Australian airline policies mandating vaccines will be test of workplace rights

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Airlines want you vaccinated. They want as many people as possible vaccinated. The sooner that happens, the sooner borders open and they can get back to profitability.

They also have reasons to want to protect both customers and staff from COVID-19. Qantas staff, for example, have been considering legal action over workplace transmissions.

Qantas has dangled the carrot of extra frequent flyer points for fully vaccinated passengers, plus ten "mega prizes" of a year's free travel for families. Virgin Australia has similar plans. It also has a scheme to encourage its workers to get vaccinated. This will reportedly include the chance to win extra annual leave.

Could they go further and mandate vaccines? This is something Cathay Pacific is doing, telling its Hong Kong-based flight crews they must be vaccinated by August or their employment will be reviewed.

Qantas chief Alan Joyce signaled in November that once vaccines are widely available it will require international travelers to be vaccinated. This implicitly suggests it will require the same from international flight staff.

But the legal ground in Australia for employers to insist that employees be vaccinated remains murky.

Whether Qantas or Virgin—or indeed any other company—do so may depend on the case of Queensland regional carrier Alliance Airlines, the first employer in Australia to insist all employees be immunized.

A question of common law

Alliance Airlines specializes in flights to and from mining sites. It is 19.9% owned by Qantas, and collaborates with both Qantas and Virgin Australia.

It announced its mandatory policy for both influenza and COVID-19 vaccinations in late May. Its stated reason is to fulfil its duty to employees and passengers. But unions have questioned the policy's lawfulness, arguing it is beyond the airline's powers.

In Australia, there has been no general government guidance on whether employers can insist on employees getting COVID-19 vaccinations.

This differs to the United States, where the federal Equal Employment Opportunity Commission ruled in December 2020 that employers could (with some exemptions for medical and religious reasons) require employees to be vaccinated.

The Queensland and Western Australian governments have passed legislation mandating workers be vaccinated, but only in certain health and quarantine workplaces.

Whether Alliance Airlines' policy is lawful therefore...
depends on a general common law "test" for determining the validity of workplace policies. This test asks if a policy or direction is "lawful and reasonable" given the circumstances. These include:

- the nature of the job, especially where it requires regular interactions with colleagues, clients and suppliers
- if the work can be done remotely, or other reasonably practical precautions exist
- the effectiveness or success rates of the vaccine
- any guidance or directives from government and medical experts
- the circumstances of individuals employee, such as whether they have reasonable grounds to refuse vaccination.

**Individual circumstances do count**

Perhaps the most important takeaway from *Glover v Ozcare* is that it was decided on its particular facts. Employers must carefully assess employees' situations to decide if a mandatory vaccination policy is justifiable.

An airline might reason that cabin crew interact with people in environments with a higher risk of COVID-19 transmission and where social distancing is impossible.

But an employee might counter that, unlike aged or disability care workers, they have much less close contact with high-risk, vulnerable individuals.

The case-by-case nature of the reasonableness test means any generalized "all in" vaccination policy is problematic. Even more so if there is employee resistance.

**Discrimination may be valid**

Employees who are dismissed for refusing to vaccinate might also argue it amounts to discrimination on prohibited grounds such as disability or pregnancy, where COVID-19 vaccination may be unsafe or pose medical risks.

Under the Fair Work Act, however, employers have a valid defense for discriminatory action if a policy or decision is based on the "inherent requirements" of the job.

In November 2020, Fair Work Deputy president Ingrid Asbury noted that vaccination against influenza was likely to be an inherent requirement for a position involving caring for young children, and so could be justified for child-care employees.

However, outside high-risk contexts such as child and health care, this defense may be limited and will turn on the employee's role and the organizational context.
Looking for safe ground

The Fair Work Commission's rulings on influenza vaccines give a fair indication of the principles it will apply to any case involving COVID-19 vaccines.

But given the different circumstances, whether it will give a green light to a general policy like that of Alliance Airlines remains up in the air.

Qantas and Virgin might be on safer ground because of their international operations, if proof of vaccination becomes mandatory for other destinations. However, I think the issue of employee vaccinations for the airline industry will ultimately be resolved via government intervention.

In other sectors, owing to the complexities in determining whether mandatory policies are "legal," many employers will likely stick with the safer route of voluntary "incentive schemes" to encourage vaccinations.

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