



AN EMPLOYER'S GUIDE TO THE CODE OF GOOD PRACTICE:

Managing exposure to SARS-CoV-2 in the workplace



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Glossary

BCEA – Basic Conditions of Employment Act 75 of 1997

DMA – Disaster Management Act 57 of 2002

DOH – Department of Health

Directions – Consolidated Directions on Occupational Health and Safety in Certain Workplaces issued on 11 June 2021

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

NIOH – National Institute for Occupational Health

OHSA – Occupational Health and Safety Act, 130 of 1993

Scheme – COVID-19 Vaccine Injury No-Fault Compensation Scheme

UIA – Unemployment Insurance Act 63 of 2001

Transitional Regulations – The amendment of regulations issued in terms of the Disaster Management Act 57 of 2002 gazetted on 4 April 2022



On 4 April 2022, President Cyril Ramaphosa 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all regulations and directions made in terms of section 27(2) of the Disaster Management Act 57 of 2002 (DMA) were repealed with immediate effect, save for a few transitional regulations. Accordingly, the Code of Good Practice: Managing SARS-COV-02 in the Workplace, 2022 (Code) has come into force and is now the authority on workplace health and safety guidelines in the management of COVID-19 effectively replacing the Directions.



PURPOSE OF THE CODE (SECTIONS 2 AND 16)

The purpose of the Code is to provide guidance to employers on managing the risk, exposure, and transmission of COVID-19 in the workplace following the end of the national state of disaster. The HBA Regs published on 16 March 2022 divides, risk into four groups according to their hazard and categories of contaminant. The HBA Regs state: "COVID-19 is recognised as a Group 3 HBA 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'".

Accordingly, an employer has an obligation to, as reasonably and practicably as possible, take measures to ensure employees are safe from COVID-19 in the workplace. The Code is intended to guide employers on fulfilling these obligations.



APPLICATION (SECTIONS 2 (4), 4 AND 18)

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.

Section 2(4) of the Code recognizes that departure from the Code may be justified in appropriate circumstances. An employer or employee who departs from the Code is required to demonstrate justifiable reasons for doing so.



UPDATING RISK ASSESSMENTS AND PLANS (SECTIONS 5 AND 6)

Obligation

Every employer 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 risk assessment employers must comply with the provisions related to mandatory vaccinations set out in section 12 of the Code. Please note that the obligations for employers with less than 20 employees differ and are specifically set out later in the guide. Furthermore, an employer may not deduct from the remuneration of employees anything they are required to provide in terms of the Code. Where employers seek to remove the requirement to wear masks within the workplace, this must be done in line with an updated risk assessment.

Consultation and inspection

Employers must consult the health and safety committee/representative or employee representative on the updated risk assessment and workplace plan. The updated workplace plan must be made available for inspection by a trade union official, the health and safety committee/representative and an inspector of the Department.

Content of the risk assessment

Mandatory

The following information must be included in a risk assessment

- Vaccine mandates, and the measures required in this regard.
- Identification of employees who must be vaccinated.
- Deadline for vaccination considering the interval between doses.
- Symptom reporting by employees.
- The isolation of employees who are diagnosed with COVID-19 and are symptomatic.
- The workplace measures to be taken in terms of the HBA Regs including PPE and ventilation.
- Procedures to resolve any issue that may arise from employees' refusal to work owing to circumstances arising where it appears to the employee, or a health and safety representative, on reasonable justification that an imminent threat and serious risk of exposure to COVID-19 infections; and
- The processes implemented by the employer to comply with the Code.

Optional

The following information may be included in a risk assessment

- Social distancing measures including staggered working hours, rotational shift systems and remote working arrangements.
- PPE requirements.
- Person hygiene, i.e.: face mask, hand sanitisers etc.
- Any other special measures taken to mitigate risk of and exposure to COVID-19.

Review of risk assessment and workplace plan

The HBA Regs require employers to review and reassess the risk assessment plan at intervals not exceeding 24 months, or when changes occur in the working environment, whichever occurs first.



INFORMATION AND AWARENESS (SECTION 7)

Employers must notify and raise awareness amongst workers (note that this includes more than just employees) on its premises of the following:

- the contents of the Code;
- the workplace plan developed in line with its risk assessment;
- the dangers of COVID-19, how it's transmitted and safety measures that can be implemented to mitigate its risk;
- the symptoms related to COVID-19; and
- the nature, benefits, contra-indications, risks, and side effects of the vaccines used in SA.



SYMPTOM REPORTING AND SCREENING (SECTION 8)

The Code is silent in respect of employer's obligations in relation to screening employees or workers for COVID-19 symptoms when entering the workplace.

In relation to symptom reporting, an employer must:

- determine the vaccination status of employees;
- require employees to immediately report any symptoms of COVID-19; and
- where an employee reports symptoms, an employer may require employees to test for COVID-19 prior to being allowed entry into the workplace unless the symptoms reported within 1-3 days following vaccination.



ISOLATION (SECTION 9)

Workers who are diagnosed with COVID-19 and are symptomatic must inform their employer and self-isolate for the period determined by the DOH (currently 7 days) or a longer period if advised to do so by a medical practitioner.

An employer must:

- Place the employee on sick leave in terms of section 22 of the BCEA or if the employee's sick leave entitlement is exhausted, make an application for an illness benefit in terms of section 20 of the UIA;
- take steps to ensure the employee is not discriminated against; and
- if evidence that it was workplace acquired COVID-19, make an application in terms of COIDA.



VENTILATION AND PPE (SECTION 10)

An employer must keep the workplace well ventilated by natural or mechanical measures and identify areas that are not well ventilated and take steps to improve the ventilation through natural measures such as opening doors and windows or through mechanical measures such as fans and air conditioning systems.

Where possible, have a mechanical ventilation system that is functioning effectively, is maintained and serviced by a competent person, does not recirculate the air, supplies sufficient and adequate ventilation and complies with the DOH guidelines for ventilation systems to prevent the spread of COVID-19.



PPE (SECTION 11)

An employer must regularly check the websites of the DOH, NICD and NIOH for the latest requirements, recommendations or guidelines in relation to PPE based on the nature of the workplace, the work performed and the level of risk.



EMPLOYER VACCINATION OBLIGATIONS (SECTIONS 12 (1) AND (2))

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 vaccinated 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.



ADVERSE VACCINE EVENT (SECTION 12(3))

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.





REFUSAL TO BE VACCINATED (SECTIONS 12(4)-(6))

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. Note that the Code does not specifically make mention of medical or constitutional grounds in these sections.

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. 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 is 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? (section 3)

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? (section 12 (6))

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.



SMALL BUSINESS (SECTION 4(3) AND 13)

Subject to the obligations contained in the OHSA, employers with less than 20 employees are only required to apply the measures set out in section 13 of the Code. The measures are as follows:

- Undertake a risk assessment and take steps to mitigate the risk of COVID-19 in the workplace;
- Comply with section 12 should they wish to implement a policy to vaccinate their employees;
- Comply with the provisions related to entry to the workplace and self-isolation for employees who have COVID-19 symptoms; and
- Ensure the workplace is ventilated in line with the Code insofar as reasonably practicable.



WORKER OBLIGATIONS (SECTION 14)

An employee is required to comply with its obligations in terms of the OHSA, HBA Regs and the employer's workplace plan.



REFUSAL TO WORK (SECTION 15)

An employee may refuse to work in circumstances where there is reasonable justification to the concerned employee or a health and safety representative that there is a serious or imminent risk of exposure to COVID-19, whether they have exhausted internal remedies or not.

An employee who refuses to work due to the serious or imminent risk of exposure to COVID-19 must inform the employer personally or through the health and safety representative of their refusal.

The employer must:

- After consultation with the health and safety committee or representative endeavour to resolve the serious or imminent risk of exposure of COVID-19.
- If the matter cannot be dealt with internally, it must be referred to an inspector of the Department within 24 hours and all parties must be informed that the inspector has been notified.
- Comply with any prohibition issued by an inspector in terms of section 30 of the OHSA

No person may benefit from, be promised a benefit, or be punished, discriminated against, disciplined, dismissed, harassed, or be prejudiced for exercising their refusal to work in terms of section 15.

An employee may refer a dispute to the CCMA where there is a dispute as to whether they have been disciplined, harassed, dismissed, or prejudiced from exercising their right of refusal in terms of section 15 of the Code.

If an arbitrator finds that an employee was disciplined, harassed, dismissed, or prejudiced from exercising their right of refusal in terms of section 15 of the Code, they may make an appropriate sanction in terms of section 193 of the LRA.



OFFENCES AND PENALTIES (SECTION 17)

Any person who contravenes or fails to comply with these obligations, will be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or both.



MARKET RECOGNITION

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

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

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

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2024 recommended **Anli Bezuidenhout** for employment.

The Legal 500 EMEA 2020–2023 recommended **Jose Jorge** for employment.

Chambers Global 2018–2024 ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from 2012–2018.

Chambers Global 2021–2024 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022–2024 recommended **Desmond Odhiambo** for dispute resolution.

Hugo Pienaar is the Head of our Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2024* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2024* recommended him for employment.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

Chambers Global 2024 ranked **Njeri Wagacha** in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment.

The Legal 500 EMEA 2023–2024 recommends her for corporate, commercial/M&A.

The Legal 500 EMEA 2023–2024 recommends **Rizichi Kashero-Ondego** 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.

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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