



# Mandatory Vaccinations – what HVIA needs to know

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This information is only of a general nature and should not be applied to individual situations without seeking further specialised advice. It is focused on particular issues and is not intended to be an exhaustive representation of the different legal issues. We are not providing any accounting, taxation or financial advice. Should you require such advice, you should seek this from the appropriate professional.

The information is current to 22 October 2021.

# Outline

- Changing landscape – commentary not opinion
- Legal framework
- When is a mandatory vaccination policy appropriate?
- Preparing and implementing a policy
- Risks to consider

# Social and Political Landscape

To date the Federal position suggests:

- Businesses have the obligation to keep their workplaces safe and to eliminate or minimise, so far as reasonable practicable, the risk of exposure to COVID-19
- Vaccinations should be voluntary and free – but recognise that State or Territory governments may (and can) mandate vaccinations in the appropriate

To date State & Territory Positions suggest:

- The position differs between respective States and Territories
- States and Territories are issuing Public Health Orders which mandate COVID-19 vaccinations for certain classes of workers and workplaces – although Victoria is making mandatory vaccination a requirement for all authorised workers i.e. all workers who cannot work from home

## Social and Political Landscape (cont.)

Other stakeholders (e.g. Business Council or ACTU) – calls for greater certainty.

Call for governments and the National Cabinet to take steps to ensure the decision to “mandate vaccinations” is not be left to individual employers and should be made following public health advice and direction

This is greatly influenced by personal and political positions, public outcry and demands for safety by the community (e.g. a community wanting to know that the worker who attends them is vaccinated (which is generally identified with “safer”).

# Legal position – employer’s legal rights to require vaccination

- Employment contracts that have an express term requiring vaccination before the commencement of employment for new employees (but this must account for anti-discrimination requirements and general protections requirements)
- Issuing a lawful and reasonable direction (every employment contract contains an implied term for lawful and reasonable directions) to ongoing employees
- Contractual rights and giving a reasonable and lawful direction are circumscribed or overridden by statutory limitations or obligations
- Accordingly, an express term in a contract or giving a reasonable and lawful direction can still pose a legal risk to an employer if it breaches anti-discrimination obligations (both direct and indirect discrimination) or is unreasonable from a work health and safety position

# Legal position (cont.)

## Anti-discrimination

- Although vaccination is not an attribute for which it is unlawful to discriminate – impairment is an attribute for which discrimination is unlawful as is religious belief
- If a person cannot be vaccinated because of a medical reason or if a person holds a genuine religious belief that prevents vaccination, then a contractual term that mandates vaccination to commence employment or to remain in employment, will on its face, be a discriminatory term and breach the anti-discrimination obligations or the general protections provided in the Fair Work Act

# Legal position (cont.)

## Anti-discrimination & general protections

- The defences to an anti-discrimination claim and a general protections claim are:
  - reasonable and necessary in order to comply with another statutory obligation
  - reasonable and necessary for public health
  - reasonable and necessary to meet the inherent requirements of the role
- For a general protections claim it will also be a defence that the adverse action (dismissal) was for a reason other than vaccination
- In the event of a discrimination/general protections claim, the employer will have to satisfy the relevant Commission, Tribunal or Court that the requirement for mandatory vaccination was reasonable and necessary; was required in order to meet health requirements, work health and safety requirements, or other statutory obligation



# Legal position (cont.)

## Unfair dismissal

Unfair dismissal is also a risk if an employee was dismissed because they were not vaccinated, either for ideological reasons, or because they have genuine religious or health objections.

The test will be whether there was a valid reason for the dismissal (which raises questions of the reasonableness of the requirement for vaccination) and considerations of:

- alternative roles
- flexible work arrangements that avoids the need for vaccination
- other managers equivalent to vaccination being available

## Instructive cases to date

### 1. Glover v Ozcare [2021] FWC 231

An employee on indefinite unpaid leave because of a refusal to be vaccinated against the flu – dismissed from employment.

In this case:

- The employee had a genuinely held belief that when she was a child, she had a severe allergic reaction to a flu vaccination
- Queensland's Chief Medical Officer had issued a direction pursuant to the Public Health Act 2005, that persons (including workers) cannot enter a residential aged care facility or perform work at a residential aged care facility after 1 May 2020, if the person does not have an influenza vaccination
- The employer in accordance with the public health direction claimed it was its legal responsibility (to safeguard clients) and mandated influenza vaccination for its workers (claiming it is an inherent requirement of your role to be immunised annually against influenza)
- Ozcare's direction was held to be reasonable based on the health direction, the vulnerability of its clients and the risks associated with caring for them
- Importantly, Ms Glover did not satisfy herself (or the Commission) that she suffers from a condition (anaphylaxis) some 60 years since the claimed incident and she refused to obtain medical advice on the issue, she stated she had no interest in consulting an immunologist and she did not provide any expert medical evidence that she continues to suffer from the condition

The dismissal was not unfair.

## 2. Barber v Goodstart Early Learning

In this case:

- The employee objected to vaccination for influenza
- The employee had her doctor write to the employer stating that the employee had “*a sensitive immune system and had history of chronic auto immune disease/Coeliac treated in the past and is still struggling with symptoms. She reports reacting quite badly to Flu Vaccination*”
- The [vaccination] policy was held to be reasonable (given the childcare scenario) and the employee elected not to comply with the policy without giving any sustainable medical exemption
- Accordingly, the [Commission] was not satisfied that [the dismissal] was unfair and the application was dismissed

The dismissal was not unfair.

### 3. Kimber v Sapphire Coast Community Aged Care [2021] FWCFB 6015

In this case:

- A receptionist at an aged care facility who declined to have an influenza vaccination was dismissed
- The employee claimed she was unwilling to have an influenza vaccination because she had suffered a 10-month skin rash from an earlier vaccination (2016) and therefore, she was medically-contraindicated for the vaccine
- Ms Kimber provided a letter from (a non-medically trained) Chinese medicine practitioner but her employer rejected this as sufficient evidence of her contraindication
- Ms Kimber produced a letter from a GP, in which the GP wrote that Ms Kimber “told” the GP about the rash, attached some undated photographs of said rash, but did not otherwise provide a medical opinion of medical contra-indication supporting the exemption
- The context was that the NSW issued a Public Health (COVID-19 Aged Care Facilities) Order 2020 requiring employees of a residential aged care facility not enter the premises of the facility if they did not “have an up-to-date vaccination against influenza, if the vaccination is available to the person” and the order referred to anaphylaxis
- The rash did not meet the medical contraindication for the influenza vaccine that justified exemption in the public health order
- The Commission considered that the public interest weighs entirely against the grant of permission to appeal.
- *We do not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement*

The dismissal was not unfair.

# Legal position (cont.)

## Work Health and Safety

The obligation is to ensure work health and safety so far as is reasonably practicable.

The obligation imposes the requirement to identify hazards, assess the risks of those hazards and to ensure that control measures are put in place to eliminate the risks arising from the hazards or, if elimination is not possible, to minimise the risks arising from hazard so far as is reasonably practicable.

COVID-19 is a hazard and the obligation is to assess the risk of transmission and the risk that workers, visitors, customers or anyone who is otherwise affected by the conduct of the business may suffer an injury or illness as a result of COVID-19.

## Legal position (cont.)

Vaccination is not a silver bullet. Vaccination is one of the risk control measures.

The evidence to date is that vaccination does not prevent the transmission of COVID-19 or a vaccinated person becoming ill from COVID-19. Rather - it reduces the likelihood of transmission or shortens the infectious period in which transmission could take effect - and it reduces the severity of the disease reaction in a person

It means that vaccination is almost certainly to be used as one control measure amidst a variety of measures for example, mask wearing, physical distancing and hand sanitising and ensuring that people who are ill do not come to a workplace)

Other measures may include the new rapid antigen testing and also temperature checks



# Legal position (cont.)

## Work Health and Safety - Safe Work Australia guide for risk assessment

When determining whether a direction to vaccinate is 'reasonably practicable' (and therefore, lawful and reasonable), businesses must consider:

1. Is the Australian Health Protection Principal Committee recommending COVID-19 vaccinations in your industry?
2. What is the risk of workers being exposed to COVID-19 as part of their work?
3. Do workers work with people who may be vulnerable to severe disease OR death from COVID-19?
4. What is the risk or likelihood of COVID-19 spreading in your workplace – do some work tasks require workers to work in close proximity to each other or with customers?
5. Do workers interact with large numbers of other people in the course of their work – members of the public or does their work go to many members of the public such that it could contribute to a "super spreading" event if a worker contracted COVID-19?
6. What alternative control measures are available? Do these control measures eliminate or already minimise the risk of infection so far as is reasonably practicable?

# Fair Work Ombudsman's guide to assessing mandatory vaccination

Tier	Description	Reasonableness of direction
1	Employees required as part of their duties to interact with people with an increased risk of being infected with coronavirus (e.g., employees working in hotel quarantine or border control).	More likely to be reasonable.
2	Employees required to have close contact with people who are particularly vulnerable to the health impacts of coronavirus (e.g., employees working in health care or aged care).	More likely to be reasonable.
3	Where there is interaction or likely interaction between employees and other people such as customers, other employees or the public in the normal course of employment (e.g., stores providing essential goods and services).	Reasonableness dependent on whether there is community transmission of COVID-19 for some time in the area.
4	Employees have minimal face-to-face interaction as part of their normal employment duties (e.g., employees working from home).	Unlikely to be reasonable.



# Other legal consideration

## Privacy

The Privacy Act 1988 (Privacy Act) is the principal piece of Australian legislation protecting the handling of personal information about individuals.

This includes the collection, use, storage and disclosure of personal information in the federal public sector and in the private sector. Vaccination status is personal information and will be covered by the privacy obligations.

Collecting COVID-19 vaccination status will require consent from employees.

The OAIC is given guidance about the collection of vaccination status and this includes:

- limit the collection, use and disclosure of vaccination status
- collection and use of the information will be in very limited circumstances when it is reasonably necessary to prevent and manage COVID-19

Vaccination status should only be disclosed only on a needs to know basis.

## Other legal consideration (cont.)

If an employee does not consent to disclosing their vaccination status, an employer will have to be satisfied that collection is required on either a work health and safety basis or is reasonably necessary to manage and minimise a serious public health risk or safety risk.

Customers asking if the person who is attending – for example, a household asking if the plumber who is coming to fix their plumbing need has been vaccinated, will rarely meet the requirements for work health and safety or to minimise a serious public health or safety risk.

# Is mandatory vaccination good policy?

Employers must undertake a risk assessment and examine the factors behind why a mandatory vaccination policy (above other options) might be implemented.

Is it:

- customer fear-based, reputational?
- public health direction based?
- operational reasons – can't afford to have multiple employees of sick
- reasonably necessary to manage a work health and safety risk for the person, for workers, for others it in connection with the business
- for public health reasons

# Is mandatory vaccination good policy? (cont.)

Risk assessment should be conducted in accordance with the employer's usual safety management practices and take into consideration:

- the scientific and medical support
- the appropriateness and use of other 'controls' (such as rapid antigen testing, temperature checking and use of PPE)
- the Safe Work Australia questions
- the Fair Work Ombudsman's questions

The risk assessment will be a key evidentiary part of any defence to a discrimination or general protections or unfair dismissal claim. Without a risk assessment as proof or corroboration of the reasonableness of the policy, it will be very difficult to defend an employment claim

It may also be key to any negligence claim involving a worker who become sick from transmission at work in either a workers compensation claim or in any public liability or death claim.

## Is mandatory vaccination good policy? (cont.)

Be ready to identify your policy for customers all those who may be concerned about doing work with your employees.

For example, if a customer says they do not want to have a worker who is unvaccinated attend to them, be ready to explain all of the risk management measures that you have implemented to keep them safe.

# Policy implementation

1. Involve workers in the risk assessment process
2. Develop the policy in consultation with the workers
3. Give sufficient time for workers to comply with any mandatory vaccination requirements
4. Consider alternative roles, flexible work arrangements that may permit a person for whom vaccination is not an option to continue

# Conclusions

Employers have a number of bases for requiring vaccination of workers but these must also meet the requirements for anti-discrimination, general protections and unfair dismissal.

Generally, these will be met if the requirement for mandatory vaccination is reasonable.

Reasonableness includes:

- a public health direction
- a risk assessment - of the individual circumstances of the business
- work health and safety assessments
- a proper assessment of alternatives if a worker cannot be vaccinated (or will not be vaccinated)

It is recommended that employers consult with workers and include them in the decision-making process if possible.

# Questions?





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