

8 September 2021

Legal effect of the Public Health Orders

Public Health Orders (PHO) are made by the New South Wales Minister for Health and Medical Research, Mr Brad Hazzard under the provisions of [section 7 of the Public Health Act 2010](#) (NSW) (“the Act”).

Under section 7 of the Act, the Minister can by order make directions or take such actions as the Minister considers necessary to reduce or remove any risk to public health and its possible consequences.

Further, the Minister may declare any part of the State to be a public health risk area and an order may contain directions to reduce to remove any risk, to segregate or isolate inhabitants of the area and to prevent or conditionally permit access to the area.

It is an offence to not comply with a Public Health Order.

Current requirements for vaccinations

Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (the Order) sets out the majority of current restrictions and requirements, including the requirement for certain workers to be vaccinated.

Under the Order, the following local government areas (LGAs) or parts of LGAs are defined as areas of concern:

- **Bayside** LGA
- City of **Blacktown** LGA
- City of **Burwood** LGA
- City of **Campbelltown**
- **Canterbury-Bankstown** LGA
- **Cumberland** LGA
- City of **Fairfield** LGA
- **Georges River** LGA
- City of **Liverpool** LGA
- City of **Parramatta** LGA
- **Strathfield** LGA
- the part of City of **Penrith** comprising the following suburbs: Caddens, Claremont Meadows, Colyton, Erskine Park, Kemps Creek, Kingswood, Mount Vernon, North St Marys, Orchard Hills, Oxley Park, St Clair and St Marys

Authorised workers – leaving an area of concern

An authorised worker is a worker identified by the NSW Government [here](#).

Under the Order, from **9 September 2021** an authorised worker **must not leave the area of concern they live in for work** unless:

- They have had at least 1 dose of a COVID-19 vaccine, **OR**
- Has been issued with a medical contraindication certificate.

An authorised worker must carry with them evidence showing their name, place of residence and vaccination evidence (evidence from the Australian Immunisation Register) and produce this evidence if requested by their employer, the occupier of the worker's place of work, a police officer or other authorised officer.

From the beginning of **9 September** until the end of **19 September**:

- if an authorised worker has an appointment to receive a COVID-19 vaccine **on or before 19 September 2021** – they are deemed to have complied with the requirement to be vaccinated with one dose from 9 September.
- evidence of the appointment for a COVID-19 vaccine is taken to be their vaccination evidence.

An authorised worker must produce evidence of this appointment, if so requested by their employer, the occupier of the worker's place of work, a police officer or other authorised officer.

Early education and care and disability support

From **9 September 2021**, relevant care workers **who live or work in an area of concern** must have their first dose of a COVID-19 vaccination or be issued with a medical contraindication certificate.

Under the order, a relevant care worker means a person who works **in an early education and care facility** or who **provides disability support services** in person to a person with a disability (this includes disability support workers and school learning support officers).

From the beginning of **9 September** until the end of **19 September**:

- if a relevant care worker has an appointment to receive a COVID-19 vaccine **on or before 19 September 2021** – they are deemed to have complied with the requirement to be vaccinated with one dose from 9 September; and
- Evidence of the appointment for a COVID-19 vaccine is taken to be their vaccination evidence.

A relevant care worker must produce evidence of this appointment, if so requested by their employer, the occupier of the worker's place of work, a police officer or other authorised officer.

Health care workers

Under the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021* (**the health care worker Order**), health care workers must not do work as a health care worker unless:

- If the work is done **on or after 30 September**, but **before 30 November 2021** the worker has **received at least 1 dose of the COVID-19 vaccine**; or
- If the work is done **on or after 30 November 2021** – the worker has received at least **2 doses of a COVID-19 vaccine**; **OR**
- the health care worker cannot get a vaccine due to a medical contraindication and presents a medical contraindication certificate to their employer.

Employer required to ensure employee complies

Each of the PHOs imposes an obligation on the employer of a relevant worker to ensure that the worker complies with the requirement not to perform relevant work unless vaccinated.

Approval of vaccines

All vaccines available in Australia are approved by the Therapeutic Goods Administration (TGA) for safety, quality, and effectiveness. Vaccine scientists from around the world are working together to ensure that rigorous processes are followed, and no testing or ethical approvals have been bypassed.

COVID-19 vaccines must meet the same high standards as any other vaccine approved for use in Australia.

Summary of legal position

Where there is a PHO which prohibits a worker from undertaking the duties of their employment unless vaccinated (i.e. health care workers), an employer is likely to be justified in disciplining or dismissing an employee who refuses to be vaccinated. The circumstances may be different if an employee can provide evidence that they cannot be vaccinated on medical grounds.

In the absence of a PHO requiring an employee to be vaccinated, an employer is able to direct employees to be vaccinated in order to perform work in their employment so long as the direction is lawful and reasonable. There is relevant and recent case law which indicates that an employer can give a lawful and reasonable direction for employees to be vaccinated, at least in circumstances where there is interaction with vulnerable populations or in high risk sectors:

- *Glover v Ozcare* [2021] FWC 2989 – A case concerning a community-care employee employed by an aged care provider who refused to obtain a flu vaccination due to a genuinely held belief that she was allergic. The policy introduced by the employer to mandate influenza vaccinations for all client-facing employees, without allowing any exemptions, was found to be lawful and reasonable by the Commission in light of the vulnerable aged clients with whom employees interacted with in the course of their employment.
- *Barber v Goodstart Early Learning* (2021) 305 IR 38 – A case concerning an employee who refused to be vaccinated as a result of a medical concern following the introduction of a policy requiring all employees to be vaccinated unless they had a medical condition which made it unsafe. The Commission found that the mandatory vaccination policy was a lawful and reasonable direction. The employee did not produce sufficient medical justification for refusing justification and the Commission held this was a valid reason for dismissal, as she failed to comply with a lawful and reasonable direction.

- *Kimber v Sapphire Coast Community Aged Care Ltd* (2021) 305 IR 387 – A case concerning a receptionist at a high-care aged care residential facility who refused to obtain an influenza vaccination due to an alleged adverse reaction to an earlier flu vaccine. At the time, the employer was subject to a public health order requiring it to ensure that all employees had received an up-to-date flu vaccination. The Commission found that the employee had not produced medical evidence to demonstrate a medical contradiction preventing her from receiving the vaccine and that the employer’s direction was consistent with the public health order. The Commission found that there was a valid reason for the dismissal.

Relevant considerations to determining if a direction is lawful and reasonable will likely include:

- The nature of the workplace;
- The degree of interaction with members of the public or colleagues;
- The state of community transmission at the time; and
- The personal circumstances of the employee.

Whilst an employee could challenge such a dismissal through unfair dismissal proceedings, the circumstances in which an unfair dismissal claim would have reasonable prospects of success are likely to be limited. There may be an arguable case if the employee did not have a reasonable opportunity to be vaccinated, the vaccination requirement is temporary or if a reasonable alternative to dismissal exists by way of redeployment to other work. Each case will turn on its individual facts and circumstances.

The advice provided in this Bulletin is of a general nature and members are encouraged to seek advice from the Member Support Centre on 1300 772 679 or their Industrial Officer or Organiser.