

LawNews

adls.org.nz

EMPLOYMENT/HUMAN RIGHTS LAW

Bosses, unions want clarity on Covid-19 jabs

By Diana Clement

Business New Zealand and the CTU (Council of Trade Unions) are calling on the government to provide advice on whether they can direct employees to get a Covid-19 vaccination.

Business NZ's manager, employment relations policy, Paul Mackay, says the government has a responsibility to coordinate input from multiple agencies, including MBIE and the Ministry of Health, into a single coherent piece of advice delivered through the Covid website. "That's the perfect vehicle to put that advice on. It just needs to be done," he says.

Employers will also need to decide how to deal with employees who will refuse the vaccine because of religious or anti-vaccination beliefs, or other fears, says CTU president Richard Wagstaff. That may involve redeploying them.

Mackay concurs: "The existence of those groups makes it almost obvious that you can't have a blanket rule that you must get vaccinated, because every one of those groups can have justifiable grounds for saying 'no that was not justified' or 'that was discriminatory.'"

There is a plethora of questions to be considered, such as whether the requirement to be vaccinated could be written into new employment contracts. But the mere suggestion raises red flags under employment law and the New Zealand Bill of Rights Act 1990.

Could employers demand that all staff are vaccinated? What if vaccinated employees refuse to work with the non-vaccinated? And could vaccines become compulsory for people who want to enter the country? And, as Qantas has already indicated, on airlines?

This has become a major issue across the ditch. Fearing an avalanche of legal disputes, including unfair dismissal claims, Australian business leaders



Photo by Tulcarton/Getty Images

Government needs to provide coherent advice on whether employees can be forced to have the vaccine

With the current lack of research, knowledge and experience of the Covid vaccine, it would be a pretty steep burden of proof to get compulsory vaccination over the line in court

have urged Cabinet to provide guidelines and advice.

But back in this country, Covid-19 response minister Chris Hipkins has no answers as yet, saying it's "too early to comment" on advice to businesses and

the unions about mandatory vaccination in some workplaces.

"In terms of incentives, sick leave, additional pay and any related matters, we're not yet in a position to design schedules for the vaccination roll-out, and the forms it will take," he says. "Some might be workplace-based and others where people are required to travel. The shape these ultimately take could influence what supports might be provided."

Mackay sees a role for business in the rollout and uptake of vaccines but says the government must take the lead in dealing with the logistical and legal issues. He suggests there may be situations where employers pay their staff for the time and other costs involved in getting vaccinations.

The law

The Employment Relations Act 2000 and the Bill of Rights Act both come into play on the question of

Continued on page 2

Bosses, unions want clarity on Covid-19 jobs

Continued from page 1

compulsory vaccination in the workplace.

Dr Bill Hodge from the University of Auckland's Law School says while s 11 of the Bill of Rights Act says you have a right to refuse medical treatment, s 5 allows for justified limitations to that right. "So, it's not an absolute prohibition. You have to demonstrate that it's justified in a free and democratic society," he says.

"The government [could] say, 'we're a vulnerable island society and we're going to prove justified limitation on your right to resist by s 5.' The government must balance individuals' rights with competing interests such as providing adequate healthcare and not allowing our standard of living to significantly deteriorate.

AUT law professor Kris Gledhill says a decent argument for compulsory vaccination can be constructed in relation to some diseases, weighing the risks to others against the right to refuse medical treatment, which is not absolute. "Witness compulsory psychiatric treatment, even for people who have capacity."

Whether it is justified in relation to Covid-19 will depend on the evidence about the danger it poses and whether there are alternatives, Gledhill says. "Banning people from flying or visiting care homes, or from attending university or using public transport – those might also be proportionate steps to take to encourage people to be vaccinated because of the duties people have to the community and the need to protect the rights of others."

Gledhill adds that rights aren't always absolute. Rights represent an important value in our society, he says, but need to be weighed against countervailing arguments. Hence the existence of s 5 of the Bill of Rights Act.

In respect of Covid-19, the government has many competing interests which it has a duty to balance – for example, protecting the right to life is the government's duty and can justify conditions such as limiting numbers of returnees. The right to health could be undermined if healthcare systems are overwhelmed. Rights that flow through from having a robust economy, such as the right to an adequate standard of living, are protected by cutting off international tourism, Gledhill says.



Paul Mackay



Richard Wagstaff

The interests of those involved in tourism, including the airlines that bring international tourists here, must be weighed in the balance. "But a government can properly point to the importance of allowing New Zealanders to move around. There is, after all, a right to freedom of movement within a state – to enjoy domestic tourism – whilst travel abroad is difficult. This right would be compromised if there were not proper checks to contain Covid-19 at the border."

Offshore New Zealanders also have rights, Gledhill says. But the government can give extra weight to protecting people already here.

Public/private employees

The Bill of Rights Act applies to individuals employed by the government, but not to those working for private employers, Hodge says.

"[But] even in the private sector, where the Bill of Rights doesn't apply, the courts are going to say 'gee that's a pretty big invasion, we want to see what's fair and reasonable.'"

The next step in considering compulsory vaccination would be whether there was precedent for some sort of invasion of the body such as requiring a urine test, he says.

A full court of the Employment Court ruled in favour of Air New Zealand on compulsory urine testing for staff members deployed to safety-sensitive roles, such as driving vehicles that

pull aeroplanes.

Other industries where a court might find compulsory vaccination justifiable might be hospitality, health and aged care facilities, says Hodge.

Mackay points out that in some cases it might be more important for the vulnerable patient or client, rather than the employee, to be vaccinated if the employee can still pass it on. In an aged care facility, it might make more sense to vaccinate the residents.

If, on the other hand, you're manufacturing something on an assembly line and you don't have any direct contact with vulnerable members of the public, there may be less of a case for vaccination, Hodge says. "I am sure the court would say, 'it depends on the facts. Tell us more'.

"Are you handling something and handing it to somebody else? Or are you more-or-less alone, putting bolts and nuts on a part of the machine that comes along the line and you don't really deal with anybody else in near proximity? I don't see that there's a strong case there.

"What's more, with the current lack of research, knowledge and experience of the Covid vaccine, it would be a pretty steep burden of proof to get compulsory vaccination over the line in court." Hodge believes, however, that there is a debate to

Continued on page 4

LawNews

LawNews is an official publication of Auckland District Law Society Inc. (ADLS).

Editor:
Jenni McManus

Publisher:
ADLS

Editorial and contributor enquiries to:
Jenni McManus, phone 021 971 598
or email jenni.mcmanus@adls.org.nz

Advertising enquiries to:
Darrell Denney, phone 021 936 858
or email Darrell.Denney@adls.org.nz

All mail to:
ADLS, Level 4, Chancery Chambers,
2 Chancery Street, Auckland 1010
PO Box 58, Shortland Street DX CP24001,
Auckland 1140, adls.org.nz

LawNews is published weekly (with the exception of a small period over the Christmas holiday break) and is available free of charge to members of ADLS, and available by subscription to non-members for \$140 (plus GST) per year. To subscribe, please email reception@adls.org.nz.

©COPYRIGHT and DISCLAIMER
Material from this publication must not be reproduced in whole or part without permission. The views and opinions expressed in this publication are those of the authors and, unless stated, may not reflect the opinions or views of ADLS or its members. Responsibility for such views and for the correctness of the information within their articles lies with the authors.



Dr Bill Hodge



Catherine Stewart



Kris Gledhill

be had.

Health and safety

The argument is not simply about protecting patients and clients of a business. Employers have a duty to take reasonable steps to protect the health and safety of all their employees. Hodge points out that employers must take employees as they find them. "If you've got an immune suppression syndrome of some sort, then the employer has to take you with that once you're employed."

One answer might be to seek a declaratory judgment that would likely move to the Court of Appeal.

As barrister Catherine Stewart sees it, some employees might have genuine reasons for declining a vaccine because they are concerned about adverse effects.

She says a careful analysis and assessment needs to be made of the effectiveness of the vaccine and its side effects. "Imagine if the employer, for example, required an employee to have a vaccination, and the employee then had a massive adverse reaction to the vaccine?"

Employees should be encouraged to be vaccinated in preference to compulsion, say Mackay and Wagstaff. Attempts in the past have backfired – for example, when employers tried to force employees to have flu injections, Wagstaff says.

Stewart says putting in place vaccination policies is something employers need to look at imminently. It would be difficult to overcome the entrenched right of people to refuse medical intervention but, on the flip side, employers have an obligation to provide a healthy and safe workplace and manage high risks prudently.

"So, I think that an employer may be justified in some circumstances in requiring an employee to have a vaccine." The employee could still decline with justification on a range of circumstances.

Stewart says the best avenue for employers might be to consult with workers and persuade them effectively rather than attempting compulsion.

In scenarios where employees work in a high-

risk area and put themselves or others at risk, the employer might be justified in dismissing an employee who refuses a vaccine, provided the employer followed a thorough process, Stewart says.

"My recommendation would be that employers have policies in place to explain the reasons behind the need for vaccination and to give employees an opportunity to provide feedback on those policies. That feedback would need to be discussed with the employee and considered. [Employers also] need to consider alternatives such as redeployments or other options to vaccination such as wearing PPE, and so on."

Whether vaccination policies and dismissals for refusing vaccinations will be upheld in court is untested territory. "These are issues that will need to be worked through with the Employment Court on a case-by-case basis."

Pre employment

Employers requiring mandatory vaccination could also face issues during the pre-employment process, although it will come down to bargaining.

Stewart says: "What is the employer offering and what is the employee willing to accept? In the same way that you bargain for drug and alcohol clauses, an employer might require [vaccination clauses]. The employee might refuse. Then it comes down to what extent the employer is willing to take on [the candidate] if they decline."

As an example, she cites clauses in contracts requiring consent for a medical examination. If an employee refuses, the employer may choose not to take that person on.

"Whether it's reasonable to decline on the basis of an employee saying, 'I'm not going to accept this vaccination' will again be one of those overall [risk] assessments for that employer, and for the employee's role."

Stewart says the courts have been cautious about enforcing such clauses and contracts in relation to drug and alcohol testing, and medical examinations. They have erred on the side of free and willing patient consent.

"Even perhaps more analogous is the medical examination clause of an employment agreement [which might] say, 'if you become incapacitated and unable to work, we have the right to require you to undertake a medical examination to ascertain your fitness to work and then we will assess whether or not we will continue to employ you.'"

In the case of a Covid vaccination, however, there is likely to be stronger grounds to enforce such clauses because there is such a strong public health necessity, she says.

But Stewart questions how enforceable a compulsory vaccination clause might be once the person is employed, even if it's written into the contract and both parties have agreed.

"The courts do take great caution not to be too intrusive with those types of issues and to be really clear about consent and carefully drafted clauses which are appropriate for the situation."

In a pre-employment situation, a requirement for being vaccinated would not come under the prohibited grounds of discrimination under the Human Rights Act.

"It's a different kettle of fish from discrimination," she says. "It's more akin to alcohol and drug-type clauses."

The best advice for employers on these questions is to seek advice and use well-drafted policies around what vaccinations they require in the circumstances and the reasons."

The question also arises about whether returnees or visitors to New Zealand can be required to have compulsory vaccines.

Hodge says s 18 of the Bill of Rights Act says every New Zealand citizen has the right to enter New Zealand. Again, that could be subject to section 5, meaning compulsory vaccines could be justified.

"I wouldn't be surprised if [in a few months] the government said 'yes, we not only want a test three days before departure, followed by three days of self-isolation or even managed isolation. We're now going to move to requirement of vaccination.' That'd be a big step. And that certainly would meet some opposition politically." ❌