

Mandatory Covid Vaccinations

The potential pushback employers might face in imposing a covid-19 vaccination policy but is pushback where it ends? The question arises whether there is scope for employees to claim that they have been discriminated against as a result of their failure or refusal to take the covid-19 vaccine.

On the face of it, a policy requiring that an employee take the covid-19 vaccine may not be in and of itself discriminatory. Instead, an employee's refusal to comply with such a policy, and their consequent treatment by their employer as a result of their refusal, may invoke a prohibited ground of discrimination. In the South African employment law context, a prohibition against unfair discrimination in employment policies or practices is set out in section 6 of the Employment Equity Act, 1998 ("EEA"). This prohibition against discrimination extends to both listed and arbitrary grounds.

A mandatory vaccination policy may have the effect of directly or indirectly discriminating against an employee. Direct discrimination takes place where it is clear that the employment policy or practice, or action in terms thereof, explicitly discriminates on a ground prohibited in section 6 of the EEA. For example, a self-evident ground would be a vaccination policy that provides that men will be vaccinated first. In the case of indirect discrimination, the criterion used in an employment policy or practice to differentiate between employees may be ostensibly "neutral" and not be based on a ground mentioned in section 6. However, its effect is that a category or group of persons, protected under a prohibited ground of discrimination, are disproportionately adversely affected by the policy or its application. An example would be where the policy dictates that vaccinations will only take place at lunchtime on Fridays. Although neutral on the face of it, the policy may exclude Muslim employees who attend mosque during this time.

Some unintended discriminatory impacts of a mandatory covid-19 vaccination policy may include the following:

Religion, conscience, or belief

It is possible that employees may argue that they cannot take the vaccine because of the tenets of their particular religion. They may also argue that they cannot take vaccines based on their "conscience and belief". All three of these grounds are mentioned in section 6. A policy that does not make provision for the "exemption" of these employees, or an employer taking action against such employees because they refuse to take the vaccine on these grounds could constitute discrimination.

Age

As things currently stand, and in accordance with the South African government's covid-19 vaccine roll-out strategy, individuals who are over the age of 18, are not essential workers, do not work in congregate settings and do not have any co-morbidities will be among the last group of people to be eligible to receive the covid-19 vaccine. Therefore, some employees may not be able to receive the covid-19 vaccine if required, even if they have no specific objection to taking it.

Pregnancy / Sex

A policy that requires pregnant employees to take a vaccination could constitute discrimination on the grounds of sex or pregnancy, both of which are grounds mentioned in section 6. It is important to note that some covid-19 vaccines are not currently recommended for those who are pregnant, breastfeeding or planning to get pregnant.

Underlying Medical Condition

*It is also possible that employees may argue that it constitutes discrimination to require them to take the vaccine where the employee has an **underlying medical condition** or is taking medication, which may render it unsafe to take the vaccine. This is not a ground specifically mentioned in section 6 but it could be an “arbitrary ground” as referred to in section 6.*

If it is found that the employer has discriminated against an employee on one or more of the grounds mentioned in section 6, the next question is to determine whether this discrimination was fair or unfair.

*It is important to note that the EEA specifically provides that distinguishing, excluding, or preferring a person on the basis of an inherent requirement of a job does not constitute unfair discrimination. Employers may, therefore, seek to rely on this exclusion in implementing a mandatory vaccination policy. However, it is important to consider what constitutes an “inherent requirement of a job”. The Labour Court in *TDF Network Africa (Pty) Ltd v Faris* dealt with this issue in the context of an unfair dismissal claim. In this case, an employee was dismissed for refusing to work on a Saturday. She did so on the basis that her religion prohibited work on a Saturday – she was a Seventh Day Adventist. The Labour Court held that an inherent requirement of a job relates to an inescapable way of performing a job and does not involve mere commercial rationale. Accordingly, the defence of an inherent requirement of a job must be strictly construed, in that:*

- the discrimination faced by an employee must fulfil a legitimate work-related purpose and must be reasonably necessary to accomplish that purpose; and*
- the employer must show that it is impossible to accommodate the employee without raising an insuperable operational difficulty.*

It is not beyond comprehension that proof of having received a covid-19 vaccine may in future become an inherent requirement of a job for some employers. For example, employees who need to travel for purposes of their day-to-day work, such as salespersons, cross-border truck drivers, cruise ship employees, and the like, could be required to receive the covid-19 vaccine in the event that points of entry in international jurisdictions require proof of vaccination.

It is also apparent from court decisions that the grounds on which an employer can argue that the discrimination is fair are wider than the narrow “inherent requirement of the job” defence. The fairness of discrimination can be justified on other grounds as well.

The key takeaway for employers is that there is a risk that, in formulating and applying a blanket mandatory covid-19 vaccination policy, it could be found that the policy or its application is discriminatory. Equally though, the policy or its application could be held to be fair, rational or otherwise justifiable. This may be based on the narrow “inherent requirements of the job” defence,

but other broader operational factors may also justify a finding of fairness provided that these are fair and rational.

Everyone has the right to work in an environment that is free from harassment, bullying and discrimination. Discrimination on the basis of race, gender, age, religion (or other protected attributes – see below) violates someone’s right to be treated with respect, dignity and fairness.

Bullying, harassment and or discrimination can damage the affected person’s wellbeing, work performance and job security, and it can be destructive to a business by creating a negative workplace culture.

It can expose an employer business to direct liability, where the business engaged in the discrimination, or vicarious liability for the discrimination engaged in by one of their employee’s where the employer cannot show that they (the employer) took reasonable steps to prevent that discrimination from happening.

WHAT IS DISCRIMINATION IN THE WORKPLACE?

Discrimination happens when you are treated less favourably than others because of a personal attribute about you rather than your ability to do the job.

It is unlawful to discriminate against someone due to their **protected attributes**:

- Race, colour, national extraction or social origin
- Sex, gender identity or sexual orientation
- Age
- Physical, intellectual, mental or psychiatric disability
- Pregnancy or potential pregnancy
- Marital status, relationship status and family or carer’s responsibilities
- Religion
- Political opinion
- Trade union activity

Examples of discrimination occurring in the workplace can include:

- Job refusal
- Being dismissed or having shifts cut down
- Denial of training opportunities, transfers and promotions
- Not being paid the same as someone doing the same job with the same experience and qualifications
- Exclusion or isolation by co-workers
- Having information you need to do your job deliberately withheld
- Being given impossible tasks
- Being subjected to taunts or abuse that references the protected attribute

EXAMPLES OF WORKPLACE DISCRIMINATION

Discrimination may be intentional or unintentional, direct or indirect. Discrimination can come in the form of jokes and offhand comments that seem harmless to or even go unnoticed by the perpetrator.

The below examples show some of the different ways in which discrimination can occur in the workplace.

Example 1

Mary is six months pregnant. After ten years working at an accounting firm, she applies for a senior position that has just opened up. Despite having more experience and qualifications than the other applicants, she was passed over. When she asked the manager, he said: "I need someone who will be more dedicated to the position."

Example 2

Ryan works on a construction site. His co-workers recently found out he was gay and have started calling him "princess".

Example 3

Annie works in a toy store and has a physical disability preventing her from carrying heavy items. She recently found out her co-workers earn more than her despite having the same experience and working just as hard. When she asked her manager about it, she said it was because "you just don't carry as much weight around here."

THE DIFFERENCE BETWEEN HARASSMENT, BULLYING AND DISCRIMINATION

Discrimination occurs where someone is treated less favourably due to a particular protected attribute, even if the treatment isn't openly antagonistic – for example, not getting a promotion because you are pregnant, or being the subject of "joking banter" by reference to that protected attribute – and even where it is indirect – for example an employer may say they are open to employing people with disabilities, but do not provide appropriate access.

Harassment is when someone is treated in a way that is offensive, humiliating, intimidating or threatening because of a particular attribute like coming from another country.

Sexual harassment is unwelcome advances or attention of a sexual nature.

Bullying is repeated unreasonable behaviour that places the affected person's health or wellbeing at risk.

Bullying and harassment are considered discriminatory behaviour if they are motivated by a protected attribute of the victim, like a disability. Example 2 shows a situation where harassment is occurring due to discrimination.

FOSTERING A POSITIVE WORKPLACE CULTURE

It's important to ensure that employers foster a positive workplace culture that is free of harassment, bullying and discrimination.