SQUIRE PATTON BOGGS

Workplace View

Australia – December 2021

As we near the end of another year (and what a year it has been!), we are busy preparing for our upcoming annual "Year in review" webinar on 9 December. We will be providing our analysis of 2021's most significant employment law issues and outlining a roadmap you can use to plan for the employment-related issues you are likely to face in 2022. Further details for the webinar and a link to RSVP are outlined below.

One issue many employers are likely to face, in some form or another, in 2022 is an increase in employees wanting to adopt "new ways of working", including flexible hours and increased remote working. With news that The Great Resignation is soon to arrive in Australia, demand for increased flexibility and hybrid working may result in increased employee turnover, reduced employee engagement and a limited ability to attract future talent for those employers who do not embrace the permanent flexibility that many employees are craving. We look at some of the legal implications of these trends in this edition.

We also answer a question we are often asked by clients – whether they can challenge the veracity of a medical certificate produced by an employee for the purposes of taking personal/carer's leave, particularly when the certificate has been obtained from an online provider or pharmacist.

In addition, this edition of Workplace View also contains an update on Australia's current migration policy, information about the introduction of the model work health and safety laws in Western Australia, and a roundup of various judgments regarding COVID-19 vaccinations and mask-wearing mandates.

We wish all of our clients a very happy festive season and look forward to working with you again next year! In the meantime, if you require any assistance in relation to the topics addressed in this newsletter, or any other employment-related matters, please do not hesitate to contact us.

Labour & Employment team, Squire Patton Boggs AU

Employment Trends as Australia Emerges from COVID-19 Lockdowns

Erin Kidd, Director

Throughout the COVID-19 pandemic, the way we work changed immensely. Recent research by Deloitte Access Economics commissioned by Telstra indicates that more than one in three workers wants at least a hybrid model of employment, with time split between working from home and attending the workplace. The research found that only 30% of employees want to return to their previous working arrangements, 20% like and want to continue with the arrangements they had in place during the pandemic, 22% want a balance between the old and new working arrangements, and 28% are still deciding what they want. Obviously, this will be more relevant for employers with office-based employees, and particularly those who work in locations where we have experienced lockdowns.

In addition, The Great Resignation, which is a global resignation trend believed to be associated with the pandemic making workers reconsider their careers, is tipped to peak in Australia next March. Data is showing that two in five employees are currently considering leaving their current roles, with the main reasons being lack of career opportunities, pay rises, they want to continue to work remotely and job fatigue. In the US, resignations are at a two-decade high, with 4 million workers handing in their notice each month.

All together, the desire to remain working flexibly, The Great Resignation and rising salaries in many sectors is unwelcome news for employers who are not receptive to change. For those employers, as well as others who are already feeling the effects of labour shortages, the next few months will require an assessment of human resources practices and policies, which may include flexible working policies that allow employees to continue to work from home to some extent, as well as policies regarding bonuses and incentives and other benefits that aim to foster employee retention.

Many employees who work in office-based roles have discovered that they can perform their roles at home or utilise a flexible work schedule, or both, and they are keen for that to continue. There is nothing stopping any employee from making a flexible work request; however, only certain categories of employees have the right to make a request for flexible working arrangements under the Fair Work Act 2009 (Cth) (**FW Act**). These categories include employees who care for a child under 18 years of age, employees over 55 years of age, employees who are a carer and employees who have a disability. Where an employee makes a request for flexible working arrangements in accordance with the FW Act, the employer can only refuse the request on reasonable business grounds. Whether there are reasonable business grounds for refusing a request will depend on the role, the business, and how the proposed flexible working arrangements would impact costs, productivity and other employees.

For example, if a request is received from an employee that has been working from home during lockdown periods, you will need to carefully consider why this cannot continue despite your IT systems being able to facilitate remote working. A holistic view of the employee's role is required. For example, although a person may be able to perform the rudimentary tasks of their position remotely, it may not be reasonable to allow this continue if the employee needs to be in the office to properly supervise others, or be supervised themselves. If the employee is also covered by a modern award or enterprise agreement, the employer is required to discuss the request with the employee and genuinely try to reach an agreement on a change in working arrangements.

Where an employee makes a request for flexible work arrangements pursuant to the FW Act process, the business's response must be provided within 21 days. Where the request is refused, the written response must also set out the reasons for the refusal. There is no appeals process under the legislation – so an employee cannot bring a claim in, say, the Fair Work Commission if they do not agree with the business's response to their flexible working request. However, it is strongly recommended that a business still has policies and procedures in place for dealing with flexible working requests, particularly those requests made in accordance with the FW Act. This is because a breach of the provisions of the FW Act in respect of the time frame for providing a response, etc. could give rise to civil penalties. Furthermore, where a decision about a flexible working request is made in accordance with published guidelines, an organisation is more likely to be able to combat any claim or complaint that an employee may bring alleging that the unfavourable response to their request was due to other factors, such as an attribute protected by discrimination legislation.

It is important to remember that the employer's work health and safety obligations continue to apply to employees that are working from home. Often, this can present a challenge for employers because they have less oversight of the way in which the employee works and their work environment. An employer, therefore, needs to ensure it has systems in place to cover off the increased risks, such as working from home checklists that cover both physical and mental risks associated with working from home.

The demand for increased flexibility and hybrid working is likely to mean that those organisations who do not support these "new ways of working" may risk increased employee turnover, reduced employee engagement and a limited ability to attract future talent. So our top tips are:

- Implement or review your existing flexible working policy to ensure it meets the requirements of the FW Act and any relevant awards or enterprise agreements
- Consider whether your remote working arrangements, including any policies and checklists, remain relevant and adequately address work health and safety risks
- Consider whether there are any other policies, incentives (short-term and long-term) or other benefits that you could introduce to foster employee retention

The Future World of Work – Global Guide on Overseas Remote Working

Throughout our Labour & Employment Practice, there has been an increasing number of requests for advice from clients who have personnel that want to live and work in one country for the benefit of a company in a different country. Many employers have agreed to, or are considering overseas remote working arrangements (also referred to as "satellite" working).

To address the key issues for businesses to consider, we have put together "The Future World of Work – Global Guide on Overseas Remote Working". The guide provides a high-level overview in relation to employment, immigration, tax and social security risks, and more. You can access the guide here.

Upcoming Webinar

Looking in the Rear-view Mirror at 2021 and Your Roadmap for 2022

When: Thursday 9 December 2021

Time: 11 a.m. AWST/1 p.m. AEST

Where: Online – dial-in details will be sent to you upon registration

What a year 2021 has been!

In Australia, many employers started out the year full of optimism that 2021 would be a less disruptive year than 2020. Employers thought the new year would provide opportunities to get strategic planning back on track and progress the human resources projects that were put on the backburner during the chaos of COVID-19 in 2020.

However, for many employers, that was certainly not the case. Extended lockdowns in many states and territories of Australia had employers on the back-foot yet again, with many people managers spending all of their time reacting to matters, rather than proactively looking at HR issues.

It is no wonder then, that so many of those tasked with people management responsibilities have perhaps not had as much time to focus on some of 2021's most significant employment law issues.

During this webinar, we will review the noteworthy employment law topics of 2021 and outline a roadmap that Australian employers can use to plan for the employment-related issues they are likely to face in 2022.

What Will You Take Away From the Session?

During the course of the webinar, our presenters will review the following employment-law issues of 2021:

- The impact of COVID-19 on employment in Australia, including increased flexible working, working from home and mandatory vaccinations
- Changes to casual employment, including casual conversion requirements
- The legislative amendments following the government's response to the Respect@Work report on sexual harassment
- Changes to employer superannuation contributions

Our presenters will also provide you with a practical roadmap to ensure that you have properly taken account of the matters listed above (including the opportunities they provide), as well as the employment-law issues likely to arise in 2022.

There will also be an opportunity to participate in an interactive Q&A session.

Please RSVP here to secure your place.

Did You Know?

What Impact Has COVID-19 Had on Global Mobility?

Andrew Burnett, Of Counsel, Migration Lawyer, LPN 5511338

The closing of Australia's national borders as a mechanism for keeping COVID-19 at bay has had an impact on the number of workers arriving from overseas. This has particularly affected multinational organisations and workplaces who are facing labour shortages in Australia.

Australia's Migration Program is designed to achieve a range of economic and social outcomes. In 2021-22, the Migration Program will have an overall planning level of 160,000 places, consisting of skilled, family, special eligibility and child streams.

The Skill stream is designed to improve the productive capacity of the economy and fill skill shortages in the labour market, including those in regional Australia. There are 79,600 places in the Skill stream in the 2021-2022 program, and the stream will continue to focus on visa categories that will help Australia's economy rebound from COVID-19, with priority given to visa cohorts that drive economic growth, job creation and investment into Australia.

The three priority categories within the Skill stream for 2021-22, which aim to provide investment, talent and critical skills to Australia, and are well positioned to assist Australia's economic recovery, are:

- Employer Sponsored Program, which has 22,000 places available
- Business Innovation and Investment Program, which has 13,500 places available
- Global Talent Visa Program, which has 15,000 places available

What does this mean to Australian employers? Well, depending on the types of roles within the organisation, it may be easier or more difficult for you to bring in skilled labour from overseas. That will be determined by the role you are trying to fill. Business visas continue to be required for overseas workers who are coming to Australia on a temporary basis and travel is still subject to interruption, as we have seen only very recently with the emergence of the Omicron variant of COVID-19.

One effect of Australia having closed its borders is that the Department of Home Affairs has significantly extended the periods for examining and determining all classes of visa applications – in some cases, these period have doubled. As a result, the number of employer-sponsored workers entering Australia plummeted.

The delays are not surprising, however, given that the Department's staff have been spending much of their time assessing and determining exemption applications for entry under the emergency regulations. These were designed to allow those visa holders who were offshore when the shutters came down in April 2020 to enter Australia on their pre-COVID visas if they had special skills or intended to work regionally. Some migrants with roles in primary industries or those who had medical skills and experience for use in regional health services managed to be exempted from the closures but that was not the end of their struggles. The next step was finding an airline that did not bump them out of their booked and paid for seats.

The situation in respect of Australia's borders will evolve as we open back up to the rest of the world. In the meantime, however, organisations should be considering any plans they have for employing overseas workers in Australia, as well as their travel policies, including whether the employer will require employees to be vaccinated in order to travel internationally on business, given their work health and safety obligations to minimise, so far as is reasonably practicable, the exposure of their workers to COVID-19.

Q&A

The Rise of Online Medical Certificates

Elisa Blakers, Associate

It is well established that an employer may require an employee to provide evidence to confirm the reason for their absence from work. However, in a time where medical certificates are readily obtainable at the click of a button, are employers entitled to question the veracity of a medical certificate?

What is the current legal position in respect of requesting an employee to provide a medical certificate?

Under section 107(3) of the Fair Work Act 2009 (Cth) (**FW Act**), an employer is entitled to require an employee to provide evidence that would satisfy a reasonable person that the leave is taken in accordance with the FW Act (i.e. the employee is unfit for work due to personal illness or injury, or is providing care to a member of their immediate family or household).

There is, however, no requirement that the medical certificate provide any information as to an employee's diagnosis. The Australian Medical Association's Guide on Medical Certificates 2011 (Revised 2016) indicates that a medical certificate should include the:

1. Name of the medical practitioner and address of the practice
2. Date on which the certificate was issued
3 Date(s) on which the employee is unfit for work

In circumstances where the employee is taking carer's leave, the certificate should indicate the date(s) on which the member of the employee's immediate family or household was unwell.

What are online medical certificates and are they legitimate?

The ease of access to medical certificates has skyrocketed in recent years. Gone are the days where an individual would be required to obtain a doctor's appointment with their local GP in order to receive a medical certificate evidencing their need to take time off work. Today, a Google search for "online medical certificates" will return a vast array of websites offering medical certificates following a virtual consult, or, intriguingly, following completion of an online survey.

The websites indicate that, for a small fee, the customer will receive a medical certificate that purportedly meets the requirements of the FW Act. Fees for the medical certificate start at approximately AU$15, with some services charging a higher fee for certificates excusing the recipient from work for two or more days.

Ultimately, however, provided the medical certificate has been issued by a medical practitioner, an employer should take this certificate on face value (unless they have reason to suspect it is false, see below).

Are pharmacy certificates acceptable?

Some pharmacists are prepared to issue a certificate of absence from work. Similar to medical certificates that can be obtained online, we have also seen an increase in employees utilising "absence from work certificates" issued by a pharmacist. Some pharmacies even advertise that customers can obtain such a certificate for as little as AU$24.95.

The Pharmacy Guild of Australia recommends that pharmacists limit the provision of certificates for absence from work to:

1. Their area of practice and expertise, which is primarily:
    a. The supply, compounding or dispensing of medicines
    b. The provision of professional pharmacy services, including advice on minor conditions and the effective and safe use of medicines
2. Circumstances where they can reasonably form a view as to an employee's fitness for work, or as to the illness or injury of the member of the household or immediate family

Can an employer look behind a medical certificate or absence from work certificate?

Generally, a medical certificate from a registered medical practitioner must be accepted on face value. However, in some exceptional circumstances, an employer may be entitled to ask for additional information beyond the basic medical certificate. For example, where an employee:

- Has previously requested (and been denied) a period of annual leave, and subsequently takes personal/carer's leave for the same dates
- The employee's medical certificate contains obvious errors (including, for example, errors in dates)
- Provides a certificate that appears to be doctored or edited
- Appears to be undertaking activities inconsistent with their need to use personal/carer's leave (for example, where it is apparent the employee is on holiday, attending events, etc.) Some employees have been caught out due to having posted about what they are doing on social media.

Please contact our Labour & Employment team should you require any advice in relation to managing an employee's absence from work, including where you have suspicions about the legitimacy of an employee's personal/carer's leave.

Legislation Update

Upcoming Changes to Western Australia's Work Health and Safety Laws

Andrew Burnett, Of Counsel

Each of Australia's states and territories have their own work health and safety laws and regulators. In 2011, model work health and safety laws were developed. These were implemented (with minimal variations) in all states and territories except Western Australia and Victoria.

However, in January 2022, Western Australia's version of the model laws, the Work Health and Safety Act 2020 (WA), is scheduled to come into force. Because the mining and resources sectors have been regulated by specific laws and were, therefore, carved out of the Occupational Safety and Health Act 1984 (WA), the process of creating one law to cover all workplaces and all "persons conducting a business or undertaking" or "PCBUs" (a new term for Western Australia) has been lengthy.

Due to the fact that iterations of the new law have been in force in other Australian states and territories (except Victoria) for a number of years, it is likely that large national employers will find little or no need to adjust. But Western Australian-based employers are likely to require adjustments as they come to grips with:

- New terminology such as PCBU, industrial manslaughter, worker, workplace, and the need for directors and those who manage PCBUs to establish a due diligence defence to any prosecution for breach of a statutory duty
- Wider and more formal consultation obligations with their workers and health and safety representatives
- A greater emphasis on principles such as the legal rule that there may be multiple duty holders in the same workplace

Ultimately, employers should note that the underlying principles have not really changed. This means that liability will be applied to joint duty holders according to their capacity to control, and that PCBUs can establish a solid defence to prosecution by doing what is reasonably practicable to ensure health and safety.

In order to do what is reasonably practicable, it is likely that employers will need to allocate more resources to the removal of hazards, such as sexual harassment and sexual misconduct, in Western Australian workplaces. A recent Western Australian parliamentary inquiry into sexual harassment against women in the FIFO mining industry has highlighted, based on information provided by the Department of Mines, Industry and Safety:

- Just one in 12 sexual misconduct and bullying complaints has led to an official infringement notice in the past five years
- The Department of Mines, Industry Regulation and Safety provides insufficient training to its inspectors in these areas
- Only 30 of about 120 WorkSafe inspectors employed across all Western Australia were women, with only three of the statewide inspectors "specifically trained" to deal with sexual harassment and assault in the workplace

Case Law Update

A Whirlwind Tour of Recent COVID-19 Related Decisions

James v NSW Trains [2021] FWC 4733

Rylee Watson, Paralegal

As we outline below, Australian courts and tribunals have been dealing with a flurry of COVID-19-related cases over the last few months.

The decision of *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 (**Kassam**) marked the first of what is expected to be many court judgments in relation to mandatory COVID-19 vaccination requirements for workers within Australia. In Kassam, 10 plaintiffs within the health, aged care, construction and education industries who had all made an informed choice to refuse the COVID-19 vaccination (**vaccination**) sought for the Supreme Court of New South Wales to determine that the mandatory vaccination measures that applied to them were, for various reasons, unlawful. The plaintiffs' applications failed, with Justice Beech-Jones finding that the health orders did not authorise vaccinations without the consent of the person receiving the vaccine. Nor were the health orders impeding one's right and freedoms, specifically in relation to bodily integrity as Australia does not have a Bill of Rights, which, therefore, could not be interfered with.

Following Kassam, a similar outcome resulted for paramedic John Larter in *Larter v Hazzard (No 2)* [2021] NSWSC 1451. Mr Larter's claim arose out of the public health orders prohibiting New South Wales health care workers from attending the workplace after 30 September 2021 if they had not received at least one dose of the vaccination. Mr Larter's challenge was based on an argument of "unreasonableness". However, similar to the result in Kassam, the Court identified that it was not its role to decide the merits of a decision of the Health Minister, Mr Hazzard conferred on him under the Public Health Act 2010 (NSW). The Court dismissed Mr Larter's application on the basis that evidence provided to Mr Hazzard by the Chief Health Officer, Dr Kerry Chant, regarding the risks associated with COVID-19, in conjunction with the necessity of the vaccination, allowed him to make the necessary orders.

A case out of Victoria, *Beydoun & Ors v Northern Health & Ors (2021) FWC 6341*, involved employees of five healthcare providers who alleged their employers had breached work health and safety, disciplinary and status quo clauses within their enterprise agreements. Their claim was on the basis that they had not been consulted, as was required for all work health and safety matters, making it unlawful to terminate their employment for not complying with the mandatory vaccination direction. Deputy President Clancy held the employees did not establish a *prima facie* case and dismissed their application for interlocutory relief that would prevent their employers from dismissing them until consultation had taken place. This was because there had not been any breaches of the occupational health and safety clauses or disciplinary clauses in the enterprise agreement. Concerning the arguments about consultation, it was held that an employer's duty to consult is only required "so far as reasonably practicable" when it is within the "management or control" of the business. As the employers were complying with the Chief Health Officer's orders, this was clearly distinguishable from work health and safety consultation requirements.

The developing case of *Harding v Sutton*, which is set for trial in the Victorian Supreme Court in March next year, saw over 130 employees from an array of industries request an order for an interlocutory injunction to remove the public health orders and restrict any further such orders being made. The injunction was not granted on the basis that the Victorian emergency powers had allowed the vaccination mandates to be made. An alternative argument before the Court, not previously seen in the above cases, is that there had been a breach of the State's "Charter of Human Rights and Responsibilities". With the State of Emergency due to end on 15 December 2021, as well as the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 currently being voted on, there will no doubt be additional considerations in this case in the New Year.

In the very recent significant decision of *CFMMEU & Howard v Mt Arthur Coal Pty Ltd* (C2021/7023), the Full Bench of the Fair Work Commission (Full Bench) handed down its judgment on 3 December 2021 in respect of a matter concerning the circumstances in which an employer can issue a "lawful and reasonable instruction" to require staff to be vaccinated as a condition of entry to the worksite. The direction that was the subject of the question was that all workers at the Mt Arthur mine must be vaccinated against COVID-19 as a condition of entry to the site, with workers needing to have had at least a single dose of an approved COVID-19 vaccine by 10 November 2021 and be fully vaccinated by 31 January 2022 (the "Site Access Requirement"). The Full Bench determined that the direction (i.e. to be compliant with the Site Access Requirement) was not unlawful but it was not a reasonable direction. The determinative factor was that the Full Bench was not satisfied that there was proper consultation in accordance with sections 47 and 48 of the Work Health and Safety Act 2011 (NSW) (WHS Act). The case turned on its own facts and should not be seen as supporting a more general argument that a direction by an employer for an employee to be vaccinated is not reasonable. Many factors will influence whether such a direction is reasonable. In this regard, the Full Bench stated:

> "The reasonableness of a direction is a question of fact having regard to all the circumstances, which may include whether or not the employer has complied with any relevant consultation obligations; the nature of the particular employment; the established usages affecting the employment; the common practices that exist; and the general provisions of any instrument governing the relationship."

In so far as the consultation issue was concerned, in coming to the conclusion that BHP had failed to consult, the Full Bench gave some insight into the range of activities that BHP had not engaged in:

> "In our view, the Employees were not given a reasonable opportunity to express their views and to raise work health or safety issues, or to contribute to the decision-making process relating to the decision to introduce the Site Access Requirement. They were not provided with information relating to the reasons, rationale and data supporting the proposal, nor were they given a copy of the risk assessment or informed of the analysis that informed that assessment. In effect the Employees were only asked to comment on the ultimate question: should the Site Access Requirement be imposed? The contrast in the consultation or engagement with Employees in the implementation phase compared to the assessment phase is stark and suggests that during the assessment phase the Respondent was not consulting as far as is reasonably practicable as required by s.47 of the WHS Act. There was no real explanation provided by the Respondent as to why there was a markedly lower level of engagement during the assessment phase."

Meaningful consultation at an early stage in the decision-making process is, therefore, going to be key for employers, as without it an employer runs a real risk that a direction to be vaccinated will not be reasonable. In turn, if an employer has terminated an employee for failing to follow what it considers to be a lawful and reasonable direction in circumstances where there has not been sufficient consultation, the termination may now be open to challenge due to a potential absence of a valid reason for the termination of the employment.

Turning away from vaccination mandates, we have also seen a challenge to a mask-wearing mandate involving Australia's leading airline, Qantas. In *Jessica Watson v National Jet Systems Ltd [2021] FWC 6182,* Ms Watson filed a constructive dismissal claim, alleging there was no mask mandate within her employment contract and suggesting disability discrimination because of a medical condition that she argued meant she could not wear a mask. However, Deputy President Nicholas Lake found Qantas's direction had constituted a "lawful and reasonable direction in the context of the COVID-19 pandemic". The actions taken by Qantas were found to be reasonable management action required to be taken to ensure the company, other crew and passengers were not subjected to a safety or reputational risk. It was determined Ms Watson was not constructively dismissed but had resigned given she had been given a "number of options" yet chose at her own will not to comply. The Deputy President also found no discrimination had occurred.

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