

New code on vaccination in the workplace

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A code of practice will replace the current Covid directions when the National State of Disaster lapses.

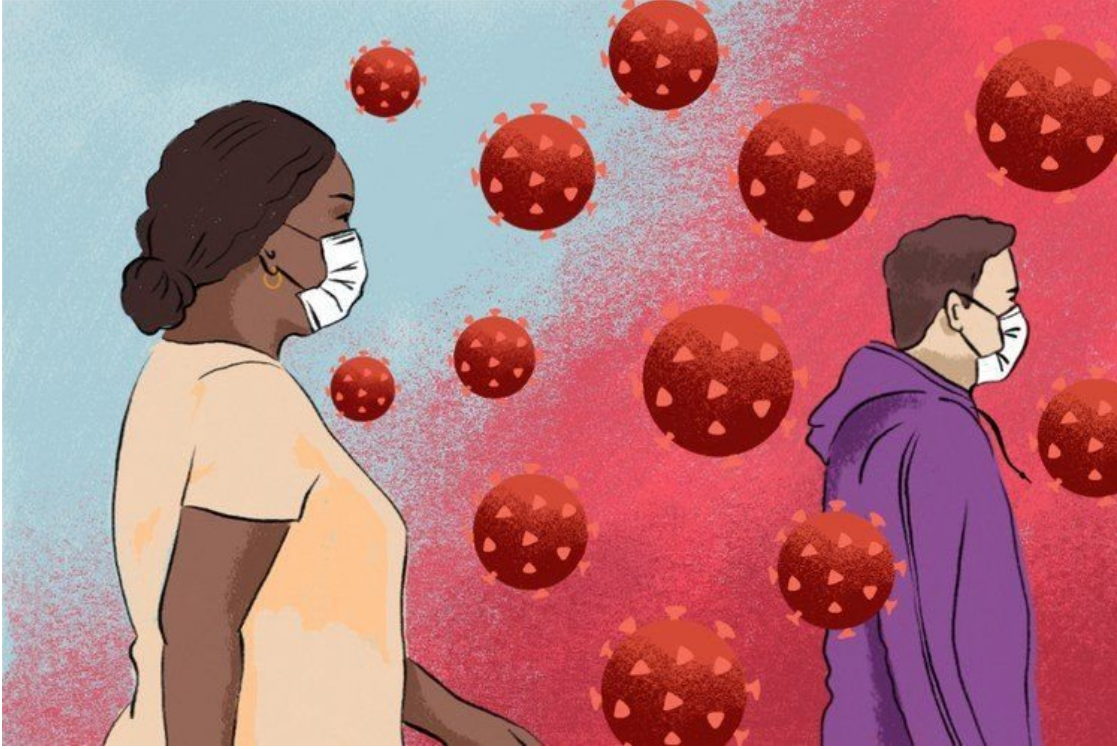


Illustration: Lisa Nelson / GroundUp

- A new code on managing Covid in the workplace will come into effect when the current directions under the National State of Disaster lapse.
- The code makes mandatory vaccination permissible and workers will be required to disclose their vaccination status.
- Businesses must develop Covid risk containment plans according to the new code.

The recently gazetted “[code of practice](#)” for managing exposure to Covid in the workplace requires workers to disclose their vaccination status and produce a certificate if they are asked to do so. Every employee has to comply with the risk assessment plan.

This is in order for employers to conduct a proper assessment of the risk of exposure and control measures required to limit infection, transmission and mitigate the risk of serious illness or death.

The new code limits the legal grounds that people can use to refuse to be vaccinated, and it gives clearer guidelines for workers who cannot be vaccinated for medical reasons.

Legitimate medical exemptions are extremely rare and the code gives the employer the right to request a confirmatory medical certificate from a medical professional of its choosing.

The code specifically allows for mandatory vaccination in the workplace.

The new code, published by Employment and Labour Minister Thulas Nxesi, after consultation with the National Economic Development and Labour Council (NEDLAC), will come into effect when the National State of Disaster (currently extended until April 15, 2022) expires and the existing directions cease to have legal effect.

While those directions also required employers to develop risk assessments plans, and possibly mandatory vaccine policies, this had to be done “bearing in mind employees’ Constitutional rights to bodily integrity and right to freedom of religion, belief, and opinion”. The new code is silent on this.

Labour lawyer Michael Maeso said, “Refusal to be vaccinated on constitutional grounds is not specifically mentioned and must be covered by the general provision dealing with refusal to be vaccinated. The employer only has to take steps to reasonably accommodate the employee.”

But he noted that the code makes provision for employees who, for medical reasons, cannot be vaccinated. “If the employee produces a medical certificate showing contra-indications for vaccination, and if a second opinion confirms the contra-indications, the employer must accommodate the employee in a position that does not require the employee to be vaccinated.”

“This is a significant departure from previous regulations. The word ‘must’ is peremptory and no provision is made for circumstances if the employer is simply unable to accommodate the employee”.

“It is assumed that on this basis, the employer can still dismiss on grounds of incapacity. This remains open to interpretation, and it will be interesting to see how the courts will interpret this,” Maeso said.

He said the code also made a “bold statement” regarding how it should be viewed in terms of employment law.

While other codes were merely guidelines, this one dictated that it was the policy of the minister and must be applied “unless reversed by a decision of the court”.

The code confirms that those employees identified in the risk assessment that are required to be vaccinated must be notified and, if necessary, counselled on the issue of the need for work-place vaccination.

It also states that an employee may refuse to perform any work if there is a serious risk of exposure to the virus.

The employer is obliged to tackle any such complaint and, if necessary, bring in an inspector from the Department of Employment and Labour to resolve any dispute.

The code is underpinned by the Occupational Health and Safety Act, which requires the employer to provide a safe working environment, and the Hazardous Biological Agents regulations, which lists Covid.

In recent weeks, both the CCMA and the Labour Court have [confirmed](#) the lawfulness of dismissals of employees who refused to be vaccinated.

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