

ADDENDUM TO SOLIDARITY'S CODE OF GOOD PRACTICE: COVID-19 VACCINATION COMPELLING EMPLOYEES TO RECEIVE COVID-19 VACCINATION

TABLE OF CONTENTS		PAGE
1.	INTRODUCTION	1
2.	VALUE OF COVID-19 VACCINATION	2
3.	RESPONSIBILITIES OF EMPLOYERS	2
	Risk assessment	2
	Plan for protective measures	3
	Responsibilities of smaller businesses	7
4.	RIGHTS AND RESPONSIBILITIES OF EMPLOYEES	7
5.	DISMISSAL OR OTHER NEGATIVE CONSEQUENCES FOR EMPLOYEES WHO REFUSE TO BE VACCINATED AGAINST COVID-19	10

INTRODUCTION

- On 1 October 2020, the Minister of Employment and Labour (*“the Minister”*) issued a directive setting out occupational health and safety measures for dealing with Covid-19 in workplaces (Government Notice 479, *Government Gazette* 43257 of 29 April 2020).
- On 11 June 2021, the Minister published an amended consolidated directive on occupational health and safety measures in workplaces in the *Government Gazette* (Government Notice 499, *Government Gazette* 44700) (*“the directive”*). This directive deals with, inter alia, the application of Covid-19 vaccination and specifically with the possibility that employers may compel employees at the workplace to receive Covid-19 vaccination.
- The directive applies to all employers who are allowed in terms of the Covid-19 regulations to continue their activities. It is, however, not applicable to employers in mining and workplaces where legislation regarding the merchant navy applies. The directive also has less stringent



www.solidariteit.co.za

provisions regarding the obligation of employees to receive Covid-19 vaccination for businesses with 10 employees or less.

VALUE OF COVID-19 VACCINATION

4. Solidarity appreciates and respects people's points of view and concerns in connection with the Covid-19 vaccine and vaccination, but is in principle not opposed to the concept of vaccination with regard to Covid-19 for the protection of individuals and communities.
5. Solidarity confirms that this is not about a "for or against vaccine" debate, but about the individual's freedom of choice, and that this freedom must be respected at all times.

RESPONSIBILITIES OF EMPLOYERS

6. Risk assessment [paragraph 3(1)(a) of the directive]
 - 6.1 The first thing employers have to do is to undertake a proper risk assessment, paying specific attention to the requirements of the Hazardous Biological Agents Regulations issued in terms of the Occupational Health and Safety Act, No 85 of 1993 [paragraph 3(1)(a)(i)].
 - 6.2 This risk assessment has to be undertaken with regard to –
 - 6.2.1 every workplace;
 - 6.2.2 every work activity performed at every workplace; and
 - 6.2.3 every employee.
 - 6.3 The purpose of this risk assessment is to determine the risks of Covid-19 infection at every workplace and to determine whether or not vaccination should be made mandatory.

6.4 The employer must consult with the following parties on the risk assessment and plan [paragraph 3(1)(c)]:

6.4.1 a representative trade union; and

6.4.2 a health and safety committee at the workplace, or in the absence of such committee, with a health and safety representative or an employee representative.

6.5 Within 21 days of the coming into force of this directive, i.e. after 11 June 2021 when it was published in the *Government Gazette*, employers must, in accordance with the provisions of sections 8 and 9 of the Occupational Health and Safety Act, 1993, and taking into account the operational (i.e. the practical) requirements of the workplace, determine the following:

6.5.1 whether the employer intends to make vaccination mandatory; and if so,

6.5.2 which specific employees must be vaccinated because of the risk of Covid-19 infection through their work or their risk for severe disease or death due to the employees' age or comorbidities [paragraph 3(1)(a)(ii)].

7. Plan for protective measures [paragraph 3(1)(b)]

7.1 Following and based on the said risk assessments, employers must develop a plan or amend an existing plan to eliminate or control the risk of Covid-19 infection at the workplace.

7.2 This plan must outline the following aspects:

7.2.1 the protective measures in place for the phased return of employees before reopening (note the required content of this plan as referred to in paragraph 3(2) of the directive); and

7.2.2 measures that the employer intends to implement in respect of the vaccination of its employees in accordance with the directive and taking into account the guidelines in Annexure C of the directive (see below).

7.3 Annexure C to the directive is very important, because it contains guidelines that have to be followed if an employer wants to make vaccination mandatory. The guidelines contained in Annexure C to the directive that have to be taken into account in the measures the employer intends implementing with regard to vaccination of the employees are as follows:

7.3.1 Annexure C deals with the most important aspects of a policy regarding mandatory vaccination at the workplace. The guidelines contained in this annexure are formulated generally and deviations from it may be justifiable in certain circumstances; it is possible, for instance, that the nature or size of a workplace will justify a different approach.

7.3.2 Annexure C, however, requires that employers first should try to enter into a collective agreement with trade unions concerning the measures to be complied with when an employer wants to make vaccination mandatory.

7.3.3 The underlying key principles are that employers and employees should treat one another with mutual respect and that employers and employees should put a high premium on the requirements of public health, the constitutional rights of employees (as emphasised by the directive) and the effective functioning of the employer's business.

7.3.4 Except where otherwise agreed in a collective agreement, the plan that compels any person to be vaccinated in terms of the Covid-19 plan must contain the following:

7.3.4.1 Every employee identified by the employer for vaccination must be notified of –

- the requirement to be vaccinated if and when a vaccine for that employee becomes available;

- the employee's right to refuse being vaccinated on the grounds of –
 - ✓ the employee's constitutional rights to bodily integrity and freedom of religion, belief and opinion; and
 - ✓ medical reasons, for example on the ground of a contraindication such as serious allergic reaction to vaccines or certain ingredients thereof;

- the right of the employee to be given an opportunity, at the employee's request, to consult with a health and safety representative, an employee representative or a trade union official.

7.3.4.2 Apart from the above requirement with regard to mutual respect and putting a high premium on the requirements of public health, the constitutional rights of employees and the effective functioning of the employer's business, the employer should, where reasonably practicable, provide transport to and from the allocated vaccination sites for purposes of Covid-19 vaccination.

7.3.4.3 In the event of an employee showing any negative side-effects as a result of the Covid-19 vaccination, the employer should give such employee paid time off to recover and it should be reported in terms of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993, if such employee has paid sick leave.

7.3.4.4 In the event of an employee refusing to be vaccinated on any constitutional or medical grounds, the employer should –

- counsel such employee and, if the employee so requests, allow the employee to receive guidance from a health and safety representative, employee representative or trade union official;
- refer the employee for further medical evaluation of there is a medical contraindication for the vaccination; and
- if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated.

7.3.5 “Reasonable accommodation”

- 7.3.5.1 For the purpose of these guidelines, “*reasonable accommodation*” means any modification or adjustment to a job or the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment.
- 7.3.5.2 It may also include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours.
- 7.3.5.3 In instances of limited contact with other persons in the workplace it might also be a requirement that the employee wears an N95 mask.
- 7.3.5.4 The applicable provisions concerning “*reasonable accommodation*” in the Code of Good Practice: Key Aspects of the Employment of People with Disabilities, issued in terms of the Employment Equity Act, No. 55 of 1998, have also been incorporated into Annexure C.

Responsibilities of smaller businesses

- 8.1 The directive has less stringent provisions regarding the obligation of employees to receive Covid-19 vaccination for businesses with 10 employees or less.
- 8.2 Subject to the employer's obligations in terms of the Occupational Health and Safety Act, 1993, to conduct a risk assessment, employers with 10 employees or less only have to comply with the measures as set out in paragraph 12 of the directive [paragraph 2(3) read with paragraph 12(1) of the directive].
- 8.3 The provisions of paragraph 12(1) of the directive, however, only deal with the usual and well-known measures of maintaining a safe distance between employees, hygiene protocols, the protection of vulnerable persons, and so on, and there is no provision with regard to employers being obliged to compel employees to be vaccinated against Covid-19.

RIGHTS AND RESPONSIBILITIES OF EMPLOYEES

9. Paragraph 13 of the directive provides that every employee, in addition to the obligations of employees in terms of the Occupational Health and Safety Act, 1993, is obliged to comply with the measures introduced by the employee in terms of the directive.
10. Note that the aforesaid obligation should be read with the recognition of employees' right to refuse being vaccinated on the basis of their constitutional rights or on medical grounds. In other words, the directive does not deny employees their right to freedom of choice not to receive the Covid-19 vaccination. Consequently, they may refuse, on the basis of the said constitutional rights or on medical grounds, to comply with the employer's instruction to be vaccinated against Covid-19.
11. Apart from the above, the directive places no specific responsibilities on employees with regard to employers introducing an obligation to receive Covid-19 vaccination.

12. However, the following rights and responsibilities of employees may be derived from the directive:
- 12.1 The directive recognises employees' constitutional rights to refuse vaccination on constitutional or medical grounds.
- 12.2 Employers are obliged to give guidance to employees who refuse to be vaccinated, and employees should at least listen to what the employer has to say in this regard.
- 12.3 Employees have the right to talk to a health and safety representative, an employee representative or a trade union official for guidance in respect of exercising their choice regarding vaccination.
- 12.4 Employers have the right to refer employees for further medical evaluation if there is a medical contraindication for Covid-19 vaccination. Employees therefore have to agree to such medical evaluation.
- 12.5 Employees are entitled to the employer taking steps to reasonably accommodate them in a position that does not require the employee to be vaccinated. Reasonable accommodation, however, does not simply mean moving the employees to alternative posts; it also means that employers have to consider other actions, for example allowing employees to work from home or in isolation at the workplace, changing the duties of employees in order to avoid or reduce the risk of infection, bringing about changes in the workplace, such as providing increased ventilation or partitioning between employees, or, as a last resort, providing suitable personal protective equipment ("PPE").
- 12.6 The directive provides for a number of measures to be taken by the employer in order to render the workplace safe and healthy against the Covid-19 risks. Employees, health and safety representatives, employee representatives and trade union officials should ensure that all these measures are duly in place and that the residual risks are duly determined and taken into account before employers turn to the requirement of mandatory vaccination. The

measures to be taken by the employer in order to render the workplace safe and healthy against the Covid-19 risks include the following:

- 12.6.1 Administrative measures (paragraph 4), including notifying and making employees aware of the Covid-19 risks and the measures taken to control them, the appointment of a Covid-19 compliance officer, monitoring and supervision, minimising the number of employees at the workplace, minimising contact between employees and members of the public, temporary closure of work areas for decontamination, etc.
 - 12.6.2 Maintaining social distance (paragraph 5).
 - 12.6.3 Medical screening for Covid-19 symptoms and exposure (paragraph 6).
 - 12.6.4 Sanitising, disinfecting and washing of hands (paragraph 7).
 - 12.6.5 Wearing cloth masks (paragraph 8).
 - 12.6.6 Specific measures for workplaces to which the public has access (paragraph 9).
 - 12.6.7 Ventilation (paragraph 10).
 - 12.6.8 Specific personal protective equipment (“PPE”) (paragraph 11).
- 12.7 In addition to the above, the right of employees to refuse to work under circumstances where there is an immediate and serious risk of exposure to Covid-19 infection, must specifically be noted.
13. In view of the above it is recommended that employees have discussions with their health and safety representatives, employee representatives and trade union officials and that they ensure that –

13.1 the employer has duly put in place all protective measures; and

13.2 they are capable of duly advising employees on their right to refuse to receive Covid-19 vaccination and they themselves also make proposals for the accommodation of the employees to the employer.

14. Regarding refusal on medical grounds to be vaccinated against Covid-19, it is important for employees to obtain timeous medical advice, confirmation and motivation from appropriate medical practitioners.
15. It is recommended that employees who refuse vaccination notify their employers in writing, giving reasons for the refusal and, where appropriate, attaching the necessary proof of such reasons, and submitting proposals regarding their alternative accommodation at the workplace.

DISMISSAL OR OTHER NEGATIVE CONSEQUENCES FOR EMPLOYEES WHO REFUSE TO BE VACCINATED AGAINST COVID-19

16. It is important to note that the directive makes no provision at all for dismissal of employees on the basis of refusal to be vaccinated. While the employer has the right, following a transparent and fair process, to identify specific employees for mandatory vaccination, the right of the employee so identified to refuse is emphasised in the directive.
17. In the extreme and extraordinary event of an employer being able to prove that vaccination is critical in the workplace for a specific identified individual and the individual refuses to be vaccinated, the normal labour law principle of fairness will dictate that the employer and the employee should attempt to solve the conflict of interests in the least drastic manner.