

Covid-19

# Vaccinating India: weighing public and individual worker rights

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[Vikram Shroff](#) is the leader of HR Law at Nishith Desai Associates



[Sayantani Saha](#) is an associate at Nishith Desai Associates

As the devastating surge of a second covid-19 wave ebbs in India, we have realised the importance of vaccination. Since early 2021, employers have been gearing up for employee vaccinations, attempting to understand the nuances of the law surrounding these uncharted territories.

## Government circulars on workplace vaccination

In April 2021, the Ministry of Health and Family Welfare (MoHFW), released its [Guidance on Covid-19 Vaccination at Work Places \(Government & Private\)](#), permitting private employers to collaborate with private covid-19 vaccination centres to inoculate employees over the age of 45.

The government subsequently clarified through [letter](#) dated 21 May 2021 to allow vaccination of employees over the age of 18 and their family members and dependents at workplace vaccination centres owing to the MoHFW's [Liberalised Pricing and Accelerated National Covid-19 Vaccination Strategy](#).

As a result, employers initiated the process for facilitating their employees and their dependents to be vaccinated through employer-organised camps. Luckily, after the initial vaccine shortage in India, things appear to be back on track and employers are now coordinating for the second dose of vaccine.

## Can employers make vaccination mandatory?

From a duty of care perspective, employers are keen that all their employees are vaccinated, so that there is a lesser chance of covid-19 infection. However, employers have been concerned as to whether they can mandate vaccination.

The [FAQs](#) on vaccination published by MoHFW state: "Vaccination for covid-19 is voluntary. However, it is advisable to receive the complete schedule of covid-19 vaccine for protecting oneself against this disease and also to limit the spread of this disease to close contacts including family members, friends, relatives, and co-workers."

Employers remain keen to explore options to encourage employees to get vaccinated, especially since it is likely to be a criteria for office entry in the initial phase.

## The court's interpretation

Given the invasive and perpetual effect of an inoculation procedure, it is debatable whether the right of a person to refuse vaccination will triumph the public benefit of universal vaccination. This issue recently came up for the views of the Meghalaya High Court in the matter *Registrar General v State of Meghalaya*.

The case was filed against various orders issued by the Meghalaya government making it mandatory for shopkeepers, vendors, local taxi drivers, and others to get themselves vaccinated before resuming business. In view of the directions issued by the Meghalaya government, a public interest litigation was filed which was taken up by a two-judge bench of the Meghalaya High Court.

In considering the legal issues thereof, Chief Justice Samadder, referring to the MoHFW FAQs on vaccination, stated: "A notification/order of the State certainly cannot put an embargo and/or fetter on the fundamental right to life of an individual by stripping off his/her right to livelihood, except according to the procedure established by law. Even that procedure is required to be reasonable, just and fair (see Olga Tellis, *supra*). Till now, there has been no legal mandate whatsoever with regard to coercive or mandatory vaccination in general and the covid-19 vaccination drive in particular that can prohibit or take away the livelihood of a citizen on that ground."

CJ Samadder also observed: "Article 21 encompasses within its fold, right to health, as a fundamental right. By that same analogy, right to health care, which includes vaccination, is a fundamental right. However, vaccination by force or being made mandatory by adopting coercive methods, vitiates the very fundamental purpose of the welfare attached to it. It impinges on the fundamental right(s) as such, especially when it affects the right to means of livelihood which makes it possible for a person to live."

In this context, CJ Samadder also looked at the common law on an individual's rights to choose vaccination stating: "Thus, by use of force or through deception if an unwilling capable adult is made to have the flu vaccine would be considered both a crime and tort or civil wrong, as was ruled in *Airedale NHS Trust v Bland*, around 30 years ago. Thus, coercive element of vaccination has, since the early phases of the initiation of vaccination as a preventive measure against several diseases, have been time and again not only discouraged but also consistently ruled against by the courts for over more than a century."

On further discussion on considerations related to forceful vaccination and rights to personal liberty under international law, CJ Samadder concluded: "Therefore, right to and the welfare policy for vaccination can never affect a major fundamental right; i.e., right to life, personal liberty and livelihood, especially when there exists no reasonable nexus between vaccination and prohibition of continuance of occupation and/or profession. A harmonious and purposive construction of the provisions of law and principles of equity, good conscience and justice reveals that mandatory or forceful vaccination does not find any force in law leading to such acts being liable to be declared *ultra vires ab initio*."

### **Other legal developments**

While the Ministry of Health and Family Welfare FAQs on vaccination state vaccination is voluntary, certain local government authorities recently issued orders saying no salaries will be credited to their employees who have not taken their covid-19 vaccine shots. This includes the authorities of [Ujjain Municipal Corporation](#) (Madhya Pradesh), [Firozabad district](#) (Uttar Pradesh), and [Pimpri-Chinchwad Municipal Corporation](#) (Maharashtra).

In fact, there are also reports of similar threats of withholding salary for non-vaccinated employees by certain departments of the state governments of [Assam](#) and [Chhattisgarh](#). This has evidently resulted in several government employees undergoing vaccination, despite reservations.

Recently, an Indian Air Force employee was also [reportedly](#) served with a show-cause notice for his reservation against undergoing vaccination against covid-19, who thereafter moved the Gujarat High Court challenging such notice. Although the matter is currently pending adjudication, the Gujarat High Court in its order dated 22 June 2021 has restrained the Indian Air Force authorities from taking any coercive action against the petitioner until the next date of hearing. It has been [reported](#) that the petitioner has cited a Supreme Court case upholding an individual's right to choose the medication of their choice in his defence.

### **Conclusion**

In view of the balance between an individual's right to life and the rights of the public at large, it does not appear to be possible for states to mandate individuals to be vaccinated as it infringes on fundamental rights. However, in view of news reports of several state authorities dictating authoritative terms against its employees, compelling them to get vaccinated, it is yet to be seen if the Meghalaya High Court judgment will have a widespread impact on the national fora.

Since employers in India may not be able to legally mandate vaccination of their employees, and given their duty of care obligations, they are more likely to encourage or incentivise them for vaccination. Several [progressive employers](#) have organised vaccination camps at the workplace and are now coordinating for the second dose. In short, it is in the employer's best interest to ensure the majority of its workforce is vaccinated as it starts to gradually reopen its offices in India over the next few months.