



# Mandatory vaccinations in the workplace

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# Introduction

- Covid-19 has made its presence known throughout the world, claiming millions of lives, ravaging economies and fundamentally changing the way that we work, live and play.
- All indications are that it will remain a reality throughout the world for some time still.
- This has an impact on the world of work with employers having to balance the generation of revenue, or service delivery in the case of governments, with ensuring the safety of employees, clients and third parties.

- Remote working out of necessity became the norm.
- Many employers (and employees) have reached a point of frustration with remote work.
- There has been a push for a return to work along with mandatory vaccinations both globally and in SA.
- There will be resistance from certain employees to being vaccinated.
- Can employers insist on mandatory vaccinations and can employees refuse to be vaccinated?

# What are the rules (laws)?

- Occupational Health and Safety Act, 1993 (OHSA).
- Occupational Health and Safety Direction (Direction) made in terms of the Disaster Management Act, 2002.
- Constitution of the Republic of South Africa, 1996.

# OHSA

- Section 8(1) of OHSA imposes a general duty on all employers to take reasonably practicable measures to ensure a healthy and safe workplace. The subsection reads:

*‘Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without a risk to the health of his employees’.*

- In elaboration of this general duty, section 8(2) states that the duty includes:

*‘taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment’.*

- Requiring employees to be vaccinated constitutes a ‘reasonably practicable step’ for the following reasons:
  - Current scientific research indicates that vaccination limits severe illness on infection and reduces transmissibility.
  - Governments commitment to mass vaccination of the population to protect individuals and public health will support an argument that vaccination is a reasonable measure.
  - Although the Direction does not make vaccination mandatory, but provides for employers to do so, also indicates that it is a reasonably practicable measure.

- Employers also have to consider third parties who are directly affected by their activities. Section 9(1) of the OHSA provides that:

*‘Every employer shall conduct his undertaking in such a manner to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health and safety’.*

- This means that part of the employer’s obligation under OHSA is to ensure that those who enter its premises, whether as contractors, visitors, suppliers or clients are not exposed to COVID-19 as transmitted by its employees.



## Potential liabilities for employers:

- Section 38 of the OHS Act makes it an offence for an employer not to comply with sections 8 and 9 carrying a penalty or fine not exceeding R50 000 or to imprisonment for a period not exceeding a year or both.
- That means that the failure to take reasonably practicable measures such as the requirement that the identified employees be vaccinated exposes employers to criminal prosecution.

# OHSA Directive

Places the following obligations on employers:

- Undertake a risk assessment and decide, taking into account the operational requirements of the workplace, whether to make vaccination mandatory.
- Identify those employees who by virtue of the risk of transmission through their work or their risk of severe disease or death due their age or comorbidities, that must be vaccinated.

- Consult with any union and health and safety committee on the risk assessment plan.
- Notify employees of the contents of the Directive, its plan and the way it intends to implement it.
- Provide information on the dangers of the virus, the manner of its transmission, the measures to prevent transmission, the nature of vaccines and benefits and the nature and risk of any serious side effects.
- Give employees time off to vaccinate.

- Employees identified for vaccination must be notified of the:
  - Obligation to be vaccinated.
  - Right to refuse on constitutional or medical grounds.
  - Opportunity to consult a health and safety representative, worker representative or trade union official.
- If reasonably practicable transport to be provided to and from the vaccination site.
- Paid time off to recover, if side effects are suffered as a result of the vaccine.

# Refusal to vaccinate

- On constitutional grounds (the right to bodily integrity, the right to freedom of religion, belief and opinion) or medical grounds.
- Practical response:
  - Provide counselling.
  - Allow employee to seek guidance from a health and safety representative, worker representative or trade union official.
  - Refer the employee for further medical evaluation in the case of a medical contraindication.
  - If necessary, reasonably accommodate the employee in a position that does not require the employee to be vaccinated. For example - work offsite or from home or in isolation within the workplace or outside of ordinary working hours.

## Refusal on constitutional grounds:

- No right is absolute.
- Each right is limited by other rights and may be limited by a law of general application (sections 8 and 9 of OHSA).
- Section 36 analysis requires a limitation to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

- Factors to be taken into account:
  - Nature of the right – 2 deeply personal rights at stake , i.e. bodily integrity and religion - purpose of any limitation has to be compelling.
  - Importance of the purpose of the limitation – Impact on public health and economy and success of vaccines make a compelling case for limitation.
  - Nature and extent of limitation-
    - Bodily integrity - limited risk of adverse effects.
    - Religion - does not seek to limit the religion itself so much as one of its tenets.

- Relation between the limitation and the purpose - clear and demonstrable relation between the limitation (vaccination) and the purpose (health and safety of employees and third parties in the workplace).
- Less restrictive means to achieve the same purpose - wearing of masks and social distancing may limit transmissibility but do not prevent severe illness and do not hold out the possibility of eradicating the pandemic.



# Available remedies for refusal to vaccinate

- Dismissal
- Misconduct:
  - Section 14 of OHSA requires every employee to cooperate to enable employer to comply with duty and to obey the health and safety rules and procedures laid down by the employer.
  - Refusal to vaccinate may therefore amount to misconduct.
  - Sanction - Warnings and reasonable time to

# Incapacity

- Not just incapacity and poor performance.
- Also, other forms of incapacity - loss of a qualification, incompatibility and incarceration or the refusal to join a trade union with a closed shop.
- Similar to closed shop, an employee's beliefs not to join the union or to be vaccinated render the employee incapable of a contractually required tender of services.
- Sanction - counselling and an endeavour to reasonably accommodate (offering an alternative position that does not involve congregate settings or engagement with the public).

## Another alternative

- Temporary remedy short of dismissal - refusal to accept an incomplete tender of services.
- If employee incapable of tendering services, employer has no obligation to accept the tender and accordingly has no obligation to pay the employee. The 'no work, no pay' rule.

# Concluding Remarks

- Ideal solution - persuade employees for their own and their colleagues' health and safety to be vaccinated.
- In other words, the best approach is not to use a stick, but to set out the terrain within which employers can develop a programme of persuasion and exception where justified.