

November 2021

To: All Labco Members

MANDATORY VACCINATION IN THE WORKPLACE

Following numerous inquiries about this subject matter, we hereby supply feedback/guidance on what is expected of Employers regarding mandatory vaccination in the workplace.

1. What are the general obligations that all employers must adhere to with regards to Covid-19 vaccinations?

1.1 Employers are still required to adhere to the obligations imposed on them in the previous Directives issued by the Department of Labour in October 2020. **However**, the following provisions have been included per the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (gazette on the 11th of June 2021) (“Consolidated Directions”):

1.1.1 Employers must:

- 1.1.1.1 undertake a risk assessment regarding whether the employer intends to make COVID-19 vaccination mandatory, if so, to identify employees who work in situations where:
 - 1.1.1.1.1 the risk of transmission is high due to the nature of employees’ work; and
 - 1.1.1.1.2 the risk for severe COVID-19 disease or death is high due to an employee’s age or comorbidities
- 1.1.1.2 develop or amend their existing COVID-19 plan to include the mandatory vaccination measures;
- 1.1.1.3 provide workers with information about Covid-19 vaccines;
- 1.1.1.4 help employees to register for vaccination on the relevant portal;
- 1.1.1.5 give employees paid time off to be vaccinated;
- 1.1.1.6 place employees who suffer from side effects on paid sick leave.

2. Must all employers comply with the general obligations provided in the Consolidated Directions?

2.1 No. Employers with **less than 10 employees** do not have to comply with the provisions referred to in paragraphs 1.1.1.2 to 1.1.1.6 above. **However**, paragraph 1.1.1.1 will apply to employers regardless of the number of employees employed.

3. Must I give employees paid time off to be vaccinated?

3.1 Yes. The Consolidated Directions require that employers give employees time off to be vaccinated. The employee may be required to provide proof of an appointment to be vaccinated. This leave should be treated as **special leave** rather than sick leave.



4. **Must I give employees paid time off if they experience any side effects from the vaccination?**

- 4.1 Yes. The Consolidated Directions require that employers give employees time off should they need to recover from any side effects after being vaccinated.
- 4.2 The Consolidated Directions state that ‘the employer must in accordance with section 22 of the BCEA place its employee on sick leave.’
- 4.3 The guidelines in Annexure C of the Consolidated Directions (which apply if vaccination is mandated by the employer) add that:
- 4.3.1 once the sick leave has been exhausted, an ill health counselling process should be followed; or
 - 4.3.2 a claim may be lodged for compensation in terms of the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA) if the employee was infected at work.
 - 4.3.3 the employer may accept a Covid-19 vaccination certificate issued by an official vaccination site in lieu of a medical certificate.
- 4.4 The differentiation between the approach for mandatory vaccination and voluntary vaccination have created some confusion with regards to leave entitlement for employees who suffer from side effects of the vaccination. Until such time as the Consolidated Directives have been amended to clarify the correct approach it is recommended that employers follow the approach set out below:
- 4.4.1 Employees must be paid for their absence to be vaccinated. This should be regarded as ‘special leave’ rather than sick leave.
 - 4.4.2 A vaccination certificate issued by an official vaccination site should be accepted as a good reason for absence in order to be vaccinated.
 - 4.4.3 In cases of absence due to side effects in the case of voluntary vaccination, employees should be entitled to their ordinary paid sick leave. In these instances, the same proof of incapacity may be required as in all other cases of absence due to illness.
 - 4.4.4 In a situation where the employer has made vaccination mandatory and an employee is absent due to side effects, it may be regarded as an occupational disease (per the Consolidated Directions) in which case -
 - 4.4.4.1 the first three days of absence should be regarded as sick leave;
 - 4.4.4.2 if the employee is absent for more than 3 days, a claim for compensation may be lodged in terms of the COIDA.

5. **Can I make vaccinations mandatory for all employees?**

- 5.1 According to the Occupational Health and Safety Act of 1993 employer have an obligation to take reasonable steps to ensure that the working environment



is safe and without risk to the health of its employees. This obligation is also extended to non-employees who may be affected by its activities.

5.2 With the above in mind the Consolidated Directions provide a framework for employees to implement mandatory vaccination policies in the workplace.

6. How do I effectively implement a mandatory vaccination policy?

6.1 Annexure C of the Consolidated Directions provide a general guideline for employer wishing to implement mandatory vaccination policies in the workplace. The Consolidated Directions require that employers who intend to introduce mandatory vaccination –

6.1.1 Undertake a risk assessment and identify employees who work in situations where –

6.1.1.1 The risk of transmission is high due to the nature of the employee's work; and

6.1.1.2 The risk of severe Covid-19 disease or death is high due to an employee's age or comorbidities.

6.1.2 Develop or amend their existing COVID-19 vaccination plan to include measures spelt out in the Guidelines for mandatory vaccination. The content of the plan must take account of the size and nature of the business, as well as any collective agreement (if applicable).

7. What should I include in my vaccination plan?

7.1 The Vaccination Plan would be based largely on the risks that have been identified in the Risk Assessment.

7.2 According to the Direction, the Mandatory Vaccination Plan must –

7.2.1 Include the identification of the employees referred to in the Risk Assessment;

7.2.2 Include the process by which the obligations in terms of the Direction are going to be complied with;

7.2.3 Take into account any collective agreement regarding mandatory vaccination (if applicable);

7.2.4 Take account of the accessibility of COVID-19 vaccines for the affected employees;

7.2.5 Take into account an employee's constitutional right to bodily integrity, as well as the freedom of religion, belief and opinion;

7.2.6 Provide for notification of every employee identified for mandatory vaccination of –

7.2.6.1 The obligation to be vaccinated and by what date;

7.2.6.2 The right to refuse to be vaccinated on constitutional or medical grounds; and

7.2.6.3 The opportunity to consult with a health and safety representative, worker representative or trade union official.

7.2.7 Transport to and from the vaccination site, if reasonably practicable;



7.2.8 If the employee suffers side effects because of the vaccination, the employee should be given paid time off to recover.

7.2.9 where employees may obtain information about Covid-19 vaccines; and

7.2.10 whom employees may approach for assistance to register for vaccination.

8. What can I do if an employee refuses to be vaccinated?

8.1 If an employee refuses to be vaccinated on any constitutional, medical or religious grounds the employer should –

8.1.1 Counsel the employee and, if requested allow the employee to seek guidance from a health and safety representative, work representative or trade union official;

8.1.2 Refer the employee for further medical evaluation should there be any contra-indication for vaccination (i.e. the employee has a condition that, if vaccinated, could cause the employee harm); and

8.1.3 Where necessary reasonably accommodate the employee in a position that does not require the employee to be vaccinated.

9. Can I dismiss an employee for refusing to be vaccinated?

9.1 The dismissal of an employee for refusing to be vaccinated should be a measure of last resort. Employers should therefore explore all possible alternatives prior to dismissing the employee. The Consolidated Directions suggest a modification of adjustment of either the employee's job or work environment. These may include:

9.1.1 Requiring the employee to work off-site;

9.1.2 Requiring the employee to work from home;

9.1.3 Requiring the employee to work in isolation at the workplace;

9.1.4 Requiring that the employee work outside of normal working hours; and

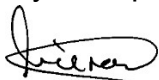
9.1.5 Requiring that the employee work while wearing an N95 mask.

9.2 If none of these measures are viable the employer should consider reasonably accommodating the employee. The Constitutional Court still needs to answer on the dismissing of employees should they refuse to vaccinate. If the Constitutional Court upholds the freedom on citizens, all dismissals will be overturned, and a twenty-four-month compensation may be awarded.

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If you require any further information, do not hesitate to contact our office.



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