



L A W Y E R S

SPECIAL CLIENT ONLY EVENT

COVID, VACCINATIONS & THE WORKPLACE



PRESENTED BY

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The environment...

- We are slowly beginning to get an answer from the State Government → the FWO is thankfully now at least getting out of the way too even if a Health Order does not issue
- Ultimately it is OUR safety obligation to determine.

Key message: narrative, narrative, narrative!

What could possibly go wrong...??

- Workplace Manslaughter – Victoria
- WHS/OHS obligations generally
- Government health orders
- Discrimination
- Privacy
- Bullying / adverse action
- Medical retirement
- Unfair dismissal

NB: New Services Australia “no fault” scheme for vaccine injury.

The start and end of everything - Safety

- Our anchor point for our narrative is safety.
- BUT – need to be careful about what the vaccine does and does not protect / achieve
- Statutory obligations in terms of risk of exposure and transmission
- Risk assessment
- Hierarchy of control measures (including vaccination) in managing risks
- Decisions on mitigation of risk
- Reveal the way forward → you are now ready to:
 - ✓ Announce
 - ✓ Consult with employees on the risk assessment and proposed measures
 - ✓ Train and inform employees on what our approach will be going forward with timetable for implementation (cf. “reasonableness” which we will come to...!)

New employees - contract of employment

- It seems to us that 4 key terms need to be added to contracts
 1. Irrevocable consent to vaccinations and immunisation
 2. Irrevocable consent to biometric data gathering, including testing
 3. Irrevocable consent to collection of sensitive health information
 4. Maintenance of licences and permits and Government requirements as an inherent requirement
- Policies and procedures to support
- RISK – indirect discrimination → “reasonableness” anchored in the safety narrative in terms of what the homework tells us
- NB: We have amended the BusVic standard templates to reflect the above

Existing employees - lawful and reasonable direction

- Implied employer right at common law to issue a lawful and reasonable direction and employee to comply
 - In *Michael King v Catholic Education Office Diocese of Parramatta T/A Catholic Education Diocese of Parramatta* [2014] FWCFB 2194, at [26] “It is well established that an employee has an obligation, implied by law, to comply with the lawful and reasonable directions of his or her employer.”
 - What is lawful and reasonable cannot be determined *en masse*
- FWO – 4 risk profile tiers
 - Tier 1 – employees required as part of duties to interact with people with increased risk of being infected
 - Tier 2 – employees required to have close contact with vulnerable health impacted people
 - Tier 3 - employees likely to interact with customers and others in the normal course of work
 - Tier 4 – employees with minimal face to face interactions in normal duties

“Lawfulness” of the direction

- The task is to break down our populations – for example:
- By function:
 1. Subject to public health orders → eg. drivers soon?
 2. Subject to client / customer / supplier access restrictions → eg. visiting suppliers?
 3. Managers – subject to needing to set an example!
- By location:
 1. Front line workers → eg. drivers
 2. Site office workers – contact with front line workers and/or shared facilities with front line workers → eg. depot staff, particularly control/operations rooms
 3. HQ workers – back of house, accounts, managers and clerical
 4. Work from home
- Safety homework needs to be multi-faceted to account for different populations

“Reasonableness” in issuing direction

- “Reasonableness” is always a mix of many and varied considerations about which educated minds may differ → but not “perfect”
 - Vaccine supply
 - Employee reason for not vaccinating
 - Government recommendation and Health Orders/Directions
 - Extent of community transmission
 - The duties and risk associated with the work and the industry (eg. cf NSW bus drivers or V-line staff)
 - Control methods available and suitable in managing the risk and hierarchy of controls
 - Medical exemptions and conscientious objectors
 - Fairness weighing up considerations of the business and the individual and any particular personal circumstances.
 - Relocation to alternative work activities or job modification
 - Individual worker situations – eg. self management mechanisms available

Other Considerations – a staged approach

1. Government Orders/Directions
 - Mandated vaccination in certain industries and jurisdictions eg residential aged care and childcare and disability workers
 - Not necessarily reasonable though!
2. Client site entry requirement – visiting client sites that have a mandate in place
→ eg. we may have such a requirement for people visiting our depots
3. Next most exposed front line workers
4. Remaining site workers with interaction with front line workers
5. Managers
6. Remaining BOH white collar / HQ Staff → you people are just the rump end!

Checklist prior to any disciplinary process (including dismissal) for refusing to be vaccinated

1. Consult with genuine opportunity for feedback
2. Clearly explain direction (if to be given) - why it is being directed, when the requirement is effective and any exemptions and the process for dealing with issues such as refusal to follow direction.
3. If an employee refuses to comply with the direction without reasonable excuse eg no vaccination booking available – provide opportunity to respond under the disciplinary process
4. Warnings issued with clear notification of impact on future employment and issue direction again
5. If employee persists with refusal, provide opportunity to respond prior to termination of employment, against backdrop of previous warnings including further written warning. Consider issues of proportionality and harshness in all the circumstances prior to termination

What approaches are being taken out there?

- Vaccination availability at sites for take up. Incentivised approach with Cth no fault COVID-19 vaccine claims scheme effective 6 September. BHP Billiton in NSW trialling on-site vaccination prior to mandatory direction
- Qantas employee survey on mandatory vaccination
- Paid time off to get the vaccination and in the event of side effects to encourage take up
- Worksite rapid antigen testing where persons not vaccinated
- Notifying suppliers/contractors /customers of site requirements to gain access to site to protect staff health
- Ensure range of suitable control measures and protocols in place for managing risk are operating effectively - face mask wearing, sanitisation, QR code scanning, COVID safety plan , authorised worker permit requirements, etc.