



health

Department:
Health
REPUBLIC OF SOUTH AFRICA



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Date:	27 August 2021		
To:	Honourable Minister Dr Joe Phaahla, Minister of Health	From:	Ministerial Advisory Committee (MAC) on COVID-19 Vaccines

ADVISORY
MANDATORY COVID-19 VACCINATION IN CERTAIN WORKSPACES

Problem Statement

Background

- Concern was raised about several employers making decisions about staff choosing not to be vaccinated against COVID-19. Guidance from VMAC on this matter was requested, for a rationale why this vaccine would be required in certain sectors.

Supporting document

- This advisory is supported by the *Background document: Mandatory COVID-19 Vaccinations in Certain Workplaces*, attached.

Points considered

- The Minister of Labour has recently released a Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces, to address, prevent and combat the spread of COVID-19 in certain workplaces in South Africa.
- The Direction states that employers need to educate and counsel health care personnel, and the general public, on the need to take the vaccine for two main reasons:
 - i. To ensure their own safety, because the country cannot afford to lose people to the virus, or to have its hospitals overcrowded with hundreds of COVID-19 patients in distress; and
 - ii. To ensure that the country attains 'herd immunity' or 'containment' as soon as possible, without which we are likely to continue under lockdowns each time a new wave or variant emerges - resulting in continuing contracting of the economy, unacceptably high unemployment, and restrictions on our Constitutional rights and civil freedoms.
- General legal principles from the Constitution, the National Health Act, the Disaster Management Act COVID-19 Regulations, as well as Common Law and Comparative Law, were reviewed. In summary:

- i. the law supports that it would be ‘reasonable and justifiable’ to compel people likely to be exposed to the risk of COVID-19 infection, to take the vaccine available in the country when backed by credible scientific evidence and approved by SAHPRA.
- ii. Measures such as counselling about the implications, risks and obligations of people who refuse the vaccine is required. They should also be informed that a possible risk of such refusal may be a court application, to compel them to take the vaccine so as to decrease the risk of them acquiring the SARS-CoV-2 virus and spreading IT to others.
- iii. It should be further pointed out that a refusal to take the vaccine cannot be used as an excuse to avoid doing certain work and if they have been provided with proper PPE, there is an obligation on them to carry out their workplace duties.
- iv. If scientific evidence emerges indicating that a vaccination also prevents the transmission of SARS-CoV-2, and people who have been exposed to the virus, have refused to take a COVID-19 vaccination, knowing that it can prevent transmission of the disease, they may run the risk of being prosecuted for having the ‘eventual intention’ to infect others.
- Legal principles applying to employment situations under the Occupational Health and Safety Act, the Ministerial Direction and Common Law were also reviewed. In summary:
 - i. Requiring COVID-19 vaccinations for all health care personnel who may be exposed to the risk of infection could be considered a ‘reasonably practicable’ method of protecting employees from acquiring the virus. If the failure to vaccinate such workers may cause a ‘serious risk to public health’ – in the unlikely event that the approved PPE is no longer effective – the employers would then be legally obliged to take steps to ensure that their employees are vaccinated – without their consent if necessary.
 - ii. The Direction gives employers detailed information about how they must protect their workers and what they must do if they wish to make vaccination mandatory.
 - iii. Should the COVID-19 pandemic reach the stage where the refusal by health care personnel to take a vaccine poses a threat to the health of the public, the courts are likely to regard the compelling of such persons to take a COVID-19 vaccine as ‘reasonable and justifiable’.
- Mandatory vaccination – international examples
 - i. The World Health Organisation currently does not support general mandates for COVID-19 vaccination. The WHO has instead argued that it is better to work on information campaigns and vaccine accessibility. Nonetheless, such policies are not uncommon, and the WHO has published a policy brief outlining some of the ethical considerations and caveats that governments and policymakers should evaluate when deciding on mandates for COVID-19 vaccinations
 - ii. Globally, several countries have implemented strategies making COVID-19 vaccinations in certain workplaces mandatory. In some countries, where employees refuse to be vaccinated, they are required to submit proof of negative SARS-CoV-2 tests weekly (see *Background document: Mandatory COVID-19 Vaccinations in Certain workplaces – Annexure A, for countries implementing mandatory vaccination strategies*).

- Ethical Considerations
 - i. Ubuntu philosophy and African values of interrelatedness and interconnectedness underscore the importance of public health preventative measures to allow for survival of communities. Therefore, achieving public health will trump personal choice. Examples of such mandatory measures include health care professionals being compelled to have hepatitis vaccines and the mandatory use of seatbelts.
 - ii. Ubuntu philosophy will require that COVID-19 vaccine uptake be socially and communally negotiated through discussions, public dialogues, and mutually respectful conversation with stakeholders and community members. This should ensure community participation and ownership, and transparency in the decision-making process.

Recommendations

1. The law and ethics are to be used as a medium of instruction and guidance.
2. All workplaces have the responsibility to ensure employees are vaccinated. In the next few months, as vaccinations are scaled up employees must use means to ascertain who is or is not vaccinated. A staggered approach which includes a medically justifiable reason for opting out of vaccination could be instituted. While considerations of religious beliefs and rights to body integrity are recognized, these rights can be limited in line with Section 36 of the Constitution.
3. The law is quite clear with regard to compulsory vaccinations in certain workplaces. However, there is an obligation on the state to ensure adequate, focused, science-based communication that builds up vaccine confidence.
4. The best option regarding employees who refuse to take a COVID-19 vaccination is for them to be counselled and educated about the two main purposes of the vaccination programme.
5. All counselling and education programmes linked to the vaccination roll-out strategy should emphasize not only the need to protect employees themselves and to prevent hospitals being overrun by COVID-19 patients, but also reduce onward transmission and contribute to wider protection of the community.
6. COVID-19 vaccination counselling and education programmes should also mention that because the pandemic constitutes a threat to the health of the public in general, the courts will have no difficulty in compelling employees in certain workplaces to take a COVID-19 vaccine.
7. Where employees refuse the vaccination despite everything the employer has instituted, the employer can exercise their right to dismiss the worker, in the best interest of the other employees and the public. The courts would be able to uphold this, as it follows the law which is very clear. An alternative measure could be the requirement that the employee produces a negative SARS-CoV-2 test on a regular basis, for example once or twice a week.

Thank you for consideration of this request.

Kind regards,



PROFESSOR BARRY SCHOUB

CHAIRPERSON: MINISTERIAL ADVISORY COMMITTEE ON COVID-19 VACCINES

DATE: 27/08/2021

CC:

- » **Dr S Buthelezi (Director-General)**
- » **Dr T Pillay (Deputy Director-General: Health Regulations and Compliance Management)**