



▪ MKHABELA HUNTLEY ATTORNEYS INC ▪

## EMPLOYMENT LAW REVIEW

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### MANDATORY VACCINATION POLICIES IN THE WORKPLACE

DECEMBER 2021

#### 1. INTRODUCTION

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Some employers have imposed a mandatory vaccination policy (“MVP”) in their workplace (Sasol, Curro, Discovery, Old Mutual) and many more are considering following suit in the interest of protecting their staff and clients. Recently NEDLAC, at its 26<sup>th</sup> Annual National Summit, supported the imposition of mandatory vaccinations. This is significant noting the broad consensus of social partners representing organised business, trade unions and community organisations.

Under the Occupational Health and Safety Act, 1993 an employer is obliged to provide and maintain a safe working environment, both for its employees and other persons who have access to its premises, such as clients/customers or suppliers. Given the wide-spread availability of vaccines, and their efficacy in mitigating health related risks, we outline the various legal considerations faced by employers.

There are various stages relevant to the employer’s response to covid-19 in the context of vaccines:

- The **“decision”** stage: When the employer decides whether or not to impose an MVP.
- The **“implementation”** stage: When the employer implements its vaccination plan.
- The **“employee management”** stage: When the employer must manage its response to employees who object to taking the vaccine.

#### 2. THE DECISION STAGE

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To fully appreciate the factors which must be considered, the legal obligations imposed by the Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces (the “Directions”), published in June 2021, must be dealt with briefly.

The Directions impose an obligation to conduct a “risk assessment” to indicate whether vaccination will be mandatory, in light of the employers operational requirements.

An integral part of the risk assessment exercise is to identify employees who are considered “vulnerable”<sup>1</sup>. Employees must be requested to disclose any issues which may bring them within the definition, and then the employer must take special measures to mitigate the risk of these employees becoming infected with Covid.

Once the risk assessment has been undertaken, the employer should prepare a “vaccination plan” which:

- Must take into consideration the risk assessment and the vaccination guidelines;
- Must identify vulnerable employees; and
- Must take into account the constitutional rights of its employees (bodily integrity, freedom of religion, etc)

Direction 4 of the Vaccination Guidelines (Schedule 3 of the Directions) provides that a premium must be placed on “public health imperatives, the constitutional rights of employees and the efficient operation of the employer’s business”. There are therefore 3 over-arching factors – the importance of eradicating the risks of Covid-19 to the public health system, the constitutional rights of employees, and the operational requirements of the employer.

With respect to the operational requirements of an employer the following should be borne in mind:

- The degree of the employees’ exposure to the public
- The nature of the employer’s business (employees in close proximity / factory environment / client facing, etc)
- The number of employees in the workplace
- The nature of the work performed by the employee and the viability of continued remote work
- The number of vulnerable employees in the workplace
- The effectiveness of additional PPE where necessary

The employer is required to consider the factors above in the decision stage, however, the considerations apply to some extent during the implementation stage, as described in more detail below.

### 3. IMPLEMENTATION STAGE

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The implementation stage involves informing employees that vaccination will be mandatory and that refusal to undergo the job may result in the termination of the objecting employees’ employment. In this communication, employee’s should be given a deadline by when to raise their objection.

Employees who have no objection and will undergo the job voluntarily, should be given a clear deadline on which to receive the job/s and be requested to provide the employer with proof of their vaccination.

On the other hand, employees who object to the job, should be given an opportunity to provide an explanation for their refusal.

The consultation stage is the first phase of the employee management stage, which is where we now turn.

### 4. EMPLOYEE MANAGEMENT STAGE – OBJECTING EMPLOYEES

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The final and arguably most important (from a risk point of view) stage of adopting and imposing an MVP involves dealing with employees who object to the job.

As stated above, objecting employee’s should be requested to provide a written and detailed explanation in support of and in justification for their objection. These reasons will be scrutinized by the employer during the counselling / consultation of the employee.

The legally recognised reasons for an objection are limited to constitutional and/or medical grounds.

Counselling is required in relation to both sets of objecting employees (as a means of encouraging / persuading them to vaccinate), and the employer must attempt to “reasonably accommodate” the employee before setting in motion steps to terminate the employment relationship. In our view, an employer should hold at least 2 consultations / counselling sessions with an objecting employee before proceeding to the “termination” phase of the employee management stage.

Constitutional objections, the employer should assess:

- The constitutional right/s on which the employee relies.
- The reasonableness of the ground/s identified. At this juncture, an employer should consider whether the belief / conviction of the employee is objectively reasonable under the circumstances, as opposed to considering whether the conviction is strongly held (albeit unreasonably) by the employee.
- The evidence provided by the employee in support of their objection. The employer may insist on evidence in order to assess the veracity of the employee’s objection.
- Whether there is a demonstrable link between the objection and vaccination.
- Whether a limitation of the constitutional right/s relied on by the employee will be considered reasonable and justifiable under the circumstances. The employer may wish to obtain legal advice if the issues are legally complex.
- Whether the employee can be reasonably accommodated. At this stage, the employer should consider whether, in light of the operational requirements of the employer and the inherent requirements of the employee’s job, whether there are alternatives such as continued remote working, working at the workplace but in isolation, wearing a facemask at all times, mandatory weekly testing, etc.
- If the employee cannot be reasonably accommodated, the employer may commence with the termination of said employees employment.

Medical objections, the employer should assess:

- The precise grounds on which the employee relies in support of his/her contention that he/she should be considered medically exempt from being vaccinated.
- Whether the ground identified by the employee is acceptable to the employer.
- Whether the employee’s medical objection has a valid basis. i.e is the objection scientifically sound?
- Is the employee’s objection based on a permanent or temporary medical condition?
- Whether the employee has evidence to support his/her objection and whether the employer has the right to independently verify any medical reports provided by the employee.
- The status of certificates / reports obtained from traditional healers by objecting employees.
- Whether there is a demonstrable link between the objection and vaccination.
- Whether the employee can be reasonably accommodated. At this stage, the employer should consider whether, in light of the operational requirements of the employer and the inherent requirements of the employee’s job, whether there are alternatives such as continued remote working, working at the workplace but in isolation, wearing a facemask at all times, mandatory weekly testing, etc.

- If the employee cannot be reasonably accommodated, the employer may commence with the termination of the employee's employment.

### 5. TERMINATION OF EMPLOYMENT – INCAPACITY OR RETRENCHMENT

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The well-known principle that termination of employment should be considered a measure of last resort, applies in this context.

There are two tools at the disposal of an employer who wishes to terminate the employment of employees who have objected to vaccination and whose positions cannot be reasonably accommodated:

- Retrenchment: in which case the employer will commence the dismissal of the employee/s in terms of Section 189 of the LRA.
- Incapacity procedure: in which case the employer may hold an incapacity hearing in terms of which the employee is given one final opportunity to persuade the employer why he/she should not be dismissed for refusing to be vaccinated.

It is advisable to seek formal legal advice before embarking on either of the two available routes abovementioned, to assess which procedure is most pragmatic, legally sound and appropriate under the circumstances, considering the business of the employer, the number of objecting employees and the role/s occupied by the objecting employee/s.

### 6. CONCLUSION

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The decision to impose an MVP, as well as the obligations related thereto, presents various challenges for employers, who have an interest in ensuring that their employment practices are considered fair during the process. MHA is available and has the capacity to assist employers who may wish to implement an MVP and limit the legal risk relating to same.

#### CONTACTS

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If you would like to discuss the approach we have suggested above and wish to adopt an MVP in your business, kindly contact our employment law specialists:

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