

EMPLOYMENT LAW ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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A grand slam for 'NO-VAC': A brief discussion of the United States Supreme Court's decision to block President Biden's vaccine mandate for medium to large scale businesses

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A grand slam for 'NO-VAC': A brief discussion of the United States Supreme Court's decision to block President Biden's vaccine mandate for medium to large scale businesses

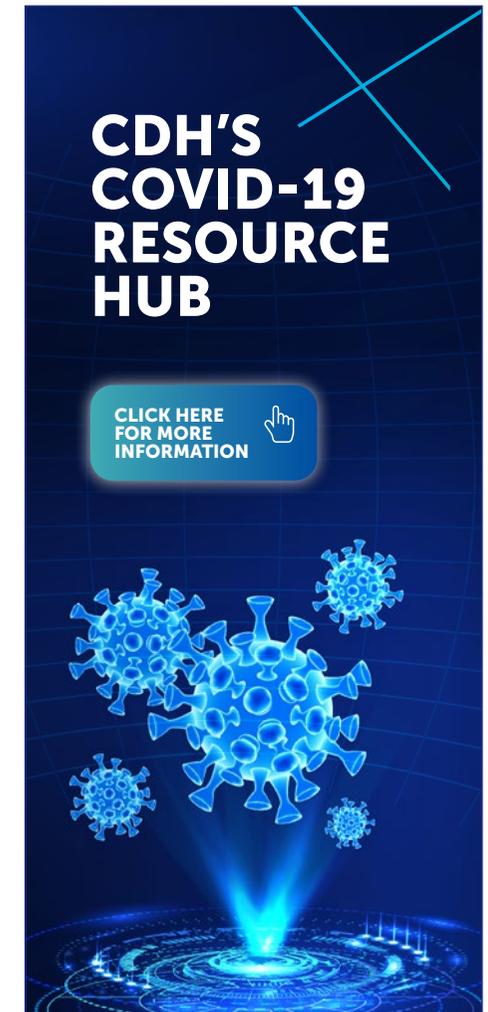
On 9 September 2021, President Joe Biden announced plans that would 'require more Americans to be vaccinated' in response to the rising number of COVID-19 cases in the US and, of course, the subsequent death toll. President Biden further announced that an emergency directive, i.e., 'vaccine mandate', would be issued requiring employers employing at least 100 employees to indicate that their workforces have been fully vaccinated, or provide a negative COVID-19 test at least once per week. This proposed vaccine mandate would affect some 100 million workers in America.

On 5 November 2021, the proposed vaccine mandate was issued through the Occupational Safety and Health Administration Act of 1970 ("OSHA"), which imposed significant fines on those businesses that refused to comply. Various parties challenged this decision to implement the vaccine mandate. These numerous cases were eventually consolidated in the matters of *National Federation of Independent Business et al vs Department of Labour, Occupational Safety and Health Administration* (21A244) and *Ohio et al vs Department of Labor, Occupational, Safety and Health Administration et al* (21A247), which then found its way to the US Supreme Court.

In the vaccine mandate cases, *Missouri v. Biden and National Federation of Independent Business v OSHA*, the Supreme Court (the Court) rendered a split decision. *Missouri v. Biden* in essence allowed the Biden Administration to begin enforcing a rule that requires entities receiving medical care or medical aid funding to insist that their employees be vaccinated. However, *National Federation of Independent Business v. OSHA* on the other hand, essentially

prevents the Biden Administration from enforcing a rule that would require businesses employing a hundred or more workers to insist that their employees who work in settings conducive to the spread of COVID-19, either be vaccinated and/or wear masks and undergo regular coronavirus testing. On a closer analysis, it is arguable that the Court, strictly speaking, did not render a decision on the validity of either rule. Instead the decisions basically determined whether the rules in question could be implemented while their legality was further litigated. The opinions of the Court are, however, such that the legality questions seem to have been answered. Mandates for health care workers are permissible, while mandates for ordinary employees of large businesses are not permissible.

The Court's decisions carry enormous significance for the federal response to COVID-19. The Court's ruling will mean that nationwide workplace protection now can be implemented only in health care facilities, where the justification is patient safety, not worker protection. As Justices



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Breyer, Sotomayor, and Kagan wrote in their dissent in the OSHA case, the majority's decision "stymies the Federal Government's ability to counter unparalleled" threats.

The Biden Administration could propose more limited COVID-19 workplace standards, for example, applying only to workplaces with especially high risks of SARS-CoV-2 transmission (such as work in medical facilities, work being carried out in confined spaces, assembly lines or cruise ships), but it is arguable that the Court's ruling gives OSHA fairly limited scope for future action.

The topic of vaccine mandates or mandatory workplace vaccination policies (as they are referred to in South Africa) continues to polarise opinions. In South Africa, the

Department of Employment and Labour has published Directives which provide the building blocks for mandatory workplace vaccinations. However, these Directives expressly state that employees can object to mandatory vaccinations on either constitutional or medical grounds.

There are pending constitutional challenges to mandatory workplace vaccinations in the Constitutional Court and the Free State High Court. In conclusion: our Courts will no doubt be monitoring global jurisprudence and it remains to be seen whether mandatory workplace vaccinations in South Africa will ultimately be declared lawful.

**FIONA LEPPAN, KGODISHO PHASHE
AND THATO MARUAPULA**

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INVITATION

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**IT IS A GIVEN THAT COVID-19
WILL CONTINUE TO DISRUPT
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Join our Employment Law experts as we reflect on the impact of COVID-19 on the workplace and discuss how to navigate the year ahead.



Thursday,
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09h00 – 10h15 (CAT)

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Following the introduction of the Directive, the employer introduced a mandatory vaccination policy, which the employee elected not to comply with. Consequently, the employee was called to attend an incapacity enquiry on 28 October 2021. Following the incapacity enquiry, the chairperson concluded that the employee was permanently incapacitated as a result of her failure to be vaccinated and participate in promoting a safe and healthy working environment. The chairperson found that the incapacity was permanent as the employee had no intention of ever being vaccinated. The employees' contract was terminated.

The employee referred a dispute to the CCMA, challenging the substantive fairness of her dismissal. The Commissioner noted that the employee had placed reliance on her right to bodily and psychological integrity in terms of section 12(2) of the Constitution in her exemption application. The employer's Exemption Committee, which was

formed in terms of its mandatory vaccination policy, considered and declined her application. The reasons for doing so were that the employee was a high-risk individual who interacted with her colleagues daily, whilst on duty in a confined and uncontrollable space, placing those colleagues at risk of possible infection.

The Commissioner considered both the process that the employer had undertaken, as well as the reasoning of the Exemption Committee, and found that, in the interest of fairness, the only possible conclusion was that the employee was permanently incapacitated. This conclusion was founded on the employee's decision to not get vaccinated and the implication thereof of refusing to create a safe and healthy working environment, an obligation imposed on both the employer and the employee in terms of the Occupational Health and Safety Act 85 of 1993.

AADIL PATEL AND DYLAN BOUCHIER

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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.

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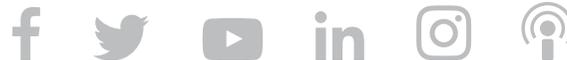
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