**CAN AN EMPLOYEE WHO REFUSES VACCINATION BE FIRED?**

“This virus is unprecedented in our lifetime and requires an unprecedented response” (António Guterres, UN Secretary-General)

Most of us will celebrate the day we are offered a COVID-19 vaccination, but here in South Africa as overseas it seems inevitable that a significant number of people will refuse to be vaccinated. The reasons given for this stance have been many and varied, some mainstream and reasonable, others less so.

Perhaps some of those refusing will reconsider if and when they find they are denied opportunities available to those vaccinated - travel restrictions spring to mind but another example could be establishments like hotels and restaurants getting sticky on the issue if customer demand for safety grows.

**A knotty problem for employers**

Nevertheless, there will still be many “refusers” – all convinced that they are being entirely reasonable in refusing - and they could pose a knotty problem for you as an employer. On the one hand you have both legal and moral obligations to keep your workplace as safe as possible, but on the other hand refusers have their own strong legal and moral rights, both as citizens and as employees. For example, health, bodily integrity and privacy concerns, and concerns related to religious and cultural beliefs, raise issues of constitutional protection.

It boils down to a series of competing questions. Can you fire employees for refusing vaccination? Can your vaccinated employees and/or health officials hold you accountable for allowing unvaccinated employees into the workplace? Can employees who are vaccinated at your behest hold you liable if they suffer adverse reactions or health problems?

**Between a rock and a hard place…**

That all leaves employers walking a tightrope between competing sets of risks and employee rights, with the added complication of statutory requirements to provide a safe working environment.

There is unfortunately no clarity on what line our courts will take when addressing the many disputes that will inevitably arise, but amidst all the speculation there does at least appear to be broad consensus that a case-by-case approach is probably the safest and the fairest way to proceed.

That suggests that the most prudent course, at least until there is some clarity from the courts, is to tread carefully and lightly, and to act strictly in line with the general principles of our employment laws.

**Some general principles to bear in mind**

Government has made it clear that despite our unprecedented National State of Disaster, vaccination is voluntary. It will try to persuade us to get the jabs, but it won’t force us to. So, expect no intervention from that source other than on the educational side – see for example “COVID-19 Coronavirus vaccine myths and facts” on the Government Information website.

The fundamental employment law principle of fairness in both procedure and reasons for dismissal will remain critical to the outcome of any legal dispute.

Beware “automatically unfair dismissal” in the form of discrimination on any “arbitrary ground”, specifically including grounds such as “…age, disability, religion, conscience, belief, political opinion, culture...” – any or all of which might underlie an employee’s objections to vaccination.

Amongst other constitutional protections we all have the right to “bodily … integrity” so it is vital to adequately address individual health concerns, such as those around adverse reactions and side-effects. Ongoing reports of some vaccines being paused from use internationally (at date of writing, said to be an over-reaction by the countries in question) will contribute to these concerns, and the cautious will need reassurance.

As always, and without losing sight of the need to address each individual employee’s concerns on a case-by-case basis, aim for agreement and consensus in the workplace via consultation. A full risk assessment specific to your workplace, and the educational resources mentioned above, could be invaluable here.

Set a workplace policy on vaccination – contravention of a fair and reasonable policy will lay the groundwork for any charge of misconduct. Decide whether a flexible policy would suffice or whether mandatory vaccination is essential. Consider every possibility and circumstance – for example, can concerned staff be allowed to work remotely? Would employee fears be alleviated by access to specific medical advice? Do you operate in a sector (health care or retirement perhaps) where vaccination will be considered essential? And so on…

Every business will have its own particular business activities, needs and employees. So most importantly, take advice specific to your workplace!