

The Australian Government Wants Workplaces to be “Covid-Safe”, but this Doesn’t Mean Employers can Require Employees to Download the “COVIDSafe App”

Asia Pacific – Australia, 20 May 2020

In a bid to reawaken the Australian economy, the Federal Government is developing a return to work health and safety “toolkit” and is encouraging workplaces to become “COVID-safe”. At the same time, the government is continuing to encourage the public to download its “COVIDSafe” digital contact-tracing application (the **app**).

[As recently reported by our Data Privacy & Cybersecurity team](#), the app is designed to record Bluetooth “digital handshakes” between app users’ mobile phones. If an app user tests positive to COVID-19, they are asked to upload this recorded data to the “National COVIDSafe Data Store” (**Data Store**) for the purpose of tracing community spread of the virus.

The government is touting prevalent use of the app as essential to lifting social distancing restrictions. In light of this rhetoric, many employers will likely be urging employees to download the app, in the hope of returning to normal business as soon as possible. However, any employer attempting to force employees to download the app will be in breach of legislation.

Some employers have already taken the government’s encouragement a step too far, including a Sydney council which recently found itself in hot water after reportedly ordering employees to install the app on their work phones.

Despite government enthusiasm, it is clear that in striving for a “COVID-safe” workplace, employers **do not** have the power to direct employees to download or use the “COVIDSafe” app. The launch of the app unsurprisingly led to debate over the security and privacy of app users’ data. To regulate the use of the app and quell data protection concerns, the government introduced legislation to govern the use of the app through amendments to the *Privacy Act 1988* (Cth), which passed parliament on 14 May 2020. Under the legislation (the *Privacy Amendment (Public Health Contact Information) Bill 2020*) it is an offence to:

- a. Require another person to download or use the app or consent to uploading app data to the Data Store.
- b. Take certain action against a person because (or for reasons including that) the person has not downloaded the app, does not have the app in operation on a mobile device, or has not consented to uploading data from the app to the Data Store. Such prohibited action includes:
 - Refusing to enter into, or continue, an employment contract with another person.
 - Refusing to allow another person to enter certain premises or participate in an activity (such as refusing to allow an employee to enter their normal workplace).
 - Taking adverse action (within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**)) against another person.

In the FW Act, the term “adverse action” is wide-ranging, extends beyond employees to independent contractors and job candidates, and includes dismissing an employee, discriminating between employees and ‘injuring’ an employee in their employment.

The explanatory memorandum for the legislation further states that an employer cannot make downloading or using the app a condition of employment.

The legislation makes it clear that employers cannot lawfully or reasonably direct employees to install the app or take adverse action against employees because they fail to do so. Breaching these provisions may lead to fines of up to AUD\$63,000 and/or 5 years imprisonment. So while the government’s new workplace safety protocols will hopefully guide employers to safely re-open their business, instructing employees to install the app is one tool that is not available.

Contacts

Bruno Di Girolami

Partner, Perth
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

John Oakes

Consultant, Sydney
T +61 2 8248 7804
E john.oakes@squirepb.com

Carly Corbett-Burns

Senior Associate, Sydney
T +61 2 8248 7823
E carly.corbettburns@squirepb.com

Madeleine Smith

Associate, Perth
T +61 8 9429 7481
E madeleine.smith@squirepb.com