

Mandatory vaccination in the workplace: considerations for employers



Various unanswered questions around mandatory vaccination may be tested in the courts after several organisations have announced that they are implementing mandatory vaccination policies at their workplaces

Several corporations have recently announced that they will implement mandatory vaccination at their workplaces, and possibly many more will follow.

This important development will hopefully result in a few unanswered questions around mandatory vaccination finally being tested (and answered) before our courts (including, among other things, disciplining employees in this context). Two of the most common considerations which our clients have faced in determining how best to address Covid-19 vaccination in their workplaces are:

Whether an employer may exclude employees who are not vaccinated from the workplace, and if so, whether this exclusion can be extended to contractors and visitors; and

Whether an employer may require employees to disclose their vaccination status.

We address these considerations below.

Excluding unvaccinated employees, contractors and/or visitors from the workplace

The Occupational Health and Safety Act, 1993 (the OHSA) places several obligations on an employer. These include that an employer must provide and maintain a workplace that is safe and without risk to the health of its employees. An employer must also ensure that, *“persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.”* Importantly, Regulation 2C of the General Safety Regulations to the OHSA expressly prohibits an employer from allowing a person to *“enter a workplace where the health or safety of that person is at risk, or may be at risk, unless such person enters such workplace with the express or implied permission of and subject to the conditions laid down by such employer: Provided that such express or implied permission shall not apply in respect of a person entitled by law to enter such workplace or premises”*.

On the basis of an employer's obligations in terms of the OHSA, it can be argued that an employer has grounds to deny entry to the workplace to those employees (including contractors and visitors) who are not vaccinated (except where a legal right to entry exists). Such a decision, however, must also be informed by the risk assessment conducted by the employer (i.e. the measure should only be implemented in circumstances where an employer's risk assessment has identified it to be necessary). While there is another argument that such an exclusion may amount to unfair discrimination, in our view an employer may argue that the exclusion is rational, not unfair, and justifiable because of the employer's obligations in terms of the OHSA, which requires an employer to provide a safe and healthy workplace. There is currently no legislation which requires all South African citizens to be vaccinated. Vaccination is still a choice, and is not mandatory. The above position may become clearer if vaccination becomes mandatory in the future, or if the Government adopts an approach of specifically mandating that entrance to public places can be restricted to vaccinated persons, in relation to public policy considerations. Given that this issue has not yet come before our courts, it should be noted that such a measure is not without risk of constitutional scrutiny and/or unfair discrimination claims.

Requesting employees' vaccination status

In requesting and retaining information about an employee's vaccination status, an employer should be aware of the provisions of the Protection of Personal Information Act, 2013 (POPIA). If an employee is requested to provide proof of vaccination, and refuses, an employer must be cognisant of the employee's right to privacy, which includes a right to protection against the unlawful collection, retention, dissemination and use of personal information.

However, there is currently no prohibition on requesting employees to voluntarily declare their vaccination status. This information may be obtained by way of consent in the form of a voluntary, specific and informed expression of will. It may also be argued that, despite an employee's right to privacy, an employer's obligations in terms of the OHSA require that an employer is aware of who is and is not vaccinated within that workplace. Such information should, however, be gathered and processed in accordance with POPIA.

From a practical perspective, we recommend that an employer should first request employees to disclose their vaccination status on a voluntary basis, while making its privacy policy available to employees at the same time. Then, depending on the information received, an employer may ask employees more directly to disclose this information. If an employee refuses to disclose their vaccination status, this should be dealt with on a case-by-case basis, taking into account the reason for the refusal.