

To vaccinate or not to vaccinate: Mandatory COVID-19 vaccination in the workplace

The past few weeks have been witness to a hub of discussion and debate on whether COVID-19 vaccinations should be made mandatory in the workplace. Central to the debate is balancing public health priorities with ethical and legal considerations. The opinion by the South African Human Rights Commission (SAHRC) seems to be that employee rights cannot be limited should they refuse to be vaccinated. This viewpoint is strongly criticised by legal and other experts in the field, with some arguing that the SAHRC has missed the difference between contagion (the current pandemic) and infectious disease (such as that caused by HIV).^[1] The discussions on whether COVID-19 vaccinations should be made mandatory were sparked off by the gazetting of a directive in mid-June by the state on the need for employees to be vaccinated in certain workplaces.^[2]

The legal situation in South Africa

On 11 June 2021, the employment and labour minister gazetted a directive on COVID-19 vaccination in certain workplaces, in the new consolidated direction on occupational health and safety measures. It stipulates that employers are required to come up with reasonable resolutions so that all parties are accommodated should employees refuse COVID-19 vaccinations on medical and Constitutional grounds. The principle espoused by the directive is that employers and employees should treat each other with mutual respect. Essential considerations are public health imperatives, employees' constitutional rights and efficient business operations.^[3]

The directive, in section 3(1)(a)(ii), stipulates that employers must undertake a risk assessment to determine whether or not they intend to 'make vaccination mandatory'. This should be in accordance with sections 8 and 9 of the Occupational Health and Safety Act No. 85 of 1993 (OHSA),^[4] and should take into account the operational requirements of the workplace. Employers are obliged to identify those employees who need to be vaccinated by 'virtue of the risk of transmission through their work or their risk for severe COVID-19 disease or death due to their age or comorbidities'. Medical grounds for an employee not agreeing to take a vaccine as stated in annexure 3 of the directive are 'an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the COVID-19 vaccines'.

On the face of it, this means that the directive does not make the vaccine mandatory, but places the onus on the employer to take into account its general duties under the OHSA, which mandates the provision of a working environment that is safe and without risk to the health of employees and persons other than those employed who may be directly affected, e.g. patients and children at schools. Employees and other relevant individuals must not be exposed to hazards to their health or safety. In addition, not every employee poses a risk. These include those who work from home or whose work is such that they are not 'people facing' and hence not in close working contact with other workers or the public.

Section 3(4) affirms that the employer must take into account the Constitutional rights of their employees to bodily integrity and the right to freedom of religion, belief and opinion. Another relevant right not mentioned in section 3(4) is that everyone is entitled to an environment that is not harmful to their health or wellbeing (section 24(a) of the SA Constitution).^[5] This is possibly because the right to a safe environment is adequately covered in the OHSA. Notwithstanding the entitlements to rights, most rights in the Constitution may be limited, provided the limitation is of general application, and is 'reasonable and justifiable' – which means that it is rational, proportional and least restrictive in terms of achieving its objective (section 36).^[5] It could be argued that backed by scientific evidence and the rights of all people to a safe environment, it would be 'reasonable and justifiable' to compel workers in certain workplaces to take a vaccine that is available and approved for use by the SA Health Products Regulatory Authority.

Additional statutory considerations include the provisions of the National Health Act No. 61 of 2003 (NHA),^[6] which in section 2(c) also makes reference to the importance of considering the rights of 'the people of South Africa to an environment that is not harmful to their health or well-being'. The Act requires all healthcare personnel to ensure that healthcare users give informed consent (section 7), and sets out the information that is required to be provided to such users beforehand (section 6(1)). The Act states that the user must also be provided with information on the implications, risks and obligations of refusal of proposed health services (section 6(1)(d)). According to the Act, a health service may not be provided without informed consent unless –

- 'the provision of a health care service without informed consent is authorized in terms of any law or a court order' (section 7(1)(c);
- 'failure to treat the user, or a group of people which includes the user, will result in serious risk to public health' (section 7(1)(d)).

Therefore, in terms of the NHA, employees need to understand the implications and risks of refusing the vaccine where they are exposed to the risk of COVID-19 exposure and transmission. They also need to understand that they may be compelled to take the vaccine to reduce the threat of a serious risk to public health.

Despite the several messages by President Ramaphosa in national media this year that no-one will be forced to take the vaccine, it can be seen from the legal situation outlined above that if life and livelihoods are to be preserved, people will feel pressurised into being vaccinated. Hence it can be argued that proof of COVID-19 vaccination may become covertly, if not overtly, mandatory in the workplace, as not taking the vaccine could result in job loss or other punitive measures.

Is COVID-19 vaccination mandatory in other countries?

Reuters^[7] recently reported that an abrupt and severe increase in new coronavirus infections due to the highly contagious Delta variant,

and a decrease in vaccine uptake, have forced governments in many countries to make COVID-19 vaccines mandatory for healthcare workers and other high-risk groups. Australia made COVID-19 vaccinations mandatory for high-care workers and employees in quarantine hotels in June. The UK has determined that the vaccine will be mandatory for care home workers from October this year. Proof of full vaccination will be necessary from the end of September for entry to nightclubs and other venues with large crowds. Canada stated in July that it was considering whether COVID-19 vaccines should be required for certain roles and positions in the federal government. In France, new rules announced by President Emmanuel Macron on 12 July make it mandatory for all health workers to be vaccinated. Furthermore, proof of vaccination or a coronavirus negative test will need to be produced by individuals who want to enter a cinema or board a train. In Greece, vaccinations were made mandatory for nursing home staff with immediate effect, and for healthcare workers from September. Proof of vaccination is required before customers can enter indoors bars, cinemas, theatres and other closed spaces. In February, Indonesia made COVID-19 inoculations mandatory. Its capital, Jakarta, threatened fines of up to 5 million rupiah (USD357) for refusing the vaccine. The Italian government approved a decree in March mandating health workers, including pharmacists, to get vaccinated. Punitive measures of suspension without pay for the rest of the year were also introduced. In Hungary, COVID-19 vaccinations are mandatory for healthcare workers as part of efforts to contain the pandemic. This was announced by its Prime Minister Viktor Orbán on public radio on 23 July. Kazakhstan's health ministry announced on 23 June that it would introduce mandatory COVID-19 vaccinations or weekly testing for people working in groups of more than 20 people, and Poland has announced its intentions of making vaccinations compulsory for some people at high risk from COVID-19. Russia has publicised plans that mandate that 60% of all service sector workers be fully vaccinated by 15 August. Saudi Arabia stated in May that all public and private sector workers wishing to attend a workplace would need to be vaccinated. In addition, proof of vaccination would be required to enter any governmental, private, or educational establishments, and to use public transportation as of 1 August. In Turkmenistan, the healthcare ministry stated on 7 July that COVID-19 vaccination would be mandatory for all residents aged ≥ 18 years. In the USA, New York has issued a mandate that will be effected from 6 September requiring state employees to be vaccinated against COVID-19 or get tested weekly, and California will require all state

employees to be vaccinated from 2 August or undergo COVID-19 testing at least once a week.

Conclusion

Successful vaccination programmes could play a critical role in establishing relative normality and the enjoyment of civil liberties. There could be a safe return to normal life and a gradual re-opening of the economy in key sectors such as food, retail, entertainment and travel, and especially with regard to import and export. Moreover, broader society could benefit if immune individuals are allowed to return to their work and care obligations. However, vaccine hesitancy, as a result of reasons including distrust in government, politicisation of the processes, the slowness in getting the vaccination rollout off the ground, reinfections despite being vaccinated and dismal communication strategies to the public, has played a substantive role in decreased uptake, and eroded vaccine confidence even where initially present. What is needed is a balance between individual rights and the public good. As South Africans, we value the rights accorded to us in the Constitution. We should in parallel take heed of their limitations, in particular in the context of furthering the public good as in the current contagion.

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