approved Pfizer-BioNTech vaccine being provided to those dealing with Australians returning from overseas, such as quarantine and border workers and frontline health care workers. Following this, the Government plans to make the vaccine available to people aged 70 and over, Aboriginal and Torres Strait Islander people over 55 and younger adults with underlying medical conditions.

Following this rollout, there is speculation that it could then be several months before the remaining majority of the population can get vaccinated as, amongst other things, the 53.8 million doses of the Oxford-AstraZeneca vaccine also purchased by the Australian Government still require approval from the Therapeutic Goods Administration.

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Safe Work Australia and Fair Work Ombudsman

Safe Work Australia (“**SWA**”)¹ has published guidelines regarding the current vaccine rollout. The guidelines reinforce that employers, under the WHS Act, do have a duty to eliminate or, if not possible, minimise, so far as reasonably practicable, the risk of exposure to the SARS-CoV-2 virus (which causes COVID-19) in the workplace. This will require organisations to at least consider whether any direction ought to be made for workers to be vaccinated when they are able to do so. Of note, SWA has also advised that:

- at this stage, it is too early to tell if the COVID-19 vaccines will stop a vaccinated person from being infected with the virus;
- it is unlikely that a requirement for workers to be vaccinated will be reasonably practicable; and
- employers may not be able to completely eliminate the risk of workers being exposed to COVID-19 while carrying out work.

Usefully SWA has also addressed the issue in relation to employer liability under the WHS Act in circumstances where an employer elects not to make a direction for its workers to undergo vaccination and a worker contracts the virus. SWA has stated that, as there is currently insufficient evidence regarding the efficacy of the vaccines currently being rolled out, an employer

¹ <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/vaccination>

is unlikely to be held liable for a worker contracting COVID-19.

The Fair Work Ombudsman (“**FWO**”) has also provided guidance for employers² stating that the “*overwhelming majority of employers should assume that they won’t be able to require their employees to be vaccinated against coronavirus*”. Importantly, the FWO has taken the position that the fact of the pandemic itself is not sufficient to make a direction for employees to be vaccinated reasonable. However, the FWO did list the following circumstances in which it considers that a direction for employees to be vaccinated may be lawful and reasonable:

- Where a specific law (such as a state or territory public health law) requires an employee to be vaccinated;
- Where an enterprise agreement, other registered agreement or employment contract includes a provision about requiring vaccinations; or
- If no law, agreement or employment contract applies that requires vaccination, whether it would be lawful and reasonable for an employer to give their employees a direction to be vaccinated (which is assessed on a case by case basis).

While SWA and the FWO’s current guidance suggests it is unlikely that employers will be penalised should they expose their workers to the risk of

² <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/health-and-safety-in-the-workplace-during-coronavirus/covid-19-vaccinations-and-the-workplace#can-an-employer-require-an-employee-to-be-vaccinated>

contracting COVID-19 in the workplace, employers shouldn’t get complacent. As more information becomes available about the vaccines, best practice will require organisations to review their policies and directions to ensure that are working effectively.

Reasonable and lawful directions

It has long been accepted that employers can make directions - after undertaking an appropriate assessment - for employees to have certain vaccinations against common illnesses when working in high-risk environments or workplaces where extensive and regular interactions occur at close proximities. Workplaces such as hospitals and aged care facilities are great examples of this. Due to the high transmissibility of SARS-CoV-2 and its impact on all industries - even those where workers are not having extensive or regular interactions at close proximities - it would be considered good governance for all employers to implement a similar assessment process so that an informed decision can be made. This assessment will necessarily need to consider which variants of SARS-CoV-2 are prevalent in the community as we know that some variants are much more transmissible than others.

If employers do wish to make a direction requiring their employees to undergo vaccination, they are advised to apply the “*lawful and reasonable*” standard prior to any direction being made. Employers will, therefore, need to ask themselves whether the vaccination is necessary to

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eliminate or minimise the risk of workers contracting COVID-19 to the extent that is reasonably practicable and consistent with the employer's existing legal obligations.

A variety of factors may impact the lawfulness and reasonableness of a particular direction, all of which should be assessed individually on a case-by-case basis, including:

- the nature of work being performed by the employee(s);
- the nature of the clients and other relevant persons who frequent the workplace;
- whether employees can work remotely;
- the advice and requirements of the Government and medical bodies at the time;
- the availability of the vaccine(s);
- how advanced and successful vaccination attempts have been to date;
- the personal circumstances of individual employees; and
- any other related circumstances.

Employers considering issuing such a direction in the coming months should reasonably expect some employee resistance if the direction to be vaccinated against COVID-19 is implemented. Reasons for objection may include but are not limited to the following:

- whether the direction constitutes discrimination for the purposes of Australia's anti-discrimination regime;

- political views;
- religious beliefs; and
- objections based on a medical or health reason raised under the advice of a medical practitioner.

In *Glover v Ozcare* [2021] FWC 231, the Fair Work Commission ("Commission") was required to consider whether an employee who had been placed on indefinite unpaid leave because of her refusal to be vaccinated against the flu had been terminated from her employment. In this case, the employee had a genuinely held belief that she had had a severe allergic reaction to a flu vaccination when she was a child.

Commissioner Hunt found that Ozcare had terminated Ms Glover's employment as it had refused to roster the worker, despite her being ready, willing, and able to perform her duties. The employer had refused to do so as it considered being vaccinated against the flu (in the context of the COVID-19 pandemic) to be an inherent requirement of the role. It also declined to provide any certainty about the worker's future employment to the Commission.

In his reasons, Commissioner Hunt noted:

[125] I consider it suitable to note that there is much discussion around the legality of employers requiring employees to be vaccinated against influenza in light of the adverse reaction a vulnerable person might have if they have

influenza and then contract COVID-19. It is, of course, a very concerning proposition, and medical evidence to-date suggests that such a combination is highly likely to increase the potential fatality of the individual.

[126] In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.

[127] It is not inconceivable that come November 2021, employers of men engaged to play the role of Santa Clause in shopping centres, having photos taken around young children, may be required by their employer to be vaccinated at least against influenza, and if a vaccination for COVID-19 is available, that too. The employer in those scenarios, where they are not mandated to provide social distancing, may decide at their election that vaccinations of their

employees are now an inherent requirement of the job. It may be that a court or tribunal is tasked with determining whether the employer's direction is lawful and reasonable, however in the court of public opinion, it may not be an unreasonable requirement. It may, in fact, be an expectation of a large proportion of the community.

Policies and procedures

As the first round of vaccinations begins, the time has come for businesses to start putting procedures in place for how they are to manage these previously unseen and unfamiliar circumstances adequately.

One option that is being considered by a number of employers is to include a requirement to be vaccinated against COVID-19 in their contracts of employment. While this approach may be something that can be considered with new employees, or employees transferring to a new role, it does not address the issue of current employees who may not be prepared to agree to amend the terms of their contracts.

Developing and introducing a business-wide vaccination policy may be a more cost-effective and flexible means to manage

this issue. Particularly as policies are easier to update as more information becomes available. When drafting a vaccination policy, it is important to consider:

- the workplace context:
 - those working in an office environment may wish to strongly recommend vaccination. However, consider other measures such as social distancing, working from home, or flexible work practices in case employees do not get vaccinated.
- whether being vaccinated is a part of the inherent requirement of an employees' role:
 - this should be done on a person by person basis, looking at the duties performed by each employee.
- the Government's directions or policies (if any) that concern your industry;
- including a process for those employees who medically cannot get vaccinated, which can be utilised to reduce the risk of an outbreak; and

- including an appeals process by which an employee's refusal can be considered.

If you require assistance in relation to anything discussed herein, please contact one of our workplace and employment law specialists.



[MORE INFO](#)

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