

30 MAY 2022

An Employer's Guide to Mandatory Workplace Vaccination Policies



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GLOSSARY

BCEA

Basic Conditions of Employment Act 75 of 1997

Department

Department of Employment and Labour

DOH

Department of Health

DMA

Disaster Management Act 57 of 2002

DOH

Department of Health

COIDA

Compensation for Occupational Injuries and Diseases Act 130 of 1993

EEA

Employment Equity Act 55 of 1998

HBA Regs

Hazardous Biological Agents Regulations, 2022

LRA

Labour Relations Act 66 of 1995

NICD

National Institute of Communicable Diseases

NISEC

National Immunisation Safety Expert Committee

NIOH

National Institute for Occupational Health

OHSA

Occupational Health and Safety Act 130 of 1993

SAHPRA

South African Health Products Regulatory Authority

Scheme

COVID-19 Vaccine Injury No-Fault Compensation Scheme

Scheme Directions

Directions on the Establishment of a COVID-19 Compensation Scheme issued by the DOH

On 4 April 2022, the President announced the end of South Africa's national state of disaster with effect from midnight of 4 April 2022. In line with the end of the national state of disaster, all regulations and directions made in terms of section 27(2) of the DMA were repealed with immediate effect, save for specific, limited regulations. The Consolidated Directions on Occupational Health and Safety in Certain Workplaces issued on 11 June 2021 (Directions) by the Department are therefore no longer in force. The Directions are replaced by the Code of Good Practice: Managing Exposure to SARS CoV-2 in the Workplace (Code) which took effect on 5 April 2022. The Code is now the authority on workplace health and safety in relation to the management of COVID-19 in the workplace.

THE STATE'S VACCINATION STANCE

WHAT IS THE GOVERNMENT'S POSITION IN RELATION TO MANDATORY VACCINATIONS?

- The government has set up a task team that undertakes broad consultations on making vaccination mandatory for specific activities and locations. The task team is to make recommendations on a fair and sustainable approach to such mandates to curb South Africans' vulnerability to new variants of COVID-19 or new waves of infection.
- Vaccination may become a condition for access to workplaces, public events, public transport and public establishments. We await the report of task team on the issue.

VACCINE ROLL-OUT

WHO IS ELIGIBLE FOR VACCINATION?

Vaccines are now available to anyone, free of charge, aged 12 years and above.

HOW DOES ONE ESTABLISH THE REGISTERED VACCINATION SITES?

- All authorised and registered vaccination sites can be found on the Masters Facilities List and are published on the website of the DOH from time to time.

- An Electronic Vaccination Data System (EVDS) has been established to manage the vaccine roll-out and to direct people towards vaccination sites closest to where they reside. The EVDS will allow citizens to register, receive an appointment date and site, and to receive a digital certificate or a hard copy confirming their vaccination status once vaccinated. Citizens are encouraged to register on the EVDS first.

HOW DOES ONE REGISTER ON THE EVDS?

Registration on the EVDS may occur in one of four ways:

- through using the online registration platform available on the SA Coronavirus website;
- dialling *134*832# and registering via USSD;
- sending the word "register" via WhatsApp to 0600 123 456; or
- calling the national toll-free call centre on 0800 029 999, where someone will assist citizens to register and answer any questions regarding the vaccination roll-out.

WHAT IS A COVID-19 VACCINATION CERTIFICATE?

A COVID-19 vaccination certificate is a document issued by the DOH to evidence, in a verifiable and secure manner, the COVID-19 vaccination status of an individual. The COVID-19 vaccine certificate is a way of standardising the proof of an individual's vaccination status, irrespective of where an individual has obtained the vaccine and which vaccine they have received.

WHY IS A STANDARDISED COVID-19 VACCINATION CERTIFICATE IMPORTANT?

A standardised COVID-19 vaccination certificate will assist in easing international travel restrictions against South Africans as it will provide identifiable proof of a person's vaccination status which is increasingly becoming a requirement to enter certain countries or a criterion for exemption from mandatory quarantine.

The COVID-19 vaccination certificate will also provide employers with an objective basis on which to verify an employee's vaccination status where they choose to implement a mandatory vaccination policy.

WHERE CAN ONE ACCESS THEIR COVID-19 VACCINATION CERTIFICATE?

An individual who has been fully vaccinated can access their COVID-19 vaccination certificate using the following link:

<https://www.gov.za/covid-19/vaccine/certificate>

HAS CORONAVAC BEEN APPROVED FOR USE IN SOUTH AFRICA?

SAHPRA has approved the CoronaVac vaccine from China for use in South Africa. The Vaccine Advisory Committee is currently working on how soon it can bring CoronaVac into the country's vaccination programme.

IMPLEMENTING A MANDATORY VACCINATION POLICY AND THE REQUIREMENTS OF THE CODE

WHY SHOULD EMPLOYERS CONSIDER A VACCINATION POLICY?

- Vaccination policies inform employees of the employers' stance regarding inoculation and their reason for it.
- Vaccination policies also enhance the health and safety of employees and is in line with the duty of employers to provide a safe working environment.
- If employees refuse to be inoculated without reasonable

justification, their employment may possibly be terminated on the basis of operational requirements, potentially incapacity or even misconduct where it constitutes a failure to abide by company policy. A dismissal for misconduct should however be a measure of last resort. This will be a vexed area of litigation as objections to vaccinations are commonly founded on religious or cultural beliefs and/or health considerations. Mandatory inoculation policies present a complex balance of rights between those employees who hold strong religious, health or cultural objections against vaccinations and the rights of those who are more susceptible to severe effects or even death should they be infected with COVID-19.

- When considering whether to implement a mandatory vaccination policy, employers must have regard to their individual workplaces and assess whether such a policy is in fact necessary and/or whether the purpose of the policy can be achieved by less imposing measures.

DOES THE CODE MAKE PROVISION FOR MANDATORY VACCINATION POLICIES IN THE WORKPLACE?

Yes, the Code makes express provision for an employer to implement a mandatory vaccination policy within their workplace subject to specific provisions. In addition, there is no prohibition in any other piece of legislation that impedes an employer's ability to implement a mandatory vaccination policy in their workplace provided that an employer does so in line with the Code and other legislation pertaining to medical testing, the constitutional rights of employees to be free from unfair discrimination, as well as the right of employees to have their personal information treated as confidential.

TO WHOM DOES THE CODE APPLY?

Generally speaking, the Code does not apply to employers who are excluded from the OHSA in terms of section 1(3) of the OHSA. However, the Code does have limited application to employers of a mine. Insofar as an employer of a mine requires its employees to be vaccinated, sections 12 (4) - (6) of the Code shall apply to them.

WHAT CONSIDERATIONS SHOULD AN EMPLOYER CONTEMPLATE WHEN DETERMINING WHETHER TO IMPLEMENT A MANDATORY VACCINATION POLICY?

While not specifically specified by the Code, an employer may wish to consider the following:



The viability of continued remote work and the effectiveness of social distancing in the workplace;



The rate of infections and/or fatalities in the workplace because of COVID-19;



The number of employees required to travel domestically and internationally for work related purposes, particularly if the COVID-19 vaccine is made mandatory for international travel;



The number of employees with religious, cultural and/or medical objections to inoculation;



The number of vulnerable employees in the workplace;



The effectiveness of alternative, less imposing measures to limit the risk of the spread of COVID-19 in the workplace;



The effectiveness of additional ppe, where necessary;



Reports from vaccination programmes around the world; and



Temporary alternative placements for employees who are vulnerable and/or who have a higher risk of exposure to the virus;



Any collective agreement in place dealing with the issue of mandatory vaccinations.



The number of employees exposed to the public;



The number of employees who are directly/indirectly exposed to persons with COVID-19;



WHAT IS REQUIRED OF EMPLOYERS IN TERMS OF THE CODE?

Every employer to whom the Code applies and who employs more than 20 employees, must, conduct an updated risk assessment in terms of the OHSA and the HBA Regs and update their workplace plan, to limit infections and transmissions of COVID-19 and to mitigate the risk of serious illness or death. In developing and implementing a workplace plan employers must comply with the provisions related to mandatory vaccinations set out in section 12 of the Code.

In addition, every employer must:

- notify employees of the measures to be taken to have employees vaccinated, who the employees are that should be vaccinated and the deadline for vaccination;
- counsel employees on the nature, benefits, contra-indications for vaccines and the nature risks and serious side effects associated with vaccines;
- permit consultation, at the employee's request, with a health and safety representative/ worker representative/ trade union official;
- give administrative support to employees to register and access their vaccination certificate in the EVDS portal;
- give employees paid time off to be vaccination and provide employees transport to and from the nearest vaccination site (presumably from the workplace); and
- in giving effect to the Code, an employer may require their employees to disclose their vaccination status and to produce a vaccination certificate.

Subject	Directive	Code
Considerations for implementing a mandatory vaccination policy	Employers were called upon to assess whether in terms of their occupational requirements the intend to implement a mandatory vaccination policy with reference to vulnerable employees or the risks associated with specific job roles.	The Code requires employers to conduct a risk assessment and on the basis of its risk assessment update its workplace plan to include any measures to be implemented in respect of the vaccination of its employees.
Grounds for objection to mandatory vaccination	The Directions specifically lists medical and constitutional grounds as a basis to object to a mandatory vaccination policy.	No specific ground for objection mentioned. The refusal to be vaccinated is provided for more generally.
Reasonable accommodation	If necessary, an employer was required to take steps to reasonably accommodate an employee who objected to being vaccinated on medical or constitutional grounds.	The language of the Code is such that an employer MUST reasonably accommodate an employee who, after producing medical evidence or undergoing medical testing is confirmed to have contra-indications to vaccines.
Referral for medical evaluation/ testing for refusal due to contraindications to vaccines	An employer may refer an employee for further medical evaluation should there be a contraindication for vaccination. There is no mention of prior medical certificate having been provided by the employee or who is to bear the costs.	If an employee produces a medical certificate attesting to their contraindication for vaccines, the employer may refer the employee for medical evaluation for conformation, at the employer's expense.
Disclosure of Vaccination Status and request for vaccination certificate	No specific mention of the disclosure of vaccination status or the right to request a copy of the vaccination certificates of employees.	Expressly provides that an employee may require its employee to disclose their vaccination status and to produce a vaccination certificate.

DOES THE CODE ALLOW AN EMPLOYER FLEXIBILITY TO ACCOMMODATE ITS SPECIFIC CONDITIONS?

The Department accepts that workplaces differ and accordingly the Code is intentionally drafted in broad terms. In terms of section 2(4) of the Code, an employer may deviate from the Code where the circumstances justify doing so and any employee or employer who deviates from the Code must have justifiable reasons for doing so.

HOW OFTEN MUST THE RISK ASSESSMENT AND PLAN BE UPDATED?

The HBA Regulations require that employers review and reassess their risk assessments at intervals not exceeding 24 months or forthwith where required by the HBA Regulations, whichever occurs first.

DOES THE IMPLEMENTATION OF A MANDATORY WORKPLACE VACCINATION POLICY CONSTITUTE A UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT?

Yes. Employees would therefore need to be consulted prior to implementation. Any such workplace plan which includes provisions related to mandatory vaccination must also be made available for inspection by trade unions, the health and safety committee as well as an inspector.

WHAT IS THE WORKPLACE PROCEDURE TO FOLLOW WHERE THERE IS AN ADVERSE VACCINE EVENT?

Where an employee suffers an adverse vaccine event that renders them unable to work, an employer must:

- on receipt of a medical certificate, grant the employee paid time off if they are no longer entitled to sick leave in terms of the BCEA or a collective agreement; or
- subject to the Scheme, make application in terms of COIDA.

OBJECTIONS TO VACCINATION POLICIES

ON WHAT GROUNDS MAY AN EMPLOYEE OBJECT TO BEING VACCINATED IN TERMS OF THE CODE?

- The Code provides a general refusal to be vaccinated (section 12(4)) and specifically a refusal to be vaccinated contra-indications for vaccines (sections 12 (5) and (6)).
- More generally, employees who subscribe to an anti-vaccine ideology are likely to resist mandatory vaccinations in the workplace in broadly two general categories:

Medical objections and safety concerns

Employees in high-risk categories who may suffer adverse effects from a vaccine or those having a compromised immune system may object to being vaccinated, where there is no science to the contrary. In addition, employees who have showed no sign of the virus over the period of the pandemic or those who have contracted the virus may also elect not to be vaccinated. Medical objections will need to be assessed thoroughly given adverse reports from vaccination programmes around the world together with the recommendations of medical practitioners.

Religious, cultural or philosophical objections

Employees may also object to being vaccinated based on the incompatibility between their religious or philosophical beliefs and vaccination policies. This includes both superstitious beliefs and beliefs rooted in the interpretation of religious text. In addition, employees may also raise objections to being vaccinated because the vaccines may include substances such as swine, whose consumption is prohibited for religious reasons, or for various other cultural and/or philosophical beliefs pertaining to the consumption of animal products or the manner in which vaccines are tested.

WHAT SHOULD AN EMPLOYER DO WHERE AN EMPLOYEE HAS REFUSED TO BE VACCINATED?

General refusal to be vaccinated (section 12(4))

Where an employee refuses to be vaccinated, an employer must counsel the employee and allow, on request, the employee to seek guidance from a member of the health and safety committee/ worker representative or trade union official. The employer must then take steps to reasonably accommodate the employee in a position where they are not required to be vaccinated.

Refusal to be vaccinated for contra-indications for vaccines (sections 12 (5) and (6))

Where an employee produces a medical certificate attesting to the fact that the employee has serious adverse reactions to vaccines, an employer may send the employee for medical testing at their expense. The employer is also required to counsel the employee and allow the employee to consult as set out above. Please note that medical testing in terms of the EEA is only permissible with the employee's consent.

If the employer accepts the medical certificate or the employee is referred for medical testing and it's confirmed that the employee has contra-indications for vaccination, the employer MUST accommodate the employee in a position where they are not required to be vaccinated.

WHAT DOES REASONABLE ACCOMMODATION MEAN?

Reasonable accommodation entails any modification or adjustment to a job or to the working environment to allow an employee to remain in employment. This may include but is not limited to working remotely.

IS AN EMPLOYER PROHIBITED FROM TERMINATING THE EMPLOYMENT OF AN EMPLOYEE WHO HAS OBJECTED TO BECOMING VACCINATED ON MEDICAL GROUNDS?

Employers are subject to a stricter obligation to find avenues to reasonably accommodate employees however, the obligation is not absolute. Any accommodation required of an employer must be reasonable in the circumstances. Employers are not prohibited from terminating the employment of employees who object to being vaccinated on medical grounds. Dismissal must however be a measure of last resort.

WOULD MANDATORY VACCINATIONS CONSTITUTE A GROUND FOR AN EMPLOYEE TO CLAIM CONSTRUCTIVE DISMISSAL WHERE AN EMPLOYER DOES NOT ACCEDE TO THEIR RELIGIOUS OR CULTURAL OBJECTIONS?

For mandatory workplace vaccinations to constitute a constructive dismissal, the employee must show that they had no other option but to resign and that the vaccination policy of the employer rendered continued employment intolerable and was unreasonable. A successful claim for constructive dismissal on the basis that an employer failed to reasonably accommodate an employee pursuant to their refusal to adhere to a mandatory vaccination policy or the refusal by an employer to exempt them from the mandatory vaccination policy will be fact dependant and will be assessed on a case by case basis.

SHOULD THE COVID-19 VACCINATION BECOME MANDATORY FOR INTERNATIONAL TRAVEL, WOULD THIS RENDER AN EMPLOYEES' OBJECTION TO BE VACCINATED UNREASONABLE WHERE INTERNATIONAL TRAVEL IS AN INHERENT REQUIREMENT OF THEIR ROLE?

This is a judgement to be made considering the nature of the employee's objection and the importance of international travel for the role performed by the employee. Employers will also need to consider whether there is a suitable alternative role for the employee that does not include international travel or whether such travel may be dispensed with owing to technological developments that allow the employee to perform their functions virtually.

WHERE AN EMPLOYEE ELECTS NOT TO BE VACCINATED NOTWITHSTANDING DOMESTIC AND INTERNATIONAL TRAVEL BEING AN INHERENT REQUIREMENT OF THEIR ROLE, IF THE VACCINE IS MANDATORY FOR INTERNATIONAL TRAVEL, WHAT OPTIONS ARE AVAILABLE TO EMPLOYERS?

An employer may wish to consider alternative placement and/or continued remote work where possible.

Where an employee cannot perform their role due to their election not to be vaccinated, and alternative placement and remote work are impossible, an employer may be in a position to dismiss the employee on the following grounds depending on the nature of the circumstances:

The inability to perform in line with their employment agreement

Operational requirements

Potentially incapacity

Potentially insubordination where the instruction to be vaccinated is reasonable.

CAN DISMISSAL OR THE EXCLUSION OF AN EMPLOYEE WHO REFUSES A VACCINE FROM THE WORKPLACE AMOUNT TO UNFAIR DISCRIMINATION?

The test is for unfair discrimination and not simply discrimination. In order for the dismissal or exclusion to constitute unfair discrimination, the discrimination would need to be arbitrary, have the ability to impair the dignity of the employee and the instruction to be vaccinated would need to be unreasonable. Whether an employee has been unfairly discriminated against will also depend on whether all suitable alternatives were considered and whether the employer properly considered the employees objections.

This will be assessed on a case by case basis, taking into account the risk assessment conducted by the employer, the efforts made to reasonably accommodate an employee and the nature of the objection raised.






SHOULD A MANDATORY VACCINATION POLICY BE LIMITED TO THOSE EMPLOYEES WHO ARE VULNERABLE, HAVE CONTACT WITH THE PUBLIC AND/OR THOSE EMPLOYEES WHOSE ROLE REQUIRES FREQUENT DOMESTIC AND/OR INTERNATIONAL TRAVEL?

Not necessarily. Many employees who do not fall within these categories may still be susceptible to severe effects of COVID-19 and with the mutation of the virus and with the uncertainty pertaining to the science related to the disease, a limitation on this kind may render the vaccination policy ineffective.






The Code call upon employers to conduct a risk assessment prior to implementing a mandatory vaccination policy to assess whether there exists an operational requirement for such a policy. This will depend on a wide range of factors.

A quick step-by-step guide to managing objections to mandatory vaccination policies

STEP 1 IMPLEMENT A MANDATORY VACCINATION POLICY

-  Clearly communicate the company's position in relation to mandatory vaccinations
-  To whom will the policy apply?
-  By when must employees be vaccinated?
-  Policy must allow for objections.
-  Clearly set out the process to be followed when lodging an objection together with possible supporting documents necessary to support the application.

STEP 2 CONSIDER OBJECTION APPLICATIONS

-  Objections must be considered in light of the competing rights - the rights of the objecting employees, the rights of other employees and the business imperatives.
-  Allow employee to consult with trade union representatives/worker representative and the health and safety committee, if any, where an employee requests to do so.
-  HR/objection committee to consider the application and communicate the outcome to the employee.
-  Allow for a process of appeal.
-  Detail the manner in which appeal applications will be dealt with and how outcomes will be communicated to the employee.

STEP 3A GENERAL OBJECTIONS



Take steps to reasonably accommodate the employee, which may include, but is not limited to any of the below:



Temporary/permanent alternative placement



N95 mask to be worn at all times at the company premises



Isolation at the company premises



Continued remote working

OR

STEP 3B OBJECTIONS FOR CONTRAINDICATIONS

Employee must produce a medical certificate confirming the contradiction to COVID-19 vaccines

An employee may accept the medical note from the employee confirming the contraindication to COVID-19 Vaccines or an employer may refer an employee for medical testing to confirm the employee's contraindication to the COVID-19 vaccines at the employers expense.

Where the employer accepts the medical certificate produced by the employee or the contraindication for vaccination is confirmed, an employer MUST reasonably accommodate the employee.

THE IMPACT OF POPI

WHAT IS THE IMPACT OF THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013 (POPI) ON MANDATORY VACCINATION POLICIES AND THE PROCESSING OF EMPLOYEE MEDICAL INFORMATION?

The provisions of POPI will apply when requesting employees or potential employees to make disclosures regarding their medical or vaccination history, as such information constitutes special personal information for the purposes of POPI and accordingly consent may be mandatory. 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 upon which to process the said special personal information. Information collected, stored and disposed of in this regard, as the case may be, must also be in line with the provisions of POPI. The Code does however expressly provide that employers may require employees to disclose their vaccination status and a copy of their vaccination certificate.

WHO IN THE ORGANISATION SHOULD MANAGE THE MEDICAL RECORDS OF EMPLOYEES SHOULD A MANDATORY VACCINATION POLICY BE IMPLEMENTED?

- Employers should create a designated team to assist with the processing and storage of such information. The team responsible should include personnel who understand the importance of maintaining the privacy and confidentiality of the information. In addition, technological measures must be catered for to limit the risk of a security breach.
- It is also important that through the management of employee medical records, or employee consent or objections to vaccinations that employees are not unfairly discriminated against based on their election to comply with a mandatory vaccination policy.

COVID-19 VACCINE INJURY NO-FAULT COMPENSATION SCHEME

What is the purpose of the Scheme?

The purpose of the Scheme is to provide compensation for vaccine related injuries, damage or loss caused by the administration of an approved COVID-19 Vaccine by an authorised facility in South Africa, in a manner that is expedient and accessible.

WHO IS ELIGIBLE TO CLAIM FROM THE SCHEME?

Persons who have suffered a serious vaccine injury resulting from the administration of an applicable vaccine at an official vaccination site or, the dependant of a deceased, who have suffered harm, loss or damage caused by the death of a person, whose death was caused by a vaccine injury resulting from the administration of an applicable vaccine at an official vaccination site.

WHAT IS THE DEFINITION OF A DEPENDANT FOR PURPOSES OF THE SCHEME?

The following persons are considered dependants for purposes of the Scheme:



the spouse or permanent life partner of the deceased;



a child of the deceased;



a person to whom the deceased person is legally liable to maintain; and/or



a person factually dependant on the deceased.

WHAT ARE THE APPLICABLE VACCINES THAT ARE RECOGNISED FOR PURPOSES OF THE SCHEME?

The vaccines recognised for purposes of the Scheme are those approved by the SAHPRA that were either donated or procured by the Government through specified agreements set out in schedule 1 of the Scheme Directions, which as at 4 April 2022 included the following vaccines:

- Comirnaty and Pfizer BioNTech Covid-19 Vaccines; and
- Johnson & Johnson's Janssen COVID-19 Vaccine, Name: JNJ-78436735, Manufacturer: Janssen Pharmaceuticals Companies of Johnson & Johnson.

The following vaccines shall not be covered by the Scheme:

- a vaccine administered prior to 17 May 2021; or
- a vaccine procured in terms of an agreement not set out in Schedule 1 of the Scheme Directions ;or
- vaccines procured in terms of an agreement entered into after 5 April 2022.

WHAT IS AN OFFICIAL VACCINATION SITE FOR PURPOSES OF THE SCHEME?

A public or privately managed vaccination site within South Africa that has been designated by the DOH for the administration of the applicable vaccines and which are authorised and listed on the Master Facilities List of the DOH.

WHAT IS A VACCINE INJURY FOR THE PURPOSES OF THE SCHEME?

A vaccine injury means a serious injury as determined by the NISec to have been caused by an applicable COVID-19 vaccine which are limited to the following:



permanent physical or mental impairment.



temporary physical or mental impairment; or



death.

HOW IS COMPENSATION CALCULATED IN TERMS OF THE SCHEME?

Compensation in terms of the Scheme is set out in Schedule 6 of the Scheme Directions and is calculated as follows:

- Death benefit- R150 000 to be shared equally between the dependants of the deceased person; or
- Permanent disabilities are calculated on the basis of a ratio of the R150 000 death benefit, the ratio's are as follows:

Ratio	Degree of Impairment
0	No compensation will be paid if the impairment is below 5%
0,13	If the impairment is equal to or greater than 5% but below 10%
0,26	If the impairment is equal to or greater than 10% but below 20%
0,44	If the impairment is equal to or greater than 20% but below 30%
0,61	If the impairment is equal to or greater than 30% but below 40%
0,79	If the impairment is equal to or greater than 40% but below 50%
0,96	If the impairment is equal to or greater than 50% but below 60%
1,14	If the impairment is equal to or greater than 60% but below 70%
1,31	If the impairment is equal to or greater than 70% but below 80%
1,49	If the impairment is equal to or greater than 80% but below 90%
1,75	If the impairment is equal to or greater than 90%

Compensation for temporary disabilities only applies where there is at least 25% physical or mental impairment persisting for a period of at least one month and is fixed at R5,000 per month for no more than six months. A claimant will not be eligible for a claim in terms of the Scheme where they have received a benefit for the impairment in terms of COIDA. A person may claim for both a permanent and temporary disability benefit where applicable.

What is the process to follow to claim from the scheme?

A high-level overview of the process to be followed when claiming from the scheme is as follows:



STEP 1

Report, within 30 days, (by an eligible person as defined in the Scheme Directions or someone authorised to act on their behalf) any untoward medical occurrence that may present after vaccination, whether or not it has a causal relationship to the vaccine concerned, (AEFI). The reporting options are set out in Schedule 2 of the Scheme Directions.



STEP 2

The NISEC will investigate and determine the causality between the AEFI and the applicable vaccine.



STEP 3

If the NISEC determines that there is a causal link between the AEFI and the applicable vaccine, the NISEC must inform the DOH, who is to notify the Scheme Administrator within 28 days of the NISEC determination.



STEP 4

The Scheme Administrator must inform the eligible person or their dependants of the causality determination and assist the eligible person or dependant to make a claim to the Scheme in the form set out in Schedule 4 of the Scheme Directions.



STEP 5

On receipt of the claim, the adjudication panel will determine the eligibility of the claim and make an assessment as to the quantum of compensation.

HOW LONG WILL THE SCHEME SUBSIST?

The regulations and directions pertaining to the Scheme will continue in force and effect until a notice is published in the Government Gazette terminating the Scheme by the cabinet member responsible for Health, in consultation with the cabinet member responsible for Finance. The Scheme will remain in effect until the period for the lodgement of claims with the Scheme has expired and all lodged claims have been finalised.

WHAT LIABILITY, IF ANY, WOULD AN EMPLOYER SUFFER SHOULD AN EMPLOYEE WHO CONSENTS TO BE VACCINATED IN LINE WITH A WORKPLACE POLICY EXPERIENCE ADVERSE EFFECTS BECAUSE OF BEING VACCINATED?

Where an employee suffers a serious vaccine injury which is causally linked to the administration of an applicable vaccine at a registered vaccination site, an employee may claim from the Scheme.

CAN AN EMPLOYER PROVIDE INCENTIVES TO EMPLOYEES WHO RECEIVE THE COVID-19 VACCINATION?

An employer may provide incentives to employees in order to encourage them to receive the vaccine. However, an employer must ensure that these incentives are also provided to employees who do not receive the vaccine on the basis of valid objections (medical or otherwise) so as to avoid a claim for unfair discrimination on the basis of health/medical reasons or any other arbitrary ground.

THE INTERPLAY BETWEEN THE OHSA AND A MANDATORY VACCINATION POLICY

WHAT ARE AN EMPLOYER'S OBLIGATIONS IN TERMS OF THE OHSA?

An employer has a duty to do what is reasonably practicable to ensure that the working environment is safe for all employees and those who access their workplace. Whether an employer would then have a duty to impose vaccinations in light of their duty to ensure a safe working environment is dependant on the objections of employees, the safety of the vaccine and the effectiveness of other measures employed by the employer to mitigate the risks of infection in the workplace.

An employer is also required to consult with the health and safety committee constituted in terms of OHSA in relation to the implementation of a mandatory vaccination policy and to make available their risk assessment and workplace plan for inspection by the health and safety committee.

In addition, COVID-19 is now recognised as a risk group 3 biological agent in terms of the HBA Regulations. Risk group 3 biological agents are hazardous biochemical agents that *"may cause severe human disease, which presents a serious hazard to exposed persons and which may present a risk of spreading to the community, but for which effective prophylaxis and treatment is available."*

THE NATIONAL HEALTH ACT

WHAT IMPACT DOES THE NATIONAL HEALTH ACT 61 OF 2003 (NHA) HAVE ON MANDATORY VACCINATION POLICIES?

The NHA makes explicit that any health care related services, medical treatment and medical care must be administered with the consent of the user, who in the current context, would be an employee. Accordingly, employees may only be vaccinated in line with an employer's vaccination policy where they have consented to do so.

WHAT DOES CONSENT MEAN FOR PURPOSES OF THE NHA?

In terms of the NHA, consent must meet three requirements. Namely, the consent must be informed, the consent must be specific to the medical treatment/care or services being administered and the consent must be given voluntarily given, free from duress or coercion.

WHAT IF ANY ARE THE EXCEPTIONS TO THE CONSENT RULE IN THE NHA?

Health care related services may be administered without the consent of the user in the following circumstances:

- Where the law or a competent court has ordered the administration of the health care services; and
- In instances where a failure to administer the health care services would present a *"serious public health risk"*.

IMPACT OF THE EEA

WHAT IS THE IMPACT OF SECTION 7 OF THE EEA ON MANDATORY VACCINATION POLICIES?

Section 7 of the EEA provides for a prohibition on the medical testing of employees save for the following instances:

- where legislation permits or requires the testing; or
- it is justifiable in terms of the medical facts, social policy, employment conditions, the fair distribution of employee benefits or the inherent requirements of the job.

Medical testing refers to both a test or an inquiry to confirm whether an employee has a medical condition. Section 7 of the EEA therefore does not prohibit a mandatory workplace vaccination policy.

The Code states that an employer may refer employees for medical evaluation where their objection to the mandatory vaccination policy on the basis of medical evidence that they experience contraindications to vaccines. Pursuant to the provisions of the EEA together with the POPIA, employers must ensure that they have obtained the express consent of employees prior to doing so.

SOUTH AFRICAN DECISIONS RELATED TO MANDATORY VACCINATION POLICIES

Forum	Citation	Brief Facts	Decision	Link To CDH Alert/Podcast
CCMA	<i>TM v Goldrush Group</i> (GAJB 24054-21)	<p>The employer's Exemption Committee, which was formed in terms of its mandatory vaccination policy, considered and declined her the employee's exemption 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 employee was called to an incapacity enquiry where the chairperson found the incapacity to be permanent as the employee had no intention of ever being vaccinated. The employee was subsequently dismissed for incapacity.</p> <p>The employee referred a dispute to the CCMA, challenging the substantive fairness of her dismissal on the basis of section 12 of the Constitution.</p>	<p>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 OHSA. The dismissal was therefore found to be fair.</p>	CLICK HERE
CCMA	<i>GK v Ndaka Security and Services</i> (FSWK2448-21)	<p>The employee was employed as a safety practitioner at Ndaka Security and Services, in the business of providing security services to, among others, Sasol Ltd (Sasol). In providing the services to Sasol, the employer runs its operations at the Sasol site with approximately 36 guard posts. The employee's post includes identifying risks on the site and engaging various stakeholders including his colleagues, clients, and the public. The employer's decision to send the employee home was informed by Sasol's requirement to have a 100% vaccination rate on site. The employee subsequently referred a dispute on the grounds that he was unfairly suspended from duty. The decision to suspend the employee was informed by his refusal to comply with either of the choices offered to him: vaccinate or submit weekly COVID-19 test results. The employee informed the employer that his reasons for refusal included that, among others, he was protected in terms of section 12 of the Constitution (the right to freedom and security), he was a devout Christian, and relied on his body's natural immunity and his faith to recover from COVID-19. The employee was unwilling to submit weekly negative COVID-19 test results either.</p>	<p>In order to arrive at a finding the CCMA considered various factors and legal principles. The employer is a security company providing an essential service and its employees are considered frontline workers under the Regulations to the DMA. The employee shared an office with ten colleagues and his duties included visiting all sites and interacting with all personnel. The employee's reliance on his religion as a reason to refuse vaccination was found to be woefully lacking as there was no theological or scientific support that the Christian faith precludes its members from being vaccinated. Finally, while many recover from COVID-19 without the benefit of the vaccine, it has been proven that vaccination curbs the rate of infection and significantly reduces the risk of severe COVID-19 symptoms. Having considered these factors as well as various legal principles from the Constitution to regulations empowering employers to implement mandatory vaccination policies, the employer's decision to send the employee home was indeed a suspension, however the CCMA found that it was not unfair and therefore did not constitute an unfair labour practice.</p>	CLICK HERE

SOUTH AFRICAN DECISIONS RELATED TO MANDATORY VACCINATION POLICIES

Forum	Citation	Brief Facts	Decision	Link To CDH Alert/Podcast
CCMA	<i>Zaphia September v Inyosi Empowerment (WECT17050-21)</i>	<p>The employee was employed, subject to a three-month probation period. Her contract stated that the employer was considering implementing a mandatory vaccination policy. It became clear after a workshop held by the employer that it intended to implement a mandatory vaccination policy. The employee requested a meeting with a director of the employer to discuss same. At the meeting, the employee stated that she was leaning toward vaccinating, but had not decided and needed more time. This was the first time that the employer became aware that the employee was not vaccinated. At the end of the meeting, the employee was given two weeks' notice of termination based on her probation period. She had until the following day, to decide whether she would vaccinate. If the employee presented a vaccination certificate within the notice period, the employer would retract the dismissal. On 10 December 2021. The employer attempted to retract the dismissal by extending the employee's probation period to 1 March 2022. The employee had until 1 March 2022 to get vaccinated. She rejected the extension. and worked until the expiry of the notice period. Thereafter, she referred an unfair dismissal claim to the CCMA.</p>	<p>The CCMA further found that September was competent in terms of her performance of the job; was compatible with her colleagues; and there was no question of misconduct. She would certainly have her appointment confirmed if she had not asked for a discussion, initiated in good faith, on the mandatory vaccination policy which revealed her vaccination status and indecision on vaccination.</p>	CLICK HERE

SOUTH AFRICAN DECISIONS RELATED TO MANDATORY VACCINATION POLICIES

Forum	Citation	Brief Facts	Decision	Link To CDH Alert/Podcast
Labour court	<i>Solidarity obo Johetta Van Rensburg/Ernest Lowe, a division of Hudago Trading (Pty) LTD – J49/22</i>	<p>Even before Ernest Lowe finalised a policy restricting access to its workplace to curb the spread of COVID-19, the employee made it clear to her employer that she was unwilling to receive the COVID-19 vaccine. Instead, she was willing to submit a weekly COVID-19 test provided it was at the employer's expense. The employer informed the employee that it would not pay for the COVID-19 test and would therefore not allow the employee onto its premises, and ultimately, the no-work-no-pay principle would apply. The dispute materialised when the employee arrived at the employer's premises on 4 January 2022 and was refused entry.</p> <p>The employee approached the court on an urgent basis arguing that the admission policy constituted a mandatory vaccination policy and that the employer did not comply with the requirements set out in the Directions to implement such a policy and that the admission policy was in breach of her contract of employment.</p>	<p>The court found that there was no breach of the employees contract of employment or that the introduction of the admission policy constituted a unilateral change to the employees terms and conditions of employment.</p> <p>The court also held that the admissions policy of the employer did not constitute a mandatory vaccination policy and was not breach of the Direction and the OHSA. In fact, the court found that the employer acted in accordance with its duties in terms of section 8 and 9 of the OHSA, as well as the Direction. The court therefore dismissed the urgent application.</p>	CLICK HERE >
Labour court	<i>Solidarity obo Members & 2 Others vs SEESA (Pty) Ltd</i>	Solidarity approached the court on behalf of its members on an urgent basis seeking an order that the employers mandatory vaccination policy together with other related policies were unlawful. The policy of the employer was first introduced in November 2022. Solidarity approached the court on 2 February 2022.	The court dismissed the matter for a lack of urgency.	CLICK HERE >
CCMA	<i>Bessick v Baroque Medical (Pty) Ltd. WECT13083-21</i>	The Respondent, a supplier of medical devices, implemented a compulsory COVID-19 vaccination policy for its staff and the Applicant refused to comply with the policy based on "medical, personal and religious reasons". It is apposite to note that the Applicant's medical grounds remained unsubstantiated at all stages in the process, and the Commissioner found that her objections on personal and religious grounds did not have any merit. Consequently, she was retrenched on the basis of operational requirements and was not paid severance pay. The Applicant challenged her dismissal on the basis that the Respondent failed to properly consider alternatives to retrenchment. The Applicant also challenged the Respondents failure to pay her severance pay upon retrenchment.	The Commissioner held that the consequence of the Applicant's decision not to comply with the Respondent's mandatory vaccination policy was that she was not able to continue the performance of her duties and that the Respondent had thus not "committed any wrongdoing in its decision to terminate the Applicant's services by reason of operational requirements". Consequently, the Commissioner held that her dismissal was substantively fair. The Commissioner also held that where an employee unreasonably refuses an alternative position the employee is not entitled to severance pay. In considering the present matter, the Commissioner held that the different condition was the vaccination requirement, which, given the Respondent's operations, became an operational requirement. Accordingly, the Applicant had the choice to vaccinate and retain her employment. However, she refused to vaccinate and her refusal to do so had no merit and was accordingly unreasonable. In light of the above, the Commissioner held that it would be grossly unfair to expect the Respondent to pay any severance pay in the circumstances.	CLICK HERE >



INTERNATIONAL DECISIONS ON MANDATORY VACCINATION POLICIES

CLICK HERE
for a weekly summary of
international decisions
pertaining to mandatory
vaccination policies



The drafting and implementation of mandatory workplace policies is complex and nuanced and is subject to the conditions in each specific workplace with various topics some general and others more specific to a peculiar workplace or industry. Considered advice is to be sought prior to the drafting and implementation of such policies. As more reports regarding the effects of vaccinations become available, employers must consider the potential risks and liability attached to implementing such policies.

Employers should strive to obtain their employees voluntary buy-in as vaccinations by consent rather than compulsion is more likely to be effective. It is always the preferred option for the employer to engage in meaningful consultation with employees and/or their representatives before embarking on any changes that will affect them. Consultation may also be a legal requirement in the imposition of a mandatory policy.

Legal advice should be obtained by an employer as it embarks on the formulation of a mandatory policy and on its implementation. CDH have written extensively on the topic and have also been quoted in the media significantly regarding this.

DISCLAIMER:

AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES is an informative guide covering a number of topics, which is being published purely for information purposes and is not intended to provide our readers with legal advice. Our specialist legal guidance should always be sought in relation to any situation. This version of the employers guide reflects our experts' views as of 30 May 2022. It is important to note that this is a developing issue and that our team of specialists will endeavour to provide updated information as and when it becomes effective. Please contact our employment team should you require legal advice amidst the COVID-19 pandemic. This guide is not intended to serve as medical advice nor does this guide intend to make any evaluations in relation to the efficacy of COVID-19 vaccines or the correctness of the decision to implement a mandatory vaccination policy in all instances.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2022 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2022* recommended us in Tier 1 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector. *Chambers Global 2015–2022* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2022* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2022 recommended **Anli Bezuidenhout** for employment.

Jose Jorge is the Head of the Consumer Goods, Services & Retail sector, and a director in our Employment Law practice. *The Legal 500 EMEA 2020–2022* recommended Jose for employment.

Fiona Leppan is the Joint Head of the Mining & Minerals sector, and a director in our Employment Law practice. *Chambers Global 2018–2022* ranked her in Band 2 for employment. *The Legal 500 EMEA 2022* recommend Fiona for mining. *The Legal 500 EMEA 2019–2022* recommended her as a leading individual for employment and recommended her from 2012–2018.

Chambers Global 2020–2022 ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2022* recommended her for employment.

Chambers Global 2021–2022 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2022* recommended him for employment.

The Legal 500 EMEA 2022 recommended **Desmond Odhiambo** for dispute resolution.

Hugo Pienaar is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2022* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2022* recommended him for employment.

The Legal 500 EMEA 2022 recommended **Njeri Wagacha** for employment.

Chambers Global 2020–2021 ranked **Michael Yeates** as an up and coming employment lawyer. *The Legal 500 EMEA 2020* recommended him for employment.



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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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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