

Prevention of Discrimination and COVID-19

Can Discrimination Trump Health & Safety?

Why is this important?

- ▶ Spike in COVID-19 Cases
- ▶ No Lockdown in sight
- ▶ "Living with COVID-19"
- ▶ Each Employer's and Employee's "Right to Choose"

What is at stake?

- ▶ Employee Unrest
- ▶ Employee Claims for Compensation
- ▶ Financial Loss to the Business
- ▶ Public Ire

What are the competing obligations?

Safety and Health at Work Act

- ▶ Imposes a duty on employers to ensure, so far as is reasonably practicable, a safe and healthy work environment for EACH employee and other persons who may come to the workplace.
- ▶ Imposes on employees a duties of:
 - reasonable care for themselves and others, including other employees within the workplace; and
 - co-operation with the employers for the purpose of employers complying with their duties.

Employment (Prevention of Discrimination) Act

- ▶ Imposes obligations on employers not to discriminate against potential or current employees

So Where Does the Employer Start?



STEP 1 - Determine Whether the Business Needs a Vaccination or Testing Policy at all

- GET A RISK ASSESSMENT DONE!

Are employees or others at high, medium or low risk of contracting, spreading or suffering a severe reaction to a COVID-19 infection in the workplace

Consider the following:

- a) an employee's disability or medical condition;
- b) the nature of the work performed by the employee, i.e. whether the employee has close contact with people who are most vulnerable to COVID-19. For example, people working in aged care, disability care, health care, people over 60 or people with respiratory conditions;
- c) whether the employee interacts with people with an elevated risk of being infected with COVID-19. For example, medical professionals or hotel workers;
- d) the effectiveness of existing control measures
- e) the incidence, severity and distribution of COVID-19 in the areas where the work is undertaken;

Consider the following - Cont'd

- f) the number of employees (with regard to employees with comorbidities and other vulnerable employees).
- g) the availability of the vaccine; and
- h) whether there are any alternative methods that might reasonably achieve the employer's objective without recourse to the mandatory COVID-19. This includes testing regimes, work from home, physical distancing and the use of personal protective equipment.

If the risk is low...

There is no need for a policy and thus the question of discrimination does not arise.

If the risk is medium or high...

- ▶ A policy *MAY* be appropriate.
- ▶ Only then does the question of discrimination arise for consideration.
- ▶ The policy *MUST* have regard to the protected characteristics found in the **Employment (Prevention of Discrimination) Act, 2020**

STEP 2 - Determine whether there are grounds for such a policy to be considered discriminatory in your business

What is Discrimination?

- The Act seeks to protect persons with certain characteristics from being treated differently or being excluded in a way that causes them to be at a disadvantage, suffer detriment or be restricted because of that characteristic.
- The relevant characteristics for these purposes are:
 - Pregnancy
 - Maternity
 - Medical condition
 - Disability

Arguments for a Policy Being Discriminatory

- ▶ Employees have a right of choice and ought not to be treated differently because they choose not to be vaccinated or do not want to be tested. [Not Supported by Legislation]
- ▶ Employers are precluded from requiring employees to undergo testing or questioning regarding medical conditions. [Not Applicable to Vaccines or in Medium/High Risk Businesses]
- ▶ Employees are unable to take vaccine or be tested because they fall into protected categories and no accommodations or exceptions are made in the policy.

Defences to Discrimination

- ▶ Genuine Occupational Requirement
- ▶ Making Accommodations may cause undue hardship on the business
- ▶ Testing frequently or at all is not disadvantageous or a detriment.
- ▶ Testing is a reasonable accommodation for non-compliance with a vaccine mandate
- ▶ It is a reasonable step by the employer to comply with the SHAW Act.

STEP 3 - Consider Accommodations/Adjustments

Are there any other reasonable steps you can implement to otherwise protect employees?

Think about:

- allocating some of the duties of the employee to another person;
- altering the hours of work of the employee;
- allowing the employee to be absent during hours of work for the purpose of assessment, rehabilitation or other treatment;
- providing the employee with alternative employment;
- assigning the employee to a different place of work;

Think about - Cont'd

- acquiring or modifying equipment for the use of the employee (for eg. PPE);
- making adjustments to premises to be used by the employee.

STEP 4 - Get Feedback!

Employees are on the ground and have more practical knowledge.

Consider:

- ▶ Employee Concerns
- ▶ Employee Flexibility
- ▶ Employee Recommendations

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STEP 5 - Get the Vaccination and Testing Policy Prepared!

STEP 6 - Notify Employees of Policy!

- ▶ Provide Copies of the Policy to Employees
- ▶ Give Reasonable Notice
- ▶ Meet to Explain the Terms



THANK YOU!

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