

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

Thursday 4 March 2021

*Professional Development and Networking for the
In-House Legal Community*

COVID-19 Vaccinations and the Law

Presenter: Bede Gahan, Partner

Ethically challenging issues

- Ethical issues are not new in employment law:
 - Drug testing:
 - Particularly in the late 1990s and early 2000s
 - Balanced personal liberties / privacy with work health and safety issues
 - Biometrics:
 - *Lee v Superior Wood Pty Limited* [2019] FWCFB 2946
 - Balances personal liberty / privacy with:
 - Convenience
 - Accurate and authoritative records
- Ethical issues regarding vaccination are not new:
 - Childcare / aged care workers
 - Attendance at childcare, welfare benefits
 - Family court issues where disputes over vaccinations

Agenda

- What we will be looking at this afternoon:
 - Is it legal to require that employees be vaccinated for COVID-19?
 - Considerations for managing a workplace where COVID-19 vaccinations are **not** mandatory
 - When should you mandate COVID-19 vaccinations?

Vaccinations and the law

Sources of the law

- Sources of legal compulsion:
 - Statute:
 - Most likely State / Territory public health laws
 - Employment determinations
 - Enterprise Agreements
 - Employment contracts / agreements
 - Directions / policies

Vaccinations and the law

Limitations

- Health limitations may arise due to:
 - Susceptibility to known complications
 - Potential reactions to ingredients of the vaccine
- Practical considerations regarding proof of health issues:
 - Medical certificate?
 - Independent medical assessment?

Vaccinations and the law

Limitations

- Discrimination laws?
 - Disability
 - Religion / ethno religion
 - Political opinion
- Practical considerations:
 - No major religion prohibits vaccinations (e.g. no religion is exempted from “no jab, no pay / play”)
 - Is it a matter of work health and safety, operational convenience or personal liberty (i.e. political opinion)?
 - Conscientious objectors (approx. 1 per cent of the population)

Vaccinations and the law

Limitations

- Conclusions:
 - There are some valid limitations
 - Ensure there is a process for considering exceptions
 - Require exceptions to be evidence-based
 - Ensure those administering the policy understand its organisational importance (i.e. how it protects / serves the organisations interests)

Non-mandatory vaccination

Encouragement etc.

- How will your workplace encourage vaccination?
 - Encouragement / messaging / policy
 - Leave arrangements
 - Recording of those who are vaccinated
 - Recognition for those that get vaccinated

Non-mandatory vaccination

Social distancing

- Will you continue to maintain social distancing?
 - If not, what new / increased risks will that pose (e.g. will that change the employee's role)?
 - Will you continue remote working arrangements?
 - Will those who are not vaccinated be required / encouraged to socially distance?

Non-mandatory vaccination

Responding to COVID-19 in the workplace

- What happens if COVID-19 is identified in the workplace?
 - Will those **not** vaccinated be excluded from the workplace?
 - If so, for how long?
 - If so, will they be:
 - Required to work from home?
 - Paid while excluded from the workplace?
 - Will cleaning of the workplace be undertaken?

Non-mandatory vaccination

Those who contract COVID-19

- What if someone contracts COVID-19 in the workplace?
 - Workers compensation issues
 - In the context where health impacts can be serious, to what extent ought the “fault” lie with the individual

Mandatory vaccination

Key considerations

- Decisions ought to be evidence-based:
 - Reflects the way in which industrially contentious practices have been introduced into workplaces (e.g. drug and alcohol testing)
 - Reflects approaches in family law cases regarding vaccination of children

Mandatory vaccination

Key considerations

- Most analysis / comment centres on views as to the inherent requirements of the role:
 - Inherent requirements are:
 - Essential to the role (without them, the role would not be the same)
 - Does not include “theoretical” or “potential” requirements
 - Identified by reference to:
 - The terms of the employee’s employment contract
 - The function the employee performs
 - The organisation of the workplace

Mandatory vaccination

Chivers v State of Queensland (Queensland Health) [2014] QCA 141

- The background facts:
 - Employee was a nurse working in a hospital
 - The employee had a medical condition that was exacerbated working night shifts
 - The hospital concluded that it was unable to permanently accommodate her restrictions
 - The employee resigned to take up day-shift employment
 - The employee alleged discrimination on the ground of her disability

Mandatory vaccination

Chivers v State of Queensland (Queensland Health) (cont)

- The Queensland Court of Appeal held:
 - Genuine occupational requirements include:
 - The physical tasks of the employee's role
 - The function the employee performs within the employer's undertaking (i.e. the work environment)
 - Working night shifts was a genuine occupational requirement
 - Short-term incapacity could (and ought to) be accommodated
 - The hospital could not be expected to accommodate her condition indefinitely

Mandatory vaccination

Chivers v State of Queensland (Queensland Health) (cont)

- The key message:
 - The organisation of your workplace is relevant
 - How does the organisation of your workplace increase risks – e.g. maintaining social distancing?

Mandatory vaccination

Glover v Ozcare [2021] FWC 231

- The background facts:
 - The employee was a care assistant
 - The employee's duties involved visiting people in their homes and administering care (she did not work in Ozcare's aged care residential facilities)
 - Ozcare updated its policy to make influenza vaccinations mandatory
 - The Applicant advised Ozcare she could not have the vaccine due to a severe adverse reaction she had when she was seven years old, in the Philippines
 - Ozcare advised the Applicant that vaccination was now an inherent requirement of her role
 - The employee was removed from the roster
 - The issue for the FWC was whether the employee was dismissed

Mandatory vaccinations

Glover v Ozcare (cont)

- The FWC observed (Commissioner Hunt):

In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.

Mandatory vaccination

Glover v Ozcare (cont)

- The FWC further observed:

*It is not inconceivable that come November 2021, employers of men engaged to play the role of Santa Clause in shopping centres, having photos taken around young children, may be required by their employer to be vaccinated at least against influenza, and if a vaccination for COVID-19 is available, that too. The employer in those scenarios, **where they are not mandated to provide social distancing**, may decide **at their election** that vaccinations of their employees are now an inherent requirement of the job.*

Mandatory vaccination

Arnold v Goodstart Early Learning Limited [2020] FWC 6083

- The background facts:
 - The employee was a group leader with responsibility for the care of children
 - In 2020, Goodstart determined that it would make flu vaccination mandatory
 - Goodstart issued a direction to all employees requiring them to be vaccinated by 29 May 2020
 - The direction provided for exemptions on health grounds
 - The employee objected to being vaccinated on grounds did not relate to her health
 - Goodstart terminated her employment on the ground that she had refused to comply with a lawful and reasonable direction
 - The decision related to an extension of time application

Mandatory vaccination

Arnold v Goodstart Early Learning Limited (cont)

- The FWC (Deputy President Asbury) held:

While I do not go so far as to say that the Applicant's case lacks merit, it is my view that it is at least equally arguable that the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason. Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants.

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