

22 FEBRUARY 2021

# EMPLOYMENT LAW ALERT

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### Extended COVID-19 TERS endorsed by NEDLAC

In a recent [CDH Employment Law Alert](#), we discussed the announcement made during the State of the Nation Address (SONA) regarding the extension of the COVID-19 TERS relief scheme into 2021. Since SONA, The National Economic Development and Labour Council (NEDLAC) partners have been working out the details of the extension with the Unemployment Insurance Fund (UIF). We summarise below the proposals made by the UIF which have been endorsed by NEDLAC and highlight to employers what we believe they should be considering in light of the 2020 learnings in respect of COVID-19 TERS applications.

### COVID-19 and workplace vaccinations – between a rock and a hard place for employers

The roll-out of COVID-19 vaccinations has been coined as a global victory with many looking forward to a return to the 'old' normal. For employers, however, there is much to be considered. In deciding whether to introduce a mandatory workplace vaccination policy, employers must delicately balance their statutory obligations against the rights and interests of their employees. The competing interests to be balanced cannot be generalised, nor is a 'one-size-fits-all' approach possible for all employers; workplaces and workplace-types.

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## Extended COVID-19 TERS endorsed by NEDLAC

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In a recent [CDH Employment Law Alert](#), we discussed the announcement made during the State of the Nation Address (SONA) regarding the extension of the COVID-19 TERS relief scheme into 2021. Since SONA, The National Economic Development and Labour Council (NEDLAC) partners have been working out the details of the extension with the Unemployment Insurance Fund (UIF). We summarise below the proposals made by the UIF which have been endorsed by NEDLAC and highlight to employers what we believe they should be considering in light of the 2020 learnings in respect of COVID-19 TERS applications.

The UIF has proposed that the Covid-19 TERS relief scheme be extended to:

1. sectors still affected by lockdown regulations;
2. employees with comorbidities; and
3. employees over 60 years old who cannot be reasonably accommodated at work.

Also of significance is that the UIF has put forward proposals on how employees who have had to self-isolate or quarantine can now claim income replacement.

The UIF have confirmed that sectors:

1. ranging from tourism to hospitality; and
2. involved in the manufacturing, sale, dispensing, distribution and transportation of liquor would be covered.

The stated intention at NEDLAC is an effort to ensure that all businesses that are still affected by COVID-19 restrictions are covered by the extension. It is proposed that there will be two payment iterations. The first will be for the period between 16 October to 31 December 2020 and the second from 1 January to 15 March 2021. It is intended that the UIF start processing applications for the first period (16 October 2020 to 31 December 2020) by the first week of March 2021. The UIF will announce once the system is open for applications and will also provide easy aid guides and frequently asked questions to assist applicants with the application processes.

Employers in the relevant sectors should start to identify which of their employees may be eligible to benefit from the extension so that once the application process commences, the necessary applications can be made. Once the relevant Directives are issued by the Minister of Employment and Labour employers should determine whether their businesses fall within the identified sectors.

In 2020, we wrote and commented extensively in the media on COVID-19 TERS fraud. There were numerous follow ups in 2020 (many of which continue) on audits of the relief received in 2020. It is important that employers who apply for the extended COVID-19 TERS benefits ensure that there is a proper audit trail in place which can be made available to the Department of Employment and Labour where there is a request for an inspection. We have assisted various businesses in complying with inspection requests since 2020.

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*Gillian Lumb, Imraan Mahomed,  
Yusuf Omar and Mbulelo Mango*

## COVID-19 and workplace vaccinations – between a rock and a hard place for employers

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The roll-out of COVID-19 vaccinations has been coined as a global victory with many looking forward to a return to the 'old' normal. For employers, however, there is much to be considered. In deciding whether to introduce a mandatory workplace vaccination policy, employers must delicately balance their statutory obligations against the rights and interests of their employees. The competing interests to be balanced cannot be generalised, nor is a 'one-size-fits-all' approach possible for all employers; workplaces and workplace-types.

### The obligations resting on employers (the rock):

All employers have a statutory obligation, in terms of section 8 of the Occupational Health and Safety Act 85 of 1993, to create and maintain a safe working environment for their Employees and all those in their workplaces. This, amidst a pandemic, presents a significant health and safety concern for employers and the management of their workplaces.

While measures must be taken, in line with the various Government Regulations and Directives on Measures to Address, Prevent and Combat the Spread of COVID-19 and, in the present South African context, SARS-CoV-2, the spread of COVID-19 and SARS-CoV-2 continues to be a major concern for employers in relation to their workplaces. The death rate of persons as a result of COVID-19 and SARS-CoV-2 also continues to have a chilling effect on the ability of employers to resume and run their businesses to full capacity.

This raises a number of questions for employers regarding the implementation (or not) of mandatory vaccination policies in their workplaces. The introduction of such policies may not be a simple exercise for many employers, especially in light of the South African Government's stance - that no person will be forced to, nor be prejudiced should they opt not to, take the vaccine.

This, to the dismay of many South African employers, leaves the decision on the introduction of mandatory vaccination policies in the workplace squarely on the shoulders of employers – the proverbial rock.

### The relevant considerations in making the choice on whether to enact a mandatory vaccination policy (the hard place)

With the advent of the vaccine, the introduction of a mandatory vaccination policy by various employers has become a matter for immediate consideration and possible implementation. What then are the considerations that employers must look at in deciding whether to introduce a mandatory vaccination policy for their workplace?

The most fundamental considerations are the Constitutional rights that all employees enjoy. These include:

1. the right to life;
2. the right to physical autonomy;
3. the right to equality; and
4. the right to freedom of religion, belief and opinion.

## COVID-19 and workplace vaccinations – between a rock and a hard place for employers...*continued*

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Section 7 of the Employment Equity Act 55 of 1998, provides employees with the right not to be subjected to medical testing in the workplace except if permitted or required by legislation or if that is justifiable based on the inherent requirements of their job.

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Other statutory rights that employees enjoy include the right, in afforded in section 7 of the National Health Act 61 of 2003 (the NHA), not to have any medical treatment and/or medical care administered on them without their informed consent. Furthermore, section 7 of the Employment Equity Act 55 of 1998, provides employees with the right not to be subjected to medical testing in the workplace except if permitted or required by legislation or if that is justifiable based on the inherent requirements of their job.

These Constitutional and statutory rights may form the basis for an employee objecting to taking the vaccine as may be required by an employer's mandatory vaccination policy where one is introduced or sought to be introduced.

For instance, employees may object to being vaccinated if they have contracted the virus and have overcome it, thereby developing immunity to further possible infection; if they have a compromised immune system; if taking the vaccine interplays with any pre-existing chronic or other illnesses that an employee has or chronic or other medication that an employee takes, which may produce undesired side effects for the employee concerned; if taking the vaccine is incompatible with an employee's religious or philosophical beliefs such as where the vaccine may contain components, such as swine, whose consumption may be prohibited by religious text and/or the interpretation thereof; and if taking the vaccine clashes with an employee's other cultural and/or philosophical beliefs

pertaining to the consumption of animal products or pertaining to the manner in which vaccines are manufactured and/or tested.

Other bases on which employees may object to vaccination in the workplace include non-legislated issues such as:

1. where an employee has shown no sign of the virus over the period of the pandemic and elects not to be vaccinated; and
2. where an employee subscribes to lifestyle preferences and/or ideologies, which go against the taking of certain medicines and/or vaccines.

These objections could present a significant hurdle to employers who are considering the introduction of a mandatory vaccination policy in their workplaces – the proverbial hard place.

### **How to manage these objections where they arise:**

These objections and their effect on an employer's workplace, must be carefully considered in light of existing case law concerning the introduction and implementation of workplace policies and the legal principles pertaining to an application of medical procedures and testing in the workplace.

So, what courses of action are available to an employer where an employee refuses to take a vaccine prior to returning to the workplace in line with a mandatory vaccination policy?

## COVID-19 and workplace vaccinations – between a rock and a hard place for employers...continued

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Another factor for employers to consider is the possible side effects which may be encountered by employees upon being vaccinated, which might yet be identified taking into account the urgency with which these vaccines have been developed across the globe.

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The answer lies in the circumstances which would have motivated the objection by an employee. However, it must be emphasised that the words of the President of the Republic of South Africa regarding the voluntary nature of any vaccination reflects Government's stance on this issue and not necessarily a prohibition to an employer considering introducing a mandatory vaccination policy where this is justified by the circumstances of their workplace(s).

An employer faced with an objection, must consider the reasonableness of the objection, and balance the Constitutional, statutory and other rights and interests of objecting employees with the obligations of an employer under statutory health and safety legislation. This must, in turn, be balanced against the potentially devastating effects of failing to implement the necessary preventative measures, which includes the possible introduction of mandatory vaccination policies at their workplace(s). While there is no South African case law yet on this topic, a look at existing case law from other jurisdictions on related topics is instructive. *Jacobson v Massachusetts*, is an example of where a foreign jurisdiction (the United States Supreme Court) upheld a state law that enforced the compulsory vaccination of adults for smallpox. In this judgment, the Supreme Court held that the individuals' rights must yield to state power in order to preserve public health and safety. This might be a useful reference point for our South African Courts in deciding on the legal permissibility or otherwise of an attempt by an employer to introduce a mandatory Vaccination Policy for their workplace.

### Other important considerations

Another factor for employers to consider is the possible side effects which may be encountered by employees upon being vaccinated, which might yet be identified taking into account the urgency with which these vaccines have been developed across the globe. What liability, if any, could employers face should employees suffer adverse effects upon taking the vaccine in compliance with a mandatory Vaccination Policy perhaps?

The case of *Bongani Nkala and Others vs Harmony Gold Mining Company Limited and Others* [2016] 3 All SA 233 (GJ), was a landmark class-action suit which involved a significant group of mine workers who had contracted a then little-known about occupational lung disease (silicosis) in circumstances where the symptoms often became apparent some years after the workers had contracted the disease. The gold parties reached a Court approved settlement. This case serves as a reminder to employers generally about the care to be taken regarding health and safety at the workplace. Obviously, that case was unique where a civil claim against an employer was not, in those particular circumstances, barred by the applicable legislation. However, the case shows how the consequences of not taking sufficient measures to safeguard health and safety at the workplace could be felt.



## COVID-19 and workplace vaccinations – between a rock and a hard place for employers...*continued*

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The advent of a vaccine in South Africa gives rise to a number of considerations for employers.

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### Conclusion

The advent of a vaccine in South Africa gives rise to a number of considerations for employers. This should be weighed against the lack of any general vaccination dispensation in South Africa.

There are a number of constitutional and statutory rights, ideological and lifestyle patterns and other interests that stand in the way of the implementation of what may be very necessary mandatory vaccination policies by employers. Despite being caught between a rock and a hard place, employers should embrace the challenge and commence the task of carrying out a thorough assessment of the circumstances at their workplaces to decide on the necessity or otherwise of a mandatory vaccination policy.

Depending on the nature and circumstances of a particular workplace, our courts will likely rely on authority and reasoning such as that which emanated from the United States Supreme Court when deciding whether an employers' mandatory vaccination policy constitutes a rational, justifiable limitation of employees' right to object to being vaccinated, and thus whether the policy is legally defensible.

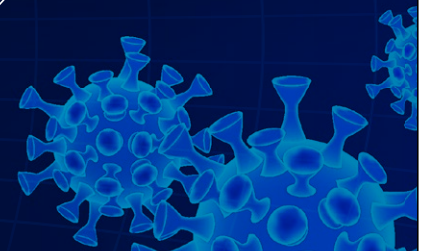
The interesting debate will centre upon the scope of the applicable legal framework in the interaction between employers and their employees.

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*Fiona Leppan, Bongani Masuku and Kananelo Sikhakhane*

# CDH'S COVID-19 RESOURCE HUB

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## SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual world of work

[A GUIDE TO MANAGING SEXUAL HARASSMENT](#)

The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

[CLICK HERE TO ACCESS THE GUIDELINE](#)



## A CHANGING WORK ORDER

## CASE LAW UPDATE 2020

[CLICK HERE](#) to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the "new normal".

EMPLOYMENT

## RETRENCHMENT GUIDELINE



CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

## 2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.

Imraan Mahomed is recommended in Employment in THE LEGAL 500 EMEA 2020.



## 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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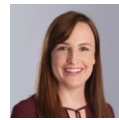
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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

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