

Can an employer compel staff to get the COVID-19 vaccine?

By Emily Creak

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With Australia set to start rolling out the COVID-19 vaccine, employers might be wondering whether they can make it mandatory for employees to be vaccinated. The answer to this question is complicated, and employers need to carefully consider the circumstances of their workforce before mandating that their employees be vaccinated.

Key points

- Employers have various obligations to provide safe and healthy workplaces.
- Whether it is '*reasonably practicable*' or '*lawful and reasonable*' to direct any employee to be vaccinated will depend on the circumstances. Key health and safety considerations include the likelihood of infection in the workplace, the degree of harm that could result, and the suitability of mandatory vaccinations as a measure to control that risk.
- To mitigate the risks of legal claims, employers must carefully consider the circumstances of any employee who does not want to be vaccinated.

Is it reasonable to make the COVID-19 vaccine mandatory?

Whether an employer can mandate the COVID-19 vaccine will depend on whether the direction to get vaccinated is lawful and reasonable. This will depend on the circumstances. For example, it might be reasonable in a high-risk environment, such as an aged care facility or a hospital, but unreasonable in a corporate office.

The circumstances of the individual employee are also relevant and can cause major complications. Let's take the example of a finance officer who works in a hospital. Would it be reasonable to direct them to get vaccinated if they had no direct contact with patients? What if they also had a genuine medical condition that made vaccination dangerous?

Key issues to consider when determining reasonableness may include:

- What are the health risks to employees and others?
- Do employees encounter vulnerable people?
- Are there specific circumstances that might make it unreasonable for a particular employee to get vaccinated?
- Can an employee perform the inherent requirements of their role without getting vaccinated?
- Is a mandatory vaccine an effective control against the risks that have been identified?
- Are alternatives to a vaccine available and sufficient (i.e. social distancing and the use of personal protective equipment)?
- What is the current health advice from experts about the side effects and efficacy of the vaccine?

Legal guidance

There are not yet any cases that consider the reasonableness of a direction to get vaccinated against COVID-19. However, comments of the Fair Work Commission have foreshadowed that such a direction might be reasonable.

In the 2021 case of [Glover v Ozcare \[2021\] FWC 231](#), a care worker refused to get a flu vaccine because she had previously had a severe adverse reaction. In respect of mandatory vaccination, Commissioner Hunt said:

[127] It is not inconceivable that come November 2021, employers of men engaged to play the role of Santa Clause in shopping centres, having photos taken around young children, may be required by their employer to be vaccinated at least against influenza, and if a vaccination for COVID-19 is available, that too. The employer in those scenarios, where they are not mandated to provide social distancing, may decide at their election that vaccinations of their employees are now an inherent requirement of the job.

Where to from here?

Regardless of whether a business intends to mandate vaccinations, there are several strategies that can be implemented to mitigate COVID-19 risks, including:

- If the workforce has a lot of casual employees, considering whether both parties may benefit from a conversion to permanent employment (part-time or full-time).
- Updating policies and procedures so that employees are clear about what is expected of them if they have COVID-19 symptoms, if they are awaiting test results or have to isolate, or if they test positive.
- Training managers about the correct policy and procedure.

If you are considering directing employees to get vaccinated:

- Establish clear policies and processes about how the direction will be communicated, what exceptions may be granted, and the protection of your employees' personal information.
- Ensure managers are trained and understand the company's approach.
- Develop strategies to encourage staff to get vaccinated, such as paid time off work to get the vaccine.
- Ensure that you keep up to date with the latest public health advice. Policies and processes should be regularly reviewed and updated so they are consistent with health advice.

Need help?

Please get in touch if you need help working out how to manage COVID-19 vaccinations in your workplace. We have a team of experienced employment lawyers who are ready to help you.

Contact **Emily Creak**, Senior Employment Lawyer, emily.creak@sourcelegal.com.au