

# MANDATORY VACCINATION

1. Mandatory vaccination has not been prescribed in our Domestic Law so can an employer implement a mandatory vaccination policy in his/her establishment?
2. If an employer institutes a mandatory vaccination policy in his/her establishment and an employee refuses to get the vaccine, can the employer terminate the employee's service without paying severance?
3. If an employee is terminated as in the case of Question 2, is this discrimination and if so, what course of action(s), can someone take to contest discrimination?

## **Mandatory Vaccination Policy in the Private Sector**

*"Mandatory vaccination is, of course, an abrogation of individual rights, but it must be balanced against the collective rights of others—like public health and importantly, the protection of the individual worker himself or herself in a very high-risk environment. No right is absolute and law does not, or should not exist in a vacuum."* Professor Rose-Marie Belle-Antoine.

It is first important to note that the employer has a common law duty to provide a safe working environment for his employees.

*"The duty of care owed by an employer to his employees is well settled. It is to take reasonable care in all the circumstances of the case not to expose the employee to unnecessary risk. For convenience this duty is often split up into different categories such as safe tools, safe place of work and safe system of work. But it always remains one general duty. The duty of the employer*

*is to take reasonable care in regard to the particular employee and all of the circumstances relevant to that employee must be taken into consideration”<sup>1</sup>.*

It is well established that every employer has a duty at common law to provide:

- (a) A competent staff of men;
- (b) Adequate plant and equipment;
- (c) A safe system of working, with effective supervision; and
- (d) A safe place of work<sup>2</sup>.

It must be noted that the employer must take “reasonable care”. It follows therefore that the steps which the employer takes must be reasonable in all the circumstances. Is a mandatory vaccine policy, which abridges the rights of the employee and unilaterally alters the contract of employment reasonable in the circumstances of the employment? The answer to this question is based wholly on the circumstances of the employment.

While for a private doctor’s office, private hospital or health care service the answer may be a definite yes, similarly for front office persons who interact closely with customers in sales given the elevated risk of contracting the disease in the course of the employment, this may not be the same for persons doing inventory management or who are removed from interaction with customers or other staff members.

The keyword is reasonableness. In the latter circumstance, it may prove more reasonable to implement a mask mandate, along with social distancing and sanitization. This may be practical in assuring that the employer has discharged his duty to provide a safe working environment. **If it is that the employer is of the opinion that a safe working environment can only be provided through the vaccination of all employees, then a mandatory vaccination policy may be deemed reasonable in the circumstances.**

“In *Paterson v. Wallace & Co.* (2), Lord Cranworth said this (3): “When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman”.

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<sup>1</sup> Per Mitchell J in *Gloria Lake v. Antigua Commercial Bank* ANUHCv1999/0123

<sup>2</sup> Commonwealth Caribbean Tort Law 5<sup>th</sup> Ed page 160

### **Employer's Remedies for Failure to Adhere to Safe Working Environment Rules**

Regarding the second question, if an employer deems it necessary to implement a mask or mandatory vaccination mandate for there to be a safe place of work and an employee refuses, there are several options available to him;

1. Take disciplinary action against the employee under section 19 of the Protection of Employment Act,
2. Lay off the employee,
3. Dismiss the employee for a cause, giving notice or payment in lieu of notice, or
4. If the action of the employee is tantamount to serious misconduct, summarily dismiss the employee under section 15 of the Protection of Employment Act.

An employee who is laid off for a continuous period of 6 weeks or more, who is eligible for severance payment can claim for such a payment. An employee who is summarily dismissed is not eligible for payment of severance. An employee who is terminated with notice is eligible for severance.

### **Discrimination in Employment re: vaccination policy**

There is no basis in employment law for a claim for discrimination on the basis of a mandatory vaccination policy designed to create a safe place of work. Neither legislation nor the common law provide protections against termination on this basis, or recourse to the courts for termination on this basis.