

Mandatory vaccination arrangements in workplaces

Yesterday, Parliament passed into law the Covid-19 Response (Vaccinations) Legislation Bill, which is a significant piece of legislation concerning mandatory vaccinations, and has important employment law implications. Note that (despite how it has been described in some media reports) the legislation does not relate to the traffic light system – that has yet to be released.

This update is to explain some key issues for employers who may be considering imposing a mandatory COVID-19 vaccination requirement.

There are two categories of vaccine mandates:

- those required by law under existing or future government orders (e.g. certain border workers, education and health workers); and
- where an employer determine its employees should be vaccinated. This article deals with these types of mandates.

Employers may elect to mandate vaccinations

The starting point is an employer is not required to impose a mandate. An employer has an obligation under the Health and Safety at Work Act 2015 to provide a safe workplace, but this does not require a mandate to be put in place.

Risk Assessment

If an employer wants to put one in place, the key is to undertake a risk assessment of the roles in the workplace. There are two ways to perform a risk assessment:

- One way is to use the "assessment tool" which will be prescribed by Regulation. No Regulations are yet in force, and we have not seen any draft, but we expect the Regulations will reflect what is already on the WorkSafe website.

Our expectation is that this form of risk assessment will do the following:

- Require assessment of the risk of four principal factors, being: the size of the workplace; proximity to other workers; length of time in proximity to other workers; and whether there are vulnerable people at the workplace (e.g. minors or other workers who cannot be vaccinated), and
 - Enable vaccinations to be mandated where there is a high risk in relation to three of those four factors.
- The other way is for an employer to do its own risk assessment, using its own formula for assessing the risks.

We expect that if an employer later relies on its risk assessment to take steps in relation to an employee, it will need to be able to demonstrate that its risk assessment was robust. The assessment tool that will be regulated should therefore be regarded as a minimum requirement. Many large organisations, including those that have publicly stated they are imposing a mandate, have undertaken extensive risk assessments, including obtaining specialist public health advice.

Whichever type of risk assessment is undertaken, there will need to be comprehensive consultation about it with employees. This includes worker representatives for the purpose of HSWA. In doing so, employers must strictly comply with the Privacy Act 2020, in particular, by not disclosing any personal information of any individual.

What happens where vaccinations are mandated?

If the employer determines an employee must be vaccinated to perform their work, they must give the employee "reasonable written notice" specifying the date by which the employee must be vaccinated. What is reasonable is not defined, but we expect that this period of time would be at least 3 working days.

Employers must allow employees paid time off during work hours to be vaccinated. Pay is at the rate they are earning on the day. The only reason for refusing such time off is if it will unreasonably disrupt an employer's business or the performance of the employee's duties.

Termination of employment

Where the employee does not become vaccinated within the required timeframe, the new legislation then imposes specific termination of employment requirements. These requirements apply to both mandates imposed by law, and employer mandates.

Importantly, *after* giving the notice requiring vaccination but *before* giving notice of termination of employment, all other reasonable alternatives to termination must have been exhausted. This is likely to be a high bar. In practice, this will require comprehensive consultation about individual circumstances, including whether there are reasonable redeployment alternatives, or any possibility of obtaining any applicable exemptions. These discussions will need to occur in good faith.

If reasonable alternatives have been exhausted, and the employee does not get vaccinated by the stated time, notice of termination of employment can be given. This is either 4 weeks' paid written notice, or the period of notice in the employee's employment agreement, whichever is the longer. The parties may agree to terminate the employment and pay out the balance of the (minimum 4 week) notice period.

In the absence of agreement to terminate, the notice period will effectively need to be dealt with as garden leave, although an employee can still be required to work, for example, from home.

Before the end of that 4 week (or longer) period, the employee can choose to get vaccinated. If they do, the notice that has been given is cancelled and is of no effect. However, this cancellation does not apply if doing so would "unreasonably disrupt the employer's business".

We are unsure how this aspect of the cancellation is going to work in practice, but it will be a question of fact in each case. It may apply, for example, if the employer has taken steps to hire the employee's replacement.

As with any other termination, any entitlements on termination (like outstanding holiday pay) must be paid as normal.

At the end of all of this, it is still a termination of employment, and an employee can bring a personal grievance.

While the government has promised simplicity with mandates, we think this new legislation is anything but. But the key for any employer wishing to go down the mandatory vaccination path is to follow robust processes, and engage comprehensively with affected employees

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