



Article

EMPLOYMENT LAW

Work Health and Safety During a Pandemic: The Issue of Vaccination for Businesses

What role, if any, do businesses have to play if a vaccine is created for SARS-CoV-2?

By Patrick Walsh

There has been a lot of discussion recently regarding the National Rugby League's ('NRL') stance on its players being vaccinated against the flu as a precondition to participating in the 2020 season.

While the discussion in Australia has thus far generally been limited to the NRL, it does offer some insight into the issues that will arise if a vaccine for SARS-CoV-2 is created and approved for use by the Therapeutic Goods Administration ('the TGA').

It is also worth noting that the Australian Defence Force ('ADF') already requires personnel in full-time service to undergo vaccination for several diseases. Failure to consent may lead to ADF personnel being deemed non-deployable and could result in a review of their fitness to continue serving in the ADF¹. This example could set a precedent for other employers if a vaccine is discovered for SARS-Cov-2.

Employees who (without a valid medical reason) refuse to undergo a

SARS-CoV-2 vaccination may find that there are restrictions imposed on the manner in which they perform work or, if the employer is not able to accommodate those restrictions, have their employment terminated on the basis that they have refused to comply with a direction to be vaccinated in order to be able to return to the workplace.

A vaccine for SARS-CoV-2 is not just a game-changer in respect of public health concerns, it will necessitate any entity that meets the definition of a *person conducting a business or undertaking* ('PCBU') under the harmonised Work Health and Safety legislation (which operates in all Australian jurisdictions other than Victoria and Western Australia) to reconsider its work health and safety policies, particularly whether the PCBU ought to require any employees to undergo vaccination before returning to the workplace.

For the purpose of this article, I will refer to the *Work Health and Safety Act 2011* (Cth) ('the WHS Act').

The SARS-Cov-2 virus

At this time, it appears generally accepted that:

- SARS-CoV-2 is a new virus, and at this time, the human population does not have any immunity to the virus.
- SARS-CoV-2 is the virus responsible for causing COVID-19 (which is the disease).
- The number of confirmed cases of COVID-19 demonstrates that SARS-CoV-2 is extremely infectious.
- Of particular importance to PCBU's, SARS-CoV-2 is capable of being transmitted before a person displays symptoms of COVID-19.
- Approximately 1 in 5 people who develop COVID-19 will require hospitalisation.
- COVID-19 can have severe consequences for a person's health up to, and including, death.

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¹ *Australian Defence Force Publications; Joint Services Document; Personnel Series; Immunisation procedures; 1.2.2.1.*

The fact that SARS-CoV-2 can be transmitted even if the infected person is not displaying any outward signs of disease, and that the disease it causes can have such severe health impacts is particularly relevant for PCBU's in formulating work health and safety policies.

Primary duty of care

Section 19 of the WHS Act requires a PCBU to ensure, so far as is reasonably practicable:

1. the health and safety of workers while they are at work; and
2. that the health and safety of other persons are not put at risk from work carried out as part of the conduct of the PCBU.

To date, some of the measures that have been undertaken by PCBU's in response to the pandemic include, but are not limited to:

- accommodating work from home arrangements;
- reducing the density of people in worksites;
- requiring workers and persons on site to abide by social distancing policies; and
- providing sanitiser for the use of workers and other people.

ISO 45001 (which is the international standard for occupational health and safety) recommends that organisations adopt the hierarchy of controls to reduce or control risks. The steps, in order of preference, are to:

1. eliminate the risk;
2. substitute the risk;

3. isolate the risk;
4. engineering controls;
5. administrative controls; and
6. personal protective equipment.

The first four steps control the risk, and the last two steps control the people.

Currently, PCBU's are reliant on administrative controls, and personal protective equipment to manage the risk of workers and other persons developing COVID-19 as a consequence of the work carried out by the PCBU. The issue with these controls is that they require people to abide by the PCBU's policies and use personal protective equipment appropriately. In addition to this, asymptomatic carriers of SARS-CoV-2 are not going to be aware of the risk they pose to other people and are less likely to adopt strict measures to prevent themselves from infecting other people.

The development of a vaccine for SARS-CoV-2 offers one of the only mechanisms by which PCBU's can eliminate the risk of workers or other people on their worksites from developing COVID-19 as a consequence of the PCBU's work. If all workers and other people involved in a PCBU's business (with the obvious exception of those who are unable to undergo vaccination for medical reasons) are vaccinated, then a PCBU can be satisfied that it has, to the greatest possible extent, eliminated the risk of transmission of SARS-CoV-2 within its organisation.

Duty of officers

Section 27 of the WHS Act requires the officers of a PCBU to

understand the nature and extent of the risk that SARS-CoV-2 infection poses to workers and other people affected by the PCBU's work.

Officers are also required to ensure that the PCBU has, and uses, the appropriate resources and policies to minimise the risk of SARS-CoV-2 infection. This will require any person who meets the definition of an officer under the WHS Act to consider whether it will be necessary to require workers to undergo vaccination for SARS-CoV-2 to participate in the PCBU's work.

In order to effectively respond to any worker who refuses to undergo vaccination, the policies that are developed will need to consider, amongst other things:

- the reason for the refusal (e.g. is the person unable to undergo vaccination because of advice from their doctor);
- whether the manner in which the worker performs their duties creates a risk of transmission of the virus (e.g. if the person is working from home and does not have any contact with the broader workforce, it may not be reasonable to require the person to undergo vaccination); and
- what, if any, opportunity has the person had to undergo vaccination (presumably it would take a significant period of time for a vaccine to be made widely available, PCBU's will need to consider how they manage the risk until a vaccine is available to their workers).

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Duty of workers

Importantly, section 28 of the WHS Act requires any worker to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other people. This is likely to be the most significant section in the context of people who elect not to undergo a SARS-CoV-2 vaccination for what I will call “non-medical” grounds.

In the debate around the NRL’s policy requiring players to have a flu vaccination, one of the arguments that has been raised frequently on behalf of those who have refused to have the flu vaccine is that a requirement that a person undergoes vaccination impinges on an individual’s right to make a choice about what medical procedures they undergo.

Where vaccination differs from other medical procedures, however, is that it confers not just a health benefit to the individual, but also to the wider population and, in particular, individuals in the community who are unable to undergo vaccination on medical grounds (i.e. the person is immunocompromised).

If the TGA approves a SARS-CoV-2 vaccine, it seems likely that a refusal to undergo vaccination for non-medical reasons by a person, whose work duties create an opportunity for transmission of SARS-CoV-2, would be a breach of section 28 of the WHS Act; if that person transmits SARS-CoV-2 to another person.

Section 28 of the WHS Act also requires a worker to comply with any reasonable instruction that is given by the PCBU to comply with the Act. Using the example of the NRL, it would be reasonable to expect that any player who refuses a direction from the NRL to undergo vaccination for SARS-CoV-2 would be in breach of section 28(c) of the WHS Act.

The duties of a worker under section 28 of the WHS Act are largely replicated for any other person in the workplace under section 29 of the WHS Act.

Duty to consult

Section 46 of the WHS creates an obligation for each person who has a duty under the WHS Act to consult, co-operate, and co-ordinate activities with all other persons who have a duty under the Act.

If a vaccine becomes available all PCBU’s will need to consider whether they need to maintain a record of which of its workers have undergone vaccination, and whether this information needs to be shared with other PCBU’s in respect of mutual business activities. An example of this might be a nursing agency that supplies on-hire labour to an aged care facility being required to certify that any nurses it supplies have undergone vaccination for SARS-CoV-2. PCBU’s will need to be mindful of the *Australian Privacy Principles*

in developing policies around how such information is collected and used.

Conclusion

The COVID19 pandemic is unprecedented in the manner and extent of the impact on Australian employers’ efforts to operate their businesses in a safe manner. Businesses have had to adapt extremely quickly in order to abide by Government regulations enforced to prevent the spread of SARS-CoV-2 within our community, and there is still a long way to go.

There may never be a vaccine for SARS-CoV-2, but I’m an optimist, and now is as good a time as any to start thinking about how a business might use a vaccine to assist them during the recovery phase to prevent further outbreaks threatening their business operations and their employees.



[MORE INFO](#)

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