



Transcript – Shana Shreier-Joffe

Helga Svendsen 0:00

Today on the Take on Board Podcast I'm speaking with Shana Shreier-Joffe about a hot topic in many boardrooms at the moment, mandatory vaccination in the workplace. First, let me tell you about Shana. Shana has over 20 years experience as an employment and industrial lawyer. She began her career as a barrister in South Africa and has a master's in law from Cambridge University. Shana's clients include numerous publicly listed and international clients. She's the trusted advisor for all employment related matters for her corporate and government clients. Shana believes in preventative law and is a frequent blogger on employment law topics, has written numerous articles that have been widely published and presented a wide variety of seminars and provides in house training on all aspects of employment law. She was recognised as a leading lawyer in her field by being nominated as a finalist for the Lawyers Weekly Employment Law Partner of the Year in 2019 and her team was nominated as a finalist for the Employment Law Team of the Year in 2020. Welcome to the Take on Board Podcast Shana.

Shana Shreier-Joffe 1:06

Thank you. Thank you for having me.

Helga Svendsen 1:07

Oh, absolute pleasure. And in fact, I probably should do a shout out to Deidre Mittingham, who prompted this conversation that we're having. She sent me something last week about mandatory vaccination. And I said Deidre, we should have you on the podcast. And she said, No, you should talk to Shana. And quickly did an introduction. So here we are. So thank you, Deidre. And thank you Shana, for taking the call, literally. Now, before we talk about some of the governance challenges of COVID, and mandatory vaccinations, as always, I love to dig a little bit deeper about the guests that I've got here. So tell me a little about you. Maybe something that wasn't in that bio that we've already heard?

Shana Shreier-Joffe 1:50

Yeah, that's, that's a loaded question. Something about me that's not in the bio. I am a mum with three children. I love to horse ride, I enjoy cooking. And I have decided that I have a passion for reading and poetry. So when I'm not lawyering, or advising clients, that's probably what you where you can find me.

Helga Svendsen 2:21

Oh, fantastic. And now I know you're based in Sydney, and we're recording this in the middle of October. So Sydney is just coming out of lockdown, which is no doubt a joy, as in Melbourne, as is Melbourne where I'm from, just because you said horse riding in there, have you been able to see your horses? Have you been able to get out with them during that period?

Shana Shreier-Joffe 2:42

No. And I have to say that I put a horse riding up there. But I haven't been able to first ride because I unfortunately had a an operation from for breast cancer. So recently, I haven't been able to do much else riding but yeah, looking forward to getting back to it.

Helga Svendsen 3:02

Oh, I'm sorry to hear that.

Shana Shreier-Joffe 3:04

From our perspective, this might be surprising. Lots of people say, what's the worst thing that's ever happened to you? That definitely is not the worst thing that's ever happened to me. Yeah, it's had lots of positive outcomes. So

Helga Svendsen 3:19

I'm guessing that on the other side, the other things that you said there around reading, pottery, cookery, I'm guessing you've had possibly a little too much time to do those things over the last few months.

Shana Shreier-Joffe 3:31

Absolutely looking forward to like everyone else, getting back out there visiting my restaurants and going back to the office, and interacting with my team. And we've been doing it all by zoom. And so this conversation we're about to have is just as impertinent to me and my employees, and myself is just a member of the public as anyone else.

Helga Svendsen 3:55

Well, let's get into it, then, shall we? So like I said, this was prompted because there'd been a bit of back and forth with theory around mandatory vaccination. And I know that is a big thing for many boardrooms at the moment. But there might be more to it than that. So I'm going to start a bit more generally. And let's see where it goes. What are the governance issues that boards should be thinking about at the moment in relation to COVID-19?

Shana Shreier-Joffe 4:21

That's a very, very important question, I think at the moment, because if you sit on a board, you are ultimately responsible for what happens to the company that you govern. And in that sense, you are responsible for the work, health and safety of all of the employees that are employed by that organisation. And you're also essentially responsible for the reputation of that organisation. And those two factors mean that where we're at right now with COVID has significant impact on what I would suggest every board needs to be thinking about. Because if you are on a board, and you are not over or covering what your organisation is doing in relation to protecting the employees that work there, both from a physical perspective and a mental health perspective, and what you're doing in relation to the people who visit your enterprise or your premises, and what happens if someone has COVID, and passes it on how that can happen, then you're not fulfilling your work health and safety obligations, which are imposed on board directors, as a matter of law. But COVID just part is part and parcel of that. So the starting point is, you have an obligation as a director to ensure the health and safety of your employees. As a governance point, you need to do that at board level. That's a requirement. And so these questions really, then are just a bit broader than that. What is your organisation doing? What does mandatory COVID vaccination mean for your organisation? Do you need to have it? Are you one of those categories of business that's required by Victoria or New South Wales or wherever you might be running operations? Or is that a choice? For some? If it's a choice, my choice? It's kind of like, well, the government says, we have to do it. Now we have to do it. How do we get our employees across the line? What do we do with those who don't want to come across the line? And those are questions that all need to be considered? If you have a choice, then there is a preliminary question, do you don't we mandate while mandate? And one of the things you have to think about it in terms of should we be mandating vaccinations? So you take the Qanta's of the world or the the businesses that are doing it at the moment? And you go, Well, what are the motivating factors? One is work health and safety? How do you ensure health and safety for everyone to is, let's have one rule that fits everybody, because, you know, some states we've got, you know, the government telling us, we have to mandate and others they're not doing that. So what do we do? And I think that the important thing for business is really to go where do we sit in that? What do we want for our workplace? Is it reasonable? Can we direct people to be COVID vaccinated? And know that you don't ask me a question about this? I'm happy to come back. I think at board level right now, these questions should be discussed. And I have to say they really, really, really need to have a plan.

Helga Svendsen 7:36

So for those boardrooms of those organisations that are mandated by the Chief Health Officer or the equivalent, wherever you're right, I think that makes it much easier. You just are, you're required to for those organisations that are not and you know, the Commonwealth Bank, Qantas, SPC there's been a number of organisations that have mandated it for their own workplaces. What should organisations be thinking about, about whether that is reasonable or not?.

Shana Shreier-Joffe 8:05

So I think the first question to ask and then I'll answer, if you're sitting on a board is, what do we do? What are people doing? So it's not only the big companies that are mandating vaccines, I had a client called me, and they're in the car wash business. And they said, Well, our people on a daily basis, dealing with the public, and we have other people who travel around from each car wash, and they might visit 20 car washes in a day. Now, if they had COVID, they spreading it to 20 locations. And so they said, We really want our people to be vaccinated. They've had some resistance. So the question from the perspective is, one work health and safety, what happens if someone gets sick, and has COVID in their environment, one significant for the business, they'll close down a carwash or whatever it is quite significant for the spread. Now, this was before and in some in some states, you know, that kind of environment is now mandated. But then the basic question is, is it reasonable to direct an employee to be COVID vaccinated? And the real question then is what is reasonable in the circumstances? And it is a little tricky, where you don't have anything that says you have to do it, then the question will be become Well, can this person safely perform his role without being vaccinated? And if the answer to that question is yes, then the mandate will not be reasonable. And you might notice that, for example, Telstra has done a mandate where they've only mandated vaccines for the client facing or customer facing roles. People who work in the back office, you can work from home they haven't, and that's one of the reasons because if you're not required to serve customers, or interact with other employees or you're not going to put the business in risk, if you've got COVID. It might not be a reasonable mandate. But in all other circumstances, especially now, if for example, you had to close your business for three days to clean it, and that would put you out or financially cripple you, that's, in my opinion, enough to be reasonable. So you do have to have a little bit of that process. And then if you can answer those questions, yes, yes, yes. Are these two out of three? Yes, that I think that would be reasonable to mandate vaccination.

Helga Svendsen 10:33

I want to take a little bit more into the Telstra example there, it would be more likely to be unreasonable to mandate for somebody who only works from home, that makes a bit more sense to me. But I'm interested in that part about front facing as in with customers versus those that are back office, because a lot of the back office, people will still be working with their colleagues, presumably?

Shana Shreier-Joffe 10:54

this, this comes back to that, that more robots, what are we doing as a business in relation of it. So if you're a business, who can socially distance your employees, and everybody is working in their own offices, and they don't have to interact, and they don't have to, now, that's going to be rare, but it's possible. And if you're prepared to, you know, have meeting rooms that are socially distanced, and all the things that we saw in the first phase of COVID, people coming in, they have to sanitize their hands. And if you got all of that, then arguably, you could say, well, for those people who are going to come in, they're going to work in their office and go home, we can use these other mechanisms to make it safe. And so it then becomes a balancing act, how many people are in your offices? How easy is it to keep people socially distanced? How many of those people are actually vaccinated at the moment? And then that raises all sorts of other questions. Can we ask our staff what the vaccination status is? Can we disseminate that? So it becomes a bit of a snowball question, because can we mandate vaccines? Yes or no? Well? Usually that's Yes, you can? No, you can't depends on the circumstances, and each person has to be looked at individually. But then the question is, well, how do we know, can we ask, what do we do with information, and things have to be considered? It's really interesting. I had a client who called me up last week, and I said, they are business that effectively distributes hardware and glasses. And they said, all of their optometrists and alike have said, well, to come into our stores, you now have to be vaccinated. So we need to know whether your employees are vaccinated. That raises a really interesting question, can the company share the vaccination information of their employees with third party?

Helga Svendsen 13:03

And what's the answer? Because that's it? That is a great question that I'm sure will be. And it's really

Shana Shreier-Joffe 13:09

interesting, because most people are going well, this is private information. You know, how does it work under the privacy legislation, and the like, and the laws around vaccination and COVID mandatory vaccinations and all of the health orders, say that an employer is entitled to and in fact, must collect this information, and they must have it on file, it doesn't tell you anything about whether you can disseminate it to a third party. And in my opinion, that becomes an issue of privacy. And you are then obliged to tell your employees that this has been a request, because to enable them to go and visit whatever to do their job to be able to do this. And so you have to tell them and they have to consent. If they don't consent, you have another problem. What happens when, and so that's what I'm saying? It's really interesting, because I think that most people who sit on the boards they can't get each question right, but there's certainly not a question.

Helga Svendsen 14:03

Yeah. And that, you know, there are varying levels in the rabbit hole of what all of those things might be.

Shana Shreier-Joffe 14:09

Absolutely. And so it's really it's an even for me as an advisor. You know, I'm not thinking about every question until the client asked me that question I hadn't thought about. So it's been quite an interesting journey. Yeah, yeah, we've thought about policies and we've thought about social distance and we thought about what signs you need to put in your workplace and when you need to tell clients, all those things and then you have a curly one. Luckily it was like okay, that's another one we have the end.

Helga Svendsen 14:36

And as I understand it, much of this at this stage is untested, because it's also new.

Shana Shreier-Joffe 14:41

It is very new and it is very raw. So everybody saw the riots in Melbourne. That was all about this. It was all about employees not wanting to be mandatorily vaccinated in the building industry. There are currently challenges in the in the courts, but the courts have made any decisions, there are challenges to the mandatory vaccination mandates. I have to say that I think that it would be very unlikely I'd be surprised if the courts found that they weren't legal or valid. And I would be surprised in the case of private employers not captured by these mandates, where they go through the process I've described being found to have unfairly dismissed someone because they wouldn't get vaccinated, because there are some test cases in relation to flu vaccines. And in those cases, the Commission has found that the flu vaccine was valid. And that's how it is so much more serious. So I just don't see it as being a problem. But it's being tested. And that's why I think it's so important for, you know, the senior people in any organisation to really think about this, not to be just reacting. And, you know, I have clients who said to me, and you've heard it on the radio, I've heard Neil Perry talk about this, when he, you know, they were talking about how restaurants kind of cope with people in front of the doors. And, you know, he's a bigger business, but what about smaller businesses? And it's, it's a very valid question, you know, you've got a young employees standing at the front of your store, his checking IDs now, and he gets or she gets some person is puts up a fuss, what is that employee going to do? Now, that is work health and safety issue for your business. And if you haven't considered how you going to instruct an employee, how you're gonna protect that employee, then you have a risk. And it's a foreseeable risk. Yes, you need to be thinking about that.

Helga Svendsen 16:42

Will restaurants require or pubs or whatever they may be, need security people around to help deal with these sorts of things, and exclude hubs, to some extent, already have a lot of these measures in place, and often a refusing service for people dressed the wrong way or already too inebriated, or whatever it may be. So some of the pubs probably already have this in place, but not so much

restaurants. So what are you hearing there about what restaurants might be doing to ensure the health and safety of their workers?

Shana Shreier-Joffe 17:13

I think it's it's restaurants, its retail stores, at your local barber shop, it's your, it's all of those stores who just don't have the resources? I mean, I've had a large number of dentists and, you know, calling me up going, what do we do? And we, what do we do with our employees? And can what do we do with our clients who saying that I want to be served by a dentist is not COVID vaccinated? I'm like, I get that. Yeah, what did you do? And I have to say, he really, I there's no one size fits all. But I do think that, you know, if you're a business, like a chain of retail stores, don't put your youngest most expect inexperienced employee on the door. Because you know, that 17 year old is just doing the casual job and is then confronted by, you know, angry people on a daily basis, that's going to be very difficult, or give them training, or actually tell them what to do. If this happens, do they have a backup do this, do that? You know, it's like, when you have a fire, you have a fire drill? People know to do, I can guarantee you I guarantee you that there are people standing at truck entrances, we've got not a clue what to do if someone puts up a fuss.

Helga Svendsen 18:30

Yes, absolutely. And they'll be the next one, not only dealing with the person at the door, but it'll all be videoed and all other social media before you know it.

Shana Shreier-Joffe 18:37

Right, exactly. So it's really interesting. I think these are challenging times, for business, for small business, but big business to in fact, to be honest, when you sit on a board of a private company or a public company, if it's a public company even worse, because you're more likely to be in the news. We're definitely going to be challenged if you get it wrong. And you really those are the companies that need to have sort of everything documented and yes. But it's moving all the time. Yesterday it was this was mandatory. And today look at Victoria's new directions that came out, I think, last night or very recently, and there's a whole list of new people on there that can't come to work anymore, because they're not vaccinated. So it's a bit of a moving beast.

Helga Svendsen 19:27

Whether it's mandated by the government or by the employer, whichever it might be for, you know, and let's assume that that is a valid order. If it gets tested, it's upheld. What happens with those employees that choose for whatever reason to not and they don't have a medical exemption? What actually happens? Presumably they're not rostered for work, do they need to be redeployed? What happens?

Shana Shreier-Joffe 19:51

Great question. So that cannot be rusted forward. There is a prohibition on the employer allowing them to come to work with leaves the employer with a choice. The choice is finding an alternative place for this employee to work if they can work from home fantastic that they can work in isolation. Well, that doesn't contravene the worker health orders, fantastic. But that is going to be the very, very vast minority of employers in that position. Which means that those people who are not willing to be vaccinated are going to face the circumstances where the employer is either going to be required to terminate their employment, or stand them down until they can be reemployed. Standing down employees in those circumstances also creates difficulties. So I think a lot of employees will lose their jobs. Because of this, and I've had that circumstance both on the employee side and employer side.

Helga Svendsen 20:52

it sounds like because my understanding is standing down and employee, there's actually quite restricted circumstances in which you can do that and not being vaccinated or not obeying a mandatory order is not one of them. So am I right there in thinking it's actually more likely the employees will get terminated than stood down?

Shana Shreier-Joffe 21:12

I think that it is very possible that employees will be terminated and instead of stood down, I think a lot of employers are trying to err on the side of will preserve your role until you're ready. But then they're in this sort of Twilight Zone of whether that's legal or not, but the one of the worst option is termination. So they're kind of rely on that. But I think that for employers, in that circumstance, it creates a number of difficulties. Just coming back to a question I mean, one of which is the legality of standing people down in those circumstances. The second is, well, what do you do? Do you are you allowed to go and hire someone else. And then when employees are out, ready to come back to work, you've got to employees doing the job, then you've got a double problem. I think employers who need the role done will go out and hire people who are vaccinated and are likely to terminate those who not prepared to get vaccinated. And those are the challenges that are going to be coming through the courts, the unfair dismissals, and the like. But I think that they will have very little chance of success.

Helga Svendsen 22:10

Yes. And you're right, they might be a little bit down the line with so many people, depending on what sort of workplace you're in, a lot of people have been able to work from home or do some of their work from home. So maybe it will be where you can work from home for now, although it doesn't work in a restaurant, or retail, or whatever it may be. But you can work from home for now.

And we'll work it out down the line. And hopefully, people will either choose to get vaccinated in the intervening period, or may find themselves something else that suits them a little better, where it's not mandated.

Shana Shreier-Joffe 22:42

It's really tricky. Because I mean, I have a client in the financial services industry, and you think, Oh, well, you know, these people are all working, direct, I mean, that they're not meeting millions of people like a restaurant. But I had the question from a client that went along the following lines, I have a person who doesn't want to be vaccinated, he can, for the most part, work from home or not work in the office. But his role is to meet clients. And what happens when the client refuses to meet him because he's not vaccinated? And one, can the client even ask what is vaccination? What are the rules around, can a client say, I only want to meet with a person of your organisation? If they're vaccinated, please let me know if they're vaccinated. So can you or can't you? And then if they are not vaccinated, and the client says I want to meet with them? What does it can that person actually do their job where he lived there? And that's where things like cannot be mandated? is a reasonable start coming into focus? If that makes sense?

Helga Svendsen 23:43

Absolutely. I mean, as a customer, it means that you then have certainty that the person you are dealing with in whatever environment that might be you have that certainty in that comfort, that the person you're dealing with is vaccinated, or the vast majority of them will be so yeah. Oh, it's a very fun can of worms that is coming.

Shana Shreier-Joffe 24:05

Yes. And it really is. I mean, I don't know the answer to this. I'm just posing the question. If you are, for example, a member of the public who goes into a dentist's office, and the dentist is not vaccinated and the employee assumes that they get COVID, is there going to be recourse against the dentist? I don't know. Those are questions that you know, I would be asking if I was that patient then got sick because our interviews of my dentist, understanding that they were vaccinated, and they weren't.

Helga Svendsen 24:38

Absolutely and increasingly I think the customer will be asking the question and requiring it so you're right, the next level will be privacy and what can and can't be revealed and maybe a mandate just makes it simpler for everybody so that you don't then need to repeat you don't need to. I was gonna say you may avoid but you might not avoid either, but anyway, it might make it easier. Around the privacy requirements, if it's a mandate,

Shana Shreier-Joffe 25:03

I don't want to advise clients to do one or the other. That's certainly my role. But I do very strongly advise anybody running a business to carefully give this thought. And to be very clear about what their position is. So if it is mandating it fine, mandated, be clear, put it in a policy, make sure you've consulted and discussed with your employees, make sure everybody knows what this means how it all works, what that means for them. All of the things be clear, and not vice versa, if you decide not to mandated, what does that mean? So does it mean that when you have a client who says I don't want to come to meet that person, or how do you deal with that? What does it mean? How's it going to work? So that everybody's on the same page? So that, you know, as an organisation, this is how we're dealing with these issues?

Helga Svendsen 25:52

Yes. Shana, I was just going to say one of the key things you want people to take away, I suspect what you just said then is part of the summary. That Yeah, what are the key things you want people to take away? In addition to that's beautiful summary you just gave?

Shana Shreier-Joffe 26:06

Yes. Well, seeing we're talking to board directors, I'm going to direct this sort of summation in my view as to what they should do to them, particularly, which is be aware that you are obligations in relation to health and safety. And be aware that for you in your organisation, you need to understand what that means. So if you aren't asking the questions, or ask the questions, to make sure your organisation has very clearly identified what it's going to do, how it's going to do it, what its position is in relation to all of those things we've talked about in this conversation. And then three asked to see the documents that sent that out, where is the policy? What is the plan, if something goes wrong, like that person's getting abused at the front door, or like, their client has asked for information? Where is it that the employees are going to know what to do on a board on want to see all of that, so that when if something goes wrong, God forbid, it shouldn't? Because if you've got a plan, you've been in a much better place, but if it is, that person on the board can go as a director, I did everything reasonably practical I could do to ensure that this company is in the best place that can be. Yeah, if you can't say that, as a director, you're failing in your duties. Is there

Helga Svendsen 27:26

Is there a resource you would like to recommend for the take on board community?

Shana Shreier-Joffe 27:31

It was the point where I can push my own agenda.

Helga Svendsen 27:35

Free fee, yes.

Shana Shreier-Joffe 27:37

You know, what, at the end of the day, the resources that most lawyers offer, but we certainly do, most good lawyers who are practicing this area is assistance in relation to advising big or small businesses in how to figure out what they should be doing. So what's the plan? Yes, then documenting their plan and a policy and helping clients work through this idea of mandating and and the fallout for employees. So there's a whole raft of things that you need to do consultation, you need letters, so letters to go to employees that direct them to be vaccinated, and the requirements around that. And absolutely, all of those things are things that we can help our clients with. And are we doing on a daily basis at the moment?

Helga Svendsen 28:23

Great, well, we'll make sure we put a link to that in the show notes for people as well. Thank you, thank you so much for sharing all of that advice, and for sharing it so quickly, I should say, as a lawyer as well, this is general advice only. Please do not take this as legal advice. But get in touch. Get in touch if you want that specific legal advice for your board to have the conversation that all boards really need to be having at the moment about how this is implemented. So thank you so much for taking the time today to share that. Thank you.