

Are SA employers allowed to implement a compulsory Covid-19 vaccine policy? - Part 2

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19 Jan 2021

In [Part 1 of this article](#), we looked at the legalities of mandatory Covid-19 vaccine policies. Here, we consider whether compulsory testing of employees for the coronavirus is allowed.



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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.

Employment policy

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. 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.

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