

THE COMPULSORY COVID VACCINATION CONTROVERSY

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Earlier this year I wrote an article warning of the dangers of enforcing compulsory Covid vaccinations at the workplace. Despite this, a trend towards compulsory vaccination has begun. This is because Covid is still spreading, far too many people are still resisting the necessary safety measures, herd immunity is nowhere to be seen and unemployment continues to edge towards 50% due to our sick economy.

It appeared that our government was doing nothing at all to deal with this spiralling crisis. Then, in June 2021 the Minister of Employment and Labour published the “*Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces*”. This Direction appears, conditionally, to give licence to certain employers to require employees to get anti-Covid vaccinations. Two of the most important conditions attached to this ‘licence’ appear to be that:

- The employer had to conduct a risk assessment by 23 July 2021; and
- If an employee refuses to be vaccinated the employer is required to:
  - counsel the employee;
  - where it is established that the vaccine might constitute a medical danger to the employee, refer him for a medical assessment; and,
  - should the two above steps fail to resolve the issue, try to accommodate the employee where at all possible.

This so called “Direction” is unclear with respect to both of these conditions. That is, it is not clear whether an employer that missed the 23 July deadline for doing its risk assessment is still entitled to enforce mandatory vaccinations. And it is also unclear what the employer is entitled to do if an employee who flatly refuses to be vaccinated cannot be accommodated in any way. Must the employer allow the employee to carry on working despite the danger to his colleagues? Or is the employer entitled to consider the termination of his employment after, for example, following an incapacity or operational requirements procedure?

While a few companies have already begun gearing up to implement forced vaccinations on their staff, most employers are following the wait and see approach.

On the side of labour some unions are opposed to their members being forced into getting the jab. At least one union is reported to have put this in writing to employers. This open letter cites people's constitutional freedoms.

Specifically, section 12(2)(b) of SA's Constitution gives every person the right to "... security in and control over their body." And section 15 gives everyone the freedom of religion. Should employees be forced to be vaccinated and/or be dismissed for refusing to do so, there is little doubt that the matter will end up in court.

In Court, employers will counter argue sections 36, 11 and 24 of the Constitution's Bill of Rights. Section 36 provides that the rights conferred by the Bill of Rights may be limited under specified conditions. Employers will argue that, in the case of Covid vaccinations, the employees' section 12 and 15 rights should be limited in the greater social interest of preserving life and the survival of our economy.

This argument will be supported by the fact that section 11 of the Bill of Rights gives everyone the right to life. As Covid has been a very prolific taker of lives, those people who have to come in contact with a Covid objector will be under threat of contracting the deadly disease, and their right to life would be infringed. Furthermore, section 24 gives everyone the right to a safe environment; and a workplace with unvaccinated people will not be safe. In view of this clash of constitutional rights the court will have a tough decision to make.

One circumstance that is likely to sway a Court in the employer's favour is where the employer can prove that it has tried everything to solve the problem in other ways, and that dismissal is truly the only suitable solution. Employers will also have to prove that having unvaccinated employees at the workplace actually does pose a real threat to others who come into contact with them. As a result, where an employer considers forcing employees to take the vaccine, it will first have to get expert advice as to whether the specific circumstances that prevail would justify such a drastic step.

The big question is, which employer will be the first to face a Court on this issue? Or will BUSA's court action to get clarity on this issue resolve the matter before a guinea pig is sacrificed?

Until the Constitutional Court makes a finding on forced vaccinations the legal position will be uncertain. The real risk of losing in court and the potential harm that could be done to employee relations at the workplace by forced vaccinations make it wise for employers to get employees to agree to vaccination through the use of education and non-coercive persuasion. Where this fails, the employer should consider alternatives to dismissal such as arranging for 'Vaccinots' to work in isolation even if this necessitates job swapping where that is viable.

To book for our 5 November webinar on BALANCING WORKPLACE EFFECTIVENESS WITH LEGAL COMPLIANCE please contact Ronni on [ronni@labourlawadvice.co.za](mailto:ronni@labourlawadvice.co.za) or 0845217492.