

Managing mandatory vaccine exemptions in the workplace

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The *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces*, which was amended by the Minister of Employment and Labour with effect from 11 June 2021, entitles employers to implement a mandatory vaccination policy for certain categories of employees.



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However, employers will need to tread carefully when shouldering their responsibility of maintaining a safe and healthy working environment while still ensuring that they respect the rights of employees who raise concerns around being vaccinated.

Legal precedents: Is an employer legally obliged to reasonably accommodate those employees who refuse to be vaccinated?

An employer's right to implement a mandatory vaccination policy is not absolute. As such, employers need to be cautious if they are to avoid claims of unfair discrimination or unfair dismissal, or reputational damage.

Employers who decide to implement mandatory vaccination policies must do so if it is necessary to ensure the health and safety of their employees and people with whom they interact.

Accordingly, the employer is required to conduct a risk assessment and identify those categories of employees who are regarded as vulnerable (ie. those over 60 and those with underlying co-morbidities) and those who, through their work, are at a higher risk of transmission of the virus. This might be the case with front-line staff members who interact with members of the public, or those who have close contact with fellow workers.

An employer will then have a further legal obligation to reasonably accommodate employees refusing to be vaccinated on medical or constitutional grounds. The constitutional rights that come into play are the right to bodily integrity and the right to religion, conscience or belief. This too is not an absolute obligation and would not apply where the effort and cost involved in accommodating the employees results in unjustifiable hardship.

Where an employee objects to the vaccination requirement on religious grounds, employers must take note of the principles that have been developed by our courts when it comes to alleged unfair discrimination on the basis of religious beliefs.

There are two seminal Constitutional Court cases. The first is *MEC for Education: KwaZulu-Natal and Others v Pillay [2008]* where the Constitutional Court held that in order to determine if a practice or belief qualifies as religious, a court should ask only whether the claimant professes a sincere belief. Further, in *Prince v President, Cape Law Society, and Others [2002]*, the Court confirmed that it should not be concerned with questions of whether, as a matter of religious doctrine, a particular practice is central to the religion. The question is how central the belief is to the individual's religious identity.

These principles were applied in the employment context in the case of *TDF Network Africa (Pty) Ltd v Deidre Beverly Faris [2018]*. The Labour Appeal Court reiterated that even where individuals who belong to a particular religion are not *obliged* to observe a certain practice, they would still be protected where they feel that the particular practice is central to their religious identity.

The Court explained that in this assessment, evidence of the objective centrality of the practice to the religious community at large would be relevant, but only in so far as it helps answer the primary enquiry, namely whether the employee regards the particular practice as central to her/his religious identity.

A roadmap for the way forward: What must an employer consider?

In assessing a request for a religious exemption, an employer can consider a range of factors, including evidence that speaks to whether the employee is part of a recognised religious group; the objective centrality of the practice to the religious community in question; and, importantly, whether the employee regards the practice as central to her/his religious identity.

In this regard, the employer can require proof of past conduct in support of the employee's religious practice. Where an employee's prior conduct contradicts the request for accommodation this too would be relevant to consider. For example, if the employee previously had a different vaccination (for example, a yellow fever vaccine for travelling) and now refuses the Covid-19 vaccination because of an alleged religious objection, then it would be reasonable to conclude that the belief is not sincerely held.

Where an employer determines that a religious belief sincerely held by the employee prevents her/him from being vaccinated, the employer should take steps to reasonably accommodate the employee, unless this would result in unjustifiable hardship.

Examples of potential ways to accommodate an employer can consider are:

- permitting the employee to work offsite or at home;
- permitting the employee to work in isolation within the workplace, such as in their own separate offices;
- requiring the employee to work outside of ordinary hours;
- in instances of limited contact with others in the workplace, requiring that the employee wears a N95 mask; or
- moving the employee into a position that does not require her/him to be vaccinated (such as a position that does not require face-to-face contact with co-workers or members of the public).

However, the employer need not accommodate the employee where this would result in *unjustifiable hardship* or insurmountable operational difficulty or expense for the business. In this case, an employer would probably not be required to create a new job to accommodate the employee.

Uncharted territory ahead

While the position as it relates to exemptions on the basis of religious grounds is reasonably clear, the position regarding the right to belief and opinion may be more difficult to assess.

Here, no definitive guidance exists from our courts on how these rights would be protected. In the recent case of *Cape Peninsula University of Technology v Mkhabela [2021]*, the Labour Appeal Court held that the combination of the rights of belief, opinion and religion in one section of the Constitution appears to signify protection beyond purely religious views.

The Constitution accordingly extends protection beyond the right to belief in a supreme being, and a person's agnostic or atheistic beliefs would therefore also qualify for protection.

In principle, 'belief' would relate to something other than facts that can be disproved. What is likely to be protected by section 15 of the Constitution are those deeply held convictions that are uninformed and unaffected by facts such as, for example, moral beliefs against consuming animal products.

In the context of a refusal to be vaccinated, an 'opinion' or 'belief' that the vaccine is not effective might be regarded as a statement of fact rather than a belief, because such statements might be disproved by medical evidence.

What is clear is that each case will need to be assessed based on its own facts and an employee's reasoning for her/his views will need to be given careful consideration.

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