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EMPLOYMENT **ALERT**

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Can South African employers impose mandatory COVID-19 vaccination policies as a pre-requisite to return to work or as a precondition for employment?

With businesses eager to gear up to as near *"normal"* operations, as is possible, in our continued analysis of the various aspects around the pandemic, we now consider what will be the position in the absence of a law which mandates inoculation of the entire population against COVID-19.

The COVID-19 vaccine race culminates with the much-anticipated roll out of a vaccine in the United Kingdom and Bahrain in the week of 7 December 2020, whilst there are parallel applications around the globe in other jurisdictions for emergency approvals. This is against the backdrop of 173 potential vaccines which continue to be developed worldwide and at different stages of their individual processes. When a vaccine will become available in South Africa is still unknown, and we can only hope that it will be as early as possible in 2021.

With businesses eager to gear up to as near *"normal"* operations, as is possible, in our continued analysis of the various aspects around the pandemic, we now consider what will be the position in the absence of a law which mandates the inoculation of the entire population against COVID-19. This raises the following questions:

1. Should employers consider implementing a mandatory vaccination policy?
2. How does an employer deal with employees or applicants for employment who refuse to be vaccinated?
3. Are personal beliefs regarding vaccinations, i.e.veganism and the like, a legitimate ground for an employee to refuse to comply with a mandatory vaccination policy?

At this stage, save for yellow fever vaccinations in specified international travel, South Africa does not have a policy of compulsory vaccination. The vaccination schedule prescribed for children is only encouraged by the Department of Health, and there is no legal requirement for parents to ensure children receive the requisite vaccinations prescribed. However, a refusal to submit children to vaccinations may create practical impediments in light of the Regulations which concern school immunisation. Surprisingly, these have not as yet been tested in court.

A mandatory employer vaccination policy will accordingly be considered against the backdrop of the Constitution. Section 12(2) of the Constitution for instance provides that: 'everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.' Patient autonomy is not, however, absolute, as the Constitution permits limitation of rights in terms of a law of general application and only to the extent that it is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. The Constitution also protects the right to religion, belief and opinion as well as the right to life. These rights must then be balanced against the disastrous effects of COVID-19 as a global pandemic.

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Can South African employers impose mandatory COVID-19 vaccination policies as a pre-requisite to return to work or as a precondition for employment?*...continued*

Like all other vaccines, including those formulated to combat the common flu, the COVID-19 vaccination is likely to be met with both suspicion and opposition.

Like other countries, South Africa plans to adopt a phased approach to the adoption of a vaccination once it has been procured. Stage one would see health workers prioritised and immunised, they would be followed by the elderly. Stage two will see 11% to 20% of the population vaccinated where people with comorbidities and high priority teachers will get the shot. In stage three, up to 50% of the population will be immunised, including other essential workers.

Like all other vaccines, including those formulated to combat the common flu, the COVID-19 vaccination is likely to be met with both suspicion and opposition. One of the greatest impediments to the irradiation of polio in Africa, for instance, was the association of vaccines with many traditional or cultural superstitions, including an inherent distrust for western medicine in a newly decolonising continent.

While the COVID-19 vaccine will be introduced in very different circumstances, general cultural and even religious opposition to vaccinations still exist across the globe. Anti-vaccine campaigners argue that vaccines cause adverse effects beyond the known vaccine-related risks and legitimate objections. Added to this is the speed at which the COVID-19 vaccines have come to the market. Employees who subscribe to an anti-vaccine ideology are likely to resist mandatory vaccinations in the workplace in three general categories:

(i) **medical reasons:** employees in high-risk categories who may suffer adverse effects from a vaccine or those having a compromised immune system where there is no science to the contrary or employees who have showed no sign of the virus over the period of the pandemic;

(ii) **safety concerns:** employees who are relatively younger and thus do not require a vaccine on the advice of their primary care physician; and

(iii) **religious:** cultural or philosophical objections.

Employees may also object to being vaccinated on the basis that the vaccines may include substances such as swine, whose consumption is prohibited for religious reasons. Whilst there are differing religious doctrinal theories around such subject, this is outside the scope of this article.

So, what does an employer do where employees refuse to be vaccinated? Is a mandatory vaccination policy ideally the way to go? 2021 will bring more hard decisions to the boardroom as the world continues to confront COVID-19 and future pandemics which seem set to become more frequent.

There are no legal restrictions on employers in implementing mandatory vaccination policies in the United States as a comparator. Employees may however validly object to receiving a mandatory vaccine on the basis of medical and/or

Can South African employers impose mandatory COVID-19 vaccination policies as a pre-requisite to return to work or as a precondition for employment?*...continued*

Employers ought to also have appropriate data storage facilities to manage confidential employee records. This implicates the Protection of Personal Information Act, 2013.

religious grounds. In addition, 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.

In the South African context, an employer has an obligation to ensure a safe workplace. Section 36 of the Constitution provides for a limitation of constitutional rights. The limitation of rights is to be considered taking into account several factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and the availability of less restrictive means to achieve the limitation's purpose. The right to bodily integrity can therefore be limited, provided such limitation complies with the constitutional requirements and the limitation is not overbearing. These issues will become relevant to employers where the state does not implement a mandatory COVID-19 vaccination law. The May 2020 decision of the Labour Court in *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others* was hailed as a significant victory for employees in the mining industry at the early stages of the initial lockdown. It was accepted in the AMCU matter that there was a need for detailed, binding national standards to guide employers and protect mineworkers against the hazards presented by COVID-19 upon their return to work in the mining industry post the hard lockdown – this was in the face of the state refusing to adopt such approach. What impact, if any, will the judgment have on mandatory vaccinations in the mining industry?

Alternatively, what impact will the principles established in the AMCU case have in other industries like aviation, entertainment, public transport for instance? Would it be best that industry/sector norms be determined across the economy which are agreed upon at NEDLAC? What about contractors or service providers who physically interact with the business, how will vaccines in relation to such persons be regulated?

In addition, what happens if an employer mandates a vaccine and it results in negative or adverse health effects among employees? There are various liability considerations that an employer will need to take into account when implementing a mandatory vaccination policy. From a delictual perspective, employers could well be liable for mandating employees to be vaccinated who later become ill as a direct result of taking the vaccine. Employers ought to also have appropriate data storage facilities to manage confidential employee records. This implicates the Protection of Personal Information Act, 2013 (POPIA).

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Can South African employers impose mandatory COVID-19 vaccination policies as a pre-requisite to return to work or as a precondition for employment?*...continued*

The myriad of questions which we have raised would indicate the complexity of the issues.

It also remains unclear on whether the state or private medical insurers will subsidise the cost of the vaccine? If not, will the employer incur the expense where it is mandatory at its insistence? A company's Health and Safety Committee will also be central to developing any mandatory policy and so will consultation with trade unions.

Ultimately every employer must determine the necessity of implementing a mandatory COVID-19 vaccine policy for its workplace where there is no law of general application. In some cases, such as worksites where employees can safely social distance during regular work duties, it may be beneficial to encourage vaccination but not require one as the most effective vaccination programs are by consent, not by compulsion.

The gist behind mandatory vaccination is that employers have an obligation to protect their employees and maintain a healthy and safe working environment. When considering whether to implement a mandatory vaccination policy employers must have regard to their individual workplaces and access whether such a policy is in fact necessary taking into account, *inter alia*, the following factors: (i) the viability of continued remote work; (ii) the number of vulnerable employees in the workplace; (iii) the effectiveness of additional PPE where necessary; (iv) temporary alternative placements; (v) the employees exposure to the public and (vi) the number of employees with religious and/or medical grounds for objection. The requirement for such a policy should be determined on a case by case basis and the objections of employees or potential employees must also be duly considered with regard to the requirement to balance various rights. Employers must ensure that their records of infected employees are kept updated as this is a factor to also be taken into account.

Furthermore, employers must be mindful of the provisions of POPIA when requesting employees or potential employees to make disclosures regarding their medical or vaccination history, as such information constitutes special personal information and accordingly consent may be mandatory for the purposes of POPIA. 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 up which to process the said special personal information. Information collected, stored and disposed of, as the case may be, must also be in line with the provisions of the POPIA.

The myriad of questions which we have raised would indicate the complexity of the issues related to mandatory vaccination policies. Considered legal advice will need to be obtained as employers begin to wrestle with this aspect of the virus entanglement in 2021.

Imraan Mahomed, Riola Kok and Rethabile Mochela

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On the first day of Christmas, my employer said to me, *"No thirteenth cheque!"*

The starting point is to consider whether the payment of this bonus is a guaranteed right, either in terms of an employee's contract of employment or an employer's remuneration or bonus policy.

As we slowly creep towards Christmas, and in light of the devastating financial impact that the COVID-19 pandemic has had on businesses and the economy, employees will most certainly be questioning whether they will be receiving their thirteenth cheque. Employers, on the other hand, will be asking whether or not they can afford to pay the thirteenth cheque this year, a sudden doubling in employee costs. Employers will therefore be considering their position in relation to the payment of a thirteenth cheque to its employees.

The starting point is to consider whether the payment of this bonus is a guaranteed right, either in terms of an employee's contract of employment or an employer's remuneration or bonus policy. If the bonus is not dependent on the exercise of any discretion at the instance of the employer or the attainment of performance related objectives, then such a bonus should ordinarily be payable. Absent such a right, there is no legislation within South Africa which obliges employers to pay bonuses to its employees. Hence, the right must either be agreed at the time of contracting or bargained for, either individually or collectively, and subsequently agreed to. Typically, the thirteenth cheque is contractually guaranteed and therefore becomes a payment that the employee is entitled to, as a right.

In *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC), the court stated that bonuses which are part of remuneration, for example a thirteenth cheque and other guaranteed bonuses, are examples of bonuses which employees receive because the employee is contractually obligated to provide services to his/her employer. The court held that the employee is entitled to be paid this kind of guaranteed bonus for tendering service and whilst the employee remains employed, and there is no real nexus between the specific work to be done and the bonus. The court held that the moment there is a direct nexus between the payment of the bonus and the performance of actual and designated work to be done, or the content thereof, or the discharging of such actual work, or the standard of the work so discharged, then the bonus is a *quid pro quo* for the nature and fulfilment of the work itself and not simply for working *per se*.

On the first day of Christmas, my employer said to me, *"No thirteenth cheque!"* ...continued

An employer cannot unilaterally force the employee to sacrifice their thirteenth cheque.

Where an employer and employee had entered into a contract of employment and/or collective agreement that contains any provision regarding the guaranteed payment of bonuses, an employer would need to ensure payment is made in terms of such contract/collective agreement. Unfortunately, whether or not the employer can afford the payment is irrelevant as failure to make payment of the guaranteed bonus may be seen as a unilateral change to the provisions of the employment contract.

If an employer is unable to pay bonuses due to financial constraints or for any other valid reason, it is advised that the employer enter into negotiations with the employees and obtain their consent. Alternatively, if the employer has entered into a collective agreement, it can approach the Bargaining Council to establish whether it may apply for exemption of paying the thirteenth cheque. Failure to do so might result in the employee taking legal action against the employer for breach of contract.

An employer cannot unilaterally force the employee to sacrifice their thirteenth cheque. Failure to receive consent from the employee or Bargaining Council affords employees an election to either accept the breach of contract and sue for damages or enforce the contract through specific performance as the employer has breached a clause of the employment contract. Alternatively, the employee can refer a dispute to the CCMA concerning the failure to pay an amount owing to the employee in terms of their contract of employment or collective agreement.

Thabang Rapuleng and Dylan Bouchier

CLIFFE DEKKER HOFMEYR

COIDA Amendment Bill: A changing work order - employers beware of administrative fines

A new chapter has been introduced to the Bill related to the appointment of inspectors and regarding enforcement and compliance.

Amendments encapsulated within the Compensation for Occupational Injuries and Diseases Amendment Bill (the Bill) have introduced harsher penalties to be levied upon employers regarding unlawful conduct in connection with workers' compensation. In light of an over-crowded court roll, employers will no longer face criminal sanctions by a court of law. These sanctions will instead be replaced with more extreme penalties, which can be objected against and appealed to the Compensation Fund, and subsequently then to the courts should they wish to persist.

A new chapter has been introduced to the Bill related to the appointment of inspectors and regarding enforcement and compliance. This enables inspectors to monitor and enforce compliance with the Act, through inspections and investigation of complaints. Inspectors have the power to enter homes and workplaces subject to consent from the occupier/owner, to enforce compliance with the Act. Inspectors will have the power to issue compliance orders, which will ultimately become an order of court.

The Bill has included domestic workers, who were previously excluded from the protection granted by the Act. This decision has also been confirmed by the Constitutional Court in *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24, which ruled that the provision in COIDA, which excluded domestic workers from being able to claim from the Compensation Fund in the event of injury, illness or death, is unlawful and violates the rights to social security, equality and dignity.

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COIDA Amendment Bill: A changing work order - employers beware of administrative fines...*continued*

When the Bill is enacted, employers will most likely be expected to revise their disciplinary procedure policies to align it with the Bill.

The Bill has also introduced the concept of a multi-disciplinary employee-based process in which employee rehabilitation, reintegration and return to work processes must be undertaken by employers for employees who suffer occupational injuries or disease. These measures will force employers to ensure that they have exhausted all processes before embarking on dismissal processes. When the Bill is enacted, employers will most likely be expected to revise their disciplinary procedure policies to align it with the Bill.

Additional proposals include:

- The Bill has further granted the Compensation Commissioner greater powers as a means to increase efficiency of the Compensation Fund.
- The Bill has also taken a strict stance on injuries related to the wilful conduct of employees in that such employees will not be entitled to compensation as a result thereof.
- Additionally, employees involved in an accident on a public road will now be required to claim form the Road accident Fund instead of the compensation fund.

The abovementioned proposals indicate an obligation on the employer to review and amend all its policies and procedures in relation to occupational health and safety in order to ensure compliance with the Bill to avoid any financial or reputational risk. The notification of the call for written submissions regarding the Bill will be issued by Parliament in 2021.

Michael Yeates, Dylan Bouchier and Kgodisho Phashe

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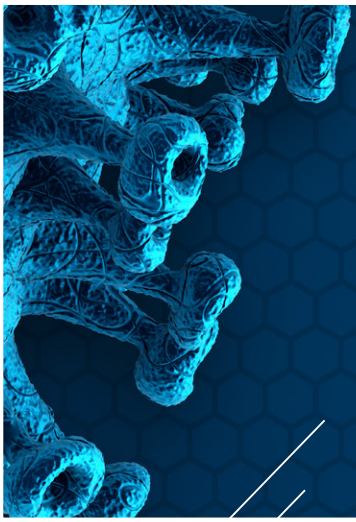

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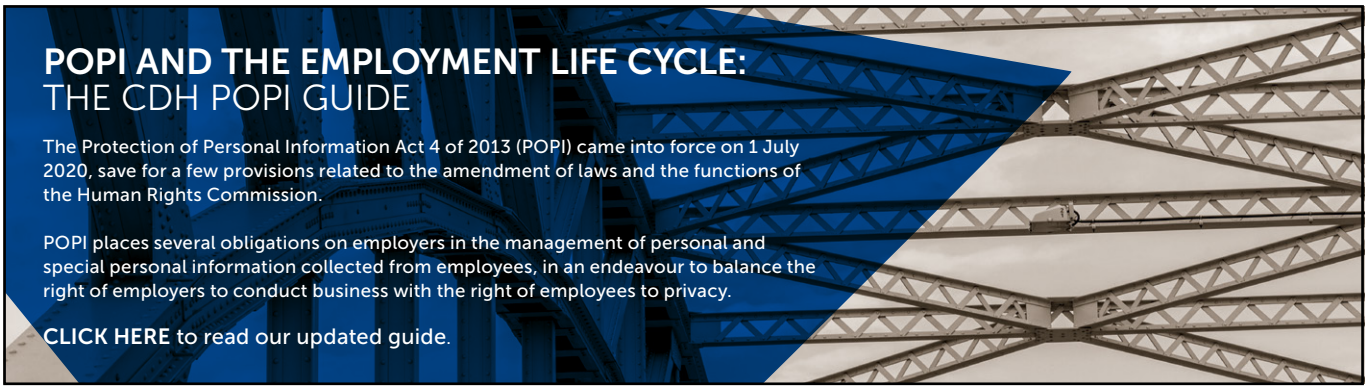

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

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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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