

# LEGALLY SPEAKING...

Taurus Legal specialise in the provision of legal advice for organisations and operators in the fitness industry. On the following pages, Associate Erin Prout discusses how fitness businesses can recoup fees, deal with the no job no job mandate and how to refuse entry, if required.

## TOP TIPS TO RECOUP YOUR FEES

If you've been closed during recent lockdowns then chances are high that cash flow is tight right now. The last thing you'll want to do, is to let go of thousands of dollars in fees which you desperately need.

The most useful tool to recouping your fees is having tight terms and conditions, which allow you to recoup fees and include succinct default clauses. The best clauses to incorporate into your terms and conditions are:

- 1. Default interest:** A 'default interest' clause allows you to charge interest from the time of default until payment is made in full. Default interest is typically between 10 and 14 per cent. An example is "You hereby agree to pay us default interest of 14 per cent from the time of any default of payment, until the time payment is received in full."
- 2. Indemnity costs:** If no payment is made by a member, and you are forced to engage a lawyer, there is no right to reimbursement of your legal costs prior to issuing legal proceedings. Even once legal proceedings are issued, the Court will generally only award costs on the court scale, which is approximately 60 per cent of your out-of-pocket costs. An 'indemnity costs' clause can help you recoup 100 per cent of your pre-issuing costs, and the remaining 40 per cent of your post-issuing legal costs. An example is "You indemnify us from all costs and expenses (including without limitation, all legal costs and expenses on a full indemnity basis) incurred by us as a result of your breach or our enforcement of these terms and conditions."
- 3. Personal guarantee:** If you are contracting with corporate clients, you should consider inserting a personal guarantee. This will hold the director liable for payment, in addition to the company.

The personal guarantee should be attached to your terms and conditions and signed separately. An example is "I agree to unconditionally and irrevocably guarantee the due and punctual performance of the company's obligations under the terms and conditions."

Once you have incorporated strong terms and conditions like these, the next step is to look out for cancelled or disputed direct debits. For disputed direct debits, you should receive a notification from your bank and be given the option to refuse the refund.

For cancelled direct debits, your rights will depend on your terms and conditions. This will usually involve being able to charge a cancellation fee, or charging up until the end of the notice period. If the payment falls short of this, you should first contact the member in writing. This will be a payment reminder. If payment is not made, you can then send a formal letter of demand requiring payment in full within seven days. For a guide on information to include in your letter of demand, download a checklist from [www.tauruslawyers.com.au](http://www.tauruslawyers.com.au).

If payment is still not forthcoming, consider whether to issue legal proceedings and whether it will be commercial to pursue. If you have a number of cancelled direct debits, a lawyer will usually be able to reduce your costs and it will be more affordable.

## DEALING WITH MANDATORY STAFF VACCINATIONS

Whether your staff are required to be vaccinated will depend on the law where your business is located, whether it is required by an award or employment contract, is a lawful or reasonable direction and/or an inherent requirement of the role.





For businesses located in Victoria, workers at a gym and other sporting facilities are required to be vaccinated. If they are not fully vaccinated against COVID-19 or hold a valid medical exemption by 26 November 2021, they cannot be granted access to the site. The employer (or self-employed worker) is required to collect, record and hold the worker's vaccination information. Many of the other states have less onerous requirements but they are expected to increase mandatory vaccinations shortly.

For those states which have a mandate by the government or Chief Health Officer, businesses and employees must comply. A failure of an employee to comply, has been held to be a breach of a lawful and reasonable direction and is a valid ground for dismissal.

Without a mandate, the question is whether it is covered in an award or employment contract, is a lawful and reasonable direction and/or an inherent requirement of the role. These tests will be assessed on a case-by-case-basis. The most common test is whether it is a lawful and reasonable direction. Generally, it will be a lawful and reasonable direction where the worker is face-to-face with customers, in close physical contact with customers, the risk of transmission of the virus is high and the vaccine is readily available.

Other frequent questions regarding mandatory vaccinations are:

- 1. Whether the business has to pay the employee for their time when getting vaccinated?** The employer should cover the travel costs and continue to pay the employee where the appointment is scheduled during work hours.
- 2. Can the employee take sick leave to get vaccinated?** Generally, no. Sick leave is only to be used where the employee is unfit or unable to work due to injury or illness.
- 3. Can an employee take leave if they feel unwell after their vaccination?** Yes, a full-time or part-time employee can take sick leave if they are unfit or unable to work due to illness or injury. If the employee does not have any paid sick leave left, they can discuss taking unpaid sick leave or annual leave. Casual employees and contractors are not entitled to sick leave under the national legislation.
- 4. Whether a business can require prospective employees or contractors to be vaccinated?** Yes – provided that it does not infringe discrimination laws. For example, a prospective employee that has a valid medical exemption should not be denied the position based on their vaccination status.
- 5. How to handle an employee who refuses to be vaccinated?** Where an employee is required to be vaccinated and refuses, an initial letter should be sent which explains the requirement to be vaccinated and the consequences of refusal (including not being able to return to site). The employee should be given an opportunity to respond.

The next step is to have a meeting with the employee and explain the requirement to be vaccinated, and discuss their concerns and whether they hold a valid exemption. The employee may be placed on paid or unpaid leave during this time. The final step is to obtain advice on whether the employee can be dismissed. If they can, arrange a meeting with the employee and recommend that they attend with a support person. Be sure to take notes of the meeting and confirm the reason for the dismissal afterwards.

If you need assistance with your employees or contractors refusing to be vaccinated, Taurus Legal can assist. We have template letters which you can use – obligation free. For a copy of these letters, please contact [info@tauruslawyers.com.au](mailto:info@tauruslawyers.com.au).

### LEGALLY (AND SAFELY) PROHIBITING ENTRY

As a business owner, you are entitled to refuse access to any member of the public – so long as it's done lawfully and safely. With restrictions on unvaccinated residents in some states, it is important that you equip yourself and your staff with information on how to refuse entry to unvaccinated members and non-members.

#### 1. Hands off!

If you have a person who refuses to leave, the worst thing you can do is physically remove them from the facility. If you do so, you risk:

- **A charge of assault:** this can easily happen if you push, hit, punch or end up in a scuffle with them. Whilst it may be an accident and they may not be injured, an assault charge can be laid, and you will be forced to defend the charge.
- **Unlawful citizen's arrest:** a citizen's arrest is when you hold a person against their will because they have committed an offence. Usually, the person is detained until the police arrive. However, doing a citizen's arrest is very difficult because it only allows for reasonably light force to be used, and the police may disagree that the person has committed an offence.
- **False imprisonment:** false imprisonment is when you confine or restrain someone, not allowing them to leave.

Whilst you may lawfully be requiring that person to leave, these are offences which you should avoid at all costs. They will be a headache to defend and bad publicity for your business.

Instead, to de-escalate the situation, you can explain that it is not your decision – you are merely enforcing the law or policy of the business; acknowledge that it is a disappointing decision for them and offer to pass on their details to the owner or manager. This will help them to feel heard, acknowledged and reassured that action will be taken.

#### 2. Look out for fake vaccination passports

Fake vaccination passports are in circulation, and they pose a significant risk for your business if you don't have steps in place to screen for them. The most obvious red flags to look out for are:

- **A still image:** often these fake passports contain one saved image of a vaccination certificate, which generally won't move from the check-in page through to the green ticked vaccination certificate.
- **Flickering symbol:** the 'State of Victoria' symbol will be flickering in the background of a fake vaccination passport. The correct background should have a moving Australian Coat of Arms.
- **Additional information:** some of the fake vaccination passports are including additional information, such as a document number, vaccination type or healthcare identifier.

The majority of these fake passports will be easy to identify if you watch the member from the time of scanning the QR code. These fake passports are generally a still image or contained in a separate app which you will be able to spot.

#### 3. Don't discriminate

Discriminating against a person based on their vaccination status is lawful. However, discriminating against a person based on certain factors is unlawful. These factors range from age, sex, physical attributes through to religious beliefs. The relevant factor for you to be aware of is disability. Disability discrimination can occur when a person with a disability is treated less favourably or is required to comply with a policy, which would have the effect of disadvantaging them. This intersects with the mandatory vaccination requirements, where a person who holds a valid medical exemption is not required to have the COVID-19 vaccine. These individuals should not be refused access to your facility. If you do refuse access, you will likely be in breach of the disability discrimination laws.

#### 4. Have a policy

Create an internal policy so that all of your staff are on the same page. You don't want someone accessing the gym one day and not being able to the next – consistency is key.

Remember, if you need any assistance with any of these or other legal issues, contact Taurus Legal Management to discuss your needs and how we may be able to help. ♦



**Erin Prout**

Erin is an Associate at Taurus Legal Management, and an experienced litigator with a specialty in contractual disputes. Her clients range from small to medium-sized businesses through to ASX-listed companies. Learn more at [www.tauruslawyers.com.au](http://www.tauruslawyers.com.au)

