

9 April 2020

No Jab, No Job – managing influenza vaccination compliance for your employees

The States and Territories have now operationalised the mandatory influenza vaccination requirements for Residential Aged Care Facilities by way of Directions and Orders issued pursuant to public health legislation in each of their jurisdictions.

The links to the various Directions and Public Health Orders can be found below:

ACT – Effective from 5:00pm on 23 March 2020 until the conclusion of the declared public health emergency.

TAS – Effective between midday 23 March 2020 and midnight 15 April 2020.

QLD – Effective from 21 March until 19 May 2020.

VIC – Effective from 6pm on 21 March 2020 and midnight on 13 April 2020.

NSW – Effective from 24 March until midnight 22 June 2020.

WA – In force for the duration of the pandemic.

SA – In force for the duration of the public health emergency.

NT – In force until revoked or until the end of the public health emergency relating to COVID-19.

Exemptions

Most Directions, with the exception of South Australia, are clear and state a person (including employees), as defined by the Direction, must have ‘an up to date vaccination against influenza, if such vaccination is available to the person’. The penalty section in all the state Directions, except NSW, provides that a person is not guilty if he/she has a ‘reasonable excuse’.

In some instances, people are unable to be vaccinated against influenza due to medical contraindications. That is, the vaccine is not available to them. According to the Department of Health’s [Immunisation Handbook](#), a contraindication is defined as “*a medical condition or risk factor in a recipient/person that makes receiving a specific vaccine potentially harmful*”.

The Minister for Aged Care, the Senator the Hon Richard Colbeck, has said while every ‘flu season is serious, the spread of COVID-19 means it’s critical every worker is vaccinated. On advice from the Chief Medical Officer Professor Brendan Murphy, Minister Colbeck stated in a [media release](#) on 2 April that:

“The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.”¹

Prof. Murphy said people who suffer from egg allergies - unless they have anaphylaxis - can be safely immunised.

To further support Professor Murphy’s advice and the Minister’s statement, there information released by the National Centre for Immunisation Research and Surveillance suggests that “although influenza vaccines in Australia are grown in eggs, because of new vaccine manufacturing methods, the amount of material from the egg in the influenza vaccine is small (usually less than 1 microgram of egg protein per dose).”² They further suggest that recent studies have shown that people with egg allergy, including egg-induced anaphylaxis, have safely received the influenza vaccine and the risk of anaphylaxis or an adverse event is very low.

It is extremely unlikely that any exemptions under other medical or religious grounds would be granted.

Employees with a medical contraindication

For employees with a medical contraindication to vaccination who are exempted on this basis, they could possibly continue to be employed. Employers, however, have a primary duty of care under WHS legislation, so far as is reasonably practicable, to ensure the health and safety of workers engaged. Risk assessment and management strategies must be employed in order to reduce the risk to those persons unable to be vaccinated due to medical contraindications.

For example, if there is an influenza outbreak at a site and it is confined to a wing or building, employers must consult with employees who are at risk and consider redeployment options, if any. If an employee is unable to be redeployed and the risk of them being exposed to influenza is unable to be mitigated, employers must consult with the affected employee and consider standing the employee down until such time the risk has been eliminated or another risk management approach becomes available.

¹ Media Release, Senator the Hon Richard Colbeck, Aged Care Workers Must Get Flu Vaccination, 2 April 2020

² NCIRS, Influenza Vaccines – Frequently Asked Questions., March 2020., http://ncirs.org.au/sites/default/files/2020-03/Influenza-FAQs_March%202020_Final.pdf

Employees who refuse to comply on other grounds

For those employees who fall outside the allowable contraindication categories for vaccination, it would be reasonable to take the following steps:

1. Consult with the employee/s, advising them that unless they can provide evidence of allowable contraindication, they must be vaccinated against influenza when the vaccine is available to them i.e. now (if there is supply);
2. Provide education, training, information etc. regarding the importance of influenza vaccination, particularly in the current environment;
3. Advise the direction to get vaccinated against influenza is a lawful instruction and failure to comply could result in termination of their employment;
4. Advise the employee/s in writing that you will stand them down without pay for 48 hours to allow them time to consider the information and reconsider their choice not to get vaccinated, knowing the consequences if they don't change their mind; and
5. If the employee/s still elect not to get vaccinated, write to the employee/s, directing them to attend a meeting to discuss their failure to follow a lawful and reasonable direction i.e. refusal to be vaccinated against influenza when it is available to them. Employers must afford procedural fairness as per normal disciplinary process:
 - give the employee/s a reasonable opportunity to consider the written material;
 - provide the employee with an opportunity to bring a support person to the meeting;
 - ensure the employee understands termination of employment could be a consequence of the process, and
 - ensure the employee/s is afforded the opportunity to respond to the issues at the meeting, before a decision is made regarding their ongoing employment.

This situation is unprecedented and, as with any dismissal, there may be a risk of a claim to the FWC for remedy of unfair dismissal. Whilst failing to follow a lawful and reasonable instruction is included in the Fair Work Regulations' definition of serious misconduct ([Reg 1.07](#)), it could be considered harsh in the current environment not to afford an employee the notice period required by the [National Employment Standards](#) or your relevant industrial instrument.

At the time of preparing this article, it is not mandatory for Home Care Workers to be vaccinated against influenza however Minister Colbeck has stated:

“Senior Australians are the most at risk from serious illness from the flu, which is why it is essential that care workers are vaccinated.

“While flu vaccination does not prevent COVID-19, a flu vaccination is critical to protecting the health of Senior Australians, who are more susceptible to contracting influenza.

“I am urging all care workers who work with older Australians, whether through residential facilities or in-home care, to heed this advice and get vaccinated against the flu.”

It is important you communicate and consult with your employees regarding the requirement to be vaccinated and should you have any concerns or would like to discuss your approach to managing vaccination compliance, please do not hesitate to contact the ACSA Employee Relations Team EmployeeRelations@acsa.asn.au.