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Mandatory Vaccination Policies in the Workplace

There is still much debate regarding the enforcement of mandatory vaccination policies in the workplace and until these types of cases are tested in the CCMA, MEIBC and Labour Courts, there is little legal certainty what line our courts will take. With any luck, the task team appointed by the President to conduct consultations into making vaccinations a condition for access to the workplace will resolve this debate.

As we know, the Consolidated Direction on Occupational Health and Safety (Directive) expressly permits an employer to implement a mandatory workplace vaccination policy, but it does not prescribe an enforcement mechanism or even recourse for an employer in circumstances where employees refuse to get vaccinated. This is exacerbated by the Directive which provides that employees are within their right to refuse to get the vaccine on constitutional and/or medical grounds and employers then bear the onus to attempt to reasonably accommodate such an employee. As it stands, enforcing a mandatory vaccination policy necessarily means an employee must either vaccinate or apply for reasonable accommodation with the employer. Perhaps the obvious solution for an employee who refuses to get vaccinated, and cannot reasonably be accommodated, is dismissal. However, there too is ongoing debate whether dismissal is fair in these circumstances, and this is also yet to be tested in the CCMA, MEIBC and Labour Courts.

Our Constitution makes provision for every person in South Africa to have the right to make their own choice regarding medical procedures and it may prove difficult for employers to get past certain Constitutional protections afforded to everyone if they wish to dismiss employees for refusing the vaccine. No right is absolute, however, and if there is a justifiable reason or compelling public interest in doing so, all rights are capable of limitation. It appears, from the President's speech on 28 November 2021, that this is the exact subject of consultations that government will undertake to determine whether they will make vaccinations a condition for access to the workplace.

At present, this area of our law remains very grey but many of the academics are suggesting that it would be best to approach the mandatory vaccination policies as a change to the employees' terms and conditions of employment and to consult with the employees and their trade unions on that basis. This is the safest course of action to enforce the policy while we await a decision from government regarding mandatory vaccination for access to the workplace. In other words, it is advisable to focus on exhausting the process that may *precede* any dismissal first. The focus should be on convincing all the employees to get vaccinated and only addressing the question of what to do with any employees who refuse to get vaccinated at a later stage, if necessary.



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SAEFA, therefore, suggests the following 4-step approach:

Step 1:

A thorough risk assessment should be conducted which may conclude, depending on the circumstances, that in order to provide a healthy and safe working environment for all, all employees must be vaccinated. It is at this point that a mandatory vaccination policy is decided upon.

Step 2:

All employees are consulted (including consultations with the company's Occupational Safety Committee and any recognized trade unions), with a view to hearing their thoughts on accommodating those who, in light of the conclusion reached in step 1's assessment, still refuse to receive the vaccination. Members may well find that in this process, a great deal of those employees may decide to get vaccinated.

Step 3:

All reasonable suggestions that come out of the consultations can be implemented to accommodate the employees who are still not vaccinated.

Step 4:

A thorough assessment of all risks is done prior to making a final decision on how to deal with any employees that refuse to be vaccinated and who cannot be reasonably accommodated.

The time period between Step 1 and Step 4 above is likely to be 2 – 3 months, by which time further clarity and direction may well have started to come from the courts.

Please contact us should you require further assistance in this regard.