

Mandatory vaccinations & other Covid-19 issues in the workplace

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12 October 2021



In the spirit of reconciliation, JobWatch acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Today's topic

Q: Can employers in Victoria require employees to be vaccinated?



COVID-19
VACCINATION



ACT EXPOSURE SITES

Keep up to date with the latest COVID-19 exposure sites in the ACT

Qantas makes COVID-19 vaccinations mandatory for all of its workers

By business reporter Nassim Khadem

Posted Yesterday at 9:59am, updated 4h ago



ACT EXPOSURE SITES

Keep up to date with the latest COVID-19 exposure sites in the ACT

Shepparton food processor SPC is the first company in Australia to mandate COVID-19 vaccination of all staff

ABC News Breakfast / By Madeleine Morris

Posted Thu 5 Aug 2021 at 7:39am, updated Thu 5 Aug 2021 at 12:25pm



Context

- The Commonwealth Government's policy on vaccines is that they are voluntary and free.
- However, as stated on the Cth DoH website, there may be circumstances where proof of vaccination may be required for continued employment in particular areas, eg to work in a residential aged care facility etc (public health orders).
- A number of private sector Ers have mandated COVID-19 vaccines outside the realm of public health orders, eg food professor SPC, Alliance Airlines, Qantas, Virgin, Rex Airlines.

Overview

Default position

- Most employers are not entitled to require employees to be vaccinated against COVID-19

H/w, Ees may be obliged to get vaccinated if:

- There is a public health order in place
- The requirement is permitted by a contract or Agreement
- A direction to be vaccinated is lawful and reasonable (assessed on a case-by-case basis)
- Vaccination is an inherent requirement of the job

Consider:

- Anti-discrimination laws
- Any requirement to consult

There is a public health order

- In Vic: CHO Directions
- Previously:
 - Frontline **quarantine** workers, incl workers in the COVID-19 Accommodation Program.
 - **Residential aged care** workers (all full-time, part-time and casual Ees, volunteers and students on placement).
 - **Construction** workers.
- Latest Directions re employment (commenced on 7 Oct):
 - COVID-19 Mandatory Vaccination (Specified Facilities) Directions (No 6)
 - COVID-19 Mandatory Vaccination (Workers) Directions
- NB: Directions which commenced on 9 Oct apply to businesses that provide goods/services to the public

Directions cont.

- Obligations on operators of specific facilities/employers of these workers:
 - **Healthcare** workers (incl medical practitioners, dental professionals, nurses and midwives, allied health professionals, PCAs, students, volunteers etc) to be vaccinated by 29 Oct / 15 Dec.
 - **Education** workers (inc workers in childcare & early childhood, schools etc) to be vaccinated by 25 Oct / 29 Nov.
- These workers to be vaccinated by 22 Oct / 26 Nov:
 - Accommodation workers, agricultural and forestry, airport, ancillary, support and welfare, Authorised Officer, care, community, creative arts, custodial, emergency service, entertainment and function, funeral, higher education, justice service centre, manufacturing, marriage celebrant, meat and seafood processing, media and film production, mining, physical recreation, port or freight, production and distribution, professional sports, high-performance sports or racing person, professional services, public sector employee, real estate, religious, repair and maintenance, retail, science and technology, social and community service, transport, utility and urban, veterinary and pet/animal care

- **Obligations on Ers:**

- **As soon as reasonably practicable:**
 - Ers to notify workers required to work o/s of home after 15 Oct that they must collect, hold & store info about vaccine status.
 - If worker is unvaccinated, Er to collect info about 1st booking by deadline.
 - If worker is partially vaccinated, Er to collect info about 2nd booking by deadline.
 - Ers to notify workers that unvaccinated workers won't be allowed to work o's of home after 15 Oct unless an exception applies.
- **From 15 Oct: Ers cannot permit unvaccinated workers to work o/s of home unless they have a 1st booking by deadline unless an exception applies.**

Exemptions / exceptions

- There is a medical contraindication: must provide evidence from a **medical practitioner** (a general practice registrar on an approved 3GA training placement; public health physician; general physician; infectious disease physician; clinical immunologist; gynaecologist; obstetrician; general practitioner who is vocationally registered; general practitioner who is a fellow of the Royal Australian College of General Practitioners; general practitioner who is a fellow of the Australian College of Rural and Remote Medicine)
- Worker must attend sites to respond to an emergency or perform urgent and essential work to protect health and safety.

Eg, Natalia

- Natalia is a retail worker who does not wish to take a COVID-19 vaccine because of her religious beliefs and general scepticism of the vaccine.
- Natalia's employer has told Natalie that she needs to have the first vaccine dose by 22 Oct 2021 and that she needs to show evidence of 1st vaccine booking by 15th Oct.
- She's been told that if she refuses, there is no redeployment option for her so she will lose her job.
- Natalia's employer has said it is complying with the Government direction.

Where a contract or enterprise agreement requires vaccination

- Employment contracts or agreements may contain terms relating to vaccinations: check if the terms apply specifically to COVID-19 vaccinations or flu shots or other vaccinations.
- Also check policies but query whether these have been incorporated into the contract.
- Always consider whether the term complies with anti-discrimination laws (term won't be enforceable if it is in br of anti-discrimination laws).

Where the employer's direction to be vaccinated is lawful & reasonable

- Employees have a duty to comply with directions of their employer which are lawful and reasonable – failure to obey without a good excuse can amount to misconduct and therefore warrant dismissal.
- Whether the direction to be vaccinated is lawful and reasonable depends on the specific circumstances.

Maria Corazon Glover v Ozcare [2021] FWC 2989 (26 May 2021)



- Er announced that annual flu jabs were an inherent requirement of a care assistant's job, citing Queensland Chief Health Officer directions (in force at the time) that workers could not enter residential aged care facilities unless they were vaccinated.
- Ee = 64-year-old care assistant with more than 10 years' service
- Claimed she "could have died" after reacting to a shot when she was 7.
- She gave Er a medical cert stating she could not be vaccinated as she had "anaphylaxis with Flushot in childhood" and she could not attend work until after the "flu infection time".
- Er didn't roster her or allow her to enter premises. When her annual and long service leave ran out she was put on unpaid leave. She claimed she'd been dismissed without a valid reason or fair process.
- **Held:** The requirement that client-facing employees needed to get the flu vaccinations was *lawful and reasonable*, so no UD.

Lawful and Reasonable Direction - Takeaways

- Whether mandatory vaccination will be lawful and reasonable is a question of fact, and the answer will depend on individual circumstances.
- The FWC is likely to look at the whole situation to determine whether a direction is reasonable.

Where vaccination is an inherent requirement of the job

- Where an employee cannot perform the inherent requirements of their role, an employer will have a valid reason for dismissal related to their capacity.
- However, according to the FWO, vaccination is **unlikely** to be an inherent requirement. It will require special circumstances for this to be the case.
- We may be guided by earlier cases that concerned the requirement to receive an *influenza* vaccination.



Barber v Goodstart Early Learning [2021] FWC 2156

- Ee was a lead educator with 14 "exemplary" years' service.
- Er introduced a new policy requiring Ees to have flu inoculations.
- She claimed to have a "sensitive immune system" and a prior adverse reaction.
- **Held:** dismissal NOT unfair. Er had a valid reason based on misconduct bc there was no medical basis for refusing to take a flu shot. Er's basis for dismissing Ee on the basis of capacity was "unfortunate".

Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818 + [2021] FWCFB 6015



- Aged care receptionist working in a high-care nursing home refused a flu vaccination on the basis of a previous allergic reaction.
- She refused to comply with NSW public health orders that no one must enter such a facility without an up-to-date influenza vaccination.
- **Held:** dismissal NOT unfair. Applicant could **not** perform her job's inherent requirements in the context of the Chief Medical Officer's direction.
- Decision upheld by Full Bench, with dissent from DP Dean.

Inherent Requirement - Takeaways

- *Barber & Kimber* suggest that without a law or government direction which prevents an employee from doing their job without being vaccinated, it is unlikely that vaccinations will be held to be an inherent requirement of the role.

Consider Cth, state/territory anti-discrimination laws & GPD provisions under the Fair Work Act

- Anti-discrim laws, including the EO Act, prohibit discrimination in certain areas of life, including employment.
- If an Ee refuses to get vaccinated in connection with a protected attribute, the Er's action in insisting on mandatory vaccination could be discriminatory, but this will depend on the circumstances.
- Eg, political belief or activity – but this ground has been interpreted narrowly in Victoria and it is unlikely to apply to people who are opposed to vaccines.

Equal Opportunity Act (Vic)

- Vaccination status is not a protected attribute.
- However, if an Er makes vaccinations a mandatory condition of employment, this could be discrimination if the Ee cannot be vaccinated due to a disability or other protected attribute (eg pregnancy) and the Er doesn't make an exception.
- Ers can lawfully discriminate on the basis of disability or physical features if the discrimination is **reasonably necessary to protect the health and safety** of any person, or the public generally. Ers will bear the onus of proving how this health and safety exception applies in the context of mandatory vaccines.

28. Consultation about major workplace change

28.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
 - (i) the introduction of the changes; and
 - (ii) their likely effect on employees; and
 - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

28.2 For the purposes of the discussion under clause 28.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

The requirement to consult

28.3 Clause 28.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

28.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 28.1(b).

28.5 In clause 28, **significant effects**, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations; or
- (g) job restructuring.

Requirement to consult

- Most workplaces are covered by either a Modern Award, Enterprise Agreement or another registered agreement
- Almost all Modern Awards and Enterprise Agreements have a consultation clause which require employers to consult with employees and any representatives when an employer intends to implement significant workplace changes.
 - This means that, before most employers are able to make the decision to introduce mandatory vaccines, they must consult the matter with their employees.
 - If they do not, the mandatory vaccine requirement would likely be in breach of a Modern Award or Enterprise Agreement and therefore breach a civil remedy provision of the FWA.

Recap

- Basic default position: no automatic right for Ers to mandate vaccines in workplaces.
- Consider if any of these apply:
 - Whether there is a government direction that requires the client to be vaccinated.
 - Whether the requirement is permitted by contract or registered agreement.
 - Whether the direction to be vaccinated is a lawful and reasonable direction.
 - Whether being vaccinated is an inherent requirement of the position.

Recap cont.

- Consider whether your client is being discriminated against because of a protected attribute.
- Consider whether your client is covered by a Modern Award or an Enterprise Agreement. If they are, check if there is a consultation clause and if it has been followed. Also check any common law contract or policies.



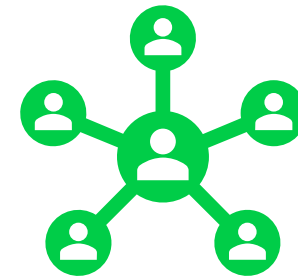
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