Can the COVID Vaccine Be Made Compulsory for Employees?

With the end of the COVID-19 pandemic in sight due to the development and distribution of vaccines, employers and employees may have pressing questions about making vaccines compulsory in workplaces. This article aims to answer some of those questions.

Can Employers Make the COVID-19 Vaccine Compulsory?

Whether employers can make the COVID-19 vaccine compulsory will depend on the specific circumstances of a case. However, most workplaces should assume that they cannot make the vaccine compulsory as an opening position.

Employers are encouraged to review specific laws, public health orders, enterprise or other registered agreements, and the employee's employment contract to substantiate whether there is a specific power or term which allows them to make a vaccine compulsory.

Otherwise, there may be cases where employers have powers to issue a "lawful and reasonable" direction to their employees to obtain specific vaccinations if they work in a "high risk environment". These include:

1. Workplaces where employees are likely to interact with people at a higher risk of being infected with coronavirus.
2. Workplaces where employees are likely to interact with people who are more vulnerable to the serious health effects of a prospective coronavirus infection.

Examples of "high risk environments" may include hotel quarantine, border control, and health, child, or aged care settings.

It should be noted that employers do not need to make the COVID-19 vaccine compulsory against all staff members, but only those who are working in high-risk environments.

Requirements and Possible Considerations for Making the Vaccine Compulsory

Recently, an increasing number of employers in Australia have made a coronavirus vaccination compulsory for employees. A prominent example being SPC.

Whether an employer can make a vaccine compulsory will depend on the following:

1. Whether there is a law, a public health order, or a term in a lawful agreement or an employment contract which specifically allows them to make a coronavirus vaccine compulsory.

Or alternatively:

2. Whether the direction can be deemed "lawful and reasonable".
3. The unique circumstances of the case.

Legislation, Public Health Orders and Other Legal Instruments

Some states have also recently (as of 13 August 2021) passed public health orders making the COVID-19 vaccine compulsory in order to attend work in a range of different industries, including quarantine workers and aged care workers.

Further information can be found here: https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations

Lawful and Reasonable

The employer must show that making the vaccine compulsory is justifiable.

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They must be able to provide supporting evidence which shows that the vaccine is inherent for the safe performance of the employee's duties.

In *Ms Maria Corazon Glover v Ozcare [2021] FWC 231* (*Glover*), the Fair Work Commission noted the importance of considering an employee's specific role when determining whether making a vaccine compulsory is lawful and reasonable. The example used in *Glover* is the requirement that shopping centre Santa employees be vaccinated as an inherent requirement of the job given their contact with young children.

In *Ms Nicole Maree Arnold v Good-start Ear-ly Learn-ing Lim-it-ed T/A Good-start Ear-ly Learn-ing* [2020] FWC 6083 (*Arnold*), the Fair Work Commission highlighted the need to consider whether an employer owed a duty of care to its consumers or clientele when determining whether making a vaccine compulsory is lawful and reasonable. The example used in *Arnold* is a childcare centre owing a duty of care to not infect the children in its care.

It is likely that a wide range of industry employers, especially those with workplaces in "high risk environments", can justify making a vaccine compulsory under OHS laws given the severe health and safety risks, and high transmissibility of COVID-19.

Further factors which may enhance the lawfulness of making a COVID-19 vaccine compulsory could be the extent of community transmission of coronavirus, especially the Delta strain of the coronavirus, and the effectiveness of vaccines in reducing risk of the transmission and severity of illness of contracting coronavirus.

FWO-suggested Approach

The Fair Work Ombudsman website suggests that employers categorise their employees' work into four tiers to help determine whether making a vaccine compulsory will likely be lawful and reasonable:

> ***Tier 1 work**, where employees are required as part of their duties to interact with people with an increased risk of being infected with coronavirus (for example, employees working in hotel quarantine or border control).*
>
> ***Tier 2 work**, where employees are required to have close contact with people who are particularly vulnerable to the health impacts of coronavirus (for example, employees working in health care or aged care).*
>
> ***Tier 3 work**, 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 (for example, stores providing essential goods and services).*
>
> ***Tier 4 work**, where employees have minimal face-to-face interaction as part of their normal employment duties (for example, where they are working from home).*

It is suggested that:

1. making a vaccine compulsory for Tier 1 or 2 workers will likely be deemed lawful and reasonable;
2. whether making a vaccine compulsory for Tier 3 workers will likely be deemed lawful and reasonable will depend on the level of community transmission of coronavirus in the area of the employer's location, and whether or not employer needs to remain open during prospective lockdowns:
    a. If there has been no community transmission in the area of the employer's location for some time, then making a vaccine compulsory for Tier 3 workers will be less likely to be deemed lawful and reasonable;
    b. If there has been community transmission in the area of the employer's location and the employer must remain open during a lockdown, then making a vaccine compulsory for Tier 3 workers will likely be deemed lawful and reasonable;
3. making a vaccine compulsory for Tier 4 workers will be less likely to be deemed lawful and reasonable.

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Unique Circumstances

Medical Reasons

Making a vaccine compulsory could be subject to genuine medical exemptions. In such cases, employers must provide reasonable alternatives to employees if possible.

However, in *Glover*, the Commissioner noted that there may be specific circumstances whereby an employee with a "medical" or "religious" reason can still be terminated for refusing a vaccine if the vaccine can be regarded as an "inherent requirement of the role".

Other Reasons

Making a vaccine compulsory can also be subject to political, religious or other objections. In those cases, the employer must consider the following factors and navigate around them.

1. The nature of the objection.
2. Any consequences in relation to discrimination laws.

Where there is a genuine, work, health and safety reason for a direction, the employer is likely to be able to successfully enforce a compulsory direction to get vaccinated against an employee without a legitimate basis for refusal.

However, discrimination laws will generally protect certain groups of people from a compulsory direction to get vaccinated. These groups include people with a disability, pregnancy or certain religious beliefs.

Other Considerations

1. The type of work being performed.
2. The ability for that work to be performed remotely.
3. Employees' specific situations.
4. The Government's and medical bodies' applicable advice at the time.
5. Other relevant circumstances.

Employees Complying with a Compulsory Direction to Get a COVID-19 Vaccine

If an employee is required by the employer to be vaccinated for coronavirus, the employer will need to compensate the employee for any associated travel costs. The employer should ensure that the employee is given time off work without loss of pay if their vaccine is to be taken during work hours.

Whilst employees are not generally entitled to take any sick leave to go and get a COVID-19 vaccine (barring any rights or entitlements in any legal instrument or legislation), they will be able to take sick leave if the vaccination causes them to feel unwell.
If the employer has lawfully made a vaccine compulsory, it can require its employees to present proof that they have been vaccinated. Employers should be wary of their privacy obligations by not collecting or making copies of the employee's evidence of vaccination, unless the employee has consented or the employers are authorised to do so by law.

Can Employers Discipline Employees for Refusing the Vaccine?

Whether an employer can discipline an employee for refusing the coronavirus vaccine will depend on the circumstances.

If an employee breaches a law or repeatedly fails to comply with a lawful and reasonable direction to be vaccinated, then the employer may be able to discipline the employee. Disciplinary action includes the termination of employment.

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Before taking disciplinary action, employers should ensure that they do not breach any terms, obligations and rights under:

1. Any relevant enterprise or other registered agreements;
2. Awards;
3. The employee's employment contract;
4. Workplace policies; and
5. Public health orders.

It is recommended that the employer discusses the reasons for an employee's vaccine refusal with the employee before taking any disciplinary action against an employee. This is because it is not generally lawful for an employer to suspend an employee without pay unless permitted by law or a lawful agreement. An employee is also protected by the law from being unfairly dismissed or treated adversely in their employment.

Can Employees Refuse to Attend a Workplace if a Colleague Is Not Vaccinated?

Employees should assume that they cannot refuse to attend a workplace if a colleague is not vaccinated against coronavirus. This is because the employer may be unable to make the vaccine compulsory, and/or the colleague may have a legitimate reason or exemption for not being vaccinated.

Employees should raise any concerns about the safety of the workplace with their employers before refusing to attend the workplace.

If an employee refuses to attend a workplace because a colleague is not vaccinated against coronavirus, the employer can issue a lawful and reasonable direction for the employee to attend the workplace. A failure to comply can lead to disciplinary action being taken by the employer.

Conclusion

PH Solicitor understands the challenges that employees and employers are facing in light of the coronavirus vaccine rollout.

If you would like to discuss your employment rights or your business' rights about making the coronavirus vaccine compulsory, we are here to help. Call our office on (03) 9642 0435 or email admin@phsolicitor.com.au for a confidential discussion with our team.

The information in this article is general only and is not to be taken as legal advice with respect to your specific circumstances.

Sources:

https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace

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