

VCCI COVID-19 employers rights and obligations relating to vaccination and lockdown Legal Advice

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1. Mandatory vaccinations and vaccine mandates

- a. Can the Government make vaccinations mandatory, lawfully? Or create vaccine mandates limiting access to public spaces, government offices or private sector businesses to people that are vaccinated?

Yes, there are strong legal grounds for the Government making vaccinations mandatory and the Government can lawfully establish vaccine mandates limiting access to public spaces, government offices and private sector businesses to people that are vaccinated.

Vanuatu recognises fundamental rights and freedoms under the Constitution, including the right to life, security of the person, freedom from inhuman treatment and forced labour and freedom of movement. All people in Vanuatu are entitled to these rights and freedoms without discrimination on the grounds of race, origin, religious or traditional beliefs, political opinions, language or sex.

However, these rights and freedoms may be restricted for non-citizens by law, and they must also be balanced with the rights and freedoms of others. They are also subject to legitimate public interests in relation to safety, public order and health.¹ When balancing others interests and limitations on fundamental rights and freedoms, principles of fundamental justice apply and would require that the mandates are not arbitrary, excessively broad or grossly disproportionate.

The *Penal Code* extends the prohibition against discrimination to the private sector in relation to the supply of goods and services, employment or admission to public places on the basis of sex, ethnicity, race or religion.² However, unlike neighbouring jurisdictions, there are no anti-discrimination laws that would impact on compulsory vaccination requirements through

¹ *Vanuatu Constitution*, Article 5(1)

² *Penal Code*, Section 150

government laws, regulations or policies, unless the person was refusing to be vaccinated on religious grounds³.

As vaccines seek to protect the health and safety of the public, there are strong arguments to support mandatory vaccination during COVID-19 because of the legitimate public interest for safety, public order and health. There is an even stronger legal basis for establishing vaccine mandates limiting access to public spaces, government offices and private sector businesses to people that are vaccinated.

The orders for mandatory vaccinations or vaccine mandates could be made under the State of Emergency Powers under the *Disaster Risk Management Act*, or by the Department of Public Health under the *Public Health Act*, and also under the *Employment Act* and *Health and Safety at Work Act*. See more on this in Sections 4 and 5 below.

b. In the absence of any government laws or regulations making vaccinations mandatory, can an employer make COVID-19 vaccination a requirement of employment?

Yes, in most cases employers can make vaccinations a requirement of employment if reasonable and if not being vaccinated means their employees are exposed to risks to their health and safety.

The *Employment Act* is limited in its prohibitions on discrimination. An employer must provide equal remuneration for equal work between men and women, and cannot terminate a woman whilst on maternity leave.⁴ As mentioned above, the *Penal Code* also applies to the private sector in relation to employment, on the basis of sex, ethnicity, race or religion. Therefore, discriminating against employees on the basis of their health, disability or vaccination status is not prohibited, unless the employee is refusing vaccination on religious grounds.

The legal basis for requiring vaccination as a condition of employment can be found in the *Employment Act* and *Health and Safety at Work Act*, which require that employers provide safe working conditions for their employees⁵ and a duty to ensure health, safety and welfare at work.⁶ Additionally, employees have a duty to cooperate or comply with any duty or requirement imposed on him by his employer or by health and safety regulations.⁷

Employers are also permitted to make regulations in the workplace for requirements concerning hygiene and safety necessary for the proper operation of the undertaking, which must be approved by a Labour Officer before coming into operation but after approval is deemed to form part of the contract of employment.⁸ Employer regulations could include

³ Countries that recognize a religious exemption to getting a COVID-19 vaccine do so on a narrow and limited basis.

⁴ Sections 16 and 37, *Employment Act*

⁵ Section 45, *Employment Act*

⁶ Section 2, *Health and Safety at Work Act*

⁷ Section 4(b), *Health and Safety at Work Act*

⁸ Section 75, *Employment Act*

vaccination requirements to reduce the risks of COVID-19 exposure impacting on employees' health and safety. If approved by a Labour Officer, this would establish a strong legal basis for making vaccination a requirement of employment.

Ministerial Orders could also strengthen the legal basis for employers requiring vaccinations as a condition of employment.⁹ This would provide the legal basis in the absence of employer regulations. A possible content option for this is provided in Section 5 below.

Without any ministerial orders or regulations requiring all workers to be vaccinated, it is left to the discretion of employers to determine whether it is reasonable to require employees to be vaccinated, and if not being vaccinated poses a risk to their health and safety at work, which may result in the employer breaching their obligations to provide safe working conditions. An infection by COVID-19 may be considered as a work-related injury if contracted as a result of work.¹⁰ Employers that fail to mitigate risks to their employees' health and safety could be held liable for failing in their duty to provide safe working conditions and expose themselves or the business to civil claims for personal injuries at work.¹¹ This potentially includes failing to require that all employees and customers or clients are vaccinated. However, determinations of this are dependent on the circumstances of each business and their employees.

Guidelines around whether it is 'reasonable' for an employer to require an employee to be vaccinated have been developed in Australia,¹² which provide useful considerations for employers in Vanuatu's context as well:

- i. The existence and scope of any relevant public health orders.
- ii. Health and safety issues and the reasons advanced in favour of the mandatory COVID-19 vaccine requirement.
- iii. Issues relating to an employee's disability or medical condition.
- iv. The nature and extent of the disadvantage resulting from the imposition or proposed imposition of the mandatory COVID-19 vaccine requirement.
- v. The feasibility of overcoming or mitigating any disadvantage to the employee by the mandatory COVID-19 vaccine requirement.
- vi. Whether the disadvantage to the employee is proportionate to the result sought by the employer.
- vii. The nature of the work performed by the employee.

⁹ Section 77A, *Employment Act*, to give effect to Sections 45 and 75, and Section 8, *Health and Safety at Work Act*, for securing health, safety and welfare of persons at work.

¹⁰ ILO, *ILO Standards and COVID-19 (coronavirus): FAQ*, Version 3.0 (April 2021), at 28

¹¹ See *VNPF v Aruhuri and others* [2001] VUVA 16; *Garu v Leong (ABM)* [2-13] VUSC 222 – the court recognised that employers that fail to ensure health, safety and welfare of all employees at work may be liable under the *Workmams' Compensation Act* for any common law damages for personal injury.

¹² Australian Human Rights Commission, *COVID-19 vaccinations and federal discrimination law: indirect discrimination and reasonableness*, available at: <https://humanrights.gov.au/about/covid19-and-human-rights/covid-19-vaccinations-and-federal-discrimination-law>

- viii. Whether the employee has close contact with people who are most vulnerable to severe COVID-19 health impacts.
- ix. Whether the employee interacts with people with an elevated risk of being infected with COVID-19.
- x. The incidence, severity and distribution of COVID-19 in the areas where the work is undertaken.
- xi. The availability of the vaccine.
- xii. Advice from medical and work health and safety bodies about COVID-19 and COVID-19 vaccinations at the relevant times, including duties owed by employers to staff and customers under work health and safety laws.
- xiii. Whether there are any alternative methods that might reasonably achieve the employer's objective without recourse to the mandatory COVID-19 vaccine requirement, such as:
 - testing regimes
 - remote work
 - physical distancing
 - personal protective equipment.

c. [Can an employer terminate or discipline an employee if they refuse vaccination?](#)

Yes, termination is possible following the normal termination notice requirements, and in limited instances for serious misconduct. Disciplinary procedures are also possible if the employee is not following government ordered vaccine mandates.

If there are no ministerial orders or regulations making vaccination mandatory for all workers, and the employer has not adopted regulations approved by a Labour Officer making vaccination a condition of employment, it would be difficult to establish grounds for termination based on serious misconduct. However, case law clearly recognises employer's rights to terminate employees following the notice requirements under the *Employment Act* for any reason (provided the employee is not currently on maternity leave).¹³

Termination with notice requires that the employer provide two weeks' notice to employees that have been in employment for less than three years, unless they are paid more frequently than every two weeks (e.g. weekly), in which case they must be given notice corresponding to one pay period. For employees that have been in continuous employment for over three years, 3 months' notice is required. Immediate termination is permitted, provided that the notice period is paid out as part of their termination payments. Additional payments include any

¹³ *Kalambae v Air Vanuatu (Operations) Ltd* [2014] VJSC 129; *Kalambae v Air Vanuatu (Operations) Ltd* [2014] VJCS 34

outstanding wages or salary, outstanding annual leave, and severance allowance accumulated.¹⁴

Employees that are not in continuous employment can be terminated without notice and are not entitled to annual leave or severance allowance. However, outstanding wages or salary must still be paid.

If there are ministerial orders or regulations making vaccination mandatory for all workers, or the employer has adopted regulations approved by a Labour Officer making vaccination a condition of employment, an employer could potentially terminate an employee on ground of serious misconduct for refusing to be vaccinated. However, the employer must be able to demonstrate in good faith that he or she could not be expected to take any other course than termination.¹⁵ This would be dependent on the content of ministerial orders or regulations. Failing to cooperate with any employer regulations approved by a Labour Officer would be a breach of the employee's duties under the *Health and Safety at Work Act*, however, whether this would be grounds for termination for serious misconduct has not yet been tested in court. If an employee were to challenge this in court and the court determine that other courses of action were available to the employer, the court has the power to demand the employer pay up to six times the severance allowance that the employee would have otherwise been entitled to.¹⁶

With termination for serious misconduct of employees in continuous employment, employers are not required to give notice or payment in lieu of notice, or severance allowance. Outstanding wages or salary and annual leave are still required to be paid. Employees that are not in continuous employment can be terminated and are not entitled to annual leave or severance, but must be paid outstanding wages or salary.

d. In the absence of any government laws or regulations making vaccinations mandatory or establishing vaccine mandates for access to private sector businesses, can a business owner limit supply of goods and services to people that are vaccinated?

Yes, businesses can restrict the goods and services they provide to people that are vaccinated, wearing masks or of legal age.

Under the existing laws, employers and self-employed people have duties to people other than employee to ensure that they are not exposed to risks to their health or safety.¹⁷ This is in addition to employers' responsibilities to their employees as detailed above.

The Minister can prescribe regulations for securing health, safety and welfare of persons at work, but also persons other than persons at work against risks to health and safety.¹⁸ This

¹⁴ Section 49, *Employment Act*

¹⁵ Section 50(3), *Employment Act*

¹⁶ Section 56(4), *Employment Act*

¹⁷ Section 3, *Health and Safety at Work Act*

¹⁸ Section 8, *Health and Safety at Work Act*

could include regulations requiring that persons that are not employees that wish to access goods and services in person, be required to show their vaccination cards on entry, wear masks and prohibit minors from entering certain or all business premises.

The Minister also has power to approve codes of practice that have the purpose of providing practical guidance to any provision under the Act or regulations.¹⁹ This provides an opportunity for a Code of Practice, specific to COVID-19, to be developed and approved for businesses that seek to restrict access to their goods or services to people that are vaccinated and/or wearing masks or restrict access to minors.

Without any regulations or a code of practice being passed by the Minister, there is still a strong legal basis for employers to place restrictions on persons that are not employees accessing the goods or services provided on the premises, if it reasonable to reduce risks to their employee's health or safety.

e. What are employer's obligations towards at-risk workers (i.e. older workers, workers with underlying illnesses and pregnant workers)?

Employers are responsible for ensuring the health, safety and welfare of all workers. Alternative arrangements of at-risk workers should be considered. A Ministerial order with further guidance is needed.

The *Health and Safety at Work Act* does not distinguish at-risk workers from other workers. Employers' obligations to ensure the health, safety and welfare of all workers is the same, however, what is required to fulfil that duty is factually determined on a circumstantial basis for each workplace and employee.

Measures to ensure the health, safety and welfare of workers with high-risk health issues may need to be taken by employers. The *Ministry of Health Safe Business Operations Workshop* advises employers to ensure that at-risk workers do not work in environments where they can be exposed to the virus. However, there has been no guidance on the continuing employment arrangements to accompany this advice.

Not following this advice would also put employers at risk of breaching their obligations to these workers, particularly given the Safe Business Operations Workshop was endorsed by the Ministry of Health.

Possible content for a Ministerial order providing guidance on this is provided under Section 5. In the absence of any ministerial orders, employers are left with the similar options as when employees cannot work due to going into lockdown. Specifically:

- i. Employers can identify alternative working arrangements for employee at high-risk of developing health issues if they contract COVID-19, e.g. remote work, physical distancing or personal protective equipment.

¹⁹ Section 9, *Health and Safety at Work Act*

- ii. If alternative working arrangements are not viable, the employer can require the employee to take annual leave, should the employee have annual leave available.
- iii. Employers also maintain the right to terminate with notice, paying out all entitlements.
- iv. It may also be possible for you to stand down your employees for the duration of the lockdown (as you are not able to provide work due to the emergency). It is not clear whether employee's entitlements (e.g. annual leave and severance) continue to accumulate during this time.

There are also no laws to address what happens to an employee's entitlements if their employment conditions are changed or reduced. For example, if the employee is able to do remote work but the hours of work reduced to below 4 days per week, this may no longer be considered continuous employment but what payments are required to be made to the employee and when is not clear.

2. Employers' obligations in case of lockdown

a. Are employers obligated to keep staff employed during a lockdown and what are payments required?

There are currently no legal guidelines for this. Employers can terminate with notice, require employees to take annual leave or offer leave without pay. Ministerial orders are needed.

Under existing laws, employers have a duty to provide work in accordance with the period and number of working days in the contract. In other words, remuneration must be paid regardless of work being available as long as the employee remains in employment. The only exception to this is if there is 'an emergency' which prevents the employer from doing so.²⁰ Given the ongoing State of Emergency declared due to COVID-19, there is a strong legal basis for this exception to be grounds for breaching the duty to provide work, particularly if a government-issued order requires businesses to shut down.

There is no legal guidance in the *Employment Act* to determine what happens in the situation that the employer cannot provide work due to 'an emergency which prevents him from doing so'.

To address this, the following options are available:

- i. The Minister makes regulations providing further details of what happens in this situation.²¹ Possible wording to address this has been provided in Section 5 below.
- ii. The employer can terminate the employee with notice, paying out all entitlements (outstanding salary or wages, annual leave and severance allowance) 'as soon as

²⁰ Section 12, *Employment Act*

²¹ Section 77A, *Employment Act* to give effect to Section 12 in the context of COVID-19.

the service has ceased'.²² With this option, the employer will have no ongoing obligations towards the employee.

- iii. The employer can require that the employee take annual leave, if the employee has annual leave accumulated. If annual leave is not available, or if it runs out during the lockdown period, the employer and employee can agree for the employee to take leave without pay. The employee will remain in continuous employment and continue to accumulate annual leave and severance allowances during this period. If the employee does not agree to take annual leave, the employer may give notice of termination and pay out all entitlements. Employers are required to pay employees entitlements in priority over suppliers.²³ If an employee that has been in continuous employment for over six years resigns during this time, the employer is still obligated to pay all entitlements, including severance allowance.²⁴
- iv. It may also be possible for you to stand down your employees for the duration of the lockdown (as you are not able to provide work due to the emergency). It is not clear whether employee's entitlements (e.g. annual leave and severance) continue to accumulate during this time.

As detailed in the subsection above, there are also no laws to address what happens to an employee's entitlements if their employment conditions are changed or reduced. For example, if the employee is able to do remote work but the hours of work reduced to below 4 days per week, this may no longer be considered continuous employment but what payments are required to be made to the employee and when is not clear.

3. Employers' obligations in relation to staff that cannot work due to becoming sick with COVID-19 or isolating

a. What sick leave is available to employees if they fall sick with COVID-19?

All employees in continuous employment are entitled to 21 days sick leave per year. Beyond the sick leave entitlements, the employee can cease to be employed if a medical practitioner certifies that the employee is unfit to continue to work. Ministerial orders are needed.

For employees to be entitled to sick leave, they must be in continuous employment for over three months (working four or more days per week) and provide a medical certificate if away for two or more days (in Port Vila and Luganville) or four or more days (outside of Port Vila and Luganville). They are entitled to 21 sick days leave each year and the employee is responsible for notifying the employer of their illness unless the employer is aware of the nature of the illness. Medical certificates cannot be backdated beyond four days from the date of the

²² Sections 16(8) and 55, *Employment Act*

²³ As above

²⁴ Section 54, *Employment Act*

examination, and employers can send an employee to a certified medical practitioner for a second opinion at the employer's expense.²⁵

In situations where employees do not have sufficient sick leave, the employee may be considered (under current law) to be unfit to continue to work and the employee then ceases to be employed. For this to apply, a medical practitioner under the *Health Practitioners Act* must certify the employee being unfit to work. In this case, the employer would be required to pay out any outstanding wages or salary, annual leave and severance allowance.²⁶

This is unlikely to be a practical solution in the context of COVID-19. An alternative option would be for the Minister to provide guidance in a regulation or order for this. Possible wording has been provided in Section 5 below.

Employers still maintain the right to terminate the employee with notice, paying out all entitlements, or to require the employee take annual leave, if the employee has accumulated annual leave.

b. When can employee return to work after testing positive to COVID-19?

There is currently no legal guidance around when an employee can return to work after having tested positive for COVID-19. SOPs should be developed to reflect the guidance issued by the World Health Organisation (WHO).

Under current law, employers' duties to provide safe working conditions for his or her employees²⁷ and a duty to ensure health, safety and welfare at work²⁸ continue in this situation. The responsibility falls on the employer to determine what measures need to be in place to ensure safe working conditions for both the employee returning to work and those that have remained in the workplace and the risks involved in early exposure.

SOPs should be developed to reflect the guidance issued by the WHO.

c. What financial support is available to employees that cannot work or be paid their normal wages?

There is currently no financial support proposed by the Government beyond the 2021 Stimulus package, which is now closed. Alternative financial support should be proposed to the Government.

As referred to in the advice above, there will be situations where a worker cannot receive wages or salary because they cannot work, either due to having COVID-19, isolating due to a positive case or being in lockdown, and do not have adequate sick leave or annual leave entitlements to continue being paid. There is currently no government supported financial

²⁵ Section 34, *Employment Act*

²⁶ Section 54(e), *Employment Act*

²⁷ Section 45, *Employment Act*

²⁸ Section 2, *Health and Safety at Work Act*

assistance available in these situations and no legal obligations on the employer to provide ongoing payments to the employee.

In Australia, the Government has established four streams of financial support for workers and employers, which provide some insight into the possibilities for when COVID-19 reaches the community level:

1. COVID-19 Disaster Payment - a support payment to eligible workers unable to earn income due to a COVID-19 public health order. The public health orders may involve lockdowns, hotspot declaration or movement restrictions.
2. Pandemic Leave Disaster Payment - available to eligible workers who do not have appropriate leave entitlements and cannot earn income because they have to self-isolate or quarantine due to a positive coronavirus case or are caring for someone with coronavirus.
3. COVID-19 hardship payments – eligible workers include those that do not have access to paid leave entitlements and cannot work because they are waiting for coronavirus test results.
4. Employers Financial support – e.g. NSW JobSaver payments

4. State of Emergency Powers – NDMO and Department of Public Health

Following the emergence of COVID-19 pandemic, the Vanuatu Council of Ministers instructed the President to declare a State of Emergency (SoE) in Vanuatu. The SoE has been extended several times – first under the Constitution and later under the recently enacted *Disaster Risk Management Act* No. 23 of 2019 (repealed and replaced the *National Disaster Act* [267]).

The latest SoE extension in relation to the COVID-19 emergency was made by the President on 8 July 2021 and is in force until 31 December 2021.

During an SoE, the Vanuatu Government through its responsible Minister for Meteorology, Geological Hazards and Climate Change has the power to direct government agencies and may, on the advice of the National Disaster Committee, direct any government agency to do or refrain from doing any act or to exercise or refrain from exercising any function.

The power to direct the government relates to the exercise of an existing Government or public power, in accordance with the law. This cannot amount to a determination of such question of contractual benefits or obligations between the parties to a private contract.

An “Instrument of Directions” was issued in April 2020 in relation to COVID-19 and deals with border controls, maintaining peace and order, improving health facilities, the promotion of good hygiene practices, and utilization of emergency funds by the Vanuatu Government. It replaced the previously issued Council of Ministers’ “State of Emergency Regulation” which had been made under the Constitution.

In May 2020, a further “Instrument of Directions” was made under the Disaster Management Act, essentially the same the one made in April 2020.

In July 2020, a further “Instrument of Directions” was made under the Disaster Management Act, with minor changes in relation to restrictions on international vessels entering Vanuatu waters.

None of these instruments have addressed employment related matters to date.

In May 2021, the *Public Health Act* was also amended to provide for the establishment of a Health Emergency Advisory Committee responsible to respond to events that may constitute a public health emergency. The Minister responsible for Public Health may, by Order, on the recommendation of the Director of Public Health – after the Director has received advice from the Committee - declare that a public health emergency exists. As of today, there has been no Declaration of Public Health Emergency in Vanuatu in relation to COVID-19 pandemic.

The Public Health Act as amended imposes a *“duty for every local authority to take all lawful, necessary, and, under its special circumstances, reasonably practicable measures for preventing the occurrence or dealing with any outbreak or prevalence of any infectious, communicable, or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred or imposed on it by this Act or by any other law.”*

The Ministry of Health has adopted and published “Public Health Guidelines” and a “Vanuatu Outbreak Alert System” in relation to the COVID-19 pandemic. Each Alert Level (rated from 0 to 3) provides for incremental individual and public health restrictions for people living in affected islands.

From the Alert Level 2, the Ministry of Health *may* impose measures such as schools, market and workplaces closures, the wearing of masks, and inter-island travel restrictions.

From the Alert Level 3, the Ministry of Health may impose additional measures such as ordering people to stay at home (lockdowns) except for non-essential services.

Again, no guidelines or measures have been adopted to address employment related issues to date.

To adequately manage the economic and business impact for employees, employers, and the general public around COVID-19 – including the public health measure which may be imposed at Alert Level 2 or 3 – the Government should consider enacting policies specific to health and safety at work, vaccinations in the workplace, and employment law implications.

Under the *Public Health Act*:

- The Minister of Health may declare a **public health emergency**. This can be done by Order, on the recommendation of the Director following an advice from the Health Emergency Advisory Committee. This can be for the whole, or parts of Vanuatu, on the

basis of either an outbreak of the COVID-19 disease or the potential exposure to an outbreak or pandemic.)

- The Minister may make **regulations** to provide for:
 - o **public health control measures** (meaning the measures used to prevent the introduction, transmission and spread of a notifiable disease (this includes COVID-19) and includes quarantine, isolation, restriction, decontamination, disinfection, disinfestations, immunization, chemoprophylaxis, preventive therapy, prevention and education); and
 - o **any conditions or restrictions** relating to the conduct of the response to the declared public health emergency.

Under the *Disaster Risk Management Act*, the Minister (responsible for Meteorology, Geological Hazards and Climate Change)'s power during a State of Emergency go beyond public health actions. This is a broad power to “**direct any government agency** to do or refrain from doing any act or to exercise or refrain from exercising any function” for the purpose of responding to a declared emergency.

A “government agency” in this context means:

- (a) a Ministry; or
- (b) an office or body established under the Constitution; or
- (c) an office or body established under an Act of Parliament; or
- (d) a prescribed agency.

5. Ministerial orders or regulations

The following sections provide some content options for Regulations or Orders to provide the necessary guidance for employers and workers during the State of Emergency and the transition into a Public Health Emergency. The content is based on the gap areas identified above and correspond to the Acts under which these powers can be exercised.

Employment Act

In exercise of the powers conferred on me by sections 77 and 77A of the Employment Act [160], I, the Honourable Alatoi Ishmael Kalsakau, Deputy Prime Minister and Minister responsible for Internal Affairs, made the following Regulation:

1. All employers in Vanuatu are exempt from their duties to provide work to their employees under Section 12 of the *Employment Act* if the Vanuatu Government imposes measures under the Vanuatu Outbreak Alert System that restricts movement of employees or limits business operations. During the period that these measures are in effect, employers may offer flexible working arrangements to their employees,

reduced hours or temporarily stand down employees. Employee entitlements are to continue to accrue on a pro rata basis during this period.

a. Ideally supported by some kind of VNPF access supported by Govt Scheme

2. Employees that are absent from work when measures are in place under the Vanuatu Outbreak Alert System under Level 2 or above are exempt from providing medical certificates to their employers under subsection 34(2). Employers may automatically deduct accrued sick leave entitlements from employees entitled to paid sick leave under subsection 34(1) that are absent from work during this period. Employers may temporarily stand down employees that are absent from work and do not have paid sick leave available during this period.
3. To give effect to Section 45, employers may require employees to be vaccinated as an essential condition of their employment to reduce risks to the health and welfare of his or her employees.
4. To give effect to Section 75, employers may make regulations concerning hygiene and safety in accordance with Schedule 1, which will be deemed as approved by a Labour Officer in accordance with Section 75(2).
5. Employees have duties to comply with lawful health and safety regulations adopted in their workplace under the *Health and Safety at Work Act*. Failing to comply with health and safety regulations will be grounds for serious misconduct under Section 50 that may result in termination.
6. This order will remain in effect for as long as a State of Emergency Order under the *Disaster Risk Management Act* or Public Health Emergency Order under the *Public Health Act* remains in force in any part of Vanuatu.

Health & Safety at Work Act

In exercise of the powers conferred on me by sections 8 and 9 of the Health and Safety at Work Act [195], I, the Honourable Alatoi Ishmael Kalsakau, Deputy Prime Minister and Minister responsible for Internal Affairs, made the following Order:

1. To secure the health, safety and welfare of persons at work during the COVID-19 pandemic, employers may require workers to be vaccinated in the workplace.
2. Employers and the self-employed may also require any employee or other person seeking their goods or services to comply with any of the requirements found in the Code of Practice under Schedule 1 to enter their premises.
3. Employees have a duty to comply with any measures adopted by their employers under this order and the Code of Practice under Section 4(b).

4. This order will remain in effect for as long as a State of Emergency Order under the *Disaster Risk Management Act* or Public Health Emergency Order under the *Public Health Act* remains in force in any part of Vanuatu.

SoE or Public Health Orders

As detailed in Section 4 above, the Minister for Public Health can also pass regulations that could support the above, including mandatory vaccination requirements or vaccination mandates, return to work after testing positive to COVID-19.

The Minister responsible for the *Disaster Risk Management Act* can also pass regulations directing the Minister of Internal Affairs or the Department of Labour to carry out any acts or functions, in accordance with law, which could also support the above regulations and orders being made under the *Employment Act* or *Health and Safety at Work Act*.

6. Guidelines for Employers

These Guidelines are based on the current laws, regulations and orders in place in Vanuatu.

Can I require my employees to be vaccinated?

There are currently no laws in Vanuatu that prohibit you from making the COVID-19 vaccination a condition of employment.

As an employer you have a duty to ensure, 'so far as is reasonably practicable' the health, safety and welfare of all of your employees. Employees also have a duty to follow requirements imposed by their employers or health and safety regulations and take reasonable care for the health and safety of themselves other persons that could be affected at work.

If having unvaccinated employees in the workplace creates risks for themselves or other employees, and their physical or mental condition is impaired or are injured from a disease, you may be held liable for their injuries if you have not taken steps to mitigate that risk.

If you intend to make the vaccinations a condition of employment, it must be seen as *reasonable* in the circumstances. For example, if the employee has contact with other people as part of their responsibilities and there has been a community transmission, which may expose them COVID-19 in the workplace, this may be considered reasonable. The same would be the case if the employee has contact with people that may be COVID-19 positive e.g. people repatriating or in quarantine/isolation. However, this is yet to be tested in court.

You should also include the vaccination requirement in the contract of employment for new employees or to make your own workplace regulations that requires employees be vaccinated. A new workplace regulation will need to be approved by a Labour Officer and should be visible in the workplace. You can find a workplace regulation that has been approved by the Commissioner of Labour for these purposes here – to be developed.

Can I terminate my employees if they refuse to be vaccinated?

Under the current laws, you can only terminate an employee in two ways: 1) termination by notice; and 2) immediate termination for serious misconduct.

Unless Government Regulations are passed requiring all workers to be vaccinated, it is unlikely that refusing to be vaccinated will amount to serious misconduct, and employers should be cautious about terminating employees for serious misconduct – it is the most litigated employment issue in Vanuatu.

However, you may terminate any employee for any reason (or for no reason at all) if you follow the termination by notice requirements.

Termination by notice requirements for open-ended contracts are as follows:

	Employee works 4 days a week or more and has been in service for <i>less than 3 years</i>	Employee works 4 days a week or more and has been in service for <i>more than 3 years</i>	Employee works 3 days or less a week (<i>not in continuous employment</i>)
Period of notice	Minimum 14 days or equal to pay period intervals (e.g. weekly pay = 1 week notice)	Minimum 3 months	Minimum 14 days or equal to pay period intervals (e.g. weekly pay = 1 week notice)
Pay in lieu of notice allowed	YES	YES	YES
Outstanding payment for work done	YES	YES	YES
Payments for annual leave outstanding	YES	YES	NO
Payment of severance allowance	YES	YES	NO

If your employees are on fixed-term contracts (i.e. there is an end date of employment) you must follow the notice requirements in the contract (provided they meet the minimum requirements in the table above). If there are no notice requirements in the contract, you must pay the employee's salary or wages until the end of the contract period.

You can find a template Termination by Notice [Letter](#) here.

Can I stop people from entering my business if they are not vaccinated?

Yes, you can stop people from entering your business or limit the provision of your goods and services for health and safety reasons. This includes limiting access to people that have vaccination cards, people wearing masks or even adults (no children allowed).

As an employer you have a duty to ensure the health, safety and welfare of all your employees, but you also have a duty to other people that could be affected through your business to not be exposed to risks to their health or safety. This also applies if you are self-employed.

Whatever measures you take to ensure a healthy and safe workplace to your employees and others accessing your business should be '*reasonably practicable*' in the circumstances.

Again, you may be held liable for any injuries to employees and others that result from COVID-19 if you have not taken steps to mitigate that risk (proportionate to the risk).

If we have community transmissions, what are my responsibilities towards 'at-risk' employees e.g. elderly, pregnant or underlying illnesses?

Your responsibilities towards 'at-risk' employees are the same as all employees (see details above). However, the risk of serious illness from COVID-19 is higher for these employees than others and different measures may need to be taken for these employees.

Until Government Orders or Regulations are passed providing further guidance on this, you may consider the following:

- i. You can identify alternative working arrangements for 'at-risk' employees if reasonably practicable e.g. remote work, physical distancing or personal protective equipment.
- ii. If alternative working arrangements are not reasonably practicable for your business, you can require your employee take annual leave, if they have annual leave available.
- iii. You also have the option to terminate with notice, paying out all entitlements (see requirements above).

What are my responsibilities towards my employees during a lockdown?

As an employer, you have a duty to provide work to your employees as per their contracts of employment and if there is no work you are still required to provide remuneration, unless there is 'an emergency' that prevents you from providing work. Vanuatu is currently in a State of Emergency as a result of COVID-19, which should justify an 'emergency' exempting you from your legal duty to provide work, or remuneration if there is no work.

If access to your business is restricted from opening or your employees cannot get to work due to Government mandated lockdowns, unless Government Orders or Regulations are made giving further directions, you have the following options:

- i. You can require that the employee/s take annual leave, if the employee is eligible for paid annual leave and has annual leave accrued.

- ii. If annual leave is not available, or if it runs out during the lockdown period, you can offer the employee leave without pay. The employee accepts, they will remain in continuous employment and continue to accrue annual leave and severance allowances during this period.
- iii. You can terminate the employee with notice, paying out all entitlements (outstanding salary or wages, annual leave and severance allowance) 'as soon as the service has ceased'. With this option, you will have no ongoing obligations towards the employee.
- iv. It may also be possible for you to stand down your employees for the duration of the lockdown (as you are not able to provide work due to the emergency). It is not clear whether employee's entitlements (e.g. annual leave and severance) continue to accumulate during this time.

There are also no laws to address what happens to an employee's entitlements if their employment conditions are changed or reduced. For example, if the employee is able to do remote work but the hours of work reduced to below 4 days per week, this may no longer be considered continuous employment but what payments are required to be made to the employee and when is not clear.

What happens if one of my employees cannot work because they have COVID-19?

An employee in continuous employment (working 4 days or more a week) is entitled to 21 days sick leave per year. Employees that are not in continuous employment are not entitled to paid sick leave.

The law requires that the employee first notifies you and then provides a medical certificate if absent from work for two or more days (in Port Vila and Luganville) or four or more days (outside of Port Vila and Luganville). Medical certificates cannot be backdated beyond four days from the date of the examination, and you have the option to send an employee to a certified medical practitioner for a second opinion at your own expense.

If the employee does not have sufficient sick leave days, you can provide leave without pay until such time that they can return. However, their sick leave, annual leave and severance allowance will continue to accrue during this period.

If the employee is unfit to continue to work, for their employment to end a medical practitioner under the *Health Practitioners Act* must certify the employee being unfit to work. You would be required to pay out any outstanding wages or salary, annual leave and severance allowance (but no notice period).

You still maintain the right to terminate with notice for any reason provided you pay out all entitlements, or require the employee take annual leave if the employee has accumulated annual leave.

What happens if one of my employees cannot work because they are isolating?

There are currently no Government Regulations or Orders to guide employers and workers in this situation to date.

If your employee cannot come to work because they are isolating but not sick, you can make remote working arrangements if reasonably practicable in the circumstances. If not, you can require the employee to take annual leave if they have leave available and if not, unpaid leave for the duration of the isolation. The employee's entitlements (e.g. annual leave and severance) continue to accrue during this time.

There are no laws to address what happens to an employee's entitlements if their employment conditions are changed or reduced, e.g. hours of work reduced to below 4 days per week, which is no longer considered continuous employment.

Whilst not likely to be desirable in these circumstances, you still have the option to terminate with notice, paying out all entitlements (see requirements above).