

COVID-19: The Future World of Work

Global Guide on Employment Implications of the COVID-19 Vaccination



The news that a number of coronavirus disease 2019 (COVID-19) vaccines are in the final stages of development/approval has been welcomed by employers and employees around the globe. At last, there may be light at the end of the tunnel! It has also inevitably prompted a number of questions, such as whether employers can require their staff to have the vaccine as part of their making the workplace as safe as practicable, and what their options are if an employee refuses to have it.

In this guide, we set out the key questions that employers are likely to have about the vaccine and the implications for the workplace. Lawyers from our Labour & Employment team have then provided outline answers to these questions for their particular jurisdiction. As will be seen from the responses, approaches differ from country to country – whilst most countries will not make the vaccine mandatory, in some jurisdictions a refusal to have it may mean that an employer has grounds to dismiss in light of the unique threat posed by COVID-19. The other key common theme from the answers is there are still lots of “maybes”. This is uncharted territory for governments, businesses and individuals alike. In most countries, the position is still developing and we are still waiting for guidance from the government and relevant health/discrimination/data protection bodies there on how employers should approach this issue. Businesses should therefore ensure they keep abreast of developments in the different countries that may affect them – a one-size-fits-all approach across your international network is definitely not recommended.

Please note that this guide is intended as a high-level overview only and should not be regarded as a substitute for legal advice. It sets out the position as at 4 December 2020. We recommend that you always check the latest position with your local labour & employment lawyer. Where “✓/× Maybe” responses are given, they may be dependent on the facts and specific advice should always be taken.

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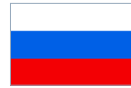
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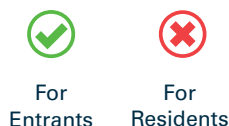
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Further Resources

Global Edge

Global Edge is an award-winning product that gives instant access to the latest employment law developments in 38 countries plus the EU, direct to a mobile device or desktop. It is an invaluable tool for inhouse counsel and HR professionals in global organisations providing up to date, clear guidance on 30 employment law topics and tracks upcoming legislation – of particular relevance as businesses prepare their workforce for the return to work. It also contains dedicated knowledge hub on COVID-19 for further information as well as a special section on pensions.

Will the Australian government make it mandatory to have the vaccine once it becomes available?



A national vaccination policy for Australia was endorsed by the National Cabinet (federal leadership and state premiers) on 13 November 2020. For persons seeking to enter/re-enter Australia from abroad, it will be compulsory to present a valid vaccination certificate when boarding the aircraft/vessel. If this is not done, the person will be required by law to spend 14 days in monitored hotel quarantine (not self-isolation) at their own/their employer's expense.

For persons within Australia, a COVID-19 vaccination will not be mandatory but strongly encouraged, and there will be a national system to monitor immunisation levels and individual vaccination status.

Can employers insist their staff have the vaccine once it becomes available? Maybe

Employers have a statutory duty to provide a safe workplace and working conditions that do not expose workers to hazards. If the vaccine is proved to be safe and effective, it is likely that a direction to a worker to be immunised will be held to be a lawful and reasonable direction. This is an objective test. Unless a worker's refusal to follow such a direction were proven to be reasonable on medical grounds, an employer could deny the worker entry to the workplace if the refusal is based on subjective grounds, such as anti-vaxxer beliefs. Until the High Court of Australia decides whether the safety of the majority outweighs the right of individuals to assert their religious or other beliefs, the answer will remain a maybe.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

It would make a difference only if the disability were medically proven, and it was proved that the harm or risk of harm to the employee caused by the vaccine outweighed the need to keep the workplace safe and free from hazard for the majority, or, alternatively, that the employer had considered all practicable options to keep the workplace safe, and immunisation of all employees was the only option.

Will employers be able to arrange for the vaccination of their own staff?

Maybe
but not initially

From early 2021, the National Cabinet's policy provides that the vaccine will be provided to three priority groups: those at risk of exposure, i.e. health and aged care workers; those in critical jobs; and those in the general population at increased risk from COVID-19. Once regulation, storage, logistics, funding policy and data collection have been resolved at a federal level, the states and territories will be responsible for delivering the vaccine to citizens and those with permanent residence and some classes of visa holders – the process to be adopted is not yet clear.


Will employers be obliged to ensure their staff get vaccinated? Maybe

There is no specific statement on this issue, but all employers are obliged to provide safe workplaces that are free from hazard.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request? Maybe

The criteria underpinning the meaning of lawful and reasonable directions given by an employer are objective and are discussed above. An additional criterion would be whether immunisation against COVID-19 was an inherent requirement of the job. If it were, this would undercut any suggestion that termination of an employee who declined was unlawful discrimination.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Probably Yes

On the basis of the Australian government's policy on those entering or re-entering Australia and the employer's statutory duty to provide a safe workplace, such a refusal, which will eventually lead to termination if the worker cannot work remotely, is likely to be upheld, subject to medical evidence supporting the exclusion as reasonably practicable.

Are there data protection/privacy considerations in relation to this?

Maybe

The inclusion of an individual's immunisation details in the federal MyHealth record would be lawful, as it would have the individual's consent.

Are there any other issues that employers should consider in relation to this issue?



It is essential in any safe and healthy workplace for there to be formally recognised channels of communication, both upwards and downwards, so that every worker understands why and how the employer intends to keep the workplace safe and free from hazard.

Is there any guidance available for employers?



The Department of Health has provided some guidance to employers on implementing occupational vaccination programmes for people at occupational risk. This might include healthcare workers, childcare workers, laboratory workers or people who work with animals.

The Department of Health has recommended that if workers have a "significant occupational risk of acquiring a vaccine-preventable disease", the employer should implement a comprehensive occupational vaccination programme, which might include:

- A vaccination policy
- Current staff vaccination records
- Information about relevant vaccine-preventable diseases
- A policy for managing vaccine refusal

The Department of Health also recommends that employers should take "all reasonable steps to encourage non-immune workers to receive the recommended vaccines"

Clearly, there will be further guidance provided once the immunisation programme actually commences, and employers are advised to keep abreast of developments.

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Will the Belgian government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?



No, employers do not have a statutory right to require employees to have the vaccine. In the absence of any such mandatory requirement, any dismissal by an employer of an employee who refuses to have the vaccine would amount to an arbitrary dismissal attracting up to 17 weeks' salary as compensation. Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority now is to ensure the vaccine is available to governments globally to allow them to administer it to priority groups such as medical staff.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?



No, there will be no such obligation placed on employers.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



No, such refusal would qualify as obstructing the employee to perform his/her duties, which could, in turn, qualify as a constructive dismissal.

Are there data protection/privacy considerations in relation to this?



Yes.

Information about who has (or has not) been vaccinated and when (or why not) will constitute special category data. The processing of this type of data is, in principle, forbidden, unless there is a specific exemption to rely on. It is assumed that the Belgian Data Protection Authority will rule that employers do not have such a ground to rely on (similar to the position they have taken on temperature checks as a measure to protect against COVID-19).

Are there any other issues that employers should consider in relation to this issue?



Employers should be conscious of the fact that whilst most people welcome the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. A recent survey suggests that 30% of Belgian doctors currently consider they will not have the vaccine themselves once it becomes available.

Employers may, therefore, find there is some pushback in connection with this issue. Transparent communication will be key.

Is there any guidance available for employers?



Unfortunately, there is not currently any guidance for employers available. Updates may become available in the weeks to come on the website of the Ministry of Employment (<https://werk.belgie.be/nl/themas/coronavirus>) and the Data Protection Authority (<https://www.gegevensbeschermingsautoriteit.be/burger/thema-s/covid-19>).

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Will the Chinese government make it mandatory to have the vaccine once it becomes available? Maybe

The Chinese government may make it mandatory for state-owned companies and public service agents/companies. It is unlikely that such a requirement will apply to all companies/industries.

Can employers insist their staff have the vaccine once it becomes available? ✗

No, employers cannot force their staff to have the vaccine unless the employers are subject to a mandatory requirement.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

If the employer is one of the companies or in one of the industries that are subject to a new requirement for mandatory vaccination, an employee's religious belief will not make any difference. If there is supporting evidence, an employee's personal condition, if it amounts to a disability, may be used as a reason not to have the vaccine.

Will employers be able to arrange for the vaccination of their own staff? Maybe

This is possible in the future. In such circumstances, employers must choose one of the vaccinations approved by the PRC government.

Will employers be obliged to ensure their staff get vaccinated? Maybe

Only if the relevant employer is in a company or in an industry subject to a mandatory vaccination requirement. Otherwise, no.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request? Maybe

If the employer is in a company or in an industry subject to a mandatory vaccination requirement, yes. Otherwise, no.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? Maybe

If the employer is in a company or in an industry subject to a mandatory vaccination requirement, yes. Otherwise, no.

Are there data protection/privacy considerations in relation to this? ✗

No.

Are there any other issues that employers should consider in relation to this issue? ✓

Employers should strictly follow government guidance/requirements on COVID-19 issues.

Is there any guidance available for employers? ✓

There was some guidance issued in March/April 2020. As China has been back to normal for the most part, most provisions of the guidance are no longer strictly enforced in practice. Employers would be well advised to keep a close eye on government communications through the local news and media briefings from the government.

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Will the Czech government make it mandatory to have the vaccine once it becomes available?



The Czech Minister of Health has **declared** that vaccination will be voluntary.

Can employers insist their staff have the vaccine once it becomes available?

Maybe

Currently under Czech law, vaccinations can be ordered in relation to employees only in specific circumstances, namely where the employer's activities are associated with the possibility of endangering the health of the employee by a biological agent, i.e. in situations where employees are directly exposed to danger from COVID-19 (e.g. in laboratories, in health professions, etc.) and where the risk of contracting this virus is specific to the workplace.

In other circumstances, employers do not have a statutory right to require vaccination.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

According to case law from the Czech Constitutional Court, an individual can object to mandatory vaccination on religious (or even secular) grounds. This exception, however, only applies in exceptional cases and must be closely linked to the individual that is required to have the vaccination, e.g. because the individual has had a highly undesirable response to a previous vaccination.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff.

According to preliminary government plans, certain groups of the population (e.g. persons over 65 years of age, healthcare professionals or critical infrastructure workers) will be provided with the vaccine as a matter of priority. So far, it is not expected that the vaccine will be commonly available in a pharmacy and it will be possible to obtain it only from a doctor who will apply it directly.

It is possible that in the future employers could arrange for this vaccination, as is the case today with the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?

Maybe

So far there is no specific and express obligation on employers to ensure their staff get vaccinated. As a minimum, employers should encourage their employees to get the vaccination and provide their employees with relevant information.

In relation to the specific circumstances mentioned above concerning mandatory vaccination, such an obligation may arise on the basis of the employer's health and safety obligations. An employer is obliged to ensure the occupational health and safety protection of employees at work with regard to risks that might endanger their life and health during the performance of their duties. If there is a high risk that employees would be directly exposed to the COVID-19 virus, the employer might be obliged to ensure vaccination.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?

Maybe

No, as the vaccine will most likely not be mandatory and employees will not be subject to such an obligation. Without a legal requirement for mandatory vaccination, employers cannot force employees to be vaccinated.

In relation to the specific circumstances referred to above concerning mandatory vaccination, it is possible that such a refusal may constitute a failure to comply with a reasonable management request, but the reasonableness of the request would have to be assessed on the facts of each individual case. Risks arising in the workplace and the employer's interest in protecting the health of its employees should always be weighed against each employee's right for personal integrity and his/her personal freedom. As explained above, vaccination can be ordered by the employer only in specific circumstances.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



In general, an employer may refuse an employee entry to the workplace and send the employee home for any reason, including health and safety concerns, but the employee must receive full pay (as this is considered to be an obstacle on the employer's side).

It is recommended that employers try and reach agreement with the employee first. For example, an agreement about working from home (if applicable) could be entered into with the employee.

In relation to the specific circumstances mentioned above concerning mandatory vaccination, if an employer's request to vaccinate was considered reasonable, the employee could be considered unfit to perform work and the employment relationship with this employee could possibly be terminated.

Are there data protection/privacy considerations in relation to this?



No guidance has yet been issued by the Czech Data Protection Authority.

Information about whether a person has or has not been vaccinated would constitute special category personal data pursuant to Article 9 of the GDPR. A valid ground for processing could be the legal obligation of the employer (as the controller) or for the purpose of preventative or occupational medicine. Employees must be duly informed about the processing.

A data protection impact assessment might need to be carried out by the employer (as the controller) if data concerning health is being processed on a large scale.

Are there any other issues that employers should consider in relation to this issue?



No.

Is there any guidance available for employers?



Not currently, but we anticipate that guidance will be issued by the government at some stage. The Ministry of Health, the Ministry of Labour and Social Affairs or the Personal Data Protection Office may also issue guidance on relevant issues.

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Will the French government make it mandatory to have the vaccine once it becomes available?

The President declared during his speech on 24 November 2020 that vaccination will not be mandatory.

The High Authority of Health ("HAS") also stated that it is not recommended to make the vaccine mandatory whether for the general population or for health professionals.

Can employers insist their staff have the vaccine once it becomes available?

Assuming the vaccine will not be mandatory, employers cannot insist their staff have the vaccine.

However, the employer can recommend, where appropriate and on the basis of a proposal by the occupational physician, that workers who have not been immunized against the pathogenic biological agents to which they are or may be exposed receive appropriate vaccinations at its expense.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Assuming the vaccine will not be mandatory, it would not make any difference if an employee refuses to have the vaccine because of his/her religious beliefs or for other reasons.

Will employers be able to arrange for the vaccination of their own staff? Maybe

The HAS has developed a preliminary vaccine strategy. The vaccination will firstly be available to people at risk of severe disease and people who are most exposed to the virus (e.g. health staff).

At this stage, the government has not made a statement about the scope for employers to arrange for the vaccination of their own staff

Will employers be obliged to ensure their staff get vaccinated?

As the vaccine will probably not be mandatory, it is unlikely that employers will be obliged to ensure their staff get vaccinated.

No mention of such obligation has been made by the government.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?

No, assuming that the vaccine will not be mandatory, an employee's refusal will not constitute a failure to comply with a reasonable management request.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

No, assuming the vaccine will not be mandatory.

On the other hand, pursuant to French legislation, employers are responsible for the health and safety of their employees at the workplace, which means that the necessary measures must be taken in order to avoid potential risks to the employee. Alternatives could be adopted such as working from home if this is possible, social distancing, barrier measures, etc.

Are there data protection/privacy considerations in relation to this?

Yes, the vaccination will constitute personal information of the employee. It will therefore be subject to the GDPR.

Are there any other issues that employers should consider in relation to this issue?



As with most Covid-related issues (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff representatives and employees, explain the rationale for their approach on vaccination, consider any feedback, etc.

In order to encourage employees and achieve a high vaccination rate within the company, free vaccinations could be taken into consideration.

Is there any guidance available for employers?



Not yet.

It should be available soon but for now no mention has been made on the role of employers in the vaccination campaign against COVID-19.

For more information on vaccination in France, please consult the site of the High Authority for Health: <https://www.has-sante.fr/jcms/>

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Will the German government make it mandatory to have the vaccine once it becomes available?



No. According to current government statements, the vaccination will be voluntary.

Can employers insist their staff have the vaccine once it becomes available?



Probably not, since in most cases the obligation to vaccinate would constitute an excessive interference with the physical integrity and personal rights of the employee.

Exceptions could be made for employees whose jobs expose them to a very high risk of infection, for example medical staff of a COVID-19 unit in a hospital.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

This is conceivable in individual cases, since both religion/belief and disability are characteristics under the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz), according to which an employee may not be discriminated against.

Will employers be able to arrange for the vaccination of their own staff?



Not in the foreseeable future. According to the government, vaccination centres are to be set up first, where mainly vulnerable staff from the caring professions/police/fire brigade will be vaccinated. The plan is to supply local doctors with the vaccine in early summer.

Will employers be obliged to ensure their staff get vaccinated?



Probably not, since infection with COVID-19 will not be deemed to be an accident at work, as the risk of infection is a general risk due to its pandemic classification.

Exceptions could be made for employees whose jobs expose them to a very high risk of infection. With an increased risk of infection, the employer's duties of protection are greater.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No, because there will not be an obligation to be vaccinated for most employees.

Again, exceptions could be made for employees whose jobs expose them to a very high risk of infection.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Please see above.

Are there data protection/privacy considerations in relation to this?

Maybe

Probably. Irrespective of the system used by the employer, it is most likely that personal data of employees is being collected in relation to this issue. There seems to be no legal basis for the collection of such personal data associated with asking employees whether they underwent a vaccination or with requiring employees to get a vaccination, except for employees working in hospitals, doctor's offices, etc. (as listed in the German Infection Protection Act). Consent (as a legal basis) by an employee would most likely not be considered as valid "voluntary" consent due to the imbalance of power between employer and employee.

Germany



Are there any other issues that employers should consider in relation to this issue?



We would generally recommend achieving a high vaccination rate amongst employees through the use of incentives. For example, the vaccination could be provided for free or could be associated with other advantages for the employees.

Is there any guidance available for employers?



Not yet, although we assume that there will be official guidance.

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Will the Indian government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?

Maybe

Employers do not have a statutory right to require employees to have the vaccine.

An employer may potentially be able to dismiss an employee for a persistent refusal to get the vaccine, although each case would need to be considered on its particular facts. Employers should avoid adopting a blanket approach on this issue.

Whether an employer's decision to dismiss is reasonable is likely to depend on a number of factors, including: (i) whether the employee's refusal to have the vaccine poses a serious health risk to themselves and others (e.g. colleagues, customers, clients, etc.) and this risk could not be mitigated sufficiently in other ways (e.g. remote working, complying with existing government guidelines on mitigating the spread of COVID-19, etc.); (ii) the sector in which the employee works and the nature of their job (it is more likely to be reasonable to dismiss an employee who works with people who are clinically extremely vulnerable, e.g. in a care home, hospital, etc.); and (iii) the employee's reasons for refusing to have the vaccine and whether these are real and substantial, etc.

Having said that, if an employer is primarily focused on the risk posed to the rest of its workforce by having employees at work who have not had the vaccine, their reasons for not having it are perhaps less relevant than would be the case in different circumstances where the health and safety of others was not potentially compromised by that refusal.

Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

Employers would certainly need to take these factors into account and be prepared to justify their decision if a discrimination claim was brought. As set out above though, in light of the novel threat to the public posed by COVID-19, the employee's individual reasons for not having the vaccine are likely to carry less weight than might normally be the case.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority now is to ensure the vaccine is available to governments globally to allow them to administer it to the general population.

Will employers be obliged to ensure their staff get vaccinated?



Unlikely, but employers may be able to obtain declarations from employees as to whether or not they have been vaccinated.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?

Maybe

Possibly, yes. The question of what is reasonable will have to be assessed having regard to the particular circumstances of the employee. Employers should not, therefore, adopt a blanket approach when dealing with employees that refuse to take the vaccine. Relevant circumstances will need to be real and substantial to make refusal reasonable. See comments above concerning the factors to take into account when deciding whether a decision to dismiss is reasonable.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Possibly. For the reasons outlined above, employers should consider each case on its particular facts and not adopt a blanket approach, as this could give rise to claims from employees. Is it really necessary to refuse an employee access to the premises? Potentially, yes, but employers should be seen to consider alternatives first, e.g. continued remote working, compliance with other guidelines on social distancing, handwashing, unpaid leave, etc.

Are there data protection/privacy considerations in relation to this?



Yes, information about who has (and has not) been vaccinated will constitute sensitive personal data and information. Employee consent is required to collect and transfer such vaccination data. Additionally, reasonable security measures must be in place when storing and transferring such data.

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine options, the speed at which the different vaccines have been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. Employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers?



Not currently.

Contact

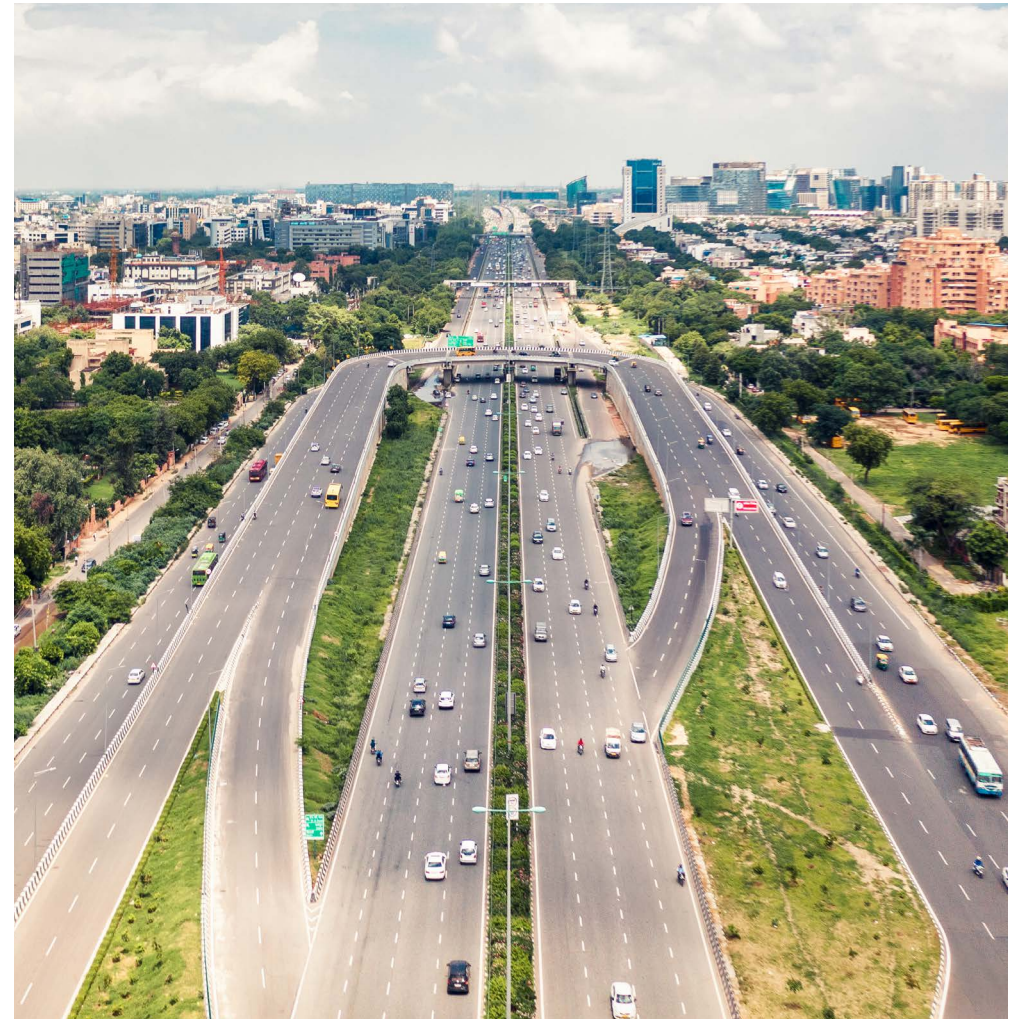


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Will the Italian government make it mandatory to have the vaccine once it becomes available?



The vaccine will not be imposed on the entire population. It will first be administered to those who are most vulnerable (e.g. disabled and elderly people) and those who are most at risk of being infected (e.g. doctors, nurses, etc.).

Can employers insist their staff have the vaccine once it becomes available?



Since the vaccine will not be rendered mandatory, employers cannot insist their staff have the vaccine.

On the basis of the company's competent doctor's opinion, employers may, however, adopt special protective measures for those employees who may be exposed to biological agents, including a vaccine.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



Since the vaccine will not be mandatory, it would not make any difference if an employee refuses to have the vaccine because of his/her religious beliefs or for other reasons.

Will employers be able to arrange for the vaccination of their own staff?



No, the government has announced that in the first phase of the national vaccination process, the vaccines will be exclusively managed by public bodies.

During the second phase, company competent doctors may be involved to arrange for the vaccination of employees.

Will employers be obliged to ensure their staff get vaccinated?



As a general rule, no.

The responsibility to ensure compliance with vaccination rests with the company's competent doctors.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



Since the vaccine will not be rendered mandatory, an employee's refusal will not constitute a failure to comply with a reasonable management request.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Pursuant to Italian legislation, employers are responsible for the health and safety of their employees at the workplace. As a consequence, they may be entitled to refuse entry to the workplace.

It is most likely that this issue will be regulated by means of a national protocol agreed with the most representative trade unions, as has been done during the first wave of the pandemic.

Are there data protection/privacy considerations in relation to this?



Yes. Data concerning who has (and has not) been vaccinated constitutes special category personal data. Accordingly, the collection and processing of such personal data must comply with stringent GDPR requirements. Data subjects must give their explicit consent to the processing of their data and must be provided with information, *inter alia*, relating to the identity of the data controller and the purpose of processing. A data protection impact assessment will be necessary when processing a large amount of data.

Are there any other issues that employers should consider in relation to this issue?



As the vaccine will not be mandatory, it is very likely that some employees will refuse to be vaccinated.

Is there any guidance available for employers?



No, there is no guidance for employers currently available.

However, the Minister of Health has issued a strategic plan to implement the vaccination process on a national basis. http://www.salute.gov.it/imgs/C_17_notizie_5202_1_file.pdf

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Will the Japanese government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?



No, an employer cannot “mandate” employees to get a vaccine, but an employer can “ask” employees to get a vaccine. An employer may, however, either order employees who refuse to get a vaccine to work remotely/via teleworking or at another location where there is no contact with other employees.

If an employer can establish that (i) neither of these alternative methods is available and (ii) there will be serious consequences if any employee is infected (e.g. there are multiple employees working closely with each other in the workplace and infection prevention measures are not in place), the employer may refuse to allow such employees to come to the office.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, as employers cannot require an employee to be vaccinated.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority is to ensure the vaccine is available to governments globally to allow them to administer it to the general population.

Will employers be obliged to ensure their staff get vaccinated?



Strictly speaking, no. Although the Industrial Safety and Health Act imposes upon employers a general duty of care with respect to the work environment and health and safety of employees, employers are only required to “endeavour” to ensure the safety and health of workers in the workplace. This may not extend to the need to provide vaccination unless there is a government directive requiring employers to do so.

Would an employee’s refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No. As mentioned earlier, an employer cannot “mandate” employees to get a vaccine, but an employer can “ask” employees to get a vaccine.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Possibly. If an employer can establish that (i) there is no option of allowing the employee to work remotely or at another location where there is no contact with other employees and (ii) there will be serious consequences if any employee is infected (e.g. there are multiple employees working closely with each other in the workplace and infection prevention measures are not in place), the employer may refuse such employees entry to the workplace.

Are there data protection/privacy considerations in relation to this?



Yes, information about who has (and has not) been vaccinated and when (or why not) will likely constitute sensitive information, being information relating to a medical matter. Employee consent is required to collect such information unless there is an exception provided in law (e.g. if such collection is provided by law or regulation, etc.).

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine options, the speed the different vaccines have been developed, potential side effects, etc. Employers may, therefore, find differences of opinion in relation to whether one should be vaccinated. Employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers?



Not currently. Employers would be well advised to keep a close eye on government communications through the local news and media briefings from the government.

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Will the Dutch government make it mandatory to have the vaccine once it becomes available?



No, vaccination against COVID-19 is voluntary.

Can employers insist their staff have the vaccine once it becomes available?



No, forcing employees to have the vaccine would constitute a breach of the right to physical integrity.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, because employers cannot insist on their staff having the vaccine.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

The Dutch government will arrange for every citizen to get the vaccination. If sufficient vaccines are available employers could offer the vaccine to their employees on a voluntary basis.

Will employers be obliged to ensure their staff get vaccinated?



No, there is no such obligation.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

This depends on the circumstances. For example, if an employee works in a nursing home with people with vulnerable health, this could be an option. If this is the case, the employer should investigate whether there are other suitable tasks the employee could perform. However, the employer is not allowed to process information about the vaccination status of an employee (see next question). Therefore, a company doctor should be involved.

Are there data protection/privacy considerations in relation to this?



Yes. The employer is – in principle – not allowed to process information about the vaccination status of an employee. The employee's vaccination status is considered medical information.

Are there any other issues that employers should consider in relation to this issue?



Not at the moment.

Is there any guidance available for employers?



There is some general information available (in English) on the official government website: <https://www.government.nl/topics/coronavirus-covid-19/dutch-vaccination-programme>

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Will the Polish government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory for all employees or the general public once it becomes widely available. So far, the Polish government has consistently declared that vaccination will be voluntary.

Can employers insist their staff have the vaccine once it becomes available?



No, employers do not have a general statutory right to require employees to have the vaccine (unless employed in, e.g., medical professions on the basis of separate regulations). In the absence of any such mandatory requirement for regular employees, any dismissal by an employer of an employee who refuses to have the vaccine may constitute an unfair dismissal.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority is to ensure the vaccine is available to governments globally to allow them to administer it to priority groups such as medical staff.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?



No, there is nothing to suggest that such an obligation will be placed on employers.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



No, as such a vaccine is not planned to be mandatory.

Are there data protection/privacy considerations in relation to this?



Inevitably, yes. Information about who has been vaccinated and when will constitute special category data. The same will be true of information about who has not been vaccinated and why. Any health-related data is considered special category data and the processing of such data is generally forbidden. An employee's consent may constitute grounds for processing special categories of personal data only where the employee provided such data on his/her own initiative. Consequently, Polish law excludes the use of consent where the employee is not the initiator of the communication on the vaccination. Refusal to provide this data shall not constitute the basis for unfavourable treatment of the employee.

Are there any other issues that employers should consider in relation to this issue?



Employers should be conscious of the fact that whilst most people welcome the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. According to market research in October, only circa 46% of Poles were going to have, or are considering having, the vaccine.

Is there any guidance available for employers?



Unfortunately, there is currently no guidance for employers available, as the government is considering how to distribute the vaccine. It has been said that the vaccine will become available first to medical staff and elderly groups, but no decisions have been communicated yet.

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Will the Russian government make it mandatory to have the vaccine once it becomes available?

Maybe

Mandatory vaccination is regulated by Federal Law of 17.09.1998 N 157-FZ (as amended on 28.11.2018) "On immunization of infectious diseases" (the Law N 157) and Decree of the Government of the Russian Federation of 15.07.1999 N 825 (as amended on 24.12.2014) "On approval of the list of works, the performance of which is associated with a high risk of contracting infectious diseases and requires mandatory preventive vaccinations" (the List).

The List includes medical workers, pedagogues, teachers, life support workers and other specialties.

At the moment, the COVID-19 vaccine is not mandatory. In order to be mandatory, it will have to be included in the attachment to the Law N 157. As soon as it is included, it will be mandatory for the professions included in the List.

It should be noted that in urgent cases (the threat of the emergence and spread of infectious diseases that pose a danger to others), compulsory immunisation can be carried out without amending the Law, by order of the Chief Sanitary Doctor (Deputy Sanitary Doctor) of a respective region of Russia. This order can be issued with regard to specific professions and positions.

Citizens who do not comply with the requirements of the above order may refuse vaccinations, but in such circumstances, they should be suspended from work for the relevant period without pay.

Can employers insist their staff have the vaccine once it becomes available?



No, vaccination will be carried out on a voluntary basis. The vaccination is obligatory only in cases expressly provided by law and only for persons directly named in the law (see above).

According to Article 5 of the Law, when carrying out immunisations, citizens of Russia have, in particular, the right to:

- Free preventative vaccinations, which are included in the national immunisation schedule
- Social support in the event of post-vaccination complications
- Refuse preventative vaccinations

If an individual does not have certain vaccinations, this means:

- A ban for citizens to travel abroad to countries where vaccination is obligatory in accordance with international health regulations or international treaties
- Temporary refusal to admit citizens to educational organisations and health institutions in the event of massive infectious diseases or the threat of epidemics
- Refusal to hire or suspension from work, the performance of which is associated with a high risk of infectious diseases

The list of works, the performance of which is associated with a high risk of infectious diseases and requires mandatory preventative vaccinations, is established by the government or the regulator.

Citizens of Russia are obliged to:

- Follow the instructions of medical professionals
- Confirm in writing their refusal of preventative vaccinations

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No.

Will employers be able to arrange for the vaccination of their own staff? Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The Health Minister said recently that vaccinations for high-risk groups would begin in December. They include health workers, teachers, life support workers, patients with diabetes, obesity or hypertension, and older people. The vaccination is not yet recommended for persons under 18 or over 60 with diseases and allergies that prevent vaccination.

Will employers be obliged to ensure their staff get vaccinated? ✔

Yes, but only for professions and specialists included in the List for whom the vaccination is mandatory.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request? ✔

Yes, but only for professions and specialists included in the List for whom the vaccination is mandatory.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? ✔

Yes, but only for professions and specialists included in the List for whom the vaccination is mandatory.

Are there data protection/privacy considerations in relation to this? ✔

It appears that the employer can process the information about vaccination only with regard to the employees who are subject to a mandatory requirement for vaccination in connection with their job.

With regard to employees for whom vaccination is not mandatory, it appears that the employer does not have a right to collect and process this information, unless such employees provide their written consent in this regard.

Are there any other issues that employers should consider in relation to this issue? ✗

No.

Is there any guidance available for employers? ✗

Not currently, but we anticipate that guidance will be issued by the government at some stage.

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Will the Saudi government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?



No, employers do not have a statutory right to require employees to have the vaccine. If this becomes a mandatory legal requirement from the Saudi government, this position may change. In the absence of any such mandatory requirement, any dismissal by an employer of an employee who refuses to have the vaccine would amount to an arbitrary dismissal attracting compensation. Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority is to ensure the vaccine is available to governments globally to allow them to administer it to the general population.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?



No, as things stand, there is no such obligation placed on employers.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Possibly, yes, although each case should be considered on its own facts and employers should consider whether it is really necessary to refuse an employee access to the workplace, particularly if employees have been back in the workplace before the vaccine is available.

Are there data protection/privacy considerations in relation to this?



Generally, no, there is no specific data protection law or regime in KSA.

Whilst no specific or relevant data protection provisions are set out in legislation, the KSA courts will still apply Shari'ah law. The Shari'ah comprises a collection of fundamental principles derived from a number of different sources, which include the Holy Qu'ran and the Sunnah. Shari'ah law principles protect an individual's right to privacy and prohibit any invasions of it, and prohibit disclosure of "secrets", unless the owner of the secret consents to it or it is in the public interest to disclose it. There is no definition or judicial guidance on what information constitutes a "secret", or when it would be in the public interest to disclose it, and it is difficult at this point to ascertain whether the KSA government would deem data flowing from vaccinations to be within the scope of this term. The extent of liability and penalties for breaching Shari'ah law principles will be determined on a case-by-case basis. Penalties may include imprisonment, monetary compensation and/or deprivation of certain rights.

Obtaining the consent of the data subject (e.g. an employee) around the use of data flowing from the vaccination negates any risk. Best practice is for the consent to be in writing. Otherwise, there is a risk that he/she may deny that consent was given.

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers?



Unfortunately, there is not currently any guidance for employers available. Employers would be well advised to keep a close eye on KSA and local government communications through the local news and media briefings from the government.

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Will the Singapore government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?



At present, employers do not have a statutory right to require employees to have the vaccine. If the vaccination becomes mandatory pursuant to directions from the Singapore government, this position will change.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, as employers have no right to require employees to have the vaccine.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority right now is to ensure the vaccine is available to governments globally to allow them to administer it to the general population.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff.

Will employers be obliged to ensure their staff get vaccinated?



Not as things stand.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



Not as things stand.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Possibly, yes, although each case should be considered on its own facts and employers should consider whether it is really necessary to refuse employees access to the workplace, particularly if such employees have been back in the workplace before the vaccine is available.

Are there data protection/privacy considerations in relation to this?



Yes, information about who has (and has not) been vaccinated and when/why not will constitute personal data that is protected under the Personal Data Protection Act 2012. Whilst there is an exception to the requirement for consent to collect personal data for the purpose of managing or terminating an employment relationship, we are of the view that employers will require employees' specific consent to collect vaccination personal data, as there is currently no mandatory vaccination requirement imposed by law.

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine options, the speed at which the different vaccines have been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Singapore



Is there any guidance available for employers?



Unfortunately, there is currently no guidance for employers available. Employers would be well advised to keep a close eye on government communications through the local news and media briefings from the government.

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Will the Slovak government make it mandatory to have the vaccine once it becomes available?



Based on the statement of the Prime Minister of the Slovak Republic, there is currently nothing to suggest that the vaccine will be mandatory once widely available. Both the coalition and opposition political parties in Slovakia seem to agree that the vaccine will not be mandatory once it becomes available.

Can employers insist their staff have the vaccine once it becomes available?



No, if the vaccine will not be mandatory, employers do not have a statutory right to require vaccination. If this becomes a mandatory legal requirement from the Slovak government, this position may change.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No. We are of the opinion that as it seems the uniform position of all political parties is that vaccination will not be mandatory, it will be an individual's voluntary decision to get vaccinated.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority at the moment is to ensure the vaccine is available to governments globally to allow them to administer it to the population in general.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?

Maybe

According to the information provided so far by the government, employers should not be under an obligation to provide for the vaccination of their employees.

In the first instance, the vaccination in Slovakia will be provided for health professionals and bodies that provide support activities in managing the epidemic, e.g. police officers and firefighters, and for those individuals ensuring the operation of basic activities of the state (energy supply, etc.), as well as for those groups of people who are at greatest risk from infection.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No, as the vaccine will most likely not be mandatory, employees will not be subject to such an obligation. Without a legal prescription of mandatory vaccination, employers cannot force employees to get vaccinated. For example, employees who as part of their job description are, or may be, exposed to dangerous illnesses are under an obligation to undergo vaccination for certain types of illnesses. Employers in such circumstances are under an obligation to pay for such vaccinations. If an employee refuses to get vaccinated in such circumstances, this would constitute a failure to comply with a reasonable management request.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Based on the information that is currently available to us, the response is no. However, employers may restrict access to the workplace in relation to those employees whose jobs can be performed remotely (under recently enacted enforcement legislation) and those employees that display COVID-19 symptoms. At this stage, it is difficult to estimate if employers will be permitted to enact any form of sanctions against employees for not taking the vaccine.

Employers should also wait for any government instructions on this issue.

Are there data protection/privacy considerations in relation to this?

Yes, information about who was vaccinated and when will constitute special category data, as it constitutes health data.

The GDPR sets out a general ban on the processing of such data, but it also contains a catalogue of exceptions where it can be processed.

In order for the processing of employee health data to be considered lawful, the employer must define the purpose of the processing, choose the appropriate legal basis for the processing and fulfil one of the exceptions for the processing of special categories of personal data.

The current situation regarding COVID-19 does not, in any way, limit the ability of individuals to exercise their rights under the GDPR. Employers, as GDPR controllers, should, therefore, also be prepared to request information from employees regarding their processing of personal data for purposes related to the fight against the spread of COVID-19.

Are there any other issues that employers should consider in relation to this issue?

Employers should be aware of the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers?

No, there is not currently any guidance for employers available specifically in relation to vaccination. Employers would be well advised to keep a close eye on Slovak government communications through the local news and media briefings from the government.

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Will the Spanish government make it mandatory to have the vaccine once it becomes available?

In principle, according to the vaccination strategy plan, having the vaccine will not be compulsory in Spain. This was highlighted by the Health Minister at a press conference on 24 November 2020. He pointed out that the vaccine will be administered for free and voluntarily through the National Health System, just like the other vaccines in the calendar.

However, if we reach a situation where the pandemic is out of control, the government has mechanisms in place to require compulsory vaccination.

Can employers insist their staff have the vaccine once it becomes available?

On the basis of current health and safety legislation in force in Spain, employers cannot force employees to get vaccinated.

In very serious or high-risk situations, compulsory vaccination could be imposed by an employer through legal proceedings. In other words, the employer could ask the court to do so. If the court accepts the request, vaccination for the employee will be compulsory.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

As vaccination in Spain is voluntary, there will be very few situations where we are going to encounter this type of conflict.

Nevertheless, if the employer applies for compulsory vaccination and the court accepts the request, employers would certainly need to take these factors into account and be prepared to justify their decision if a discrimination claim was brought.

Will employers be able to arrange for the vaccination of their own staff? Maybe

According to the vaccination strategy plan designed by the government, a priority order of groups to be vaccinated has been established. Therefore, this priority order has to be satisfied first before employers will be able to arrange for the vaccination of their own staff.

Will employers be obliged to ensure their staff get vaccinated?

Based on the vaccination strategy plan, no. The government is responsible for ensuring the vaccination of the population.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request? Maybe

As explained above, vaccination in Spain is voluntary, except in very serious situations. If the employer is in one of those serious situations where the court decides to order compulsory vaccination, in that specific case the employee's refusal will constitute a failure to comply with a court judgment.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Under normal circumstances, no (vaccination is voluntary).

Nevertheless, if the court (or new regulations) has ordered compulsory vaccination, the employer could be entitled to refuse the employee entry to the workplace.

Are there data protection/privacy considerations in relation to this?

Absolutely. The processing of this type of data must comply with the provisions of the GDPR and national implementing laws. It is necessary to keep in mind that vaccination data constitutes special category personal data.

Are there any other issues that employers should consider in relation to this issue?



Employers should remember that the government is entitled to design and apply a vaccination strategy plan. The government expects to achieve high levels of vaccination coverage without having to impose compulsory vaccination, since in many cases, mandatory vaccination could have counterproductive effects.

Although vaccination is voluntary in Spain, in general vaccines have always been very popular.

Moreover, although the first vaccines might be administered in January, they are still months away from reaching the general population.

Is there any guidance available for employers?



Not at the moment. The Health and Labour Ministries may issue some guidance once the date for vaccination gets closer.

Likewise, we understand that the Spanish Data Protection Agency will issue guidance regarding data protection.

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Will the UAE government make it mandatory to have the vaccine once it becomes available?



There is currently nothing to suggest that the vaccine will be mandatory once widely available.

Can employers insist their staff have the vaccine once it becomes available?



No, employers do not have a statutory right to require employees to have the vaccine. If this becomes a mandatory legal requirement from the UAE government, this position may change. In the absence of any such mandatory requirement, any dismissal by an employer of an employee who refuses to have the vaccine would amount to an arbitrary dismissal attracting up to three months' full pay as compensation. Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority right now is to ensure the vaccine is available to governments globally to allow them to administer it to the general population. Vaccinations are, however, starting to be administered for those in frontline positions in the UAE.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?



No, as things stand, there is no such obligation placed on employers.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?



No.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Possibly, yes, although each case should be considered on its own facts and employers should consider whether it is really necessary to refuse an employee access to the workplace, particularly if employees have been back in the workplace before the vaccine is available.

Are there data protection/privacy considerations in relation to this?



With the exception of specific regulation around data protection/privacy within the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) (see below), the UAE does not have any specific federal laws of general application on data privacy or protection. For the purpose of any data processing as a result of a vaccination for an individual, the UAE Constitution of 1971 (UAE Constitution) is arguably the most material, although the degree to which it could apply is relatively limited. The UAE Constitution guarantees the right to secrecy of communications, but only those of UAE nationals. In addition, difficulty arises in determining what information would be considered to be a "secret". There is no judicial guidance on the meaning of the term "secret" in this context, and it is arguable whether or not the use of data flowing from the vaccinations of individual employees would fall within the scope of this term. Obtaining the consent of the data subject (employee) negates any risk in this context, so if it is possible to obtain consent, that would be the safest approach. In the absence of such consent, it is not possible to say that there is no risk that such use/disclosure of personal information will breach the relevant prohibitions in the Federal Law No. 9 of 1987 (i.e. the UAE Penal Code).

In respect of the ADGM, information about who has been vaccinated and when will constitute sensitive personal data. That data will need to be kept subject to all the appropriate protections against loss or unnecessary disclosure, etc. Employers, will, however, be able to lawfully justify any processing of data flowing from vaccinations, as there is provision within the ADGM that allows sensitive personal data to be processed if it is for the provision of care or treatment or the management of healthcare services or where the data is processed by a health professional subject under law or rules established by competent bodies to the obligation of confidence (i.e. the UAE government).

Data protection/privacy is considerably more regulated in the DIFC by virtue of the recently enforced Data Protection Law DIFC Law No. 5 of 2020 (DIFC DP Law). Information about who has been vaccinated and when will constitute special category data; however, the same will be true of information about who has not been vaccinated and why. That data will need to be kept subject to all the appropriate protections against loss or unnecessary disclosure, etc. Records will need to be kept long enough to be used in any possible proceedings arising out of the vaccination, e.g. if it comes to action against the employee. These will constitute valid grounds for processing under the legal obligation, especially if the employee is provided with a prior written notice as to the employer's intentions in this respect. Employers must be fully transparent about how this particular personal data will be used and who will have access to it, which may require them to amend or supplement their current employee privacy notice.

Where employers process health information, they are required under the DIFC DP Law to carry out a data protection impact assessment to document whether the use of this data is necessary and proportionate and complies with the applicable laws.

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers?



Unfortunately, there is not currently any guidance for employers available. Employers would be well advised to keep a close eye on UAE and local government/municipality communications through the local news and media briefings from the government.

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Will the UK government make it mandatory to have the vaccine once it becomes available?



It appears not. At a press conference on 23 November, the Prime Minister said: *"There will be no compulsory vaccination. That's not the way we do things in this country."* However, he went on to say that *"Everybody should get a vaccine as soon as it is available"*, so the intention of the government is clear even without individual legal compulsion behind it – everyone should get it.

Can employers insist their staff have the vaccine once it becomes available?

Maybe

In physically practical terms, obviously no. That would be an assault or battery by the employer.

But can you insist as a matter of law, i.e. dismiss for a persistent refusal? Potentially yes, although each case would need to be considered on its particular facts. Employers should avoid adopting a blanket approach on this issue.

Whether an employer's decision to dismiss is reasonable is likely to depend on a number of factors, including: (i) whether the employee's refusal to have the vaccine poses a serious health risk to themselves and others (e.g. colleagues, customers, clients, etc.) and this risk could not be mitigated sufficiently in other ways (e.g. remote working, complying with government guidelines on mitigating the spread of Covid-19); (ii) the sector in which the employee works and the nature of their job (it is more likely to be reasonable to dismiss an employee who works with people who are clinically extremely vulnerable (e.g. in a care home, hospital, etc.); (iii) the employee's reasons for refusing to have the vaccine and whether these are real and substantial, etc.

Having said that, if an employer is primarily focused on the risk posed to the rest of its workforce by having employees at work who have not had the vaccine, their reasons for not having it are perhaps less relevant than would be the case in different circumstances where the health and safety of others was not potentially compromised by that refusal.

Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

We would recommend that employers seek advice before deciding to dismiss someone for refusing to have the vaccine.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under the Equality Act 2010?

Maybe

An employer would certainly need to take these factors into account and be prepared to justify its decision if a discrimination claim was brought. As set out above though, in light of the novel threat to the public posed by Covid-19, the employee's individual reasons for not having the vaccine are likely to carry less weight than might normally be the case.

On that note, is being an anti-vaxxer a philosophical belief allowing employees to argue they fall under the Equality Act 2010 and should be excluded on that basis? There are a number of conditions to a belief falling under the Equality Act protections, including that it is something worthy of respect in a democratic society and that there needs to be a coherent belief system behind it. Most scientific opinion would suggest this is not the case for the anti-vax movement (the World Health Organisation has described it as one of the top 10 health threats to the world). The wide range of reasons why people are anti-vax (distrust of Big Science or Big Pharma, bad childhood reaction, historic drug scandals, religion, etc.) suggest that statutory protection under the Equality Act 2010 is unlikely for anti-vaxxers.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. The main priority right now is to ensure the vaccine is available to governments globally to allow them to administer it to priority groups such as medical staff, those most at risk, etc.

It may be that at some stage employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?



Based on the government's current stance, no. Employers will not be required expressly by statute to ensure their staff are vaccinated.

Would a failure to ensure your staff are vaccinated nonetheless constitute a breach of your obligations under the Health & Safety at Work Act 1974? Section 2 of the Act requires employers to take all reasonably practicable steps to reduce workplace risks to their lowest practicable level. This is unlikely to extend to requiring all employers to provide the vaccine to their staff/ensure their staff get vaccinated. As a minimum, however, employers will be obliged to encourage their employees in the most robust of terms to have the vaccine and potentially (see below) to take action against those who refuse.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?

Maybe

Possibly, yes. The question of what is reasonable will have to be assessed having regard to the particular circumstances of the employee. Employers should not, therefore, adopt a blanket approach when dealing with employees that refuse to take the vaccine. Relevant circumstances will need to be real and substantial to make refusal reasonable. See comments above regarding factors to take into account when deciding whether a decision to dismiss is reasonable.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Realistically, yes. For the reasons outlined above, employers should consider each case on its particular facts and not adopt a blanket approach, as this could give rise to claims from employees. Is it really necessary to refuse an employee access to the premises? Potentially, yes, but employers should be seen to consider alternatives first, e.g. continued remote working, compliance with other guidelines on social distancing, handwashing, unpaid leave, etc.

Employers should also be aware that if mass vaccination does not begin until the new year, it could be Easter or even later before most people in the UK are vaccinated. If employers continue to allow their staff to have access to the workplace in the meantime, they should be prepared to justify why it is then necessary to prevent certain employees from returning if they refuse to have the vaccine. Needless to say, this decision should not be made in any discriminatory manner.

Employers should also wait to see if the government publishes any guidance on this issue.

On a related note, can employers refuse to allow third parties access to their premises if they have not had the vaccine, e.g. pubs, restaurants in the hospitality sector, etc.? Potentially, yes. This week it was reported that Australian airline Qantas said that in the future travelers will need to prove they have been vaccinated in order to board their flights. It may be that more businesses take this approach.

Are there data protection/privacy considerations in relation to this?

Inevitably, yes. Information about who has been vaccinated and when will constitute sensitive personal health data. The same will be true of information about who has not been vaccinated and why. That data will need to be kept subject to all the appropriate protections against loss or unnecessary disclosure, etc. Records will need to be kept long enough to be used in any possible proceedings arising out of the vaccination, e.g. if it comes to action against the employee. These will constitute valid grounds for processing under the legal obligation and/or legitimate business interest reasons, especially if the employee is provided with a prior written notice as to the employer's intentions in this respect. Employers must be fully transparent about how this particular personal data will be used and who will have access to it, which may require them to amend or supplement their current employee privacy notice.

Where employers process health information, they are required under data protection laws to carry out a data protection impact assessment to document whether the use of this data is necessary and proportionate and complies with data protection laws.

Are there any other issues that employers should consider in relation to this issue?

Employers should be alive to the fact that whilst most people welcome this latest development and the imminent arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, receive pushback in seeking to get their staff vaccinated. As with most things COVID-19-related (compulsory testing, introducing other safety measures, etc.), employers should ensure they communicate with their staff, explain the rationale for any decision on vaccination, consider any feedback, etc.

Remember that whatever steps you take in this regard may be examined later before the Court of Public Opinion, usually with the benefit of hindsight, which you did not have at the time. We consider that there will be little latitude given to employers that go too far to accommodate the issues of individuals where that poses any increased risk at all to the health and safety of the majority.

Is there any guidance available for employers?

Not currently, but we anticipate that guidance will be issued by the government at some stage. Given the shifting terms of the government's guidance in relation to most COVID-19 measures, employers will be well advised to keep a very close eye on what it says in relation to the vaccine, to follow it fully and to keep a hard copy of the version relied upon in case (like some of that relating to the CJRS) it is overridden and then, in traditional Nineteen Eighty-Four style, ceases ever to have existed.

The Information Commissioner's Office and the Equality and Human Rights Commission may also issue guidance on the data protection and discrimination issues, respectively.

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Will the US government make it mandatory to have the vaccine once it becomes available?



There has been no indication, or even suggestion, from the federal government that the COVID-19 vaccination will be mandatory for US citizens. Although the incoming presidential administration under President-elect Biden has been, and is expected to be, a strong proponent for all US citizens receiving the vaccine, government-mandated vaccination would be contrary to the individual liberties guaranteed to US citizens. Moreover, any government-mandated vaccination requirement undoubtedly would be challenged in court, and likely would be decided by the US Supreme Court, now comprising a majority of conservative justices who almost assuredly would strike down any such requirement.

Can employers insist their staff have the vaccine once it becomes available?

Maybe

Employers in certain industries, most notably hospital and healthcare employers, have, for years, required employees to receive vaccinations for seasonal influenza to prevent employees from becoming ill as a result of treating sick patients and to prevent patients from becoming ill from infected healthcare providers. However, in those situations where seasonal influenza vaccination requirements have been deemed lawful, employers are required to provide reasonable accommodation from the requirement if an employee declines or refuses to be vaccinated for a legitimate disability or religious-related reason. It is possible, due to the nature of COVID-19, that employers will be able to require employees be vaccinated as a condition of continuing to work in, or returning to, the workplace. See below for discussion concerning whether employers that require employees to be vaccinated for COVID-19 will be obligated to provide disability or religious-based accommodations.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

Unclear at this time. Although under the Americans with Disabilities Act (and analogous state laws) employers that require employees be vaccinated for legitimate business-related reasons (i.e. healthcare employers requiring employees to receive seasonal influenza vaccinations) must accommodate employees who, for disability or religious-related reasons, decline or refuse to be vaccinated, the US Equal Employment Opportunity Commission (EEOC) – the federal administrative agency that enforces federal employment discrimination laws – has stated that COVID-19 presents a “direct threat” to employee health and safety, which may relieve employers that require employees be vaccinated for COVID-19 from any accommodation requirements. The EEOC is anticipated to issue guidance on this issue in the near future, which is expected to provide clarity on the issue of employer mandatory COVID-19 vaccination requirements.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

Many employers provide on-site clinics or other opportunities for employees to receive seasonal influenza and pneumonia vaccinations in the workplace. Depending on how COVID-19 vaccines are distributed and made available, if the opportunity presents, employers may be able to provide similar opportunities to employees to receive a COVID-19 vaccination at the workplace.

Will employers be obliged to ensure their staff get vaccinated?



Although employers have a general duty under the federal Occupational Safety and Health Act to provide a safe workplace, this requirement likely would not be extended to require that employers ensure that employees have been vaccinated. Moreover, a number of states have passed liability shield laws protecting employers from lawsuits from employees who allege that the employer was negligent in protecting employees from actual or potential COVID-19 exposure/infection, as well as laws that make clear that an employee who contracts COVID-19 in the course and scope of his/her employment is limited to the exclusive remedy provided by the state's workers compensation laws. In addition, under the Americans with Disabilities Act, employers are limited in what medical-related inquiries they may make of employees, which could extend to inquiries related to whether an employee has received a COVID-19 vaccine. Note, however, that whether employers can require employees to disclose whether they have been vaccinated for COVID-19 may change depending on anticipated guidance from the EEOC on employer COVID-19 vaccination policies.

Would an employee's refusal to have the vaccine constitute a failure to comply with a reasonable management request?

Maybe

If an employer may lawfully implement a mandatory COVID-19 vaccination requirement for employees, as appears may well be permitted given the reported efficacy and lack of side effects of the vaccines under development, an outright refusal by an employee to receive the vaccine who does not have a genuine reason for such refusal may be a legitimate basis to terminate an employee's employment. Caution should be taken here, however, as a number of unresolved considerations remain, including whether an employer will be required to accommodate employees who refuse to be vaccinated due to disability or religious reasons, whether the employee has a contract of employment that limits the basis on which the employee's employment can be terminated, whether the employee is covered by a collective bargaining agreement that similarly limits the grounds for discipline and termination, and whether termination for refusal to be vaccinated could be considered wrongful termination under state law.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Under the current state of the law and applicable guidance, it appears that an employer could refuse to allow employees – and, for that matter, customers, vendors, suppliers, guests and visitors – who have not been vaccinated (and presumably previously have not had COVID-19) from entering the workplace. Employers should, however, consider whether reasonable alternative arrangements, i.e. remote work or having non-vaccinated employees work elsewhere on the premises, can be implemented to permit employees who may have legitimate reasons for refusing to be vaccinated to continue working.

Are there data protection/privacy considerations in relation to this?



Employers need to be certain to keep both Health Insurance Portability and Accountability Act (HIPAA) and state privacy laws in mind before requiring disclosure of (or sharing) employee health information, including as relates to COVID-19 vaccinations. Although HIPAA generally does not apply to employers collecting health information in the capacity as an employer, employer-sponsored group health plans are subject to HIPAA, and there is often ambiguity regarding the function the employer is performing. For example, human resources personnel often perform both "employment" functions (not subject to HIPAA) and "group health plan" functions (subject to HIPAA). There is also a range of state privacy laws that employers must navigate. For example, the California Consumer Privacy Act (CCPA), which became effective in 2020, requires businesses to provide a formal privacy notice to consumers "at or before collection" of personal information (defined broadly). The notice must describe the information collected and how the data will be used. Other state laws regulate how "health information" can be collected and shared independently of HIPAA.

Are there any other issues that employers should consider in relation to this issue?



Employers should anticipate that regardless of whether they implement a mandatory COVID-19 vaccination requirement for employees, some employees will have legitimate concerns about the safety and potential side effects of a vaccine that has been developed and distributed on an extremely expedited timeline. Other employees will have concerns about being in the workplace with co-workers who may not have yet received a vaccine or who, for legitimate (or non-legitimate) reasons, decline or refuse to be vaccinated. Accordingly, a robust communication and implementation plan for any workplace COVID-19 vaccine policy will need to be developed by employers, which will take into consideration the range of anticipated employee concerns.

Is there any guidance available for employers?



The EEOC has published guidance relating to the COVID-19 pandemic. However, this guidance has not been updated since 8 September 2020, and it does not specifically address employer COVID-19 vaccination policies. As noted above, further guidance specifically on the issue of employer COVID-19 vaccination policies is anticipated from the EEOC, likely in early 2021.

Is there any guidance for employers on homeworking?



No. Although most federal and state government agencies, including the US Centers for Disease Control and Prevention, are actively encouraging employers to permit work-from-home arrangements, no official government guidance has been issued for employers on such arrangements.

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