

# MANDATORY VACCINATION – PUBLIC HEALTH ORDER FACT SHEET



**BOOSTER UPDATE:** The introduction of the [Booster Vaccination \(Restrictions on Access\) Directions \(No 2\) \(Booster Directions\)](#) mean that all persons subject to vaccination requirements under Public Health Orders are required to obtain a booster vaccination, in order to continue to access their workplace as per the applicable Directions, as follows:

- If eligible to receive a booster vaccination (as per applicable ATAGI advice at the time) at the commencement of the Booster Directions on 24 December 2021, a person must obtain the booster vaccination by 5 February 2022;
- If not eligible for a booster vaccination as of 24 December 2021, then a person must obtain a booster vaccination either within one calendar month of eligibility (based upon applicable ATAGI advice at the time) or by the 5 February 2022, whichever is the latter.

## How has this direction been given?

As a public health state of emergency was declared by the Minister of Health on 23 March 2020 for COVID-19 under the *Public Health Act 2016 (WA) (the Act)*, this empowers authorised emergency officers, including the Chief Health Officer (CHO), to exercise certain emergency powers and issue lawful directions to all persons in Western Australia deemed reasonably necessary to prevent, control or abate the serious public health risk presented by COVID-19 whilst the state of emergency is in effect. These powers include restricting access to certain premises (e.g., health care facilities) and requiring persons to provide information or answer questions for the purpose of investigating, preventing, controlling, or abating the serious public health risk (e.g., disclosing vaccination status).

A copy of the relevant *Health Worker (Restrictions on Access) Directions (the Directions)* issued by the CHO under the Act can be found online [here](#).

## How will the Directions be implemented?

The Directions implement a staged approach which will in effect restrict access for work purposes to specified health care facilities to health care and health support workers who are vaccinated against COVID-19.

WA Health have put together an information page (found online [here](#)) and FAQ which outlines who is covered by the Directions, what health care facilities are covered and whether they are classified as Tier 1, 2 or 3, the stages of implementation and relevant time-frames, as well as Exemption Guidelines which provides further information on how to apply for temporary or medical exemptions.

This also outlines that by the final stage (1 January 2022) everyone employed by WA Health, other than workers with an exemption, must be fully vaccinated, including those employed in office roles, such as employees of Health Support Services and the Department of Health.

## What happens if a worker is unvaccinated when the relevant deadline approaches?

We have attended a number of recent Union briefings with WA Health on the implementation of the Directions. A WA Health policy and detailed guideline is forthcoming, but our understanding of the proposed process is:

- WA Health Service Providers (HSPs) must ascertain in the first instance which staff are currently vaccinated which would already be underway;
- temporary exemptions can be granted on reasonable grounds with evidence (e.g., limited access to vaccinations in a remote area);

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- temporary or permanent exemptions can be granted on reasonable medical grounds (e.g., anaphylaxis after previous vaccine) as well as reasonable protected grounds such as religious beliefs with evidence;
- those staff who have not confirmed vaccination status will be issued a formal letter outlining the requirements of the Directions at least one week prior to the relevant deadline as per the staged approach;
- employees who are not vaccinated, and who do not have a temporary or permanent exemption, by the time of the relevant deadline will be subject to a two week “exclusion period” where they will not be able to attend their workplace (otherwise they would be breaching the Directions). The two-week period is intended to provide additional time for the employee to consider and arrange for vaccination (or an exemption if applicable);
- WA Health have advised this two week “exclusion period” would be unpaid. The AMA WA does not support this position and further discussions with the other Public Sector Unions and WA Health are continuing.
- at the end of the “exclusion period”, if an employee is still not vaccinated (nor obtained an exemption) a formal disciplinary process will be initiated which WA Health have advised may result in termination of employment;
- WA Health may consider temporary alternative measures in exceptional circumstances where appropriate such as redeployment, working remotely and access to accrued leave (this may then affect the timing and implementation of the “exclusion period” and formal disciplinary process); and
- new employees who commence after the relevant deadline under the staged approach must be vaccinated prior to commencement (unless an exempt person). It is likely that existing employees whose contracts come up for renewal throughout the staged approach will not be offered new/renewed contracts if they are not vaccinated and compliant with the Directions.

### **Can WA Health lawfully terminate my employment for not complying with the Directions and choosing not to be vaccinated (without an exemption)?**

The area of law around Employers implementing mandatory vaccinations and subsequent dismissal of employees for being unvaccinated is relatively new and untested.

In the matter of *Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818*, the Employer, a residential aged care facility, introduced a compulsory flu vaccination for all employees in March 2020 in response to a New South Wales (NSW) public health order that was in effect preventing persons from entering aged care facilities without a current flu vaccination.

In this matter, the employee, a receptionist, refused to be vaccinated and claimed to have suffered a severe reaction to a flu shot in 2016 however, despite further enquiries from the employer, the employee did not provide substantiated medical evidence to demonstrate a history of post-vaccination anaphylaxis.

The Employer terminated the receptionist’s employment, relying on NSW government advice at the time that the only absolute contraindication to a flu vaccination was a history of post-vaccination anaphylaxis, the use of certain cancer treatment drugs or Guillain-Barre’ syndrome.

The decision handed down by the Fair Work Commission (FWC) on 29 April 2021 found that the dismissal was valid in that without the flu vaccination (or any evidence of the ability to work from home) the employee could not perform the inherent requirements of her job as she was not permitted to be on the aged care premises under the NSW public health order. The FWC also commented that whilst in this case, the employer hadn’t formally directed the employee to be vaccinated, if they had it would have been considered a lawful and reasonable direction.

In a 2/1 majority decision of the Full Bench of the FWC, handed down on 27 September 2021, the dismissal of Ms Kimber was upheld and her request for appeal dismissed.

These decision appear to support WA Health if they were to decide to terminate an employee who was unvaccinated (without an exemption) and was subsequently unable to access work premises and perform their job under the current Directions (public health order) and providing that working remotely or from home was not a reasonable and viable alternative. We recommend that Members contact the AMA Workplace Relations team for specific advice if subject to a formal disciplinary process.