

# **Vaccinated and Unvaccinated Workers in the Labor Market**

Position Paper 18.3.2021

Covid-19 poses numerous challenges to the labour market. The most recent are dilemmas concerning the appropriate regulation of access to work for unvaccinated workers, and the possible infringement of labour rights that may ensue. Being the first country in which large scale vaccination took place, there is a heated debate within Israel on this topic. As part of the public discourse, 17 labour law experts from academic institutions around Israel have written the position paper presented below:

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We, a group of leading labour law scholars from Israeli law faculties, have been closely monitoring the public and legal discourse around the access of unvaccinated workers into workplaces. We are concerned that at this time, when a large share of the adult population in Israel is being vaccinated, there are calls to terminate the employment of workers who are not. To this end, we wish to emphasize a few basic principles of labour law and human rights that lie at the heart of Israeli law and international labour law. These principles should guide regulation on this issue, whether it is negotiated by the parties to collective labour law, the legislature, or in the labour courts' judgements.

At the outset we wish to underscore the personal and public importance of vaccination. At the personal level, data collected thus far indicates that the vaccine is highly beneficial in preventing infection, and in decreasing possible symptoms, serious morbidity, hospitalization and death rates. At the social level, the aims of stopping morbidity, caring for people at risk, reducing overcrowding in hospitals, are also strong justifications for supporting vaccination with the interest of protecting public health and promoting social solidarity. Therefore, we believe that providing positive incentives to encourage vaccination is important. We are also of the opinion that there are legal and moral justifications for distinguishing between vaccinated and unvaccinated individuals in certain contexts and circumstances.

However, such a distinction should not be based on a unified approach towards the issue, but rather distinguish between different contexts and circumstances. First, it is our view that it is necessary to distinguish between the regulation of leisure, travel and hospitality, and the regulation of workplaces. Second, we believe that within the workplace no 'one rule' should govern, but rather a series of principles that should be considered.

In workplaces:

- Special consideration should be given to the centrality of work for the livelihoods of individuals and their families, the basic right to freedom of occupation, the right to work, and the inherent connection between work and human dignity. Acknowledging these rights, even at times of severe disruption is essential.
- Employers' right to property as well as their prerogative power should be appreciated, alongside their duty and responsibility for sustaining a healthy and protected work environment for employees, customers, and other service recipients, like students,

patients and other third parties entering the workplace. At the same time, it is important to consider the discrepancies in power between workers and their employers, which lie at the heart of labour law's purpose and persist at time of crisis.

- Discriminatory implications of the distinction between vaccinated and unvaccinated workers should be considered, including equality for persons with disabilities who cannot be vaccinated, and the tight correlation between the rate of vaccination and socioeconomic status. There is serious concern that policies restricting the right to work for those who have not been vaccinated, will primarily harm the more disadvantaged workers in the market.

Given these general guidelines, and on the basis of previous judicial rulings on the effects of human rights at work, our position is that restrictions on workers who have not been vaccinated need to fulfill the following criteria:

1. Legitimate Purpose:

We believe that the general public goal of incentivizing vaccination is not a legitimate purpose for restricting access to the workplace and infringing labour rights. Two main reasons underlie our opinion on this matter: First, the power gap between the parties to the employment relationship, might infringe the basic idea, currently endorsed by the state, that people have the autonomy to choose whether to be vaccinated or not. When the loss of work is at stake, autonomy may quickly be transformed into a highly restricted and coerced choice. Second, restrictions on work during one of the most severe economic and social crises humanity has experienced, should be done with extreme caution, and solely for the purpose of upholding the employers' duty and responsibility for sustaining a healthy and protected work environment.

2. Relevance:

Distinctions among vaccinated and unvaccinated workers should be done only if relevant to the job performed. Therefore, one should ask whether lack of vaccination may harm other employees and/or third parties (students, patients or customers). The question of relevance depends on the type of job performed (for example, being vaccinated or not is irrelevant for an employee who works alone in a warehouse and does not have contact with others. The same cannot be said regarding a kindergarten teacher who has close bodily contact with kids)<sup>1</sup>. This question also depends on epidemiological knowledge, currently in study, on the effects of vaccinations, or lack of, on both the vaccinated and un-vaccinated populations.

3. Proportionality:

Employers must examine whether they have at their disposal alternative means by which they could achieve their appropriate and relevant goals, and which are less damaging to the worker. Thus, for example, the employer must consider whether the

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<sup>1</sup> This has also been decided by the regional labour court of Tel-Aviv in the case of 42405-02-21 (Tel Aviv District Labor Court) Jane Doe – The Kochav Yair Local Council (20.3.2021) The court decided to uphold a decision to prohibit a school teacher from entering school grounds if she was not vaccinated, recovered or checked as Covid negative in the last 72 hours.

nature of the work and the workplace structure enables them to draw on alternative measures, such as mandatory masks and social distancing policies; or enabling when possible to work from home, even if only for an additional short period; or offering the worker to present the results of a Covid-19 test very 72 hours. According to the Israeli Supreme Court's ruling, employers must make reasonable and creative adjustments and accommodations to strive for an inclusive workplace.<sup>2</sup> An inclusive workplace includes unvaccinated employees. Denying a worker access to the workplace, depreciating the workers' salary and termination are measures of last resort.

#### 4. Social Dialogue and collective bargaining:

Basic postulates in labor relations emphasize the importance of dialogue between employees and employers, which should be encouraged on two levels. At the national or industry level and the occupational level, we believe that an agreement should be achieved through social dialogue and collective negotiations. Such agreement should take into consideration the interests of all parties involved and provide certainty and uniformity. It is desirable that the traditional partners of labor relations – workers' and employers' organizations, and in cooperation with the state – will sign collective agreements on the subject, accommodating the different needs of various sectors, occupations, and trades. On the workplace level, employers should work out how to apply the relevant general principles to their workplace in cooperation with the workplace's employee representatives. Social dialogue and collective agreements are key pillars of labor law – and any arrangement should result from them. Such agreements need to incorporate both the rights and obligations of employers and the rights of both vaccinated and unvaccinated workers.

#### 5. Limitations on dismissal:

Our point of departure is that employers should not dismiss employees who have not been vaccinated. Employers should be cautious about taking action that may constitute too severe harm to employees who have not yet been vaccinated, especially in the short term. There is a good chance that hesitant employees will get vaccinated shortly as information about the vaccine's quality and importance increases. Dissemination of information, offering positive incentives, adopting legal and social nudging, and taking other "soft" actions are therefore desirable. Only in cases where not being vaccinated is detrimental to work performance and no other appropriate accommodating measure is found is it permissible to take more severe actions. Such actions could include forcing the employees to take a paid or unpaid leave (furlough) as long as the Covid-19 unpaid leave policy is in place.<sup>3</sup>

These examples express the general principle that it is desirable to find ways to keep employees, whether vaccinated or not, employed. This general guideline is argued to

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<sup>2</sup> High Court of Justice 6069/10 Rami Machmali V. The Prison Authorities (5.5.2014)

<sup>3</sup> We do not take a position on the continuation of the furlough policy that was used since March 2020, and is currently intended to terminate in June 2021, as the share of vaccinated people is high and the operations of considerable parts of the economy are being resumed.

benefit workers, employers, and the economy. It does not diminish the managerial prerogative or derogate from any other vital societal needs. However, alongside the desire to accelerate vaccinations, we must consider that we live in a complex society; in a difficult period, and solutions should not arise from decreasing workers' source of livelihood or diminishing individuals' dignity. Precarious solutions should only be sought as a last resort after exhausting all possible less harmful solutions.

We believe that the implementation of these standards should be re-examined from time to time. The more precise and well-established the information on the vaccine's effects on public health – both vaccinated and unvaccinated – the more it will become possible to design optimal policies that suit the needs of the individual, society, and the market. At every stage of policy development, care and transparency must be exercised, with concern for public health, employers' rights, the health of employees and customers, and respect for the rights of the individual who has not been vaccinated.

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