

MANDATORY COVID-19 VACCINATION POLICY IN THE WORKPLACE

INTRODUCTION

May an employer implement a mandatory vaccination policy in the workplace? Before answering this question, one needs to consider some of the legal obligations facing employers.

An employer has a legal obligation (section 8 of the Occupational Health and Safety Act) to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of employees. This includes taking reasonably practicable steps to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to protective equipment.

The amended [Covid-19 Consolidated Direction](#) on Occupational Health and Safety Measures in Certain Workplaces (Covid-19 OHS Direction) of 11 June 2021, also sets out measures that the employer must take in order to provide a safe (from Covid-19) workplace.

Likewise, an employer also has reasonable obligations towards protecting the health and safety of its customers and could potentially be held liable if a Court finds that the source of a customer or client's Covid-19 infection was at that employer's workplace and that the employer failed to ensure that it implemented reasonably practicable steps to protect to prevent same.

The source for 'permission' to implement a mandatory Covid-19 vaccination policy is the amended Covid-19 OHS Direction. The legal authority to issue this Direction arose from section 27(2) of the Disaster Management Act which allows for authorisation to be given to a Cabinet Minister, in this case the Minister of Employment and Labour, to issue directions linked to the state of disaster.

However, there are certain considerations and steps that an employer must take before it may implement a mandatory vaccination policy in the workplace. These are discussed below.

CONDUCT A WORKPLACE RISK ASSESSMENT

As a brief framework the Covid-19 OHS Direction requires an employer to undertake a workplace risk assessment in line with the Directions. This risk assessment should inform the plan on what protective measures need to be implemented for the phased return to the office (where employees may be working from home). It should also inform the employer's plan regarding the vaccination of employees.

The risk assessment should take into account the operational requirements of the workplace (e.g., degree of exposure to people, nature of the service provided, etc.) and the extent to which minimum health and safety measures of the Covid-19 OHS Direction are implemented.

The risk assessment should also serve to identify employees or categories of employees, who by virtue of their risk of transmission through their work, or who may be at high risk of developing severe illness or death due to their age or co-morbidities, should be vaccinated.

VACCINATION POLICY

If the risk assessment concludes that certain, or all employees should be vaccinated, the next step is to consult with representative trade unions (defined in section 14 of the LRA as a representative registered trade union, or 2 or more representative registered trade unions, acting jointly, that have a majority of members in a workplace), if applicable, and, for larger employers, the Health and Safety (H&S) Committee (establish in terms of the Occupational Health and Safety Act, 1993) and prepare a vaccination policy (unless a collective agreement exists in this regard).

The vaccination policy should clearly identify those employees or categories of employees who, based on the risk assessment, are required to be vaccinated in order to continue to do the work that they do for the employer.

It is suggested that employers also provide employees with information about Covid-19 and vaccinations as may be found on reputable websites such as that of the Department of Health (<https://www.health.gov.za/covid19/>) and that they assist employees to register on the South African Vaccination Programme Registration Portal (<https://vaccine.enroll.health.gov.za/#/>).

The policy should provide for paid time off to attend to vaccination (proof of vaccination may be required for this) and paid sick leave in the event of side effects (or, in the case of workplace acquired Covid-19 or claim from the Compensation for Occupational Injuries and Diseases Act if no paid sick leave is available at the time).

ADVISE THE AFFECTED EMPLOYEES OF THE VACCINATION POLICY

Once the vaccination policy is finalised, advise employees of the policy and the Covid-19 OHS Direction. Employees need to understand the content of the policy, in particular –

- their right to refuse mandatory vaccination on constitutional or medical grounds as well as the employer's obligation to, as far as reasonably practicable, provide a working environment that is safe and without risk to the health of employees or the public who frequent the workplace;
- their right to consult with a Health and Safety representative, a worker representative or trade union representative;
- that they may be referred for further medical evaluation should there be a claim of a medical contra-indication for vaccines.

WHAT HAPPENS IF AN IDENTIFIED EMPLOYEE REFUSES OR IS NOT ABLE TO BE VACCINATED?

Subject to the risk assessment and consultation with internal stakeholders as discussed above, an employer should, if necessary, consider steps to reasonably accommodate those who refuse to vaccinate on constitutional or medical grounds (this is discussed below).

If, based on the employer's operational needs, reasonable accommodation is not possible alternatives short of dismissal may be considered, including, but not limited to, requiring the employee to test regularly for Covid-19 and to produce proof of the test outcome.

Where the employer is considering dismissal, this must be done in accordance with a fair procedure. Please see discussion below.

REASONABLE ACCOMMODATION

Reasonable accommodation means that an employer should consider all reasonable alternatives that may allow the identified employee who refuses to be vaccinated to continue to work for that employer. Reasonable accommodation should, however, not result in hardship for the employer.

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In terms of the Covid-19 OHS Direction, reasonable accommodation means any modification or adjustment to a job or to the working environment that will allow an employee to remain in employment. This may include alternative working arrangements (e.g. to work from home), additional health and safety protocols (e.g. N95 mask, physical partitions between workstations), or consideration of an alternative position.

Reasonable accommodation steps are guided by the [Code of Good Practice: Employment of People with Disabilities](#) published in terms of the Employment Equity Act 55 of 1998. An employer should also consider the Code of Good Practice: Dismissal, especially in so far as it deals with reasonable accommodation of employees to prevent dismissal.

DISMISSAL FOR FAILING TO VACCINATE

In the event that an employer, despite efforts made to encourage the employee to get vaccinated and consideration of reasonable accommodation, contemplates dismissing that employee, this must be done according to a fair procedure and for a fair reason.

There may be different starting points to the decision to dismiss. The following are dealt with below:

1. Dismissal for operational requirements
2. Dismissal based on incapacity
3. Dismissal based on conduct

Dismissal for operational requirements

Where an employer relies on the ground of operational requirements when dismissing someone for failing to comply with a Mandatory Vaccination Policy, the employer will need to provide proof of, amongst other things, the existence of such an operational requirement(s) (economic, technological, structural, or other similar needs).

An example may be where an employer does contract work for a client and that client has a mandatory vaccination policy in place that extends to contract workers on its sites.

A decision to retrench would need to follow a consultation process as set out in section 189 (section 189A deals with large-scale retrenchment) of the Labour Relations Act. Severance pay of one weeks' pay for each completed year of service will apply if the dismissal is for operational requirements.

Dismissal based on incapacity

Where an employer relies on the ground of incapacity when contemplating the dismissal of an employee, the employer is required to follow a fair procedure as set out in item 10 (Incapacity: ill health or injury) of the Code of Good Practice: Dismissal

An example may be where an employee's refusal to vaccinate is based on medical grounds that have been confirmed by that employee's doctor.

It is also important to determine whether the medical grounds are chronic or whether these may be linked to a particular condition that is likely to persist for a specific period of time only. This should all form part of the consideration for reasonable accommodation.

Dismissal based on conduct (misconduct)

At this stage it is not clear that a failure to vaccinate would constitute misconduct. It is still an individual's choice whether or not to vaccinate and the only mandatory thing would be whether the employer, following a risk assessment and the development of a mandatory policy, requires vaccination as a condition of service for identified employees.

Where employees wish to challenge the fairness of their dismissal, they may refer a dispute to the CCMA or a bargaining council within 30 days of the date of dismissal.

CAN AN EMPLOYEE REFER A CASE OF UNFAIR DISCRIMINATION TO THE CCMA IN RESPECT OF A MANDATORY VACCINATION POLICY?

Section 6(1) of the Employment Equity Act provides that "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

Where an employee claims that the employer's Mandatory Vaccination policy or practice directly or indirectly unfairly discriminates against him or her on one of grounds listed above, the employee, after attempting to resolve it internally, may refer a dispute of this nature to the CCMA for conciliation within 6 months of the act or omission. There should be a

link between the policy or practice and the ground that has been identified.

For example, that the policy exclusively targets people with disabilities irrespective of the nature of the disability. The focus in this example will not necessarily be on whether the mandatory vaccination policy itself constitutes a form of unfair discrimination, but rather whether the employment policy directly or indirectly unfairly discriminates against those with disabilities.

Automatically unfair dismissal – dismissal linked to unfair discrimination

Where an employee claims that dismissal for refusing to vaccinate is automatically unfair, the employee will need to show a link between the dismissal and the ground of discrimination. Would dismissal still have occurred if it was not for the alleged ground of discrimination?

SOURCE DOCUMENTS

- Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces [11 June 2021] GG 44700 No. R 499.
- Code of Good Practice: Dismissal.
- Code of Good Practice: Employment of People with Disabilities GG 23702 and GG 23718 of 19 August 2002.
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.
- Disaster Management Act 57 of 2002.
- Employment Equity Act 55 of 1998.
- Labour Relations Act 66 of 1995.