

Article Information

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Mandatory Vaccine Policy Requirements: FWCFB provides vital guidance for employers

On Friday, 3 December 2021, a 5 member full bench of the Fair Work Commission (FWCFB), lead by President Justice Ian Ross, handed down a decision that provides some guidance and a degree of confidence for businesses looking to introduce a mandatory COVID-19 vaccination requirement as a condition of employment for entering the workplace and performing work.

The FWCFB decision is an important landmark decision for businesses that are presently engaged in the battle against COVID-19 and a number of resistant individuals that are fighting employer efforts to introduce reasonable mandatory vaccination requirements.

In short, the FWCFB ultimately found that Mt Arthur's mandatory vaccine policy had failed to meet the requirements for reasonableness as Mt Arthur had failed to properly consult with its employees prior to implementing the policy.

We always recommend getting advice, but we note that the FWCFB decision provides the following helpful guidance for some common problem areas and compliance requirements:

Vaccine Integrity and Efficacy

In practical terms, the FWCFB has accepted the following as uncontested and established on the evidence (matters that were agreed between the employers and union parties):

1. COVID-19 is a markedly worse disease than the flu.
2. COVID-19 presents a very real risk of serious illness and death.
3. The COVID-19 vaccines are effective at preventing symptomatic infection.
4. The COVID-19 vaccines substantially reduce the risk of serious illness or death.
5. The COVID-19 vaccines are safe and any adverse effects are usually mild and there is a much higher risk of developing serious complications and dying from acquiring COVID-19.
6. Unvaccinated individuals are more prone to infection from other unvaccinated individuals.
7. Other control measures (masks, social distancing etc) cannot substitute the constant protection or risk reduction provided by the COVID-19 vaccines.
8. Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.
9. Even with high vaccination rates in the community, COVID-19 will remain a significant hazard.

The above matters deal with a number of the major objections that have been repeatedly raised by employees in response to their employers seeking to introduce a mandatory vaccine requirement.

Bodily Integrity

The FWCFB has clarified that:

1. Employees do have a right to 'bodily integrity' and that right means that individuals cannot be forced to undergo a medical procedure without their consent.
2. The issue of bodily integrity alone is not enough to determine that a policy mandating vaccinations is not reasonable.
3. The issue of bodily integrity is a factor for employers, that must be weighed against other rights and relevant issues.
4. Employers must ensure that employees with concerns about bodily integrity are '*heard;... consulted and their views be taken into account*'.

Importantly, while the FWCFB and all parties acknowledged its existence and the need to give the issue of bodily integrity careful consideration, ultimately it was not considered by the FWCFB to be a reason that would prevent an employer imposing the requirement.

Reasonableness of the Mandatory Vaccine Requirement

Putting the consultation failures to one side, the FWCFB found that the following factors supported a finding that the mandatory vaccine requirement at the Mt Arthur mine was reasonable:

1. It is directed at ensuring the health and safety of workers of the Mine.
2. It has a logical and understandable basis.
3. It is a reasonably proportionate response to the risk created by COVID-19.
4. It was developed having regard to the circumstances at the Mine, including the fact that Mine workers cannot work from home and come into contact with other workers whilst at work.
5. The timing of its commencement was determined by reference to circumstances pertaining to NSW and the local area at the relevant time.
6. It was only implemented after Mt Arthur spent a considerable amount of time encouraging vaccination and setting up a vaccination hub for workers at the Mine.

The FWCFB stated that, had Mt Arthur satisfied The Commission that it had met its consultation obligations, '*the above considerations would have provided a strong case in favour of a conclusion that the Site Access Requirement was a reasonable direction*'.

Key Takeaways

Obviously the central issue in this case was the employer's failure to correctly consult in a way that satisfied the FWCFB that they had done all they were required to do under the *Work Health and Safety Act 2011* and the relevant enterprise agreement. The requirement to consult is paramount (as it always has been).

A summary of the principles centrally relevant for employers when considering whether they should implement a vaccine requirement in the workplace, includes:

- The proposed policy should be focussed on ensuring the health and safety of your employees and others who come into contact with your workplace/work.
- The implementation of a vaccine mandate must be proportionate having regard to the circumstances of the workplace and the prevailing conditions surrounding the workplace at the time.
- The views and opinions of all employees should be given careful consideration and, if there is disagreement, an explanation in at least some detail is likely to be necessary to ensure genuine engagement during consultation.
- Consultation should involve providing workers with all the relevant information at the time, including factors that are being considered as part of a risk assessment, any mitigating factors being considered and the rationale surrounding those factors.

If your company requires assistance in introducing a legally compliant COVID-19 policy and consultation obligations, or would like advice on the options available in relation to dealing with employees who are refusing to comply with your business' directions in relation to COVID-19, the employment relations team at Piper Alderman are here to assist you.