

COVID-19: can employers in Africa mandate vaccinations?

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(with input from G.Elias & Co., Nigeria; ENS Africa, South Africa; Nour & Partners in association with Al Tamimi & Company and Africa Legal Network)

With the start of the roll out of vaccination programmes across the world, many employers are expectantly waiting for the programmes to be initiated so that they can get back to some degree of normality. Expectation is high in African countries, especially on the back of the COVAX initiative, launched by the World Health Organisation, which will hopefully accelerate the roll-out process. With countries such as the UAE, Israel and the UK already having large-scale vaccination programmes in place and having administered millions of doses, employers across the African continent are keen to see progress.

In this articles we take a look at the key legal questions in four key African jurisdictions namely, Egypt, Nigeria, Kenya and South Africa with a comparative analysis:

1. Can an employer force an employee to take the COVID-19 vaccine?

At present, none of the countries have any legislation in place that would allow an employer to force an employee to take the vaccine; there does not even appear to be any guidance or regulations introduced due to the pandemic in this regard. Egypt does however have, within its labour law, an obligation on an employer to take all precautionary measures to protect employees at work from any viruses that may occur. This is broadly in line with health and safety obligations under relevant legislation in Kenya and South Africa.

In South Africa there may be limited workplace specific circumstances (e.g. work places with a large number of employees and/or where there is a high degree of public contact) where mitigating measures may be difficult or impossible to impose, an employer may be able to justify imposing a mandatory vaccination programme.

Additional concerns in Kenya and South Africa have been raised that a forced or mandatory vaccination programme could infringe an individual's constitutional rights. Accordingly, any action should always be carefully considered in advance.

2. Can an employee refuse to take a vaccine if it has been mandated by an employer or government?

As one would expect, if it is mandated by law, an employee could not refuse to take the vaccine unless they fell into one of the current notable exceptions as stipulated by the vaccine manufacturers (such as pregnant women, those under a certain age, etc.) which would appear to be the likely position adopted by each of the countries. An additional consideration for employers in South Africa to bear in mind as a

justifiable excuse would be a person's religion or beliefs. The South African Supreme Court of Appeal has previously emphasised that where a work – place policy offends against an individual's religion or beliefs the employer must show that there were no means by which the employee could be reasonably accommodated or that its requirement was fair and inherent to the requirement of the job. In the current context, there may be grounds pursuant to this Court of Appeal decision upon which an employee could lawfully refuse to be vaccinated.

3. Can an employer discipline an employee who refuses to comply with an employer mandated vaccination requirement?

In the absence of specific laws, an employer in each of the countries must look at more general provisions under existing legislation namely under the overarching theme of refusing reasonable instructions from an employer. The consensus is that none of the countries have legislation that will allow an employer to terminate or impose disciplinary sanctions on an employee for refusing to take the vaccination. However, in Nigeria, should the requirement for an employee to be vaccinated be provided for in the employment contract, refusal to do so may allow an employer to take disciplinary action. In South Africa, it would not be advisable for employers to subject their employees to disciplinary action for refusing to be vaccinated and this should only be done in exceptional circumstances such as on the basis of legitimate operational requirements, where the employees are otherwise incapable of doing their job and there being no other means by which the employee can be reasonably accommodated.

Furthermore, in the absence of exceptional circumstances, a South African based employer should not object to an employee's return to the workplace in circumstances where they are unable to work remotely. In addition, in Kenya, based on current laws, an employer cannot refuse an employee the right to access the work premises in the absence of a vaccination as this may be deemed an unfair labour practice in contravention of an employee's rights under the Kenyan Constitution.

4. Where an employee has been vaccinated, can an employer require proof of the vaccination?

Egyptian law provides that an employer can request this information. In Nigeria this is not mandatory but can be required if it is stipulated under the terms of the contract of employment. In both Kenya and South Africa, the position is that whilst an employer can require this information, concerns around data protection or data privacy are paramount where employees are being asked to disclose their medical or vaccination history and the processing of such data may be subject to additional restrictions and considerations.

5. Where a vaccine is made mandatory, who will be responsible for cost?

As stated above, at present there is little or no legislation on this issue in any of the jurisdictions and the burden of cost will largely depend on the specific legislation to be introduced by each of the countries. The

Egyptian Minister of Health has publicly stated that employers will be forced to bear the cost of vaccinating employees and, in all probability, it is likely that the other countries will also shift this financial burden onto employers, where applicable.

It remains to be seen whether governments will introduce free vaccination programmes like most of the current vaccine programmes initiated around the world or whether potentially cash-strapped governments in Africa may want to pass this burden on to employers or individuals.

The roll-out of vaccination programmes across the world have had their challenges with new variant, increasing the number of infections as well as manufacturing delays, and one would expect that the African experience will be no different. The challenge for all employers in the absence of specific legislation that mandates vaccinations will be to find the right balance between protecting the health and safety of their employees (particularly those who are deemed to be vulnerable) versus their business and operational requirements.

It remains to be seen whether governments will introduce legislation to mandate vaccinations, a step which is likely to be supported by employers. However, the question of who bears the cost of the programmes will be a crucial determining factor on this issue. It is likely that, in order to avoid legal and constitutional challenges to mandated programmes (which may lead to delayed roll-outs), governments will probably launch vaccination programmes that will be accompanied by guidance and a strong recommendation that individuals who can be vaccinated seek to do so.

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