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Department of Employment and Labour

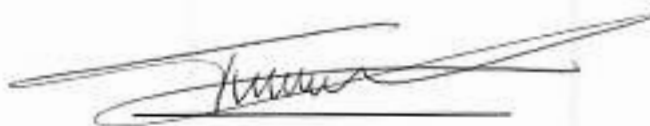
NO. R. 2191

24 June 2022

CODE OF PRACTICE: MANAGING EXPOSURE TO SARS-COV-2 IN THE WORKPLACE, 2022

Notice is hereby given that the Code of Good Practice: Managing Exposure to SARS-CoV-2 in the Workplace set out in the Schedule is issued by the National Economic Development and Labour Council in terms of section 203(1) of the Labour Relations Act, 1995 (Act No. 66 of 1995) to take immediate effect.

For the sake of clarity, it is recorded that the Notice published in GN 1876 on 15 February 2022 in GG 46043 was made in error and is liable to be set aside. An application has been filed in the High Court to have it declared invalid.


MR TW NXESI, MP**MINISTER OF EMPLOYMENT AND LABOUR**

DATE: 22/06/2022

SCHEDULE**CODE OF PRACTICE: MANAGING EXPOSURE TO SARS-COV-2 IN THE WORKPLACE, 2022****ARRANGEMENT OF CODE OF PRACTICE**

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CHAPTER 1

INTRODUCTORY PROVISIONS

1. Introduction

- (1) A national state of disaster to counter the magnitude and severity of the COVID-19 outbreak was declared on 15 March 2020 in terms of section 27(1) of the Disaster Management Act, 2002 (Act No.57 of 2002).
- (2) On 29 April 2020 the Minister responsible for Cooperative Government and Traditional Affairs published Regulations in terms of section 27(2) of that Act, which Regulations were amended to respond to the changing circumstances of the pandemic. Those Regulations included measures that applied to the workplace.
- (3) On 29 April 2020 the Minister responsible for Employment and Labour published a Direction on Occupational Health and Safety Measures in Certain Workplaces in terms of regulation 4(10) of those Regulations, which amended and consolidated to respond to the changing circumstances of the pandemic.
- (4) On the expiry of the declaration of the national state of disaster, the Regulations and the Direction will cease to have legal effect. Because there remains an ongoing need to prevent and mitigate the risks associated with SARS-CoV-2 exposure in the workplace, it is necessary to incorporate those provisions in the Regulations and the Direction relevant to preventing and mitigating those risks.
- (5) The Occupational Health and Safety Act, 1993 (Act No. 85 of 1993)(OHSA), read with its regulations and incorporated standards, requires the employer to provide and maintain as far as is reasonably practicable a working environment that is safe and without risks to the health of workers and to take such steps as may be reasonably practicable to limit or mitigate the hazard or potential hazard.
- (6) The OHSA further requires employers, to ensure, as far as is reasonably practicable, that all persons who may be directly affected by their activities

(such as customers, clients or contractors and their workers who enter their workplace or come into contact with their employees) are not exposed to hazards to their health or safety. This obligation also applies to self-employed persons (for example, plumbers or electricians) whose working activities bring them into contact with members of the public.

- (7) For the purposes of OHS Act in the workplaces to which this Code applies, the identifiable hazard relating to COVID-19 faced by workers, is the virus infecting a worker, the virus transmission by an infected person to other workers in the workplace and the risk of serious illness or death if infected. In workplaces to which the public has access, the hazard includes transmission of the virus by members of the public. Each situation requires special measures to be implemented by employers in order to prevent infection and transmission of the virus or mitigate the risk of serious illness or death.
- (8) The Regulations for Hazardous Biological Agents, 2022 (HBA Regulations)¹ list coronavirus as a listed hazardous biological agent, classed as Group 3. It therefore places legal responsibilities on employers in respect of employers to limit the exposure and mitigate the risks of infection by SARS-CoV-2.
- (9) The primary obligation is to conduct a risk assessment in terms of regulation 6 to determine the risk of exposure and the control measures to limit infection, transmission and mitigate the risk of serious illness or death on the part of employees and other persons who may be directly affected by the activities of the workplace.

2. Purpose of this Code

- (1) A purpose of this Code is to guide employers and employees in managing exposure to SARS-CoV-2 in the workplace by providing guidance to employers and employees in -

¹ [link]

- (a) conducting or updating a risk assessment in terms of the OHSA and the HBA in respect of SARS-CoV-2 exposure;
 - (b) developing a plan to limit infection, 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 .
- (2) Another purpose of this Code is to require any person interpreting an employment law 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.
- (3) To the extent that this 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.
- (4) Apart from those provisions of this Code that reproduce the obligations contained in the employment laws, the Code is intentionally general because workplaces and their requirements differ. Accordingly departures from the non-obligatory provisions of this Code may be justified in appropriate circumstances. Any employer or employee who departs from them must demonstrate justifiable reasons for doing so.

3. Interpretation

- (1) In this Code, a word or expression bears the meaning assigned to it in the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) or the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) and unless the context otherwise indicates –

"adverse event following immunisation" means an adverse event caused by a SARS-CoV-2 vaccination and includes adverse events following immunization as categorised by the WHO²;

"BCEA" means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

"COVID-19" means Coronavirus Disease 2019 as a result of infection of the SARS-CoV-2 virus;

"Department" means the Department of Employment and Labour;

"EVDS" means the Government's Electronic Vaccination Data System³;

"HBA Regulations" means Regulations for Hazardous Biological Agents promulgated in terms of section 43 of OHSA in GN R..... of 2022;

"inspector" means a person –

- (a) designated as an inspector in terms of section 28 of OHSA;
- (b) with the approval of the Minister responsible for Transport, a railway safety inspector appointed in terms of section 32 of the National Railway Safety Regulator Act, 2002 (Act No. 16 of 2002) in respect of a "network" and a "railway operation" as those terms are defined in that Act;
- (c) law enforcement officers appointed with public health responsibilities by a local authority authorised in terms of section 17(1);

"LRA" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"NDOH" means the National Department of Health;

"OHSA" means the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

² <https://vaccine-safety-training.org/adverse-events-classification.html>

³ <https://www.gov.za/covid-19/vaccine/evds>

"PPE" means personal protective equipment contemplated in section 11;

"SAHPRA" means the South African Health Products Regulatory Authority in terms of the Medicines and Related Substances Act, 1965 (No.1 of 1965);

"SARS-CoV-2" means severe acute respiratory syndrome coronavirus 2, the virus responsible for causing the coronavirus disease 2019 (COVID-19). SARS-CoV-2 has undergone numerous changes over time, resulting in the emergence of several variants. Some of these, that are likely to cause severe disease are referred to as "variants of concern" and include the Beta, Delta and Omicron variants.

"reasonable accommodation" means any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of People with Disabilities published in terms of the Employment Equity Act, 1999 (Act 97 of 1999);

"vaccination certificate" means a certificate issued by the EVDS or a COVID-19 Vaccination Record Card issued by the NDOH or any other digital certificate issued outside the Republic and recognised by the NDOH;

"vaccinated" means fully vaccinated with vaccines and includes an additional dose or booster and **"vaccination"** has the same meaning;

"vaccines" means the COVID-19 vaccines and boosters that have been scientifically evaluated and recommended by the WHO and registered or authorised by SAHPRA to be effective in preventing severe disease and death;

"virus" means the SARS-CoV-2 virus;

"worker" means any person who works in an employer's workplace including an employee of the employer or contractor, a self-employed person or volunteer⁴; and

"workplace" means any premises of an employer or place where a person performs work.

4. Application

- (1) Subject to subsections (2) and (3), this Code applies to workplaces except those excluded from the OHSA in terms of section 1(3) of the OHSA.⁵
- (2) Despite the exclusion of mines, mining areas and works referred to in subsection (1), section 18 of this Code applies to these workplaces.
- (3) Subject to the employer's obligations under the OHSA to conduct a risk assessment, employers with less than 20 employees need only apply the measures set out in section 13.

CHAPTER 2 RISK ASSESSMENT AND PLAN

5. Risk assessment and plan

- (1) Every employer must-
 - (a) undertake a risk assessment to give effect to its obligations under the OHSA and the HBA Regulations;
 - (b) on the basis of the risk assessment develop or amend its existing plan to include-

⁴ The distinction between 'worker' and 'employee' in this Code is used to ensure that all persons who in work in a workplace are protected and to locate the responsibility in respect of certain obligations imposed on the employer in respect of its employees such as an application for illness benefits or worker's compensation.

⁵ Section 1(3) of OHSA excludes mines, mining areas or works in terms the Minerals Act, 1991 (Act No. 50 of 1991) and ships, boats or cranes in terms of the Merchant Shipping Act, 1951 (Act No. 57 of 1951).

- (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 section 6 (1) and (2);
- (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.

6. Contents of risk assessment and plan

- (1) The risk assessment and plan referred to in section 5 (1)(b) must include-
 - (a) the identification of the employees contemplated in paragraph (i) of that section;
 - (b) the reporting of symptoms by employees and isolation of employees who are diagnosed with COVID-19 and are symptomatic;
 - (c) the workplace protective measures required to be taken in terms of the HBA Regulations including personal protective equipment and ventilation;
 - (d) a procedure to resolve any issue that may arise from the HRA by an employee of the right to refuse to work in the circumstances contemplated in section 15 (1); and
 - (e) the process by which the obligations under this Code will be complied with.

- (2) The risk assessment and plan referred to in section 5 (1)(b) may include-
- (a) social distancing measures including minimising the number of workers in the workplace through rotation, staggered working hours, shift and remote working arrangements;
 - (b) PPE measures contemplated in section 11;
 - (c) personal hygiene measures such as the wearing of facecloth masks, barriers, hand washing, sanitisers and surface disinfectants;
 - (d) any special measures to mitigate the risk of infection or serious illness or death in respect of individual employees at increased risk such as reducing the numbers in and the duration of occupancy in meeting rooms.
- (3) In developing and implementing a plan in terms of subsection (1)(b)(i), an employer must comply with section 12.

CHAPTER 3

ADMINISTRATIVE MEASURES

7. Notification of workers

- (1) An employer must notify workers on its premises of the contents of this Code and its plan contemplated in section 5(1)(b) and the manner in which it intends to implement it.
- (2) It must provide workers with information that raises awareness in any form or manner, including, where reasonably practicable, leaflets and notices placed in conspicuous places in the workplace informing workers of-
- (a) the dangers of the virus, the manner of its transmission, the measures to prevent infection or limit transmission such as personal hygiene, social distancing, use of facecloth masks and cough etiquette;

- (b) the symptoms associated with COVID-19 as described from time to time by the clinical guidelines published by the National Institute of Communicable Diseases⁶;
- (c) the nature of vaccines used in the country, the benefits associated with these COVID-19 vaccines, the contra-indications for vaccination and the nature and risk of any serious side effects⁷.

8. Symptom reporting by workers

- (1) Every employer must take measures –
 - (a) to determine the vaccination status of their workers;
 - (b) to require workers to immediately inform their employer if they experience any of the symptoms associated with COVID-19 contemplated in section 7(2)(b).
- (2) Subject to subsection (3), if an employee informs their employer that 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.
- (3) Subsection (2) does not apply to workers who report the presence of COVID-19 symptoms between one to three days after vaccination.

9. Isolation of workers

- (1) Workers who have been diagnosed with COVID-19 and are symptomatic must–
 - (a) inform their employer; and

⁶<https://www.nicd.ac.za/diseases-a-z-index/disease-index-covid-19/covid-19-guidelines/guidelines-for-case-finding-diagnosis-management-and-public-health-response/>

⁷ See the information supplied in the NIOH site: <https://www.nicd.ac.za/covid-19-vaccine-faq/>

- (b) isolate themselves for the period as recommended by the National Department Health⁸, unless a longer period is recommended by a medical practitioner.
- (2) In the circumstances contemplated in subsection (1) or section 8(2), an employer must-
- (a) place the employee on paid sick leave in terms of section 22 of the BCEA or if the employee's sick leave entitlement under the section is exhausted, make application for an illness benefit in terms of section 20 of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);
 - (b) take steps to ensure that the employee is not discriminated against on grounds of having tested positive for SARS-CoV-2 in terms of section 6 of the Employment Equity Act, 55 of 1998; and
 - (c) if there is evidence that the worker contracted COVID-19 arising out and in the course of employment, lodge a claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993, in accordance with Notice No. 629 published on 22 October 2019.⁹

10. Ventilation

- (1) In accordance with its obligation under the OHSA, regulation 5 of the Environmental Regulations for Workplaces¹⁰ and the HBA Regulations, every employer must –
- (a) keep the workplace well ventilated by natural or mechanical means to reduce the SARS-CoV-2 viral load;
 - (b) identify areas in the workplace that are usually occupied and poorly ventilated, and improve ventilation through-

⁸ <https://sacoronavirus.co.za/2022/02/18/circular-changes-to-covid-19-quarantine-isolation-and-contact-tracing/>

⁹ GNR 387 GG 4350 of 23 July 2020.

¹⁰ Environmental Regulations for Workplaces GNR 2281 of 16 October 1987.

- (i) natural ventilation including opening doors, windows and vents and where possible cross ventilation in preference to single-sided ventilation;
 - (ii) ventilation through the use of fans, air conditioners or mechanical ventilation.
- (c) where reasonably practicable, have an effective mechanical ventilation system that –
- (i) is technically assessed to be functioning effectively and in accordance with the manufacturer's instructions;
 - (ii) is regularly serviced and maintained by a competent person in particular that ventilation filters are cleaned and replaced in accordance with the manufacturer's instructions;
 - (iii) supplies fresh air at an adequate ventilation rate;
 - (iv) does not have ventilation vents that feed-back through open windows;
 - (v) does not recirculate the air; and
 - (vi) if appropriate in terms of the Guidelines referred to in paragraph (d), have High Efficiency Particulate Air Filters; and
- (d) ensure that ventilation is in accordance with the NDOH Guidelines for ventilation to prevent the spread of SARS-CoV-2 virus.¹¹

11. Specific personal protective equipment

Every employer must check regularly on the websites of the National Department of Health¹², National Institute of Communicable Diseases¹³ and the National Institute for Occupational Health¹⁴ whether any specialised

¹¹ <https://www.nioh.ac.za/wp-content/uploads/2021/08/V1.1-Guidelines-for-ventilation-to-prevent-the-spread-of-the-SARS-CoV-2-virus-FINAL.pdf>

¹² <http://www.health.gov.za/>

¹³ <https://www.nicd.ac.za/>

¹⁴ <http://www.nioh.ac.za/>

PPE for COVID-19 is required or recommended in any guidelines based on the nature of the workplace or the nature of a worker's duties and the associated level of risk.

12. Vaccination of employees

- (1) Every employer must in accordance with the measures contemplated in section 5 (1)(b)(i)-
 - (a) notify the employee identified in terms of section 6(1)(a) of the obligation to be vaccinated;
 - (b) counsel the employee on the issues related to vaccines in section 7 (1)(c);
 - (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 EVDS Portal for SARS-CoV-2¹⁵; and
 - (e) give the employee paid time off to be vaccinated and provide transport for the employee to and from the nearest vaccination site.
- (2) In giving effect to this Code, an employer may require its employees to disclose their vaccination status and to produce a vaccination certificate.
- (3) Should an employee suffer a vaccine adverse event that renders them unable to work, the employer must –
 - (a) on receipt of a medical certificate, give the employee paid time off to recover if the employee is no longer entitled to paid sick leave in terms of the BCEA or any applicable collective agreement; or
 - (b) subject to any regulations in respect of a COVID-19 Vaccine Injury No-Fault Compensation Scheme¹⁶, lodge a claim for compensation in terms

¹⁵ vaccine.enroll.health.gov.za/#/

¹⁶ GNR 376 GG 44485 of 22 April 2021.

of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

- (4) If an employee refuses to be vaccinated, the employer must-
 - (a) counsel the employee and, if requested, allow the employee to seek guidance from a health and safety representative, worker representative or trade union official;
 - (b) take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated.
- (5) If an employee produces a medical certificate attesting that an employee has contra-indications for vaccination, the employer may refer the employee for a medical evaluation for confirmation at the employer's expense.
- (6) If the employer accepts the medical certificate or the employee is referred to medical evaluation and that evaluation confirms that the employee has contra-indications for vaccination, it must accommodate the employee in a position that does not require the employee to be vaccinated.

13. Small businesses

Employers with 20 employees or less must -

- (a) undertake a risk assessment of the workplace and take any reasonably practicable measure that may mitigate the risk of infection and transmission of the virus or the risk to employees of serious illness or death contemplated in section 6(2) and (3);
- (b) comply with section 12 if a measure contemplated in section 5 (1)(b)(i) is introduced;
- (c) if an employee has COVID-19 related symptoms –
 - (i) refuse to allow the employee to enter the workplace;
 - (ii) comply with section 9;
- (d) to the extent reasonably practicable, ventilate occupied closed spaces in the workplace in accordance with section 10(1).

14. Worker obligations

In addition to the obligations of employees under the OHSA and the HBA Regulations, every worker is obliged to comply with the employer's plan contemplated in section 5 (1)(b).

15. Refusal to work

- (1) An employee may refuse to perform any work if circumstances arise which, with reasonable justification, appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to SARS-CoV-2 virus infection.
- (2) An employee who has refused to perform work in terms of subsection (1) must, as soon as is reasonably practicable, notify the employer, either personally or through a health and safety representative, of the refusal and the reason for the refusal.
- (3) Every employer that has been notified in terms of this section must –
 - (a) after consultation with the health and safety committee or, if there is no committee, a health and safety representative, endeavour to resolve any issue that may arise from the exercise of the right in terms of subsection (1);
 - (b) if the matter cannot be resolved internally, notify an inspector¹⁷ of the issue within 24 hours and advise the employee and all other parties involved in resolving the issue that an inspector has been notified; and
 - (c) comply with any prohibition issued by an inspector in terms of section 30 of the OHSA.
- (4) Subsection (1) applies whether or not the person refusing to work has used or exhausted any other applicable external or internal procedure.

¹⁷ Notification by contacting the relevant provincial inspectorate at the telephone numbers listed in Annexure C or at an address in <http://www.labour.gov.za/Contacts/Provincial-offices>.

- (5) No person may benefit from, or promise any benefit to any person for, not exercising his or her right in terms of subsection (1).
- (6) No person may threaten to take any action against a person because that person has exercised or intends to exercise the right in terms of subsection (1).
- (7) No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work as contemplated in subsection (1).
- (8) If there is a dispute as to whether subsection (7) has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or an accredited bargaining council for conciliation and arbitration in accordance with the procedures contained in section 191 of the Labour Relations Act, 66 of 1995.
- (9) If the arbitrator, appointed as contemplated in subsection (8), finds that the employer has contravened subsection (7), the arbitrator may make any appropriate order contemplated in section 193, read with 194(3) or (4) of the Labour Relations Act, 1995.

16. No deduction from employee's remuneration

No employer may make any deduction from an employee's remuneration or require or permit an employee to make any payment to the employer or any other person, in respect of anything which the employer is obliged to provide or to do in terms of this Code.

17. Monitoring and enforcing this Code

- (1) To the extent that this Code gives effect to the OSHA, the Minister responsible for Employment and Labour may authorise local authorities to perform certain inspectorate functions in terms of section 42(3) of the OSHA.
- (2) In so far as any contravention of this Code constitutes a contravention of an obligation or prohibition under the OHSA or HBA Regulations-

- (a) an inspector may perform any of the functions in section 29 of the OHSA and exercise any of the powers listed in section 30 of the OHSA to monitor compliance with this Code;
 - (b) the offences and penalties provided for in section 38 of the OHSA apply.
- (3) An inspector may, for the purpose of promoting, monitoring and enforcing compliance with the OHSA and the HBA Regulations, advise employees and employers of their rights and obligations in accordance with section 64 of the BCEA.

18. Limited application to mines, mining areas and works

If an employer of a mine, mining area or works requires its employees to be vaccinated as part of its mandatory code of practice prepared and implemented in terms of the Guideline for the Compilation of a Mandatory Code of Practice for the Prevention, Mitigation and Management of COVID-19 Outbreak¹⁸, section 12(4), (5) and (6) applies to any employee who refuses or fails to be vaccinated.

19. Amendment of footnotes

The Minister may from time to time amend and publish the footnotes to this Code online on the Department's website without issuing an amended Code in order to update the links and references that the footnotes contain.

¹⁸ GN 701 of 6 August 2021 GG 44947