

Helping you  
understand  
**COVID-19**  
**Vaccination**  
**Certificates**  
in the  
workplace

Your guide to the protection of  
personal information

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## The importance of protecting personal information

The Protection of Personal Information Act No 4 of 2013, (POPIA) commenced on 1 July 2020. All public and private bodies, with few specific exceptions, are required to comply with the POPIA requirements. Personal information is any information that relates to a living, identifiable natural person or an existing juristic person (e.g. a company). In order to process such information, one must comply with the information processing conditions contained in POPIA and enable data subjects to exercise the related rights.

A new Code of Practice issued by the Minister of Employment and Labour will come into force upon the expiry of the national state of disaster on 15 April 2022. This code guides employers in managing exposure to SARS-CoV-2 in the workplace. It highlights the need for protective measures including measures to protect personal information.

## Processing personal information in the workplace

There are numerous provisions in the Protection of Personal Information Act that require the responsible party to act in a reasonable manner. The standard to determine whether a responsible party has acted reasonably is that of objective foreseeability. In other words, would a reasonable person have foreseen the harm?

Any deviation from the standard of foreseeable harm establishes negligence, irrespective of whether the damage is due to the act of the responsible party, a staff member or a service provider. Clearly, a responsible party can be held liable even though there is no apparent fault on his or her own.

The burden of proof rests with the responsible party to demonstrate that he or she did properly and continuously assess the risk and take all the measures necessary to mitigate the harm to data subjects.

To identify which measures are necessary, employers are required to complete a personal information impact assessment. There is a general prohibition on employers processing employee health information. Where it is permissible, additional protection is required for the processing of special personal information.

# Code of Practice: Managing exposure to SARS-COV-2 in the workplace, 2022

A new Code of Practice issued by the Minister of Employment and Labour will come into force upon the expiry of the national state of disaster on 15 April 2022.

## Purpose of the Code

The purpose of the Code is stated as “to guide employers and employees in managing exposure to SARS-CoV-2 in the workplace by providing guidance to employers and employees in -

- a) **conducting or updating a risk assessment** in terms of the OHS Act and the HBA in respect of SARS-CoV-2 exposure;
- b) **developing a plan to limit infection and transmission**, and mitigate the risks of serious illness or death on the basis of that risk assessment;
- c) **implementing the plan**;
- d) **managing absence from work** due to infection, isolation and adverse effects of vaccination;
- e) **seeking to accommodate employees** who refuse or fail to vaccinate against SARS-CoV-2 .

Any person interpreting an employment law is to “take this Code into account in respect of any matter arising from its application. This includes employees, trade unions, employers, employers’ organisations, inspectors, conciliators, arbitrators and judges”.

To the extent that the Code advances an interpretation of the law, “that interpretation is the policy of the Minister and the Department and should be applied unless that interpretation is reversed by a decision of the courts”.

## Risk assessment in terms of the OHS Act

The Code of Practice stipulates that every employer must:-

- a) **undertake a risk assessment** to give effect to its obligations under the OHS Act and the HBA Regulations;

- b) **develop or amend its existing plan** in accordance with the results from the risk assessment to include-
  - i. any measures to be implemented in respect of the vaccination of its employees and, taking into account the intervals between vaccinations, the **dates by which the employees must be fully vaccinated**; and
  - ii. any other **protective measures** contemplated in the risk assessment and plan, which include:
    - a. the identification of the employees;
    - b. the reporting of symptoms by employees;
- c) **consult on the risk assessment and plan** with-
  - i. any representative trade union as contemplated by section 14(1) of the LRA; and
  - ii. any health and safety committee established in terms of section 19 of the OHSA or, in the absence of such a committee, a health and safety representative designated in terms of section 17(1) of the OHSA or employee representative; and
- d) **make that risk assessment and plan available** for inspection by the trade union and committee contemplated in paragraph (c) and an inspector.

## Protective measures for Personal Information

The Code of Practice stipulates that the employer's risk assessment and plan must include protective measures related to the identification of employees and reporting of symptoms by employees.

Information about employee symptoms is health information. **Employers are prohibited from processing information concerning employee health** unless the processing is necessary to comply with an obligation in law or the information has been deliberately made public by the employee.

This general prohibition on processing personal information concerning a data subject's health does not apply to the processing by—

- a) medical professionals, healthcare institutions or facilities or social services, if such processing is necessary for the proper treatment and care of the data subject, or for the administration of the institution or professional practice concerned;

- b) insurance companies, medical schemes, medical scheme administrators, and managed healthcare organisations, if such processing is necessary for—
- i. *assessing the risk to be insured* by the insurance company or *covered* by the medical scheme and the data subject has not objected to the processing;
  - ii. the performance of an insurance or medical scheme *agreement*; or
  - iii. the enforcement of any *contractual rights* and obligations.
- c) administrative bodies, pension funds, employers or institutions working for them, if such processing is necessary for—
- i. the *implementation of the provisions of laws, pension regulations or collective agreements which create rights dependent on the health or sex life of the data subject*; or
  - ii. the *reintegration of or support for workers or persons entitled to benefit in connection with sickness or work incapacity*.

This general prohibition on processing personal information concerning a data subject's health also does not apply if the responsible party has applied for and received an exemption from the Information Regulator.

A responsible party that is permitted to process health information of a data subject must treat the information as confidential unless the responsible party is required by law or in connection with their duties to communicate the information to other parties who are authorised to process such information.

Failure of a responsible party to comply with POPIA could result in:

- any person submitting a complaint to the Regulator
- the Regulator issuing an administrative fine
- the responsible party being charged with an offence
- a data subject or the Regulator instituting a civil action for damages in a court.

## Processing of Employee Personal Information

POPIA applies to the exclusion of any provision of any other legislation that regulates the processing of personal information unless the other legislation provides for conditions for the lawful processing of personal information that are more extensive than those set out in POPIA, the extensive conditions prevail. All public and private bodies, with few specific exceptions, are required to comply with the POPIA requirements.

Before any new processing of an employee commences, the information officer must ensure a **personal information impact assessment** is done to ensure that adequate measures and standards exist in order to comply with the conditions for the lawful processing of personal information.

As with all other processing of personal information, if an employer plans to—

- a) process any unique identifiers of employees—
  - i. for a purpose other than the one for which the identifier was specifically intended at the collection; and
  - ii. with the aim of linking the information together with information processed by other responsible parties;

the employer must obtain **prior authorisation** from the Regulator.

## Data minimisation

When processing personal information, employers are required to implement all such measures that avoid processing the personal information of employees in the first place. The full suite of measures that employers can employ to maintain workplace safety should be evaluated before making any assessment as to whether knowledge of vaccination status is necessary. The justification of the employer's requirement to know the vaccination status of employees must be documented and made available to the employees. Employees have the right to object to the processing of their vaccination status by their employer and complain to the Information Regulator.

The measures that employers must evaluate and document the effectiveness include:

- social distancing measures, including minimising the number of workers in the workplace through rotation, staggered working hours, shift and remote working arrangements
- personal protective measures as required or recommended on the websites of the National Department of Health, National Institute of Communicable Diseases and the National Institute for Occupational Health
- personal hygiene measures, such as the wearing of facecloth masks, barriers, hand washing, sanitisers and surface disinfectants
- reducing the numbers in and the duration of occupancy in meeting rooms
- keeping the workplace well ventilated by natural or mechanical means

- identifying areas in the workplace that are usually occupied and poorly ventilated, and improving ventilation
- ensuring all mechanical ventilation systems are technically assessed to be functioning effectively, regularly serviced by a competent person, and in accordance with the manufacturer’s instructions.

## Purpose specification

The Code of Practice is intentionally general. It states that “in giving effect to this Code, an employer may require its employees to disclose their vaccination status and to produce a vaccination certificate”. But, being vaccinated and the disclosure of vaccination status is not mandatory. Therefore, the employer must explicitly define the specific and lawful purpose for the employer requiring vaccination and having knowledge of the vaccination status of employees.

POPIA requires that “the personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party”.

- **Specific**, that is, sufficiently defined to enable the implementation of any necessary data protection safeguards, and to delimit the scope of the processing operation.
- **Explicitly defined**, the purpose must be sufficiently unambiguous and clearly expressed (i.e. no hidden purpose)
- **Lawful purpose**, valid legal basis, non-discriminatory.

The purpose for requiring vaccination and having knowledge of vaccination status of employees must take into account:

- vaccination is voluntary
- vaccinated employees are just as likely as unvaccinated employees to transmit the virus if they have been in contact with a COVID-19 positive person
- benefits of vaccination largely accrues to the individual; vaccinated people clear the virus faster, with lower levels of the virus overall, and have less time with very high levels of virus present.

The Code of Practice requires employers to undertake a risk assessment to give effect to their obligations under the OHSA and the HBA Regulations and develop a protective measures implementation plan. If an employer will require disclosure of an employee’s vaccination status or production of a vaccination certificate, the employer will need to

identify the specific risks, justify and document how these risks are reduced, and provide this information to the affected employees.

The explanation must be detailed enough to determine what kind of processing is and is not included within the specified purpose, and to allow that compliance with the law can be assessed and data protection safeguards applied. A purpose that is vague or general will not meet the criteria of being 'specific'. The degree of detail in which a purpose should be specified depends on the particular context in which the information is collected and the personal information involved. For example, if the employee's identification number is to be collected, there must be a valid purpose and a legal basis to collect the identity number.

## Legal basis for employees presenting vaccination certificates

The Code of Practice states that the date by which employees must be fully vaccinated must be based on a risk assessment that can give effect to the employer's OHSA and the HBA Regulations obligations. ***This suggests that COVID-19 vaccinations are not considered to be a general workplace safety measure.*** The Code of Practice transfers the burden of obtaining reliable evidence supporting the efficacy of vaccinations preventing the spread of the virus, and selecting an appropriate workplace safety strategy to the employer.

Some employees in the workplace might have underlying health conditions or comorbidities. Should these employees be barred from working or should the employees who could spread the coronavirus be barred?

It's not only the unvaccinated employees who spread the virus. Vaccinated employees can spread the virus too. Consequently, it makes no difference whether an employee has a vaccination certificate or not, a vaccinated employee is just as likely to spread the virus if they have been in contact with a COVID-19 positive person. The benefit of being vaccinated largely accrues to the individual. Research indicates that vaccinated people clear the virus faster, with lower levels of the virus overall, and have less time with very high levels of virus present.

With over 90% of the population vaccinated, the majority of new COVID-19 infections in Ireland and the United Kingdom are among the vaccinated.

A study in the medical journal The Lancet followed 602 primary close contacts of 471 people with COVID. It documented transmission and viral load in the group.

It found there were no differences in *peak* viral loads between vaccinated and unvaccinated individuals. It also showed only a small decrease in the number of infections in household members between vaccinated and unvaccinated people, suggesting a similar level of infectiousness.

Employers should only require COVID-19 vaccinations where necessary to achieve a specific, legitimate purpose determined from its assessment of risks. There are several infection prevention and control measures an employer can take to protect the workforce, for example, physical distancing, hand hygiene, face coverings, and ventilation.

This risk assessment must include the protective measures related to the **identification of employees** and **reporting of symptoms** by employees. If this processing of personal information is unlawful under POPIA, it is of high risk for the employer and therefore the employer should not set a date by which employees must be fully vaccinated.

Other risks the employer must consider include:

- vaccinated employees harming fellow works
- unvaccinated employees harming fellow works
- vaccinations harming employees.

POPIA does provide for an employer applying to the Information Regulator for an exemption to process special personal information if such processing is in the public interest and appropriate safeguards have been put in place to protect the personal information of employees.

## Notification of Employees

The Code of Practice requires employers to notify workers (employees, contractors, volunteers, etc.) on its premises of:

- the contents of the Code of Practice
- its Covid-19 management plan
- how the employer intends to implement its plan, and
- the symptoms associated with COVID-19.

Section 8 of the Code requires workers to inform their employer if they experience COVID-19-related symptoms. The employer may require the employee to be tested for COVID-19 before permitting the employee to enter the workplace or report for work.

Section 15 of the Code provides that every worker is obliged to comply with the employer's Covid-19 management plan.

If the employer's Covid-19 management plan includes the obligation to be vaccinated, the employer is required to:

- a. notify the employees identified in the risk assessment plan of the obligation imposed by the employer for these employees to be vaccinated;
- b. counsel the employee on the issues related to vaccines, the nature of vaccines used, the benefits, the contra-indications, and the nature and risk of any serious side effects.
- c. permit the employee, at the employee's request, to consult a health and safety representative, a worker representative or a trade union official;
- d. give administrative support to the employees to register and to access their COVID-19 vaccination certificates on the Department of Health's EVDS Portal for SARS-CoV-2, and
- e. give the employee paid time off to be vaccinated and provide transport for the employee to and from the nearest vaccination site.

If the employer has completed the risk assessment, implemented the protective measures, and can justify why it still requires its employees to disclose their vaccination status, it may require an employee to produce a vaccination certificate.

Where personal information of an employee is to be processed, POPIA requires employees to be notified prior to the processing of their personal information of:

- the information being collected
- the source from which it is collected if not the employee
- the name and address of the responsible party
- the purpose for which the information is being collected
- whether or not the supply of the information is voluntary or mandatory
- the consequences of failure to provide the information
- any particular law authorising or requiring the collection of the information
- recipient or category of recipients of the information
- nature or category of the information
- existence of the right of access to and the right to rectify the information collected
- existence of the right to object to the processing of personal information
- right to complain to the Information Regulator
- contact details of the Information Regulator.

## For assistance

Contact the Information Officers Association:

Email: [info@informationofficers.co.za](mailto:info@informationofficers.co.za)

Telephone: 012 - 7436383

Join the LinkedIn group for Information Officers:



If you have any queries, comments or suggestions regarding this document, please contact us at [info@informationofficers.co.za](mailto:info@informationofficers.co.za).

