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**From:** Halton Cheadle

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**Date:** 16 September 2021

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**RE:** Covid-19 Vaccination and the employer's obligations under the Occupational Health and Safety Act and Direction

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### **Privileged and Confidential Attorney–Client Communication**

#### **Introduction**

- 1 We have been asked to provide a general memorandum for B4SA on an employer's legal obligations and liabilities in respect of Covid-19 vaccination and what the rights and responsibilities of employees are arising from an employer's decision to require its employees to be vaccinated.

#### **Employer's obligations under the Occupational Health and Safety Act (OHSA)**

- 2 Section 8(1) of the OHSA imposes a general duty on all employers to take reasonably practicable measures to ensure a healthy and safe workplace. The subsection reads:

*'Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without a risk to the health of his employees'*

- 3 In elaboration of this general duty, section 8(2) states that duty includes:

*'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'*.

- 4 The requirement that employees be vaccinated in order to continue their employment during the COVID-19 pandemic constitutes a 'reasonably practicable step' that an employer is *required* to take, as contemplated in section 8(2), and there are a number of reasons for this.

- 5 *Firstly*, there is the current science on the matter which increasingly demonstrates that vaccination not only limits severe illness on infection but also reduces the transmissibility of the virus.
- 6 *Secondly*, the fact that the Government has committed itself to the mass vaccination of the population (even if not yet mandatory) in order to protect both individual and public health clearly demonstrates that the health and safety inspectorate will consider vaccination as a reasonable measure.
- 7 *Thirdly*, the fact that the Direction, although it does not itself make vaccination mandatory, provides for employers to do so again indicates that it is a reasonably practicable measure. The Direction did not need to make vaccination mandatory because the OHS Act does. It defined COVID-19 vaccines as follows:

*'a vaccine that has been scientifically evaluated and recommended by the WHO and approved by the South African Health Products Regulatory Authority to be effective in preventing severe disease and death, and likely to reduce SARS-CoV-2 viral transmission in order to contribute to herd immunity'.*

- 8 Section 9(1) of the OHS Act extends the employer's obligations to third parties who are directly affected by its activities. The section reads:

*'Every employer shall conduct his undertaking in such a manner to ensure, as far as is reasonably practicable, 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 and safety'.*

- 9 This means that part of the employer's obligation under the OHS Act is to ensure that those who enter its premises, whether as contractors, visitors, suppliers or clients are not exposed to the hazard of COVID-19 transmitted by its employees.

### **An employer's obligations under the Direction**

- 10 The Direction is made up of two parts: those provisions that are in the body of the Direction and binding as legislation; and those that are attached to the Direction as guidelines and indirectly binding as we will demonstrate below.
- 11 The Direction imposes the following obligations on the employer in so far as these obligations relate to mandatory vaccination:
- 11.1 it must undertake a risk assessment and as part of that assessment decide, taking into account the operational requirements of the workplace, whether to make vaccination mandatory;

- 11.2 if it does, it must identify those employees who by virtue of the risk of transmission through their work or their risk of severe disease or death due their age or comorbidities, that must be vaccinated;
  - 11.3 it must develop or amend its plan based on the risk assessment and consult on both with any representative trade union and any health and safety committee established under the OHSA;
  - 11.4 it must notify all its employees of the contents of the Direction, its plan and the manner in which it intends to implement it;
  - 11.5 it must provide its employees with information that raises the awareness of the dangers of the virus, the manner of its transmission, the measures to prevent transmission, the nature of vaccines and benefits of associated with COVID-19 vaccines and the nature and risk of any serious side effects<sup>1</sup>;
  - 11.6 it must give administrative support to assist to register on the Electronic Vaccine Data System Registration Portal for COVID-19;
  - 11.7 it must give time off for its employee to be vaccinated on the date and time required provided that the employee provides proof of vaccination that has occurred or is to occur during working hours.
- 12 The guidelines annexed to the Direction provide for the following:
- 12.1 every employee identified for vaccination must be notified of –
    - 12.1.1 ‘the obligation to be vaccinated’;
    - 12.1.2 the right of an employee to refuse to be vaccinated on constitutional or medical grounds;
    - 12.1.3 the opportunity for the employee to consult a health and safety representative or a worker representative or trade union official
  - 12.2 the employer, if reasonably practicable, should provide transport to and from the vaccination site allocated by the Electronic Vaccine Data System Registration Portal;
  - 12.3 the employer should if the employee suffers side effects as a result of the vaccine, give the employee paid time off to recover if the employee is no longer entitled to

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<sup>1</sup> Much of this information is available via the links listed in the Direction.

paid sick leave or lodge a claim for compensation under the Compensation for Occupational Injuries and Diseases Act, 1993.

12.4 if an employee refuses to be vaccinated on any constitutional<sup>2</sup> or medical ground<sup>3</sup>, the employer should-

12.4.1 counsel the employee and, if requested, allow an employee to seek guidance from a health and safety representative, worker representative or trade union official;

12.4.2 refer for further medical evaluation should there be a medical contra-indication for vaccination;

12.4.3 if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated such as an adjustment to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours. In instances of limited contact with others in the workplace, it might include a requirement that the employee wear an N95 mask.

13 Although only guidelines, they do have a legal effect. If, as we will set out below, an employer decides to dismiss an employee for refusing to vaccinate, the fairness of that dismissal will be determined with reference to the guidelines. Accordingly, our advice is to follow them in both spirit and letter.

### **Employee obligations under the OHSA and the Direction**

14 Section 14(b) and (c) of the OHSA requires every employee at work to *'as regards any duty or requirement imposed on his employer ... cooperate with such employer ... to enable that duty or requirement to be performed or complied with'* and to *'obey the health and safety rules and procedures laid down by the employer ... in the interests of health and safety'*.

15 Section 13 of the Direction states that in addition to the obligations of employees under the OHSA, *'every worker is obliged to comply with the measures introduced by the employer, as required by these Directions'*.

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<sup>2</sup> The constitutional grounds are the right to bodily integrity in section 12(2) of the Constitution and the right to freedom of religion, belief and opinion in section 13.

<sup>3</sup> Employees who cannot vaccinate due to medical grounds for the contra-indication of vaccination in the form of an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the Covid-19 vaccine.

## **Employer's potential liabilities**

- 16 Section 38 of the OHS Act makes it an offence for an employer not to comply with sections 8 and 9 carrying a penalty of fine not exceeding R50 000 or to imprisonment for a period not exceeding a year or both. That means that the failure to take reasonably practicable measures such as the requirement that the identified employees be vaccinated exposes employers to criminal prosecution.
- 17 Although section 35 of the Compensation for Occupational Injuries and Diseases Act, 1993 states that an employee may not sue their employer for recovery of damages arising from an occupational injury or disease, section 56 provides that if an employee contracts an occupational disease due to the employer's negligence, the employee may apply for increased compensation. If an award of increased compensation is awarded, section 85 permits the Director General of the Department of Employment and Labour to assess the employer at a higher tariff of assessment.
- 18 Although it may be difficult to prove in individual instances as to the source of the infection, the simultaneous infection by a number of employees working in congregate settings may expose the employer to a re-assessment of its tariff under section 85.
- 19 The situation is quite different in respect of third parties who enter the workplace, for example, independent contractors, clients and members of the public. As we have indicated above, the OHS Act places a statutory obligation on the employer to ensure a safe and healthy workplace. If the source of the infection can, on the balance of probabilities, be proved to originate from the workplace and the employer has not taken 'reasonably practicable' measures to make the workplace safe and healthy, the employer may be liable for a claim for delictual damages, which, in the case of dependents' claim, can amount to a substantial amount.

## **Constitutionality of mandatory vaccinations in the workplace**

- 20 It is necessary before considering the consequences for employees who refuse to be vaccinated to consider the constitutional implications of any action taken against an employee who refuses to be vaccinated on medical or constitutional grounds.
- 21 As the Constitutional Court stated in *Berstein v Bester NO*<sup>4</sup> 'no right is to be considered absolute'. Each right is to a certain extent limited by other rights and may be limited by a law of general application in terms of section 36 of the Constitution.

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<sup>4</sup> 1996 (2) SA 751 (CC) at para 67.

- 22 The section 36 analysis requires a limitation to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the following factors: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose and whether there are less restrictive means to achieve the purpose.
- 23 Sections 8 and 9 of OHSA are laws of general application requiring employers to take reasonably practicable measures to make and maintain a healthy and safe workplace. To the extent that those measures in terms of the two sections infringe the constitutional rights of employees, the sections (and the measures they authorise) must be subjected to the limitations analysis.
- 24 That analysis will involve the following:
- 24.1 The nature of the right, which in this case involves two deeply personal rights, namely the right to bodily integrity and the right to freedom of religion, belief and opinion. This means that the purpose of any limitation has to be compelling.
  - 24.2 The importance of the purpose of the limitation. The ravages of the pandemic to both public health and the economy as well as the demonstrable success of the COVID-19 vaccines to limit severe illness and transmissibility of the virus make out a compelling case for limitation;
  - 24.3 The nature and extent of the limitation. Vaccination has a very limited risk of adverse effects in so far as the right to bodily integrity is concerned and in so far as the right to freedom of religion, belief and opinion is concerned it does not seek to limit the religion, belief and opinion itself so much as one of its tenets.
  - 24.4 The relation between the limitation and the purpose. There is a clear and demonstrable relation between the limitation (mandatory vaccination) and the purpose (the health and safety of employees and third parties in the workplace);
  - 24.5 Whether there are less restrictive means to achieve the same purpose. The occupational health and safety measures such as the wearing of masks and social distancing, while they reduce transmissibility of the virus, do not prevent severe illness or significantly reduce fatalities and do not hold out the possibility of eradicating the pandemic.
- 25 Accordingly, sections 8 and 9 of the OHSA and its implicit authorisation of mandatory vaccinations in accordance with the Directions will withstand constitutional scrutiny. The consequence of this analysis is that the scope of the constitutional right has been limited to that extent, and, accordingly, the employee who refuses to be vaccinated cannot any

longer lay claim to the constitutional right. The right that any person has is the right as it is formulated in the Constitution as justifiably limited by a law of general application such as the OHSA. An employee cannot therefore legitimately claim the right because OHSA justifiably limits it.

### **Employees who refuse to be vaccinated**

- 26 How is an employer to respond to an employee who refuses to be vaccinated in the face of a health and safety rule requiring all employees who work in congregate work settings or engage with the public? The non-compliance with a lawfully issued health and safety rule raises two issues: firstly, it constitutes an offence in terms of section 35(a) of the OHSA; secondly it can constitute a ground for dismissal in terms of the Labour Relations Act, 1995 (LRA).
- 27 The LRA recognises three reasons for justifiable dismissal: misconduct, incapacity and operational requirements:
- 27.1 Given that the it is an offence not to obey a lawfully issued health and safety rule, the refusal to be vaccinated may constitute misconduct and fairness in these circumstances requires warnings and a reasonable time to comply.
- 27.2 The refusal to be vaccinated can also constitute incapacity. Although the Code of Good Practice: Dismissal refers to two forms of incapacity, namely medical incapacity and poor performance, the Labour Courts have held that there are other forms of incapacity such as the loss of a qualification, incompatibility, incarceration or the refusal to join a trade union with a closed shop.<sup>5</sup> Similar to the case of a closed shop, the employee's belief not to join the union or to be vaccinated render the employee incapable of the contractually required tender of services. Fairness, in these circumstances requires counselling and an endeavour to reasonably accommodate the employee's incapacity (such as offering an alternative position that does not involve congregate settings or engagement with the public).
- 27.3 The obligation to be vaccinated can also constitute an operational requirement in that it is a requirement for the safe, healthy and undisrupted operation of the employer. A fair dismissal in this context would have to comply with the provisions relating to operational requirement dismissals in the LRA.

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<sup>5</sup> *Samancor Tubatse Ferrochrome v MEIBC & others* [2010] BLLR 824 (LAC) at para 10. Although the decision was reversed on appeal, it was for reasons relating to the scope of review of an arbitrator's decision and not the meaning of incapacity.

27.4 There is an important caveat. This opinion is a general opinion and any employer that contemplates dismissal of unvaccinated employees should seek advice from their own lawyers before doing so.

28 There is an alternative temporary remedy short of dismissal, namely the refusal to accept an incomplete tender of services. If the employee is contractually incapable of tendering services, the employer has no obligation to accept the tender and accordingly has no obligation to pay the employee.<sup>6</sup> This is colloquially called the 'no work, no pay' rule.<sup>7</sup> The form that this refusal of the tender to work is to establish a rule that no employee without proof of vaccination may enter the workplace in order to work. In this respect it is no different from the existing rule that an employee may not enter the workplace without a mask or presenting with COVID-19 symptoms.

29 This alternative remedy of exclusion of the unvaccinated from the workplace and from working may also be challenged on the grounds that it constitutes an employment practice amounting to unfair discrimination in terms of section 6 of the Employment Equity Act, 1998. That section prohibits unfair discrimination in any employment policy or practice on various grounds, in particular for the purpose of this opinion, the grounds of religion, opinion and belief. If unfair discrimination is alleged, the employer must, in terms of section 11 of the Act, prove on the balance of probabilities that the discrimination is 'rational, not unfair and otherwise justifiable'. The exclusion is rational because there is a clear link between the object of the exclusion and its effect (a safer and healthier workplace). It is reasonable and justifiable because it constitutes a reasonable measure under section 8(1) of the OHS Act to protect workers from serious disease, particularly if there is a breakthrough infection among vaccinated workers in the workplace, and to reduce the transmissibility of the disease. Moreover, the fairness equation is not bi-lateral – it does not involve only the rights and interests of the employer and the unvaccinated employee – it is multi-lateral because it also affects the rights and interests of fellow employees and customers.

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<sup>6</sup> *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC) at para 9.

<sup>7</sup> *Coin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers Union and others* (1989) 10 ILJ 239 (C) at page 239.