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ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

FORUM

VOLUME 11 ISSUE 7

The Lawyers Newsletter for Business Professionals

MARCH 2021



COVID-19 VACCINES IN THE WORKPLACE: CAN EMPLOYERS MAKE THEM MANDATORY?

Catherine Ramnarine

The 'novel' Covid-19 coronavirus continues to live up to its name, presenting new and evolving challenges for businesses as time goes on. The latest of these is the imposition of what some have termed 'no jab, no job' policies, under which employers seek to make it mandatory for their employees to be vaccinated against Covid-19. Are such policies enforceable in Trinidad and Tobago?

Health Matters In the Workplace:

When it comes to matters of health, some could argue that there is an inherent tension between an employee's right to privacy and autonomy on the one hand and an employer's legitimate business interests on the other. An employee's rights in medical matters ought not to be lightly interfered with. However, they are not necessarily absolute. Employers can and do make enquiries and impose requirements on matters relating to employee health. For example, employers can make employment conditional upon employees being medically certified as fit to work, require employees to wear personal protective equipment or even terminate employees on medical grounds.

One can understand why some intrusion into matters of employee health might be reasonable. In certain circumstances, an employee's health might have a direct impact on their ability to perform their job and in extreme cases pose health and safety risks. For example, a forklift driver with bad eyesight or a roofer with vertigo could potentially pose a danger to

themselves and others.

That said, not every intrusion into an employee's health is justifiable. Where does mandatory Covid-19 vaccination fall along this spectrum?

The answer will be different for each employer and may even vary from job to job or between different worksites within a single organisation. Employers must carefully consider their own specific operational needs and objectives before making any policy decisions.

Employers could have a case for implementing Covid-19 vaccination policies where such policies:

- Are in furtherance of legitimate business objectives;
- Are reasonable and proportionate to those objectives;
- Allow for legitimate exemptions; and
- Are implemented in a realistic, practical and fair manner.

Legitimate Business Objectives:

Some employers might have legitimate business objectives in favour of mandating Covid-19 vaccination, such as promoting workplace health and safety, public health and even customer confidence. However, it will be important for employers to be guided by information and recommendations issued by local health and employment regulators and to assess whether, and to what extent, vaccination actually achieves their desired objectives. For example, the efficacy of vaccination in the prevention of asymptomatic transmission is not yet settled.

Reasonableness and Proportionality:

Even if an employer does have legitimate business objectives, this does not automatically entitle them to impose mandatory Covid-19 vaccination policies. Such policies must be also be reasonable and proportionate.

This means conducting an examination of:

- The risks that an unvaccinated employee might pose; and
- The extent to which such risks can be mitigated by other workplace controls such as social distancing, wearing face masks, sanitisation or remote work.

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PRIVATE HIRE 'PH' TAXIS:
Regularisation from an Insurance Law Perspective
Cherie Gopie



Operating a motor vehicle as a 'PH' taxi (private hire taxi) is illegal. Some argue that PH taxis provide a necessary service for the general public in Trinidad and Tobago particularly in areas or along routes that are not routinely serviced by public transportation vehicles or registered taxis. This argument does not change the fact that operating a private motor-vehicle as a 'PH' is in direct violation of existing laws and likely the insurance policy obtained in respect of such a vehicle. Unfortunately, arising from several recent tragedies involving young women who were allegedly passengers in such vehicles, comes clamour for change, including a renewed vigour to examine the issue of 'regularising' PH Taxi's.

Why regularise?

All public transportation services are legislated and regulated at a national level. The relevant laws and regulations include the Motor Vehicles Insurance (Third-Party Risks) Act Chap 48:51; the Motor Vehicle and Road Traffic Act Chap 48:50 and Regulations and the Motor Vehicles and Road Traffic (Enforcement and Administration) Act Chap 48:52. Pursuant to the MVRT Act and the MVRT Regulations, a distinction is made between private vehicles and vehicles used for public transportation. Accordingly a motor vehicle approved by the Licensing Authority of Trinidad and Tobago ("the Authority") for private use exclusively with seating accommodation for not more than eight persons is considered a private motor car and a motor vehicle used for carrying passengers for hire or reward, whether at separate and distinct fares for their respective places or not is considered a public service vehicle.

A motor car registered by the Authority for private use is prohibited by law from providing rides in exchange for money. Pursuant to section 8 of the MVRT Regulations, "No person shall use a motor vehicle for a purpose other than that for which it is registered." As such, the use of a private registered motor vehicle for hire or reward is an offence in Trinidad and Tobago. According to the MVRT (Enforcement and Administration) Act: First Schedule, item 2, failure to comply with the regulation attracts a fixed penalty of TT\$750.00.

As we are no doubt aware, this law is not enforced with any real consistency and there are in fact many motor vehicles registered by the Authority for private use which are illegally plied for hire and reward, referred to as 'PH' taxis.

Motor Vehicle Insurance Requirements

The Motor Vehicle Insurance (Third Party Risks) Act, Chap 48:51, Section 5 requires that a Certificate of Insurance be issued as evidence that there is an insurance policy in force that covers personal injury and property damage that may be caused by the motor vehicle. Motorists are required to produce a valid Certificate of Insurance on demand by a law enforcement officer or an officer of the Transport and Licensing Authority. This Act requires that, at a minimum, every motor vehicle must be insured against third party risks. It is therefore compulsory for all vehicles to carry at least third-party motor insurance cover for use on all public roads.

Limitations to Use

Typically, a policy of insurance obtained in respect of a motor vehicle would indicate "limitations as to the use" of that vehicle. Limitations as to the use may specifically restrict the use of a private motor vehicle to "social, domestic and pleasure purposes" and the carrying out of such activities may be done by an authorized driver. Therefore, the operation of a vehicle for hire with these limitations is in fact in contravention to the policy of insurance. The risk is a heavy one for those who use their private motor vehicle as a taxi. If there is an accident, the law does not permit an insurance company to deny liability to a third party even if the driver of the insured motor vehicle was not operating in accordance with the terms of the insurance contract. However, the insurance company can refuse to pay its client's own damage – that is, the damage to your own motor vehicle even under a Full Comprehensive section of the policy, since you are in breach of your contract. Moreover, even where an insurance company settles third party claims, it is generally entitled to recover its pay-out from its insured personally.

If 'PH' taxis are 'regularised' – whatever this means, how will the licensing of private hire vehicles affect existing Insurance laws and policies? Would premiums rise? Have Insurance companies been consulted with respect to the insurance of such vehicles to cover passengers? This is just one of the many issues to consider. In this regard, the national discussion in this arena should continue to a sensible and meaningful resolution, hopefully without further tragedy as its impetus.

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COVID-19 VACCINES IN THE WORKPLACE: CAN EMPLOYERS MAKE THEM MANDATORY? (CONT'D)

Catherine Ramnarine



It may be easier to make the case that mandatory vaccination is reasonable and proportionate in some industries - like health care, travel or hospitality - than in others. The position may even vary from job to job or between different worksites within the same business.

Even where other workplace controls exist, this does not automatically mean that an employer is bound to apply them instead of vaccination where there is a real risk that this would result in lower workplace efficiency, higher operational costs or require vaccinated employees to do more than their fair share of potentially hazardous or burdensome work.

Each employer would need to weigh the potential risks and requirements of their own operations before making a decision.

Legitimate Exemptions:

Some employees may be reluctant or outright refuse to get vaccinated. Their reasons for doing could potentially fall within the protected categories established under the Equal Opportunity Act. The Act prohibits discrimination in employment based on (among other things) disability and religion.

- **Disability:** It is possible that an employee might have a genuine medical reason for why they cannot be vaccinated. What should an employer do in such a case? As a preliminary step, it must be guided by medical opinion and not the employee's or its own personal view of the situation. It is reasonable to request that the employee submit a medical from a doctor confirming that they have a genuine medical reason why they cannot be vaccinated.
- **Religion:** Some religious groups may have an absolute objection to vaccines. Others may have objections to specific vaccines, such as those that involve testing on foetal cell lines. Religious objections may require a more nuanced response than objections based on medical grounds. That said, it is noteworthy that even the Vatican has reportedly issued guidelines for its own employees, warning that those who refuse the vaccine without proven health reasons could face penalties including the termination of the employment relationship.

Even if an employee does have a legitimate reason for refusing Covid-19 vaccination, this does not automatically mean that they would be exempt from a vaccination policy. The employer would again need to consider the risks that an unvaccinated employee might pose, whether being vaccinated is inherent or critical to the performance of the

job in question and the efficacy of alternative workplace controls.

It is also important to note that a generalised fear or scepticism of vaccines is not protected under the Equal Opportunity Act.

Implementation:

From a practical perspective, it is also important to ensure that any Covid-19 vaccination policy is implemented in realistic, practical and fair manner. This includes:

- Giving employees advance notice before the policy takes effect
- Allowing employees an opportunity to raise medical, religious or other objections
- Setting realistic timetables for employees to be vaccinated. It may not be practical to require all employees to obtain the vaccine immediately as it becomes available
- Considering offering paid time off to enable employees to both obtain and recover from vaccination
- Being clear on what evidence employers will require in order to prove vaccination

In a unionised environment, consultation with the recognised majority union may also be required.

Regardless of the strict legal position, no employer wants to risk losing or demotivating a good employee because of that employee's reluctance to be vaccinated. A more strategic and holistic approach would also include education and encouragement rather than a simple unilateral mandate. This would help to ensure employee buy-in to any policy that an employer might wish to introduce.

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The featured articles were previously published in the
Trinidad Guardian newspaper.

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
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