

Overview

Mapien is Australia's largest independently owned bespoke Specialist People Consultancy

With more than 50 employees, they have offices in Brisbane, Perth, Sydney & Melbourne.

Jamie Paterson is an Associate Director at Mapien in Melbourne and he spoke on this important topic.

Insightpay has worked with Mapien on projects to bring a combination of strategic HR skills & expertise.



Can employers mandate the Covid Vaccine for employees?

Employers want to know what they can do, and Government at all levels are unsure of whether mandating vaccinations is lawful. It was likened to an awkward school dance – with no one wanting to make the first move. There are a number of aspects to this debate

Human Rights and Constitutional considerations, require a balance to be maintained, for example:

- With your body - there is a requirement to administer health care with consent only
- Freedom of speech - and freedom of choice are key considerations
- Governments also have a role - in protecting human rights and protecting the health of people

The ACTU best embodies the union stance, only supporting mandates based on expert medical advice:

- Health Care Workers – for obvious reasons to keep patients safe from harm
- Meat Workers – and industries where transmission is a very significant issue

This does provide more guidance in terms of clear and logical medical imperatives. In summary, employers “*can give lawful and reasonable direction*” to employees within the workplace.

Looking at Legal Precedents

So now let's look at whether mandating the “Jab” is “lawful and reasonable”.

The case law so far has involved employers mandating that their employees get the flu jab, but they all backed it up with sound reasoning associated with their employment.

That is ... employees who work with, or engage with, vulnerable people. In all three cases we see here (see the box), this has been the reason.

This is why the employer was successful in these cases and in their decision to terminate the individual's employment, which was deemed to be *not unfair*.

The Relevant Case Law

The Case Law at this stage is all related to the flu shot only:

- *Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156*
- *Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818*
- *Glover v Ozcare [2021] FWC 2989*

Treatment Plant Case Study

One webinar attendee had significant Covid transmission concerns for their sewage treatment workers.

Their own advice suggested open cuts could be a big OH&S issue.

They asked. "Could these workers be instructed to get the Jab?"

Jamie worked through the detail using this framework:

- *Was there a demonstrated employee OH&S risk?*
- *Is there a public health risk eg: from an outbreak?*
- *Is there medical evidence to support the request?*
- *Was there a range of other logical measures in place?*
- *Was the response in line with State Gov. legislation?*

Obviously only a start.

But it was an instructive and popular application of these principles for all involved.

What is Lawful and Reasonable Direction?

We know that employers can give lawful and reasonable direction to employees.

But of course, the question here is... is mandating the Covid Vaccine Jab "lawful and reasonable"?

If an employer wants to mandate the jab, then there needs to be an adequate connection to the work the employee is engaged in.

Some employers will use the OH&S argument – we have an obligation for the health and safety of all employees, and this will have some credibility in the short term.

Pressure from society to vaccinate is likely to increase

In the long term, these types of scenarios may be challenged:

- Qantas – No Jab No Fly
- Cinemas – No Jab No Film
- Child Care – No Jab No Play

The Best Option for Employers

Have in place a pragmatic, flexible Covid Workplace Policy.

Look at all avenues to protect employees – QR Code, Hand Sanitiser, Work from home policy, staggered work teams, disposable cutlery.

If possible, align your approach with those accepted already by society and/or State and National Legislation.

Think it through carefully, and get advice if need be.