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NNF 36 of 2021

24 July 2021

## NAPTOSA COMMENT ON DBE CIRCULAR 4 OF 2021

Having failed to negotiate a collective agreement in the ELRC on operational requirements for school-based educators, therapists, counsellors and psychologists, post the education vaccination programme, the Department of Basic Education (DBE) late on Friday, 23 July 2021, issued a circular based on the contents of the failed agreement.

We expected that the DBE would at least have taken the inputs made by the unions during the negotiations on board in issuing their circular, but alas. This leaves us with DBE circular 4 of 2021 that is confusing and raises more questions than answers. Below are the contents of the circular with comments by NAPTOSA.

DBE CIRCULAR (wording copied from circular)	NAPTOSA COMMENT
<p><b>1. Applicability</b></p> <p>1.1 The provisions of this circular shall apply to all institution-based educators, Therapists, Counsellors and Psychologists post the Basic Education Sector COVID-19 Vaccination programme that came to an end on 14 July 2021.</p> <p>1.2 These provisions shall also be applicable during the various adjusted alert levels as per the regulations of the Disaster Management Act, 2002 as shall be announced from time to time.</p> <p>1.3 This circular shall replace DBE Circular(s) 01, 02 and 03 of 2021 and shall come into effect immediately when the schools resume for the third term of the 2021 academic year.</p>	<p>Noted</p> <p>Noted</p> <p>Noted, but the short timeframe (a weekend between issuing the circular and the re-opening of schools) will present implementation problems.</p>
<p><b>2. Purpose</b></p> <p>2.1 The purpose of this circular is to provide guidance in respect of the operational requirements for educators employed in terms of the Employment of Educators Act, 1998 (Act No. 76 of 1998), (EEA), following the implementation of the Basic Education Sector COVID-19 Vaccination Programme.</p>	<p>The purpose is noted, but the contents does not give clear guidance as intended.</p>

<p>2.2 This circular will also serve as a guide to managing vulnerable employees in the context of the current SARS-CoV-2 pandemic as mentioned in the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002.</p> <p>2.3 The circular further seeks to give effect to the Consolidated Direction on Occupational Health and Safety measures to address, prevent and combat the spread of COVID-19 in certain workplaces in the Republic of South Africa, issued in terms of Regulation 4(10) of the National Disaster Regulations.</p>	
<p><b>3.1 Return to work after the Departmental Vaccination Programme</b></p> <p>3.1.1 Whilst it is not mandatory for educators (employees) to be vaccinated, the employer had put the necessary measures in place to ensure that educators feel safe and are encouraged to take the vaccine.</p> <p>3.1.2 According to the prevailing science taking the vaccine will reduce the impact of COVID-19 on lives and livelihoods and would drastically reduce the risk of severe disease and related fatalities.</p> <p>3.1.3 The DBE's vaccination concluded on 14 July 2021 therefore, all educators who were granted the concession to work from home would be required to report for duty when the schools resume for the third term of the 2021 academic year.</p> <p>3.1.4 Educators that have opted not to take the vaccine and those who have taken the vaccine are also required to report for duty when schools reopen.</p>	<p>NAPTOSA agrees that the vaccination programme was not mandatory.</p> <p>Agreed.</p> <p>While NAPTOSA agrees in principle, it cannot be a blanket provision. Employees that require different forms of leave (e.g. sick leave, family responsibility leave, etc.) need to be accommodated.</p>
<p><b>3.2 Educators who elect to exercise their right not to be vaccinated</b></p> <p>3.2.1 The Department respects the rights of educators who opt not to be vaccinated on constitutional, religious, cultural, comorbidity or medical grounds.</p>	<p>Agreed, these grounds should be respected.</p>

3.2.2 An educator who opts not to be vaccinated on medical grounds shall be required to submit a detailed medical report indicating that taking a vaccine will pose a health hazard to him/her or that he/she is allergic to the vaccine;

NAPTOSA believes that employees in this category cannot be forced to submit medical reports. The only condition under which the DBE can insist on a medical report is if an educator who chose not to vaccinate, wishes to be considered for some form of comorbidity concession. Under all other circumstances such a request would be a violation of educators' constitutional rights. The Constitution guarantees everyone the right to bodily and psychological integrity.

It would also be discriminatory, because no such requirements are imposed on educators who opted out for the other reasons mentioned. And what about educators who elected not to be vaccinated on personal grounds (e.g. those who don't believe in vaccination, don't trust the vaccines, don't trust the science or government)?

While the DBE has records of all the educators that opted for vaccination, they cannot make a blanket assumption that those whose names are not on record opted not to be vaccinated, because other vaccination avenues have been available. As with HIV/AIDS, the Department cannot force employees to divulge their vaccination status, which makes the whole circular unworkable.

3.2.3 The Department may refer such educators as contemplated in 3.2.2 above, for further medical evaluation which may include to the Health Risk Manager (HRM)

If the employee's refusal to vaccinate does not impact the employer, referring the employee for further medical evaluation would be an invasion of privacy at best, at worst an infringement of the educator's constitutional rights.

Should the DBE forge ahead with implementation of the circular, clauses 3.2.1 – 3.2.3 lack process. The following are but a few questions to illustrate this:

- By when is the report supposed to be presented?
- If not referred to the HRM, who would have the skills in the education department to assess the report?
- If the HRM is to be used, would there be a timeframe within which to make the recommendation, keeping in mind that the HRMs fail in most TIL cases to adhere to the timeframe?
- What happens in the period until there is a decision?
- What happens if the report is not accepted?

<p>3.2.4 Where an educator does raise one of the objections based on constitutional or medical grounds, the Department shall make voluntary counselling available to the employee.</p> <p>3.2.5 The educator shall also have the right to consult a health or safety representative or a union official.</p> <p>3.2.6 Where practically possible and based on the operational requirements, the Department shall take reasonable steps to accommodate the educator by making amendments to their role or work environment in one or more of the following ways:</p> <ul style="list-style-type: none"> <li>• allow them to work from home where possible,</li> <li>• require that they self-isolate in the workplace where adequate self- isolation facilities are available; or</li> <li>• Should the above not be available, the employee will not be required to self-isolate at the workplace.</li> </ul>	<p>Unclear for what reason educator would need counselling?</p> <p>These are rights that exist. No need for inclusion in the circular.</p> <p>It is accepted that this clause refers to educators <b>who contract the disease</b>, but had opted out of vaccination on medical and constitutional grounds. It does not address those who opted out for other reasons. Why should they not also be accommodated? What is the position of those vaccinated but who still contract the virus?</p> <p>How is this possible in the majority of schools that have space challenges? Our overcrowded schools will be unable to implement this. How will this even benefit the school?</p> <p>It is assumed that this means self-isolation at home. How does it differ from allowing the educator to work from home, or are those in this category exempted from work?</p>
<p><b>3.3 Educators who opt not to be vaccinated based on medical, Constitutional or cultural grounds and whose medical condition or comorbidity does not allow them to teach at an institution or be reasonably accommodated</b></p> <p>3.3.1 After considering the educators' reasons for opting not to be vaccinated such as medical, religious, constitutional, cultural and comorbidity, the employer reserves the right to subject such educators to the procedures as contemplated in the Labour Relations Act, No. 66 of 1998 read in conjunction with the Employment of Educators Act, No 76 of 1998.</p>	<p>NAPTOSA rejects this, not so subtle, attempt to make vaccination a conditions of employment and also to threaten operational requirement procedures.</p> <p>This clause purports to mean that those educators vaccinated will never experience medical grounds or comorbidities that will prevent them to teach at an institution, which is just not true.</p> <p>The clause fails to address the position of those educators who have been vaccinated, but still contract medical conditions/ comorbidities that will prevent them from teaching, unless it means that</p>

	no procedures will ever be instituted against them because they adhered to the call to be vaccinated, which will be grossly discriminatory.
<p><b>3.4 Processes pursuance (sic) to Schedule 1 and 2 of the Employment of Educators Act, 76 of 1998</b></p> <p>3.4.1 Any educator, therapist, counsellor, psychologist who:</p> <ul style="list-style-type: none"> <li>• refuses to report for duty whether having taken vaccination or not;</li> <li>• is incapacitated to report for duty due to comorbidity as verified by the Department of Health as high risk or for other medical condition not stipulated but verified by a medical practitioner as high risk; and or</li> <li>• may not be covered in terms of the reasonable accommodation stipulations,</li> </ul> <p>3.4.2 shall be subjected to the processes as provided for in Schedule 1 of the Employment of Educators Act, 76 of 1998.</p> <p>3.4.3 Any educator, therapist, counsellor, a psychologist who refuses to report for duty based on a reasonable instruction of his/her Department, subject themselves to be dealt with in terms of Schedule 2 of the Employment of Educators Act, 1998</p>	<p>The Department has these legislative and policy provisions at its disposal. Its inclusion in the circular is seen as an attempt at coercion of educators, which is unacceptable.</p> <p>These bullets acknowledge that there are employees, who due to comorbidities, are incapacitated to report for duty. How can this be seen as refusal to report for duty? Surely their situations need to be dealt with in terms of sick, or incapacity, leave provisions.</p> <p>Agreed that refusal to adhere to a lawful and reasonable instruction could constitute misconduct, but again this cannot be applied universally. Employees with legitimate reasons, which the Department seems to acknowledge, cannot be dealt with in terms of this legislative provision.</p>
<p><b>4. Provision of Safety measures by the Employer</b>  <i>(The provisions under this item deals with the provisioning of non-pharmaceutical equipment /material, screening and how employees who are not feeling well and those who test positive for COVID should be dealt with. The provisions are those that everyone is familiar with and are not repeated here. Public Service Act personnel will continue to be dealt with in terms of DPSA Circulars.)</i></p>	<p>NAPTOSA agrees with the provisions and will hold the DBE and provincial education departments to account to provide safe and healthy working environments.</p>

While NAPTOSA fully supported the vaccination programme for educators and have consistently urged members to be vaccinated, the union will not stand by and allow those members who opted not to be vaccinated, to be victimised or discriminated against.

We call on the DBE to immediately withdraw this circular and utilise the procedures at their disposal through legislation, policies or collective agreements, being cognisant of the fact that NAPTOSA will, as always, defend the rights of our members.

**BASIL MANUEL**

**EXECUTIVE DIRECTOR**