Can my employer force me to get a Covid-19 vaccine?

With the daily rise in COVID-19 infections in the country, and the Government heeding to the call for South Africans to be vaccinated, we are indeed living in unprecedented times. One can argue that the labour market has been the hardest hit by this pandemic. With unprecedented times, come unprecedented measures that need to be implemented to preserve and sustain jobs.

Prior to the president announcing the arrival of the first dose of vaccines, many South Africans were uneasy about whether taking the vaccine shot would be compulsory for South Africans. The president, however, allayed the fears of those in doubt when he announced that the vaccine will not be compulsory and would be voluntary for all those seeking the jab.

Mr Thembelani Thulas Nxesi, Minister of Employment and Labour, has issued various directives on how businesses, employees and employers ought to implement certain safety protocols considering the COVID-19 pandemic.

These directives are, of course, not new, as in previous occasions, various directives and regulations had been gazetted. However, these specific ones deal with in detail with issues pertaining to vaccinations, and whether an employer can make same compulsory for employees.

A compulsory employer vaccination policy will have to be applied and considered in terms of our Constitution.

Section 12(2) of the Constitution states that:*) Everyone 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.

This right is, however, not absolute nor cast in stone, as the same Constitution permits the limitation of rights in terms of a law of general application to the extent that it is reasonable and justifiable in an open democratic society.

Section 36 of the Constitution provides for such limitation of constitutional rights. The limitation of rights is to be considered considering several factors, including "the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose". The right to bodily integrity can, therefore, be limited, provided such limitation complies with the constitutional requirements and the limitation is not overbearing.

Furthermore, the Occupational Health and Safety Act 1993 obligates an employer to have and maintain, as far as reasonably possible, a working environment that is safe and without risk to the health of the employees. Health and safety in the workplace are important because it safeguards the welfare of those in employment.

In essence, every employer must determine whether it is necessary to implement a compulsory COVID-19 vaccine policy for its business, where there is no law of general application. In certain instances, where employees can safely socially distance during regular work hours, with a lesser risk of transmission, it may be beneficial to encourage vaccination, and not make it mandatory.

The regulations give an employer an option of 21 days to decide as to whether, based on the business' operational requirements, vaccination can be made mandatory.

Should any employers indeed elect to make vaccinations in the workplace compulsory, they are required to identify the employees who would be required to take the vaccine owing to factors such as age, co-mobilities, and the kind of work they would be exposed to.

Employers are required to put in place a plan of action as to how employees will be phased back into the workplace, and how those identified as being at high risk of transmission should be vaccinated accordingly.

The plan of action should consider the following factors:

1. The operational hours of the business.
2. Employees who would be able to come into the business premises, and those who would be required to work from home.

- List of those employees who have been identified as vulnerable or rather high risk of transmission.

1. Employers should also as far as possible implement ways of minimising workers in the workplace.
2. Employers are also obligated to put in place measures for the daily screening of employees, clients etc.
3. Constitutional measures for employees who refuse to work due to fear of exposure to Covid-19.

Should an employer elect to make vaccinations compulsory, same should be included in the plan of action, as and when Covid-19 vaccines become available for the employees.

The directive states that employees still have a right to refuse the vaccine on constitutional or medical grounds, and should be allowed to consult with health, safety- or labour officials.

The employer is also obligated to provide transport to the relevant vaccination sites for the employees, and allow employees leave should they require same due to the possible side effects of taking the jab.

Should an employee refuse to be vaccinated on whichever relevant ground, the employer should:

1. Arrange counselling for the employee and permit the employee to seek guidance from a medical practitioner, fellow colleague, or trade representative.
2. If necessary, take reasonable steps to accommodate an employee in a position that does not require them to be vaccinated.
   The directive states that this ‘accommodation’ means any reasonable change that would allow an employee to keep their job, such as working offsite or from home, or in isolation at the workplace, or continuously wearing a mask.

It is, however, prudent, that we will all take steps to stay safe for our own sakes, and those around us. Consult your legal advisor should you not be sure as to how to implement these directives in the workplace.

Considering the above, when answering whether an employee may make employees receiving the COVID-19 vaccine compulsory, the short answer is yes – but same must be weighed considering the operational requirements of the company, and the employees' bodily integrity rights.

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