

EMPLOYMENT

Vaccination Policies for the Workplace

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The Department of Employment and Labour recently released an Amended Consolidated Direction on Occupational Health and Safety measures in certain workplaces ("**Directions**") published in [Government Gazette No. 44700](#) on 11 June 2021.

The Directions are applicable to all employers that are permitted to continue or commence business operations under the Regulations made under section 27(2) of the Disaster Management Act 57 of 2002 ("**the Regulations**"), and as such essentially apply to all employers operating in South Africa. Since the Directions contain obligations on employers in relation to the mandatory vaccination of employees, it is critical that employers be aware of these requirements and start taking steps to ensure compliance.

Under the Directions an employer is required, within twenty one (21) days of the coming into effect of the Directions to undertake a risk assessment to determine whether it will make the vaccination of employees mandatory. The Directions came into effect on the day they were published in the Government Gazette being 11 June 2021. Therefore the 21 day period lapses on 2 July 2021.

The Directions requires employers to state in the risk assessment whether or not the employer intends to make vaccination mandatory in its workplace, based on its operational requirements. The employer may therefore decide, after its risk assessment and taking into account its operational requirements and working environment, that it will not make vaccination mandatory. Operational requirements in this case are not elaborated on in the Directions but are likely to encompass factors such as whether employees operate remotely, social distancing limitations and sensitisation measures in the workplace, the usage of PPE, and the prevalence of Covid-19 in the workplace.

If the employer does intend to make vaccination mandatory, it is required to identify the employees for whom vaccination is mandatory, based on:

- their risk of transmission of Covid-19 through their work; and/or
- their risk for severe Covid-19 disease or death due to factors such as age or comorbidities.

As such, it is essential to note that the employer does not have to adopt a vaccination policy that requires all of its employees to be vaccinated, and the policy can require only those employees who are at risk, as assessed in the risk assessment, to be vaccinated. If the employer concludes that it will not adopt a mandatory vaccination policy there should also be objective reasons as to why this was decided.

After the risk assessment has been done, the employer must develop a plan or amend an existing plan in which it –

- outlines the protective measures it intends to implement in relation to employees' return to the workplace (in this regard the employer would in all likelihood already have such plan in place, to deal with issues such as social distancing measures and the usage of PPE in the workplace); and
- if the employer intends to make vaccination mandatory for any employees, it must also outline how it intends to implement a vaccination program.

If there is mandatory vaccination for any category of employees, the employer must:

- notify the employee of the need to be vaccinated once the vaccine becomes available for that employee (note that the Directions do not require the employer to obtain or pay for the vaccine, but it would reasonable be required for the employer to assist the employee to register for either private or public vaccination);
- notify the employee of his/her right to refuse to be vaccinated on constitutional or medical grounds. If the employee refuses on these grounds, the employer should counsel the employee on these issues, and, if necessary, attempt to accommodate the employee through

measures other than vaccination;

- notify the employee of his/her right to consult with a union or health and safety or worker representative;
- if practical, arrange transport for the employee to the vaccination site; and
- allow the employee paid time off for side effects suffered from the vaccination.

Employers in unionised environments must also ensure that any vaccination measures align to any collective agreement already in place with their unions.

It appears that these Directions are aimed at ensuring that employers update their risk assessments and their plans for protective measures in light of the third wave of Covid-19 and initiation of the vaccine rollout in South Africa. The Directions seek to ensure that employers plans for protective measures take into account any subsequent governmental and health changes introduced since the implementation of their existing plans. The Directions however steer clear from outlining any definitive consequences that may arise if employees refuse to be vaccinated in circumstances where employers have implemented mandatory vaccination policies. Whether employers will be entitled to dismiss employees who refuse to be vaccinated will consequently be determined with reference to the employer's and employee's particular circumstances. As with all matters employment related the principles of fairness and equity will need to prevail.

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