



A GUIDE TO IMPLEMENTING A MANDATORY VACCINATION POLICY AT A SOUTH AFRICAN BUSINESS

The complex issue of implementing mandatory vaccinations is becoming a heated topic in South Africa. While these mandates are only expected to be implemented in the new year, several corporates have already taken steps to introduce mandatory policies.

Old Mutual recently joined the growing list of employers and entities – which includes Discovery, Life Healthcare, Curro, MTN, Sanlam and various universities – that intend to implement mandatory vaccinations in the workplace with effect from January 2022.

It appears that many employers are considering this option in light of the poor uptake of vaccinations amongst the South African population and the understanding and hope that if the majority of the population is vaccinated, the economy can start with the recovery process.

The Department of Employment and Labour introduced the Consolidated Direction on Health and Safety in Certain Workplaces on 11 June 2021 which effectively allows employers to introduce a mandatory vaccination policy provided certain conditions are met.

Outlined below are guidelines and key considerations for implementing a mandatory vaccination policy in South Africa.

Step 1: Coverage

Determine whether your business is covered by the Occupational Health and Safety Act.

Step 2: What does the business want?

If it is, determine whether the company wishes to implement a mandatory vaccination policy in its workplace.

Step 3: Risk assessment

If it does, commence with a risk assessment. The risk assessment will involve a critical review of the employer's workplace for the purposes of establishing whether the implementation of a workplace policy on mandatory vaccinations is justifiable.

Not only will employers be required to consider the physical aspects of the workplace, such as whether there is sufficient ventilation and an opportunity for employees to conduct their work while maintaining an acceptable distance from one another, but they will also be required to consider whether it is viable to continue to permit employees to work from home.



Step 3: Risk assessment

The benefits of working in each other's physical presence are well known and whilst productivity may improve whilst employees work from home, creativity, collaboration and morale are negatively impacted. Employers will also be required to consider their current policies in relation to flexible and agile working and determine to what extent these policies may be amended.

Importantly, the risk assessment will also identify those employees who, by virtue of the risk of transmission through their work or their risk for severe Covid-19 disease or death due to their age and co-morbidities must be vaccinated.

The risk assessment must be conducted in consultation with all relevant stakeholders which includes employees, trade unions (if applicable), health and safety representatives and or the health and safety committee, if applicable.

It is probable that at this early stage of the process, those who intend to object to the implementation of the mandatory vaccination policy will do so during the consultation process.

Employers are encouraged to use the consultation process to their benefit and to understand the concerns which employees have so that they can be effectively and efficiently managed and, hopefully, disposed of at this early stage in the process.

Objections to the possible implementation of a mandatory vaccination policy should be carefully considered and consulted upon and the views of both the employer and the employee should be recorded in writing in order to mitigate the risks associated with a dispute that may arise at a later stage.

The direction provides that the key principle in relation to this issue is mutual respect.

Step 4: Viable and justified

Once the risk assessment is completed and the employer is of the view that the introduction of a mandatory vaccination policy in the employer's workplace is viable and justifiable, the employer must develop a plan and/or amend its existing plan.

It is probable that most employers will have a plan in place and will merely be required to amend the existing plan.

The plan must outline the measures that the employer intends to implement in respect of the vaccination of its employees. It must also identify those employees that it considers to be vulnerable. The direction requires the employer, in developing and implementing the plan, to take into account the constitutional rights of its employees to bodily integrity, religion, belief and opinion.

The plan must then be made available for inspection by an inspector as contemplated in the Occupational Health and Safety Act as well as employees, their representatives, trade unions and health and safety representatives.

Step 5: Decide whether a policy is necessary and justifiable

At this stage, i.e. after the risk assessment is completed and the plan is developed in consultation with relevant stakeholders, the employer may decide to implement a mandatory vaccination policy.

Step 6: Inform employees of intention to implement policy

If the employer decides to implement the policy, it must inform all of its employees of its intention to implement a mandatory vaccination policy and the date upon which the policy will come into effect.

Employers are encouraged to provide employees with a reasonable time (one to two months) within which to consider the employer's position prior to implementation of the policy – though this is not a legal requirement.

However, it is preferable from a human resources and industrial relations perspective to provide employees with prior notice.

Step 7: Inform employees of their right to object

Once employees are made aware of the implementation date, the employer is required to inform employees of their right to object to being required to comply with the policy on constitutional or medical grounds.

In the event that an employee is considering an objection, but does not understand what a “constitutional” or “medical” ground is, the employer should explain this to the employee with reference to the direction.

The direction defines “constitutional grounds” as the rights to bodily integrity, religion, belief and opinion. “Medical grounds” are defined as an immediate allergic reaction of any severity to a previous dose or a known diagnosed allergy to a component of the Covid-19 vaccine.

Employees should be given a time period within which to object to the implementation of the policy. Objections ought to be in writing.

Step 8: Consider objections

Employers are obliged to consider these objections and take into account various factors including public health imperatives and the efficient operation of the employer's business when making their determination.

Step 9: If the objection is based on a medical ground

If the employee refuses to be vaccinated on medical grounds, the employer should counsel the employee and allow the employee to seek guidance from a health and safety representative, employee representative or trade union official.

The employer should also refer the employee for further medical evaluation should there be a medical contraindication for vaccination.

If these interventions do not resolve the impasse between the employer and the employee, the employer should take the steps necessary to reasonably accommodate the employee in a position that does not require vaccination.

Step 10: If the objection is based on the right to bodily integrity, religion, belief or opinion

If the employee refuses to be vaccinated on constitutional grounds, the employer should counsel the employee and allow the employee to seek guidance from a health and safety representative, employee representative or trade union official.

If these discussions do not resolve the impasse between the employer and the employee, the employer should take the steps necessary to reasonably accommodate the employee in a position that does not require vaccination.

Step 11: Reasonable accommodation

The direction defines “reasonable accommodation” as any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of People with Disabilities published in terms of the Employment Equity Act.

This might include an adjustment that permits the employee 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, this might include a requirement that the employee wears a N95 mask.

The code provides that reasonable accommodation includes, but is not limited to:

- Adapting existing facilities to make them accessible;
- Adapting existing equipment or acquiring new equipment;
- Re-organising work-stations;
- Changing training and assessment materials and systems;
- Restructuring jobs so that non-essential functions are re-assigned;
- Adjusting working conditions including working time and leave;
- Providing specialised supervision, training and support in the workplace.

Importantly, the code provides that the employer need not accommodate an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.

“Unjustifiable hardship” is an action that requires significant or considerable difficulty or expense and factors such as whether there would be a serious disruption to the operation of the business should be considered.

Step 12: Dismissal

In the event that the employer has taken all of the steps referred to above and the employee maintains a refusal or failure to be vaccinated, which is at odds with the employer’s workplace policy, the employer may commence a process to secure the employee’s dismissal.

Importantly, employers remain obliged to dismiss on the basis of a fair reason only and in accordance with a fair procedure. South African employers are only entitled to dismiss an employee for three reasons, namely misconduct, incapacity or the employer’s operational requirements. The procedure to be followed by the employer will be dictated by the reason for the dismissal.

It is accordingly critical that the employer ensures that the path to dismissal is carefully and accurately recorded in writing so that the employer is in a position to illustrate that it complied with the direction and employment law generally before resorting to dismissal.

If you have any further questions regarding mandatory vaccination polices, please contact Jacqui Reed.

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