



## Can Employers require Employees to get vaccinated?

***As the COVID-19 vaccines are roll out, attention is turning to whether employers can require employees to be vaccinated. While all employers have a duty of care to their employees, they also have the right to issue lawful and reasonable directions to them. However, what is considered lawful or reasonable invariably differs from workplace to workplace.***

### Employer's Duty of Care

Under work health and safety laws, employers have a duty of care to ensure the health and safety of employees and others, so far as is reasonably practicable. Throughout the pandemic, employers have become accustomed to managing the health and safety risks associated with COVID-19 through the implementation of various control measures. Whilst none of these control measures would be as invasive as a vaccine, they would also not be as effective (and presumably, long lasting) at protecting the health of the individual vaccinated.

From a health and safety perspective, there can be an obvious benefit if an employee receives the vaccine, as it will help protect against the virus. However, an employer's duty of care to ensure health and safety 'so far as is reasonably practicable' necessitates consideration of the various ways in which a risk can be managed, the availability and suitability of such control measures and whether they are lawful and reasonable.

### What Is Lawful and Reasonable?

A term requiring employees to comply with the lawful and reasonable directions of their employer is implied into every contract of employment. This is a key feature of the employer/employee relationship and distinguishes an employee from an independent contractor.

An employer's directive made by an employer to its employees to be vaccinated against COVID-19 will be lawful if it concerns the employee's duties and involves no illegality. In most instances, a vaccination policy will meet this test. This leaves the question of whether or not it is reasonable for an employer to ask an employee to have such a physically invasive procedure that also involves the injection of a substance into the body? The answer will depend on whether a COVID-19 vaccination is necessary for employees to perform their core duties safely.

In past unfair dismissal cases involving proceedings brought by employees after their employment was terminated for non-compliance with the flu vaccination policies of their employers, the Fair Work Commission has made a number of rulings in favour of the employer. In these cases, the employees were either child care or aged care workers who had no health or medical grounds for refusing their employer's directive to have a flu vaccination, but did so for moral and/or philosophical reasons.

In these matters the Commission determined that the employer's vaccination policy was reasonable because of the nature of the employee's work, that is, the care of children or aged persons who were either too young to be



vaccinated or unable to be vaccinated or were more susceptible to the ravages of the flu. Arguably, the employer's policy was necessary to ensure that it met its duty of care with respect to those children and aged persons. These "nature of work" circumstances don't however occur in most workplaces, and accordingly the majority of employers would need the backing of a law to enforce a blanket COVID-19- vaccination policy on their employees.

## The Government's Position

In Australia, both the Federal and State Governments have broad powers to take action during a public health emergency and all have done so to date by adopting various measures during the Covid-19 pandemic. These have included border closures and public health orders in relation to "shutdowns" and restrictions to business and social activities.

However, while the Federal Government's stated position is to make getting the Covid-19 vaccine "as mandatory as possible" it has not legislated to make taking the vaccine mandatory.

Accordingly, without a public health order, or an express obligation under existing terms of employment supporting a requirement for vaccination due to the nature of work, most employers will not be in a position to direct employees to receive the COVID-19 vaccine.

***If you want to know more about an employer's duty of care and ability to issue lawful and reasonable directions to employees or require assistance with employment contracts, contact [Ken Gray](mailto:Ken.Gray@batemanbattersby.com.au) on 02 4731 5899 or email us on [commercial@batemanbattersby.com.au](mailto:commercial@batemanbattersby.com.au).***