

CAN EMPLOYERS DIRECT EMPLOYEES TO BE VACCINATED?

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CAN EMPLOYERS DIRECT EMPLOYEES TO BE VACCINATED?

What is a lawful management direction?

1. As long ago as 1938 the High Court of Australia in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* held that:

*“If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, **the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable**...But what is reasonable is not to be determined, so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled. When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the contemplation of the contract of service”¹*

2. The above case established that there is a term implied by law in all contracts of employment that requires an employee to obey lawful and reasonable commands or directions of an employer provided those directions “*fall within the scope of the contract*” of employment, they involve “*no illegality*” and are “reasonable”.
3. To be lawful, a direction does not require a positive statement of law endorsing an action; a direction can be classified as lawful provided that it does not involve illegality and “*falls reasonably within the scope of service of the employee*”².
4. It has also long been established that the power of employer to command or direct an employee in the performance of their work and their conduct in the workplace is lawful and an essential component of the employment relationship.

What constitutes a reasonable management direction?

5. As set out above, the right of an employer to direct their employee is implied at common law and stems from the ability of an employer to exert control over their employees. Employees, therefore, have a duty of obedience which requires an employee to comply with any lawful and reasonable direction given by a superior³, or otherwise contained in an employer’s policies and procedures⁴. A breach of this

¹ (1938) 60 CLR 601

² See *Grant v BHP Coal Pty Ltd (No 2)*[2015] FCA 1374, at [142], endorsing the decision of the Full Bench in *Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027, at [110].

³ *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* [1938] HCA 44, (1938) 60 CLR 601, at 621.

⁴ *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159 (3 July 2008) at [342]

implied duty constitutes a breach of contract; this misconduct may provide the basis of a valid reason for dismissal.

6. Conversely, where an employee fails or refuses to comply with a direction that is either unlawful or unreasonable, no cause of action manifests. Failure to follow such a direction does not provide a valid reason for dismissal.⁵
7. If there is no express term in the employment contract, award or enterprise agreement governing the employment relationship which specifies the obligation to follow a reasonable management direction, then the implied duty will operate only to the extent that it is not contrary with the express terms contained within the instrument governing the employment⁶.
8. The question of what is reasonable is a question of fact and balance; it is not material that a “*better*” direction may exist; a determination of what is reasonable must be assessed against factors relevant to the employment relationship⁷.
9. The direction must relate to the subject matter of the employment, which is informed by the “*nature of the work the employee is engaged to do, the terms of the contract, and customary practices or the course of dealings between the parties.*”⁸

Is a direction requiring an employee to vaccinated lawful?

10. In the current pandemic environment a pressing question for all employers has become “Is it lawful and reasonable to direct that all their employees be vaccinated against the Covid19 virus?”
11. Unfortunately, at this time, there is no generic answer to this question that can be applied across all workplaces and in all workplace situations and relationships.
12. Because the question of whether a direction to an employee is lawful and reasonable means that the “*nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument... governing the relationship*”, (which may be either a common law contract and/or an award or an enterprise agreement) needs to be taken into account then until such time as the Federal Government legislates accordingly then the answer will depend on the circumstances of each employer's workplace.
13. Importantly what the case law establishes is that a direction to vaccinate must fall within the scope of service of the employee.

⁵ See *Ms Bou-Jamie Barber v Goodstart Early Learning Ltd* [2021] FWC 2156 at [343]

⁶ See *Australian Colliery Staff Association v Queensland Mines Rescue Service* [1999] FCA 395, (1999) 88 IR 78 at [48] where an express stipulation as to location limited the ability of the employer to reasonably direct the employee to another site.

⁷ See *Construction, Forestry, Mining and Energy Union v Glencore Mt Owen Pty Ltd* [2015] FWC 7752, at [8]-[11].

⁸ See *Briggs v AWH Pty Ltd* (2013) 231 IR 159, at [8].

Do the statutory duties of employers or employees enable a Vaccination Direction?

14. Section 19 of the Commonwealth *Work Health and Safety Act 2011* specifies;
- (1) A person conducting a business or undertaking **must ensure**, so far as is reasonably practicable, **the health and safety** of:
- (a) workers engaged, or caused to be engaged by the person; and
- (b) workers whose activities in carrying out work are influenced or directed by the person;
- while the workers are at work in the business or undertaking.
- (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that **the health and safety of other persons is not put at risk** from work carried out as part of the conduct of the business or undertaking.
- (3) **Without limiting subsections (1) and (2)**, a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
- (a) the provision and maintenance of a work environment without risks to health and safety; and...
- (c) the provision and maintenance of safe systems of work; and...
- (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
- (f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- (g) that **the health of workers** and the conditions at the workplace **are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business** or undertaking.
15. It is clear from the above that an active and positive duty is imposed on an employer, where it is reasonably practicable to do so, to prevent the health and safety of not just workers but also others, including visitors to the workplace, being put at risk.
16. As the High Court said in *Work Health Authority v Outback Ballooning Pty Ltd*⁹;
- “Although the requirement of reasonable practicability in s 19(2) is formulated in similar terms to a standard of care in ... negligence, it is a higher duty than the common law. Section 19(2) is part of a strict liability duty to “ensure” a result. The offence is based upon risk, not outcome.”

⁹ [2019] HCA 2 at [162] – [163]

17. It seems only logical therefore that the duty to ensure the health and safety of workers and others extends to preventing the risk of Covid 19 infection in the workplace and therefore may, where it is reasonably practicable to do so, include but does not necessary require a lawful and reasonable direction that employees be vaccinated in order to not adversely affect the health and safety of other persons in the workplace.
18. Section 28 of the Commonwealth *Work Health and Safety Act 2011* specifies;
- “While at work, a worker must:*
- (a) take reasonable care for his or her own health and safety; and*
- (b) take reasonable care that his or her acts or omissions do **not adversely affect** the health and safety of other persons; and*
- (c) comply, **so far as the worker is reasonably able**, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and*
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been **notified** to workers.*
19. On this basis alone, it can be argued that an employee has in the scope of their employment a duty, where they are reasonably able to do so, to comply with reasonable and lawful direction by an employer to be vaccinated in order to not adversely affect the health and safety of other persons in the employers workplace.

Do the statutory duties of employers or employees enable Covid testing?

20. The above requirement that *“the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business”*¹⁰ is often relied upon by an employer when requiring drug and alcohol testing of employees who are suspected of being under the influence of drugs and alcohol in the workplace, particularly in dangerous occupations, and potentially placing other employees at risk of harm.
21. When referring to the requirement in the *Occupational Health and Safety Act 2004* (Vic) that *“An employer must, so far as is reasonably practicable (a) monitor the health of employees of the employer; and (b) monitor conditions at any workplace under the employer’s management and control”*¹¹ not dissimilar to section 19(3)(g) of the now Commonwealth Act set out above, the Federal Court when considering the issue of whether an employer in New South Wales could lawfully require a reinstated employee to undergo a medical examination before reporting for work on reinstatement held;

*“It is in my opinion, essential for compliance with the above duties, that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee’s continuing fitness to undertake duties. Likewise, an employer should, **where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to***

¹⁰ See s.19(3)(g) of the *Work Health and Safety Act 2011* (Cth)

¹¹ See s.22(1) of the *Occupational Health and Safety Act 2004* (Vic)

*attend a medical examination to confirm his or her fitness. This is likely to be particularly pertinent in dangerous work environments...The question whether it is reasonable for an employer to request an employee to attend a medical examination will always be a question of fact as will the question of what are reasonable terms for the undertaking of the medical examination. The matters will generally require a sensitive approach including, as far as possible, respect for privacy. Nevertheless, I assume that there now should be implied by law into contracts of employment terms such as those set out in the first two sentences of the preceding paragraph (being sections 22(1)(a) & (b) above), on the basis that such terms pass the test of 'necessity' accepted by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450."¹²*

22. In light of the above, where there is a genuine indication that an employee is suffering from apparent Covid symptoms it would be lawful and reasonable for an employer to direct that the employee undertake a Covid-19 test in order "*that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers.*"¹³
23. Of-course before simply ordering that employees undertake Covid testing it will be necessary that an employer first consult with employees¹⁴ publish a sufficiently detailed Covid testing policy setting out when employees will be required to undertake testing, the conditions under which such testing is to be performed and ensure they adhere to the terms of that policy as in *Shannon Green v Lincon Logistics Pty Ltd T/A Lincon Hire & Sales* (2017) FWC 4916, an inadequate drug and alcohol policy and its incorrect implementation allowed an employee to succeed in their claim for unfair dismissal.
24. Where possible employers should also consider varying current contracts of employment and amending future employment contracts or renegotiating enterprises agreement to obtain the consent of employees to Covid testing.

What considerations need to be taken into account when issuing a Vaccination Direction?

25. In assessing whether an employer might issue a blanket direction to their entire workforce or alternatively to an individual worker to be vaccinated the recent cases of *Ms Bou-Jamie Barber v Goodstart Early Learning Ltd*¹⁵, *Kimber v Sapphire Coast Community Aged Care Ltd*¹⁶ and *Glover v Ozcare*¹⁷ provide some guidance to employers as to relevant factors an employer should take into consideration where they are considering make such an order. Unfortunately, at this time, each of these cases deal with the flu vaccine and employers operating in the child care, aged care and home care service industries where by definition employees had face to face contact with potentially 'vulnerable' clients.

¹² See *Blackadder v Ramsay Butchering Services Pty Ltd* [2002] FCA 603; (2002) 118 FCR 395 at [411] quoted with approval in *Thompson v IGT (Australia) Pty Limited* [2008] FCA 994 (5 June 2008)

¹³ *Ibid* at Note 10

¹⁴ See s.47 of the *Work Health and Safety Act 2011*(Cth) that imposes a duty to consult workers likely to be affected by a matter related to their health and safety

¹⁵ [2021] FWC 2156

¹⁶ [2021] FWC 1818

¹⁷ [2021] FWC 2989

26. Nonetheless the principles that emerge from these cases determined by the Fair Work Commission and dealing with the question of compulsory vaccination can be summarised as follows;
- (i) The environment in which an employer operates is pivotal in determining what is considered reasonable; it provides the surrounding context upon which an employer must inform their decision¹⁸; and
 - (ii) An employer organisation in fulfilling their obligation to best deliver their services, may decide on what they perceive to be the correct option and such a management prerogative is not to be lightly curtailed, unless it would be unreasonable to do so. It is not for the Commission to determine how an employer should organise its enterprise, or to find that the policy is unreasonable due to the presence of a potentially more favourable approach; and
 - (iii) In deciding to opt for mandatory vaccination for their staff, due consideration needs to be given to the various other controls that are available of the nature of the recognised hierarchy of work health and safety controls¹⁹, and whether they are ineffective or impractical to implement with respect to potential infection; and
 - (iv) Where an employer operates within a highly regulated environment, which creates statutory obligations beyond that of a normal employer and safety and quality care are of paramount importance then this is the environment in which an employer's policy to vaccinate will be scrutinised by a Court or Tribunal²⁰; and
 - (v) It does not seem far-fetched to say that the process of implementing mandatory vaccination may make an employee feel threatened that they must provide their consent to the vaccination, or face termination (or otherwise qualify for a medical exemption). However, this is not the equivalent of a threat of being forcibly vaccinated;²¹ and
 - (vi) A refusal to be vaccinated where an employee is unable to perform the inherent requirements of their position, such as being required to be in a particular place or dealing with particular persons because they have not been vaccinated²² can constitute a valid reason for termination; and
 - (vii) Where an employee who refuses to be vaccinated is not treated differently when compared to others, and all employees who decline vaccination are managed equally as non-vaccinated employees in accordance with a published Vaccination/ Immunisation Policy then such treatment does not amount to discrimination.²³

¹⁸ Ibid Note 5 at [343]

¹⁹ See <https://www.safeworkaustralia.gov.au/risk#controlling-risks-using-the-hierarchy>

²⁰ Ibid Note 5 at [346]

²¹ Ibid Note 5 at [356]

²² See *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818 (29 April 2021)

²³ See *Glover v Ozcare* [2021] FWC 2989 at [218] & [219] and *Darvel v Australian Postal Corporation* (2010) 195 IR 307, [21]-[26].

(viii) In determining the reasonableness of any Employee Vaccination/Immunisation Policy, it is necessary to do so against the backdrop of managerial prerogative and that it is a decision a business considers necessary to take to safeguard its clients and employees as far as it is practicable to do so²⁴ and in this regard the vulnerability of clients and employees and risk of spreading and the capacity to prevent infection will be highly relevant.

27. These three well-reasoned Fair Work Commission cases although not binding authority on superior Australian Courts nonetheless offer guidance on the likely approach a superior court might take to the issue of mandatory vaccination.

In what other circumstances could a Vaccination Direction be lawful and reasonable?

28. Clearly, where it is an inherent requirement that an employee's position requires them to be in a particular place and dealing with particular persons and because they have not been vaccinated they pose a risk to the health and safety of those persons, particularly where those persons are vulnerable due to age or pre-existing medical conditions the cases show that an employer is lawfully able to issue a direction to that employee to receive a Covid-19 vaccination.

29. Further, the case of *Teslime Kuru v Cheltenham Manor Pty Ltd*²⁵ where Cheltenham Manor, an aged care facility, demonstrates that an employer can lawfully issue a direction that requires the wearing of personal protective equipment ('PPE') such as masks, enforce social distancing and divide the workplace into zones prohibiting staff from one zone from interacting with staff from another zone in order to protect the health and safety of vulnerable clients.

30. The concept of protection of vulnerable persons from risks to their health and safety would presumably also extend to protecting those employees in workplaces that an employer knows to be vulnerable due to pre-existing medical conditions or compromised immune systems other than just in the fields of child, aged and health care.

31. This would be particularly so where immune compromised staff are unable to be isolated and where other measures such as distancing and the constant wearing of PPE is impractical given the nature of the work being performing thereby enabling an employer to issue a direction to other employees working in close and frequent proximity to the at risk worker to be Covid-19 vaccinated.

32. Apart from the above child care, aged care and home care cases, an employer is presumably lawfully able to issue a Covid-19 vaccination direction to other workers who frequently deal with large numbers of different people outside the workplace in the course of performing their normal employment duties and more likely than not will

²⁴ See *Glover v Ozcare* [2021] FWC 2989 at [257]

²⁵ [2021] FWC 949 (24 February 2021)

come into contact with the Covid 19 virus and therefore likely to spread the virus upon returning to the workplace, for example transport workers, delivery drivers, and workers visiting and working in numerous locations.

In what circumstances could a Vaccination Direction be unlawful and unreasonable?

33. It is beyond the scope of this paper to examine in detail the discrimination laws that operate at both a Federal and States levels across Australia. In particular, it does not deal with subject of potential religious discrimination as it does not at this time ground a federal cause of action but, nonetheless, may be indirectly captured by state legislation of the nature of *Anti-Discrimination Act 1977* (NSW) which prohibits discrimination on the basis of ethno-religious or national origins.
34. Suffice it to says that any employer considering issuing a Vaccination Direction must be aware of the potential for such a direction to conflict with any of the following discrimination laws and should seek specific legal advice specific to their circumstances:

Age Discrimination Act 2004 (Cth)

Australian Human Rights Commission Act 1986 (Cth)

Disability Discrimination Act 1992 (Cth)

Sex Discrimination Act 1984 (Cth)

In particular s.342 of the *Fair Work Act 2009* (Cth)

Australian Capital Territory – *Discrimination Act 1991* (ACT)

New South Wales – *Anti-Discrimination Act 1977* (NSW)

Northern Territory – *Anti-Discrimination Act 1996* (NT)

Queensland – *Anti-Discrimination Act 1991* (QLD)

South Australia – *Equal Opportunity Act 1984* (SA)

Tasmania – *Anti-Discrimination Act 1998* (TAS)

Victoria – *Equal Opportunity Act 2010* (VIC)

Western Australia – *Equal Opportunity Act 1984* (WA)

35. In this regard, a Vaccination Direction should only be issued after taking into account the nature of the particular workplace and the individual circumstances of each employee and will need to have the capacity to accommodate employees who object to being vaccinated on the basis of one of the attributes protected in the above discrimination acts.

36. There will of-course be valid medical reasons why employees may not be able to comply with a Vaccination Direction, or may decide not to comply given their particular circumstances such as pregnancy, disability or even age.
37. The *Sex Discrimination Act 1984* (Cth) (the “SDA”), the *Disability Discrimination Act 1992* (Cth) (the “DDA”) and the *Age Discrimination Act 2004* (Cth) (the “ADA”) make it unlawful to discriminate in employment on the grounds of pregnancy, disability and age.
38. Importantly the DDA defines disability to include “(c) *the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness...and includes a disability that: (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future...; or (k) is imputed to a person*”.²⁶
39. A blanket Vaccination Direction that mandates COVID-19 vaccinations without exception for all staff, including people with disabilities, medical conditions or who are pregnant, will more likely than not conflict with ‘indirect discrimination’ provisions in the SDA, the DDA and the ADA and may provide an employee grounds for an unfair dismissal claim in the instance of the employee refusing to comply with a Vaccination Direction and the employer terminating the employment on that basis.
40. In the instance of Covid 19 Vaccination Direction an employer might also indirectly discriminate against an employee if they required the employee to comply with a blanket Vaccination Direction and the employee was unable to do so because of an attribute protected under one of the above acts and it results in them being disadvantaged by being treated differently to other employees or as the *Fair Work Act 2009* (Cth) states the employer discriminates “*between the employee and other employees*”.
41. Further under the SDA, DDA, and ADA indirect discrimination may even occur if an employer requires, or proposes to require, that a person comply with a blanket direction. Thus an employer does not even need to enforce a blanket Vaccination Direction through termination or suspension to potentially engage in unlawful discrimination.
42. It is, however, a defence to a claim of indirect discrimination if the Vaccination Direction can be shown to be ‘reasonable’ in the particular circumstances of the particular employer and the particular employee which includes where an employee is unable to perform the inherent requirements of their position without being vaccinated.
43. The moral of the story is clear; where an employer is proposing to issue a Vaccination Direction it should include the ability for employees to opt out on the basis of medical conditions, pregnancy, age and preferably religious beliefs (noting that it is not unlawful for the employer to request proof of medical conditions and pregnancy) and the employer must make reasonable adjustments²⁷ to accommodate those employees who choose to opt out on the basis of disability, sex, age and religion unless to do so would impose “*unjustifiable hardship*” on the employer such as putting the financial viability of the business at genuine risk.

²⁶ See s.6 of the *Disability Discrimination Act 1992* (Cth)

²⁷ See ss. 5 & 6 of the *Disability Discrimination Act 1992* (Cth)

44. Such accommodations might include but not be limited to enforcing social distancing and good hygiene practices, dividing the workplace into vaccinated and unvaccinated zones, prohibiting staff from one zone from interacting with staff from another zone, requiring the wearing of personal protective equipment ('PPE') such as masks when interaction occurs between these zones.
45. Further where the work environment is one in which a Health Order applies or in particular deals with the vulnerable and would put those persons at extreme risk then the employer would appear to be justified in not making exceptions on the basis of disability, sex, age and religion and would be entitled to rely upon the "unjustifiable hardship" defence in the ADA.
46. Also s.48 of the ADA does "*not render it unlawful for a person to discriminate against another person on the ground of the other person's disability if: (a) the person's disability is an infectious disease; and (b) the discrimination is reasonably necessary to protect public health.*" It seems patently clear that Covid 19 comes within the definition of an "*infectious disease*" for the purposes of this defence but unfortunately the term "*public health*" is not defined within the ADA and at this time little if any case law deals with the application of this section.
47. One rather dated case that does deal with s.48 of the ADA is *Beattie (on behalf of Kiro and Lewis Beattie) v Maroochy Shire Council* [1996] HREOCA 40 (20 December 1996) which determined that the defence was available to the Council who chose to exclude children from a child care centre who had not received standard immunisations vaccinating them against measles, diphtheria, whooping cough and poliomyelitis.
48. As this case again dealt with an employer dealing with vulnerable clients and the extent of the term "*public health*" is yet to be determined caution should be exercised by any employer in seeking rely upon a s.48 defence to a discrimination claim from a worker refusing to comply with a Vaccination Direction on the grounds of disability, pregnancy, age or religious in an 'ordinary' workplace.

Can a vaccinated worker refuse to work with an unvaccinated worker?

49. Section 84 of the *Work Health and Safety Act (Cth) 2011* allows that "*A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an **immediate or imminent exposure** to a hazard.*"
50. It is to be noted that the right of the worker to cease or refuse to carry work is premised on there being an immediate or imminent exposure to a hazard and this right would not appear to extend to simply working in or near another worker in an ordinary workplace who was unvaccinated, unless the other worker was known to be infected or a close contact of others who were still infected with the Covid 19 virus and had not undergone testing or was continuing to work in the workplace not having received a negative test result.
51. Leaving the unlikely scenario of an infected worker or untested close contact continuing to work in the workplace the answer to this question remains to be determined and is yet again dependent on the circumstances of the workplace.

52. However, where the workplace is a high risk workplace of the nature of a hospital, medical centre, doctors surgery, vaccination centre, quarantine centre or an ambulance service with frequent potential exposure to the Covid 19 virus the particular circumstance of such workplaces would appear justify a worker ceasing or refusing to carry work due to the imminent risk of exposure to the Covid 19 virus.

What steps should an Employer take if they are considering issuing a Vaccination Direction?

53. Section 17 of the *Work Health and Safety Act (Cth)* 2011 imposes a duty on an employer *“to ensure health and safety requires the person: (a) to eliminate risks to health and safety, so far as is reasonably practicable and (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.*
54. As with all potential health and safety hazards in the workplace the employer should begin by performing a risk assessment of their workplace²⁸ to (i) determine the likelihood of Covid 19 entering their workplace; and (ii) the consequences of Covid 19 entering their workplace; and (iii) what effective controls other than a Vaccination Direction could be put in place to control the risk of Covid 19 and the extent to which those controls are likely to be effective in eliminating the risk of Covid 19 infection or mitigating against the risk of Covid 19 infection or isolating the risk of Covid 19 infection or, the least preferable option, of protecting against the risk of Covid 19 infection using PPE.
55. Safe Work Australia has published a National Guide for Safe Workplaces Covid 19²⁹ and specify factors that an employer in performing a risk assessment should;
- *identify all of the activities or situations where people in the workplace may contract COVID-19 from each other or from a surface*
 - *assess the level of risk that people in these activities or situations may contract and spread COVID-19 in the workplace.*
 - *The level of risk associated with exposure to COVID-19 may not be the same for all businesses and will depend on a range of factors, including the geographic location, business size, workforce demographics and characteristics (such as whether the business has any vulnerable workers), as well as:*
 - *the nature of the workplace, such as whether it is a factory, an office, a construction site*
 - *the work tasks and activities undertaken at the workplace, for example is there significant interaction with customers, do any work tasks require workers to be in close proximity to be carried out safely*

²⁸ Information on conducting risk assessments can be found at <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/risk-assessment?tab=tab-toc-employer> and at <https://www.safeworkaustralia.gov.au/doc/key-considerations-undertaking-risk-assessment-covid-19>

²⁹ See https://www.safeworkaustralia.gov.au/sites/default/files/2020-10/National%20guide%20for%20safe%20workplaces%20-%20COVID-19_1.pdf

- *the working arrangements of the workers, for example is there shift work involved, do workers share facilities and break times.*
 - *determine what control measures are reasonably practicable to eliminate or minimise the risk of exposure to COVID-19.*
56. Other factors the writer is of the opinion the employer should assess before issuing a Vaccination Direction are:
- (a) Does an inherent requirement that employee's position requires them to (i) be in a particular place and dealing or working in close proximity with particular persons and (ii) because they have not been vaccinated they are exposed to higher risk of infection and pose a risk to the health and safety of other workers and other persons, particularly where those other workers or persons are vulnerable?
 - (b) Do your workers frequently deal with large numbers of different people from outside the workplace either in numerous locations outside the workplace or in the workplace itself, in the course of performing their normal employment duties, and will they more probably than not come into contact with the Covid 19 virus and therefore be more likely to spread the virus when in the workplace?
 - (c) If reasonably practicable, given the nature of the work and the workplace, would the wearing of personal protective equipment ('PPE') such as masks, enforcing social distancing, hand sanitisation and dividing the workplace into zones prohibiting staff from one zone from interacting with staff from another zone be effective in protecting the health and safety of workers, visitors and clients particularly where another worker or client is known to be a vulnerable person due to pre-existing medical conditions or compromised immune systems?
57. Where the answers to (a) & (b) above are yes and the answer (c) above is no, then and perhaps only then, an employer may, in order to discharge their duty under s.19 of the *Work Health and Safety Act (Cth)* 2011, be justified in issuing a lawful and reasonable direction that their workforce be vaccinated but this decision ultimately turns on the individual circumstances of each workplace, the workers and the environment in which an employer operates.
58. Importantly where a decision is made to issue a Vaccination Direction the employer should;
- (i) consult with the workforce first before issue the Vaccination Direction and take their concerns into consideration; and
 - (ii) develop and publish a policy setting out the requirements of both vaccination and where relevant Covid 19 testing; and
 - (iii) ensure the policy and the direction includes the ability for employees to opt out on the basis of medical conditions, pregnancy, age and preferably religious beliefs; and

- (iv) ensure the policy and the direction specifies how the employer will make reasonable adjustments³⁰ to accommodate those employees who choose to opt out on the basis of disability, sex, age and religion unless to do so would impose “*unjustifiable hardship*” on the employer; and
 - (v) ensure the policy and the direction specifies those employees who choose to opt out will not be disadvantaged by being treated differently to other employees nor will the employer discriminate between vaccinated and unvaccinated employees
59. Ultimately the question of whether employers can lawfully direct their employees to be vaccinated is one that will fall to be determined by a tribunal or court but in light of Telstra recently announcing it is intending to issue a Vaccination Direction and the Communications, Electrical and Plumbing Union of Australia announcing it will oppose the same Australian employers may not have long to wait for the answer.



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³⁰ See ss. 5 & 6 of the *Disability Discrimination Act 1992* (Cth)