

Mandatory vaccines and life after the state of disaster

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16 Mar 2022

As has been recently publicised, the National State of Disaster has been extended by the Minister of Cooperative Governance and Traditional Affairs to 15 April 2022, after which we expect the state of disaster to be lifted.



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But what happens to the pandemic specific regulations and restrictions that employers have been operating under since the lockdowns began?

Do these fall away, and will mask wearing and other safety measures, at least in the office, become a relic of the past? In relation to the protective measures that an employer must take in the workplace, as well as the rights of employers to insist on the mandatory vaccination of staff, the easy answer is: No. All of these measures will remain (with a few minor and administrative adjustments). Just under a new piece of legislation.

During the height of the pandemic, the Department of Employment and Labour released a Consolidated Direction on Occupational Health and Safety measures in certain workplaces (Directions) which was published in various iterations until its formal form was published in the Government Gazette on 11 June 2021.

Earlier versions of the Directions put in place the requirements of mask-wearing, social distancing, provision of other personal protective equipment, sanitisation of workplace surfaces, hand-washing and the various other workplace measures.



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The last version of the Direction, released in June 2021, introduced the possibility of employers putting in place mandatory vaccination policies (MVPs) for the workplace. In short, the Directions allowed (and will continue to do so until 15 April 2022) an employer to undertake a risk assessment to determine whether it will make the vaccination of employees mandatory. These risk assessment must assess whether it is necessary to make vaccination mandatory in the workplace, based on the operational requirements of the employer. The employer may therefore decide, after its risk assessment and considering its operational requirements and working environment, that it will not make vaccination mandatory.

After 15 April 2022, the Directions lapse and will cease to have any legal affect but, as much as this is to be welcomed, Covid will not disappear from the lives of employers and employees, and the concerns around what steps an employer must take to ensure that it provides healthy and safe working conditions remain relevant.

Latest Code of Good Practice

As such, the Labour Department, after consultations with Nedlac, has issued a Code of Good Practice: Managing Exposure to SARS-CoV-2 in the Workplace, dated 15 February 2022 (the Code of Good Practice) under the Labour Relations Act, which essentially copies and pastes the content of the Directions, and makes the rights, measures and obligations required of employers and employees under the Directions, direct rights, measures and obligations under the LRA.

Major elements of the Code of Good Practice are that:

1. It recognises that the Regulations for Hazardous Biological Agents (HBA Regulations) under the Occupational Health and Safety Act (OHSA), list coronavirus as a listed hazardous biological agent, classed as Group 3. It therefore places legal responsibilities on employers in respect of employers to limit the exposure and mitigate the risks of infection by SARSCoV-2;
2. All employers are recognised to have direct and positive obligations under the OHSA to take steps to employer to provide and maintain as far as is reasonably practicable a working environment that is safe and without risks to the health of workers and to take such steps as may be reasonably practicable to limit or mitigate the hazard or potential hazard. Employers must also ensure, as far as is reasonably practicable, that all persons who may be directly affected by their activities (such as customers, clients or contractors and their workers who enter their workplace or come into contact with their employees) are not exposed to hazards to their health or safety;
3. Employers who employ less than 20 persons only have to take limited steps (they must undertake a risk assessment and take reasonable practical measures to mitigate the risk of infection or transmission, and if an employee has Covid-19 symptoms to refuse to allow the employee to access the workplace and isolate the employee, and to provide closed spaces with reasonable ventilation);



4. Employers must conduct a risk assessment to determine their obligations under OHSA and the HBA Regulations. The risk assessment must lead to a new or an amended plan to deal with safety measures, which can also include the mandatory vaccination of employees. This is critical to note, as the Code of Good Practice now specifically makes it an entitlement under the LRA for employers to adopt mandatory vaccination policies;
5. The protective measures adopted by an employer must be applied in respect of all workers. This includes employees, contractors, self-employed persons or volunteers.

Mandatory vaccination policies

A recent hot topic which has occupied the Commission for Conciliation, Mediation and Arbitration is that of mandatory vaccinations. In this regard, the Code of Good Practice specifically and expressly continues the provisions of the Directions in this regard, and it is likely that many employees and workplaces which have not yet adopted mandatory vaccination policies, on the basis that these may have become defunct when the state of disaster is lifted, are likely to do so now. As much as Covid-19 appears here to stay, so too is the reality of the vaccinated workplace. In terms of mandatory vaccination policies, the Code of Good Practice replicates the requirements of the Directions in that if there is mandatory vaccination for any category of employees, the employer must:

1. notify the employee of the need to be vaccinated once the vaccine becomes available for that employee (note that the Code of Good Practice still does not require the employer to obtain or pay for the vaccine, but it would reasonably be required for the employer to assist the employee to register for either private or public vaccination);
2. counsel the employee on these issues and allow the employee to consult a health and safety representative a worker representative, or a trade union official;
3. give administrative support to register for and access vaccination certificate portals;
4. provide paid time off for vaccination and provide transport to and from vaccinations sites.

A major difference between the Directions and the Code of Good Practice is that, whereas the Directions allowed employees the right to refuse to be vaccinated on the basis of constitutional or medical grounds, the Code of Good Practice refers generally to an employee's refusal to be vaccinated, but only requires the employer to make a reasonable accommodation for such refusal where the employee produces a medical certificate attesting to the employee having contra-indications for vaccination (and the employer accepts such medical assessment, or has such assessment confirmed at its own expense). As such, it appears that the Code of Good Practice would be less generous to employees if they appeal to a non-medical (religious or belief based) objection to vaccination.



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Vaccine status disclosure

A critical issue addressed by the Code of Good Practice is that employers may now require workers to disclose their vaccination status and to produce vaccination certificates. Naturally, any processing of this information must be done in

accordance with the relevant Protection of Personal Information Act, 4 of 2013 (POPIA) requirements, and any POPI policies and procedures adopted by the employer.

Under the Code of Good Practice, mandatory vaccination policies will also live side by side with the usual measures such as:

1. social distancing measures including minimising the number of workers in the workplace through rotation, staggered working hours, shift and remote working arrangements;
2. PPE measures (employers are advised to regularly check whether any specialised PPE for Covid-19 is required or recommended in any guidelines based on the nature of the workplace or the nature of a worker's duties and the associated level of risk);
3. personal hygiene measures such as the wearing of face cloth masks, barriers, hand washing, sanitisers and surface disinfectants; and
4. any special measures to mitigate the risk of infection or serious illness or death in respect of individual employees at increased risk such as reducing the numbers in and the duration of occupancy in meeting rooms.

Employee obligation

A further emphasis which appears from the Code of Good Practice is that every worker is obliged to comply with the employer's workplace plan (which can include mandatory vaccination) in addition to the obligations of employees under the OHS Act and the HSA Regulations. As such, there appears to be a stricter requirement on employees to take reasonable steps to adhere to mandatory vaccination plans, and an acceptance that such plans are reasonable measures which may be adopted under the OHS Act and HSA Regulations to ensure that employers do not breach their obligations to ensure that workplaces are free of health and safety risks.

In summary, the old legal requirements have been slightly adjusted and strengthened and are now rights and obligations which exist under the foundation entitling piece of labour legislation in South Africa, the Labour Relations Act. As such, they should be considered here to stay, for so long as Covid-19 is here to stay.

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