

# “Navigating the Post-Vaccination Workplace”

**Date** : 1 April 2021  
**Time** : 3.00 – 4.00pm  
**Presented by** : Ms. Wong Keat Ching

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1. **Employer's duty** to provide a safe workplace → does this include mandatory vaccination policies?
2. **Issue 1: Circumstances justifying compulsory vaccination in the workplace**
3. **Issue 2: Employees refusing** to get vaccination → can employers treat them differently?
4. **Encouraging** vaccination?
5. Best practices in the workplace post-vaccination



# The Overarching Issue

- The balance between public health and the individual right of choice and bodily integrity.
- What does the law say?



# Employer's Duty of Care

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An Employer has a **duty to ensure the safety, health and welfare at work of all its employees** under **Section 15(1)** of the **Occupational Safety and Health Act 1994 (“OSHA”)**.



## ❖ Employer's Duty of Care

An employer's duty of care extends to...

- **S.15(2)(c) of OSHA** → the **provision of such information, instruction, training and supervision** as is **necessary** to ensure, so far as is practicable, the safety and health at work of his employees.
- **Section 15(2)(e) of OSHA** → an Employer has a duty to **provide and maintain a working environment for his employees that is safe, without risks to health**, and adequate as regards facilities for their welfare at work.



## ❖ Risk of Liability to the Employer

- **Section 19 of the OSHA** → Employers contravening Sections 15 to 18 shall be held liable to a fine not exceeding RM50,000.00 / imprisonment / both.
- As such, if an Employer **unduly exposed its Employees to the risks of contacting COVID-19 at work**, the Employer may be held liable under **Section 19 of the OSHA**.
- Depending on the circumstances, the Employer may also be in breach of the terms of the Employee's contract of employment and/or breach of tortious duty of care.





❖ Does the employer's duty of care include mandatory vaccination?

There is **no specific statutory provision/guidance** which...

- **Mandates** COVID-19 vaccination for employees;
- **Imposes a duty on employers to vaccinate** their employees, or
- Allows employers to **compel** their employees to be vaccinated



## ❖ Government Provisions on Getting Vaccinated

- 2 elements:
  - a) The vaccination ought to be **voluntary**
  - b) Employees are required to fill in the **consent form** in order to obtain the vaccine

*Source: MOH FAQ Covid-19 Vaccination*





# Can employers impose mandatory vaccination?

**Canadian Case → Trillium Ridge Retirement Home v Service Employees Union, Local 183 (Vaccination Grievance) [1998] OLAA No. 1046**

- The Employer's policy during the Influenza A epidemic was that → **staff had to choose either (a) to be vaccinated OR (b) be granted time off without pay until the influenza outbreak was declared over at the facility**
- The Union of Workers claimed that the mandatory policy described above was unlawful assault/battery (invasion of bodily integrity) and claimed damages
- **Issue → Can there be a loss of pay/shifts for the employees if they refuse to be vaccinated?**
- **Held →** The vaccination policy in the Company was **not mandatory in character** – and the purpose of the employer's policy was to incentivize staff to be vaccinated/take the amantadine, which was reasonable.



# Case Study: Trillium Ridge Retirement Home Case

*“[42] On the whole of the evidence, I must conclude that the Employer's policy was not mandatory in requiring employees to accept vaccination or amantadine. **Ultimately the employee was permitted to refuse either measure, but there was a cost to such refusal.** Such an employee would not be allowed to attend at work and be paid during the period of an outbreak.*

***Did the imposition of such a cost render the policy arbitrary and unreasonable? [...] Did such a cost amount to a disciplinary penalty, or was the requirement to stay off work a constructive lay-off out of seniority order [...] Ultimately I am persuaded that the answer to each of these questions is no.”***



# Case Study:

## *Trillium Ridge Retirement Home Case*

### Learning Points:

- Employees **still had a choice** whether they wanted to get vaccinated or not, but will have to bear the cost of not having work → hence not mandatory
- These measures were **not without consent** as management had taken a variety of reasonable steps to make clear to employees → the nature of the options open to them and the implications of non-immunisation
- The measures enforced were on **genuine safety grounds**



# Issue 1: Circumstances justifying compulsory vaccination?

## Section 17 OSHA 1994:

It is the employer's duty to ensure that **persons who are not their employees** are not exposed to risks to their workplace health and safety.



# Circumstances justifying compulsory vaccination (cont)

- Examples of groups of employees that might require compulsory vaccination are where they are exposed to vulnerable individuals, in customer-facing roles and frontliners.





# Circumstances justifying compulsory vaccination (cont)

**E.g. Employees exposed to vulnerable individuals**

***Caressant Care Nursing & Retirement Homes Case v Christian Labour Assn. of Canada [2020] O.L.A.A. No. 342 (“Caressant Care Case”)***

- **Facts:** The Union contends that the Employer’s policy mandating a nasal swab every 2 weeks is an intrusion of their privacy and a breach of their dignity.





## **(cont) Caressant Care Case**

***[42] But, most importantly, while the privacy intrusion is arguably comparable, in both cases, the factors to be taken into account in order to determine the weight to be given to the need for COVID testing as compared with drug and alcohol testing, is not. COVID is novel, thus its name. Public health authorities are still learning about its symptoms, its transmission and its long-term effects.***



## **(cont) Caressant Care Case**

***[43] What is known is that it is highly infectious and often deadly for the elderly, especially those who live in contained environments.***

***[44] [...] While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not a reasonable option.***



## (cont) *Caressant Care Case*

### Learning Points:

- The Court considered the **novelty of the coronavirus** and **extent of the employee's exposure to third parties** in deciding that a mandatory nasal swab test is reasonable.
- The Court took into account (1) the **infectiousness** of the disease, (2) the fact that **employees are constantly around the elderly** and (3) being in a **contained environment**.



## Issue 2: Employees refusing to get vaccinated?

- **Section 27(1)(a) of OSHA 1994**

**No employer shall dismiss an employee, injure him in his employment, or alter his position to his detriment **by reason only that the employee makes a complaint about a matter which he considers is not safe or is a risk to health.****



## Issue 2: Employees refusing to get vaccinated?

Employees who refuse the vaccine may fall into one of the following categories:

**Category 1** → Employees who are **able** to take the vaccine, but **refuse** to do so; and

**Category 2** → Employees who fall within the **excluded categories**, i.e. those unable to take the vaccine



# Category 1 (i.e. Employees able to be vaccinated but refuse to)

- Can the Company take action?
- Depends on (1) nature of work (2) employee's duties and (3) the enforced direction being "lawful and reasonable"
- Australian Case Law → A mandatory requirement on employees to take the vaccine could be a reasonable instruction, taking into consideration the nature of the work done by the employee.





# *Ms Nicole Maree Arnold v Goodstart Early Learning Limited T/A GoodStart Early Learning [2020] FWC 6083 (“Arnold’s Case”)*

## Facts

- The question in this case was whether an Employer (a childcare center) could give “**lawful and reasonable**” **direction** to employees to receive flu vaccination?
- Employee’s refusal to get a flu vaccination was not on medical grounds
- Employee was terminated
- Employee’s case of unfair dismissal was ultimately dismissed as being out of time -- however the Deputy President of the Fair Work Commission offered interesting observations



## Case Law → Arnold's Case

### Opinion


- *“It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants”*



## Case Law → Arnold's Case

### Learning Points:

- **Nature of Work / Duties of employee:** The Claimant was taking care of **vulnerable groups** of individuals, i.e. children
- The **greater the detriment** to the employees/colleague/customers, **the more reasonable the requirement for vaccination** will be.



# Category 2 (i.e. Excluded Categories of Employees)

Excluded categories of persons under the MOH FAQs:

- Persons with **allergy to active material / with history of serious allergy (anaphylaxis);**
- **Pregnant/breastfeeding mothers;**
- Persons with a **weak immune system** due to any disease or medical treatment such as HIV patients or cancer patients undergoing chemotherapy; and
- Persons who are **confirmed or suspected positive for COVID-19.**



# Can an employer terminate employees in Category 2?

- Although these individuals may be willing to be vaccinated, they may not be allowed to do so in line with government guidance, and professional healthcare advice.
- Depending on the **nature of their work**, an employer may be forced to remove the said employee from their duties.



# ***Maria Corazon Glover v Ozcare***

## ***[2021] FWC 231***

### **Facts:**

- Applicant was a long-standing employee of the Respondent → her duties included visiting people and caring for them at their homes
- In 2020, the Respondent directed that all employees have the flu vaccine
- In previous years, the **Applicant declined a flu vaccine for medical reasons** and this was accepted by the Respondent
- However, as a result of the pandemic, **the Respondent refused to roster the Applicant on shifts unless she was vaccinated**





# Case Law → *Maria Corazon Case*

## *The Fair Work Commission opined:*

*“...there is much discussion around the legality of employers requiring employees to be vaccinated against influenza **in light of the adverse reaction a vulnerable person might have** if they have influenza and then contract COVID-19. It is, of course, a very concerning proposition, and **medical evidence to-date suggests that such a combination is highly likely to increase the potential fatality of the individual.**”*

*In my view, each **circumstance of the person’s role** is important to consider, and the **workplace** in which they work in determining **whether an employer’s decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction”***



# Case Law → *Maria Corazon Case*

## Learning Points

In cases where the employee is unable to take the vaccine on medical grounds, termination may be justified in the context of:

- (1) Nature of business and**
- (2) Circumstances of employee's role, i.e. impact of unvaccinated employees on customers**



# Issue 3: How can employers encourage vaccination?

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- a) Education (Providing sufficient medical information on potential side effects of the vaccine)
- b) Paid Time Off
- c) Pre-Vaccination Allergy Screening



## a) Education

- This sense of distrust has been attributed to:
  - **Samples used in vaccine testing;**
  - **Speed at which these vaccines were developed;**
  - **Misinformation spread through social media.**
- To mitigate the impact of this distrust, employers could, in light of the National COVID-19 Immunisation Programme, endeavor to **make credible information regarding the COVID-19 vaccine available to their employees** alongside information on the importance or relevance of vaccination given the nature of the business.



## b) Paid Time Off

- This idea has gained some traction in the United States → with several large companies such as Aldi and Trader Joe's undertaking a scheme to encourage employees to be vaccinated → by paying them wages for the time spent being vaccinated.
- Encouraging businesses to be flexible when employees are called in for vaccinations



## c) Pre-Vaccination Screening

- Employers may also choose to organise pre-vaccination allergy screening for their employees, OR
- Encourage employees to undergo such screening provided by the Malaysian Government → to ease any reservations against the vaccine, and to enable their employees to make an informed decision





# Measures by Employers to ensure workplace safety?

- **Examples of different treatments to accommodate employees:**
  - **Granting of incentives or benefits** only to employees who are vaccinated;
  - **Implementing work-from-home policies** only for employees in Category 1 and 2; or
  - **Relocation of unvaccinated employees to other areas of the office**, whereby contact with external parties/other employees may be reduced (similar to the social distancing policies already in place).



# Best Practices Post-Vaccination

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- 1. Can I stop wearing a mask in the workplace?**
- 2. Does this mean I can skip isolation, quarantine, and testing?**
- 3. Will I be able to travel, attend conferences and socialize in large groups in the office?**



# Best Practices Post-Vaccination

- With the vaccination in place, employers might be able to be more flexible in workplace policies
- However, given the novelty of our circumstances, employers are encouraged to take **proportionate approaches** to accommodate employee's requests considering the company's **nature of business, workplace health & safety, and employee's duties.**



# Conclusion

In implementing any new initiative/practice/policy, employers should always engage with their employees, and adopt a **consultative approach**, and act in accordance with good Industrial Relations practices and principles.

# Thank you.....

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