



Mandatory COVID-19 vaccination for NT school staff

AEU NT advice to members, 22 October 2021

Introduction

On 13 October, the Northern Territory's Chief Health Officer (CHO) issued a public health direction that amounted to a mandate for most NT workers, including all staff working in schools, to be vaccinated against COVID-19. The CHO has the legal authority to issue these kinds of orders through the emergency powers granted to him by the *Public and Environmental Health Act 2011*.¹

This direction follows the NSW and Victorian governments issuing public health orders requiring all school staff to be vaccinated, with similar orders sure to follow in other jurisdictions.

During the current state of emergency, a public health order issued by the NT CHO carries the same legal weight as any other law in the Territory. Contravention of a legally binding health order, including a vaccine mandate, is thus a breach of the law.

This has obvious implications for employees, who could be subject to sanction by both government and employer for failing to comply with the directive. Although the union has not been briefed at this point on how employers intend to deal with employees who fail to comply with the mandate, there will be consequences for any employee who disobeys a lawful direction from the government or the employer.

As well as preventing employees from attending the workplace after 13 November if they have not received at least one vaccine dose (with the second dose due by 24 December), the directive also places a legal requirement on employers to prevent unvaccinated workers from attending the workplace if they have not complied with the order, including providing proof of vaccination status.

Member attitudes

The AEU NT has fielded numerous member enquiries on this issue. A recent member survey showed that the mandatory vaccination is an emotive topic for many. Whilst 83% of the more than 600 respondents said they were either vaccinated or intending to be, approximately 17% of respondents said they did not intend to be vaccinated. Most members supported mandatory vaccination of school-based employees, with 56% of respondents in favour, compared to 33% opposed (and 11% unsure).

It should be noted this survey was conducted in late September – before the mandate was announced. At that stage a mandate looked likely but was not certain. Now the choice is more stark: agree to vaccination, or risk being unemployable.

Whatever views one has on this issue, it is important for members to understand what non-compliance with this mandate will mean for your employment.

¹ The Minister of Health declares a state of emergency under Section 48 of the Act and the CHO can issue orders or directions under Section 52. A declared state of emergency can be declared for 90 days and then extended by one or more further periods under Section 50. Whilst the CHO's orders lapse once the state of emergency ends, it is likely the Government will seek to legislate as appropriate to maintain powers such as the vaccine mandate.

Legal basis of mandate and objections on grounds of human rights and discrimination

In our member survey several respondents pointed out that a public health order mandating vaccination is simply a way of indirectly forcing educators to get vaccinated. Effectively, while an employee cannot be forced to be vaccinated, if an order is in effect, they cannot earn a wage unless they do so. Some members feel that this is a form of coercion, which may be accurate. However, this does not detract from the fact that the decision on whether to be vaccinated still resides with the employee.

On the other side of the equation, governments and employers can mount a legitimate case that a vaccine mandate is a reasonable step to comply with work health and safety legislation. It is a requirement under WHS laws for an employer to take any necessary steps to ensure a safe workplace for all staff (and by extension in the school sector, students, parents and other visitors). The implications are that staff may be prevented from attending a workplace since, if unvaccinated, they could pose a health and safety risk to others, notably children under the age of 12, who are not at this time eligible for COVID-19 vaccination.

The prospect of mandatory vaccination has led some to question whether this approach may be discriminatory or a breach of human rights. It is worth noting here that there is no Charter or Bill of Human Rights in Australia. According to the Australian Human Rights Commission (AHRC), Australia is one of the only western democracies without one.² The implication is that there are many rights and freedoms that Australian citizens may expect, that are not specifically protected by Australian law. Only Victoria, the ACT and Queensland have anything that remotely approaches legislated human rights.

There is, however, federal legislation covering sex, race, age, and disability discrimination.³ Although these acts explicitly place the burden of proving “reasonableness” on the person requiring compliance (in this case, the employer), if the mandatory vaccination is required by law or a public health order the employer can rely on the defence of “statutory authority”. This means that it has the authority to take actions based on legislation, in this case a public health order.

Similarly, some members have questioned whether such a workplace requirement may be discriminatory towards someone with an underlying health condition or other protected attributes. In the Territory, the NT Anti-Discrimination Commission deals with discrimination complaints as specified in the *Anti-Discrimination Act*.

This Act allows for discrimination, given certain circumstances. Specifically, Section 53 of the Act provides an exemption for discrimination in cases where such conduct is required to comply with legislation. The federal *Disability Discrimination Act (DDA)* provides that it is lawful for an employer to discriminate against a person on the grounds of the person’s disability if the person is unable to carry out the inherent requirements of a particular job. Additionally, Section 48 of the DDA can also make it lawful to discriminate against an employee if their disability is an infectious disease — or arguably the potential to acquire an infectious disease — and such discrimination is “reasonably necessary” to protect public health.

However, it is still possible to allege discrimination based on compliance with public health orders at the NT Anti-Discrimination Commission, but as mandatory vaccinations are an emerging issue, this is

² <https://humanrights.gov.au/about/covid19-and-human-rights/how-are-our-human-rights-protected-law-australia-during-covid-19>

³ *Age Discrimination Act 2004, Disability Discrimination Act 1992, Racial Discrimination Act 1975, Sex Discrimination Act 1984*

yet untested⁴. Notwithstanding the fact that some people will have valid health reasons for refusing vaccination, the issues around mandating vaccination are more complex when protected attributes are involved, such as pregnancy and disability. The interplay between discrimination based on attributes protected under law and the extent that the government can exempt itself from discrimination is, as mentioned, untested. Inevitably, any complaint that is raised by a school employee will be determined through the Anti-Discrimination Commission.

For some, there is a higher principle at stake, namely whether the NT government has gone beyond what is lawfully reasonable with such a broad mandate. As has occurred in other parts of the country, some individuals believe their jurisdiction's government has overstepped what is permissible under health orders in a declared state of emergency and have made challenges in court.⁵ In the NT, along with those cases elsewhere, this is a "question of law" that can only be appealed in the Supreme Court.

Exemptions from mandatory vaccination

There may be valid permanent or temporary exemptions from being vaccinated, such as a for a person undergoing major surgery or a hospital admission for serious illness. The Federal Government has listed the reasons that a person can be exempted on the Services Australia website.⁶

Legitimate exemptions for COVID-19 vaccines can only be assessed and lodged to the Australian Immunisation Register by GPs, paediatricians, and infectious disease physicians on behalf of a patient. Patients can't access the register themselves. According to the Services Australia website, the list of legitimate reasons for not being able to get vaccinated are limited.

Pregnancy and breastfeeding are not considered medical contraindications for the Pfizer (Comirnaty) COVID-19 vaccine, along with those who are considered immunocompromised, as none of the COVID vaccines are "live" viruses.⁷ Some protected conditions (like pregnancy or disability) are therefore not valid exemptions under the public health order.

Additionally, the immunisation advisory group ATAGI states an anaphylactic allergic reaction to one of the COVID vaccines presently available does not mean that the same adverse reaction would occur with another one of them.⁸ As a result, a medical exemption from one COVID-19 vaccine does not mean that that an exemption would be granted for the other two. In fact, the only people who cannot get any of the three coronavirus vaccines available are those who are allergic to both polyethylene glycol (PEG), which is in the Moderna and Pfizer vaccines, and polysorbate 80, which is in the AstraZeneca vaccine.⁹ As a result, obtaining a legitimate medical exemption from a recognised health professional will be difficult and is not likely to be on a long-term basis.

Anecdotal reports suggest that medical practitioners are unwilling to provide exemptions due to the legal ramifications of doing so.¹⁰ Those who are stridently opposed to receiving the COVID-19 vaccination on philosophical grounds will find it very difficult, perhaps impossible, to obtain an exemption on medical grounds.

⁴ Where someone feels that they have been discriminated against, a complaint to the Commission can be made online at <https://adc.nt.gov.au/complaints>.

⁵ [Teacher challenges Victorian government's COVID-19 vaccine mandate - ABC News](#)

⁶ [Immunisation medical exemptions - Services Australia](#)

⁷ <https://theconversation.com/who-cant-have-a-covid-vaccine-and-how-do-i-get-a-medical-exemption-168371>

⁸ [ATAGI Expanded guidance on temporary medical exemptions for COVID-19 vaccines \(health.gov.au\)](#)

⁹ [COVID-19 Vaccination FAQ - Australasian Society of Clinical Immunology and Allergy \(ASCI\)](#)

¹⁰ [COVID-19 vaccine exemptions on the way, but 'almost no one' eligible \(smh.com.au\)](#)

Potential disciplinary action

At this stage it is not clear how NTPS agencies will deal with employees who refuse to be vaccinated, however they would appear to have recourse to disciplinary action under the *Public Sector Employment and Management Act* (PSEMA) for employees who fail to abide by a lawful directive – namely, to produce evidence of vaccination status in line with the CHO’s order and not to enter the workplace without providing such proof. The employer can enforce this directive because failure to do so would leave the employer in breach of law.

Section 49(c) of PSEMA states that an employee who “disregards or disobeys a lawful order or direction given by a person having authority to give such an order or direction” will commit a breach of discipline and therefore be subject to disciplinary measures. An employee found to have breached discipline will be dealt with under Section 49C of the Act. A number of actions are available to the Chief Executive Officer, up to and including termination of employment.

Additionally, the Act allows that action may be taken against an employee if they have been deemed unable or incapable of performing their roles, including for health or any other reason as appropriate. Such employees may be medically retired on the grounds of invalidity. However, given the scope of PSEMA, an employee’s refusal to follow an order from the CHO would most likely result in a breach of discipline under Section 49C.

Unfair dismissal

It is possible for an employee to appeal a decision to terminate employment under Section 604 of the *Fair Work Act*, which covers unfair dismissal. However, relevant case law with the Fair Work Commission (FWC) does not appear supportive of an unfair dismissal ruling. Earlier this year, the FWC heard an unfair dismissal case where a worker’s termination arose from her refusal to comply with a direction to be vaccinated against influenza. The FWC ruled that the aged care worker’s termination was lawful and dismissed the worker’s appeal.¹¹ This also occurred, in similar circumstances, with a childcare worker whose unfair dismissal appeal was similarly dismissed.¹²

The Fair Work Ombudsman cites the premise of what is a “lawful and reasonable direction” in the decisions attached to these cases. This principle is determined by a variety of caveats, including whether a public health order has been made, WHS considerations and an individual employee’s circumstances.¹³ However, it would appear from these cases, both of which specifically make comment on COVID vaccination in workplaces, that the Commission is unlikely to rule in favour of an employee in an unfair dismissal matter relating to a workplace COVID-19 vaccine mandate.

Summary

The implications of a public health order from the CHO for education in the NT are serious, both for individual employees and for the entire school system. As detailed above, a refusal to obey a lawful direction from the CHO will likely both breach the law and be considered a breach of discipline under PSEMA. This will leave the Chief Executive Officer and the Department with several options.

A transfer to a non-teaching role with no contact with those deemed vulnerable by the directive seems unlikely, both from a practical point of view as well as the political thrust of the government’s “road map” strategy and its prioritisation of vaccination.

¹¹ Jennifer Kimber v Sapphire Coast Community Aged Care Ltd (C2021/2676)

¹² Ms Bou-Jamie Barber v Goodstart Early Learning (U2020/11916)

¹³ [COVID-19 vaccinations: workplace rights & obligations - Fair Work Ombudsman](#)

In Victoria, employees who do not meet the mandatory vaccination requirements will not be able to attend work on site and will not be assigned alternative duties.¹⁴

There may be some scope to negotiate leave or alternative arrangements in the short term, however it is difficult to imagine this being extended into 2022.

We are still awaiting correspondence from the Office of the Commissioner for Public Employment on how they will advise NTPS agencies to handle non-compliance with the directive. We are also anticipating the Department will shortly advise all employees on how to comply with the mandate by proof of vaccination (or exemption) to line managers, who will be required to maintain a register.

We are aware there will remain some number of members who do not support mandatory vaccination and will not be vaccinated. The union will advise those members on what avenues are available in both the short- and medium term.

** DISCLAIMER: Every effort has been made to ensure the accuracy of the information presented here. Be aware that the information provided here is of a general nature and should not be considered legal advice. Members should always seek individual advice appropriate to their circumstances.*

¹⁴ <https://www.aeuvic.asn.au/coronavirus-advice-and-information-aeu-members>