



Labornet No. 1298

Compulsory Vaccination in France, Austria, Germany. The Great Debate: Mandatory Vaccination at the Workplace. Vaccination, Immunity or Negative Test. New rules at the workplace. New measures to prevent the spread of Covid-19. The Impact of Vaccination at the Workplace. Returning to Work.

Employment & Workforce - Operational Impact & Strategy - HR, Health & Safety

Dear All,

Austria has recently passed a resolution about the return to work and mandatory vaccination, clearly following the trend that is taking hold in different European countries, such as Germany and Slovakia, where this is called the 3G rule, meaning employees must be vaccinated against COVID-19, have recovered from COVID-19 or have a very recent negative test result to access the workplace. In Slovakia employees must present the so-called Green Pass to access their workplaces, and in Italy as well.

In Austria, both employers and employees are responsible for complying with the 3G rule. However, employers are primarily responsible for monitoring compliance and employees are subject to penalties if they break it. **This is not the case in Argentina, where the Department of Health has specifically indicated that vaccination is not mandatory.** Austrian law, however, urges the population to get vaccinated and even punishes non-compliance. In Argentina if employers dare to impose vaccination on employees or even suggest it, companies may be sued for discrimination or damages for any eventual health condition or disorder employees may get as a result of vaccination.

What happens if an employee refuses to get vaccinated? As this matter is not regulated under the law and vaccination is not mandatory, companies will take decisions based on common sense and social responsibility, not knowing exactly which the future consequences will be.

Vaccination could be mandatory to ensure legally protected interests, such as life, health and disease prevention. Vaccination could be optional for those who refuse to get it, with restrictions still in place including social distancing, mandatory mask wearing and PCR testing to avoid the eventual spread of the virus at the workplace.

This means that if physical contact with other people (customers or colleagues) cannot be avoided at the place of work in question (including random meetings at office common areas, the canteen or the like), **then employees must provide proof of (full) vaccination, recovery or testing (the '3G rule') from 1 November 2021. [Austria].**

Under the '3G rule' in Europe, in Germany in particular, the antigen test should be conducted on a sample taken no more than 24 hours before returning to work and a PCR test, not more than 72 hours; however, the period of validity of tests may still change as a result of new regulations to be issued within the next few days. In addition, there is a transition period planned until 14 November 2021 during which **every employee without '3G' proof must continuously wear a FFP2 mask at the workplace. After this date there is basically no alternative to providing 3G proof.** Employees who refuse will face the consequences described below.

In Austria, exceptions to the obligatory 3G proof in the workplace are made for certain employee groups, such as truck drivers or night watchmen with very little contact with other people during their work; there is also an exception for employees working continuously from home.

According to the Government, the purpose of introducing the 3G rule in the workplace is to create an incentive and to (further) motivate employees to get vaccinated. However, in contrast to the situation in Italy, lawmakers have agreed to keep testing free of charge for employees (meaning possible costs will be borne by employers pending further notice).

Both employers and employees are responsible for complying with the 3G rule. However, employers are primarily responsible for monitoring employee compliance. In the event of non-compliance, employees are subject to penalties of up to EUR 500 and employers of up to EUR 3,600 per breach.

Employees who refuse to comply with the 3G rule may be sent home without pay. There is no legal obligation to order employees to work from home in this situation, because remote work is voluntary for both parties (according to the 'Telework Act' of April 2021). The law regulates every situation and how employers and employees should act, which is not the case in Argentina.

Employers may even fire employees for their refusal to fulfill their legal obligations in the workplace (if employees do not have any specific health-related justification for their refusal) **since employers are not allowed to let these employees access the workplace.** In the event of repeated breach due to continued refusal to provide the 3G proof, employers may even summarily dismiss employees.

Naturally, some countries or even organizations may take different measures to deal with the pandemic and prevent the spread of the virus.

I. Vaccination against Covid-19

The rollout of vaccination against Covid-19 allowed many companies to eliminate the uncertainty that prevailed at the onset of the pandemic up to date; they have been doing business and adapting their structures to let the organization define the future of the business.

Then companies started giving notices, making announcements and launching communiqués to prepare employees for a return to work, whether temporarily or permanently, thinking about the new forms of the future of work and how the new hybrid system could be put in place.

Some companies embraced remote work during the pandemic and digitized processes, services and products; going to the office was exceptional, just to attend extraordinary events with the aim of protecting health and avoiding the spread of such a strange virus that is still unknown in terms of variants and mutations, and that can further change the way in which people interact and work.

First of all, from a legal perspective, **there is the ban on employment termination;** it was the first restriction imposed on employers, with court decisions declaring that terminations were null and void.

On the other hand, the national vaccination campaign progressed successfully, with the administration of two doses. Employers can now continue to prepare for vaccinated employees to return to their workplaces, as well as discuss what treatment should or can be given to employees and future hires.

What happens if an employee refuses to get vaccinated? As this matter is not regulated under the law and vaccination is not mandatory, companies will have to take decisions based on common sense and social responsibility, not knowing exactly which the future consequences will be.

Vaccination could be mandatory considering health and disease prevention. Vaccination may be optional for those employees who refuse to get vaccinated, but restrictions are still in place.

For example, Austria announced lockdown for the unvaccinated, as of Monday, November 15, 2021; "People who are not vaccinated should stay at home and only leave to perform certain activities such as work, study or shopping at essential businesses, but they will be denied access to non-essential stores and social events." The Government of Austria decided to implement new social restrictions exclusively for those who are not vaccinated or have not recently recovered from COVID-19.

Most countries are using different mechanisms or strategies to encourage vaccination: the National Vaccination Campaign, private vaccination plans and vaccination abroad (in some cases with employers' authorization).

II. New COVID-19 Workplace Access Rules In Austria

From 1 November, employees in Austria must comply with the '3G' rule, meaning they must get vaccinated against COVID-19, have recovered from COVID-19 or have a very recent negative test result to access the workplace.

On 20 October 2021, the Austrian Federal Minister of Health announced that the Government has decided to introduce a general requirement for '3G' proof to enter the workplace. The '3Gs' are 'geimpft, genesen oder getestet' (abbreviated as 3G as all three words start with a G in German) meaning vaccinated, recovered or tested. This means that if physical contact with other people (customers or colleagues) cannot be avoided at the place of work in question (including random meetings at common office areas, the canteen or the like), then employees must provide proof of (full) vaccination, recovery or testing (the '3G rule') from 1 November 2021.

Employees who refuse to comply with the 3G rule may be sent home without pay. There is no legal obligation to order employees to work from home in this situation, because remote work is voluntary for both parties (according to the 'Telework Act' of April 2021).

In addition, employers may fire employees who refuse to fulfill their legal obligations in the workplace (if employees do not have any specific health-related

justification for refusal) since employers are not allowed to let these employees access the workplace. In the event of repeated breach for continued refusal to provide the 3G proof employers may even summarily dismiss employees.

III. Argentina. National Vaccination Campaign

The Ministry of Health implemented the National Vaccination Plan for nationals.

Considering the fourth wave (of the Pandemic) and the Delta variant (of the virus) as of November 16, 2021, approximately 27 million citizens have been fully vaccinated (with two doses), and a total of 68 million doses have been administered in Argentina. The national population totals around 46 million people.

While there is still a long way to go until the entire population is fully vaccinated, immunization has become available for almost every eligible individual.

IV. Vaccination abroad

Vaccination abroad is a largely a personal initiative. In a few cases, employers have sponsored employees to participate in foreign vaccination programs or allowed them to work abroad to receive the vaccine; however, this alternative is available only to individuals with the means to travel; and less people are travelling as the National Vaccination Plan rollout is more efficient and covers almost all of the population.

V. Impact of vaccination on employment

The International Labor Organization (ILO) is now projecting that global hours worked in 2021 will be below pre-pandemic levels, the equivalent of 125 million full-time jobs, and warns about a great divergence in the roll-out of vaccinations and fiscal stimulus packages in developing countries.

The highly uneven roll-out of vaccinations in many developing economies hinders the return to work for many employees, together with a lack of fiscal stimulus packages, which are the key factor in stalled trajectories of recovery and great divergence among countries. According to ILO, vaccination rate is crucial to understand these disparities, because administering more doses of vaccines means that many economies could lift restrictions to return to the workplace.

VI. Should employers require vaccination?

In response to the most frequently asked question about employment and vaccination: employers cannot make vaccination mandatory, neither as a condition for hiring nor continuing employment. This is because:

- Vaccination against Covid-19 is not currently mandatory in Argentina, as announced by the Department of Health;
- Individuals have the right to decide which medical protocols and treatments they receive;
- Individuals have the right to accept or reject medical procedures; and
- The General Personal Data Protection Act is applicable in Argentina

However, some scholars believe, and we agree, that employers may urge employees to return to the office and get vaccinated –except for medical reasons–; otherwise they will not collect wages. This is based on a fundamental principle of labor law, whereby workers get paid when they work.

Therefore, if workers themselves decide not to work - provided there is not a stay-at-home order or other health- or religion-related issues -, they won't get paid.

In Argentina, case law suggests that employers cannot stop paying wages, impose disciplinary measures or fire employees who do not want to get vaccinated. Requiring employees to get vaccinated, or denying them a job if they refuse to do so, could be considered as unlawful discrimination, especially if they object for reasons related to their mental or physical health, religion, or for other personal reasons. Coercive action could trigger claims for discrimination and violation of the right to privacy and intimacy.

In practice, however, employers as owners or tenants of the workplace, can refuse access to unvaccinated individuals on the basis of preventing contagion.

It is important, then, to have a clear strategy in the event employees refuse vaccination because the only possible solution is to deny them physical access to the premises, but this cannot impact their salary or employment. For example, offering the option of working remotely or taking a leave of absence may be assessed on a case-by-case basis to mitigate risks.

To combat such issues, employers can (and should) design return to work strategies according to the vaccination status of employees.

Regulations may establish schemes to return to in-person work for both fully vaccinated employees and employees who refuse vaccination, with some restrictions.

In response to another frequently asked question: employers cannot ask employees to provide information related to their vaccination but may ask it for work organizational purposes.

This is private and sensitive medical information that can only be given voluntarily. Data privacy consent is essential when collecting personal and collective information on the vaccination status of employees or contractors, or when the company possesses this information due to its vaccination plan.

VII. Legal implications at the workplace

Please take note of the following conditions for a safe return to the workplace:

Returning to the office is expected to become the norm for everyone who used to work on site before the pandemic or those who got a job and then have worked from home ever since. Employees' situations should be evaluated on a case-by-case basis whether because they may be having logistical or commuting issues, or because they may have moved abroad or to a province, and in some cases a reasonable -but clearly defined- term extension for remote work may be granted by written request for management approval.

Mixed or hybrid systems may be put in place, where employees work on site at least 2 days a week, 3 days maximum. The rest of the days they may continue working from home. **This model has come to stay, with almost all jobs essentially designed to work remotely 2-3 days per week.** Those who cannot meet this schedule should have a specific exception previously approved by HR in writing.

For the purposes of business continuity, planning or organization, companies are designing organizational schemes and assessing remote and in-person team work, where team members do not go to the office all at once, on the same day. The maximum number of team members on site should not exceed 1/3 of a given team, unless they have a specific exception approval. Employees are required to connect with their Managers to organize team work, plan projects and achieve targets. A tailor-made work schedule should be designed to meet the needs of the company and the business, without downtime.

This plan will be governed by the local laws in each country. It is made clear that guidance by local authorities prevails over any regulations and policies about remote work and flexible hours defined by companies.

Employees should all submit a copy of their FULL Covid-19 vaccination certificate in advance to the global administrative support team, or otherwise they will be denied access to the office. The electronic copy of the certificate should always be available on employees' phone and showed when requested. In the event that an employee has not yet got vaccinated against Covid, **they must provide a medical certificate in writing to Global HR Support.** Covid-19 vaccination status for associates of.... as of October 20, 2021 - 1st dose: 90%; 2nd dose: 66% (**everyone is required to get fully vaccinated**).

In order to schedule on site visits for a limited number of people, it is imperative to get authorization by the local Legal Division, before confirming a meeting with outside third parties. Management and IT teams work together with HR and Legal Affairs to launch basic internal apps to manage conference room bookings. Confirmation via email, through the local IT area, will remain in force until the company app is ready. It is not advisable for employees to reserve a spot without discussing it with the management team, because it will pose unnecessary planning problems on site with other colleagues.

Office space will be designed to work at full capacity, including cafeteria services, cleaning, security, like before the pandemic, except for daycare that will be offered according to guidance by the local authorities and as required by law. Some companies are thinking about options in the event that employees do not have any available caregiver to look after their young children up to 6 (for whom daycare at the office will be offered in due course); they can ask to work from home on all business days, until daycare reopens. However, general capacity planning at the workplace will be determined by calculating a maximum of 40% staff, on any given day.

All the precaution measures related to Covid-19 would remain in place, including social distancing, mask wearing, disinfection, temperature check, frequent hand washing.

Employees are required to get vaccinated to be able to return to the workplace, except for some extraordinary reasons. Although compulsory vaccination for citizens in general is in itself a rather sensitive matter, it is not considered as such in the context of employment and employer-employee relations [workplace].

VIII. Conclusions

This approach to vaccination has allowed the country's level of protection against Covid-19 to improve steadily in recent months, thanks to the successful National Vaccination Campaign.

The return to work schemes for current employees provide an opportunity for employers to avoid the potential challenges discussed above in relation to present or potential employees. With these considerations in mind employers are better equipped to adopt business practices that may help them deal with different attitudes towards vaccination.

Please do not hesitate to contact us for further information.

Best regards,

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