



21 AUG, 2021

Job debate throws up workplace test case

Sydney Morning Herald, Sydney

Page 1 of 3

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EXPLAINER

By law, employers can issue ‘reasonable’ directions to workers. Will a compulsory COVID-19 injection qualify? **Nick Bonyhady** reports.

First came SPC, the food manufacturing giant, then Qantas, the national carrier. By mid-month, both household names had decided to mandate vaccines for their workforce, by November for frontline staff at each.

Employers’ organisations including Ai Group, which represents about 60,000 businesses, say Qantas and SPC are just the vanguard. Mining industry representative Steve Knott, who runs the Australian Resources and Energy Group, agrees. Virgin Australia has flagged it is looking at a similar proposal.

One thing uniting these first movers is that they are major companies with well-resourced legal and human resources teams. They need them; the rules around mandatory coronavirus vaccines are complex and untested.

SafeWork NSW, for instance, tells firms they “may require workers to be vaccinated for COVID-19 if reasonably practicable to do so”, which sounds positive. But Safe Work Australia, which co-ordinates work on health and safety nationally, advises: “It is unlikely that a requirement for workers to be vaccinated will be reasonably practicable.”

So, can businesses mandate vaccines? Can governments intervene? Does the proposed hospital worker job order work the same way?

ARE MANDATORY VACCINES LEGAL?

Broadly, yes, according to lawyers and law professors. Josh Bornstein, who heads union law firm Maurice Blackburn’s employment practice, is of that view, as is barrister Ian Neil, SC, who typically represents the country’s largest businesses in big disputes.

Bornstein said early this month: “Due to the risks posed by the Delta variant, more employers are likely to

require their employees to be vaccinated. Such directions are likely to be legal, provided that there is

proper consultation, vaccinations are available and workers with health complications are accommodated.”

But there has yet to be a test case on mandatory COVID-19 vaccinations, leaving the exact consequences of the law uncertain. Three analogous challenges – brought by workers in aged care and childcare who were told they had to have flu vaccinations and disagreed – have all failed. SPC, the first major brand to announce mandatory vaccination, will require staff to have both doses by the end of November. That leaves the issue live.

All business and workers can go on are the general principles in employment law. Employers can issue “lawful and reasonable” directions. They have to take “reasonably practicable” steps to keep staff safe. Both could be used to mandate vaccines but it hinges on what is “reasonable” for a particular business, in a particular place, at a particular time. All guidance from industrial regulators comes back to that.

“REASONABLENESS”: WHAT DOES IT MEAN?

The advantage is that it allows courts and tribunals to tailor rulings to an

individual business so that office workers who are perfectly productive at home in Adelaide don’t have to be treated the same way as miners operating in close quarters in the Hunter. The downside is that legal minds can do no more than make an educated guess about how the test will apply to a given situation. When the courts are looking to see whether a business’s decision to mandate a vaccine complies with the law, they will look at things such as how easily staff can socially distance (harder in a



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Page 2 of 3

childcare centre) and where the business is located (safer in Perth than Melbourne). Vulnerabilities among the firm's customers matter, too, as does the availability of vaccines.

It's on the basis of such factors that the Fair Work Ombudsman has broken down businesses into these four tiers:

Tier 1 work, where employees are required to interact with people with an increased risk of being infected with coronavirus (hotel quarantine or border control).

Tier 2 work, where employees have close contact with people who are particularly vulnerable to the health impacts of coronavirus (health care or aged care).

Tier 3 work, where there is interaction or likely interaction between employees and other people such as customers, other employees or the public (stores providing essential goods and services).

Tier 4 work, where employees have minimal face-to-face interaction (where they are working from home).

ARE THERE WAYS AROUND IT?

Yes. Public health orders mandating vaccines, which have been used sparingly – such as for construction workers from a small number of council areas in Sydney, and aged care workers – generally trump industrial law. On August 20, the NSW government revealed it planned to use a public health order to require jobs for all health workers. But even public health order mandates are easier said than done. Despite agreement by national cabinet in June to require aged care workers to be vaccinated by September 17, less than half have been fully vaccinated so far.

Some states have not yet put in place the actual orders requiring vaccinations and the federal Department of Health has flagged there could be exemptions for regions where vaccine supply is thin.

As well as public health orders, employers and unions can include rules on vaccinations in the pay deals that cover about 2 million workers, or in individual contracts. It's also easier for

firms to require that new hires be vaccinated than existing staff because they don't have the same protections that employees do at that stage.

WHAT ABOUT DISCRIMINATION, AND HUMAN RIGHTS?

These could be issues, especially if employers don't offer exceptions to staff with legitimate complaints.

Advice from the solicitor-general, Stephen Donaghue, QC, provided to Prime Minister Scott Morrison indicates that requiring staff to be vaccinated is unlikely to be discriminatory because state and federal law protects only certain characteristics, such as sex and race.

Vaccination status itself is not directly protected. But discrimination doesn't have to be direct. If a person is disadvantaged by a vaccination mandate in a way that can be traced back to a protected characteristic, they may be able to make a complaint.

But that isn't the end of the matter. Victorian Equal Opportunity and Human Rights commission legal

director Emily Howie last week said there were additional thresholds. "For discrimination, the test is whether it's reasonably necessary to keep the workplace safe," Howie said. "And for the [Victorian Charter of Human Rights and Responsibilities], if it's a human rights issue, whether it's necessary and proportionate to impose that vaccine requirements on employees."

Businesses, though generally only those with more than \$3 million in annual revenue, are also limited by privacy laws if they want to ask for vaccination status. Employees have a choice about freely consenting, and the collection of the information has to be "reasonably necessary", too.

WHAT ARE OUR GOVERNMENTS DOING?

Not much so far, although, as the NSW government decision to require jobs in hospital staff shows, that could change quickly. Morrison and Industrial Relations Minister Michaelia Cash have both been adamant: the government will not generally



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Page 3 of 3

mandate vaccines. “We’re not suggesting that businesses should be mandating vaccines to their employees,” Morrison said on August 13. “We’re not suggesting that.”

Instead, they have left the political hot potato up to individual businesses, on the basis that the law as it stands is robust enough to let the businesses that have a good case to mandate jobs to do so.

With unionists opposed to mandatory vaccinations outside what health professionals deem absolutely necessary, and conservative Coalition MPs raising concerns about religious and general “freedom” objections, state governments and Labor have also been wary of entering the debate.

For instance, when asked by a journalist on August 17 whether Labor supported mandatory vaccinations, party leader Anthony Albanese did not answer directly, instead repeating his concerns about supply.



On August 18, when Qantas boss Alan Joyce announced his company’s policy, he made clear: “If other employees decided that they’re not taking the job, then they’re deciding, I think, that aviation isn’t the area for them.”