

NOTICE

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RETURN TO WORK – VACCINATION POLICIES



With the return to the workplace South African employers are **required** to consider how they will meet their obligation to provide and maintain, as far as reasonably possible, a safe working environment, as is required in terms of the Occupational Health

and Safety Act (“OHSA”).

Part of meeting this requirement entails that the employer must consider measures to safeguard its employees against Covid-19. Many large employers have already implemented vaccination policies and others have indicated that they will be implementing vaccination policies as part of the required safeguarding measures.

According to Business for South Africa, Nedlac and COSATU support vaccination mandates and the large businesses that have committed to the implementation of mandatory vaccination policies include Anglo American, Aspen, Big Concerts, Dis-Chem, Discovery, ENS Africa, EY, MTN, Multichoice, Old Mutual, Sanlam, Sappi and Standard Bank.

Many universities, including the University of the Witwatersrand, the University of Johannesburg, the University of the Free State, the University of the Western Cape, the University of Cape Town and the University of Stellenbosch have also implemented vaccination policies.

Whilst vaccination policies are regarded as excellent tools to assist in compliance with the obligation to create a safe workplace environment, employers must be aware that a blanket adoption of a vaccination policy without due and proper consideration and proper balancing of rights (of the employer, all employees, and those employees who choose not to be vaccinated) may be regarded as being unconstitutional.

*We are committed to
helping our clients
succeed by providing
innovative legal
solutions which make
practical and
commercial sense and
which deliver legal
certainty.*

RECENT CASES:

The National Black Consumer Council (“NBCC”) approached the Constitutional Court to provide clarity on the issue of mandatory vaccination policies. The application for direct access was, however, refused by the Constitutional Court and the NBCC will now proceed with an application to the High Court.

An application by FS4C for an interim interdict against the University of the Free State’s vaccination policy was struck from the roll for a lack of urgency.

In two recent arbitration awards by the CCMA which dealt with employees who failed to comply with mandatory vaccination policies (the award in the matter of *T Mulderij and Goldrush Group* (Case Number: GAJB24054-21) (Hyperlink: [Scanned Document \(constitutionallyspeaking.co.za\)](https://constitutionallyspeaking.co.za) as well as the award in the matter of *GJ Kok and Ndaka Security Services* (Case Number: FSWK2448-21) (Hyperlink: [Scanned Document \(groundup.org.za\)](https://groundup.org.za)) the CCMA Commissioners took specific note of the **risk assessments** conducted by the employers which supported the mandatory vaccination policies of such employers.

In both of these awards it was found that the risk assessments were conducted in respect of every position within the company, **prior** to implementation of the vaccination policies and that the measures introduced in terms of the vaccination policies were fair, also when having regard to the rights of the employees in question.

Whilst it is certain that there is still legal uncertainty regarding vaccination policies what is also certain is that vaccination policies which are supported by proper risk assessments and which provide for fair consultation and proper consideration of all rights and reasonable accommodation where possible, should be considered as constitutionally compliant.

THE DIRECTIVE

The June 2021 directive by the Department of Employment and Labour in terms of the OHSA, which applies to all employers, save for those excluded in terms of section 1(3) of the OHSA, (being mines, mining areas or works in terms the Minerals Act, 1991 (Act No. 50 of 1991) and ships, boats or cranes in terms of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), sets out the steps employers must follow to introduce a

vaccination policy in their workplace and provides assistance in respect of the process which must be followed to ensure that a vaccination policy withstand constitutional scrutiny.

It is important to bear in mind that it is not the policy alone which will be considered by a court, but the process which was followed by the employer to arrive at the structure of the policy and the process followed to implement the core principles of the policy.

The directive provides guidance, however, each employer must also have regard to all applicable legal, strategic, operational and ethical considerations.

Some considerations regarding vaccination policy implementation which employers should keep in mind are:

Legal

- Compliance with all applicable legislation;
- Balance of rights (legal obligation to provide a safe working environment v employee rights) with reference to limitations as provided for in section 36 of the Constitution.

Business operational and strategic considerations

- Business requirements;
- Actual operational requirements;
- Business risk and reputation;
- Organisational culture.

Implementation principles

- Clear and reasonable rationale;
- Proper consultation and engagement;
- Mutual respect;
- Balancing of rights;
- Reasonable accommodation, engagement, clear and reasonable rationale.

Continuous training

- Employers should also ensure that policy makers and those involved in the process of implementation are properly educated on all applicable issues and that they keep abreast of the constant changes in this regard.

- One training session may not do the trick and it is likely that ongoing training and discussion will be required.

The value of ensuring that an extensive and thorough assessment process is implemented in order to properly inform return to work vaccination policies cannot be overstated.

We are here to assist in all of the steps relevant to ensuring compliance with the directive, from assistance with risk assessments to the drafting of policies.

Contact us.

The Team

Sim & Buzo Attorneys