

MANDATORY VACCINATION – AN ONGOING COMPLEX ISSUE FOR EMPLOYERS

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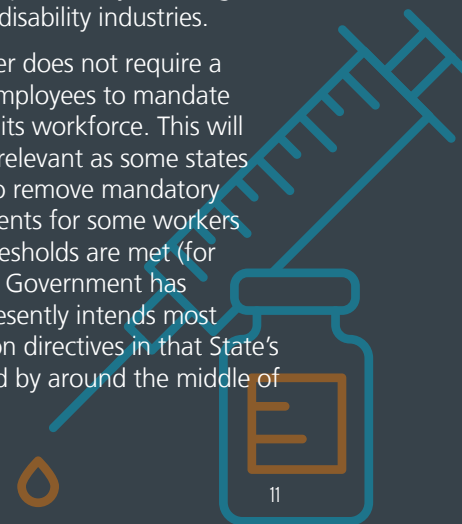
Vaccination for COVID-19, and particularly mandatory vaccination, is a hot topic in the workplace that is constantly evolving. Currently, there is a great deal of complexity for employers, particularly for those that operate across multiple states/territories or multiple industries. These complexities arise largely because:

1. each of the states/territories has a different regime of public health directions or public health orders (collectively, **PHOs**) regulating what parts of employers' workforces are required to be vaccinated for COVID-19 in order to continue working at certain locations lawfully. These differences are particularly stark between the "COVID-free" states and territories (i.e. NT, WA, SA, Tas and Qld) and the states with ongoing outbreaks that are existing in "COVID-normal" (e.g. ACT, Vic, NSW) and will continue to evolve as COVID-free areas shift towards a COVID-normal strategy as and when borders open up and remain open.
2. the PHOs are constantly changing based on a variety of factors including the status of domestic and international borders, the vaccination level of the population and the size of any outbreak (including the presence of the Delta variant or more recently, the Omicron variant).
3. the rights of employers to enforce mandatory vaccination, absent a PHO, is contingent, in part, on the location of the particular employee and the nature of any outbreaks in that location. Given the status of COVID outbreaks can change very dramatically in

a very short period of time and the starkly different circumstances in each state and territory, this creates an element of uncertainty around employers' lawful rights on this issue.

As a result, the legal landscape on whether and how an employer can mandate vaccination amongst its workers is difficult to predict. Notwithstanding this unpredictability, the following general guidance about mandatory vaccination remains true across the country:

1. In circumstances where a PHO requires a worker to be vaccinated to perform work lawfully, it is generally lawful for an employer to mandate vaccination (subject to appropriate exceptions). Employers are generally required to enforce the requirements of those PHOs or face significant criminal consequences such as significant fines. At the time of this publication, all states and territories have PHOs in place, which require vaccination for COVID-19 for at least part of the workforce in that state or territory, particularly in the aged care, healthcare and disability industries.
2. However, an employer does not require a PHO to apply to its employees to mandate vaccination amongst its workforce. This will become increasingly relevant as some states and territories start to remove mandatory vaccination requirements for some workers when vaccination thresholds are met (for example, in NSW the Government has announced that it presently intends most mandatory vaccination directives in that State's PHOs will be removed by around the middle of December).



3. The implementation of a mandatory vaccination requirement for employees may be a reasonably practicable control measure for minimising the risk of COVID-19 in the workplace, if reasonably practicable, and can therefore assist an employer or person conducting a business or undertaking (PCBU) to meet its obligations under occupational health and safety/work health and safety (WHS) legislation.
4. An employer implementing a mandatory vaccination requirement without a PHO applying must ensure that it complies with any duty to consult it has under WHS legislation and any applicable industrial instrument (e.g. modern award, enterprise agreement). A failure to comply with consultation obligations can mean that an employer's mandatory vaccination requirement is not reasonable and therefore is not legally enforceable. This was recently considered in the case of *CFMMEU & Anor v Mt Arthur Coal*. We published [Keep your coal: mandatory vaccination still lawful and reasonable; but consultation is key](#) that explores the implications of this decision in more detail.
5. Employers operating in certain industries have an elevated risk profile related to COVID-19 due to the vulnerability of customers, patients or others who workers may come in close contact with. For example, in the healthcare industry, the close proximity generally required for the administration of healthcare and the increased vulnerability of patients to significant complications associated with COVID-19, mean that imposing mandatory vaccination is far more likely to be considered a reasonably practicable control measure. This is particularly so given the comprehensive evidence that vaccination for COVID-19 is a proven and effective measure for controlling the risks associated with the spread of COVID-19.

The Sparke Helmore Workplace team has been assisting employers and PCBUs across Australia in managing issues related to COVID-19, including:

- advising clients on how to manage employees who refuse to be vaccinated for COVID-19
- navigating compliance with PHOs in each state/territory, including determining which (if any) apply to all or parts of a business and its workforce
- developing and implementing policies requiring vaccination for COVID-19 separate to the requirements in PHOs
- acting on behalf of employers in relation to claims brought by employees dismissed due to non-compliance with a direction to be vaccinated for COVID-19, and
- advising employers or PCBUs in relation to their compliance with WHS obligations related to vaccinated and unvaccinated workforces and emerging from COVID-19 lockdowns generally.

Our SA team also recently published an article, [Mandatory Vaccination Policies in South Australia](#) on the current rules around mandatory vaccination in South Australia.

If you have any questions, please don't hesitate to contact Partner [Jackson Inglis](#) and Partner [Sam Jackson](#).

[Disclaimer: As circumstances in respect of mandatory vaccinations in Australia are changing frequently, the article above needs to be read in context as at the date of publication.]