

VIRAL LAW

A blog series on legal issues arising from the *COVID-19* pandemic

"No Jab, No Job" - analysing
the legality of an employer-
imposed vaccine mandate.

by

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Introduction

With the end of the latest lockdown, and Sri Lanka's commendable progress in its vaccination drive, employers and businesses are now keen to open up and resume a sense of normalcy. Employers are similarly keen to avoid another wave, and the resultant loss in productivity and profitability.

Whilst previously it was sufficient for employers to ensure that mask mandates and social distancing rules were observed, the Delta variant of Covid-19, and the ensuing havoc caused by high transmissibility, has shown that vaccinations may be the only effective long-term solution. This would explain why although not compulsorily mandated by most governments, globally there is an emerging pattern of employers requiring employees, who work in person, to show proof of vaccination, or undergo regular testing, in order to be able to continue working.

Whilst this vaccine mandate has not caught on in a large scale in Sri Lanka, it is only a matter of time before local employers adopt a similar approach. This article aims to briefly explore the legality of such an approach, if adopted, by private sector employers.

Global Perspective

In several foreign jurisdictions the vaccine mandate has come through government directives rather than through employer proactivity. In the United States for example, federal workers are required, through an executive order, to be vaccinated. Moreover, the Path Out of the Pandemic COVID-19 Action Plan, which was released by the Biden administration in September 2021 requires employers with 100+ employees to mandate vaccination and requires any unvaccinated workers to undergo weekly testing. In New Zealand, those falling within the ambit of the Public Health Orders, can be required to be vaccinated to continue to provide services. Those falling within this mandate include those working at airports, quarantine centers, isolation facilities etc.

Although, jurisdictions like Australia have not been subjected to any governmental directives on mandatory employee vaccinations, major employers like Qantas are requiring that all their frontline workers be vaccinated.

Local Approach

As of date, there is no legislation or directive requiring employers to make vaccines mandatory for their employees. Any such approach adopted therefore, is one that would be imposed by an employer of its own accord. The question to be asked hence is whether such a mandate, if challenged, would be legally sound. As mentioned at the outset, this analysis focuses solely on private sector employers¹.

A requirement by a private sector employer, that its employees all be vaccinated in order to report to work, could be viewed as an introduction of a new term into the contract of employment. In terms of local labour laws, such an introduction cannot be done unilaterally. i.e. it would require the employee's consent. One possible exception would be contracts that expressly specify that employees are subject to various guidelines promulgated by the employer. In which case, the guidelines could be amended to include mandatory vaccination.

¹ Any issues relating to government mandates to state sector employees have therefore not been considered.

Based on this, it would not be possible for an employer to mandatorily require its employees to be vaccinated in order to be able to continue to be in its employment.

Could then an employer dismiss any employee who refuses to be vaccinated? An employer's right to dismiss employees, in terms of the Termination of Employment of Workmens Act No. 45 of 1971, is subject to the approval of the Commissioner of Labour or of the employee himself. The only exception to this is a termination on disciplinary grounds, which grounds are viewed strictly and mostly in favour of an employee. Although untested, a failure to be vaccinated would be highly unlikely to fall within the grounds of warranting termination on disciplinary grounds.

As such, it is unlikely that a “no jab, no job” approach could be undertaken by local employers, unless the same is mandated through legislation.

Alternative Approaches

Sri Lankan employers would therefore need to be creative in their approach towards making vaccines mandatory for existing employees. Some approaches that could be adopted are:

- (A) ***Incentivization:*** Employers could incentivize employees through various monetary and non-monetary rewards that could be availed of by producing vaccine cards. Such an approach has proven to be successful abroad. For example, a survey from Blackhawk Network, a US based payments provider, finds that, although some 40% of respondents were either unsure about getting the vaccine or did not plan to get it, certain incentives could boost vaccination rates. The said survey of 1,105 employees found that one-third of employees agreed to get vaccinated against COVID-19 for a reward of USD 100.²
- (B) ***Spreading of Information:*** Employers are also encouraged to have an ongoing stream of information channeled towards their employees on the dangers posed by Covid-19, and the success of vaccinations towards limiting the effects of the same. In doing so, employers need to maintain consistency and clarity in their notifications in order to be successful.
- (C) ***Facilitation:*** Employers should ensure that workers who opt to have their vaccine, or their second dose of the vaccine, are given the necessary time off, to not only obtain the vaccine, but also recover from any side effects. Employers could also partner with ride services in order to ensure transport to and from the vaccination centers.
- (D) ***New Hires:*** Employers would of course have the option of verifying vaccination statuses in making new hires and/or making it a term of employment that new employees are vaccinated against diseases such as Covid-19.
- (E) ***Lobby for a Vaccine Mandate:*** The National Institute of Occupational Health and Safety is, through the National Institute of Occupational Health and Safety Act No. 38 of 2009, empowered

² <https://hrexecutive.com/want-to-get-workers-vaccinated-try-these-6-strategies/>

to advise the Minister of Labour on occupational health and safety related legislation that is required to maintain occupational health and safety. Employers should lobby the said Institute to advise the Minister of Labour on the benefits of a compulsory vaccination policy in workplaces.

Conclusion

An employer introduced vaccine mandate, to existing private sector employees, is likely to be successfully legally challenged by a local private sector employee. As such, employers would need to adopt alternative approaches until such time legislation is enacted making vaccinations compulsory.

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