

Can Australian employers require employees to have a COVID-19 vaccination?

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In the absence of any express contractual right or government regulation, Australian employers can only direct employees to be vaccinated against COVID-19 if it is considered a reasonable and lawful direction. Whether it is reasonable and lawful to direct an employee to be vaccinated against COVID-19 will depend on the industry in which the employee works and the job performed by the employee. In most cases, it will not be a reasonable and lawful direction. If the direction can be regarded as reasonable and lawful, an employer can take action against the employee for non-compliance up to and including the termination of employment. Employers should bear in mind any rights the employee has to an unfair dismissal, discrimination or adverse action remedy under Australian law.

Government regulation is unlikely given the federal government's vaccination policy states that the COVID-19 vaccine is not mandatory.

The best that employers can do is encourage employees to be vaccinated through information programmes and making vaccinations easily available. For example, by arranging for the vaccination to be administered to employees at work.

In some industries where employers operate in a high-risk environment for COVID-19 transmission (for example, aged care), it may be considered reasonable and lawful to direct an employee to have the vaccination but this will depend on circumstances such as the prevalence of the COVID-19 risk at that time. Employers should also be conscious of any particular objections from employees to obtaining the vaccination because of health or religious reasons.

Can employers refuse to hire someone who is not vaccinated?

An employer in Australia can decide not to offer employment to an applicant for employment who has not been vaccinated but employers should be aware of the risks of refusing employment to a person who has not had the vaccination for health or religious reasons.

Can employers keep a database recording who has had the vaccine?

Most employers in Australia are aware that under the Australian Privacy Act 1988 (Cth) (the **Privacy Act**) businesses have less stringent privacy obligations to their employees because of the "employee records" exemption. Specifically, private sector employers' handling of employee records in relation to current and former employment relationships is

exempt from the Australian Privacy Principles in certain circumstances. The exemption applies if the organisation's act or practice is directly related to:

- Either a current or former employment relationship between the employer and the individual
- An employee record held by the organisation relating to the individual

Not all personal information that an employer holds about an employee will be considered an employee record however if it is not sufficiently related to their employment - and so that is something that employers will need to bear in mind if they want to keep database records of who has had the vaccine. Legal advice should be sought.

Another issue to consider is that contractors, subcontractors and volunteers are not covered by the employee records exemption but will instead be governed by the restrictions in the relevant contract. Irrespective of whether the employee's vaccination record falls within the employee records exemption under the Privacy Act, employers should be cautious about making any public statements such as "all our staff are vaccinated". Not only might this be misleading if not true, but other risks may arise. For example, it does not accord with the Australian Privacy Principles requirements under the Privacy Act to use personal information about an employee's health status (that is, their vaccination record) which is collected for the purpose of managing health and safety for another purpose such as for the purpose of the employer's marketing / promotional efforts. Again – this is a complex area and legal advice should be sought before any public statements are made.

Next steps

Whether employers can direct employees to be vaccinated against COVID-19 is one of several issues employers currently face in the ongoing management of employees through this pandemic. Other issues include:

- Employees who want to continue working from home (**WFH**) and employers who want them to return to work
- Long term considerations for a WFH workforce
- The health and safety issues arising from people working in the office
- What happens if there are further outbreaks and border closures such as that experienced before the end of the 2020 year in Australia

Join Nicholas Linke and Ruth Nocka from our National Employment and Safety team who will provide information about some of the risks facing employers and suggest practical ways for setting up systems to address the risks and for approaching individual issues as they arise.

If you need any legal advice about privacy laws, please contact Robyn Chatwood or your usual Dentons privacy team contact.

Upcoming CPD Webinar

Dentons Employment and Safety team will be hosting a webinar on Tuesday 2 March 2021 on "Back to the office? 2021 workplace issues" including COVID-19 vaccinations, managing working from home arrangements, changes to the Fair Work Act, and more.

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