

VACCINE OR VACC-OUT:

THE COVID-19 VACCINE AND THE WORKPLACE



The arrival of COVID-19 vaccines in Malaysia has no doubt brought about a worldwide sigh of relief mixed with new concerns about the vaccines' effectiveness. With the much awaited National COVID-19 Immunisation Programme in place, we may turn our attention to the considerations of a post-vaccine world, most notably the impact of the COVID-19 vaccine in the workplace.

At the time of this writing, there exists no statutory provision mandating COVID-19 vaccination, nor imposing a duty on employers to vaccinate their employees, or allowing employers to compel their employees to be vaccinated. The Frequently Asked Questions ("FAQs") issued by the Ministry of Health ("MOH") on 31 December 2020 in this regard provide that: i) the vaccination **ought to be voluntary**; and ii) employees are required to fill in the **consent form** in order to obtain the vaccine¹. To date, the *MySejahtera* application has been updated with the COVID-19 vaccine registration module².

The MOH FAQs provide that the following categories of persons ought to be excluded from the COVID-19 vaccination ("**the excluded categories**"):

- i. persons with allergy to active material or other additional material in the COVID-19 vaccination [Q&A 16 of MOH FAQ];
- ii. persons with history of serious allergy (anaphylaxis) to medicine/ food/ vaccine which require treatment in the hospital [Q&A 19 of MOH FAQ];
- iii. mothers who are pregnant or breastfeeding her child [Q&A 19 of MOH FAQ];
- iv. persons with a weak immune system due to any disease or medical treatment such as HIV patients or cancer patients undergoing chemotherapy [Q&A 26 of MOH FAQ]; and
- v. persons who are confirmed or suspected positive for COVID-19. These employees are required to postpone vaccination [Q&A 27 of MOH FAQ].

¹ [Soalan Lazim Berkaitan Vaksin COVID-19](#)

² [The Star: MySejahtera app updated with vaccine registration module](#)

Employees who refuse the vaccine may fall into one of the following categories:

- a) Employees who are able to take the vaccine, but refuse to do so (**Category 1**); and
- b) Employees who fall within the excluded categories i.e. those unable to take the vaccine (**Category 2**).

Managing a partially vaccinated workforce presents a unique challenge to employers, which will necessitate balancing the right of individuals to choose for themselves what medical procedures to undergo, and the health and safety of their employees as a whole.

We shall endeavor to shed some light on the following concerns:

Can an employer terminate/take any action against employees in Category 1?

While an employee is at liberty to refuse to take a vaccine, it is another question as to whether the said refusal amounts to a ground for dismissal.

We have not found any reported cases pertaining to the employer's right to terminate employees' services due to refusal to take any vaccine or medication. We note that in Australia, a mandatory requirement on employees to take the vaccine could be a reasonable instruction, taking into consideration the nature of the work done by the employee. In this regard, we refer to the case of [**Ms Nicole Maree Arnold v Goodstart Early Learning Limited T/A Goodstart Early Learning \[2020\] FWC 6083³ \(Arnold's Case\)**](#) wherein the Fair Work Commission opined that:

*"While I do not go so far as to say that the Applicant's case lacks merit, it is my view that it is at least equally arguable that **the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations** which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason. Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has **unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position**, which involves the provision of care to young children and infants."*⁴

³ <https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2020fwc6083.pdf>

⁴ The opinion in Arnold's case was expressed as part of a decision to extend time for the filing of an unfair dismissal claim.

Whether or not an employer's instruction is "lawful and reasonable" will be fact-sensitive, which will of course be subject to the degree of risk or impact of the virus infection/transmission in that particular workplace/industry vis-a-vis the individual employee's personal predicament. Applying the opinion in Arnold's case, the greater the detriment to the employees, their colleagues or the customers, the more reasonable the requirement for vaccination will be.

Can an employer terminate employees in Category 2?

In light of the discussion in respect of Category 1 employees above, taking action against those in Category 2 will likely present an even greater challenge than in Category 1. In line with government guidance, and professional healthcare advice, these individuals, though they may be willing to take the vaccine, may not be allowed to do so. Depending on the nature of their work, an employer may be forced to remove the said employee from their duties. This situation was discussed in the case of [Ms Maria Corazon Glover v Ozcare \[2021\] FWC 231](#):

The Applicant was a long-standing employee of the Respondent. Her duties included visiting people and caring for them at their homes. In 2020, the Respondent directed that all employees have the flu vaccine. In previous years, the Applicant declined a flu vaccine for medical reasons and this was accepted by the Respondent. However, as a result of the pandemic, **the Respondent refused to roster the Applicant on shifts unless she was vaccinated.**

The Fair Work Commission held that by the Respondent enforcing its policy that unvaccinated employees not be rostered to work, the result was that the Applicant was terminated at the Respondent's initiative as she was not permitted to perform any work. The Commission opined:

*"...there is much discussion around the legality of employers requiring employees to be vaccinated against influenza in light of the adverse reaction a vulnerable person might have if they have influenza and then contract COVID-19. It is, of course, a very concerning proposition, **and medical evidence to-date suggests that such a combination is highly likely to increase the potential fatality of the individual.**"*

In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector."

[Note: This decision was in respect of the jurisdiction of the Fair Work Commission to hear the claim of Ms. Maria. The Commission did not arrive at a conclusion as to whether the termination was with or without just cause or excuse, only that there was in fact a dismissal]

The opinion of the Commission in Maria's case therefore suggests that, even in cases where an employee is unable to take the vaccine on medical grounds, termination may be justified in the context of the nature of the employer's business, and the impact of unvaccinated employees on its customers.

Would treating vaccinated and unvaccinated employees in different ways amount to discrimination?

With the advent of the vaccine, employers may be forced to treat employees differently based on their vaccination status. Such differential treatment may arise by:

- Granting of incentives or benefits only to employees who are vaccinated;
- Implementing work-from-home policies only for employees in Category 1 and 2; or
- Relocation of unvaccinated employees to other areas of the office, whereby contact with external parties/other employees may be reduced (similar to the social distancing policies already in place).

The relevant legislation that sheds light on this issue is the Occupational Safety and Health Act 1994 (OSHA).

Section 27(1)(a) of OSHA provides that **no employer shall dismiss an employee, injure him in his employment, or alter his position to his detriment by reason only that the employee makes a complaint about a matter which he considers is not safe or is a risk to health.** Therefore, in the absence of any Government directive/order mandating the vaccine, an employer may attract liability under Section 27(1)(a) of OSHA in the event an employer treats its employee differently by dismissing him, injuring him in his employment, or altering his position to his detriment by reason only that the said employee makes a complaint about:

- his employer's requirement for COVID-19 vaccination which the employee considers is not safe or is a risk to the employee's own health (for Category 1); or
- working from the office being a risk to the employee's health (Categories 1 and 2).

In the event such a complaint is made, it may be necessary to continue with work-from-home policies for both Category 1 and Category 2 employees, particularly in industries where remote work is possible, or those where the risk of transmission is high.

Differential treatment as described above may be accorded by the employer to its employees based on their vaccination status in so far as such treatment is proportionate, reasonable and justifiable for the employer to discharge its duty to ensure, so far as is practicable, the safety, health and welfare to work of all its employees under Section 15(1) of OSHA, as well as to ensure compliance with the Standard Operating Procedures (SOPs) which are already in place to mitigate the spread of the virus, rules, guidelines or directives issued by the Malaysian National Security Council, the Ministry of Health, Department of Occupational Safety and Health and/or other relevant authorities from time to time.

Whether a particular initiative is practicable, safe and good for the welfare of employees will necessarily turn on the facts of the matter. To mitigate the risks inherent to such an exercise, employers should engage with their employees, and bear in mind the welfare of employees in implementing such policies. For example, when moving employees to other areas of the office, care should be taken to ensure the areas are suitable for the employees in question. In this regard, we refer to the case of ***Najah Ahmad v. Consist College Sdn Bhd [2019] 2 LNS 1301***, where the Industrial Court, in allowing the Claimant's claim for constructive dismissal took into consideration amongst others, the fact that the Claimant (who was pregnant at the time) was instructed to move her office from Level 3 to the Ground Floor beside the motorcycle parking area, which was exposed to noises and fumes emitted from the motorcycles.

What is the employer's duty under OSHA?

- a) Section 15(1) of OSHA provides that it shall be the **duty of every employer** and every self-employed person **to ensure, so far as is practicable, the safety, health and welfare to work of all his employees;**
- b) Section 15(2) of OSHA provides amongst others, that without prejudice to the generality of Section 15(1), the matters to which the duty extends include in particular-

S.15(2):

...

- (c) **the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;**

...

- (e) **the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work; and**

- c) Section 16 of OSHA provides that except in such cases as may be prescribed, **it shall be the duty of every employer** and every self-employed person **to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.**

Moving forward, employers may choose to require new recruits to be vaccinated **as a condition of hire**⁵, which may arguably be justified in the context of health and safety at work.

In light of the National COVID-19 Immunisation Programme, what steps can employers take to encourage employees to get vaccinated?

a) Education

Reports indicate that, despite the various iterations of the COVID-19 vaccine having undergone clinical trials, there remains a high level of distrust towards the vaccine. This sense of distrust has been attributed to, amongst others, the samples used in vaccine testing⁶, the speed at which these vaccines were developed⁷ as well as misinformation spread through social media⁸.

To mitigate the impact of this distrust, employers could, in light of the National COVID-19 Immunisation Programme, endeavor to make credible information regarding the COVID-19 vaccine available to their employees alongside information on the importance or relevance of vaccination given the nature of the business. This is to enable them to make informed decisions as regards the COVID-19 vaccine based on accurate and/or credible data, to supplement the effort of authorities to combat what has been described by the the Fatwa Committee of the National Council for Islamic Religious Affairs (MKI) as “anti-vaccine propaganda”.⁹

b) Paid Time Off

This idea has gained some traction in the United States, with several large companies such as Aldi¹⁰ and Trader Joe’s¹¹ undertaking a scheme to encourage employees to be vaccinated, by paying them wages for the time spent being vaccinated.

⁵ [BBC: Coronavirus: ‘No jab, no job’ policies may be legal for new staff](#)

⁶ [There is a lot of distrust’: why women in their 30s are hesitant about the Covid vaccine](#)

⁷ [Survey suggests COVID-19 vaccine hesitancy stems from a distrust in the vaccine development and approval process](#)

⁸ [Covid-19: vaccines, distrust and lives](#)

⁹ [The Sun Daily: Covid-19 vaccine permissible for Muslims](#)

¹⁰ [ALDI Announces Plan for COVID-19 Vaccine for All Employees](#)

¹¹ [Aldi, Trader Joe’s and others will pay workers to get a vaccine](#)

c) Pre-Vaccination Allergy Screening

Employers may also choose to organise pre-vaccination allergy screening for their employees, or encourage employees to undergo such screening provided by the Government of Malaysia¹², so as to ease any reservations against the vaccine, and to enable their employees to make an informed decision to either accept or refuse the COVID-19 vaccine.

However, in implementing any new initiative/practice/policy, employers should always engage with their employees, and adopt a consultative approach, and act in accordance with good Industrial Relations practices and principles.

Please do not hesitate to contact us if you require further assistance and/or information on this matter.

Authors:



[Wong Keat Ching](#)



[Jude Peters](#)



[Julian Kie Chang Ming](#)

Assisted by:

Anthony Christopher Crimson

Nicole Goh Jia Yie

Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

Zul Rafique & Partners

26 February 2021

¹² [The Star: Muhyiddin: People to be screened for suitability before receiving Covid-19 vaccine](#)