

Shearn Delamore & Co.

*Covid-19 Vaccine — Can employers compel their employees to be vaccinated?*



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# Covid-19 Vaccine – Can employers compel their employees to be vaccinated?

## Introduction

Covid-19 has disrupted our lives and businesses at many unprecedented levels never seen before in the history of mankind. The recent announcements by numerous pharmaceutical companies of newly developed Covid-19 vaccines have been positively received by the world at large and many now have high hopes that our lives will now finally return to normal as we knew it<sup>1</sup>. However, the emergence of Covid-19 vaccines comes with its own set of legal challenges from the employment law perspective.

## Legal Position

In Malaysia, there is no statutory provision which imposes specific legal obligation on employers to vaccinate their employees prior to entry into a workplace or commencement of employment. In the absence of express statutory right or obligation, the question that arises is whether an employer can compel its employees to be vaccinated before entering the workplace or commencing employment.

In dealing with this issue, employers will need to take into account the following legal considerations:

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- a. The duty to provide a safe system of work;
- b. The medical risks arising from the taking of the Covid-19 vaccine; and
- c. Circumstances that may justify compulsory vaccination at the workplace.

## Safe system of work

At common law, employers are under a duty of care to provide a safe system of work for their employees. As an extension of this obligation, it would be fair to state that employers are under an obligation to devise and implement the necessary policies in their workforce in respect of Covid-19 vaccination.

There are no reported cases in Malaysia on this point but cases from New Zealand may offer useful guidance.

In **Department of Labour v Idea Services Ltd, [2008] NZHSE 37**, an employer was charged under Section 6 of New Zealand Health and Safety and Employment Act 1992 for failing to take *“practicable steps to ensure the safety of employees while at work”*. This emanated from an incident where one of its employees contracted Hepatitis B in the course of employment. The Court ruled that the employer could not insist its employees to undertake vaccination and that as long as the employer has advised its employees of the option for medical screening, the employer had complied with the relevant statutory duties. The court rationalised as follows:

*“It can hardly be a practicable step demanded of an employer to protect the safety of an employee to require a blood test that the employer has no authority to - enforce by either insisting that the test be carried out or by restricting or removing employment if*

*there is a refusal by the employee to do so. All that can be done is to strongly recommend such screening and as I have found the Defendant did so on many occasions.”*

Conversely, in **Worksafe New Zealand v Rentokil Initial Ltd [2016] NZDC 21294**, the employer had put in place a specific policy where it required its employment candidates to be tested for Hepatitis B as part of their pre-employment screening process. The policy further specified that in the event that a candidate was not immune to Hepatitis B, the employer would offer the said candidate the option of a Hepatitis B vaccination. However, in the said case, the employer failed to undertake its pre-employment screening process for an employee, despite the employee having raised the issue with his manager. The employer also took no efforts to offer the employee screening or Hepatitis B vaccination. Eventually, the employee was hospitalized and diagnosed with acute Hepatitis B infection. The employer pleaded guilty to a charge under Section 6 of the New Zealand Health and Safety and Employment Act 1992.

The duty to provide a safe system of work is also codified in Malaysia under Section 1(1) of the Occupational Health and Safety Act 1994 (**“OSHA 1994”**) which imposes a duty on every employer to ensure the safety, health, and welfare of its employees.

Pursuant to the duty to provide a safe system of work, employers must now appreciate the importance of introducing sound policies in the administration of Covid-19 vaccines.

## Medical risks

Implementing a vaccination program at the workplace is not without any legal and medical risks.

Not every person may react to vaccination in a similar fashion. One cannot rule out the possibility of an adverse medical impact to a vaccine recipient. As recent as October 2020, reports have shown that a seasonal flu vaccine in South Korea had resulted in a number of casualties, most of whom are elderly individuals.<sup>2</sup> This serves to show that vaccines, whilst may be effective on most occasions, is not unerring.

On this account, employers should be mindful of any potential side effects of any Covid-19 vaccine, particularly to employees that are classified in the “high risk” category. This category covers employees with pre-existing medical conditions or employees of a higher age group. One ought to have regard to the expeditious speed in formulating Covid-19 vaccines in less than a year, unlike more traditional medical vaccines with longer period of time taken to develop.

Hence, any arbitrary and rushed move to mandate vaccination at the workplace as a condition of employment without careful regard to the medical risks, without providing employees with sufficient medical information on the known potential side effects of the vaccine and without regard to higher risk groups, may result in the employer breaching its duty of care owed towards its employees.

## Exceptional circumstances that may justify compulsory vaccination at the workplace

Whilst employers are generally not permitted to compel their employees to be vaccinated, there may be instances where an employer is justified to require compulsory vaccination of employees at the workplace.

Employees in the frontline healthcare industry are exposed to heavy traffic of Covid-19 patients and therefore are at a higher risk of contracting Covid-19. Section 17 of the OSHA 1994 prescribes a duty on all employers to also ensure that persons, not being their employees, are not exposed to risks to their safety or health at the workplace. Given the ease of transmission of the Covid-19 virus amongst healthcare workers (who are themselves more readily exposed) and patients, there is a case to argue that employees in the healthcare industry should receive compulsory vaccination as a condition of employment, subject to certain exceptions such as employees with pre-existing medical conditions or higher risk employees.

Similarly, the need for compulsory vaccination may be more apparent in respect of employees who are continuously stationed in remote facilities over a long period of time with limited medical access. For example, employees who are placed in offshore facilities. Given the lack of access to immediate medical attention within a reasonable vicinity and the enclosed nature of the workplace with a high number of employees, there is case to justify the need for such employees to be inoculated with Covid-19 vaccine.

## Requirement for consent

For employers intending to implement a vaccination program or policy at the workplace, the most prudent course of action would be to secure the consent of their employees. Such consent should be very specific in nature with reference to the Covid-19 vaccine as opposed to a generic consent for vaccination. It is also important for employers to also provide employees with sufficient available medical information on the potential side effects of the vaccine so that employees can make an informed decision.

## Recommendation

Employers ought to be mindful of the various legal conditions and obligations in formulating policies for the administration of the Covid-19 vaccine.

Therefore, in introducing vaccination policies and programmes, employers may wish to consider the following guidance: -

- a. In general, employers cannot compel employees to be vaccinated.
- b. To advise employees of the known potential side effects that may arise, particularly in respect of employees in the “high-risk” category;
- c. The final decision to take the vaccine rests on employees;
- d. Employees’ consent to the Covid-19 vaccination should be expressed in writing.

Employers are advised to seek practical legal advice due to the novel and fluid legal issues that will likely arise from the roll-out of Covid-19 vaccines.

<sup>1</sup> <https://tinyurl.com/y2bvzafy>.

<sup>2</sup> <https://tinyurl.com/y5k2gvvf>.

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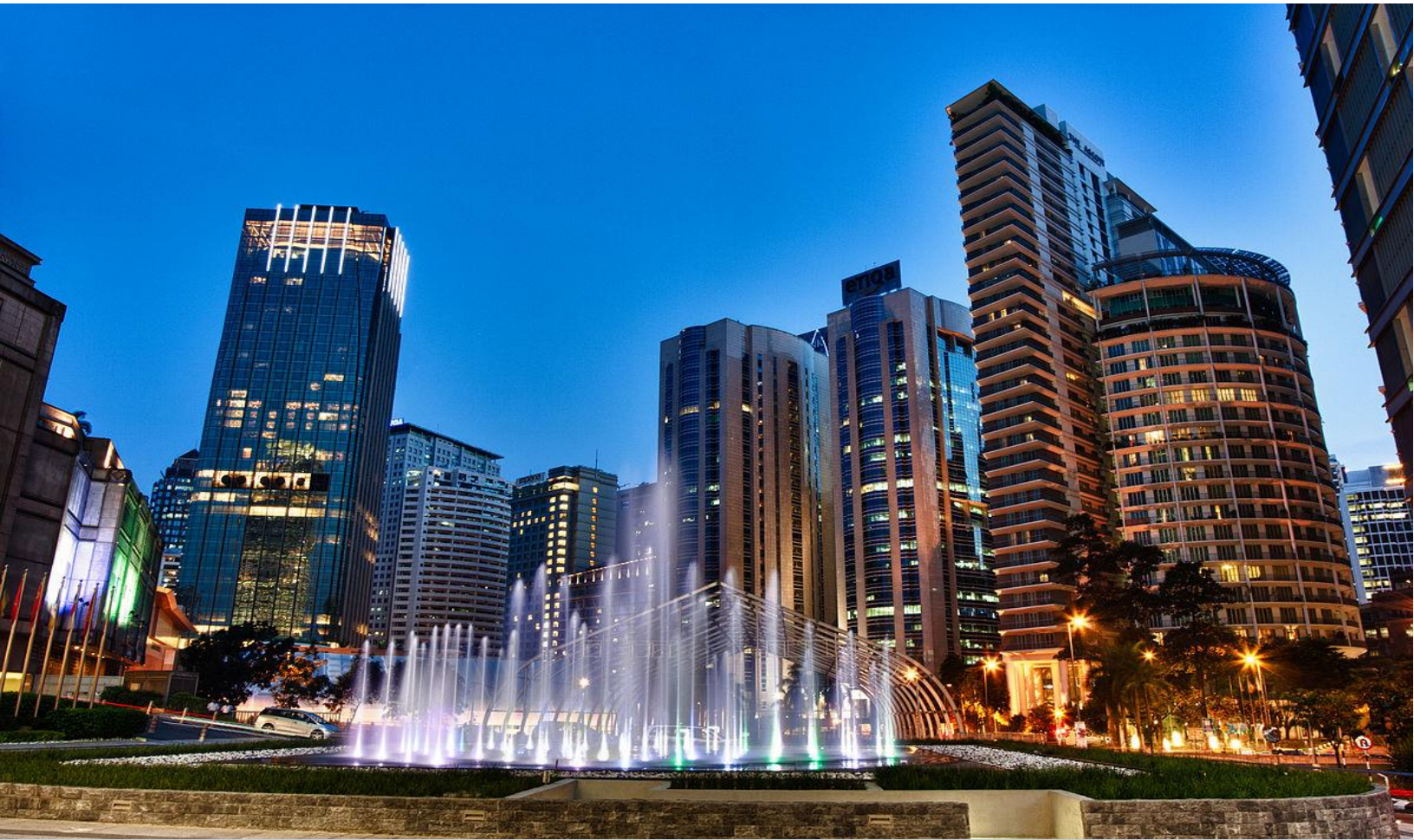


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