



COVID-19 MEASURES IN THE WORKPLACE A PROTOCOL ADVISORY FOR BUSINESSES

Background and Objective

The Received Medical Position

1. The COVID-19 virus (particularly, the Delta Variant) is highly contagious, and can cause serious disease and death.
2. The Government has introduced various measures to try to control its spread. These measures include mandatory mask-wearing and social distancing in all public places. It has encouraged frequent hand sanitization and has imposed curfews and lockdowns. These measures have been only partially effective, and Jamaica's infection rate continues to soar.
3. Vaccines have been developed and are becoming increasingly available in Jamaica. They are safe and effective. They do not however provide absolute protection against contracting and spreading the virus, but significantly reduce the risk of doing so. They are regarded by the medical profession as the most effective means of containing the spread of the virus in the long term. The vaccines also significantly reduce the risk of serious illness in those who contract the virus. Unvaccinated people have a higher risk of contracting the virus, and of infecting others.
4. COVID-19 has adversely affected the economy. The interests of business leaders, workers, and the wider community require the implementation of effective anti-COVID measures in the workplace. The purpose of this Protocol is to guide and assist employers and employees in the implementation of such measures.

Legal Duties Owed by Employers

5. Every employer owes to each employee a legal duty to provide a safe system of work in keeping with current standards of best practice. Each employer also owes a duty of care to customers and members of the public. This means that every employer has a duty to do all that is reasonably necessary and practical to protect other workers, customers, and members of the public from risk of injury or harm. In the context of COVID-19, this means that every employer should consider implementing a policy to protect his workers, customers and members of the public. The details of any individual policy to provide such protection, should have regard to what is reasonably necessary in the context of each individual workplace.
6. What is reasonable may range from mask-wearing, social distancing and sanitizing, to working remotely, to being vaccinated, or a combination of any of the above.



7. The duties owed by the employer to workers, customers and members of the public are legally enforceable against the employer, who can be sued if a worker, customer or member of the public is injured or harmed as a result of the employer failing to discharge any of these duties.

Legal Duties Owed by Employees

8. The common law implies into every contract of employment a duty, on the part of every employee, of good faith and fidelity to the employer.
9. This duty requires, among other things, that the employee does nothing unreasonable that would cause the employer to incur legal liability to another.
10. There may be particular circumstances in which it may be unreasonable for an employee to refuse to comply with his employer's policies intended to contain the spread of COVID-19, as to do so would be likely to increase the employer's risk of being liable for injury or loss suffered by another. Such circumstances could amount to a breach of the employee's duty of good faith and fidelity to the employer, and therefore a breach of such employee's contract of employment.

The Consequences

11. Consequences may flow from this, but it is of vital importance that all parties realize that there can be no universal (generally applicable) rule that applies to all employers and all employees regarding this issue. All relevant circumstances of each individual case, and all feasible means of achieving the objective, namely, the safety of others, must be considered before there can be any move to take any disciplinary action against an employee for refusing to comply with an anti-Covid-19 measure.

The Relevant Law – in Brief

12. Jamaican Law requires that even if an employee is in breach of his contract, the employer cannot dismiss him unless the dismissal is justifiable. Our courts have decided that 'justifiable' means fair or reasonable, in all the circumstances.
13. This means, in straightforward terms, that:
 - a. all the circumstances of every particular case must be considered and weighed by the employer before any decision to dismiss can properly be made; and
 - b. any such dismissal will be judged (if the matter goes to the Industrial Disputes Tribunal) upon whether it was reasonable in all the circumstances.
14. These principles apply to all disputes between an employer and an employee, and therefore to any situation in which an employer wishes an employee to comply with measures designed to contain the spread of COVID-19 in the workplace, the employee refuses to comply, and the employer wishes to take disciplinary action.



This Protocol

15. This Protocol sets out:

- a. suggested procedures for ascertaining the extent of the likely risk of transmission of the virus in the particular circumstances of an employer's workplace;
- b. suggested modes of consultations to be conducted with employees in circumstances where the employer wishes to implement measures designed to contain the spread of COVID-19 in the workplace;
- c. other steps to be taken by employers in such circumstances; and
- d. the circumstances in which it may be justifiable to dismiss an employee who refuses to comply with such measures, after all the above processes have been implemented.

What is the Risk?

Step I

16. The first step is to identify the risk of infection in the particular circumstances of the employer's workplace.

Step II

17. Then, design a policy that provides the best level of protection from transmission of the virus in the workplace. If the policy requires the use of any equipment, or the need to be vaccinated, the employer must provide such equipment and/or arrange vaccinations at his expense, on his time, and at a place convenient to the employees. The employer should discuss all of these matters with each/all employees with a view to ascertaining any suggestions, or objections any might have. The employer should seek to resolve any issues that might arise at this stage.

Step III

18. Then in relation to any employee who refuses to comply with any aspect of the policy applicable to him personally, determine if such refusal creates a real and significant, as opposed to hypothetical, risk to others in the particular circumstances of the employer's establishment.

Step IV

19. If Step III results in a conclusion that the presence of any such person who has refused to comply with ant-COVID-19 measures as above poses a real risk to others, the employer must now commence formal consultations with the employees who have declined to comply, in accordance with Section 19 of the Industrial Relations Code, with a view to working out a mutually acceptable



solution. These consultations should be with the employee, personally, and with his union if he is a member of a bargaining unit, and should cover and include:

- a. the employees' reasons for not wishing to comply with the anti-Covid-19 measures; special consideration may need to be given to an employee who discloses a reason related to a medical condition or religious convictions;
- b. the supply by the employer of information, advice or tutorials (as may be appropriate in the circumstances) regarding the proposed measures, including the vaccine (if applicable), the employees' reasons for not wishing to comply, and any other relevant matters; in this regard, relevant medical professionals either from the private sector or the Ministry of Health and Wellness should be utilized to provide relevant data and respond to concerns raised by the employees;
- c. any reasonable alternatives to the proposed measures, that might be sufficient to address or sufficiently ameliorate the risk to others, which would not unreasonably burden the employer (e.g. assignment of alternate work duties, implementing "Work From Home" or other Flexible Working Arrangements), or some other combination of measures; and
- d. which may be subject to change from time to time, depending upon commercial developments and/or developments in local and international standards of best practice in relation to COVID-19.

20. All of the above Steps must be recorded in writing, and the employee kept informed of the details of each step, in writing.

Step V

21. If full discussions/consultations as above are unsuccessful in resolving the issue to the mutual satisfaction of the parties, the employer may legally move to dismiss the employee provided that:
 - a. it is clear that the employee's refusal to comply with the measures proposed by the employer would be likely to give rise to the employer having an increased risk of being liable to other workers, customers, or members of the public; and
 - b. all feasible alternatives to the measures proposed (where possible), have been considered and found not to be viable.
22. In the current context, dismissal is very much a last resort, and only to be contemplated after all reasonable alternatives have been explored. However, the dangers posed by the pandemic are real and devastating, and it is vitally important that people and businesses are not unreasonably put at risk by those who refuse to comply with reasonable measures designed to contain the spread of the virus in the workplace.

Conciliation

23. Discussion and consultation are a vital part of the legal process of dealing with the matters set out above, and this Protocol is intended to be a guide for resolving issues relating to anti-COVID-19 measures at work. It is not a charter for dismissing reluctant employees. So as to ensure that



full and meaningful consultations have taken place in each case, this Protocol recommends, in addition to the legal requirements above, that there be mediation at the Ministry of Labour BEFORE there can be any dismissal. Accordingly, if consultations with an employee have failed to resolve any matter relating to compliance by the employee with anti-COVID-19 measures in the workplace, the employer must refer the matter to the Ministry of Labour for mediation before taking any disciplinary action relating to such non-compliance.

24. It is only if conciliation as above fails that an employer may, under this Protocol, move to dismiss an employee for failing or refusing to comply with reasonable measures designed to contain the spread of COVID-19 in the workplace
25. Accordingly, if the employer, having followed the above steps, still wishes to dismiss the worker, he should follow the correct procedures including giving to the worker written charges setting out the allegations against the worker, requiring him to attend a hearing of the charges, and advising him of his rights in accordance with the rules of natural justice, in alignment with the Labour Relations Code.

Closing Note

26. While we note that the Courts have not yet confirmed the application of some of the above legal principles to the issue, particularly in relation to vaccination in the workplace, this Protocol, relies on an analysis of existing legal principles. The Jamaica Employers Federation (JEF), the Jamaica Chamber of Commerce (JCC), the Private Sector Organisation of Jamaica (PSOJ), the Jamaica Manufacturers' and Exporters Association (JMEA) and the Jamaica Confederation of Trade Unions (JCTU) do not accept any responsibility should it be determined subsequently that the law is other than as set out above.

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