

COVID-19 - The Masks are off but the Fight Remains

Introduction

The regulations on Covid-19 protocols that generally apply in public and in workplaces are now respectively found in the ***Control of Notifiable Medical Conditions – May 2022*** (under the National Health Act and referred to herein as the ***Controls***) and ***Hazardous Biological Agents Regulations*** – March 2022 (The HBA Regulations under OHS Act) together with the ***Code of Practice: Managing Exposure to SARS-Cov-2 in the Workplace*** – March 2022 (per the LRA).

Three items in the ***Control of Notifiable Medical Conditions***, namely regulations 16A-16C, that dealt with the wearing of face masks in public, limits on gatherings and restrictions on international travel to South Africa ***were repealed*** with effect from 22 June 2022. ***The remaining Conditions continue to apply.***

As far as the workplace is concerned the HBA Regulations (the Regulations) and the Code of Practice (the Code) mentioned above are not affected by the repeal of the Conditions and continue to apply - hence the title to this article.

The Code and the HBA Regulations are to be applied in combination - section 2(1)(a) of the Code. Both provisions require a risk assessment as the initial step; the outcome of this assessment in workplaces will inform the architecture and content of the applicable and mandatory C-19 Plans.

The Code can be seen as a fit for purpose document. The contents build on the C-19 return to work experiences over the past 2 ½ years. In contrast, SARS-COV-2 has been parachuted into the existing HBA Regulations where, it is suggested, the covid classification is an uneasy fit for most employers.

Furthermore, it seems incongruous that additional Covid-19 obligations are now placed on employers via the HBA Regulations at a time when: -

- the number of Covid related infections and deaths are low compared with the past 2 years
- the workplace Covid protocols are proving effective when measured against incidence of infections among employees and
- the rate of vaccinations in many workplaces will continue to impact positively on any C-19 risk assessment.

A demanding aspect of the HBA regulations is the number of mandatory provisions. Examples are that the risk assessment is to be conducted by a competent person (has the required knowledge, training, experience and, where applicable, qualifications specific to HBAs) and input required from and role of an occupational health practitioner- Regulations 6(1)(2)(b) and 8.

The key question: how to reconcile the “marriage” of the Code and the HBA Regulations?

These Regulations apply to every employer where ... exposure to an **HBA (read Covid infection) may occur** - Regulation 2 (1)(b). Potentially the risk of Covid infection applies to all workplaces.

As the Regulations fall under the umbrella of OHSA, they are to be **interpreted and applied** in terms of the general obligations of employers under the Act.

The primary obligation of employers is, as far as is **reasonably practicable**, to provide and maintain a work environment that is safe and without risk to the health of employees (and others) - Section 8.

It is suggested that employers will do well to conduct **risk assessments** using the **combined templates** provided in the Code and HBA Regulations and then follow the **reasonably practicable test** as the cornerstone of its measures to be listed in the Plan.

Assume for a moment that this assessment demonstrates a very low exposure to Covid-19 infection that is borne out by experience in a particular workplace over the preceding year or so. The employer in this case can presumably defer to the Code as the primary architecture for the workplace Covid-19 Plan.

Conversely, a high risk assessment will require the employer to apply the balance of the Regulations. In both instances, the final plan can be fashioned subject to the reasonably practicable OHSA test.

Remember that the Covid protocols in place will apply not only to employees but also to visitors. By extension, employees can be required to apply minimum Covid protocols of their employer when visiting clients/customers. Further, respect choices of individuals, say, to wear a mask when this is not a universal requirement workplace – section 1(6).

The Code and Regulations are further explained below together with concluding remarks.

The Code of Practice

This Code builds on previous directions and regulations regarding the return to work of employees in line with the various lockdown stages. To this extent employers will identify with the architecture that requires a risk

assessment and development of related plan (The Plan) that is to be finalised in an inclusive fashion including stakeholder consultation and communication. Risk assessment here is a continuous process that requires fine-tuning and amendments in line with changes in Covid -19 infections (including variants), the regulatory environment and the emergence of best practices.

The Plan must also deal with the obligations of employees, their absences from work for Covid related reasons and possible accommodation of employees who refuse or fail to be vaccinated - section 2.

The Code must be considered when interpreting employment law (for example when employees are disciplined for breach of in-house Covid rules) - section 2(2).

The Covid-19 health and safety protocols will continue to apply in the workplace despite the repeal of wearing masks et cetera in public spaces. Protocols include social distancing, use of PPE measures, personal hygiene measures and obligation of employees to report symptoms and to isolate when diagnosed with Covid-19 - sections 6,8(2), 9 and 14.

The obligation on employees in a particular workplace to be vaccinated must follow upon the risk assessment and be included in The Plan - section 5(1)(b)(1). Related measures are to include booster vaccinations - section 5 (1)(i).

The obligations of an employer towards employees regarding compulsory vaccinations are covered in §12. Remember that the fairness of responses by an employer to those employees who fail or refuse to be vaccinated must take into account the contents of the Code. These obligations are not repeated here as the details can be found in related case law reported in *Beaumont's Express* since March 2022.

Employers may require employees to disclose their vaccination status and to produce a vaccination certificate- section 12(2). Two subsections of the Code on vaccinations are important where an employee refuses to be vaccinated. The employer: -

- is to take steps to **reasonably accommodate** the employee in a position that does not require the employee to be vaccinated - Section 12(4)(b) but
- **must accommodate** the employee in a position that does not require the employee to be vaccinated where this is **based on a medical certificate or medical evaluation that the employee has contra-indications for vaccination**. Section 12 (6).

The obligation reasonably to accommodate an employee will arise where the refusal to be vaccinated is based on **constitutional grounds**. In contrast the employer **must** accommodate employees who do not vaccinate based on contra-indications. These contrasting obligations are unusual;

presumably in the latter case, the employer may rely on the grounds of incapacity should accommodation prove elusive.

The Code deals with the procedure to be followed should an employee *refuse to work*, with reasonable justification, due to an imminent and serious risk of exposure to Covid infection. This exposure must be reported to the employer and, if not resolved internally, the matter must be notified to an inspector in terms of §30 of OHSA. The “no work, no pay” rule will **not apply** where refusal to work is based on reasonable justification.

In conclusion, the Covid pandemic is not over. Any relaxation of Covid protocols in the workplace must be based on an appropriate risk assessment. In particular encourage employees to remain vigilant against infection and immediately to report if they have symptoms or have been diagnosed with Covid-19.

The above introduction to the Code illustrates the people-centric emphasis that applies to all employers; note however that the obligations on small businesses (employ ≤ 20 employees) are reduced – sections 4(3) and 13. The Code does not apply to employers excluded from OHSA but the mandatory vaccination sections do apply to mines – section 18.

The Hazardous Biological Agents Regulations

Under these Regulations, Covid-19 is classified as a Group 3 Hazardous Biological Agent that is defined as an ‘agent [that] may cause an infection ... that may cause severe human disease, which presents a serious hazard to exposed persons and which may present a risk of spreading to the community, but for which effective ... treatment is available’ - regulation 1.

These regulations apply to every employer ... at a workplace where ... [there is] exposure to an HBA (occurrence) - regulation 2. Exposure to Covid-19 infection is a consequence of working in-person in a pandemic environment. As a result, the HBA Regulations potentially apply to all employers – regulation 1(8).

If the Code has a people-centric emphasis, then the Regulations are operationally focused and where the presence of a hazardous biological agent is “intrinsic” to the operations. By comparison Covid-19 is extrinsic the organisation. These distinctions are made by the editor and are illustrated in Diagram 1 below.

Covid-19 Workplace Plans

Code	Regulations
Risk assessment - §5(1)(a), Agenda for assessment & plan- §6(1) Vaccination of employees- §§5(1)(a)(i) & 12 PPE options - §§6(2) & 11 Employee communication - §7 Symptom reporting - §8 Isolation requirements - §9 Ventilation - §10 Small business application - §13 Work obligations - §14 Refusal to work - §14	Upfront transparency re risk assessment & implications – R4 HBA risk assessment & agenda – R6 Exposure monitoring – R7 Medical surveillance – R8 Record keeping – R9 – 40 years! Exposure to HBA – biological & PPE etc – R10/11 Duties of persons to HBA exposure – R5 Control measures – R12 HBA H & S committee – R16 & R4(1). Covid as HBA – R Annexure A

Diagram 1

Conclusion

The aims of this article are to bring to the attention of employers and employees the significant responsibilities placed at their door in the next stage of the fight against the pandemic and to make sense of the regulatory changes that currently apply.

Covid risk assessments are to be conducted at regular intervals. Record the related steps in writing, including lists of employees in related meetings and briefings.

The countrywide approach to the pandemic through the adoption of common Covid-19 health and safety protocols has had its successes. This uniformity no longer exists. Employers and employees are being asked to keep up their Covid guard at a time when a contrary message is being conveyed to ordinary citizens.

A highlight of the Code is the reference to booster vaccinations. Enthusiasm here will be tested given the different messages in the country about the way forward with the pandemic. The road ahead may still reveal surprises and vaccinations may yet prove to be the best defence.

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