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## **FACT SHEET 11**

### **VACCINATION MANDATES**

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## 1. INTRODUCTION

The purpose of this Fact Sheet is to provide a general overview of the legal position of employers and employees regarding the mandating of COVID-19 vaccinations, as a result of the Public Health Orders issued by the State Government.

## 2. DEFINITIONS

**Vaccine** means a COVID-19 vaccine approved by the Therapeutic Goods Administration (TGA).

**Vaccination** means the administering of a double dose of a TGA approved COVID-19 Vaccine.

**Vaccination Mandates** means directions issued by employers to employees requiring employees to be Vaccinated in order to retain employment status.

**Public Health Order** means an order issued by a State Government requiring a particular class of employees to be Vaccinated to attend their workplace.

## 3. PUBLIC HEALTH ORDERS

The Australian Government's policy in relation to COVID-19 Vaccinations is that the decision to be Vaccinated is to be a free and voluntary decision made by each individual. The State Government can, however, pass Public Health Orders requiring particular classes of employees to be Vaccinated to attend their workplace.

Public Health Orders have led to some employers issuing Vaccination Mandates to their employees. Failure to comply with employer Vaccination Mandates has in many cases resulted in disputes between employees and their employers. This is not limited to workplaces to which a Public Health Order applies.

It is important to note that there are exemptions to Public Health Orders that may apply to particular employees.

### 3.1 What if an Employee Fails to Comply with a Public Health Order?

Where an employee fails to comply with a Public Health Order and attends their workplace without being Vaccinated, the employer may rightfully direct them not to come to work. The employer is also entitled to take reasonable disciplinary action, which may include withholding pay.

Information regarding Public Health Orders passed by the Western Australian Government can be accessed via the following link. This resource includes a list of workers to which each Public Health Order applies, and the relevant legislation:

<https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-legislation-and-public-health-orders#w>

### 3.2 What if an Employee Complies with a Public Health Order and suffers an Adverse Reaction?

The Australian Government is currently developing a scheme which will provide compensation to people whose livelihood is moderately or significantly impacted by an adverse reaction to the COVID-19 Vaccine. This will extend primarily to people who receive the Vaccine to comply with a Public Health Order. Where a person suffers an

adverse reaction to a Vaccine, the scheme will reimburse that person for hospitalisation, medical costs and lost wages.

Information regarding the Australian Government scheme compensating those who suffer an adverse reaction to the Vaccine can be accessed via the following link:

<https://www.health.gov.au/initiatives-and-programs/covid-19-vaccine-claims-scheme>

#### **4. EMPLOYER VACCINATION MANDATES**

An employer can only require their employees to be Vaccinated where:

1. A specific law requires their employees to be Vaccinated (e.g., Public Health Order as discussed above);
2. Vaccination is required by the specific employment contract or any other agreement in relation to the employment; or
3. Where a 'lawful and reasonable' employer direction is given (Employer Direction).

##### **4.1 Employer Directions**

Where no Public Health Order is made, an employer can still make an Employer Direction requiring their employees to be Vaccinated, provided that the direction is both lawful and reasonable.

The threshold for lawful and reasonable in relation to an Employer Direction is a determination to be made regarding the specific circumstances of that workplace, the nature of the work and the individual circumstances of employees themselves. FairWork outlined the following:

'Just because it may be lawful and reasonable to give a direction to one employee, that doesn't mean it will automatically be lawful and reasonable to give the same direction to another employee or to all employees.'

##### **4.1.1 Lawful**

An Employer Direction will be lawful where it complies with the relevant employment contracts and any State or Commonwealth law that may apply, including anti-discrimination legislation. An Employer Direction could be deemed to be discriminatory in nature if it requires someone to get Vaccinated who cannot for medical reasons. As such, it is important that an employer considers the possible exemptions that could be relevant under a proposed Employer Direction.

##### **4.1.2 Reasonable**

FairWork outlines the following factors for consideration in determining the reasonableness of an Employer Direction:

1. The nature of each workplace (for example, the extent to which employees need to work in public facing roles, whether social distancing is possible and whether the business is providing an essential service)

2. The extent of community transmission of COVID-19 in the location where the direction is to be given, including the risk of transmission of the Delta and now Omicron variants among employees, customers or other members of the community
3. The terms of any Public Health Orders in place where the workplace is located
4. The effectiveness of Vaccines in reducing the risk of transmission or serious illness, including the Delta and Omicron variants (find out more at the Department of Health website)
5. Work health and safety obligations (find out more at Safe Work Australia website)
6. Each employee's circumstances, including their duties and the risks associated with their work
7. Whether employees have a legitimate reason for not being Vaccinated (for example, a medical reason)
8. Vaccine availability to employees

These considerations of reasonableness lead to a four-tiered system classifying employees:

1. Where employees are required as part of their employment duties to interact with people with an increased risk of being infected with COVID-19 (for example, employees working in hotel quarantine or border control).

It is very likely that a Public Health Order exists, therefore an Employer Direction is very likely to be reasonable.

2. Where employees are required to have close contact with people who are particularly vulnerable to the health impacts of COVID-19 (for example, employees working in health care or aged care).

It is very likely that a Public Health Order exists, therefore an Employer Direction is very likely to be reasonable.

3. 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).

Where no community transmission of COVID-19 has occurred for some time in the area where the employer is located, an Employer Direction is less likely to be reasonable.

Where community transmission of COVID-19 is currently occurring or has recently occurred in an area, and an employer is operating a workplace in that area that needs to remain open to provide essential goods and services, an Employer Direction is more likely to be reasonable.

4. Where employees have minimal face-to-face interaction as part of their normal employment duties (for example, where they are working from home).

An Employer Direction is unlikely to be reasonable.

A workplace is likely to have a range of employees in different tiers. Furthermore, the tier an individual falls into may change over time. As a result, it is not likely to be reasonable to extend a single, uniform Employer Direction to all employees.

It is also important to note that a determination of reasonableness considers all relevant circumstances. Therefore, this generalised tier system is only a guide, as there may be situations where no tier adequately reflects the circumstances of an employee.

#### **4.2 Workers Compensation Considerations**

Australia's workers' compensation system is a 'no fault' system, meaning the employer will be liable for injuries to employees during the course of their employment, regardless of if the employer is in any way at fault (in most circumstances). Therefore, if an employee were to contract COVID-19 while in the course of employment, it can be inferred that they would be entitled for workers' compensation payments for the period in which they would be unable to work. There have been no workers compensation claims to support or reject this assertion.

There is an evidentiary issue for employees claiming workers compensation for contracting COVID-19, as in the circumstances of widespread community transmission it would be very difficult to be sure if the virus was contracted in the course of employment.

This has been suggested as the reason behind more expedient implementation of mandatory Vaccination policies for fly-in-fly-out workers. It will be significantly easier for a FIFO worker to show that they contracted COVID-19 while in the course of employment as they have no contact outside of their employment for long periods of time.

#### **4.3 Employee's Privacy Considerations**

The Office of the Australian Information Commissioner and State and Territory Privacy Commissioners and Ombudsmen have produced the following universal privacy principles to support a nationally consistent approach to solutions and initiatives designed to address the ongoing risks related to the COVID-19 pandemic.

These high-level principles provide a framework to guide a best practice approach to the handling of personal information (such as an employee's Vaccination status) during the pandemic by government and business.

1. The collection of personal information should always be limited to the minimum information reasonably necessary to achieve a legitimate purpose
2. Information that is required to be collected for a specific purpose related to mitigating the risks of COVID-19 should generally not be used for other purposes
3. Reasonable steps must be taken to protect Australians' personal information from misuse, interference and loss, and from unauthorised access, modification or disclosure. In line with community expectations, personal information should be stored in Australia.
4. Personal information should be destroyed once it is no longer needed for the purpose for which it was collected.
5. Australians' personal information should be protected by an enforceable privacy law to ensure that individuals have redress if their information is mishandled, either the Privacy Act 1988 (Cth) or a state or territory privacy law

### **5. RECENT CASE LAW DEVELOPMENTS**

As with many of the legal impacts of COVID-19, there is a very limited number of judgements that can be used to determine how the courts are likely to interpret the framework outlined above. The primary judgement to be analysed at this time is the decision of the Fair Work Division of the Federal Court in November 2021 in the matter of *Cox v DP World Brisbane*.

## **Cox v DP World Brisbane Limited [2021] FCA 1335**

### ***Facts***

- DP World is a port terminal and supply chain operator that notified all employees that they would be required to be Vaccinated should they wish to continue employment with DP World.
- This action was brought by all the employees of DP World who refused to be Vaccinated and as a result were stood down without pay (the Applicants)
- The Applicants sought from the court
  - Restraining DP World from terminating the Applicants' employment; and
  - That each Applicants weekly wages would continue to be paid until their contract was validly terminated.

### ***Judgement***

- The various types of employment undertaken by the Applicants were as follows:
  - *Terminal Work* – Employees were consistently in close contact with each other and would also have close contact with members of crews of the vessels that dock at the port. These crews could be from various other countries
  - *Machinery / Crane Operators* – Limited exposure to others, however, could have multiple workers in a small cabin for extended periods of time
  - *Clerical Work* – Mostly office based with limited exposure to others, however any of the employees detailed above can enter the office at any time
- The COVID-19 risk assessment undertaken by DP World outlined the key factors for requiring Vaccination being:
  - Significant disruptions had been experienced at DP World facilities as a result of COVID-19 outbreaks in these facilities
  - DP World provides an essential service given the nature of its work being critical to supply chains
  - NSW Government treated Vaccinated and unvaccinated exposees differently in relation to isolation requirements
  - Stevedores had priority to receive the Pfizer Vaccine and as such Vaccination was readily available to all DP World employees
  - Public Health Orders in Victoria and Western Australia mandate Vaccinations for stevedores
- The risks identified in the risk assessment are valid and support the assertion that a Vaccination mandate is necessary to protect both the employees and the business
- It is likely that the Vaccination Mandate is reasonable, but the matter will proceed to trial for substantial determination in the case of each individual applicant
- It is likely that it will be impossible to order reinstatement of an employment contract as a remedy
- Trial is scheduled to be for the 20<sup>th</sup> and 21<sup>st</sup> of December 2021

### **Key Takeaways**

- The threshold for the validity of an employee Vaccination Mandate is whether the Employer's Direction is lawful and reasonable
- The nature of employment varies between employees, and therefore any decision in relation to the legality and reasonableness of a Vaccination Mandate must be made in relation to each employee's individual circumstances
- It's unlikely that the court will order the reinstatement of an employment contract as a remedy for an employee terminated for failing to comply with a Vaccination Mandate. This suggests that the remedy likely to be awarded to employees terminated pursuant to an illegal Vaccination Mandate is compensatory damages

### **BHP Mt Arthur Coal Mine Dispute**

In October 2021, 80 BHP employees at the Mt Arthur coal mine were stood down without pay pursuant to BHP's Vaccination Mandate. The primary union representing the coal miners (CFMEU) are challenging the Vaccination Mandate in the Fair Work Commission claiming it was both unlawful and unreasonable. BHP maintains that it owes a duty of care to its employees and the Vaccination Mandate was necessary for their protection.

This matter is ongoing and as such there is no judgement to be analysed at this time. The outcome of this dispute is likely to provide employers with more direction regarding the circumstances in which Vaccination Mandates will be found to be legal and reasonable by the courts. The hearing is scheduled for December 2021.

## **6. EMPLOYER'S CHECKLIST**

The steps an employer may consider taking when issuing an Employer Direction include:

1. Conduct a Risk Assessment of the Business in Relation to COVID-19
  - The risk profile of the company has been relevant during litigation
  - A well-documented risk assessment could be used to support a claim that an Employer Direction was lawful and reasonable
2. Classify Employees
  - Use the tiers outlined in 4.1.2 as a guide to classify employees
  - Employees can be considered in groups where appropriate
  - Document the reasons for the classification of each employee/group to be documented and provided those reasons to each employee
3. Allow Consultation with Employees Regarding their Classification
  - Employees individual circumstances are critical to the determination of whether an Employer Direction is lawful and reasonable
  - Consulting with Employees regarding their circumstances and how they may relate to the classification of the employee allows for those circumstances to be heard and documented
4. Issue Employer Direction
  - Employer Direction to be issued mandating Vaccinations for those employees for which it is likely to be both lawful and reasonable to mandate Vaccinations

## **7. CONCLUSION**

For all your queries and concerns about employer Vaccination Mandates, please don't hesitate to call Janette Tavelli (0417 926 155), Michael Sonter (0419 900 299), or another team member on 08 9218 8588.

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