

# Covid-19: Mandatory vaccination of employees – Key considerations for employers

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**WEBBER WENTZEL**

in alliance with > **Linklaters**



# Welcome and introduction

# Presenters



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## Key statistics

## Covid-19 across the globe: key statistics

New cases

662 383

Positive cases

205 338 159

Deaths

4 333 094

Total vaccinations

4 428 168 759

# Covid-19 in South Africa: key statistics



## WHO on vaccines

- Vaccines “most effective” tool to protect people against Covid-19
- WHO has cautioned against countries imposing mandatory vaccination
- Ethical considerations must be borne in mind –
  - Necessity and proportionality
  - Sufficient evidence of vaccine safety
  - Efficacy and effectiveness
  - Public trust



# Vaccination legislation in South Africa



# Vaccination legislation in South Africa

- SA **does not** currently enforce any type of compulsory vaccination regime
  - Expanded Programme on Immunisation for children
  - International Health Regulations Act – Yellow fever vaccination
- At this stage, **no possibility of legislation** that will make Covid-19 vaccinations **compulsory or mandatory**
- Minister of Health has also indicated that in order to achieve herd immunity, **65% of our adult population needs to be vaccinated**. It will therefore be interesting to see how government will handle a scenario where we do not reach the 65% threshold through voluntary vaccinations

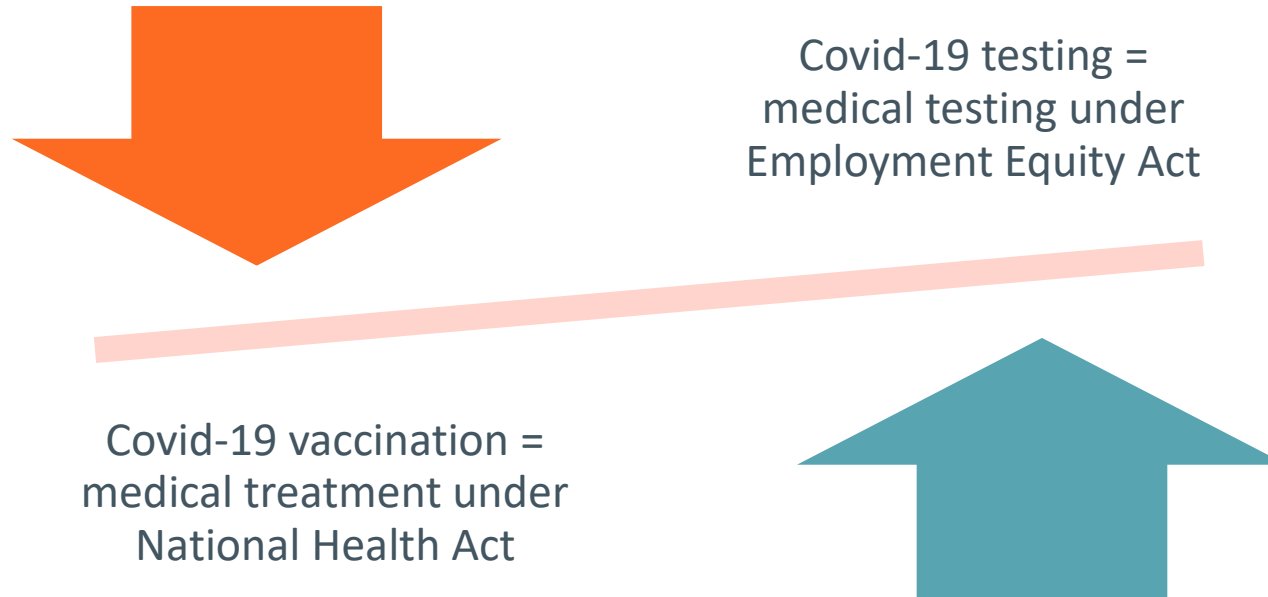
**Key question: Is it permissible for an employer to implement a mandatory vaccination policy for its employees in the workplace?**



# Testing v Vaccination

# Testing v Vaccination

Starting point – distinguish *testing and vaccination*



*NB: In terms of NHA, a health service (including medical treatment) may not be provided to a user without their consent*



# Revised Covid-19 Health & Safety Direction

## Revised Covid-19 Health & Safety Direction

Gazetted on **Friday, 11 June 2021**

Replaces previous direction

Mainly deals with issue of **mandatory vaccination**

Direction must be read together with other source documents listed in **Annexure A**

# Covid-19 mandatory vaccination policies

- **Revised Covid-19 Health & Safety Direction (11 June 2021)**
  - Applicable to certain workplaces only
  - Definition of “Covid-19 vaccine” included in Direction
  - Within 21 days, employer to conduct **risk assessment** to determine if mandatory vaccination is necessary:
    - **Identify employees** who will be subject to mandatory vaccination
    - **Develop a plan** that outlines measures for mandatory vaccination
    - Comply with **guidelines on mandatory vaccination policy** (Annexure C)
  - Employer must develop a **plan for Covid-19 vaccine rollout** to employees
  - Employee **education and awareness** on Covid-19 vaccines
  - **Paid sick leave** for employees who undertake vaccine and if employees experience major side-effects
  - Emphasis on primacy of collective agreements



# Covid-19 Mandatory Vaccination Policies

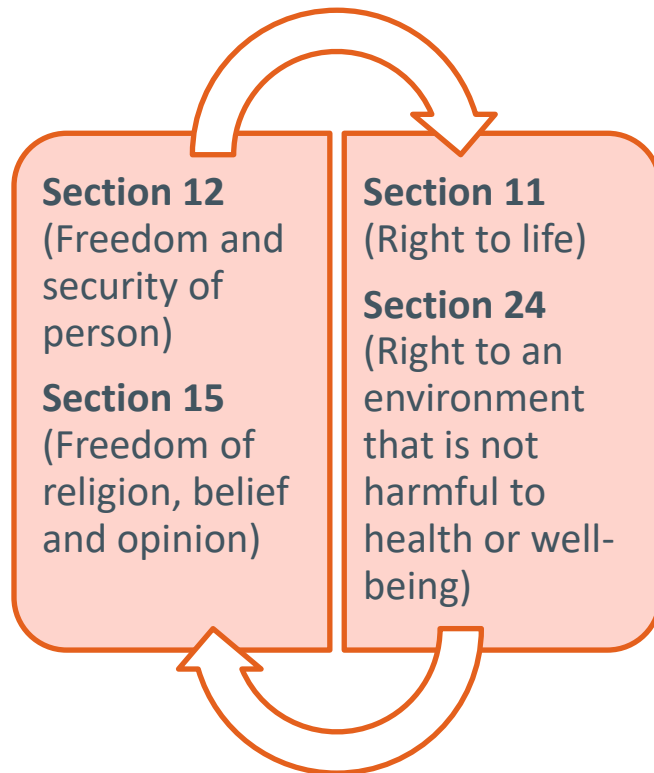
# Covid-19 mandatory vaccination policies

- **Occupational Health & Safety Act 85 of 1993**
  - Employers are under an obligation to maintain, as far as reasonably practicable, a **safe and healthy working environment for employees**
  - This requires an employer to make an assessment and to consider factors such as the severity and scope of the hazard or risk identified
  - However, can this obligation be used to justify employers imposing mandatory vaccination policies on employees?



# Covid-19 mandatory vaccination policies

- Constitutional rights at play



## *Limitation of rights*

- The nature of the right
- The importance and purpose of the limitation
- The nature and extent of the limitation
- The relationship between the limitation and its purpose
- Less restrictive ways of achieving the same purpose

# Covid-19 mandatory vaccination policies

Apart from the constitutional rights of employees, employers should also bear in mind certain sections of relevant employment-related legislation -

## Section 187(1)(f) of LRA

- Automatically unfair dismissals on account of discrimination (including on religious, conscience, belief, political opinion, cultural or arbitrary grounds)

## Sections 5 and 6 of EEA

- Offer similar protection to employees against unfair discrimination by employers

# Covid-19 mandatory vaccination policies

## Practical implementation and costs of mandatory vaccination policies

Employer would need to bear the **costs of the vaccine** if it requires employees to undertake the vaccine (mandatory vaccination)

**Changes to terms and conditions of employment** and reaching agreement with employees on those changes

**Personal information management** of vaccination records/history submitted by employees

# Covid-19 mandatory vaccination policies

## Practical implementation and costs of mandatory vaccination policies

**Reputation management issues** (eg employers who employ large workforces and do not seek to make vaccination compulsory may face public criticism for failing to do so)

**Liability** in event of illness or death due to vaccination  
(Consider Covid-19 vaccine injury no-fault compensation scheme – see Regulation 96 of Disaster Management Regulations)

**Management of employees who refuse vaccination**

- Constitutional or medical grounds
- Unreasonable or spurious grounds

# Covid-19 mandatory vaccination policies

What key aspects should the policy deal with?





## Q&A

# Contact us



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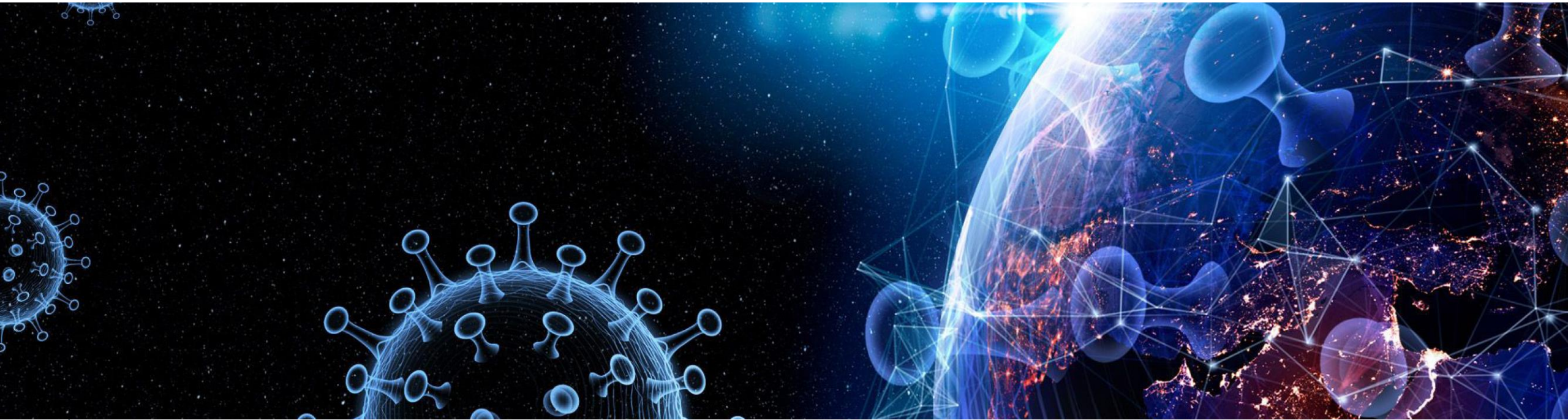


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