

To vaccinate or not - an employer perspective



The vaccination drive is in full swing and, while we are in the middle of the third wave, the numbers of positive infections are consistently rising, much more significant than the first and second wave, and many employers are expecting staff to be at work and to be productive under these very difficult circumstances.

What is also significant is that most infections do not appear to take place at the workplace, but rather in public spaces, like malls, religious gatherings, weddings and funerals and now lately, even the vaccination queue. This is as result of many infected people being asymptomatic or display very mild symptoms and do not justify a COVID test.

As a result of this, many infected staff then come to work and the likelihood of spreading the virus is real as the workplace is now becoming a “gathering place” as many employers are insisting that staff should come to work. Where does this leave the employer and what are the expectation of the employees?

In terms of the common law duties of the employer, it is supposed to provide a safe working environment for all staff. For employers, no matter where the offices are physically located, there are clear advantages to having a vaccinated workforce. Prior to the advent of Covid-19 vaccines, employers’ efforts to provide a safe and healthy work environment were primarily limited to face coverings, social distancing, screening and temperature checking, enhanced cleaning and disinfection protocols, and work from home policies. With lists of vaccines to choose from, employers now have an additional weapon in their arsenal to prevent the exposure to and the spread of Covid-19 in the workplace.

It appears the only light at the end of the long, dark tunnel is a vaccine, but its slow rollout has dulled that light significantly. As a result, while the long-awaited vaccine is finally made available, health authorities will want to ensure that it is administered optimally and that all employees are vaccinated. While mandatory vaccination policies may be controversial, they are not novel. Similar to other immunisation requirements imposed on healthcare staff working in certain healthcare or residential facilities, employers may impose a vaccination mandate on their employees. From a practical standpoint, however, it is important that employers be open to having a conversation with their employees to address their concerns, rather than imposing a bright line, take-it-or-leave-it policy that does not take into consideration staff concerns or overall workforce morale.

From an employee perspective, some might not want to be vaccinated for religious, health or other reasons. Be that as it may, somewhat of a middle ground needs to be found in order to make it work and to provide a safe working environment for all employees.

Regardless of whether employers choose to require or simply encourage vaccination, employers should consider the following before deciding on an appropriate course of action:

Providing employees with information about the benefits of vaccination. Employers with employees hesitant about receiving a Covid-19 vaccine may find it beneficial to provide employees with information about the benefits of vaccination (or at least direct employees to where they can obtain such information). Understanding the benefits of vaccination can promote confidence in the decision to be vaccinated.

Requiring proof of vaccination. Employers may ask an employee about vaccination status or require proof of vaccination. However, employers should be careful not to ask follow-up questions that may elicit information about a disability, such as why an employee did not receive a vaccination, to avoid discriminatory claims and practices.

Consider the specific industry and office set-up. Additionally, employers should consider whether mandatory vaccination is necessary, given their specific industry, office set-up, and other alternatives (such as remote work, transfers to other work areas, modifications of duties or physical distancing capabilities).

Contrary to this debate, is the whole issues of consent.

The National Health Act, 2003, gives effect to this right and makes it clear that a health service (which includes medical treatment) may not be provided to a user without the user's **consent**.

In terms of sections 6 to 8 of the National Health Act:

The consent must be for a 'specific health service' and must be given by a person of legal capacity. The individual must have 'full knowledge' (i.e. the consent must be 'informed'). In this regard, the health care provider must inform the individual of:

- (a) her/his health status (except in limited circumstances);
- (b) the range of treatment options generally available to the individual;
- (c) the benefits, risks, costs and consequences generally associated with each option; and
- (d) the individual's right to refuse the health services and the implications, risks and obligations of such refusal. (This right of refusal emphasises that the consent must be given voluntarily.) These provisions must be explained to the individual in language that s/he understands and in a manner that takes into account her/his level of literacy.

Consent must accordingly be **informed, specific** and **voluntarily given**.

The National Health Act makes provision for certain exceptions when such consent to treatment is not required. These include where a **law or court order** authorises the provision of a health service; or where the failure to treat the individual, or group of people which includes the individual, will result in '**a serious risk to public health**'.

At this stage, the Minister of Health has indicated that the COVID-19 vaccine will not be obligatory and there is accordingly currently no law, which requires persons to be vaccinated. Considering all of this, and at this juncture, employers may request employees to vaccinate, but can't really force them to do so as there is no law currently addressing this requirement directly. I am of opinion that this might change in the near future, as employers and government will be under pressure to ensure a safe and healthy work environment.

References

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