



# TO VAX OR NOT: WORKERS' RIGHTS IN THE AGE OF COVID

It's a legal minefield in workplaces as companies juggle compliance and health and safety demands with the employee's right to say no. Story by **Ewin Hannan**

Reluctant to return to the office after working from home during 2020?

Leading workplace lawyers believe white-collar employees who refuse to take the COVID-19 vaccine could use this opposition to argue the case for working remotely.

"Say, for example, somebody is working at a university and is instructed they can't come to work unless they are vaccinated," says University of Adelaide law professor Andrew Stewart. "They say, 'I don't want to get vaccinated. I'm not convinced it's necessary. I'm worried there might be effects so I want to do my job from home which I'm perfectly able to do as we established in 2020'.

"The argument will be, OK, it's lawful and reasonable for you to tell me I can't come to the workplace unless I get vaccinated, but it's not fair for you to refuse to allow me to stay unvaccinated and do my job from home which I can do reasonably well.

"There is going to be an ongoing argument about the willingness or capacity of employers to have some, but not all, employees allowed to work from home and arguments about vaccination are going to perhaps

bring some of those situations to a head."

This scenario is one of many being war-gamed by employers and lawyers as they contemplate the industrial relations consequences of the vaccine rollout across Australian workplaces.

In short, workplace vaccination in the era of COVID-19 shapes up as a legal minefield for business in 2021 and beyond.

"Navigating through the IR, WHS, anti-discrimination and workers' compensation issues will be very difficult for employers, particularly those who decide to make COVID-19 vaccinations mandatory in their workplaces," Australian Industry Group chief executive Innes Willox tells *The Deal*.

"Given all of the legal issues, most employers are likely to take the view that they will not go beyond encouraging employees to be vaccinated unless a public health order is issued making vaccines compulsory in a particular sector."

Willox says some key legal questions facing business are in what circumstances would it be lawful and reasonable for an employer to direct its employees to



be vaccinated; what liability does a company have under workplace health and safety laws if it decides to make vaccinations mandatory or not mandatory; what are the rights of an employee under anti-discrimination laws to refuse vaccinations, such as on the basis of religious beliefs; and what can an employer lawfully do if an employee refuses to comply with a direction to have a vaccination.

Michael Byrnes, partner at law firm Swaab, says an employer mandating an employee be vaccinated for COVID-19 will need to justify the direction, and show the vaccination is necessary for the employee to perform the inherent duties of their position safely.

But he says the infectious nature of COVID-19 should allow a much broader range of employers to mandate COVID-19 vaccinations for staff, subject to genuine medical exemptions, than occurred for influenza vaccinations.

Rather than just being mandatory for employees working with the sick, elderly or vulnerable, he says employers could make it compulsory for workers who are in contact with members of the public such as the retail and hospitality sectors.

Where an employee declines on philosophical or political grounds to be vaccinated, employers could refuse to allow them to come to work. If the worker, as expected, objects to not being paid, the employer could dismiss them, exposing the business to legal action.

Lawyers expect employers will face unfair dismissal or adverse action claims as well as legal action under discrimination laws. "Certainly, I expect there will be examples of that, but at the same time, you may have instances in which you have got a particularly useful employee and the employer is put in a really, really tricky situation," Stewart says.

"The employer thinks, 'I don't want to get rid of this person but on the other hand if I give them an exception, if I let them come to work, do I then have other employees getting concerned? What if something happens, and it's argued I'm not complying with my health and safety obligations to everyone else?' It's a tricky area.

"Perhaps the most likely way this is going to come up will be if the employee is ultimately sacked, and then they argue that it's a harsh or unjust or unreasonable dismissal. Right away then we are getting into broader territory than just what's a lawful instruction or not. These are not straightforward legal questions. The lower the actual health risk, the easier it is to make some kind of an argument that it's not reasonable for employers to refuse to accommodate what you might call conscientious objectors."

While there might be a test case around the politics of anti-vaccination, Stewart says legal action is more likely to come from an employee "who's not an anti-vaxxer but somebody who has got genuine concerns about the necessity for having the vaccine in a country with very little transmission, and against the background of a continuing degree of debate about how effective the vaccine is in preventing transmission".

"I suspect that if we are going to see a test case, it's going to be more in that territory, the kind of oppo-

sition which isn't based on political philosophy but arguments that are actually based in the science and around the uncertain state of science," he says.

In a recent unfair dismissal proceeding involving an in-home-care worker's refusal to be vaccinated against influenza, the Fair Work Commission noted the parallels between the worker's refusal and the impending rollout of COVID-19 vaccinations.

"In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction," Commissioner Jennifer Hunt said.

"Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.

"It is not inconceivable that come November 2021, employers of men engaged to play the role of Santa Claus in shopping centres, having photos taken around young children, may be required by their employer to be vaccinated at least against influenza, and if a vaccination for COVID-19 is available, that too.

"The employer in those scenarios, where they are not mandated to provide social distancing, may decide at their election that vaccinations of their employees are now an inherent requirement of the job. It may be that a court or tribunal is tasked with determining whether the employer's direction is lawful and reasonable, however in the court of public opinion, it may not be an unreasonable requirement. It may, in fact, be an expectation of a large proportion of the community."

Industrial Relations Minister Christian Porter says due to the states and territories having the largest area of legal responsibility for workplace safety, "it is expected state health orders will be the primary tool to drive vaccination rates, just as they did last year to require influenza vaccinations in aged care facilities".

Accusing the federal government of sitting on the sidelines and leaving the states to make the hard decisions, Stewart says there is no legal impediment to the Commonwealth legislating to require vaccination either in all workplaces or at least the great majority. "It's preferable there be a national policy with guidance about exceptions because there will be arguments," he says.

Resources and energy employers are calling for a better approach from governments. The Australian Mines and Metals Association says a nationally coordinated, uniform approach to vaccination requirements "is of paramount importance".

"Fly-in-fly out industries would be particularly disrupted if we see the states and territories go it alone, as they have done with border closures and quarantine matters," AMMA chief executive Steve Knott says.

"Resources employers are pushing for as much certainty from governments as possible. For example, it would be immensely helpful if states and territories mandated that employees working on critical resources infrastructure, or in certain types of close-proximity work, had to be vaccinated.



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“It should not be left to employers alone to confront the legal and ethical issues arising from requiring persons to be vaccinated. We’re all in this together—government, business, the workforce and broader community—but ambiguity does not work in our sector.”

*Ewin Hannan is The Australian’s workplace editor*