

VACCINATION IN THE WORKPLACE – LATEST INFORMATION

By Annelize Crosby, Agbiz head of Legal Intelligence

The issue of mandatory Covid vaccination in the workplace is a very sensitive topic. People tend to have very strong opinions on vaccination and the debate on mandatory vaccination has ruined many a relationship and may cause strife in the workplace and the marketplace. It is however one that the world, our country and businesses cannot shy away from.

The South African government has not yet taken a firm decision on mandatory vaccinations in South Africa, with deliberations still ongoing.

There have been two CCMA rulings on mandatory vaccination:

- The first case was a dismissal case and the arbitrator found that by refusing to be vaccinated, the employee was incapable of presenting themselves for work and therefore it was tabled as an incapacity dismissal. This will now be taken on review to the Labour Court.
- The second case involved Sasol, where a security guard refused to be vaccinated. Sasol suspended the employee without pay. The arbitrator found that this was not unfair.

Solidarity has brought a court case against the University of the Free State following its decision to require all staff and students to be vaccinated as of the 14th of February.

When deliberating on the consolidated directives for occupational health and safety issued under the Disaster Management Act, the National Economic Development and Labour Council (Nedlac) has recommended that companies follow a risk-based approach. The directions require each company to conduct a risk assessment to identify that company's Covid risk exposure and to put measures in place to protect its employees and members of the public. Since vaccinations became available, the directions were amended to include an Annexure ([linked here](#)) that can assist companies to decide whether or not mandatory vaccinations should be required. Relevant factors may include whether or not an employee interacts with the public and if the nature of work accommodates remote working arrangements.

In line with these guidelines, various businesses have already taken the initiative to introduce a mandatory vaccination requirement from their employees if they wish to access their place of work. Legal experts seem to hold the view that an individual employer can, under certain circumstances, make it mandatory for certain staff in the workplace to have the vaccination after consultations and discussions. These consultations will have to consider factors such as the employee's reasons for not having the vaccination. ¹

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Michael Bagraim: Solidarity vs University of Free State in vaccine mandate court case: <https://mg.co.za/education/2022-01-27-solidarity-vs-university-of-free-state-in-vaccine-mandate-court-case/>

In recent times, government has hinted at a vaccine mandate that would require the implementation of mandatory vaccinations in workplaces and the restriction of access to certain venues to allow only those who are vaccinated. Social partners at Nedlac are still deliberating on these issues. Meanwhile, Business Unity South Africa (BUSA) has indicated that it is seeking legal advice on the possibility of applying to the High Court for a declaratory order to provide additional legal certainty to back up the occupational health and safety guidelines. The application for a declaratory order will hopefully be heard before the end of April.

The medical profession generally seems to be in support of mandatory vaccination.

Agbiz will be carefully following all these developments and keep our members informed. For the time being, the consolidated OHS Directions are still applicable and should be used to guide employers in their decision. If an employer does decide to go in this direction, a risk-based approach should be followed that responds to the unique circumstances of the workplace and its employees.