



## **COVID-19 VACCINE – CAN EMPLOYERS MANDATE EMPLOYEES TO TAKE THE VACCINE IN NIGERIA?**

**Kenneth Chijioko-Keme**



## Introduction

In 2020, the world was hit with a pandemic that had not been witnessed since the Spanish flu in the early 19th century and the human race grappled with a virus that ravaged the entire globe. As a result, the clock began ticking to find a cure for this disease, and in so doing, a pseudo arms race began in the pharmaceutical industry as the Big Pharma across the world sought to find a vaccine.

Fortunately, in November 2020, the first Covid-19 vaccine was developed, and since then, several pharmaceutical companies have developed theirs for use by the mass populace. Despite this scientific breakthrough, some persons have developed conspiracy theories on the vaccine's safety.

Many people have lost their jobs due to the pandemic and working from home has changed the face of work. But this is not all, as employers and employees begin to adjust to the new normal of the pandemic, a critical issue has ensued. Can employers require their employees to get the Covid-19 vaccine if they want to keep their jobs? This article will discuss the legal perspectives and the legality of whether employers in Nigeria can make it mandatory for their employees to take the Covid-19 vaccine to remain employed.

## Blast from the past – Vaccination Ordinance of 1917?

The issue of mandatory vaccination is not new to Nigeria. As far back as the colonial period, in Northern Nigeria, the issue of vaccine hesitancy was prevalent, particularly with the smallpox vaccine, which resulted in low vaccination levels in Northern Nigeria. The solution to this was the introduction of the Vaccination Ordinance by the colonial administration, which was initially enacted in 1917. By 1945, this Ordinance was amended to include a schedule for compulsory vaccination of adults and their children, which was enforced by local authorities. Furthermore, the native authorities were also empowered to fine people for non-compliance with the Ordinance.



*(source: Berlin.de)*

## What is the current legal position in Nigeria?



Many things have changed since the Vaccination Ordinance of 1945, as Nigeria has enacted several legislations to regulate the health care system and employer-employee relations. The position since the pandemic hit Nigeria is that unless the nature of a person's job requires it, including people in the health industry such as frontline health workers, laboratory staff, Covid-19 rapid response team and other essential workers, such person is not mandated to be vaccinated.

However, in the absence of any specific law or regulation which mandates the compulsory vaccination of individuals not working in the aforementioned sectors, an employer can still take steps to ensure that its employees can take the Covid-19 vaccine.



## Can my employer make me get the Covid-19 vaccine?

Despite the inexistence of any substantive legislation, the employment contract, employee handbook etc., are the contractual documents that form the basis of an employer-employee relationship. Therefore, if the contractual documents which form the basis of the relationship between the employer and employee require the employee to take the Covid-19 vaccine and is considered reasonable given the circumstance, then an employer will be justified to make an employer take the Covid-19 vaccine.

Furthermore, where an employer does not have a policy of mandating its employees to take the Covid-19 vaccine, such employer can argue that it has a legal duty[1] to provide a safe working environment for its employees. In an English Case[2], the House of Lords held that an employer has personal a duty of care to provide a safe system of work, and this duty cannot be delegated to another employee.

Additionally, the common law duty of care of an employer is fourfold, namely:

- (i) The duty to provide a safe place of work.[3]
- (ii) The duty of an employer to provide adequate plant, appliance and premises.[4]
- (iii) The provision of a safety system/method of work and wears against hazards.[5]
- (iv) The duty of the employer to provide a reasonably competent workforce.

For example, an employer will be in breach of their duty to provide a reasonably competent workforce if the conduct of an employee or a set of employees is likely to be a source of danger to others. Then the employers are under a duty to remove the danger and/or the dangerous employee to avoid being liable vicariously for his acts of omission or commission.[6]

Furthermore, with the ongoing wave of the Omicron variant, making the Covid-19 vaccination mandatory could be reasonably justified because there is a real and present threat to public health and safety. An employer can overcome this issue by inserting a clause in the employment contract or by amending the existing contracts to require their workforce to be vaccinated mandatorily. This amendment[7] of the employment contract may be justified by the employer if this is done to protect other vulnerable employees who may have pre-existing conditions or customers of the business.

## The legal impact of employers forcing a Covid-19 Vaccine

Although employers have a legal duty to ensure the health and safety of their workforce as far as reasonably possible, the potential legal implication is where an employee files an action against their former employer, which has taken the form of Vaccine Mandate Litigation.

In a recent decision by the Fair Work Commission in Australia[8], the Full Commission Bench upheld an employee's dismissal for a refusal to take a flu shot. The case was an appeal which was brought by an aged care facility worker in New South Wales, Australia, who was dismissed by her employer



after it was discovered that she had an invalid medical contraindication. The Full Bench majority affirmed that her employer had an obligation to comply with Public Health Orders of New South Wales.

In another recent decision from the United Kingdom[9], the court, while affirming the decision of the European Court of Human Rights in the case of Vavříčka[10], also held that the UK regulations required care homes to allow only persons who have taken the two jabs of the Covid-19 vaccine were allowed to enter the care homes. The court went on to state the basis for the regulation was to reduce the spread of Covid-19 in care homes in order to protect care home residents who are



vulnerable to Covid-19. The Court went further to state that since the Government passed this regulation to protect people living in care homes, it could implement these measures.

Although these are foreign decisions remain persuasive in Nigerian courts, these are arguments that can be raised by employers if faced with a vaccine mandate litigation in Nigeria.

### **Can an employer terminate to contract of an employee who refuses to take the vaccination?**



An employer can terminate any employee that refuses to comply with a request of the management, and such employer is required to give a reason for the termination of the employment. Therefore, if an organization considers that a failure to comply with a mandatory policy to take the Covid-19 vaccine is sufficient to terminate an employee's contract, then such a contract can be terminated on the basis of refusal to comply.

However, this will require careful analysis on a case-by-case basis and depend on the specific circumstances. If an employee refuses to take a vaccination and is refusing to

come into the workplace, an employer should first consider alternatives such as change of role, regular testing, or permanently working from home. Nevertheless, where the employee's role is such, that it is contingent upon/necessitates regular contact with customers, clients or other employees, an employer can enforce its policy to dismiss such employee by taking recourse to the appropriate steps in the employment contract and providing a reason for such termination.

### **Conclusion**

Although there is no specific statute that mandates the vaccination of Nigerians, an employer is left with the choice of terminating an employee's contract by having recourse to its legal obligation to provide a safe working environment or the Employee Handbook where such policy on the provision of a safe working environment is included in the handbook.

Nevertheless, employers should note that such a policy still has the potential of exposing such an employer to litigation bordering on discrimination, unfair labour practice or unfair dismissal as a result of an employee being forced to take the Covid-19 vaccine and where there is a dismissal for failure to comply with such policy.

### **Author**



**KENNETH CHIJOKE-KEME**

Associate  
Commercial Litigation & Dispute Resolution  
Regulatory and Compliance  
kchijioke-keme@alp.company



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- [1] *Iyere v. Bendel Feed and Flour Mills Limited* (2008) LPELR-SC.309/2002
- [2] [1938]A.C.57
- [3] *Julius Berger Nig Plc v Ogundehin* 2014 2 NWLR pt 1391 p. 388, *Samson Ediagbonya V. Dumez* (1986) 3 NWLR PT 31 P. 53 *Salihu v Tin Associated Minerals Ltd* (1958) NMLR 56
- [4] *Chukwu v Makinde* (2007) 9 NWLR pt 1038, 195- a case of negligent and reckless (indiscriminate) parking of a trailer leading to an injurious collision.
- [5] *In Ozigbu Eng. Co. Ltd v. Iwuamadi William* 2009 16 NWLR PT 1166 P 44, The respondent lost one of his eyes. See also *Cullen v Scan Building Services Ltd* [2018] SC EDIN 15
- [6] *In Owolabi v Akinwumi Motors and Anor*, (1980) HIF/7/79 Judgment delivered 7/3/80, the court awarded damages in favour of the University lecturer who was completely paralysed in a motor accident due to negligent driving of the first defendant's servant.
- [7] Any changes to staff policy, when done or approved by a company's management, must be communicated to all affected employees. See *Nlewedim v. Uduma and Shoprite Checkers [Pty] Ltd & Anor. v. A. I. C. Ltd.*
- [8] *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* (C2021/2676)
- [9] *R (Peters and Findlay) v Secretary of State for Health and Social Care* [2021] EWHC 3182 (Admin)