Can South African employers require their employees to undergo mandatory vaccination and testing for COVID-19?

Introduction

South Africa is now deeply within its second wave of COVID-19 infections which appears to be significantly more widespread than that which prevailed during early to mid-2020. Since then, and in response to the pandemic, global efforts have successfully developed both expedited means of testing for the virus and, more recently, vaccines.

Employers may thus wish to explore the introduction of workplace policies which formalise mandatory testing and vaccination protocols in order to restore their workplaces to some level of normality, particularly workplaces where remote working is not suitable.

In this piece we attempt to give employers some guidance as to how to approach these issues. We must however stress at the outset that these questions are unprecedented and throw into stark relief the competing rights of individuals, their employers and the public at large. We also appreciate that a number of the issues involve moral and ethical considerations that are difficult, if not impossible, to resolve.

Vaccinations

On 7 January 2021, the South African Government publicised its COVID-19 vaccine roll-out plan. The plan involves a number of stages, the priority being to ensure the vaccination of approximately 1.25 million healthcare workers and those directly involved in the collection and processing of COVID-19 specimens. Thereafter it is planned to ensure the rapid vaccination of the more vulnerable segments of the population and those persons with underlying health conditions.

The Government has made clear on a number of occasions that whilst the uptake of vaccines was to be encouraged, it would not require South African citizens to become vaccinated. It may accordingly be safely assumed that the Government will not seek to legislate compulsory COVID-19 vaccinations. This is consistent with the reluctance by governments to require vaccinations for other contagions such as polio and MMR.

The Government aims to vaccinate up to 70% of the country's citizens over 16 years of age are vaccinated in order to reach herd immunity (the condition under which the spread of a contagious disease is contained) by the end of 2021. In order to monitor the uptake of vaccination, the Government intends to create a vaccine registration and contact tracing system.

The Government envisages sourcing vaccines from a limited number of suppliers. Vaccinations will be administered through a broad range of providers ranging from hospitals, clinics and medical scheme facilities. The Government also hopes to enter into public-private partnerships with medical schemes whereby such schemes would effectively cross-subsidise part of the costs.

Given the impact of COVID-19 on employers and employees in the private sphere, the prospect of early vaccination is particularly attractive. As a consequence, employers may wish to consider the introduction of workplace policies requiring mandatory vaccination as a precondition for ongoing employment. The subject of compulsory vaccinations has however become increasingly contentious and there are significant legal and moral facets that must be considered.

Given the lack of any legislation requiring vaccinations, employers will need to assess whether it would be permissible or desirable to require their employees to be vaccinated.

In our view, there would be considerable legal risk attendant upon employers adopting workplace policies that require their employees to be vaccinated in order to prevent them from contracting or spreading COVID-19. Any mandatory vaccination policy could, depending on the circumstances, violate section 12 of South Africa's Constitution, which guarantees everyone the right to bodily integrity.

Section 187(1)(f) of the Labour Relations Act of 1995 (the LRA) prohibits dismissals that discriminate against employees based, *inter alia*, on their religion, conscience, belief, political opinion or culture. The Employment Equity Act of 1998 (the EEA) offers similar protection against discriminatory conduct that falls short of a dismissal. The EEA also protects applicants for employment. Section 5(2)((c)(iv) of the LRA prohibits employers from prejudicing an employee (or person seeking employment) for refusing to do something that the employer is not lawfully entitled to require them to do.

In our view, it is unlikely that a Court would uphold a decision by an employer to subject an employee, or applicant for employment, to occupational detriment for failing to undergo a vaccination, subject to the exceptions that we discuss below. Thus, as a general principle, employees who refuse to undergo a vaccination may not be dismissed and, where such employees are unable to work remotely, ought to be allowed to return to the workplace, subject to existing safe working practices and symptom monitoring.

Employers would generally be limited to encouraging their employees to become vaccinated, provided that such encouragement does not go any further than providing information and facilitating the logistics, through the provision of special leave or hiring a nurse for the purpose. The employees should be informed that vaccination is not compulsory. The final choice must be that of the employee, and employers should take care to ensure that there is clear consent on the employee's part.

There may be some limited scope for employers to provide that only employees who have been vaccinated may work from the employer's premises. Thus, and in keeping with the employer's general obligation to accommodate objecting employees, a work from home option could be explored, provided that this is feasible given the nature of the employer's business. However, employers would need to carefully assess whether differentiating between employees on this basis would itself constitute a form of indirect discrimination.

Employers in certain limited industries might justify the dismissal of an objecting employee on the basis of that employee's incapacity to do the job. This would likely be limited to employees working in industries where there is regular and obligatory interaction with members of the public, for example the health industry or those caring for the sick and elderly in care homes.

In this regard, the Supreme Court of Appeals has clarified in *Department of Correctional Services v POPCRU & others*[1] that religious and personal beliefs may be trumped by to an employer's legitimate operational requirements or its occupational health and safety obligations. The Court did however emphasise that where a workplace policy offends against a central tenet of a person's religion or beliefs, the employer was obliged to demonstrate that there was no means by which the employee could be reasonably accommodated or that the employer's requirement was a fair and inherent requirement of the job.

Testing of employees

In the event that employers cannot or do not introduce mandatory vaccination policies, employers may wish to consider regular, or even daily, mandatory testing of employees for COVID-19, thereby minimising the risk of transmission within the workplace.

There are currently two forms of test for COVID-19, namely the polymerase chain reaction or PCR test and the rapid SARS-CoV-2 Antigen test. Whilst the PCR test is considered substantially more reliable it is impractical for workplace purposes given the lengthy time taken to obtain an outcome. In contrast, Antigen tests reveal an outcome within 15 to 30 minutes and are substantially cheaper, but are less reliable, particularly in respect of false-negatives.

Whilst antigen tests have, since December 2020, been approved by South African Health Products Regulatory Authority (SAHPRA) for public use, there is currently a shortage of antigen tests in South Africa due to global demand. Assuming that such tests are available, this may be an attractive alternative to mandatory vaccinations.

Mandatory antigen testing would constitute 'medical testing' in terms of section 7 of the EEA, and thus subject to a general limitation. Given that there is no national legislation requiring or permitting employers to test their employees by way of an antigen test (section 7(1)(a)), an employer seeking to introduce such a test would need to establish that "*it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job*" (section 7(1)(b)).

In our view, it is more likely that a court would be prepared to accept that mandatory antigen testing is permissible, provided that at least some provision is made for objectors who have legitimate concerns with how such tests are conducted. Again, case specific advice is recommended.

Employers might also wish to obtain disclosure from their employees as to whether they have received a COVID-19 vaccination. Before doing so, employers must be aware that seeking such information from employees would itself constitute 'medical testing' given the extremely broad definition set out in the EEA.

[1] (107/12) [2013] ZASCA 40 (28. March 2013)

Thus any "*any … inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition*" would constitute medical testing and thus be subject to the guidance set out above.

Employers must ensure that such collection, storage or transfer of data is done in accordance with the Protection of Personal Information Act 2013 (POPI).

As vaccination and testing data constitutes 'special personal information' in terms of POPI, employers may not process this information without the employee's consent. The processing of vaccination data must be done in accordance with POPI's general requirements, which include: collecting only the minimum amount of information required for the relevant purpose; retaining the information only for as long as it is necessary to fulfil the purpose for which it was collected, after which it must be destroyed or anonymised; ensuring as far as reasonably possible that the information is accurate and updated when necessary; taking measures to secure the confidentiality and integrity of the data, and reporting any security breaches to the relevant employee; and informing employees of various aspects relating to the processing of their personal information.

In summary,

- In general, employees may not be dismissed or subjected to material adverse action in the workplace for refusing to undergo a vaccination.
- Whilst there are circumstances under which an employer would be justified in taking adverse action against an employee who refuses to undergo a COVID-19 vaccination, such cases would be exceptional, and employers would do well to obtain case specific advice before introducing workplace policies. It is likely that other forms of incentive (such as public awareness campaigns and 'vaccination passports' for international travel) will be more successful to increase the uptake of vaccinations.
- Employee testing and screening, including enquires as to vaccinations would constitute medical testing under the EEA, but would in all likelihood be justifiable given the considerable risks attendant upon COVID-19 transmission.
- Employers will need to ensure compliance with POPI when obtaining employee medical data.