

The background of the slide is a blurred photograph of a modern office interior. Several people are walking through a hallway with large glass windows and metal frames. The motion blur gives a sense of activity and movement. The lighting is bright, coming from the windows.

**Baker
McKenzie.**

Mandatory vaccinations in the workplace

Where are we now in Asia Pacific?

December 2021

INTRODUCTION

After a prolonged period of remote working, employers in many jurisdictions are encouraging employees to return to the office where it is safe to do so. A key question employers globally now have is whether they can require employees to be vaccinated against COVID-19 as a condition of employment.

In Asia Pacific, differing government strategies to tackle the spread of COVID-19 and different vaccination drives and timelines mean that the position differs from jurisdiction to jurisdiction. This makes it particularly challenging for multi-national employers who often want to adopt a global position on such issues.

In this publication, we aim to provide global employers with a snapshot of recent developments on mandatory employer COVID-19 vaccinations across 11 jurisdictions in the Asia Pacific region.

We hope you find this update useful.



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Mandatory vaccinations in the workplace - where are we now in Asia Pacific?

For some time now, across the Asia Pacific region, we have generally been seeing employers encouraging their staff to become vaccinated. With a strong desire to return to pre-pandemic life, employers want to understand to what extent they can require employees to become vaccinated and the options available to the employer if employees refuse.

In many common law jurisdictions such as **Australia**, **Hong Kong** and **Malaysia**, whether an employer can require its employees to be vaccinated against COVID-19 as a condition of employment will depend on whether it is a lawful and reasonable direction of the employer. Such a direction is unlikely to breach any particular law so essentially what this means is that the employer will need to assess whether such a direction would be reasonable in the individual circumstances. This will require a consideration of a number of factors:

* Factors include but are not limited to: the nature of the particular work environment; rates of community transmission; the risk of transmission to employees or other persons in the workplace without a vaccine; whether there are any vulnerable employees / clients / customers who could be exposed to COVID-19; whether other less intrusive measures are available and viable means of mitigating the transmission risks (such as remote working / social distancing / masks etc.); the role of each affected employee and the specific risk applicable to that employee; and the efficacy and safety of the vaccine. Any direction would also need to consider data privacy obligations and obligations under anti-discrimination legislation.

In **Australia**, such a direction may be justified taking into account obligations under health and safety legislation, and whether being unvaccinated renders an employee unable to perform the inherent requirements of their role in a way that does not pose an undue risk to health and safety.

A similar approach applies in **Thailand** where employees are under an obligation to follow the orders of the employer that are lawful and fair. Currently, there is no legal requirement to become vaccinated. Whether the requirement is fair will require consideration of the factors listed below. Employers should also be aware that employees may have a preference as to which brand/type of vaccine and may therefore be reluctant or refuse to receive their less preferred vaccine.

Generally, it will be easier to show that a direction is reasonable for employees operating in high-risk environments such as employees working in aged care homes or in international aviation with exposure to travelling passengers etc. An employer direction that staff be vaccinated will also likely be considered a reasonable and lawful direction if it is following a public

health direction. For example, in **Australia**, public health orders in all states and territories mandate vaccinations for aged care workers and there are similar orders in states and territories for other high-risk settings, such as health care and quarantine workers.

Further, in Victoria, public health orders have mandated vaccination for on-site attendance of general workers (e.g. most general office workers). Victoria's orders also require employers to collect and hold a record of each on-site workers' vaccination information (this may be a copy of their vaccination documentation, or a record stating that such evidence has been sighted). Victoria has not given a firm date of when the public health order vaccination requirements will be lifted, but we anticipate requirements will continue into 2022. In New South Wales, public health orders require employers to ensure that employees who are not fully vaccinated work from their place of residence, unless it is not reasonably practicable for them to do so. Vaccinated employees are permitted to work in offices (but must be allowed to work from their residence if this is their preference, and it is reasonably practicable for them to do so). New South Wales will remove this health order on the earlier of 15 December 2021 or 95% double vaccination of those 16 and above. At this point, vaccination and site-attendance requirements will be per the employer's discretion.

In **Hong Kong**, the the Hong Kong Monetary Authority (HKMA) issued a circular on 1 June 2021 in which all authorized institutions were required to strongly encourage staff performing client-facing roles or critical support functions to get vaccinated. Pursuant to the circular, authorized institutions were asked to identify and draw up a list of designated staff expected to receive inoculation and the circular directed that bank staff included in such list should get vaccinated as soon as possible. Staff who were not yet vaccinated or who were unfit for vaccination due to a medical condition should undergo effective

testing for COVID-19 every two weeks commencing on 30 June 2021. The HKMA issued a follow up circular on 28 October 2021 explaining that the HKMA considers it essential for authorized institutions to expand the scope of their vaccination and regular testing arrangements to all staff. The Hong Kong Securities and Futures Commission (SFC) also issued a similar circular on 1 June 2021, in which licensed corporations were strongly encouraged to consider vaccination as a critical part of operational risk management, to ensure that their business operations and client interests would not be unduly affected by COVID-19. A follow-up circular was issued by the SFC on 28 October 2021 urging licensed corporations to strongly encourage all their staff who are medically fit to get vaccinated by 20 November 2021 or to undergo effective testing for COVID-19 every two weeks. Pursuant to the HKMA and SFC circulars, it is arguably reasonable for employers who are covered by the circulars to request relevant designated employees to become vaccinated, or if they refuse, to undergo regular testing for COVID-19. From 1 September 2021, all government employees who have not received the first dose of vaccination must take regular COVID-19 tests on a bi-weekly basis outside working hours at their own expense. This is extended to Hospital Authority staff, care home workers and staff of public schools. The Hong Kong Airport Authority is requiring mandatory vaccinations for certain targeted groups, e.g. those handling high risk cargo or having unavoidable close range contact with arrival and transfer/transit passengers and crew. With effect from 30 September 2021, all targeted groups must have had two doses of the COVID-19 vaccination and must take a COVID-19 test every seven days (with no medical exemptions available).

In **Malaysia**, the Standard Operating Procedures (SOP) issued by the Malaysian National Security Council that are put in place for relevant industries arguably creates an implied obligation on applicable employers to ensure employees are vaccinated, or at least provide added justification for such a requirement. Moreover, employers in several sectors (including construction, manufacturing, mining, and quarries) have their on-site operating capacities pegged to the percentage of employees who are fully-vaccinated. The more employees who are fully-vaccinated, the higher the permitted operating capacities. Businesses such as cafes and restaurants are only permitted to offer dine-in services if employees are fully vaccinated.

On 23 October 2021, the Tripartite Partners (which include the Ministry of Manpower) in **Singapore** issued an updated advisory on COVID-vaccination at the workplace in response to the Singapore Multi-Ministry Taskforce's announcement that, from 1 January 2022, only employees who are vaccinated, or who have recovered from COVID-19 within 270 days, can return to the workplace. All unvaccinated employees will not be allowed at the workplace unless they have a negative COVID-19 test result (24-hour validity). The advisory provides guidance to employers on adjusting their HR policies, in consultation with unions if applicable, for implementation from 1 January 2022. In Singapore therefore, from 1 January 2022, there is effectively a "soft" vaccine mandate.



Unvaccinated employees are required to pay for the COVID-19 test and show the results to their employer when reporting to the workplace. For unvaccinated employees whose work can be performed at home, employers may allow them to continue to work from home but such working arrangements remain the employers' prerogative (subject to any Government mandated Safe Management Measures that require employees who work from home by default). In relation to employees whose work cannot be performed from home, employers have the following options:

- a. Allow them to continue in the existing job with COVID-19 testing done at the employees' own expense;
- b. Redeploy them to suitable jobs which can be done from home if such jobs are available, with remuneration commensurate with the responsibilities of the alternative jobs; or
- c. Place them on no-pay leave or, as a last resort, terminate their employment (with notice) in accordance with the employment contract. If termination of employment is due to the employee's inability to be at the workplace to perform their contracted work, such termination of employment would not be considered as wrongful dismissal.

Employers are requested to give special consideration for unvaccinated employees who are medically ineligible to receive a vaccine or who are pregnant.

In **Japan**, the **PRC**, the **Philippines**, **Taiwan** and **Vietnam** the general position is that employers cannot require their employees to be vaccinated as a condition of employment unless the employee's job position is subject to compulsory vaccination by health authorities.

For Japan, the government has made it clear that COVID-19 vaccination cannot be mandated for any Japanese citizens. However, employees do not have a contractual right to work on their employers' premises. It is therefore permissible for employers to mandate COVID-19 vaccination for their employees as a condition to come to the office. That said, as mentioned above, employers cannot make vaccination a mandatory condition of continued employment, and must provide alternatives to employees who do not wish to get vaccinated. If employees are not vaccinated and cannot come to the office, employers would need to have them either work remotely or take leave. If employers need to put employees on leave in such manner, they would likely be required to continue paying 100% (or 60% as the case may be) of the employee's salary.

For further details about the governmental positions and actions regarding COVID-19 can be found from the below website (in English). https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000164708_00079.html

In the **PRC**, employers may not mandate vaccines or take disciplinary action against employees for refusing to take vaccines. In theory, employers can inform employees that vaccines are required to physically enter the office as long as such measure has no impact on the employee's ability to perform their work and there is no negative impact on their compensation and terms of employment (i.e. they can fully perform their job remotely). However, we have not seen this done in practice due to the low numbers of COVID-19 in China and most workers returned to office/site based work last year.

In March 2021, the Department of Labor and Employment in the **Philippines** issued Guidelines on the Administration of COVID-19 Vaccines in the Workplaces, which provide that: (i) employees have the right to choose between getting vaccinated and not getting vaccinated, (ii) employers may not discriminate against

or dismiss employees who choose not to be vaccinated, and (iii) employers may not implement a "no vaccine, no work" policy. More recently on 11 November 2021, the Philippine Government issued Resolution No. 148-B directing employers in the public and private sectors in areas where there are sufficient supplies of vaccines to require on-site workers to be vaccinated or, at the expense of the employees, testing for those who refuse vaccination effective on 1 December 2021. The Resolution does, however, state that employment of eligible employees who remain unvaccinated may not be terminated solely because the employee is not vaccinated.

Currently, in **Vietnam**, the situation still remains the same. To be specific, legally speaking, employers cannot require their employees to be vaccinated if they are not among the mandatory vaccination subjects. In practice, depending on the pandemic situation and corresponding local requirements for COVID-19 prevention and control in each province/city, employees may be required to be vaccinated to be eligible to return to the workplace. Employees without vaccination may be subject to other stricter requirements or restrictions by local authorities, which may prove to be an inconvenience to unvaccinated employee thereby encouraging them to become vaccinated.

The position in **Indonesia** is somewhat different. Indonesia was one of the only Asia Pacific jurisdictions to mandate vaccinations quite early on. Indonesian nationals aged 12 and above are required by the government to be vaccinated (unless they fall within a relevant exemption, e.g., they suffer from a certain health condition). Administrative sanctions can be imposed by the government on eligible individuals who refuse to have a COVID-19 vaccination. The administrative sanctions can be in the form of postponement or termination of social security or social assistance benefits, postponement or termination of government administration services (e.g. renewal of driver's license) and a monetary fine. The monetary fine is determined

by the relevant local/provincial government. In most regions in Indonesia, including Jakarta, only those who have been vaccinated are allowed to conduct activities in public places, including to work in the office. Exemptions to this requirement apply to an individual (i) with a health condition that does not allow them to be vaccinated (which must be supported with the relevant doctor's certificate) and (ii) who has tested positive for COVID-19 within the past three months (which must be supported with the relevant lab result). In light of the government's direction for mandatory vaccination for eligible individuals, an employer is able to deny unvaccinated employees from entering into the workplace. Further, we consider that it would be reasonable for an employer to have a policy requiring its employees to comply with government directions on this issue.

Concluding comments

There are a myriad of other issues employers need to consider when developing their stance vis-à-vis workplace vaccinations. Much will depend on the relevant employment laws in the jurisdiction and whether there has been any government guidance issued generally or in relation to the specific industry sector.

One area employers need to be mindful of is the indirect discrimination risks in relation to any vaccination policy or action taken because an employee chooses not to be vaccinated, for example, where the employee is suffering from a medical condition, is pregnant (or in some jurisdictions if the employee has refused vaccination based on religious belief). In certain jurisdictions, depending on the circumstances and action taken by the employer, discrimination risks may be lower if the employer can show a justifiable reason for treating an unvaccinated employee differently e.g. denying the entry into

its premises to protect the employees'/customers' health and safety within its workplace or if there is a relevant exemption in the discrimination legislation for infectious diseases. The extent of discrimination laws varies across jurisdictions in Asia Pacific. For example, there are currently no express applicable anti-discrimination laws in Malaysia that would apply in this context. Note however that amendments to the Malaysian Employment Act have recently been tabled before Parliament to propose that power be given to the Director General of Labour to inquire and decide on any dispute between employer and employee relating to discrimination in employment. Similarly, in Singapore, there are presently no overarching anti-discrimination laws. However, there are guidelines in relation to fair consideration and fair employment practices the contravention of which attracts administrative sanctions. Singapore's Prime Minister announced on 29 August 2021 that the Singapore government would enshrine into law current workplace anti-discrimination guidelines and a Tripartite Committee on Workplace Fairness is presently undertaking a consultation exercise with the relevant stakeholders on the scope of the planned law on workplace discrimination.

Another area employers need to be mindful of is employee data privacy. Most jurisdictions have data privacy legislation that will be applicable when an employer collects vaccination status information or COVID-19 test result data from an employee. Employers will have obligations to its employees in relation to collection of such data and employee consent requirements as well as in relation to the security, retention and use of that data including to whom the data may be transferred.

Where remote work is not feasible, employers in particular want to understand whether they can take disciplinary action against an employee who refuses to be vaccinated or whether the employer can make changes to the terms of employment. Employers in Asia Pacific jurisdictions where unilateral

termination of employment by the employer is difficult and where vaccinations have not yet been mandated are more limited in terms of the options available to them if an employee refuses to be vaccinated.

Finally, when considering policies on work-place vaccinations, employers will also need to take into account whether problems associated with the supply and distribution of vaccines still remain in certain Asia Pacific jurisdictions.

Please feel free to reach out to any member of the team below should you wish to discuss any issues raised in this article in further detail.



Resources

Australia

Link to summary of health orders: COVID-19 vaccinations: legislation and public health orders – Fair Work Ombudsman

Hong Kong

COVID-19 Thematic Website – Together, We Fight the Virus – Home (coronavirus.gov.hk)

Indonesia

Indonesian's government official website containing COVID-19-related policies: <https://covid19.go.id/p/regulasi>

Japan

For further details about the governmental positions and actions regarding COVID-19 can be found from the below website (in English). https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000164708_00079.html

Malaysia

<https://covidnow.moh.gov.my/>
<https://citf.mosti.gov.my/faq/en/docs/>

Philippines

Labor-Advisory-No.-03-21-Guidelines-on-the-Administration-of-COVID-19-Vaccines-in-the-Workplaces.pdf (dole.gov.ph)
<https://www.officialgazette.gov.ph/downloads/2021/11nov/20211111-IATF-Resolution-148B.pdf>
<https://www.officialgazette.gov.ph/downloads/2021/11nov/20211118-IATF-RESO-149-RRD.pdf>

PRC

National government website (in Chinese): <http://www.gov.cn/fuwu/zt/yqfwzq/yqfkbld.htm>

Singapore

Updated advisory on COVID-19 vaccination at the workplace (mom.gov.sg)

Taiwan

<https://www.cdc.gov.tw/En/Category/MPage/G8mN-MHF7A1t5xfRMduTQQ>

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