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An Employer's Guide to Mandatory Workplace Vaccination Policies





COVID-19 vaccination rollouts have commenced in several countries around the world and vaccinations are expected to commence in South Africa potentially as early as February 2021. The Minister of Health has indicated that at present, the South African government does not intend to make the COVID-19 vaccination mandatory. Absent a law which mandates the inoculation of the entire population against COVID-19 and given the serious risks posed by the more deadly and transmissible new strain, introducing the vaccine raises these questions: (i) should employers consider implementing a mandatory vaccination policy? (ii) how does an employer deal with employees or applicants for employment who refuse to be vaccinated? (iii) are beliefs regarding vaccinations, i.e. veganism, health related concerns, religion and the like legitimate grounds for an employee to refuse to comply with a mandatory vaccination policy?

This guide assists employers in navigating the above-mentioned considerations and aims to provide direction in determining under what circumstances a mandatory vaccination policy should to be implemented. While mandatory vaccinations may not be immediately applicable in light of the availability of the vaccine, it is useful for employers to begin considering its workplace policies in this regard and to commence educating and communicating with its employees about the subject.

PRELIMINARY CONSIDERATIONS PERTAINING TO MANDATORY VACCINATION POLICIES

WHY SHOULD EMPLOYERS CONSIDER A VACCINATION POLICY?

- Vaccination policies inform employees of the employers' stance regarding inoculation and their reason for it.
- Vaccination policies also enhance the health and safety of employees and is in line with the duty of employers to provide a safe working environment.
- If employee's refuse to be inoculated without reasonable justification, their employment may possibly be terminated on the basis of operational requirements, potentially incapacity or even misconduct. This will be a vexed area of litigation as objections to vaccinations are commonly founded on religious or cultural beliefs and/or health considerations. Mandatory inoculation policies present a complex balance of rights between those employees who hold strong religious, health or cultural objections against vaccinations and the rights of those who are more susceptible to severe effects or even death should they be infected with COVID-19.

- When considering whether to implement a mandatory vaccination policy, employers' must have regard to their individual workplaces and assess whether such a policy is in fact necessary and/or whether the purpose of the policy can be achieved by less imposing measures.

ARE THERE ANY LEGAL RESTRICTIONS IN SOUTH AFRICA THAT PROHIBIT MANDATORY VACCINATION POLICIES IN THE WORKPLACE?

There are no legal restrictions on mandatory vaccination policies. The introduction of such policies will need to be assessed against the principle of reasonableness. Health and safety litigation at the commencement of lockdown evidenced that the courts are of the view that binding national health and safety guidelines which present a uniformed approach are necessary to protect employees. In addition, the decisive action taken by the government to implement lockdowns and ban international travel indicate the seriousness with which the government has treated the virus and that health and safety is of paramount importance.

DOES THE IMPLEMENTATION OF A MANDATORY WORKPLACE VACCINATION POLICY CONSTITUTE A UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT?

Yes. Employees would therefore need to be consulted prior to implementation.

WHAT CONSIDERATIONS SHOULD AN EMPLOYER CONTEMPLATE WHEN DETERMINING WHETHER TO IMPLEMENT A MANDATORY VACCINATION POLICY?

When determining whether to implement a mandatory vaccination policy, an employer may wish to consider, amongst others, the following:

- (i) the viability of continued remote work and the effectiveness of social distancing in the workplace;
- (ii) the number of employees required to travel domestically and internationally for work related purposes, particularly if the COVID-19 vaccine is made mandatory for international travel;
- (iii) the number of vulnerable employees in the workplace;
- (iv) the effectiveness of additional PPE, where necessary;
- (v) temporary alternative placements for employees who are vulnerable and/or who have a higher risk of exposure to the virus;
- (vi) the number of employees exposed to the public;
- (vii) the number of employees who are directly/ indirectly exposed to persons with COVID-19;
- (viii) the rate of infections and/ or fatalities in the workplace because of COVID-19;
- (ix) the number of employees with religious, cultural and/ or medical objections to inoculation;
- (x) the effectiveness of alternative, less imposing measures to limit the risk of the spread of COVID-19 in the workplace;
- (xi) reports from vaccination programmes around the world; and
- (xii) whether the employer is prepared to subsidise or pay for the vaccination of employees who would not otherwise be in a position to afford the vaccine.

OBJECTIONS TO VACCINATION POLICIES

ON WHAT GROUNDS MAY AN EMPLOYEE OBJECT TO BEING VACCINATED?

Employees who subscribe to an anti-vaccine ideology are likely to resist mandatory vaccinations in the workplace in broadly two general categories:

- **medical objections and safety concerns:** employees in high-risk categories who may suffer adverse effects from a vaccine or those having a compromised immune system may object to being vaccinated, where there is no science to the contrary. In addition, employees who have showed no sign of the virus over the period of the pandemic or those who have contracted the virus may also elect not to be vaccinated. Medical objections will need to be assessed thoroughly given adverse reports from vaccination programmes around the world together with the recommendations of medical practitioners;
- **religious, cultural or philosophical objections:** employees may also object to being vaccinated based on the incompatibility between their religious or philosophical beliefs and vaccination policies. This includes both superstitious beliefs and beliefs rooted in the interpretation of religious text. In addition, employees may also raise objections to being vaccinated because the vaccines may include substances such as swine, whose consumption is prohibited for religious reasons, or for various other cultural and/or philosophical beliefs pertaining to the consumption of animal products or the manner in which vaccines are tested.

WOULD MANDATORY VACCINATIONS CONSTITUTE A GROUND FOR AN EMPLOYEE TO CLAIM CONSTRUCTIVE DISMISSAL WHERE AN EMPLOYER DOES NOT ACCEDE TO THEIR RELIGIOUS OR CULTURAL OBJECTIONS?

For mandatory workplace vaccinations to constitute a constructive dismissal, the employee must show that they had no other option but to resign and that the vaccination policy of the employer rendered continued employment intolerable and was unreasonable.



There are no legal restrictions on mandatory vaccination policies. The introduction of such policies will need to be assessed against the principle of reasonableness.

SHOULD THE COVID-19 VACCINATION BECOME MANDATORY FOR INTERNATIONAL TRAVEL, WOULD THIS RENDER AN EMPLOYEE'S OBJECTION TO BE VACCINATED UNREASONABLE WHERE INTERNATIONAL TRAVEL IS AN INHERENT REQUIREMENT OF THEIR ROLE?

This is a judgement to be made considering the nature of the employee's objection and the importance of international travel for the role performed by the employee. Employers will also need to consider whether there is a suitable alternative role for the employee that does not include international travel or whether such travel may be dispensed with owing to technological developments that allow the employee to perform their functions virtually.

WHERE AN EMPLOYEE ELECTS NOT TO BE VACCINATED NOTWITHSTANDING DOMESTIC AND INTERNATIONAL TRAVEL BEING AN INHERENT REQUIREMENT OF THEIR ROLE, IF THE VACCINE IS MANDATORY FOR INTERNATIONAL TRAVEL, WHAT OPTIONS ARE AVAILABLE TO EMPLOYERS?

- An employer may wish to consider alternative placement and/or continued remote work where possible.
- Where an employee cannot perform their role due to their election not to be vaccinated, and alternative placement and remote work are impossible, an employer may be in a position to dismiss the employee on the following grounds depending on the nature of the circumstances:
 - the inability to perform in line with their employment agreement;
 - operational requirements;
 - potentially incapacity; or
 - potentially insubordination where the instruction to be vaccinated is reasonable.

CAN DISMISSAL OR THE EXCLUSION OF AN EMPLOYEE WHO REFUSES A VACCINE FROM THE WORKPLACE AMOUNT TO UNFAIR DISCRIMINATION?

The test is for unfair discrimination and not simply discrimination. In order for the dismissal or exclusion to constitute unfair discrimination, the discrimination would need to be arbitrary, have the ability to impair the dignity of the employee and the instruction to be vaccinated would need to be unreasonable. Whether an employee has been unfairly discriminated against will also depend on whether all suitable alternatives were considered and whether the employer properly considered the employee's objections.

SHOULD A MANDATORY VACCINATION POLICY BE LIMITED TO THOSE EMPLOYEES WHO ARE VULNERABLE, HAVE CONTACT WITH THE PUBLIC AND/OR THOSE EMPLOYEES WHOSE ROLE REQUIRES FREQUENT DOMESTIC AND/OR INTERNATIONAL TRAVEL?

Not necessarily. Many employees who do not fall within these categories may still be susceptible to severe effects of COVID-19 and with the mutation of the virus and the uncertainty pertaining to the science related to the disease, a limitation on this kind may render the vaccination policy ineffective.

HOW DOES AN EMPLOYER MANAGE RELIGIOUS AND/OR CULTURAL EXEMPTIONS TO BEING VACCINATED?

All objections by employees must be considered on the facts of the case before them, taking into account the evidence produced by the employee for their objection to obtaining the vaccine. The objection of the employee must then be balanced against the risk and impact of COVID-19 in the particular workplace and the rights of all employees to a safe working environment.



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THE IMPACT OF POPI

WHAT IS THE IMPACT OF THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013 (POPI) ON MANDATORY VACCINATION POLICIES AND THE PROCESSING OF EMPLOYEE MEDICAL INFORMATION?

The provisions of POPI will apply when requesting employees or potential employees to make disclosures regarding their medical or vaccination history, as such information constitutes special personal information for the purposes of POPI and accordingly consent may be mandatory. It does however remain debatable whether an employer may rely on other sources of law, the public interest, or the contract of employment as a basis upon which to process the said special personal information. Information collected, stored and disposed of in this regard, as the case may be, must also be in line with the provisions of POPI.

WHO IN THE ORGANISATION SHOULD MANAGE THE MEDICAL RECORDS OF EMPLOYEES SHOULD A MANDATORY VACCINATION POLICY BE IMPLEMENTED?

- Employers should create a designated team to assist with the processing and storage of such information. The team responsible should include personnel who understand the importance of maintaining the privacy and confidentiality of the information. In addition, technological measures must be catered for to limit the risk of a security breach.
- It is also important that through the management of employee medical records, or employee consent or objections to vaccinations that employees are not unfairly discriminated against based on their election to comply with a mandatory vaccination policy.

LIABILITY, POLICY AND FINANCIAL CONSIDERATIONS

WHAT LIABILITY, IF ANY, WOULD AN EMPLOYER SUFFER SHOULD AN EMPLOYEE WHO CONSENTS TO BE VACCINATED IN LINE WITH A WORKPLACE POLICY EXPERIENCE ADVERSE EFFECTS BECAUSE OF BEING VACCINATED?

There are various liability considerations that an employer will need to consider when implementing a mandatory vaccination policy. From a delictual perspective, employers may potentially be liable for mandating employees to be vaccinated who later become ill because of taking the vaccine, provided an employee can prove the element of wrongfulness. This is a complex area which intersects with statutory law.

WOULD AN EMPLOYER BE LIABLE FOR THE PAYMENT OF THE VACCINATION OF ITS EMPLOYEES WHERE THE EMPLOYEE DOES NOT QUALIFY TO BE VACCINATED BY THE GOVERNMENT OR WHERE A GOVERNMENT VACCINE IS NOT AVAILABLE?

Absent a government subsidy, an employer may need to assist employees financially in obtaining the vaccine should it implement a mandatory vaccination policy and a vaccine is available. This is a particular consideration in relation to lower-level employees who may not otherwise be in a position to afford to be vaccinated without financial assistance.

WHAT IS THE ROLE OF MEDICAL AID PROVIDERS, IF ANY?

Medical aid providers have committed to assisting with the vaccine roll-out once the vaccine becomes available.

WHAT ARE SOME OF THE POLICY CONSIDERATIONS REGULATORS NEED TO CONSIDER WHEN ISSUING VACCINATION CERTIFICATES?

Regulators will need to consider, among others, these factors:

- The format of the certificate itself, what will make it unique and identifiable?
- Who can issue the certificate? Will it be limited to government, as the vaccine will only be distributed by government for the time being?
- What will a possible exemption process look like, for those who refuse to take the vaccination for religious and/or medical reasons?
- How will government regulate when a vaccination certificate would be necessary, as not everyone will be receiving the vaccination immediately? and
- Will the need for a vaccination certificate in effect force every person to get vaccinated if they can?



Presently medical aid providers in South Africa do not pay for or subsidise any vaccinations.

THE INTERPLAY BETWEEN THE OCCUPATIONAL HEALTH AND SAFETY ACT 85 OF 1993 (OHSA) AND A MANDATORY VACCINATION POLICY

WHAT ARE AN EMPLOYER'S OBLIGATIONS IN TERMS OF THE OHSA?

An employer has a duty to do what is reasonably practicable to ensure that the working environment is safe for all employees and those who access their workplace. Whether an employer would then have a duty to impose vaccinations in light of their duty to ensure a safe working environment is dependant on the availability of the vaccine, the cost of the vaccine, the objections of employees, the safety of the vaccine and the effectiveness of other measures employed by the employer to mitigate the risks of infection in the workplace.

THE NATIONAL HEALTH ACT

WHAT IMPACT DOES THE NATIONAL HEALTH ACT 61 OF 2003 (NHA) HAVE ON MANDATORY VACCINATION POLICIES?

The NHA makes explicit that any health care related services, medical treatment and medical care must be administered with the consent of the user, who in the current context, would be an employee. Accordingly, employees may only be vaccinated in line with an employer's vaccination policy where they have consented to do so.

WHAT DOES CONSENT MEAN FOR PURPOSES OF THE NHA?

In terms of the NHA, consent must meet three requirements. Namely, the consent must be informed, the consent must be specific to the medical treatment/care or services being administered and the consent must be given voluntarily given, free from duress or coercion.

WHAT IF ANY ARE THE EXCEPTIONS TO THE CONSENT RULE IN THE NHA?

Health care related services may be administered without the consent of the user in the following circumstances:

- Where the law or a competent court has ordered the administration of the health care services; and
- In instances where a failure to administer the health care services would present a "serious public health risk".

IMPACT OF THE EMPLOYMENT EQUITY ACT 55 OF 1998 (EEA)

WHAT IS THE IMPACT OF SECTION 7 OF THE EEA ON MANDATORY VACCINATION POLICIES?

Section 7 of the EEA provides for a prohibition on the medical testing of employees save for the following instances:

- where legislation permits or requires the testing; or
- it is justifiable in terms of the medical facts, social policy, employment conditions, the fair distribution of employee benefits or the inherent requirements of the job.

Medical testing refers to both a test or an inquiry to confirm whether an employee has a medical condition. Section 7 of the EEA therefore does not prohibit a mandatory workplace vaccination policy.

INTERNATIONAL COMPARATORS

WHAT IS THE POSITION INTERNATIONALLY IN RELATION TO MANDATORY VACCINATION POLICIES?

- There are no prohibitions in the United States, for example, in relation to mandatory vaccination policies. In *Jacobson v Massachusetts*, the American Supreme Court upheld a state law that required compulsory Smallpox vaccinations for adults. The Supreme court held in this judgement that the individuals' rights must yield to state police power in order to preserve public health and safety.



An employer has a duty to do what is reasonably practicable to ensure that the working environment is safe for all employees and those who access their workplace.

- India is an example of a jurisdiction with both present and historic mandatory vaccination legislation. In 1880, the British Government of India passed the Vaccination Act, followed by the Compulsory Vaccination Act in 1892, in response to the Smallpox epidemic. Failure to comply without sufficient cause resulted in jail time. The repeal of these laws was however completed in 2001.
- Another such example is section 2 of the Indian Epidemic Diseases Act of 1897 which confers state governments with wide ranging executive authority to *"take, or require or empower any person to take, such measures and... prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof"*.

WHAT ARE SOME OF THE INTERNATIONALLY ACCEPTED GROUNDS FOR OBJECTIONS TO VACCINATIONS?

- In terms of the Americans with Disabilities Act, where an employee can evidence a covered disability which would make them susceptible to a negative reaction to the vaccination, such an objection may be sustained with the requisite medical evidence. An employer may however rebut these objections by showing that there would be undue hardship caused, which may be either financial or health related or that the COVID-19 pandemic constitutes *"real threat"* and thus mandatory vaccinations should be enforced.
- Looking again at the Indian context, citizens may resist vaccinations on two broad grounds. Firstly, their right to life, which extends to the right to refuse medical treatment. The right to refuse medical treatment was confirmed in the Indian Supreme Court decision of *Aruna Shanbaug v Union of India*. Secondly, on religious grounds, which are protected by the Indian Constitution *"subject to public order, morality and health"* (Article 25).

The drafting and implementation of mandatory workplace policies is complex and nuanced and is subject to the conditions in each specific workplace with various topics some general and others more specific to a peculiar workplace or industry. Considered advice is to be sought prior to the drafting and implementation of such policies. As more reports regarding the effects of vaccinations become available, employers must consider the potential risks and liability attached to implementing such policies. It is also unclear at what stage the vaccine will become available in mass and thus the deadlines imposed for mandatory vaccinations will need to be adjusted in line with the vaccine availability and the phased in approach of the vaccine roll out.

Employers should strive to obtain their employees voluntary buy-in as vaccinations by consent rather than compulsion is more likely to be effective. It is always the preferred option for the employer to engage in meaningful consultation with employees and/or their representatives before embarking on any changes that will affect them. Consultation may also be a legal requirement in the imposition of a mandatory policy.

Legal advice should be obtained by an employer as it embarks on the formulation of a mandatory policy and on its implementation. CDH have written extensively on the topic and have also been quoted in the media significantly regarding this.



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