

COVID-19 VACCINE - An operational requirement - still a needle in a haystack?

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A Covid vaccine is intended to provide immunity against COVID -19 by prompting the recipient's immune system to produce anti-bodies. Simple in modern science, yet complex in the application! Vaccines go through rigorous testing and sometimes take years to be rolled out. COVID -19 did not provide such luxury, and this is where the conundrum in the labour sphere also becomes affected.

Many people refuse to be vaccinated for various personal reasons. Starting COVID-19 vaccinations in South Africa amidst an ill-prepared medical infrastructure seems to lag on and is slowly taking shape in South Africa. Currently, the roll-out is staggered into three phases, the first of which will be front-line health care, secondly essential workers, and persons over 60 and over 18 with co-morbidities. Phase 3 will target persons over 18, which will comprise some 22 500 000 citizens of South Africa. At the date of publication, approximately 0.5% of SA have been fully vaccinated. In the end, South Africa aims at vaccinating 40 million of its citizens.

When the vaccination process was announced, President Cyril Ramaphosa specifically said that nobody in South Africa will be forced to be vaccinated, giving rise also to the question of whether employers have the right to require employees to vaccinate themselves during or before they can return to work? From a practical perspective, it should also be considered that the South African Government is still in the first phase of vaccination and plans to only have 46.2% of South Africans vaccinated only by March 2022. On the flip side, the death toll is rapidly closing in on the 54 000 mark.

This article claims to assist employers in finding a rock on which it can plant its feet in this uncertain and tumultuous ocean of present-day labour relations and how to approach the rights of employees regarding the vaccination.

Introduction: Legislative contradictions and consent

*"Employers are private actors and cannot act beyond the scope of a delineated legal framework in their interaction with employees"*¹,

Which means that employers need a legal framework providing them with the authority to affect certain measures of control within their organisation.

As the Occupational Health & Safety Act (OHSA),² requires employers to do all that is reasonably practicable to ensure a safe working environment for its employees and other people who may visit the working environment, one might assume that employers have the requisite legal framework to develop, standardise, and implement mandatory vaccination policies within the workplace, however, as vaccinations constitute a medical procedure,³ it has to be conducted by a registered medical practitioner or registered nurse ('Practitioner'), wherefore the provisions of the Employment Equity Act,⁴ the Health Professions Act⁵ and National Health Act,⁶ which befuddles the issue, has to be taken into account.⁷ All of this, has to be applied within the practical conundrum of vaccines being available, rolled out, and safe!

According to the HPCSA⁸ code of ethics, a Practitioner has several duties towards a patient, including but not limited to "...guard against human rights violations of patients, and not allow, participate in or condone any actions that lead to violations of the rights of patients...";

- "...respect the right of patients, to refuse treatment or to take part in teaching or research.";
- "...everyone has the right to participate in decision-making on matters affecting one's health.";
- "A person may refuse treatment and such refusal shall

be verbal or in writing, provided that such refusal does not endanger the health of others."

Section 7 of the National Health Act requires that the patient (employee) has to provide his or her consent to be subjected to the medical procedure of vaccination.

The Employment Equity Act⁹ (EEA) has similar requirements.

Inherent employment requirements as the guiding light:

In terms of the EEA, an employer may fairly discriminate against an employee based on, *inter alia*, the inherent employment requirements, which can loosely be defined as those requirements which are essential outcomes of the position to which an employee is employed, and which outcomes must be achieved. In other words, these 'outcomes' are tasks, skills, or elements that are so closely connected to the position to which an employee is employed, that without complying and/or fulfilling those tasks, skills, or elements, the employee cannot be said to have achieved the necessary outcomes of the specific position.

The critical question to be asked of an employer, wishing to impose a duty on the employee to vaccinate against COVID-19, is whether it is an inherent requirement of the job or not. Should the answer be yes, then the requirement can be set and a failure to comply can result in an operational termination of service.

Therefore, applying this test to the question of whether an employer can implement a mandatory vaccination policy, requires consideration of, to name a few, the following factors:

- First and foremost, the availability of the vaccine to the employer and employee, and whether the employer renders a front line, essential or non-essential service, which may affect the availability of the vaccine to the employer and employee;
- The Constitutional right to bodily integrity, freedom

of opinion, and privacy, as well as the impact that

the Protection of Personal Information Act nr 4 of 2013

(POPIA), which requires of a data subject, in this instance an employee, to provide his or her consent, before an employer can process his or her health or medical information;

- The impact of the EEA, which states that an employer cannot conduct a medical test, which refers to testing and inquiry into the medical status of an employee, unless it is, inter alia, an inherent requirement of the position;

The National Health Act, which requires the consent of an employee before medical care and treatment can be administered to them;

- The religious, medical, and/or cultural objections which

an employee might have to be vaccinated;

- The possibility of employees to work from home;
- The domestic- and international travel requirements concomitant to the business of the employer, especially

if vaccination is made mandatory for international travel;

- The effectiveness of PPE, sanitary, safety, and less

invasive measures and practices that are already being, and/or can be applied within the workplace to curb and/or prevent further infections;

- Health and safety considerations and COVID-19 policies of the employer;
- Budgetary and financial implications, with specific reference to the employer's capability to subsidise and/

or pay for its employees to be vaccinated, as the employer will be required to pay for the vaccinations.

Employers are advised to consider policies and procedures when dealing with the vaccination of employees. Naturally, an employer cannot force an employee to vaccinate, however, if the need to vaccinate constitutes an inherent requirement of the job, it may lead to retrenchment should the employee refuse.

Employers should also consider the following in developing their vaccination policy and roll-out program:

- The public exposure of employees and/or employees who have direct or indirect exposure to infected persons;
- Alternative employment opportunities and/or placement of vulnerable employees;
- The number of employees who has 1 or more comorbidity;
- The possibility that the judicial and alternative dispute resolution structures within South Africa could lead to the conclusion that the infringement of an employee's right to human dignity and bodily integrity cannot be justified when considering the possible unknown side effects of a vaccine, as well as the actual availability of

the vaccine; and

- International standard applicable to accepted grounds for objecting to being vaccinated;

Safety in the inherent employment requirements test is further found in the fact that it is the only absolute defense to a claim of unfair discrimination and/ or unfair dismissal, which will be the foundation of the claims by aggrieved parties to labour disputes.

Conclusion:

In summary, an employer has a strenuous task ahead of itself when considering a mandatory vaccination policy and will in all likelihood only be able to impose the provisions of such a policy when the inherent employment requirements of the position to which the employee is employed, requires of the employee to be vaccinated.¹¹

Inherent requirements will have to be clearly set and defined for those positions and it is advisable to roll out the employer's policy, considering the availability of vaccine and alternative measures to comply with health and safety obligations of the employer until the workplace is safe. Simply put, if it is not an inherent requirement of the position, the employee is not obliged to vaccinate, nor to disclose his intention to vaccinate or not.

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1 'COVID-19 vaccine: Compellability of Employees', Advocate KH Kemp under supervision and with assistance of Advocate P Kirstein, Brooklyn Chambers, 28 January 2021.

2 Act 85 of 1993, as amended from time to time. It is imperative to consider the provisions of all legislation, which includes but is not limited to: The Basic Conditions of Employment Act, Act 75 of 1997, the Labour Relations Act, Act 66 of 1995, The Employment Equity Act, Act 55 of 1998.

3 Section 7 of the Employment Equity Act, Act 55 of 1998.

4 Act 55 of 1998.

5 Act 56 of 1974.

6 Act 61 of 2003.

7 *Supra* footnote 1, ad paragraph 23 to 25.

8 Health Professionals Council of South Africa.

9 *Supra* footnote 6.

10 Employment Equity Act, Act 55 of 1998.

11 *Supra* footnote 1