

Are SA employers allowed to implement a compulsory Covid-19 vaccine policy? - Part 1

By [Jason Whyte](#)

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South Africa is now deeply within its second wave of Covid-19 infections, which appears to be significantly more widespread than that which prevailed during early to mid-2020. Since then, and in response to the pandemic, global efforts have successfully developed both expedited means of testing for the virus and, more recently, vaccines.



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Employers may thus wish to explore the introduction of workplace policies which formalise mandatory testing and vaccination protocols in order to restore their workplaces to some level of normality, particularly workplaces where remote working is not suitable.

In this piece we attempt to give employers some guidance as to how to approach these issues. We must however stress at the outset that these questions are unprecedented and throw into stark relief the competing rights of individuals, their employers and the public at large. We also appreciate that a number of the issues involve moral and ethical considerations that are difficult, if not impossible, to resolve.

Vaccinations

On 7 January 2021, the South African Government publicised its Covid-19 vaccine roll-out plan. The plan involves a number of stages, the priority being to ensure the vaccination of approximately 1.25 million healthcare workers and those directly involved in the collection and processing of Covid-19 specimens. Thereafter it is planned to ensure the rapid vaccination of the more vulnerable segments of the population and those persons with underlying health conditions.

The Government has made clear on a number of occasions that whilst the uptake of vaccines was to be encouraged, it would not require South African citizens to become vaccinated. It may accordingly be safely assumed that the Government will not seek to legislate compulsory Covid-19 vaccinations. This is consistent with the reluctance by governments to require vaccinations for other contagions such as polio and MMR.

The Government aims to vaccinate up to 70% of the country's citizens over 16 years of age in order to reach herd immunity (the condition under which the spread of a contagious disease is contained) by the end of 2021. In order to monitor the uptake of vaccination, the Government intends to create a vaccine registration and contact tracing system.

The Government envisages sourcing vaccines from a limited number of suppliers. Vaccinations will be administered through a broad range of providers ranging from hospitals, clinics and medical scheme facilities. The Government also hopes to enter into public-private partnerships with medical schemes whereby such schemes would effectively cross-subsidise part of the costs.

Given the impact of Covid-19 on employers and employees in the private sphere, the prospect of early vaccination is particularly attractive. As a consequence, employers may wish to consider the introduction of workplace policies requiring mandatory vaccination as a precondition for ongoing employment. The subject of compulsory vaccinations has however become increasingly contentious and there are significant legal and moral facets that must be considered.

Given the lack of any legislation requiring vaccinations, employers will need to assess whether it would be permissible or desirable to require their employees to be vaccinated.

Legal risk

In our view, there would be considerable legal risk attendant upon employers adopting workplace policies that require their employees to be vaccinated in order to prevent them from contracting or spreading Covid-19. Any mandatory vaccination policy could, depending on the circumstances, violate section 12 of South Africa's Constitution, which guarantees everyone the right to bodily integrity.

Section 187(1)(f) of the Labour Relations Act of 1995 (the LRA) prohibits dismissals that discriminate against employees based, inter alia, on their religion, conscience, belief, political opinion or culture. The Employment Equity Act of 1998 (the EEA) offers similar protection against discriminatory conduct that falls short of a dismissal. The EEA also protects applicants for employment. Section 5(2)(c)(iv) of the LRA prohibits employers from prejudicing an employee (or person seeking employment) for refusing to do something that the employer is not lawfully entitled to require them to do.

In our view, it is unlikely that a Court would uphold a decision by an employer to subject an employee, or applicant for employment, to occupational detriment for failing to undergo a vaccination, subject to the exceptions that we discuss below. Thus, as a general principle, employees who refuse to undergo a vaccination may not be dismissed and, where such employees are unable to work remotely, ought to be allowed to return to the workplace, subject to existing safe working practices and symptom monitoring.

Employers would generally be limited to encouraging their employees to become vaccinated, provided that such encouragement does not go any further than providing information and facilitating the logistics, through the provision of special leave or hiring a nurse for the purpose. The employees should be informed that vaccination is not compulsory. The final choice must be that of the employee, and employers should take care to ensure that there is clear consent on the

employee's part.

Concessions and incapacity

There may be some limited scope for employers to provide that only employees who have been vaccinated may work from the employer's premises. Thus, and in keeping with the employer's general obligation to accommodate objecting employees, a work-from-home option could be explored, provided that this is feasible given the nature of the employer's business. However, employers would need to carefully assess whether differentiating between employees on this basis would itself constitute a form of indirect discrimination.

Employers in certain limited industries might justify the dismissal of an objecting employee on the basis of that employee's incapacity to do the job. This would likely be limited to employees working in industries where there is regular and obligatory interaction with members of the public, for example the health industry or those caring for the sick and elderly in care homes.

In this regard, the Supreme Court of Appeals has clarified in *Department of Correctional Services v POPCRU & others*^[1] that religious and personal beliefs may be trumped by an employer's legitimate operational requirements or its occupational health and safety obligations. The Court did however emphasise that where a workplace policy offends against a central tenet of a person's religion or beliefs, the employer was obliged to demonstrate that there was no means by which the employee could be reasonably accommodated or that the employer's requirement was a fair and inherent requirement of the job.

In Part 2 of this article, we look at whether employers have the right to introduce the mandatory testing of employees for Covid-19 - [click here to read it](#).

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