NATIONAL

No Jab, No Job?

Can employers make vaccines mandatory in the workplace?

Mandatory vaccination in workplaces has been a contentious talking point recently as the vaccine becomes more widely available. Overseas, private companies across the USA are rapidly implementing 'no shot, no pay' policies.[1] Last month, SPC and Qantas Group made headlines by becoming the first Australian companies to mandate vaccines for all workers.[2]

At a State level, vaccinations have been made mandatory for workers in quarantine, healthcare, aged care, security, and other frontline employment.[3] However, for all other workers, the National Cabinet has stated that vaccines should be 'voluntary and free'[4] And the Fair Work Ombudsman has warned employers to tread carefully around anti-discrimination laws and the issuance of lawful and reasonable directives, leaving the onus of creating a workplace vaccination policy squarely at the feet of the retail employer. Last month, MGA advocated for our members on this issue at a roundtable with Senator Michaelia Cash. MGA believes that Members are essential businesses and supermarket retail staff are frontline workers, and therefore should be prioritised for COVID-19 vaccinations.

Are Members permitted to mandate a COVID-19 vaccine for workers?

Put simply: yes, though at a risk. If your policy is challenged, you may have to defend it in court.

Under State health and safety legislation, employers are obliged to ensure the health and safety of their employees and to minimise risks in the workplace.[5] This includes eliminating, so far as reasonably practicable, the risk of employees and customers contracting COVID-19. Members could therefore justify a vaccination policy by reason of protecting their workforce and their customers.

However, Members must also ensure that the policy is:

- **'Lawful and reasonable'**
- **Not in conflict with anti-discrimination legislation; and**
- **Abides by COVID-19 communication guidelines from the Therapeutic Goods Administration ('TGA').**

'Lawful and reasonable'

You must ensure that your directions to employees are both lawful and reasonable with regard to the circumstances. Retail has been an essential service during the pandemic, remaining operational at risk to the health of employers and employees alike.

Under the Fair Work Ombudsman's (FWO) 'tier system' guideline, whether it is 'reasonable' to mandate vaccinations depends on the level of interaction with particular individuals and must also be assessed on a case-by-case basis. When considering what is 'reasonable', you must keep in mind the nature of the workplace, the risk of transmission, health and safety obligations, each worker's individual circumstances, and whether the worker has any legitimate reason not to be vaccinated. This guidance will likely be difficult to apply in practice. Members are encouraged to contact the MGA Legal and IR team for assistance.

Anti-discrimination

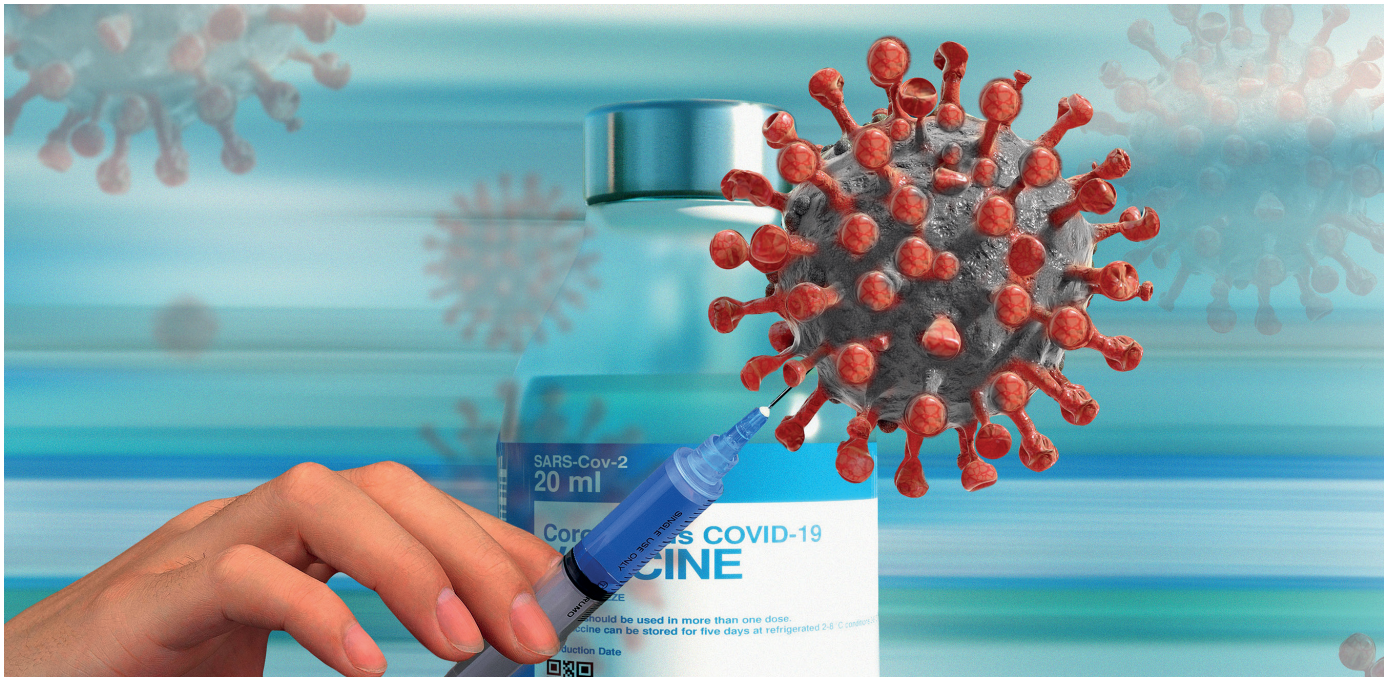
You must also consider, as always, any discriminatory effect your policy may have. Federal and State legislation both prohibit discrimination based on certain attributes. [6]

However, you may be able to discriminate if it is reasonably necessary to protect the health and safety of any person or the public generally.[7] If you wish to make vaccinations mandatory, you must also prove how this health and safety exception applies.

TGA Guidelines

The TGA has strict rules for communicating vaccination information, such as requiring that any messaging does not contain a brand name or a statement that vaccines have no side effects.[8] You must be aware of these rules if you wish to communicate a policy to your workers.

The TGA has also permitted employers to offer rewards to fully vaccinated employees, including store vouchers, discounts, and even cash or alcohol. For example, SPC has offered their workers



paid vaccination leave and 2 days' special leave to recover from any ill effects of the vaccine.

Watch this space

Lastly, you may not necessarily need a vaccination policy to achieve high levels of vaccination among workers. An abattoir in Central Queensland has 94% of its workers fully vaccinated against COVID-19, by simply promoting the vaccine among staff and encouraging them to speak with their doctors. [9]

Whether a Member should implement a vaccination policy should be determined on a case-by-case basis. For now, MGA advises to 'watch this space' with as governmental advice and guidance evolves. For the moment, MGA advises that Members should continue to encourage employees to speak to their doctors for information about getting vaccinated.

For more information about COVID-19 vaccinations and the workplace, please visit https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations

[1] https://www.forbes.com/advisor/personal-finance/cover-letter-resume-vaccine-card-no-shot-no-pay-for-some-workers/

[2] https://www.abc.net.au/news/2021-08-05/spc-first-australia-company-to-mandate-covid-vaccine-staff/100351492

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

[4] https://www.pm.gov.au/media/national-cabinet-statement-11

[5] Work Health and Safety Act 2011 (NSW) s 19; Work Health and Safety Act 2011 (Qld) s 19; Occupational Health and Safety Act 2004 (Vic) s 21; Work Health and Safety Act 2011 (ACT) s 19; Work Health and Safety Act 2012 (SA) s 19; Work Health and Safety (National Uniform Legislation) Act 2011 (NT) s 19; Occupational Safety and Health Act 1984 (WA) s 19; Work Health and Safety Act 2012 (Tas) s 19.

[6] Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 2010 (Vic); Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1992 (NT); Equal Opportunity Act 1984 (WA); Discrimination Act 1991 (ACT).

[7] https://www.humanrights.vic.gov.au/resources/explainer-mandatory-covid-19-vaccinations-and-your-rights/

[8] https://www.tga.gov.au/communicating-about-covid-19-vaccines

[9] https://www.abc.net.au/news/rural/2021-08-06/teys-australia-abattoir-surpasses-90pc-workforce-vaccination/100355474

Should you require any assistance please contact

MGA's Legal and Industrial Relations
team on
1800 888 479 *(option 1)*