

## Can employers force their employees to be vaccinated?

New Zealand employers still continue to face challenging issues related to the COVID-19 pandemic. While the focus for employers in 2020 was coping with lockdowns and changing Alert levels, the vaccination rollout in New Zealand has created a new set of nuanced issues for employers to grapple with.

### **Can employers force employees to be vaccinated?**

New Zealand has secured enough doses of the Pfizer vaccine to cover the entire population. However recent studies have shown that up 20-22% of people in some regions are hesitant to taking the vaccine, at least right now. This poses the question of what can an employer do if they want their full workforce vaccinated, but some employees refuse? Would dismissing them be justified?

The obvious starting point is that the Government has not made vaccination compulsory for all New Zealanders. However the Minister for Covid-19 Response recently issued the Covid-19 Public Health Response (Vaccinations) Order 2021 (“the Order”) which makes it illegal for certain types of workers (for example, port workers and airline crew members) to carry out work in certain places unless they are vaccinated.

It could be argued that an employer who compels an existing employee to be vaccinated is attempting to unilaterally impose upon the employee a new condition of employment. Any employment agreement can only be varied if the parties agree, and the variation is recorded in writing. However an employer that employs workers in one of the areas covered by the Order can rightfully claim they are breaking the law if they continue to employ an unvaccinated person in that role. Employers could also seek to introduce a new company policy making vaccination of employees mandatory. Whether the imposition of such a policy would be fair and reasonable would depend on the nature of the work the employees are involved in – the Australian Fair Work Commission has recently ruled that the imposition of such a policy for childcare workers was justifiable.

If an employee refuses to be vaccinated it could also create a genuine redundancy situation where the employer could rightfully terminate the employment providing there were no other areas of the business where the employee could be

redeployed to. Of course, any employer undergoing a restructuring process must adhere to their good faith obligations and ensure a fair and robust process if followed. The employer would also have a compelling argument that they must require those workers be vaccinated where this was necessary to meet their obligations as a PCBU under the Health and Safety at Work Act. Those obligations include taking all practicable steps to protect the health and safety of other employees.

WorkSafe has recently issued guidance saying that employers faced with this prospect should first undertake an assessment of the particular role to ensure it is one that must be performed by a vaccinated person. If workers in that role are required to undergo regular testing under the Covid-19 Public Health (Required Testing) Order 2020 then this would go a long way towards satisfying that requirement.

The question of whether an employer could dismiss an employee on disciplinary grounds for refusing to get vaccinated has not yet been tested in the employment courts. If the employee’s role was covered by the Order and they refused to be vaccinated then terminating the employment may still not necessarily be fair and reasonable. For example, the employer would have to consider other alternatives at its disposal, such as deploying the employee to another area of the business. In the case of healthcare workers, who are not all covered by the Order, the employee might have a legitimate argument that it is not reasonable to require them to be vaccinated because they have alternative forms of protection against contracting the virus, such as PPE.

It was revealed last week that nine Customs workers (including four from the same port) have lost their employment after refusing to take the vaccine. While the precise details of the situation are not known yet (it is contended that some workers did not have their fixed term agreements extended) the counsel for the workers has indicated an urgent application is being made to the Employment Relations Authority. The decision will certainly have implications for employers right across New Zealand.

What is almost certain is that employers operating in non-safety sensitive areas (for example retail and professional services) are not going to be able to lawfully require their

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employees to be vaccinated if the businesses can lawfully operate within relevant Covid alert restrictions. We would however encourage employers to point out the positive effects of vaccination and direct employees to Ministry of Health website if they require more information to make an informed decision.

### **Can employers force employees to disclose their vaccination status?**

Again, this is likely to depend on the nature of the role performed by the employee. Employers of border or port workers are legally obliged to ensure that unvaccinated workers are not working in places like ports and Customs. A logical extension of that is that they will need know which of their employees are vaccinated and which are not. These employers will also be able to justify asking when workers were last tested as they are now required to enter this information in a national database.

Employers operating in other industries who demand to know the vaccination status of their employees are likely to run into legal issues. There are many reasons why an individual may not wish to be vaccinated other than mere scepticism of the science, including objections based on religious grounds.

An employer who forced an employee to disclose their vaccination status and drew a negative inference from that could face a claim of discrimination under the Human Rights Act. Citizens also have rights under the Bill of Rights Act, including the right to refuse medical treatment, and vaccines are included within the definition of medical treatment. Discrimination claims could also result if an employer refused to hire a prospective employee because they were unvaccinated or excluded unvaccinated people altogether from consideration for a role.

### **Travel bubbles – what can employers do if employees are left stranded overseas?**

With the much-deliberated Trans-Tasman “travel bubble” now finally operating, employers are turning their attention towards employees who may wish to travel. One of our largest employers, Vodafone, recently created waves when they cautioned employees who were contemplating travel that they could be dismissed if they were stranded in Australia. Part of their concern was not all of their

employees would be able to work remotely from overseas if they encountered travel disruption, or from overseas.

As with all important employment-related decisions, the employer must act as a fair and reasonable employer, given all the circumstances. Take for example, an employee who travelled to Perth under the Trans-Tasman bubble but was unable to travel back to NZ because Perth went into a lockdown. Simply declaring the employment as terminated straight away will obviously not be justifiable. Nor could the employer treat the employment as abandoned as the employer knows the whereabouts of the employee and the employee has never intended to abandon their work.

The employer would have to first attempt to negotiate a solution with the employee, for example allowing them to take unpaid leave and/or use up any remaining accrued annual holidays until they were able to return to work, or allowing the employee to work remotely from overseas, if feasible. If those options were not available, whether a termination was justifiable would include assessing in each individual case such factors as the period of the lockdown and the impact of the employee’s absence on the needs of the business and on other colleagues.

Employers always have the discretion to decline a request by an employee for annual holidays, however this decision must also be fair and reasonable. If an employee has a high annual holidays balance and genuinely wishes to travel (for example to visit family overseas) it would be difficult for an employer to reasonably decline the request on the grounds of a risk the employee might get stranded.

### **Summary**

In summary, just because we have entered the Covid-19 recovery phase it doesn’t mean employers are free of having to consider Covid-related employment issues.

We recommend employers communicate regularly with employees about the vaccination and travel issues to ensure staff are aware of what is required of them. It may also be an opportune time to update company policies, such as leave policies.

Please contact Glenn or Jeremy if you wish to discuss any of the issues covered in this article.

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