

Schools' rights and obligations in respect of employees' vaccination

In July 2021, the Department of Basic Education implemented the school sector's COVID-19 vaccination programme, whereby all school staff were given the opportunity to receive the vaccine. The programme concluded on 14 July.

Two issues arose in response to the vaccination drive, namely (i) whether an employer may compel its employees to get vaccinated, and (ii) whether the employer may disclose information about employees' vaccination status. These issues are unpacked below.

1. The legal position regarding employees' rights, and when the COVID-19 vaccine may be made compulsory in the workplace

Note that the legal position described here is in line with what is **currently regulated** by the disaster management directives. The Minister of Employment and Labour recently amended the Direction on Occupational Health and Safety Measures in Certain Workplaces.¹ Among others, the direction now also covers vaccination in the workplace.

According to the latest direction, **every employer** not specifically excluded therefrom must, within 21 days of the amended direction coming into effect, **undertake a risk assessment to determine whether to make vaccination mandatory depending on the employer's operational requirements**, and, if so, **identify employees who must be vaccinated** by virtue of the risk assessment, either based on their type of work or their risk of severe COVID-19 illness or death due to their age or comorbidities.²

The employer must also develop a plan, or amend an existing plan, outlining the measures it intends to implement in respect of its employees' vaccination in accordance with the

¹ GN 499, Government Gazette 44700, 11 June 2021. Available on www.fedsas.org.za.

² Direction 3(3).

direction and/or any applicable collective agreement. In doing so, the employer is obligated to take into account its employees' constitutional rights to bodily integrity and to freedom of religion, belief and opinion.³

A plan that requires employees to be vaccinated in accordance with the national vaccination roll-out should provide for the following:⁴

- The employer's duty to inform every employee of the obligation to get vaccinated as and when a vaccine becomes available, the employee's right to refuse vaccination on constitutional or medical grounds, and the opportunity for an employee to request to consult a health and safety representative, a workers' representative or trade union official
- The employer's duty to provide transport to and from established vaccination sites, if this is reasonably practicable
- The employer's duty to grant paid sick leave if the employee suffers side effects and is unable to attend work following vaccination, or to lodge a claim in terms of the Compensation for Occupational Injuries and Diseases Act

The important conclusion is that **the direction recognises and maintains an employee's right to refuse vaccination on any constitutional or medical ground.** Should the employee refuse, the employer may counsel the employee or allow the employee to seek guidance from a health and safety representative or trade union; refer the employee for further medical attention should there be a medical contraindication for vaccination, or take steps to reasonably accommodate the employee in a position that does not require vaccination according to the employer's vaccination plan.

³ Direction 3(4).

⁴ Direction 4(2) & annexure C.

It is further important to note the Department of Basic Education's Circular 4 of 2021,⁵ which determines that all educators who were granted the concession to work from home (for example due to comorbidities), and **who have opted not to take the vaccine, would be required to report for duty** when school resumes for the third term of the 2021 academic year.

2. The legal position regarding the employer's right to disclose employees' vaccination status

The school's duty to provide information in terms of section 59(1) of the South African Schools Act (SASA)⁶ does not relieve the school of its obligations in terms of the Protection of Personal Information Act (POPIA).⁷

POPIA prohibits the processing of special personal information, which includes a person's health information. Section 26 of POPIA provides:

"(1) A responsible party may, subject to section 27, not process personal information concerning-

*(a) the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, **health** or sex life or biometric information of a data subject; ..."*⁸

Subsections 27(1)(a), (b) and (e) then go on to stipulate:

"(1) The prohibition on processing personal information, as referred to in section 26, does not apply if the:

(a) processing is carried out with the consent of a data subject referred to in

⁵ 23 July 2021, par 3.1.3. Available on www.fedsas.org.za.

⁶ 84 of 1996.

⁷ 4 of 2013.

⁸ Own emphasis.

section 26;

(b) processing is necessary for the establishment, exercise or defence of a right or obligation in law;

...

(e) information has deliberately been made public by the data subject; ...”

Clearly, therefore, information on an employee’s health may be processed in the following circumstances only:

- With the employee’s permission
- If the employee has deliberately made the specific information public
- When processing is required to establish, exercise or defend a right or an obligation in law

Without the employee’s consent or own deliberate disclosure of his or her vaccination status, the information may only be made public if a third party can prove that (s)he needs it to establish, exercise or defend a legal right.

So, for a parent to obtain access to the special personal information of an educator, and specifically the educator’s vaccination status, the parent will have to prove that (s)he needs this information to protect a right. This right may include, for example, the best interests of the child, which section 28(2) of our Constitution describes as follows:⁹

“(2) A child’s best interests are of paramount importance in every matter concerning the child.”

The school already has a statutory obligation to comply with health and safety regulations to create a safe environment for learners (such as practising social distancing, sanitising

⁹ Constitution of the Republic of South Africa, 1996.

regularly, and wearing masks), which will ultimately serve the best interests of the child. Therefore, the parent would need to make out a compelling case as to why (s)he requires the information.

Information that has undergone appropriate de-identification is no longer considered personal information, and may be released to individuals requesting it. De-identification involves the removing or altering of information that identifies an individual. By implication, therefore, schools may disclose the percentage of employees vaccinated, as employees' identity would not be made known in the process.

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July 2021