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To be or not to be... vaccinated?



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Constitutionally every South African has the right to freedom and security in terms of section 12 of the [Constitution of the Republic of South Africa, 1996](#) (“the Constitution”), specifically, every person has the right to bodily and psychological integrity which includes the right—

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.

Some constitutional rights may, however, be limited if there is a justifiable reason for such limitation. South African courts have not yet decided on whether vaccinations are to be compulsory. Based on past cases that have dealt with the application of section 12 of the Constitution it is important to consider public interest and the protection of the public at large.

By weighing the right afforded in section 12 of the Constitution against public interest, it can be argued that forcing people to obtain the vaccine is premature as there is no guarantee or certainty about the effectiveness or long-term effects thereof.

By analysing section 12 of the Constitution, it is evident that all South African citizens have the right to decide whether they wish to receive the vaccine. This decision should be voluntary and should be made without undue influence.

South African labour legislation does not specifically deal with the rights of employers to force employees to get vaccinated. However, the [National Health Act 61 of 2003](#) (“NHA”) deals with the issue of consent. Consent in terms of the NHA must be for a specific health service and must be given by a person of legal capacity. It must also be given voluntarily. There are certain exceptions to when the consent for treatment is not required, with one instance being “a serious risk to public health”.

There is currently no legislation in place that forces any South African to get vaccinated.

In respect of safety in the workplace, it is important to consider the [Occupational Health and Safety Act, 1993](#) in terms of which an employer is required to maintain a safe working environment and to do that which is reasonably practicable. This must

again be weighed up against an employee's constitutional right to freedom and security.

If an employer removes an employee from the workplace due to the fact that he/she has not been vaccinated, this could be ruled to be an infringement of the employee's constitutional right. However, in some cases it may be permissible to request mandatory vaccinations from employees depending on the work environment and risk of transmission, such as in the mining industry.

In terms of the new consolidated direction on occupational health and safety measures in certain workplaces, which was gazetted by the Minister of Employment and Labour, Thulas Nxesi, employers should find a reasonable resolution that accommodates all parties where employees refuse to be vaccinated for medical and constitutional grounds. The [Consolidated OHS Direction](#) now requires an employer to include in its risk assessment whether he/she intends to make vaccinations compulsory. This is a three-step enquiry:

Firstly, an employer must make the assessment taking into account the operational requirements of the workplace. This means that the Direction does not make the vaccinations mandatory, but every employer must take into account its general duties under the Occupational Health Safety Act to provide a working environment that is safe and without risk to the health of employees and persons other than those in its employment who may be directly affected by its activities.

Secondly, if the employer decides to make it mandatory once the risk assessment has been conducted, it must then identify which employees will be required to be vaccinated. In determining whether an employee can be required to be vaccinated, the employer must identify those employees whose work poses a risk of transmission or a risk of severe COVID-19 disease or death due to their age or comorbidities. In other words, not every employee poses such a risk – for example workers who work from home or whose work is such that they do not come into close working contact with other workers or the public.

Thirdly, having identified the employees who are required to be vaccinated, an employer must amend its plan to include the measures to implement the vaccination of those employees as and when COVID-19 vaccines become available in respect of those employees, taking into account the Guidelines set out in Annexure C of the June 2021 version of the Direction. Given the phased nature of the National Vaccination Programme based on criteria determined by NDOH from time to time, an employer may only make it an obligation once the employee becomes eligible under

the programme for vaccination and has been registered on the Electronic Vaccination Data System and given a date for vaccination.

If employees refuse to get vaccinated, another alternative will be for employers to introduce alternative working spaces, minimise functions, permit non-vaccinated employees to work from home, scheduled workdays for vaccinated and non-vaccinated employees, or the requirement that a N95 mask is to be worn at all times.

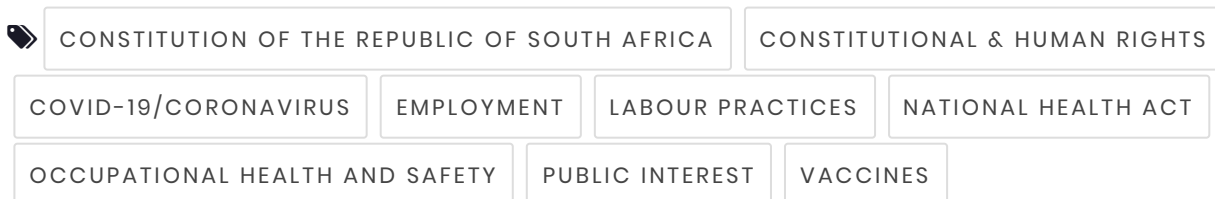
In the circumstances, and in light of the above, it is our view that all employees should be trained and educated on the importance of the vaccination, as well as the transmissible nature of COVID-19. If it is a strict requirement in the workplace, this may bring about resentment causing workers who don't wish to get vaccinated to be segregated from those who do. Given the lack of specific legislation, employers are encouraged to avoid forcing employees to get vaccinated but rather to enlighten them on the benefits.

Written by Kayla Pashiou, Senior Associate at Christodoulou & Mavrikis Inc.

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- [COVID-19: An accelerant for inclusion in the workplace](#)
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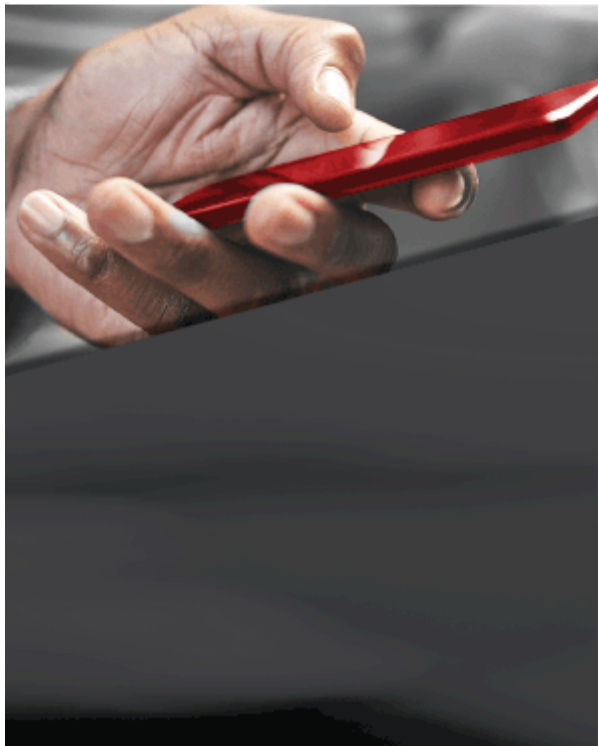


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