

# Discussion paper on the introduction of mandatory COVID-19 vaccinations

## *Introduction*

This discussion paper provides some points for consideration as part of the current debate on what the employer's role will be to implement the COVID-19 vaccination, and what will be the appropriate requirement to mandate the vaccine in certain industry sectors. While it is early days for the vaccine in Australia, this paper serves to contribute to the discussion that employers and HR leaders will need to consider in 2021.

## *Key Questions and Issues*

- A COVID-19 vaccination program in Australia is planned to roll out nationwide from February 2021.
- With the vaccine supply not yet assured, the timing for a national rollout is unclear at this stage.
- While the government has not formed a position on mandating the vaccine for certain workers, consultation with employers and unions will take place from February onwards. At this time, AHRI is not aware of any discussion of proposed amendments to public health or OHS legislation or the *Fair Work Act 2009* regarding vaccinations.
- Sectors such as aged care have already implemented requirements for flu vaccinations.
- Questions that employers are currently asking about COVID-19 vaccination include:
  - How can we best continue to manage the risk of infection for employees and clients?
  - Should COVID-19 vaccinations be included as a condition of employment (in high transmission risk sectors) in the same way flu vaccinations have been required?
  - In relation to managing potential workplace transmission, will employers be exposed to possible litigation?
  - Should employers have the right to stand down employees who refuse to be vaccinated?
  - Can individual businesses self- assess and determine their position to mitigate risk?

## Government Position

- The Australian Prime Minister, Scott Morrison, has publicly stated that COVID-19 vaccinations will not be mandatory, however, the [vaccine will be free for all Australians](#).
- Flu vaccinations:
  - The aged care sector is required to maintain a flu [vaccination program](#).
  - The Government has implemented policy levers to encourage vaccinations in the past – specifically in early childhood where free childcare and child support payments have a vaccination requirement (No Jab, No Play) in QLD, NSW, SA and WA.
  - Vaccinations can be required for health and aged care workers under the [Health Services Amendment \(Mandatory Vaccination of Healthcare Workers\) Act 2020](#) in Victoria.
- The Department of Health has recommended that if workers have a [“significant occupational risk of acquiring a vaccine-preventable disease”](#) the employer should implement a comprehensive occupational vaccination program, which might include:
  - A vaccination policy
  - Staff vaccination records
  - A policy for managing vaccine refusal
  - Information about relevant vaccine-preventable diseases
  - Taking “all reasonable steps to encourage non-immune workers to receive the recommended vaccines”.

## The Legal Position

In respect of the states, it is questionable whether or not a population-wide Government mandate would be lawful (in any jurisdiction). It generally appears unlikely. It is another question whether or not individual mandates may be made requiring individuals to be vaccinated. For example, in [Victoria the Public Health and Wellbeing Act 2008](#) allows for the Chief Medical Officer to issue a public health order requiring a *person* to "receive specified prophylaxis, including a specified vaccination". This power relates to *individual cases* and cannot form the basis of a population-wide policy.

State governments could potentially take other action, such as refusing to allow unvaccinated persons in state-run facilities (in a similar way to how the ‘No Jab, No Play’ policy is currently implemented, i.e. by withholding benefits/right of participation from those who aren’t fully immunised).

Private businesses may refuse entry to those who are unvaccinated. They will generally be permitted to do so, so long as such refusal does not breach anti-discrimination laws, for example, by refusing entry to a person with certain health conditions meaning they cannot

be safely vaccinated. In respect to international travel, [Qantas has flagged](#) it may make vaccinations compulsory for those wanting to travel internationally with the airline.

### ***Individual employment contracts:***

If it is a term of an individual's contract of employment that they have an up to date vaccination against influenza, an employer can require the employee to be vaccinated.

It may be more common in certain industries and professions to make vaccination a condition of employment, such as in: (See: [Department of Health, Immunisation for work](#))

- The health services sector
- Residential aged care, and
- Childcare.

If an employer wishes to make vaccination against influenza a condition of employment (for which non-compliance amounts to dismissible conduct), the term in the contract should clearly justify/explain the purpose behind the requirement.

### ***Fair Work:***

Vaccination is a physically invasive procedure. As such, if an employer is to mandate that employees be vaccinated for COVID-19, they need to justify the direction. The employer will need to show that the vaccination is necessary for the employee to perform the inherent duties of their position safely.

Generally, this type of direction would be difficult, despite there being some situations (primarily in a medical or care context) where a direction for an employee to have a flu vaccination will be lawful and reasonable, and in most situations it could not be justified.

### ***Reasonable direction:***

As COVID-19 is easily transmissible and there are significant health impacts on those afflicted, it is likely that a wide range of employers will seek to mandate COVID-19 vaccinations for staff, subject to genuine medical/health exemptions. In such cases, employers will need to consider whether reasonable adjustments (redeployment to non-facing work) can be made. However, it is possible some employees might not be able to perform the inherent requirements of their position safely due to an inability to be vaccinated for COVID-19. See [\[3\]](#) below.

Currently there are various flu vaccination cases before the Fair Work Commission. If they proceed to judgment it will be interesting to see what impact they have on the rights of employers and employees in this challenging but interesting area. See: [Maria Corazon Glover v Ozcare \[2021 FWC 231\]](#) [5]

## ***Implications for HR***

### ***Employer considerations:***

- High risk sectors (e.g. aged care, childcare, health, hospitality) need to recommend a policy/legal position for relevant jurisdictions – should COVID-19 vaccinations be mandated for employees working in these sectors?

### ***Issues to consider:***

- Some people will be medically exempt (a medical certificate should be obtained) from having certain vaccinations. Is alternate accommodation to work remotely or away from customers/clients/patients possible?
- Where an employee has a health or medical reason for not wanting a vaccination, the employer may have an obligation under the Disability Discrimination Act to make reasonable adjustments.
- Even if an employee rejects the vaccine on grounds other than medical or religious reasons, do not immediately jump to terminating their employment.
  - While being an “anti-vaxxer” would weaken the position of an employee refusing a mandatory vaccine, the employer should always take steps to accommodate the employee before considering termination.
- Regardless of the legal position, all employers should develop a policy and program to promote, provide for, and enable the majority of employees to be vaccinated.
  - Employer-run flu vaccination programs are shown to drive higher take-up of vaccination.
  - In terms of flexible work practices, remote working continues to be a relevant strategy for many workplaces as businesses transition to ‘COVID normal’.
  - Many people (not just anti-vaxxers) are concerned about being vaccinated early due to the vaccine being in its relative infancy.

### ***If implementing a vaccination program:***

#### **Have a good communication strategy:**

- Make clear to employees why you require them to get vaccinated and outline the alternatives for those who may refuse.
- Make sure communication around the vaccination direction is two way, so employees have an opportunity to ask the employer questions and voice concerns.
- Do not be heavy-handed in your communications as it is likely to put employees offside.

### **Put processes in place:**

- Ensure there is a clear process if an employee does refuse to be vaccinated, so a discussion can take place on why they are refusing and what will happen moving forward (be that an adjustment of their role or termination of their employment).
- Understand good practice termination processes.

### **Allow employees to get vaccinated during work hours:**

- You should not direct employees to use a particular vaccine supplier or administrator of the vaccine.
- The delivery of vaccinations should be carried out under a [clinical setting to monitor administration and possible reaction](#) (see page 12).

### **Have a transition plan in place while the vaccine is rolled out:**

- Continue to be flexible with remote work while the vaccination is progressively rolled out across the country/globe.
- Continue with safe work practices, including sanitising, wearing of masks, physical distancing - these all need to be maintained during the vaccine implementation, and probably beyond.

### ***Additional References***

[1] HRM Online: (<https://www.hrmonline.com.au/section/legal/can-workplaces-mandate-covid-19-vaccines/>)

[2] HRM article comments section (<https://www.hrmonline.com.au/section/legal/can-workplaces-mandate-covid-19-vaccines/#comments>)

[3] FWC Ms Nicole Maree Arnold v Goodstart Early Learning Limited T/A Goodstart Early Learning (<https://www.fwc.gov.au/documents/decisionsigned/html/pdf/2020fwc6083.pdf>)

[4] Department of Health, *Immunisation for work* (1 May 2019) Department of Health (<https://www.health.gov.au/health-topics/immunisation/immunisation-throughout-life/immunisation-for-work>).

[5] [Ms Maria Corazon Glover v Ozcare \[2021 FWC 231 \(18 January 2021\)\]](#)