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‘No Job, No Job’ — Can Employees be Compelled to Vaccinate Against COVID-19?

The National Immunisation Programme has begun. The COVID-19 vaccine will soon be widely accessible to the public. Many employers are contemplating the same question: Can employees be compelled to vaccinate against COVID-19 or alternatively, can employers introduce a “no vaccine, no entry” policy?

The answer is not as straightforward as one might think. Compulsory vaccination interferes with the right to respect for one’s private life, which encompasses both his physical and psychological integrity.¹ Employers generally therefore cannot compel their employees to be vaccinated. As will be discussed below, however, there may be instances where compulsory vaccination is justified.

Currently, only employees covered under the Employees’ Minimum Standards of Housing, Accommodations and Amenities Act 1990 may be required to vaccinate against COVID-19.² For other employees, it is left open as to whether employers can require them to be vaccinated. In determining whether they may require their employees to vaccinate against COVID-19, employers should consider the following factors:

- (a) The employer’s obligations and duties under the Occupational Health and Safety Act 1994 (**OSHA**);
- (b) The need for the employees to be vaccinated; and
- (c) The employees’ reasons for refusing vaccination, if any, and whether such reasons can be reasonably accommodated.

With the immunisation drive barely a month old, there are no reported cases in Malaysia pertaining to this matter. In this regard, guidance is sought from relevant cases from other jurisdictions.

(a) The employer’s obligations and duties under the OSHA

Every employer has a duty under the OSHA to ensure, so far as is practicable, the safety, health and welfare of all its employees at the

¹ *Solomakhin v Ukraine* [2012] ECHR 451
² Section 24J(f)

office.³ Non-compliance with this duty may lead to a constructive dismissal claim under the Industrial Relations Act 1967.

In a case in Ireland,⁴ an operations coordinator claimed that she was constructively dismissed following her employer's refusal to implement work-from-home (**WFH**) arrangements following the COVID-19 pandemic. The Irish Workplace Relations Commission found in favour of the employee. In doing so, the Commission considered the employer's duties under the Irish Safety, Health and Welfare at Work Act and held that compliance with these statutory duties is an implied and fundamental term of the employment contract and significant non-compliance could represent repudiation of the employment contract. In reaching its decision, the Commission considered the fact that: (a) social-distancing practices were not practicable, given the confined nature of the office workspaces; (b) employees were able to WFH on a rotational basis considering their scope of work; and (c) the workplace preventive measures taken, such as supplying cleaning materials, PPEs and the shifting of workstation arrangements were considered inadequate in eliminating the risk of virus transmission between employees as compared to allowing them to WFH.⁵

In respect of requiring vaccination, there was a New Zealand case where an employer was held liable for not taking practicable steps to ensure that its employee, a janitor, was not exposed to the risk of contracting Hepatitis B. This resulted from the employer's failure to offer the employee either a screening or vaccination for the virus which was a requirement under the company's policy.⁶ The outcome was different for an employer in another New Zealand case concerning its employee, a support worker for the intellectually disabled, who had contracted Hepatitis B while attending to a client under her care. Here, in the absence of a company vaccination policy, the District Court held that it was not practicable to demand that an employer protect the employee's safety by requiring a blood test when it had no authority to do so, even more so by requiring him to get vaccinated.⁷ In both cases, the District Courts' findings were reached by auditing the employer's health and safety policies at the workplace.

From the foregoing, it would appear that an employer may be able to justify implementing a mandatory vaccination policy on the basis that it is one of the steps taken to comply with its obligations and duties under the OSHA.

(b) The need for employees to be vaccinated

One of the considerations in determining the need for a mandatory vaccination policy would be the nature of work undertaken by the employee.

³ Occupational Health and Safety Act 1994, s 15(1)

⁴ *An Operations Coordinator v A Facilities Management Service Provider* [2020] WRC ADJ-00028293

⁵ *Ibid*

⁶ *WorkSafe New Zealand v Rentokil Initial Limited* [2016] NZDC 21294

⁷ *Department of Labour v Idea Services Ltd* [2008] NZHSE 37

In *Hustvet*,⁸ the employee was a living skills specialist at a rehabilitation centre. Her role involved assisting clients with disabilities in developing and maintaining independence in their home and community. It was a requirement in her employment to carry out a health screening to disclose whether she has immunisation to Rubella and to take a vaccination if she does not. While the employee had carried out the health screening which disclosed that she was not immunised to Rubella, she did not take the required vaccination. She was subsequently dismissed. The US Court of Appeals found that the requirement for vaccination was reasonable as it was job-related and consistent with business necessity to ensure that employees were medically safe to undertake their engagements with clients, who were individuals with compromised or fragile immune systems.

Likewise, the requirement for mandatory flu vaccination for employees of a childcare centre⁹ and hospital¹⁰ was held to be lawful and reasonable as the nature of the business therein involves close contact with young children and infants.

In the particular context of mandating COVID-19 preventive measures, the following guidelines and/or policies were upheld by the courts:

- (a) The workplace policy implemented by a retirement home, requiring its employees to take a bi-weekly swab test.¹¹ Here, the policy was held to be reasonable in view of the need to prevent the spread of COVID-19 at the retirement home, particularly since the virus can often be deadly for the elderly.
- (b) The workplace guidelines implemented by an airport requiring its workers to self-isolate following a COVID-19 swab test.¹² Here, an airport worker who had failed to self-isolate following a COVID-19 swab test was held to have placed countless others at risk of illness or death by her actions especially since she was working at an airport.

It is apparent from the above that a mandatory vaccination policy may be justified where the employee's nature of work: (a) presents a high risk of both transmitting and contracting the virus; (b) involves contact with clients who are individuals with weak immune systems or categorised as "high-risk"; and/or (c) requires employees to work in a contained environment where social distancing is not practicable. The need to vaccinate must be an inherent requirement of the job¹³ having regard to the nature of work carried out.

⁸ *Hustvet v Allina Health System*, 910 F.3d 399 (8th Cir. 2018)

⁹ *Ms Nicole Maree Arnold v Goodstart Early Learning Limited T/A Goodstart Early Learning* [2020] FWC 6083

¹⁰ *Robinson v Children's Hospital Boston*, WL 1337255 (D. Mass. Apr. 5, 2016)

¹¹ *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, 2020 CanLII 100531

¹² *Garda Security Screening Inc v IAM, District 140 (Shoker Grievance)* [2020] O.L.A.A. No. 162

¹³ *Ms Maria Corazon Glover v Ozcare* [2021] FWC 231

(c) *Employees' reasons for refusing vaccination, if any, and whether such reasons can be reasonably accommodated*

Employees may refuse to vaccinate against COVID-19 for various reasons. Such reasons can range from one's religious beliefs in opposing vaccination as a medical practice, to personal medical reasons, such as: (a) a history of allergic reactions;¹⁴ or (b) the risk that its side effects will seriously harm one's health, particularly if he has a pre-existing medical condition or is of old age.¹⁵

In *Fallon*,¹⁶ an employee was dismissed for refusing to be inoculated against influenza as he believed that one should not harm one's own body and that the vaccine may do more harm than good. His refusal was contrary to the employer's policy which required its employees to receive the flu vaccine unless they qualified for a medical or religious exemption. The US Court of Appeals dismissed the employee's claim of religious discrimination and found that his reason was not a religious one. Similarly, the same Court rejected an employee's refusal to vaccinate on medical grounds pertaining to her existing allergies as she was unable to produce sufficient medical evidence to substantiate such grounds.¹⁷

Some employees may have legitimate reasons to resist the vaccination. Employers should implement appropriate measures to reasonably accommodate such reasons. Such accommodation should not impose undue hardship on the employer's business,¹⁸ such as if it: (a) imposes more than a *de minimis* cost on the employer;¹⁹ or (b) would cause or increase safety risks of legal liability for the employer.²⁰ The accommodation of such employees' reasons should also not involve the elimination of an essential function of a job.²¹

In *Robinson*,²² an administrative associate in a children's hospital was dismissed following her refusal to vaccinate against influenza contrary to the hospital's policy. The policy mandated the vaccination of all hospital staff in a patient-care position. As the employee's duties required her to be in close proximity with patients, the US District Court held that to accommodate her request to remain in a patient-care position vaccination-free would create undue hardship as it would have increased the risk of transmitting influenza to the hospital's vulnerable patient population. The hospital was found to have reasonably accommodated the employee by offering her assistance in securing new employment in a non-patient care position where vaccination is not required.

¹⁴ *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, (3d Cir. 2018)

¹⁵ "Norway warns of Covid-19 vaccine risk after 23 die", Bloomberg (16 January 2021) <https://www.nst.com.my/world/world/2021/01/657879/norway-warns-covid-19-vaccine-risk-after-23-die>

¹⁶ *Fallon v Mercy Catholic Med. Ctr. of Se. Pennsylvania*, 877 F.3d 487 (3d Cir. 2017)

¹⁷ *Supra*, n 8

¹⁸ *Supra*, n 10

¹⁹ *EEOC v Oak-Rite Mfg. Corp.*, 88 Fair Empl. Prac. Cas. (BNA) 126 (S.D. Ind. August 27, 2001)

²⁰ *Ibid*

²¹ *Stevens v Rite Aid Corporation*, 851 F.3d 224 (2nd Cir. 2017)

²² *Supra*, n 10

The following other measures have been regarded as a reasonable accommodation of an employee's reason to refuse vaccination:

- (a) Offering a pork-free (non-gelatine) influenza vaccine to a Muslim employee who refused vaccination on religious grounds.²³
- (b) Granting a medical exemption to an employee who claimed to have a history of allergic reactions to the influenza vaccine. Here, the employee was required to provide medical documentation or records to support her claim.²⁴

As a matter of good practice, employers are encouraged to initiate and engage in an interactive process with their employees²⁵ to: (a) obtain more information regarding their reasons to refuse vaccination; and (b) subsequently work out an appropriate solution to accommodate such reasons, if possible.

Conclusion

In the absence of a statutory provision or guidance which requires employers to enforce mandatory vaccination on its workforce, the factors above should be thoroughly considered by employers before implementing a mandatory vaccination policy at their workplace.

Even if vaccination is an inherent requirement of the job, employers are advised to consider how they may encourage and incentivise employees to obtain the vaccine on a voluntary basis, rather than mandating it. By doing so, employers may be able to best maintain the balance between protecting the employees' right to respect for one's private life and ensuring a safe working environment.

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²³ *Ibid*
²⁴ *Ibid*
²⁵ *Supra*, n 21