





fm cover story / vaccination

# WHY VACCINE MANDATES MAY JUST BE INEVITABLE

For life to return to normal, many companies will probably insist on their staff being vaccinated against Covid. But it's a decision with possible legal, ethical and political pitfalls. The FM canvassed corporate SA to get a sense of where businesses stand on this question

Garth Theunissen, Lisa Steyn & Katharine Child

**C**ompulsory Covid vaccination is fast emerging as the only viable way to return to "normal". Companies and governments around the world are eyeing mandatory inoculation as the best weapon against the virus. But actually implementing such a rule will be extremely difficult, particularly in a country such as SA, where the weight of history casts a shadow on policymaking. The rapid pivot from lockdowns to talk of mandatory inoculation has caught policymakers off guard – not only because of the legal, ethical and sociopolitical implications, but also because enthusiasm for the vaccine has fallen short of expectations. Given the series of lockdowns SA has endured, one would have thought the whole population would be eager to get the jab. But this hasn't been the case – an irony not lost on Discovery CEO Adrian Gore. "We never thought our problem would be demand," he said last month. "We've got sites around the country that don't have people going to them." Gore was speaking after the company said it will be mandating that all staff must be vaccinated as of January 1. While other companies such as Curro Holdings had hinted at mandatory vaccination, Discovery was the first JSE-listed company to announce an implementation date publicly. Sanlam, Mediclinic, Life Healthcare and others followed suit.

**The legal groundwork**  
It may sound a simple decision, but mandatory vaccination is a thorny legal issue. Talita Laubscher, a director at law firm Bowmans, says it straddles the nexus between your constitutional right to bodily integrity and employers' legal duty to provide a safe working environment. Some of those opposed to mandatory vaccines argue that it would force people to undergo a medical intervention that strips them of their right to make choices about their bodies. From there, they extrapolate, it's a slippery slope to authoritarianism.

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But health-care legal specialist Elsabé Klinck says this isn't so. "The law doesn't say we can pin someone down and force the vaccine on them," she explains. But the law does allow for consequences if an employee doesn't comply with a lawful workplace rule – like health status being considered an "inherent requirement" of a job.

An Occupational Health & Safety directive, issued in June 2021, reiterated that companies have a legal duty to provide a safe working environment. It is this directive that prompted Discovery to begin extensive due diligence, spanning labour and constitutional law, as well as occupational health and safety law, before instituting its mandatory vaccination policy.

"We are comfortable there's a solid legal framework and footing in place to support our mandatory vaccination decision," says Dr Ronald Whelan, chief commercial officer of Discovery Health. "[But] we're doing this because, ethically and morally, we feel we must, in the context of the severe impact the pandemic impact has had on SA."

Whelan says companies could face legal issues from staff or clients if they don't institute mandatory vaccinations. Staff could refuse to come to work, or challenge their employers in court over unsafe conditions.

"Across our health-care services business we have clients telling us not to send them health-care nurses who aren't vaccinated or a wellness consultant who's not vaccinated," he says. "Our clients have an expectation that

we're doing everything possible to protect their safety as well. There's also an expectation from our employees to provide a safe workplace."

Discovery has lost more than 14,000 clients and 22 staff members to Covid.

Whelan says this was a strong influence on its decision to institute the policy – as was the trove of member data it has at its disposal.

This is why the country's largest medical aid administrator is unapologetically pro-vaccination.

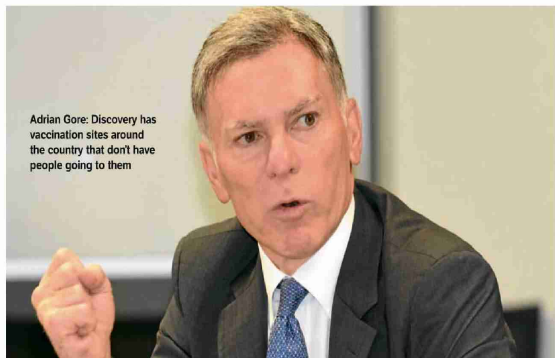
"The evidence both globally and in SA is incontrovertible – vaccines are safe and effective. Period," says Whelan. "It's grounded in solid scientific evidence, solid clinical studies, and over 6 billion Covid vaccines that have been administered globally."

Based on its own data, Discovery calculates that Covid vaccines reduce the risk of infection by 50%-80%, depending on variables such as which vaccine is used, as well as the age and risk profile of the person.

Vaccination also translates into a 73%-90% reduction in hospital admission risk and a 95% reduction in the risk of dying from Covid, 28 days after the second Pfizer dose has been administered. For J&J there's a 91% reduction in mortality risk.

The risk of transmitting Covid is also lower, says Whelan, pointing to Discovery data that suggests a 50%-80% reduction in transmission risk (though it must be said other experts are less convinced by this correlation).

"If you put both sides of the equation together and say there's an infection risk reduction and a transmission risk reduction, those two combined mean the risk reduction across your employees is compounded."



Adrian Gore: Discovery has vaccination sites around the country that don't have people going to them

Fredrick Mawanda



## Vaccination in context

Mandatory vaccination is not a new concept.

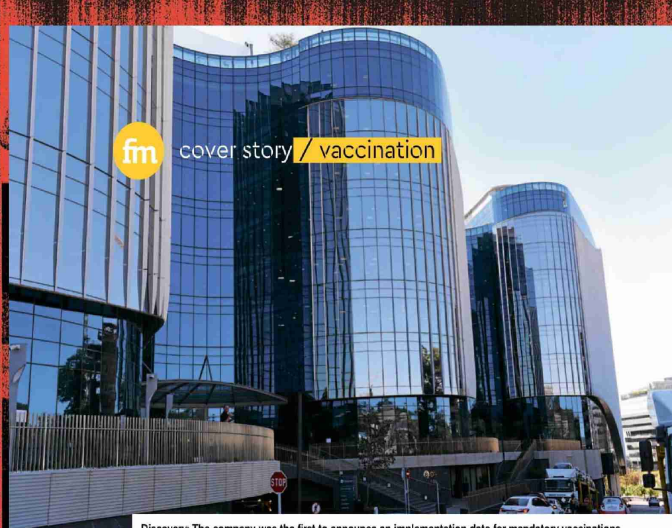
In SA, the Bacillus Calmette-Guérin vaccine against TB has been compulsory for newborns since at least 1973. Yellow fever vaccination certificates are required for entry into countries such as Uganda, Tanzania, Zambia and Angola.

And vaccine mandates played a pivotal role in eradicating smallpox: England made smallpox vaccination compulsory as early as 1853, and Germany did so in 1874, with other countries following suit.

But it isn't always plain sailing. Consider the 1904 vaccine rebellion in the Brazilian city of Rio de Janeiro. At the time, the city suffered from a host of diseases, including yellow fever, bubonic plague and smallpox. With the blessing of Brazil's president, Rio's authorities launched a blitz to eradicate rats and mosquitos linked to outbreaks of the plague and yellow fever.

But mandatory vaccination against smallpox elicited a revolt. When a law was passed on October 31 1904 allowing sanitary workers and the police to enter homes and administer vaccines by force, there was an eruption of violence, looting and rioting.

Thankfully the disorder was short-lived. But it remains a cautionary tale of an overzealous application of state power – even, as it was in this case, to protect the common good. x



Discovery. The company was the first to announce an implementation date for mandatory vaccinations



Freddy Mawurata

to have strongly unionised workforces. When the FM asked companies about vaccination policies, a distinction emerged between those whose labour forces were largely unionised and those that weren't. Large retailers, for one, mostly encouraged vaccination rather than mandating it. Pick n Pay, Dis-Chem and Woolworths say they're encouraging their staff to get vaccinated, and facilitating access to vaccines for workers. Clicks says it hasn't taken a decision on mandatory vaccinations. Massmart – which owns Makro, Game and Builders – says it, too, is going the encouragement route.

But what happens when an unvaccinated employee argues that her working arrangements don't pose a threat to other staff or the public? This gets murkier, since proving an employee is in breach of the Occupational Health & Safety Act rule on not endangering others isn't always so simple. "You might not pass the test of presenting a serious risk to public health if we're talking about the finance manager sitting in an office the whole day and never coming into contact with colleagues or interacting with the public," says Laubscher. "But if we're talking about mines, call centres, retailers, public transport or even our health-care workers – there one can see the scale is shifting towards the other side."

**SA Inc on board**  
 Some private sector companies have been more strident than others in their push for mandatory vaccines.

Last month, PSG CEO Piet Mouton wrote in an open letter: "If you are not vaccinated, your access to restaurants, public parks, shopping centres, airports, businesses, educational institutions [and other places], should be limited." Mouton said while nonvaccination is an act of free choice, it is an "economically and socially inconsiderate and selfish one." Whelan says that since Discovery's decision, it has been inundated with requests from other firms to share its knowledge. "We've had... multiple discussions with other organisations across the country, including CEOs, boards and executive committees," he says. "Many corporates and small and midsized businesses across the country are actively exploring this." Rob Kane, CEO of the Boxwood Property Fund, says smaller companies seem to be more in favour of vaccinating all staff, while larger corporates seem more apprehensive. That could be because they're more likely

"Our strong preference is to ensure Massmart staff are fully vaccinated," says Massmart spokesperson Brian Leroni. "We have included vaccine costs as a medical benefit for all staff, arranged mobile clinics to offer vaccinations at 'hub' stores in high-density urban areas, provided up to one day off per vaccine shot as vaccination leave and are running an internal awareness campaign to encourage vaccination." SA Breweries, now part of global brewing giant AB InBev, is another company with a large workforce that has balked at openly calling for mandatory vaccinations. It has, however, opened pop-up vaccination sites at some of its breweries. "We opened these vaccination drives to neighbouring companies, third-party service providers and employee family members," says SAB regional corporate affairs director Kgosi Mogotsi. Distell says much the same. Though it emphasises that it regards vaccination as the only viable path out of the pandemic, it won't be making it mandatory.



Pick n Pay: Encouraging its staff to get vaccinated



Woolworths: Facilitating access to vaccines for workers

Beckenham/Markus Schwaner

Clare Imrey/Jacques Stuuror



"Getting the vaccine is still a personal choice for Distell employees," says company spokesperson Frank Ford. "We do, however, continue to review our company's position, to ensure that it remains consistent with developments in the management of Covid."

**Mines balk at mandatory jobs**

Mining is a heavily unionised industry that is likely to play a critical role in determining whether the government can hit its population vaccination target of 70%.

Without the buy-in of its 450,000 employees, most of whom work in close proximity to each other underground, SA's vaccination drive is unlikely to succeed.

But the industry is wary of coercion. Precious metals producer, Sibanye-Stillwater, the largest employer in SA mining, has no policy regarding the job, though it says more than 70% of its 84,000 employees are vaccinated.

"We are conceptually in favour of mandatory vaccines in the workplace to ensure the safety and wellbeing of our employees and sustainability of our operations," says Sibanye spokesperson James Wellsted. "But a decision in this regard will require further consideration and engagement."

Coal miner Thungela Resources, which employs 7,500 workers, has worked closely with the health department to administer shots to more than 4,300 employees (1,700 are fully vaccinated). It will soon open vaccine pop-up stations to encourage more employees and contractors to vaccinate.

"I am vaccinated; my executive committee is vaccinated; my general managers are vaccinated," says Thungela CEO July Ndlovu.

"We have got to [be] role model[s] to be examples, so that when we go to our mines, and we say to our colleagues, to save lives and fight the pandemic, we all should be vaccinated," they understand we are not just saying it, but we're actually doing it"

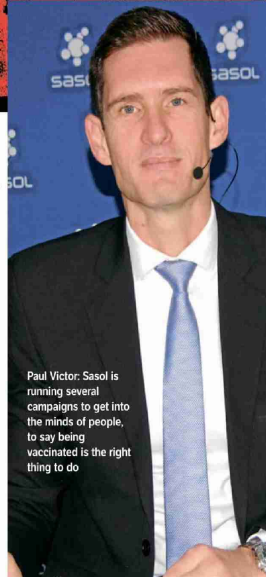
Ndlovu also makes the point that the mining sector has considerable experience in combating misinformation about highly infectious diseases.

"When we started wanting everyone to be tested for HIV/Aids to know their status, you can imagine the stigma that went with that, and how many people actually didn't want to do it," he says. "Today, we routinely test 99% of our employees every year for HIV/Aids ... We know how to communicate with our employees to encourage them to do what is right."

Nevertheless, while Thungela expects all its employees to get vaccinated, it is not mandating the process at this stage. But it



July Ndlovu: The mining sector has experience in combating misinformation about infectious diseases



Paul Victor: Sasol is running several campaigns to get into the minds of people, to say being vaccinated is the right thing to do

says it "reviews" this stance regularly.

The Minerals Council SA has also not taken a firm position on the issue yet. Rather, it is advocating persuasion and education to achieve an industry target of 80% first-job vaccinations by the end of October.

"The industry is now at 51% of its 450,000 employees with both the first and second shots," says council spokesperson Allan Seccombe.

Glencore CEO Gary Nagle told journalists in August that while the group is encouraging staff to be vaccinated, it won't impinge on people's rights. He said he couldn't foresee a time when Glencore would bar the unvaccinated from accessing its sites.

Sasol, meanwhile, was among the first SA companies to take a firmer position.

Ahead of a planned plant shutdown that would require more than 20,000 people to be on site for 23 days, it said staff participating in the shutdown were expected to submit proof of vaccination, or show a negative Covid test result prior to – and every seven days during – the shutdown.

But Sasol met fierce resistance from trade unions. In the end, the company said it would still require the tests, but it agreed to pay the costs.

Still, Sasol CFO Paul Victor says the company isn't mandating vaccines across the organisation yet. "We are running several campaigns to get into the minds of people to say: 'Being vaccinated, it's the right thing to do,'" says Victor.

Eskom, however, has fallen behind the

national curve.

As of October 11, just 11.4% of its 42,700 staff were fully vaccinated, even though 14,810 doses of Pfizer and J&J had been administered at company vaccination sites.

Spokesperson Sikonathi Mantshantsha says Eskom doesn't know the proportion of staff who are hesitant to vaccinate, but will conduct a survey to find out why there has been such a low uptake.

It has not at this stage developed a policy regarding mandatory vaccination. But again, the strong presence of unions at Eskom means coercion would be tricky.

As it is, several unions have come out strongly against mandatory vaccinations.

In September, the Association of Mineworkers & Construction Union said forced vaccination and the disclosure of employees' vaccination status would impinge the right to privacy and be in breach of the law.

"The benefits, if any, of compulsory vaccination must be weighed against the enormous harm such a programme will cause to workers who are dismissed simply because they have honestly held reservations," it said.

Cameron Morajane, director of the Council for Conciliation, Mediation & Arbitration, says several cases have already come to it about mandatory Covid vaccines.

William Mabapa, acting secretary of the National Union of Mineworkers (NUM), says his union won't accept compulsory vaccines.

"We can't force people to vaccinate if they don't want to vaccinate," he says, "but we



will encourage them to vaccinate. We are just hopeful people will make up their minds and understand that life is not only about themselves; it involves others, so they must not take decisions that put others at risk."

NUM has so far seen a general willingness to vaccinate among its members, Mabapa says. And he adds that the mining sector is faring better than most others on vaccination, since mines typically have their own health facilities.

Solidarity is also against mandatory vaccinations and vaccine passports.

"We encourage people to go and get themselves vaccinated, but it has to be their own choice; it has to be voluntary," says Connie Mulder, head of Solidarity's research institute. "We're vehemently against state-mandated vaccinations. History is replete with examples of governments forcing citizens to undergo medical procedures for their own good, which ends in some of the darkest places that you can go."

Solidarity says other interventions should be considered, including education programmes.

"Forcing an employee to undergo a medical procedure in order to work for you requires an exceptionally high burden of proof [on the employer]," says Mulder. "We think in almost all cases that cannot be met."

He adds that vaccine mandates require an

"exceptionally capable state" to roll out the programme, as well as a population willing to comply. SA, he says, has neither.

"We see enormous chaos happening the minute this starts being your ticket to public spaces. The SA populace is not really in the position of complying religiously with Covid regulations. We've even seen our politicians openly flouting it."

#### Overcoming hesitancy

The widespread opposition to vaccine mandates may explain why the government itself is not pushing the issue.

Martin Kingston, who heads Business for SA (B4SA), said at a recent event the lobby group hosted that it has heard "the government initially expressing, I would say, some negativity about the concept of vaccination mandates, in our engagements with them".

Another business leader, who would only speak anonymously, tells the FM that the government will not even meet about the issue until after the November 1 local government elections.

While the government has balked at mandatory vaccination, it does seem to be encouraging citizens to see vaccine passports as a ticket to increased personal freedom. It has tentatively moved towards opening up sports events, by allowing as many as 2,000 vaccinated spectators to begin attending live matches.

Speaking at a vaccination drive in Durban, deputy president David Mabuza said sports events, places of worship and other mass gatherings might be allowed to "gradually open" if the 70% vaccination target is reached by year-end. Entry, however, would require a vaccine certificate – underscoring the notion that any return to normal life will be predicated on being jabbed.

Still, with only 17.8% of the population fully vaccinated, and 23.5% having received at least one jab, SA is far short of its 70% target. By mid-October, SA was administering only about 200,000 vaccines a day – against the 350,000 it would need to meet its target, by Kingston's estimate.

But that means getting people into vaccine sites in the first place. As it stands, low demand at sites has meant vaccine stocks are piling up.

Already, the SA Health Products Regulatory Authority has "approved a shelf-life extension" for Pfizer jabs – 6 million doses, the FM understands – so they won't be destroyed. But the private sector will start shutting down its vaccination sites if they remain empty, Kingston told a conference last week.



## Student resistance

SA's universities may yet emerge as a hotbed of resistance to vaccine mandates.

Wits University has said mandatory vaccinations will come into effect from 2022. Staff and students who refuse to get vaccinated will have to wear medical N95 masks and take weekly PCR tests if they wish to access campus.

The policy is still open for comment, but it's elicited fierce criticism from the student representative council (SRC), which believes it will unfairly discriminate against poorer students.

"The framework imposes a mandate to vaccination on the poor and the working class, as they are required to

This drop-off in demand has been of great concern to Business Unity SA (Busa), which is partly why it's pushing for mandatory vaccination.

As Busa CEO Cas Coovadia told a press briefing: "The problem is that we've got declining demand. We've sorted out the supply side, but the demand side is presenting a problem ... We believe that mandatory vaccination is a critical element of generating demand."

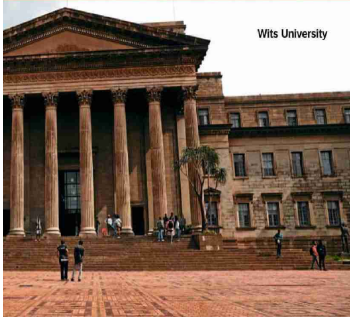
While Solidarity puts part of the blame for SA's slow vaccine uptake on the government's infatuation with lockdowns (rather than sourcing vaccines), it's not exactly clear why so many are still hesitant.

A recent report by the Human Sciences Research Council and the University of Johannesburg shows white adults are among the most hesitant, with only 52% willing to



Connie Mulder: Vaccine mandates require an exceptionally capable state as well as a population willing to comply. SA has neither

Frederic Mwanza



Wits University

Steyn / Images of Africa

pay for the SARS-CoV-2 test on a weekly basis, and failure to do so will result in the individual not having access to the premises," says SRC secretary-general Nkhonipho Nxumalo. "Students and staff members who do not have the capital to pay these weekly tests will ... come to the vaccination against their will. This then makes the constitutional freedom of choice exclusive to the rich."

Again, this shows a failure to understand limits on rights when others could be harmed. But Nxumalo's opinion isn't uncommon.

The University of Cape Town also encountered resistance to a proposed mandatory vaccination policy, approved by the senate last month. It's been engaging with staff and students, but has yet to make public its final decision on the issue. x

be vaccinated, against about three-quarters of black adults.

Discovery estimates that less than 3% of its employees are "fiercely in opposition" to vaccine mandates, with many of them raising concerns about the relatively short vaccine development timeline, says Whelan.

"It's a very small portion of the employee population, which we are reassured by," he says. "We have heard from other organisations that have studies on this that they're seeing rates of between 3% and 4% of people falling into the very-resistant category."

What's perplexing about the stubbornness of vaccine hesitancy is that Covid has been worse than many imagined: the SA Medical Research Council says SA has now had more than 260,000 excess natural deaths since May 2020.

Discovery's Whelan says that amounts to about 41% more deaths than the long-term average – something he attributes to Covid. "Effectively that means all of us living in SA have had a 41% greater risk of dying in the past 18 months," he says.

#### Clearing the hurdles

Apart from rampant online conspiracy theories, mandatory vaccination also faces another powerful hurdle: religion.

In September, the SA National Christian Forum approached the Constitutional Court for an urgent interdict against mandatory Covid vaccinations. The African Christian Democratic Party also marched on the Constitutional Court earlier this month to oppose "mandatory" coronavirus vaccinations.

While employers must consider and accommodate the genuine religious beliefs of their employees, Laubscher says there's no

absolute obligation to accommodate someone on religious grounds. An objection to vaccination, she says, "must be part of the inherent tenets of the particular belief to count as genuine".

That would be tough to prove, says Klinck. In her experience, no-one has yet made a successful case "that antivaccination is officially part of their doctrines".

Still, there is a specific process to enforcing vaccination – one that requires consultation and reasonable accommodation on the basis of religious or medical grounds, or the option of working from home or at a time when other staff aren't at the office.

But unions expressly prevented termination from being included as an option in the June directive on vaccination, attorney Halton Cheadle said at a recent BASA event.

However, Cheadle says companies may refuse employees access to their premises.

"You have the property rights to say that people can come onto your property on specific conditions," he explains.

Discovery says it will allow its employees to lodge objections to its vaccine mandate – including on medical, religious and cultural grounds. Whelan says it is putting in place structures to assess the veracity of those appeals, and it will try to accommodate people with justifiable reasons.

"If we are not reasonably able to accommodate someone, or their reasons for refusal are not justifiable, then it would move into various industrial relations processes," he says. "Our expectation is that there will be a very small number of employees who go through the entire process. If we get to a situation where Discovery and an employee are not able to find common ground, then we would have to look at parting ways."

Laubscher, however, says employers won't be able to simply introduce a blanket policy under which they dismiss staff who don't get vaccinated. The Labour Relations Act requires companies to look at alternatives short of dismissal to deal with the issue.

"This could be to require the employee to wear an N95 surgical mask, or to limit face-to-face interaction with clients and fellow-employees," she says.

But while the mandatory vaccination debate rages, so does the pandemic. At the time of writing, SA's confirmed Covid deaths had reached 88,612, with excess deaths, mostly attributed to the virus, roughly three times that number.

"Just think about that 260,000 excess deaths number for a moment," says Whelan. "It's more than 80 times the number of people who died on 9/11." x



Waiting game: A Discovery employee waits for people who want to be vaccinated

Gallop Images/Alisa Lencore