



COVID-19 Vaccines; What Next?

Implications for Employment Law in Jamaica

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What are the Duties of Employers in respect of providing a safe workplace?



The Employer owes a duty to employees to provide safe workplaces under common law, statute and the Labour Relations Code

- The employment contract places a non delegable duty on the employer to take reasonable care to ensure the safety of his employees
- The employer should provide:
 - competent fellow workers
 - safe plant and equipment
 - a safe place of work
 - a safe system of working and effective supervision
- Where a statute imposes specific duties on an employer which is dependent on the nature of their operations, they will be strictly bound by those provisions with respect to securing workers safety and health e.g. **The Factories Act**
- The proposed **Occupational Safety and Health Act** which is currently being debated in Parliament will also impose duties in respect of safety in the workplace as defined in the legislation.
- **The Labour Relations Code** (Paragraph 12) also provides guidance to employers with respect to the Working Environment”

Management in consultation with workers or their representatives should seek to improve these standards. Management has a duty to-

(i) furnish, equip and otherwise provide factories, workshops, offices and other places where work is to be performed with such facilities as meet the reasonable requirements of safety, health and welfare regulations and to adopt suitable measures for the workers protection, and the prevention of the spread of epidemic or infectious disease;

(ii) organize work in such a manner as to provide in so far as is practicable and best guarantee for the workers' safety and health;

How can the Employer address the duty in the context of COVID-19?

In the context of the ongoing Covid 19 pandemic, the employer will therefore have a duty to take reasonable steps to ensure as best as possible that their workplace provides a safe environment for employees and customers/clients. In doing so they should:

- Ensure that guidance provided by the Ministry of Health and Wellness and mandates set out under the various **Disaster Risk Management Orders** are adhered to in the workplace setting;
- Provide as best as possible protective devices/equipment for staff e.g., masks, protective barriers, sanitizing stations, social distancing protocols and implement where possible flexible working arrangements to reduce the possible incidents of exposure to COVID 19 in the workplace.

The administering of the COVID 19 vaccines is another measure which could assist the employer in meeting their obligation to create a safe workplace for all employees. However, this option raises other issues which the employer must navigate to ensure that they are not exposed to liability. Note the following points:

- Currently the Covid 19 vaccine is not universally accessible in Jamaica, and there is no government mandate/statutory provision requiring persons to be vaccinated.
- The Covid 19 vaccine does not provide immunity from contracting and transmitting the virus. Its effectiveness is in the fact that scientific studies suggest that the virus' impact on persons who receive the vaccine would reduce the risk of death.
- Every Jamaican has the right under the Jamaican Constitution (Charter of Fundamental Rights and Freedoms) to freedom of thought, conscience, protection of private and family life, thus persons have the right to choose whether they wish to subject themselves to being vaccinated utilizing these grounds.



Can Employers mandate that its Employees must be vaccinated as a condition of employment?



Much will depend on the specific circumstances of each case:

- In the case of new hires, the employer could require that a prospective employee is immunized as a condition of employment. In such a case, the prospective employee would then be aware of the requirement and is then at liberty make a choice as to whether they will voluntarily subject themselves to vaccination prior to employment.
- In the case of persons who are already in employment, note the following:
To insist on an employee being vaccinated as a condition for continued employment would be considered a breach of the employment contract if there is no existing right to this effect.

If the employer seeks to mandate this, it would be a unilateral change to the contract and the employee may resign and claim constructive dismissal and compensation.

From a practical standpoint it will prove challenging for the employer to mandate that employees must be immunized as a condition of continued employment where there is no unimpeded universal access to the vaccine as is currently the case.

Where employees disclose a legitimate medical or religious reason for refusing to take the vaccine, the employer should take care not to act in any manner that would be inimical to the employee's interest by continued insistence on vaccination as a condition of employment



Recommended approaches to Employers



Note the following recommendations:

- Employers should consider providing employees with all relevant information about the vaccine and the surrounding issues as part of a public education drive to encourage them to make their own informed decision to take the vaccine.
- Employers should engage in consultations/discussions with employees and their representatives (i.e. unions, staff associations etc.) to seek consensus around the business need for the employees to be vaccinated, especially in high-risk professions e.g. within the health sector.
- There is no legal impediment to employers providing incentives (e.g. discretionary bonuses or other tangible benefits) as consideration for employees to take the vaccine; employers should however contemplate that where they take this decision it is imperative that they do not act in a discriminatory manner with respect to those who choose not to get vaccinated as this may well negatively impact staff morale and continued industrial relations.
- Consider establishing a company policy with respect to the Covid 19 protocols and keep it constantly updated as the legal issues continue to evolve and keep employees informed of developments.
- If an employee does not agree to be vaccinated, dependent on the nature of their position, the employer should examine whether alternate arrangements can be made to place them in other roles so they can continue in employment.
- It is not advisable that employers move to unilaterally or summarily terminate an employee because they refuse to be vaccinated. To do so will likely expose the employer to the possibility of a claim of unjustifiable dismissal, which may have a reasonable prospect of success.
- If termination must be considered as a last resort, a mutual separation with the employee should be contemplated.



RESOURCES

Carla-Anne Harris-Roper – Attorney-at-Law, Principal Consultant, Employment Matters Caribbean; Partner, Karene N. Stanley and Company

- Email: croper@employmentmatterscaribbean.com; chroper@knscolaw.com
- Website: www.employmentmatterscaribbean.com; www.knscolaw.com

