



## “NO JAB, NO WORK”

# COVID-19 and Mandatory Vaccination

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As the COVID-19 vaccine rollout continues, the question has arisen whether employers are required to (or allowed to) direct their employees and contractors to receive the vaccine. The recent outbreaks have added extra force to the discussion.

Let's deal with the questions separately.

### **MUST EMPLOYERS INSIST THAT WORKERS GET THE COVID-19 VACCINATION?**

Every employer owes their workers a duty of care. Under the Work Health & Safety Act, an employer must eliminate (or if not possible, minimise), so far as is reasonably practicable, the risk of exposure to COVID-19 in the workplace.

The key words there are “so far as is reasonably practicable”. For the time being, SafeWork Australia have indicated that they do not consider that mandating vaccination is reasonably practicable. They have publicly stated:

*This is because, for example:*

- *at present, public health experts, such as the Australian Health Protection Principal Committee has not recommended a vaccine be made mandatory in your industry*
- *there may not yet be a vaccine available for your workers, or*
- *some of your workers have medical reasons why they cannot be vaccinated.*

SafeWork NSW is less forthcoming with their advice. They say on their website:

*When a COVID-19 vaccine is generally available, businesses may require workers to be vaccinated for COVID-19, if reasonably practicable to do so. A variety of factors*

*such as eligibility for the vaccine, personal health, medical history, type of work and alternative control measures should be considered, along with the risk of exposure.*

*Once a vaccine is available to protect against COVID-19 it is likely to be recommended for all those performing tasks in, or intending to perform tasks in, a situation where there is a high risk of exposure to the virus that causes COVID-19, unless there is a medical contraindication.*

Because the COVID-19 vaccine is currently available only by strictly regulated appointment, it is not reasonably practicable for an employer to require their workers to receive the vaccine. If it is not reasonably practicable for workers to get the vaccine, the Work Health & Safety Act does not require employers to mandate it.

Employers should keep a close eye on this issue, though. As the vaccine becomes more available, the practicability of vaccination will increase, and we will likely reach a “tipping point” at which SafeWork changes their view. WCRA will keep Members advised of changes in policy in that area, but in the meantime, we recommend that Members implement any measures they can to ensure a safe workplace. For example:

- assessing work activities that involve close personal contact (less than 1.5m);
- implementing controls to reduce direct contact with workers and customers, including:
  - physical distancing of at least 1.5 metres where reasonably practicable;
  - barriers and/or modifying workplace layouts to create adequate space at counters, between workstations, seated areas, etc;
  - modify shifts, hours and rosters to reduce peak periods. For example, stagger start and finish times, days of the week from home/office;
  - actively support flexible work arrangements, including working from home or other locations;
- implementing controls to reduce environmental exposure, including:
  - inspecting and reviewing air conditioning and ventilation systems;

- cleaning and disinfection of high traffic areas and shared surfaces;
- provide cleaning products and instruction for cleaning workspaces;
- provide instruction and amenities for personal hygiene and infection control.

## **CAN EMPLOYERS INSIST THAT WORKERS GET THE COVID-19 VACCINATION?**

The answer to this question varies depending upon a worker's type of employment.

For casual employees<sup>1</sup> and contractors who are engaged on a short-term basis, an employer generally has the right to choose who to offer work to. Unless that decision infringes on a worker's legal rights (such as if the worker cannot safely receive the vaccine because of a medical condition, in which case refusing to employ them would be discrimination), the decision cannot be disputed.

For permanent employees, an employer is entitled to issue reasonable directions and to terminate employees who do not comply with those directions. Disputes between an employer and a worker in relation to vaccination would be viewed through that lens.

Recent decisions of the Fair Work Commission<sup>2</sup> have indicated that the reasonableness of a vaccination direction is to be determined on a number of factors, including:

- the nature of the employer's industry;
- the state and nature of the workplace;
- the role of the employee subject to the direction;
- the roll out of the policy or procedure;
- the type of vaccine involved and, in some respects, the legitimate concerns held around the different types of vaccines (live and/or inactive virus).

The characteristics of each employer's workplace, workforce and customers are different so it is difficult to provide a conclusive answer that applies to every employer, but at this stage a

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<sup>1</sup> When considering casual employees, be careful regarding workers on a regular and systematic hours. They are sometimes considered to be (and legally treated as though they were) permanent employees.

<sup>2</sup> Notably *Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156*, which dealt with the influenza vaccine and a worker in a child care centre

direction that employees receive the COVID-19 vaccine is unlikely to be considered reasonable because in most cases vaccination is not necessary to create a safe workplace, the vaccine is not widely available and mandatory vaccination has not been recommended by health experts.

If the direction is not considered reasonable, any attempt to suspend or terminate an employee for failing to comply would have legal repercussions including claims for unfair dismissal and/or breach of contract.

### **THE SITUATION WHERE CUSTOMERS INSIST ON INCOMING CONTRACTORS BEING VACCINATED**

The parties (employer and the workers) may also need to consider a request from a customer or group of customers that workers entering their site are vaccinated. In this situation, the employer needs to consult with their workers, consider all of the factors stated above, agree on the safest possible course of action and advise the customer of their position.

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