

12 JULY 2021

An Employer's Guide to Mandatory Workplace Vaccination Policies



INCORPORATING
KIETI LAW LLP, KENYA



AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES.

On 11 June 2021, the Department of Employment and Labour (Department) issued an updated Consolidated Direction on Occupational Health and Safety (Directive) which, among other things, expressly permits an employer to implement a mandatory workplace vaccination policy, subject to specific guidelines. The Directive has put an end to the debate as to whether a mandatory vaccination policy is legally permissible. However, the permissibility of a mandatory vaccination policy remains subject to an assessment of the risks present in each individual workplace and the guidelines issued by the Department. In terms of Direction 3(1) (ii) of the Directive, within 21 (calendar days) of the Directive coming into effect, an employer must, in line with section 8 and 9 of OHS Act, taking into account their operational requirements, determine whether it intends to make vaccinations mandatory, and if so, determine the category of employees to be vaccinated taking into account the vulnerability of a particular category of employees owing to age or co-morbidities or the risks posed as a result of the role of the employee.

- The guidelines do not supersede or undermine any collective agreement on the subject;
- The guidelines are general and broad in nature and deviation may be required based on the specific workplace; and
- When implementing a mandatory workplace vaccination policy, the Department has cautioned employers to ensure that the rights of employees to bodily integrity and religious freedoms and beliefs are taken into account. In addition, the Department encourages the implementation of mandatory vaccination policies that are based on mutual respect, and one that achieves a balance between public health imperatives, the constitutional rights of employees and the efficient operation of the employers' business.

THE STATE'S VACCINATION PROGRAMME

WHAT IS THE GOVERNMENT'S POSITION IN RELATION TO MANDATORY VACCINATIONS?

- The government has advised that they will not be implementing a mandatory vaccination programme and that vaccines will be administered by consent. The President categorically stated that no one would be forced to be vaccinated and that the government had no intention of forbidding travel on the basis of a refusal to be vaccinated, nor would they be prohibited from participating in public activity.
- The President has also made it clear that the vaccine would not be a barrier to enrolment in schools.
- On 11 June 2021, the Department issued the Directive which expressly permits an employer to implement a mandatory vaccination programme in its workplace following a risk assessment which indicates an operational requirement for such a policy, subject to certain guidelines.

DOES THE GOVERNMENT'S STANCE TO ADMINISTER VACCINES BY CONSENT PROHIBIT AN EMPLOYER FROM IMPLEMENTING A MANDATORY VACCINATION POLICY?

- No, the Directive from the Department makes express provision for an employer to implement a mandatory vaccination policy within their workplace subject to specific guidelines. In addition, there is no prohibition in any other piece of legislation that impedes an employer's ability to implement a mandatory vaccination programme in their workplace provided that an employer does so in line with the Directive issued by the Department and other legislation pertaining to medical testing, the constitutional rights of employees to be free from unfair discrimination, as well as the right of employees to have their personal information treated as confidential.



WHAT ROLE DO EMPLOYERS PLAY IN ASSISTING GOVERNMENT WITH THE VACCINE ROLL-OUT?

In order to assist with the vaccine roll out, the government has established a number of committees. One such committee is the Private Health Sector Co-ordinating Committee which consists of, amongst others, employers and business associations.

Employers may also make application to be registered as a workplace vaccination site. There are many employers in the mining sector who are making such applications in light of the fact that they already have the capacity to do so owing to the fact that they have historically been vaccinating employees for influenza on a voluntary basis for a number of years. Certain employers in the mining sector have the capacity to vaccinate up to 80,000 persons in a day and thus will be instrumental in assisting government in rolling out the vaccine with the required efficacy in order to achieve herd immunity as soon as possible.

THE PHASED APPROACH TO VACCINE ROLL-OUT

- **Phase 1:** this phase has been completed in April 2021. To date a total of 950,000 health care workers have been vaccinated.
- **Phase 2:** in terms of reports from government, phase 2 has gone well and the drive to vaccinate citizens over 60 years is yielding good results.

The national vaccination program will now move into 4 defined streams:

- The first of which vaccinated citizens in the age group 50-59 year olds.
- The second stream vaccinated persons in the education sector.
- The third stream focuses on the police and other security personnel who began to receive vaccinations as of 5 July 2021. Whilst citizens in the age category 35-49 may register to be vaccinated from the 15 July 2021 and are likely to be vaccinated from 1 August 2021.
- The fourth stream is through workplace programmes in key economic sectors such as mining, manufacturing and the taxi industry.

VACCINATION SITES

The Department of Health is currently working with the private sector to implement workplace vaccination programmes that can expand government's vaccination capacity beyond public sites. Government is also working to ensure that vaccination sites are located closer to where citizens live to make it easier for them to access.

An Electronic Vaccination Data System (EVDS) has been established to manage the vaccine roll-out and to direct people towards vaccination sites closest to where they reside. The EVDS will allow citizens to register, receive an appointment date and site, and to receive a digital certificate or a hard copy confirming their vaccination status once vaccinated. Citizens who are eligible for vaccination will have to be registered on the EVDS first.

Approximately 3,8 million citizens have registered on the EVDS system thus far.

REGISTRATION ON THE EVDS MAY OCCUR IN ONE OF FOUR WAYS:

- Through using the online registration platform available on the SA Coronavirus website;
- Dialling *134*832# and registering via USSD;
- Sending the word "register" via WhatsApp to 0600 123 456; or
- Calling the national toll-free call centre on 0800 029 999, where someone will assist citizens to register and answer any questions regarding the vaccination roll-out.

SOUTH AFRICA'S ACQUISITION OF VACCINES

To date over 4,2 million citizens have been vaccinated and 190,000 citizens are on average being vaccinated each weekday.

The African Union (AU), through South Africa, as the AU COVID-19 Champion, and the European Union (EU) have reached a historic agreement that will substantially improve the supply of vaccines to South Africa and its sister countries on the African continent.

In terms of this agreement, Aspen will be delivering over 17 million Johnson & Johnson vaccine doses to South Africa and other African countries over the next three months, commencing later this month. This number will double monthly from October 2021.

Initial vaccine stocks running into millions of doses will be released in both South Africa and other African countries as of July 2021.

There is, in addition, a commitment by Johnson & Johnson to adapt the current arrangement so that South Africa may produce the vaccine under license rather than under contract, resulting in South Africa and the continent having control over the vaccines.

South Africa is also negotiating that in time the drug substance itself would be produced in South Africa, so that it has a fully-owned African vaccine manufactured on African soil in a number of countries on the African continent.

The United States is also donating 15-20 million doses of the Pfizer vaccine to African countries through the COVAX facility.



HERD IMMUNITY THRESHOLD

Government aims to vaccinate 29 million adult citizens before the end of the year, in order to reach the herd immunity threshold. This would help realise meaningful health and economic outcomes, and would avoid many preventable COVID-19 related deaths.

PUBLIC PERCEPTION

WHAT IS THE SOUTH AFRICAN PUBLIC PERCEPTION IN RELATION TO ACCEPTING THE COVID-19 VACCINE?

- On 25 January 2021, the Centre for Social Change and the University of Johannesburg in partnership with the Developmental, Capable and Ethical State research division of the Human Sciences Research Council published a research study on the South African public willingness to receive the COVID-19 vaccine and their reasons related thereto.
- The study showed the following:
 - 67% of adults would definitely or probably take a vaccine if it available;
 - 18% of adults would definitely or probably not take a vaccine; and
 - 15% of adults did not know whether they would accept the vaccine.
- A copy of the complete report can be found at the following link: <https://www.uj.ac.za/newandevents/Pages/UJ-HSRC-survey-shows-that-two-thirds-of-adults-are-willing-to-take-the-Covid-19-vaccine.aspx>

WHAT WERE COMMONLY CITED REASONS FOR NON-ACCEPTANCE OF THE VACCINE?

The most commonly cited reasons for non-acceptance were related to effectiveness of the vaccine, side effects and uncertainty about testing. Many people said they needed more information about the vaccine. Only 10% of those who stated that they would not accept the vaccine or who were unsure whether they would accept the vaccine referred to conspiracy theories.

IVERMECTIN

WHAT IS THE POSITION IN SOUTH AFRICA IN RELATION TO THE USE OF IVERMECTIN TO TREAT COVID-19?

Ivermectin is a drug not previously registered for use in humans in South Africa. In the recent High Court decision of *Dr Coetzee and Others v South African Health Products Regulatory Authority and Others* (2820/2021), the South Gauteng High Court approved the use of Ivermectin for emergency use and where developed for human use.

SAHPRA has been reviewing all new evidence on the safety and efficacy of ivermectin for the treatment and prevention of COVID-19 and maintains that there is insufficient evidence for or against the use of ivermectin in the prevention or treatment of COVID-19.

However, on the 6 April 2021, SAHPRA entered into a settlement agreement in a matter in the North Gauteng High Court (NGHC). The NGHC order has confirmed that medicines containing Ivermectin may be compounded and accessed in accordance with the provisions of section 14.4 of Medicines and Related Substances Control Act 101 of 1965 (as amended) (Medicines Act).

In the interim SAHPRA has implemented a Compassionate Use Access Program (Program) via the legal framework of section 21 of the Medicines Act, which remains firmly in place. Unregistered Ivermectin containing finished pharmaceutical products for human use remains accessible only under the Program and through authorised suppliers of such products.

APPROVAL OF CORONAVAC

SAHPRA has approved the CoronaVac vaccine from China for use in South Africa.

The Vaccine Advisory Committee is currently working on how soon it can bring CoronaVac into the country's vaccination programme.

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.



The most commonly cited reasons for non-acceptance were related to effectiveness of the vaccine, side effects and uncertainty about testing.

- 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 where it constitutes a failure to abide by company policy. A dismissal for misconduct should however be a measure of last resort. 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.
- In addition, the Directive issued by the department calls on employers to undertake a risk assessment within 21 days (calendar days) of the publication of the directive to ascertain whether there is an operational requirement in the workplace to implement a mandatory vaccination policy. This includes an assessment associated with the duties and work environment of their employees together with any underlying conditions an employee may have which will render them more susceptible to serious risks or even death in the event that they contract COVID-19.

WHEN IS THE EXPIRY OF THE 21 DAY PERIOD?

The expiry of the 21 day period is 2 July 2021.

WHAT IS AN EMPLOYER REQUIRED TO DO WITHIN THE 21 DAY PERIOD?

An employer is required to update their risk assessment plans in order to determine whether it intends to implement a mandatory vaccination policy or not.

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

No. On the contrary, the Directive published by the Department makes express provision for workplace mandatory vaccination policies.

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. Furthermore, the Directive published by the Department states that an employer must consult with any representative trade union in terms of section 14 of the LRA together with any health and safety committee established in terms of the Occupational Health and Safety Act 85 of 1993 (OHSA) on the implementation of a mandatory vaccination policy. The amended workplace plan which includes provisions related to mandatory vaccination must also be made available for inspection by trade unions, the health and safety committee as well as an inspector.

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 should 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;
- (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; and
- (xiii) any collective agreement in place dealing with the issue of mandatory vaccinations.



The amended workplace plan which includes provisions related to mandatory vaccination must also be made available for inspection by trade unions, the health and safety committee as well as an inspector.

OBJECTIONS TO VACCINATION POLICIES

ON WHAT GROUNDS MAY AN EMPLOYEE OBJECT TO BEING VACCINATED?

More generally, 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.

THE DIRECTIVE ISSUED BY THE DEPARTMENT RECOGNISES THAT EMPLOYEES MAY OBJECT TO AN EMPLOYER'S MANDATORY VACCINATION POLICY ON ON MEDICAL OR CONSTITUTIONAL GROUNDS. 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. A successful claim for constructive dismissal on the basis that an employer failed to reasonably accommodate an employee pursuant to their refusal to adhere to a mandatory vaccination policy or the refusal by an employer to exempt them from the mandatory vaccination policy will be fact dependant and will be assessed on a case by case basis.

SHOULD THE COVID-19 VACCINATION BECOME MANDATORY FOR INTERNATIONAL TRAVEL, WOULD THIS RENDER AN EMPLOYEES' 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.

THE DIRECTIVE RECOMMENDS THAT AN EMPLOYEE WHO HAS OBJECTED TO A MANDATORY VACCINATION POLICY BE ACCOMMODATED IN THE WORKPLACE BY MAKING AMENDMENTS TO THE ROLE PERFORMED BY AN EMPLOYEE OR THEIR WORK ENVIRONMENT IN ONE OR MORE OF THE FOLLOWING WAYS: ALLOW THE EMPLOYEE TO WORK FROM HOME WHERE POSSIBLE, REQUIRE AN EMPLOYEE TO SELF-ISOLATE IN THE WORKPLACE; OR REQUIRE THE EMPLOYEE TO WEAR AN N95 MASK WHILE IN THE WORKPLACE. 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 employees objections.



This will be assessed on a case by case basis, taking into account the risk assessment conducted by the employer, the efforts made to reasonably accommodate an employee and the nature of the objection raised.

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 with the uncertainty pertaining to the science related to the disease, a limitation on this kind may render the vaccination policy ineffective.

The Directive does however call upon employers to conduct a risk assessment prior to implementing a mandatory vaccination policy to assess whether there exists an operational requirement for such a policy. This will depend on a wide range of factors.

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.

In addition, the Directive states that where an employee refuses to be vaccinated either on medical or constitutional grounds, an employer should:

- counsel an employee and allow him/her to confer with a trade union representative, a worker representative or a member of the health and safety committee;
- refer the employee for further medical evaluation where the objection is on medical grounds. This will however require the consent of the employee; and
- if necessary, take steps to accommodate an employee who refuses to be vaccinated.

ONCE AN EMPLOYER HAS ESTABLISHED AN OPERATIONAL NEED FOR A MANDATORY VACCINATION POLICY, WHAT ARE THE NEXT STEPS?

The Directive states that once an employer has established an operational requirement for a mandatory vaccination policy, an employer must do the following:

- update their workplace plan to indicate whether they intend to make vaccination mandatory;
- list the category of employees that must be vaccinated as and when vaccines become available;
- detail the manner in which it will adhere to the Directive;
- detail the measures it intends to implement with regards to the vaccination of employees as and when vaccines become available;
- provide electronic support to assist employees to register on the EVDS Registration Portal for COVID-19;
- provide employees with paid time off to be vaccinated, provided an employee shows proof of vaccination;
- allow employees the right to refuse vaccination on constitutional or medical grounds;
- where an employee has refused vaccination, provide the employee with an opportunity to consult with a trade union representative, a worker representative or a representative of the health and safety committee;
- provide employees with information on the nature and benefits of the COVID-19 vaccines;
- provide employees with information on the risks of any serious side effects such as allergic reactions;
- where reasonably practically possible, provide transport to vaccination sites; and
- allow an employee sick leave or paid time off should they suffer side effects after having received the vaccine, alternatively make a claim on behalf of the employee in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.



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.



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.

Where employers elect to direct employees for medical evaluation to ascertain the veracity of their objection to a mandatory vaccination policy on the basis of a medical ground, employers must ensure that they have the express consent of the employee to such medical testing as well the consent of employees to access to the results of such medical evaluation.

In terms of the Directive, an employee is only eligible for paid time off to be vaccinated provided they produce proof of such vaccination. An employer must ensure that the consent related to this disclosure has been obtained prior to storing and processing such information.

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.

THE COVID-19 VACCINE INJURY NO-FAULT COMPENSATION SCHEME (VIC SCHEME), LIABILITY, POLICY AND FINANCIAL CONSIDERATIONS

Government has established the VIC Scheme on 22 April 2021. The purpose of which is to provide expeditious and easy access to compensation for persons who suffer harm, loss or damage as a result of receiving the COVID-19 vaccine.

The VIC Scheme is designed to compensate those who are either recipients of the COVID-19 vaccine who have suffered loss, harm or damage or the dependant of a deceased person who has suffered loss, harm or damage by the death of the deceased recipient of the COVID-19 vaccine.

THE FOLLOWING MUST BE APPARENT FOR A CLAIM TO BE MADE:

- The injury was caused by a COVID-19 vaccine registered or approved by South African Health Products Regulatory Authority (SAHPRA).
- The COVID-19 vaccine was procured and distributed by government.
- The COVID-19 vaccine was received at a government site.

TYPES OF VACCINE INJURIES COVERED UNDER THE VIC SCHEME ARE:

- Severe injuries resulting in permanent or significant injury or serious harm to the recipient's health;
- Other serious damage; or
- Death of the recipient as a result of receiving the COVID-19 vaccine.

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?

An employee may claim from the VIC Scheme where they have suffered loss, harm or damage as a result of having received the COVID-19 vaccine, as defined in the regulations, which was administered within the Republic of South Africa at an official site designated for this purpose. In other words, the employee him/herself who suffers an injury may claim, alternatively a dependant of the employee who has passed on may claim from the Scheme provided they have met the conditions for a claim of such nature.

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?

There is no obligation on employers to pay for the vaccination of its employees and this is at the employers' discretion. The employee may obtain the vaccine through the government roll-out or through a medical aid provider.

In addition, on 14 May 2021, the Minister of the Department announced that through the Compensation Fund, in partnership with Rand Mutual Assurance and Federated Employer's Mutual Assurance, have set aside R1,35 billion for the procurement of vaccines for around three million employees who are not covered by a medical aid scheme.

The Vaccination Scheme is a joint effort by the public and private sectors to ensure the health and safety of employees who are not covered by a medical aid provider and to close the funding gaps in relation to procurement of vaccines in the government vaccination programme. The Vaccination Scheme is a commitment by the DOL to ensure the safety of all employees irrespective of their financial status and to ensure these employees are not disadvantaged as a result of not belonging to a medical aid. The Vaccine Scheme will commence in phase 2 of the government's vaccine roll-out programme.

CAN AN EMPLOYER PROVIDE INCENTIVES TO EMPLOYEES WHO RECEIVE THE COVID-19 VACCINATION?

An employer may provide incentives to employees in order to encourage them to receive the vaccine. However, an employer must ensure that these incentives are also provided to employees who do not receive the vaccine on the basis of valid objections (medical or otherwise) so as to avoid a claim for unfair discrimination on the basis of health/medical reasons or any other arbitrary ground.

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

Medical aid providers are currently assisting with the vaccine roll out as and when the vaccines become 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?
- Will the need for a vaccination certificate in effect force every person to get vaccinated if they can?

THE INTERPLAY BETWEEN THE 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.

An employer is also required to consult with the Health and Safety Committee constituted in terms of OHSA in relation to the implementation of a mandatory vaccination policy and to make available their risk assessment and workplace plan for inspection by the health and safety committee.

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.

The Directive recommends that employers refer employees for medical evaluation where their objection to the mandatory vaccination policy is based on medical grounds. Pursuant to the provisions of the EEA together with the POPIA, employers must ensure that they have obtained the express consent of employees prior to doing so.



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 judgment that the individuals' rights must yield to state police power in order to preserve public health and safety.
- 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.

DISCLAIMER:

AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES is an informative guide covering a number of topics, which is being published purely for information purposes and is not intended to provide our readers with legal advice. Our specialist legal guidance should always be sought in relation to any situation. This version of the employers guide reflects our experts' views as of 12 JULY 2021. It is important to note that this is a developing issue and that our team of specialists will endeavour to provide updated information as and when it becomes effective. Please contact our employment team should you require legal advice amidst the COVID-19 pandemic. This guide is not intended to serve as medical advice nor does this guide intend to make any evaluations in relation to the efficacy of COVID-19 vaccines or the correctness of the decision to implement a mandatory vaccination policy in all instances.



To access our other resources on the topic, please [click here](#).

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



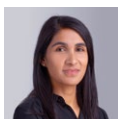
Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2021 9692/JULY



INCORPORATING
KIETI LAW LLP, KENYA



EMPLOYMENT LAW | cliffedekkerhofmeyr.com