

No right to not hire or force staff to sign up to COVIDSafe app

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Abstract:

COVIDSafe is a voluntary app developed by the Australian Government and launched on 26 April 2020. COVIDSafe can be installed on Android and iOS personal devices to collect information to assist State and Territory health officials when they conduct contact tracing to combat the spread of COVID-19.

The [Privacy Amendment \(Public Health Contact Information\) Act 2020](#) (Cth) (COVIDSafe Act), which commenced on Friday 15 May 2020 and amends the [Privacy Act 1998](#) (Cth) to ensure that downloading and using the COVIDSafe app is strictly voluntary.

This means it is unlawful for an employer or principal contractor to impose a requirement on a current or prospective employee or contractor to sign up to and use the COVIDSafe app. Penalties apply, including imprisonment and/or a monetary penalty.

Unlawful to require current or prospective staff to sign up to COVIDSafe app

The COVIDSafe Act elevates the [Biosecurity \(Human Biosecurity Emergency\) \(Human Coronavirus with Pandemic Potential\) \(Emergency Requirements - Public Health Contact Information\) Determination 2020](#) (the Determination) into primary legislation and introduces additional measures to strengthen privacy protections.

This has particular implications for employers and principal contractors utilising labour services. Specifically, employers and principal contractors are prohibited from imposing requirements on their workers to download the COVIDSafe app, have it in operation or to upload its data to the National COVIDSafe Data Store at the point of a positive COVID-19 diagnosis: see s 94H(1), [COVIDSafe Act](#). A contravention may be a criminal offence, with penalties being a maximum of 5 years' imprisonment or 300 penalty units, or both.

Examples of actions that may contravene the [COVIDSafe Act](#) include where an employer or principal contractor:

- imposes conditions on employment or engagement by refusing to enter into, or continue, a contract or arrangement with another person (including a contract of employment and current or prospective arrangements) because the person has not signed up to the COVIDSafe app: [s 94H\(2\)\(a\)](#);
- takes adverse action (within the meaning of the *Fair Work Act 2009* (Cth) (FW Act)) against another person because of COVIDSafe "workplace rights": [s 94H\(2\)\(b\)](#);
- requires a staff member to work from home or in a remote location and refuses to allow that person to enter the workplace because the person has not signed up to the COVIDSafe app: [s 94H\(2\)\(c\)](#); or
- refuses to allow a staff member to participate in a work event because the person has not signed up to the COVIDSafe app (eg, on-site meetings or activities or meet with clients): [s 94H\(2\)\(d\)](#).

The COVIDSafe Act introduces new "workplace rights" as made clear in the "avoidance of doubt provision" in subsection [94H\(3\)](#). This subsection confirms that each of the offences in [s 94H\(2\)](#) are "workplace laws" and the benefits derived by a person under that subsection are "workplace rights" for the FW Act. Subsection [94H\(3\)](#) clarifies the interaction between [s 94H](#) and the treatment of workplace laws and workplace rights under [Pt 3-1, FW Act](#).

An adversely affected “COVIDSafe person” will be able to make an application to the Fair Work Commission under the general protections provisions in [Pt 3-1, FW Act](#). These provisions prohibit adverse action being taken because of these workplace rights and an employer or principal contractor will need to prove there were other reasons for that action. Adverse action can include dismissals, not providing legal entitlements, disadvantageous changes to jobs, treating staff differently to others, not hiring staff and offering different and unfair terms compared to other staff.

The COVIDSafe Act also provides for Australian Information Commissioner oversight and offences under the COVIDSafe Act will also be breaches of the Privacy Act in certain circumstances. Employers and contractors will need to comply with the [Australian Privacy Principles](#) in relation to records of, for example, whether or not employees or contractors have downloaded the COVIDSafe app.

This should also ring tangential alarm bells for employers remembering the recent decision in: [Jeremy Lee v Superior Wood Pty Ltd \[2019\] FWCFB 2946](#) (Superior Wood case), where the Full Bench of the Fair Work Commission found that an employer’s direction to Mr Lee for fingerprint scanning was unlawful and that the employee record exemption under the Privacy Act did not apply during the collection. The Full Bench found that Mr Lee had been unfairly dismissed because his refusal to provide a scan of his fingerprint was not a valid reason justifying his dismissal.

Interestingly, the Superior Wood case is an ongoing matter, with Mr Lee’s appeal regarding remedies only recently being considered by a second FWC Full Bench decision: [Jeremy Lee v Superior Wood Pty Ltd \[2020\] FWCFB 1301](#). The Full Bench upheld Mr Lee’s appeal and agreed to rehear the application as to the appropriateness of a reinstatement remedy. If successful, this will be a significant cost for Superior Wood with the potential for 17 months’ continuity of service to be provided together with the restoration of lost pay. So, trying to make employees give up their privacy rights can be an expensive mistake to make.

Employer actions

While it may be desirable for staff to download and use the COVIDSafe app as part of a workplace health and safety management plan in response to the pandemic, employers and principal contractors must ensure that any requests around the COVIDSafe app clarify that compliance is voluntary.

This is particularly important to remember given the reverse onus of proof applies in adverse action claims. This means that a respondent must show that the “workplace” right was not a factor in its decision-making regarding the adverse treatment.

Click [here](#) to view the full text of the [Privacy Amendment \(Public Health Contact Information\) Act 2020](#) (Cth).

Click [here](#) to view the Explanatory Memorandum.

See also [General protections, Pandemics and COVID-19](#) and the [COVID-19 Toolkit for Employers](#)