

Mandatory Vaccinations

Constitutional and legal implications

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- Constitutional rights and their limitation
- Occupational Health and Safety Act and the Mines Health and Safety Act
- Occupational Health and Safety Direction
- Consequences for those employees who refuse to be vaccinated
- Caveats

- No right is absolute
- A law of general application may limit a right provided that its purpose is sufficiently important and its effect is proportionate
- The constitutional right that is directly infringed is the right to bodily integrity in section 12 of the Constitution

- Although the right to religion or belief is often raised as infringed, the right is to the *free exercise* of religion and belief. A vaccination mandate does infringe the free exercise of religion
- Although the right not to be discriminated against is also raised, the discrimination has to be unfair. The arguments raised in support of the limitation of the right to bodily integrity apply equally to discrimination. It is not unfair

- The Act is a law of general application

“Section 8. General duties of employers

- 1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees
- 2) Without derogating from the generality of an employer's duties under subsection (1), the matters to which those duties refer include in particular-
 - (a) the provision and maintenance of systems of work, ... without risks to health;
 - (b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment; ...
 - (h) enforcing such measures as may be necessary in the interest of health and safety;...”

- The Act is a law of general application

“Section 5. Employer to maintain a healthy and safe mine environment

As far as reasonably practicable, every employer must provide and maintain a working environment that is healthy and safe”

- Vaccination is pre-eminently a reasonably practicable measure
- The science is clear that the COVID-19 vaccines are effective and reduce the risk of serious illness and fatalities
- The purpose of both Acts is to protect the health and safety of workers – an important purpose
- It is proportional given that vaccination is not a particularly invasive health intervention and that there are not less invasive means as effective as vaccines

- Endorses the employer's right to impose mandatory vaccination

- Guidelines require:
 - extensive information
 - extensive consultation
 - endeavour to accommodate the employee who refuses to be vaccinated

- Is silent as to dismissal, accordingly the LRA applies

- The general contractual rule is that if employees tender their services and the employer does not accept their tender, the employer is required to pay the employees
- The exception to the rule is that the tender must be in accordance with the employer's rules as to dress, sobriety, etc and under the pandemic, a mask, vaccination certificate
- Employer can accordingly refuse to allow an unvaccinated employee to enter the workplace without attracting any liability for pay

- The LRA permits employers to dismiss employees for valid reasons and after a fair procedure
- The refusal to obey a health and safety rule which endangers others constitutes is serious misconduct (note that the employee's failure to obey the rule is a criminal offence)
- It is also a species of incapacity (not being able to meet the requirements of the job)
- It is also a species of incompatibility
- It can also be justified as an operational requirement

- Mandatory vaccination is a highly charged subject as a result of misinformation and whatever the law permits or requires an employer to do, the answer is not only in law but in human resource management
- This presentation is an overview of the law and any policy or measure an employer puts in place should be settled by its legal advisors



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