

FUTURE OF WORK - NO JAB, NO JOB?

09 August 2021 | Australia

Legal Briefings - By **Nicholas Ogilvie, Nerida Jessup and Alexis Agostino**

Can or should an employer make Covid-19 vaccinations a requirement for workers to be in the office?

Last week, Australian fruit and vegetable manufacturer [SPC announced that the unvaccinated](#) would not be welcome at its workplaces.

Naturally, this has sparked debate – can or should an employer make COVID-19 vaccinations a requirement for workers to be at work?

Mandatory vaccinations aren't new to workers in some high-risk industries, such as aged care, aviation, healthcare and hotel quarantine. The difference is that, for these workers, vaccination has been mandated by public health orders.

Workers at SPC may end up being the first in Australia outside of those industries to be subject to a mandatory vaccination policy by an employer.

Employers have a positive obligation to manage the risk of COVID-19. Many are encouraging their workforces to be vaccinated by introducing voluntary workplace vaccination programs.

However, it's unsurprising that the risk of workplace transmission is significant in many industries that fall outside the scope of the existing public health orders. Schools, transport delivery providers, and cafes are good examples.

[The Prime Minister on Friday](#) referred to workers “who are in a position where they are public-facing in their daily lives, retail, supermarkets, things of that nature”.

For those employers, who are now faced with managing the risks of the highly transmissible Delta variant, there has been a rethink of strategies for managing these risks.

This includes considering mandatory vaccination policies. They must look at whether a direction that employees be vaccinated is [lawful and reasonable](#) - in their own specific context.

Vaccination can prevent the spread of COVID-19, but the courts won't just accept that it is a reasonable requirement for all employees across the board to be vaccinated. Any decision to implement mandatory vaccination policies comes with legal risk.

It will depend on a variety of factors, including how much contact employees have among themselves and others, and what alternatives or secondary measures are available to prevent the spread.

Employers also need to consider how they treat workers who cannot be vaccinated for medical or religious reasons.

The Fair Work Commission has grappled with some of these considerations when looking at the fairness of terminating employees for refusing to participate in mandatory flu vaccination programs.

In those cases, the Commission assessed whether the employee was at a heightened risk of contracting an infection, whether they were likely to interact with vulnerable people, and alternatives available to prevent transmission.

Given what we have seen in recent outbreaks across Australia, and the relative ineffectiveness of previous methods of infection control such as social distancing, it's easy see how these considerations could apply to COVID-19 vaccinations.

The government has also acknowledged that ultimately employers need to make their own decisions appropriate to their workplace.

Of course, just because employers can introduce mandatory vaccination policies, doesn't necessarily mean they should. Or that they should do it now.

Vaccination as a mandatory condition of entry to workplaces, including offices, is becoming more common internationally. [In the United States, high-profile employers](#) such as Delta Airlines, DoorDash, fitness company Equinox, Facebook, Microsoft, Google, Lyft and Netflix have introduced these types of policies.

The problematic issue of the timing of these policies in Australia can't be overlooked. In the current phase of our rollout, where eligibility is limited, and demand for the vaccination outstrips supply, many workers won't be able to be vaccinated until the back end of the year.

This does not mean that the current debate is largely academic.

It's likely that by the time these policies can realistically be enforced, the landscape will have shifted.

In addition, any further Government intervention – broadening the scope of public health orders or legislative guidance on employer mandated polices – will help. The Fair Work Ombudsman has announced that it will update its guidance soon.

The introduction of rapid COVID-19 testing, which could increase infection control measures in the workplace, providing an alternative means for infection control, will also form part of the equation.

We know that the impacts of this pandemic shift quickly and employers' resources are stretched in their COVID-19 response.

Instead of employers thinking about what they might do in the future if their workforce isn't vaccinated, employers should be considering what they can do now to encourage and assist employees to get vaccinated as soon as they can.

Worker consultation is important. The early announcement of workplace vaccination policies might influence eligible workers to get vaccinated.

But outside of this, employers should focus on proactive and positive messaging.

The workplace can be a powerful resource for disseminating accurate and up-to-date information. Recently, the Therapeutic Goods Administration announced new measures to guide employers on promoting vaccines.

Some employers are providing rewards. Others are facilitating (virtual) events with medical experts to enable employees to ask questions. Others are offering vaccination leave and additional leave for those who suffer adverse side effects.

Of course, once supply of the vaccine meets demand in Australia, and those who want to be vaccinated are, let's then revisit the utility and reasonableness of mandatory vaccination (with the facts and medical advice available to employers at that time)

This article was first published in [The Age](#), [The Sydney Morning Herald](#), [Brisbane Times](#) and [WA Today](#) on Sunday 8 August 2021 and is reproduced with permission.

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