

Article Information

Author: Joe Murphy

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Mandatory vaccinations - put to the test

Many businesses are facing a wave of compulsion to make sure that their staff are vaccinated when dealing with other companies and members of the public.

The Pressure

Many businesses that might otherwise have opted to support individual choice, are implementing pro-vaccination policies in their workplaces. Those that are yet to decide what to do, really need to be ready to do so, in the event that a critical partner, client or customer mandates that they will only deal with companies and businesses supplying a vaccine assurance over their staff.

These commercial pressures will start to affect less impacted jurisdictions like South Australia and Western Australia as time passes and restrictions lift, with the relative commercial pressures already hitting breaking point in many places east of the 145th meridian in Australia.

The commercial pressures of bigger companies mandating vaccines is gaining pace and this is having a flow on effect to businesses with public facing staff or where there is a risk that a business might need to shut down due to exposure and infection in their own ranks.

The Resistance

NSW Ambulance paramedic, John Larter, has launched proceedings in the Supreme Court of NSW to challenge his State Government employer's right to demand that he receive the COVID-19 vaccine before the NSW Government's public health order takes effect on 30 September 2021. Mr Larter is joined by up to 4 other plaintiffs who are seeking an injunction and other forms of relief from the Supreme Court of NSW.

Mr Larter has made it clear that this is about choice and not about any medical reason he might have had not to receive the vaccine. Mr Larter has also said there are a number of reasons he seeks the orders, that variously seek to neutralise the NSW State Government's ability to enforce public health orders requiring health workers to be mandatorily vaccinated.

Mr Larter & Co are due to have their matter heard imminently, but was not able to obtain an outcome before the vaccine deadline arrives, being 27 September 2021. A recent attempt to urgently subpoena the NSW Premier (to produce documents surrounding an admission she is alleged to have made about not having power to implement public health orders mandating vaccination) failed on the grounds of relevance.

Earlier this month a NSW Police officer launched legal action against the NSW Health Minister, Brad Hazzard MP, as a pre-emptive strike to challenge the NSW Government's right to compel its employees to receive the vaccine. Like Mr Larter, Senior Constable Belinda Hocroft (of the Dog and Mounted Police Unit) has openly declared her challenge is one based on principles and rights and not about any medical condition affecting her ability to receive the vaccine.

The prospects of these challenges are not clear and carry some speculation given Australian human rights laws, whether federal or state based, although it is expected that such prospects are reasonably limited.

No Guarantees

In a very recent decision, an employee who was sacked by an aged care employer for failing to comply with a requirement to be vaccinated, had her appeal to a Full Bench of the Fair Work Commission declined on the basis that leave to appeal was refused.

This is yet another in a line of decisions from the Fair Work Commission, backing employers' decisions to terminate based on vaccination policies not being complied with. The difference with this case is that, one of the members of the sitting Full Bench, Deputy President Dean, was critical of the majority decision (Vice President Hatcher & Commissioner Riordan) stating that she would have upheld the employee's appeal and she would have made a finding in her favour on the basis that she had done all that was required of her under the company's policy in place at the time.

However, the Deputy President then went further and has produced somewhat of a policy position on COVID-19 Vaccination Policies, on her own behalf, and she has indicated it is her view that:

- Vaccinations should be voluntary
- Mandatory vaccination cannot be justified in almost every workplace in Australia
- Testing is a viable alternative to vaccination for employers to deploy as a reasonably practicable measure
- There is no justifiable basis for employers to mandate COVID vaccinations in order to meet their work health and safety obligations
- It was highly likely that the employee's dismissal was in breach of the Disability Discrimination Act 1992 (Cth)
- Many 'vaccine-hesitant' individuals have been found to be well educated, work in health or care and have questions about the efficacy of the vaccines in stopping transmission and their safety generally
- *'All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia. It is an abhorrent concept and is morally and ethically wrong, and the antithesis [sic] of our democratic way of life and everything we value'*
- *'all Australians, including those who hold or are suspected of holding "anti-vaccination sentiments", are entitled to the protection of our laws, including the protections afforded by the Fair Work Act'*

The Deputy President has also:

- provided a critique of the NSW Government's basis for issuing public health orders mandating vaccinations, including that she is of the view that they are punitive, and should not be used in a way that suspends human rights during states of emergency or disaster; and
- offered some free legal advice to businesses in that *"it should be clearly understood that employers who mandate vaccinations will be liable for any adverse reactions their workers may experience, given this is a foreseeable outcome for some people"*.

Finally, the Deputy President wraps up her policy position by stating that *'one can only hope that the Majority Decision is recognised as an anomaly and not followed by others'*.

It is one thing to be a dissenting minority in a Full Bench decision of any court or tribunal, and another level of controversy to make the statements and matters raised by the Deputy President.

What the Deputy President didn't deal with was the commercial pressures referred to at the outset of this article. In circumstances where the vast majority of the business community are inclined or forced to consider full or partial vaccination policies due to commercial pressures, together with those in the community who are more concerned about catching COVID-19 while not vaccinated (thereby increasing the chances of hospitalisation and indeed death) and potentially spreading the disease to their elderly relatives or those who are immunocompromised, the asserted 'human rights' of opponents seem to pale in comparison.

Do the Right Thing

Businesses must do what is necessary, reasonable and lawful for their businesses and their communities.

There is always going to be a minority of workers who will object or be vaccine hesitant. It is important that the imposition of mandatory vaccinations for workers and others is implemented carefully and in compliance with any requirements (such as consultation).

Conclusion

Businesses need to engage with their staff to not only gauge their opinions but gain an understanding of the issues they will need to manage once a policy is introduced. It's important to obtain advice and support before embarking on the process above.

Do you need assistance with a workplace vaccine policy or want to make sure you're prepared to implement one in future? Contact a member of Piper Alderman's [Employment Relations Team](#) and stay tuned for our webinar featuring [Tim Lange](#) and [Joe Murphy](#), coming soon.

Key Takeaways

When faced with implementing a COVID-19 Vaccination Policy in the workplace, a high level summary of the approach businesses need to deploy, is:

1. not to automatically assume that mandatory vaccination for all staff is going to be a reasonable (and therefore, legally enforceable) position;
2. follow a proper process for engaging with workers and other stakeholders about the issue of vaccine policies in the workplace;
3. carefully consider any issues raised by workers and stakeholders, and any issues currently being contemplated publicly;
4. address all the concerns raised by any workers and/or stakeholders. This means considering the issues raised about the efficacy or otherwise of the various vaccines. Consultation must be genuine and there is no better way to demonstrate this than explaining to workers and stakeholders why a policy is to be introduced, even if there are no contrary views;
5. ensure any policy position is not so rigid that it is discriminatory in its coverage and terms; and
6. provide a copy of the draft policy for comment before it is implemented, and again genuinely consider any feedback, suggestions or objections before finalising the policy. Consultation might involve multiple meetings and staff communications.