

## **“Employer and Employee Rights Regarding the Covid-19 Vaccine”**

- **Can an employee legally be dismissed for choosing not to take the COVID-19 vaccine?**

Whether or not an employer can legally terminate the employment of an employee who chooses not to take the COVID-19 vaccine depends on all the circumstances of each case which will be viewed against a backdrop of the employer’s written policies and procedures and the employee’s contract of employment, as well as the relevant legislation.

If the termination breaches common law (e.g. it breaches the terms of the contract) or the Employment Act 2000 (“the EA 2000”) or is in violation of the Human Rights Act 1981 (“HRA 1981”), the employee may have remedies in unfair, wrongful or constructive dismissal, breach of contract, and/or for breach of human rights.

S.18 of the EA 2000 prohibits employers from dismissing employees, “*unless there is a valid reason for termination connected with: a) the ability, performance or conduct of the employee; or b) the operational requirements of the employer’s business.*”

Depending on the nature of the business and level of risk, the number of employees, the size of the workplace, the alternatives available to protect employees, etc., the operational requirements of the business may necessitate that the employer implement new policies or contractual terms that require employees to get vaccinated as a condition of new or continued employment (say, for example, ICU nurses or dentists).

Employers have a duty to take reasonable care to ensure the health and safety of their employees under the Occupational and Safety Health Act 1982. This may impose a duty on employers in high risk workplaces to require employees take the vaccine.

As the law stands now, of course, every employee has the right to refuse to consent to the medical procedure of a vaccine, and there is no law in Bermuda that allows employers to force employees to be vaccinated against their will. However, an employee’s refusal may cause their job to be at risk, again, depending on the circumstances.

If we are dealing with a normal low-risk workplace, where employees can work over 6 feet apart comfortably or work remotely, and an employee is dismissed for refusing to take the vaccine, this would amount to a wrongful or unfair dismissal as there would be no valid and reasonable reason to require the vaccination. The current low levels of virus spread in Bermuda would also be a relevant circumstance.

In high-risk work places where an employer does consider it necessary in the specific circumstances of the workplace to require that its employees take the vaccine, then a new condition of employment that an employee be vaccinated may be considered reasonable.

In such circumstances, best practice dictates that employers should act reasonably by having consultation meetings with employees explaining why it is necessary, and educating them with unbiased, scientific literature on the vaccine, its safety and efficacy. Employers should also consider, before mandating mandatory policies, whether implementing alternative health and safety procedures could be equally as effective as receiving the vaccine (such as working remotely). Consulting with the relevant union for unionized employees is also highly recommended.

On the human rights side, it is important for employers to remember that an employee may choose not to take the vaccine because of an existing disability (which could include a health condition that prohibits being vaccinated such as an auto immune disease) or because the employee is pregnant, or because her religion or beliefs prevent her from taking it. These are all protected characteristics under the HRA 1981.

Section 6 of that Act makes it unlawful for employers to discriminate against persons based on any of these characteristics, e.g., by refusing to recruit someone or by dismissing, demoting or refusing to employ or continue to employ someone. The employer may not know that he/she is indirectly breaching human rights in favouring employees who took the vaccine for employment or continued employment; the employee will often not volunteer up his/her disability or beliefs and certainly not in the opening job interview. Human Rights is a serious business because the compensation that can be awarded under the HRA 1981 (including financial restitution for injury to feelings) does not have a cap (unlike the EA 2000 which limits unfair dismissal compensation to 6 months' wages).

In light of the above risks, the safer way forward for employers is to strongly recommend vaccinations to its employees (forwarding established, respected medical information from the Government health authorities) rather than requiring them to take the vaccine and risk the above types of damages claims.

- **Can employers look more favourably on candidates seeking employment if they've had the vaccine?**

An employer can choose to take into consideration whatever qualifications and characteristics it feels are relevant and suited to a particular position, provided the employer does not violate the HRA 1981. The Act prohibits discriminatory treatment by employers in recruiting or refusing to employ persons on the basis of protected characteristics.

Again the nature of the job and risk factor will be the most important considerations in deciding whether an employer may lawfully prefer candidates who have been vaccinated. If an employer is hiring for a front-facing and indoor position (closed space interior) such as a bartender or gym instructor, it would be of benefit for the employer to hire an employee who has been vaccinated, as it reduces the risk of the employer having to close his or her business for 14 days arising from a Covid exposure, as we have seen happen with certain establishments in Bermuda during the crisis.

Whether or not a person is vaccinated against COVID-19 is not a protected human rights characteristic, which means that it is generally not discriminatory for an employer to favour a candidate who has had the vaccine over one without the vaccine. However, as mentioned above, an employer could potentially find themselves defending a human rights claim if they engage in hiring practices that indirectly discriminate against applicants on the basis of a disability, pregnancy, or religion or beliefs who cannot take the vaccine.

Employers must also note that, although it is not statutorily prohibited (as it is in the U.K. and U.S.A) to ask job candidates about personal health information during the interview process, doing so could potentially be construed as discriminatory. We recommend that employers not ask potential candidates whether they have a vaccine unless they have a reasonable and objectively justifiable reason for considering this relevant to the position and can explain their reasoning.

Of course there is nothing to stop a candidate voluntarily from disclosing that she has had the vaccine and the employer could certainly take this into consideration when determining whether to hire the candidate, again, if the nature of the job and other circumstances of the specific case justify making the the vaccine-status of an applicant a relevant and fair consideration.

- **Do employees need to tell / prove to their employer whether or not they've had the vaccine?**

Medical treatment is confidential and thus, generally speaking, an employee is under no obligation to inform the employer about his medical treatments, conditions or medications.

However, the contract of employment or Employee Handbook may stipulate in what circumstances an employee may be required to disclose his medical condition, e.g. where prolonged absences are occurring or where the employee is applying for short term or long term disability insurance, etc.

Furthermore, employees have a duty to obey the lawful instructions of their employer. If it is the lawful policy of an employer to require employees to take vaccines (e.g. for employee nurses working in a rest home, the residents of which are at high risk), then the employee will have a duty to disclose whether or not they are vaccinated as a condition of continuing employment in that role.

- **If an employee chooses not to take the vaccine, but they become ill from the coronavirus, will they still be entitled to sick pay?**

Yes, pursuant to section 14 of the EA 2000, employees who have completed one continuous year of employment are legally entitled to up to 8 days of paid sick leave in the case of illness or injury (and entitled to more days if the employer's sick leave policy is more generous than the Act). Illness arising from the coronavirus will of course qualify

for sick leave as the issue is whether the employee is sick and unfit for work, and not what caused that sickness.

- **How do pre-existing conditions (that might prevent someone from taking the vaccine) fit into this?**

Many people have conditions (such as diabetes, suppressed immune systems and/or various types of cancers) that may prevent them from safely receiving other types of medical treatment. The COVID-19 vaccine is no different. It is important for an employer to take these types of considerations into account when enacting policies and procedures to ensure that they are not discriminating against employees who are unable to take the vaccine. As with any other disability, employers may be required to make reasonable accommodations (e.g. working from home or in their own designated office or wearing a mask all day whilst social distancing from others) for employees who are unable to take the vaccine before taking the drastic step of terminating their employment.

- **Can employees get any sort of bonus or preferential treatment if they do take the vaccine?**

At present there is no law that prohibits employers from using rewards to encourage employees to get vaccinated, provided there is no discriminatory treatment of persons based on the protected human rights characteristics noted above. Awarding bonuses or other preferential treatment to employees who receive a vaccination such as a promotion or a certain career fast-track may be viewed as a discriminatory practice, in breach of the HRA 1981.

We encourage employers to take the safe approach by not risking discriminatory practices that penalize employees in this manner, oftentimes unbeknownst (at first) to the employer. If an employer must introduce the vaccination requirement, then clear consultation and open dialogue should take place.

- **How will all of this differ in various employment sectors, such as healthcare, retail, public transport, international business (where people might not be interacting with the public on a daily basis) etc?**

The extent and standard of the legal duty of care on an employer to provide a safe workplace will vary based on the type of workplace and risk factors involved. Employers must act fairly and reasonably, taking into consideration all the circumstances of their workplace and workforce. Policies and procedures should be reasonable and applied consistently across the board, but they will necessarily vary depending on the nature of the workplace and the risks of exposure and infection faced by employees.

For example, hospital workers and bus drivers will be at a greater risk of exposure to COVID-19 than insurance executives who are working from home remotely. It might therefore be reasonable in the former examples to require vaccinations both for the safety

of employees, patients and the public, whereas in the latter example, employees are equally safe working remotely and isolating at home, and therefore requiring vaccinations would be both unnecessary and unreasonable.

Employers must also note that when the Personal Information Protection Act 2016 (“PIPA”), comes fully into effect, they will owe a higher duty of care to employees as regards the use and storage of their personal information. Sensitive personal information is defined to include information about the physical health of employees. Thus PIPA will need to be followed with respect to personal vaccine-related information about an employee going forward.

Employers should always get legal advice as it relates to their specific circumstances and not rely on general articles such as this in relation to their rights and obligations.

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