

## Mandating vaccinations in the workplace

**Abstract:** Employers' rights to mandate vaccination for Covid-19 are limited and many factors must be considered.

### Background

The Covid-19 (or SARS Cov-2) pandemic has impacted Australia since March 2020. For 2021, vaccine development is now leading the Australian approach to address the health impacts of Covid-19, with at least three vaccines being made available.

The ability of an employer to mandate the vaccine for their employees will depend heavily on the industry that the employee works in and the nature of their employment. In addition, the terms of the employment contract, company policies, and applicable industrial instruments will play a role.

### The vaccines and their distribution

Starting February 2021, the Pfizer vaccine, and then the AstraZeneca vaccine has commenced being rolled out.

The Federal Government has so far indicated that Covid-19 vaccines will be voluntary, but take-up will be strongly encouraged. State governments have also indicated that they will encourage (or sometimes mandate) front line workers to "get the jab."

### Can an employer require an employee to get vaccinated?

An employer can direct employees to get vaccinated if the direction is lawful and reasonable.

A direction to get vaccinated will be lawful if it falls within the scope of the employment agreement (ie, as an express or implied term) and involves no illegality. For example, laws in place in Victoria such as the [Health Services Amendment \(Mandatory Vaccination of Healthcare Workers\) Act 2020](#) may make it easier to mandate vaccinations for certain front-line health care staff.

By contrast, an anti-discrimination law may make such a term unlawful for a disabled employee if reasonable accommodations can be made to otherwise enable the employee to do their job.

Whether a direction is reasonable is ultimately a question of fact, with reference to the scope of the employment agreement (ie, including if there is an express term), the nature of the employee's job and applicable legislation.

Going forward, employers could consider mandating vaccination as a condition of employment for new employees. The FWO supports such a prospect, saying on its webpage that "[in most circumstances, an employer may be able to require a prospective employee to be vaccinated against coronavirus.](#)" However, that issue has yet to be tested and any such condition must not be discriminatory on any relevant, protected ground.

### Vaccination as a requirement to fulfil employment

Another novel issue will be whether service providers will mandate vaccinations to use their services, eg, airlines. This may require employees to be vaccinated and/or have a valid "digital health wallet" to fulfil key requirements of their roles, such as international travel.

In such circumstances, employers may need to assess whether that travel requirement is inherent or whether the job can be performed without travel or, for example, through on-line meetings.

## Recent guidance and case law

The Fair Work Ombudsman has published resources which in part address when vaccinations might be made mandatory. See: [Latest legal update – Guidance on COVID-19 vaccinations and the workplace](#).

In the recent case of [Arnold v Goodstart Early Learning Limited \[2020\] FWC 6083](#), it was found to be at least 'equally arguable' that a policy issued by a child-care business requiring mandatory immunisation was lawful and reasonable in the context of its operations. In addition, the substantive upcoming hearing of [Ms Maria Corazon Glover v Ozcare \[2021\] FWC 231](#) is expected to address the issue of mandatory influenza vaccines.

## Possible outcomes

It is possible that a Court or Commission may decide it is lawful and reasonable for employers to direct employees who work in very high-risk industries (quarantine workers, frontline healthcare, elder care, childcare etc) to get vaccinated. However, in most cases, it is unlikely that a mandatory vaccine regime for employees would satisfy the test.

In all circumstances there could potentially be a tension between the need to work safely, and the requirement under disability laws to make reasonable accommodation to help the employee perform the inherent requirements of their job.

## Refusal to vaccinate

Issues around discrimination could arise where employees refuse vaccination on a protected ground. One example could be where an employee's religious beliefs preclude them from being vaccinated or receiving associated health treatment. In such circumstances the employer may need to accommodate those religious beliefs.

Another might be where an employee has a disability that could potentially lead to an adverse reaction to the vaccine. Interestingly, [s48 of the Disability Discrimination Act 1992](#) allows discrimination on the basis of an infectious disease such as Covid-19 if it is reasonably necessary to protect public health however it is unlikely that this will offer much assistance for most employers.

Employers should also keep in mind that an employee may also be able to seek relief under [Pt 3-2, Fair Work Act 2009](#) (unfair dismissal) if the direction is unreasonable and not a valid reason to justify dismissal as a response to an employee's refusal to get vaccinated. Similarly, if the employee has a workplace right which entitles the employee to refuse vaccination (eg, disability discrimination) the employee may seek relief if treated adversely because of that refusal: [Pt 3-1, Fair Work Act 2009](#) (general protections).

Employers should also consider the risk of potential workers compensation claims if an employee suffers an adverse effect after a mandated vaccination.

## Consultation around vaccination

Consultation will form a necessary part of establishing any workplace vaccination programme.

Employers are obliged to consult as far as reasonably practicable about work health and safety matters under applicable work health and safety legislation. Industrial instruments may also require employers to consult with employees and their representatives.

## What to do

The issues raised by a programme of widespread vaccination are novel. In preparation for making appropriate decisions, employers should monitor developments including government regulations and Commission/Court decisions.

In addition, employers should:

- Audit the vaccination needs for different parts of the organisation (eg, the role of vaccination for customer facing employees as opposed to back room employees);
- Review employment contracts for relevant clauses (eg, clauses that make employment conditional on having required vaccinations) and consider variations to employment contracts for new employees and, if appropriate, attempt to agree variations with existing employees;
- Develop appropriate internal communications about vaccinations (eg, flagging key government or regulator websites which provide quality information) and establish a protocol for addressing concerns;
- Review policies to assess whether changes are need to better manage ongoing issues and to pro-actively address issues the business may face for future pandemics (e.g. health and safety policies, leave policies, stand down policies, home working policies) and consult where appropriate;
- Consider the likelihood of employees refusing vaccination and the process you will take to respond to this, eg including assessing the potential impact on an employee's ability to carry out the key requirements of their role;
- Consult as required (and for best practice) with employees and representatives regarding vaccination as a measure relating to work health and safety;
- Assess whether the overall risks to health and safety from COVID-19 transmission can be managed through encouraging employees to obtain vaccinations rather than mandating them (eg, provide for in-office jabs or consider permitting employees to take a day's paid leave to attend an appointment to get vaccinate);
- Consider a system that acknowledges specific exemptions from vaccination and sets out evidence requirements (eg, persons claiming medical conditions may need to provide a medical certificate supporting that).

[For more information, see [Guidance Note – Dealing with the impact of widespread disease on the workplace](#) and [Guidance Note – Duty to comply with lawful and reasonable directions](#)]