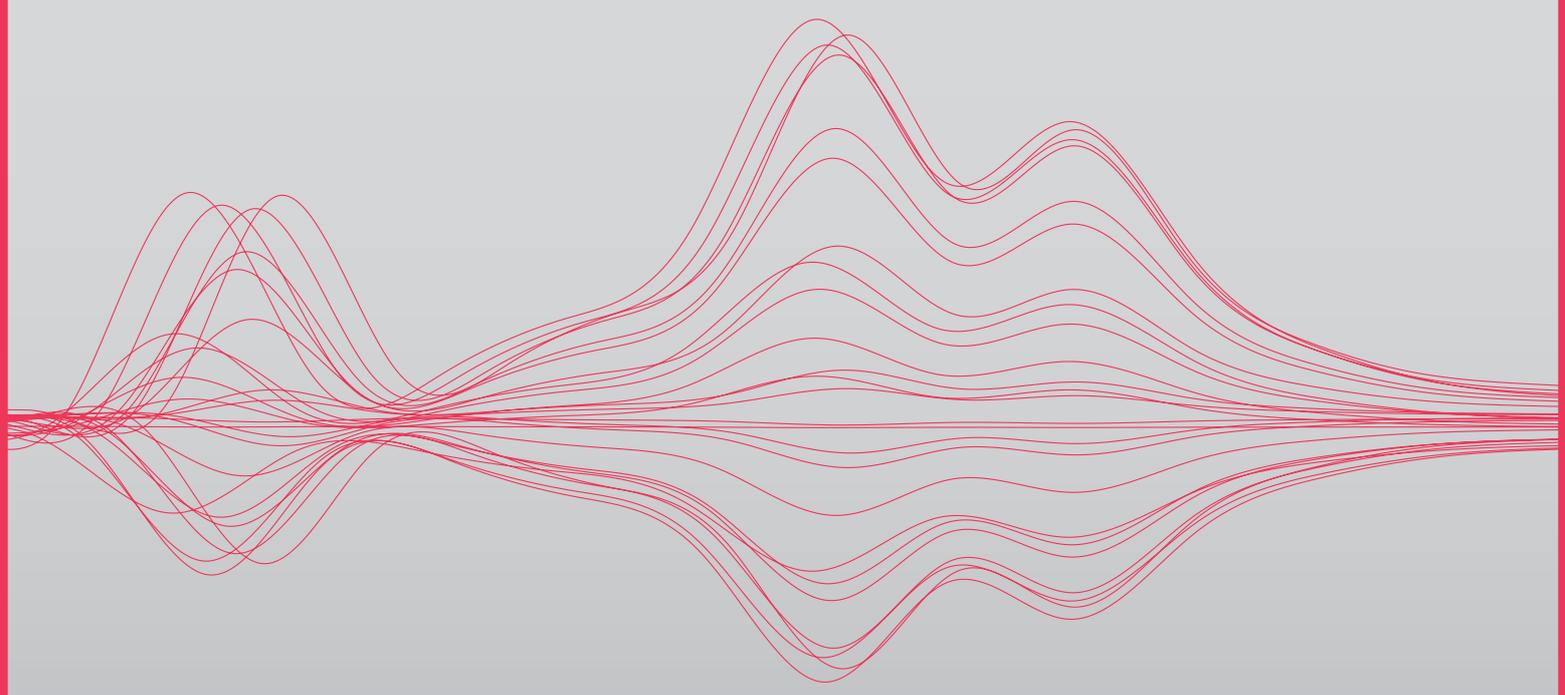


# Global COVID-19 Vaccine Guide for Employers



# Overview

As the scientific response to the COVID-19 pandemic develops, many employers are considering what their approach should be to the issues around vaccination for their workforce, with a view to accelerating a return to some kind of normality. This is an area where law, guidance and best practice is likely to develop rapidly and there is no one-size-fits-all solution, particularly for multi-national employers. The risks, challenges and benefits will vary depending on the profile of the workforce and nature and location of the business. In this global guide we set out some of the key considerations with regard to requiring or encouraging employees to be vaccinated and highlight some of the differences in risk around the world. These are complex and evolving issues and the situation should be kept under review as vaccine programmes become more widely available, economies and borders begin to open up again and more people return to the workplace.

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## Can employers require employees to be vaccinated?

For many employers, this remains in practice a question for the future as the vaccines are not yet available to all working age people. Even countries with a well-developed vaccine timetable are unlikely to have sufficient supply to fully vaccinate all the working age population until the autumn.

In almost all countries covered by this guide the vaccine is not mandated by government and there will be significant legal risks in requiring employees to be vaccinated in order to access employment, either in order to return to the workplace or to participate in specific work activities (such as attending meetings or training or travelling). Key risks to consider are:

- Disability discrimination – any available vaccine may not be suitable for all workers. For example, some of the vaccines are not suitable for certain individuals with suppressed immune systems or other medical conditions which may constitute a disability. Likewise, some people with allergies may not be able to be vaccinated safely;
- Discrimination on grounds of religion or belief – some workers may have religious or moral objections to the vaccine and these may amount to protected religious or philosophical beliefs; and
- Pregnancy discrimination: in some countries pregnant women are being advised not to have the vaccine.

It may be possible to justify such potential discriminatory impacts, but this is untested. Some countries also require employers to engage in a reasonable accommodation process for workers who request an exemption for certain reasons (e.g. disability, religion).

There are a very limited number of countries where employers may be able to make employment or continued employment conditional on an individual receiving a vaccine, particularly in sectors where there is particularly high risk such as health and social care.

In those countries where it is not possible or legally very risky to require the workforce as a whole to be vaccinated, there may be very limited exceptions where employers can require vaccination, such as if an employee is required as part of their role to travel to countries which require evidence of vaccination as part of their border controls. However, even in this case the employer should consider whether there are alternative options.

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## Can employers incentivise employees to be vaccinated?

Some employers are considering offering incentives to employees who are vaccinated; in some countries this may be a valid approach. However, in many countries this carries the same potential discrimination risks as requiring vaccination.

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## Can employers ask their workforce whether they have had or intend to have the vaccine?

In the European Economic Area (EEA), any processing of information about the vaccination status of employees will need to comply with the GDPR. Under the GDPR, information about vaccination status, including vaccination intentions, is private health information and is therefore special category data. Special category data is strictly regulated and employers must be able to demonstrate that any processing of this data is fair, necessary and relevant for a specific purpose. In particular, the GDPR requires employers to have a sufficient lawful basis for processing the information. Factors such as the sector/type of work the employees carry out; the health and safety risks in the workplace; and the current public health advice/government guidelines will all be relevant when deciding whether processing of vaccine information is justified and compliant with GDPR requirements.

In some countries, where data protection is less strictly regulated, employers can survey employees to ask if they will take the vaccine when it's offered, but would not be able to force an employee to answer the survey or discipline them for not answering it.

**What approach should employers take to vaccination in countries where it cannot be mandated?**

For now, a logical first step for employers considering measures and policies in relation to vaccines would be to discuss plans with employees and allow them to ask questions and voice their concerns. While employers cannot force employees to have the vaccine, it may be sensible (and will be lawful in many countries) to encourage vaccine where available, signposting the benefits and making it as easy as possible for employees to receive the vaccine. Employers may wish to consider giving time off work (paid or unpaid) to attend vaccination appointments or to assist family members in attending appointments. Some jurisdictions may even require employers to provide leave for vaccination.

At an appropriate time, employers may wish to consider a voluntary vaccination programme, being mindful of risks when structuring and implementing such a programme. In the event that voluntary vaccination becomes feasible it is likely that employers will need to work with a third party provider due to the regulatory and data protection issues; such a programme could potentially be rolled out alongside seasonal flu vaccination programmes.

**Once the workforce is vaccinated, what are the implications for the return to workplaces?**

As it is not yet clear how effective the vaccines are in stopping or reducing transmission, health and safety considerations will remain paramount and caution is recommended. Employers are urged to continue to monitor applicable laws, regulations and guidance regarding workplace health and safety measures. Employers planning for a return should also consider updating risk assessments to include vaccination considerations, especially where not all employees have received the vaccine.

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# Global risk overview

Risk of legal claims:

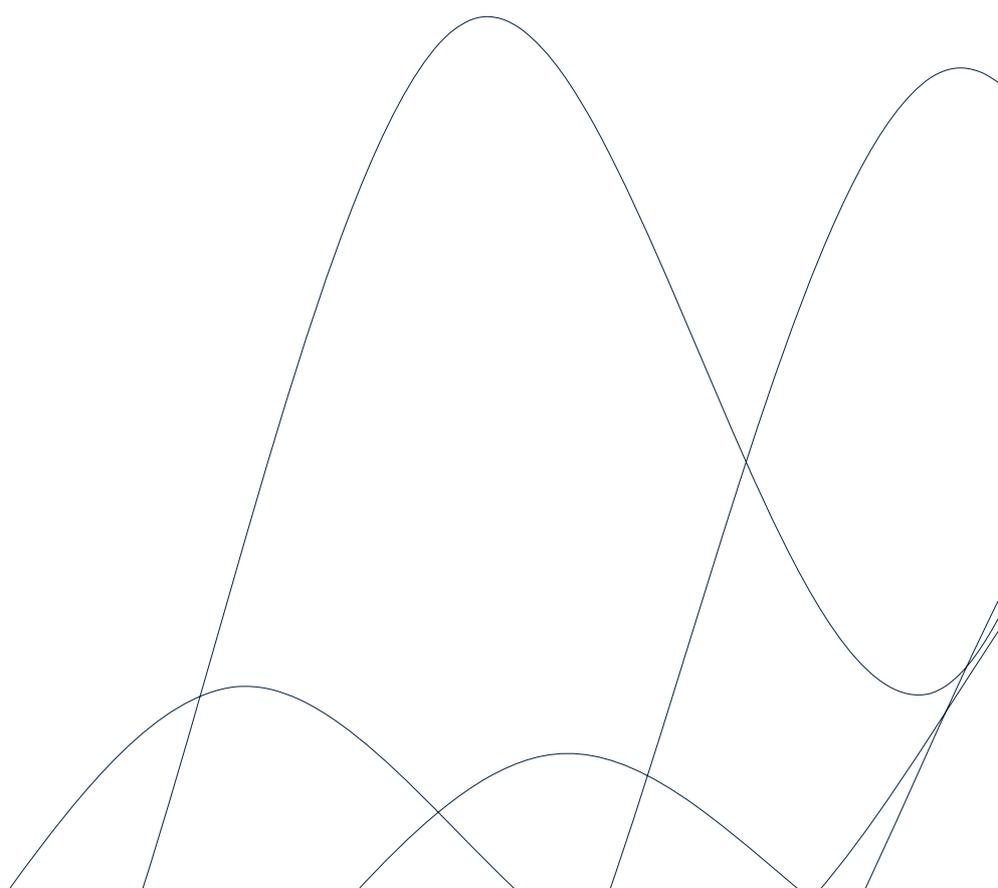
Red = high

Amber = medium

Green = low

Country	Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivising employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
<b>EMEA</b>								
Austria	No	Amber	Amber	Amber	Amber	Green	Amber	No
Belgium	No	Red	Red	Amber	Amber	Green	Red	Yes
Czech Republic	No	Red	Red	Green	Amber	Green	Green	No
Denmark	No	Red	Red	Red/Amber	Amber	Red/Amber	Red	No
France	No	Red	Red	Red	Red	Green	Red	No
Germany	No	Amber	Red	Red	Amber	Green	Red	Yes
Ireland	No	Red	Red	Amber	Amber	Green	Red	No
Italy	No	Red	Red	Red	Amber	Green	Red	Yes
Netherlands	No	Red	Red	Red	Amber	Green	Red	Yes
Norway	No	Red	Red	Amber	Amber	Green	Red	No
Poland	No	Red	Red	Red	Amber	Green	Amber	Yes
Portugal	No	Red	Red	Red	Amber	Green	Red	No
South Africa	No	Amber	Red	Red/Amber	Red	Green	Amber	No
Spain	No	Red	Red	Red	Red	Green	Red	No
UAE	No	Amber	Red	Amber	Green	Green	Amber	No
UK	No	Red	Red	Amber	Amber	Green	Red	Yes

Country	Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivising employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
<b>APAC</b>								
Australia	No	Red	Red	Amber	Green	Green	Amber	Yes
China	No	Amber	Red	Green	Green	Green	Amber	No
Hong Kong	No	Amber	Red	Amber	Green	Green	Amber	No
Japan	No	Red	Red	Amber	Amber	Green	Amber	No
New Zealand	No	Amber	Red	Amber	Red	Green	Amber	Yes
Singapore	No	Amber	Red	Amber	Green	Green	Amber	No
<b>Americas</b>								
Brazil	No	Amber	Amber	Amber	Red	Green	Amber	Yes
Canada	No	Amber	Amber	Amber	Green	Green	Amber	Yes
Chile	No	Amber	Red	Amber	Green	Green	Amber	Yes
Colombia	No	Amber	Red	Amber	Green	Green	Green	Yes
US	No	Amber	Red	Amber	Amber	Green	Amber	Yes



# EMEA

## Austria

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Amber	Amber	Amber	Green	Amber	No

### Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. The vaccination against COVID-19 is currently free for all people in Austria and the government encourages people to get vaccinated. Initially there are not enough vaccines available to vaccinate everyone at the same time, so those at the highest risk (older people, people in health care professions) are vaccinated first. After that, everyone else can be vaccinated step by step.

### Is there any current law or guidance relevant to employee vaccination?

No.

### Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Currently there is no government advice stating that employees must be vaccinated and, without this, imposing a vaccination requirement, or directing unvaccinated employees to work from home/ not attend the workplace, would not be a reasonable management instruction in most cases. However, there is one exception where it can be assumed that vaccination is mandatory. It is conceivable that there is an obligation to vaccinate is conceivable if legal

foundations for this exist or are created. In individual areas (e.g. treatment of the sick, nursing and midwifery) there is the potential to mandate such an obligation for health and safety reasons.

### Can employers discipline or dismiss an employee for failure to be vaccinated?

In Austria, there is generally no protection against dismissal in many areas of work. Employers can give notice of termination at any time without giving reasons.

As mentioned above, the vaccination is voluntary and therefore can be refused. However, in individual areas, especially in the health sector, it is conceivable that there may be an obligation to vaccinate.

If employees refuse to be vaccinated, thus making it impossible for the company to fulfil its duty to protect third parties (e.g. in the health sector), the employer will have the right – regardless of the existence of an obligation to vaccinate – to transfer the employee in question.

In areas where there is no special duty to protect on the part of the employer, the employee can only be transferred under the generally applicable conditions (e.g. regulation in the employment contract).

## Can employers ask employees for evidence of having been vaccinated?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the General Data Protection Regulation (GDPR) and the Austrian Data Protection Act (DSG). In particular, employers will need to have a legal basis for processing vaccination data under Article 6 and Article 9 of the GDPR. The Austrian DPA has issued only very general guidance concerning the processing of COVID-19 related data, which does not address data related to vaccinations. Please see the section below '*Can employers process data about the vaccine status of employees?*' for further information.

In addition to data protection requirements, if applicants are asked about their health or vaccination status during the interview, they are generally not obliged to provide any information. An exception exists if it is assumed that there is an obligation to disclose the vaccination status. This is the case if a danger to the life and health of persons, whom the company is obliged to protect (patients or customers) is to be assumed.

If applicants refuse to provide such information, potential employers have the right not to consider the application.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may not want to or cannot be vaccinated, such as disability, pregnancy, religion or belief. Providing incentives to employees who get vaccinated therefore carries the risk of discrimination. The extent of that risk depends on the type of incentive. For example, if an employer provides assistance such as paid leave from work to attend vaccination dates this is probably less risky than providing a financial bonus.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so.

For example, employers can encourage employees to get vaccinated by

conducting positive information campaigns about vaccination to provide clear facts and eliminate misinformation, build trust, or considering ways to support employees in getting vaccinated when it is offered, such as paid or unpaid time off.

If the employer wants voluntary vaccination and employees (voluntarily) agree, the vaccination costs must be borne by the company. In the case of mandatory vaccination, it would be assumed that the costs would not have to be borne by the employees.

The vaccine against COVID-19 is currently available free of charge to all people in Austria who want and are eligible to be vaccinated.

## Can employers process data about the vaccine status of employees?

Data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR and DSG. While the DPA has issued no specific guidance in relation to the processing of vaccination status data, GDPR requirements and general guidance published in relation to the processing of personal data relating to the COVID-19 pandemic require that any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. An employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;
- Public health advice and government guidance should be kept under review – currently vaccination is not required by the Austrian government, or required as part of ensuring a COVID-secure workplace, but this area may develop; and
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR although employers will need to undertake an assessment of this on a case-by-case basis. Under Article 9 (which applies to special category data), pursuant to the opinions in the practice, as well as the general guidance of the Austrian DPA regarding the processing of COVID-related data, employers may be able to rely on A9.2(b) – the employment condition, with the general duty of care of the employers and the employees

arising from civil and labour law. While the legal practice and the DPA generally accept this as an applicable legal basis for processing of COVID-related data, based on the duty of care of the employers and the employees, the prevalent opinion is that this legal basis is applicable only if there is a specific justification for the collection of this data, such as the kind of work that the employees undertake, and the health and safety risks in the workplace. The employers will likely be able to rely on this legal basis only if there is an increased risk of infection due to such factors (e.g. in sectors where the employees have close physical contact with other persons, such as healthcare).

- In relation to Article A9.2(a) – consent, as a legal basis, while the practice in Austria does not consider this legal basis as completely inappropriate in the employment setting, there is a significant risk that such consent may not be freely given in the employment setting. Therefore, employers seeking to rely on consent for the processing of vaccination status data would only be able to do so in very narrow circumstances and must take utmost care and every precaution to ensure that the consent is indeed freely given and that no detrimental consequences whatsoever (including such consequences as refusing to allow the employees back to the office, regardless of the agreement on home working and salary) are imposed if consent is not given. In practice, due to the imbalance of power between employers and employees, it is unlikely that consent will be an appropriate lawful basis under the GDPR.

In addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.



# Belgium

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Amber	Green	Red	Yes

## Is vaccination being mandated by the government or local authorities?

No, vaccination is not being mandated by the Belgian government. For the time being the COVID-19 vaccine in Belgium is entirely voluntary and it is not expected that the Belgian government will make the vaccine mandatory in the near future.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

For the time being, there is no legal basis for an employer to require employees to be vaccinated as a condition to return to the office. As indicated, the COVID-19 vaccine is entirely voluntary in Belgium.

## Is there any current law or guidance relevant to employee vaccination?

The Belgian government has approved a law for requiring leave of absence for employees to get the COVID-19 vaccine during working hours. This law applies from 9 April 2021 until 31 December 2021 (but could be extended until 30 June 2022). The employee is entitled to the time required to get the vaccination (i.e. the time spent in the vaccination center and the time required to travel to and from the vaccination center). In order to be entitled to this leave the employee should notify the employer beforehand of their scheduled vaccination as soon as possible. No proof is required to be entitled to this leave but an employer could request that the employee provides the invitation that the employee has received to get the COVID-19 vaccine.

There is also guidance relevant for employee vaccination, in relation to data protection – see below.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No, as there is no mandatory vaccination, an employer cannot discipline or dismiss an employee for not being vaccinated.

## Can employers ask employees for evidence of having been vaccinated?

No, an employer will in principle not be able to request proof of vaccination. Under Belgian legislation an employer does not have access to the medical file of an employee (e.g. to verify whether the employee is vaccinated) as the medical file is only accessible by the occupational doctor – prevention advisor. Moreover, the vaccination status of a person is considered to be health data by the Belgian Data Protection authority. The Belgian Data Protection Authority has issued 'Frequently Asked Questions' on the processing of personal data relating to vaccination status, which includes the processing of employee vaccination data. The Belgian DPA took a strict approach to the processing of vaccination status data. As health data is special

category personal data processing is in principle prohibited, unless an employer could rely on one of the exception grounds mentioned in article 9.2 GDPR such as a legal basis or the consent of the employee. In the absence of any adequate legal basis in Belgian law mandating vaccination, however, only 'explicit consent' will be an appropriate exception ground. However, it follows from the European Data Protection Board and the Belgian Data Protection Authority guidance that consent by an employee to his or her employer is unlikely to be valid under the GDPR as it will not be considered as 'freely given' given the dependency that results from the employer/employee relationship. Taking this into account, an employer will in principle not be able to request its employees to disclose whether they are vaccinated or not.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

An employer could in principle incentivize its employees to be vaccinated, but there are considerable risks of discrimination based on beliefs (e.g. "anti-vaxxer" movement) or health status.

To minimize these risks, an employer must be able to demonstrate that the difference in treatment – i.e. incentivizing only people who want to get vaccinated – is (i) made in view of achieving a legitimate purpose and that (ii) the means used to achieve the legitimate purpose are not inappropriate or disproportionate.

In our view, the criterion under (ii) could be problematic if a financial incentive was to be offered, as the measures contemplated, that is the incentivization of the staff through additional benefits, could be regarded as disproportionate.

Indeed, if challenged in front of a court one could argue that there are other possible incentives which would have less impact on the workers than extra compensation, for example a vaccination campaign at the office, reimbursement of costs linked to getting the vaccination (travel expenses), or compensation for the working time employees lose when getting the vaccination.

That being said, even financial incentives might be possible if the conditions are not discriminatory, for example in the framework of a so-called "collective result-oriented bonus plan", under which a cash premium can be granted to all employees (both vaccinated and non-vaccinated) if a certain % of the staff would be vaccinated by a specific deadline.

The % of staff vaccinated could then be confirmed by the employer's occupational doctor – prevention advisor, who would be in charge of managing and gathering the vaccination data of the employees.

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes, an employer could provide its employees with information on vaccination and encourage its employee to get vaccinated. Nevertheless, even though an employer may provide information and encourage vaccination, it may obviously not impose any undue pressure on its employees to get vaccinated.

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### **Can employers process data about the vaccine status of employees?**

No, please see our answer to "*Can employers ask employees for evidence of having been vaccinated*".



# Czech Republic

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Green	Amber	Green	Green	No

## Is vaccination being mandated by the government or local authorities?

No, the vaccination is strictly voluntary. Currently there is a governmental vaccination program for specific risk and age categories of Czech citizens. At this moment the registration for the vaccination programme is open for medical staff, workers in social services, workers in critical infrastructure, workers in educational system and generally citizens older than 60 (the groups of younger citizens will follow).

## Is there any current law or guidance relevant to employee vaccination?

No. There is a general vaccination strategy for the Czech Republic available here: [https://koronavirus.mzcr.cz/wp-content/uploads/2020/12/Strategie\\_ockovani\\_proti\\_covid-19\\_aktual\\_221220.pdf](https://koronavirus.mzcr.cz/wp-content/uploads/2020/12/Strategie_ockovani_proti_covid-19_aktual_221220.pdf) and also some local vaccination strategies for specific regions have been published.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No, as the vaccination is voluntary and the vaccines are not regularly available to all citizens nor employers, such a requirement will not be achievable. Moreover, the vaccination as a requirement should be stipulated by law in order to be enforceable. Most probably such a requirement cannot just be set by the employer without proper legal grounds regardless of whether it is related to the general health and safety of employees.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that requiring vaccination will not be reasonable and justifiable, it is not possible to discipline or dismiss an employee for failure to be vaccinated. Dismissal will be invalid.

## Can employers ask employees for evidence of having been vaccinated?

Yes. Under a Decree issued by the Czech Ministry of Health, all employers must test their employees for COVID-19. Vaccinated employees do not need to be tested within this mandatory testing requirement. It is therefore within the legitimate interest of the employer to obtain information about whether the employee has been vaccinated.

Any potential data regarding vaccination of employees will be deemed as special category personal data under the GDPR. Please see the section below '*Can employers process data about the vaccine status of employees?*' for further information.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

Currently this is not a consideration as the vaccines are not generally available. In any event, there are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy, religion, or belief. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, there is no issue with doing so – although such information campaigns will make more sense when the vaccines become generally available.

## Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR – any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a ‘just in case’ basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. Given the Decree from the Czech Ministry of Health in relation to mandatory testing of employees, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR. Under Article 9 (which applies to special category data), as the vaccine status of employees is relevant information for the employer in order to assess if the employee is eligible for mandatory testing of employees. Employers may be able to rely on:
  - A9.2(b) – the employment condition; or
  - A9.2 (i) – the public health condition.

Given the employment setting, consent will not be an appropriate lawful basis under the GDPR.

In addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.



# Denmark

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red/amber	Amber	Red/amber	Red	No

## Is vaccination being mandated by the government or local authorities?

No. The Government might in the future introduce vaccine passports, meaning that you have to show a passport of whether you have received the vaccine in order to travel to Denmark or attend certain festivals, concerts, arraignments, etc.

## Is there any current law or guidance relevant to employee vaccination?

No.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No, at least not generally. In specific circumstances, the Danish Working Environment Authority and/or sector specific legislation can require employees to be vaccinated if their job involves a health risk.

## Can employers ask employees for evidence of having been vaccinated?

Likely, no. According to the Danish Act on the use of health data, employers are not allowed to ask for health data for the purpose of assessing the employee's risk of contracting or developing specific diseases. It is not clear whether such information includes evidence of vaccination. If not, asking for evidence of vaccination is only permitted if doing so is of significant importance for the employee's regular work duties. However, please note that the Danish rules on the use of "COVID-19

passports" are currently evolving quite fast. In addition, please see the section below 'Can employers process data about the vaccine status of employees?' for further information about the data protection requirements when asking employees for evidence of having being vaccinated involves processing of personal data.

This will be based on a concrete assessment. Please see the section below 'Can employers process data about the vaccine status of employees?' for further information about the data protection requirements when asking employees for evidence of having being vaccinated.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that there is no legislation stating that an employee must be vaccinated as a condition of being in the workplace, employers cannot discipline or dismiss an employee for not choosing to be vaccinated. Therefore, any dismissal on these grounds is likely to be unfair.

Furthermore in this regard, please keep in mind the risk of discrimination claims, for example:

- On religion/belief grounds (religious beliefs may oppose vaccination; anti-vaccine beliefs could also arguably qualify for protection – as yet this is untested);
- On disability grounds (for example if a disability impacts on the risks of vaccination for that disabled individual); and
- On pregnancy grounds (in Denmark it is not recommended to be vaccinated if you are pregnant).

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy, religion, or belief. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

This will be based on a concrete assessment involving the circumstances of the specific incentive scheme.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, assuming no specific vaccine brand is being directly or indirectly promoted.

For example, employers are allowed to say that vaccination is a good idea and inform employees about the benefits of being vaccinated.

## Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be considered special category data (i.e. health data) which is subject to extensive protections under the GDPR and the Danish Data Protection Act. Any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;
- Public health advice and government guidance should be kept under review – currently vaccination is not required by the Danish government, or required as part of ensuring a COVID-Secure workplace; and
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR although employers will need to undertake an assessment of this on a case-by-case basis. Under Article 9 (which applies to special category data) employers may be able to rely on:
  - A9.2(b) – the employment condition;
  - Article 9(2)(h) – preventive or occupational medicine; or
  - A9.2 (i) – the public health condition.

Given the employment setting, consent will not be an appropriate lawful basis under the GDPR. Please note, however, that all legal bases listed above must be "activated" by national or EU law. As far as we are aware, no general law is currently enacted in Denmark other than the Danish Act on the use of health data. However, please note that the Danish rules on the use of "COVID-19 passports" are currently evolving quite fast.

In addition, employers intending to process vaccination data in addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.

# France

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red	Red	Green	Red	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. The Government’s current aim is that 2/3 adults in France will be vaccinated before Summer (however only 5 million people had been vaccinated as of mid-March).

Making vaccination mandatory for health workers is currently being discussed. It seems unlikely however that the vaccine will become an obligation for the general public in the future.

## Is there any current law or guidance relevant to employee vaccination?

There is no law regarding employee vaccination as it is not mandatory.

Employee vaccination is mentioned in the National Health Protocol and on the Labour Ministry’s website but minimal guidance is given for now.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No, this is not possible. Employers cannot condition employees’ presence in the workplace on the employee being vaccinated as this pertains to the employee’s private life and free will. This could constitute discrimination on health grounds and an infringement of employees personal freedoms.

Paying employees to stay at home as long as they are not vaccinated is also discouraged.

The current National Health Protocol as well as the guidance provided by the Labour Ministry expressly prohibit such behaviour.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No. As vaccination is not mandatory, it is not possible to dismiss an employee on such a basis as this pertains to the employee’s private life. The disciplining or dismissal would lack real and serious grounds under French law and could be disputed.

Moreover, depending on the reason why the employee has chosen not to be vaccinated, such a dismissal could be discriminatory. For example, if the employee has refused:

- On religious grounds: religious beliefs may oppose vaccination;
- On disability grounds: for example if a disability impacts on the risks of vaccination for that disabled individual; or
- On pregnancy grounds: there is a debate regarding whether pregnant women should be vaccinated and with which vaccines.

## Can employers ask employees for evidence of having been vaccinated?

No, as vaccination is not mandatory, it is not possible to ask for such proof as this pertains to the employee’s private life. The only case in which asking for evidence of vaccination is acceptable is for specific professions listed in the Public Health Code (i.e. medical workers, workers working with the elderly,

funeral workers, social workers, prison workers) and only regarding mandatory vaccination as this legally conditions the possibility for such workers to perform their duties.

Moreover, as the employer cannot discipline, dismiss or prohibit the employee from coming to the workplace if he is not vaccinated, the purpose of asking for said evidence seems to be rather limited and could constitute an indication of discrimination on health grounds. Indeed, for now, only employees between the ages of 50 and 64 with underlying health conditions can be vaccinated; vaccination status can therefore disclose confidential health information concerning employees.

Finally, asking for evidence of vaccination could equate to processing health-related data, which is only allowed in specific cases (see question on data processing below).

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### Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

No, employers cannot incentivise employees to be vaccinated via bonuses, extra holiday or other benefits.

Such pay outs cannot infringe employees' rights and freedoms. By encouraging employees to be vaccinated via a bonus, employers could be seen to infringe employees' freedom over their body and health-related choices, which is a fundamental right.

Moreover, as mentioned above, there are several reasons why employees could not be vaccinated: religious reasons, health reasons, disability reasons etc. and such incentives could therefore constitute discrimination.

Time off can be negotiated for vaccination but this will be done on an amicable and case by case basis. It is to be noted that vaccination by Occupational Doctors will be done during working hours and will not require time off (see below).

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### Can employers promote vaccination (e.g. by an information campaign)?

Yes, they can, this is explicitly provided for in the Employment Code. Employers can promote vaccination in case of a pandemic.

Moreover, the occupational medicine services can be associated with such a campaign. Indeed, occupational doctors have been authorised by decree to vaccinate in occupational health

departments. This will be of no cost to the employer or the employee and will be done during the employee's working hours. However:

- Acute attention will be placed on assessing the employee's consent by the occupational doctor;
- This will be done within the framework of medical secrecy and will not be revealed to the employer (no information whatsoever relating to either vaccination status or refusal to get vaccinated shall be divulged); and
- Total choice will be left to the employee as to whether to get vaccinated or not.

The information campaign will have to specify that vaccination will only be done on a voluntary basis and that employees can choose if they want to be vaccinated by their Occupational Doctor or by their own family doctor.

Finally, the Social and Economic Committee will have to be informed of this campaign.

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### Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be special category data (i.e. health data) under GDPR rules, which is subject to extensive protections: the employer will require a specific legal basis for processing the data pursuant to article 9 GDPR. Under Article 9 (which applies to special category data) employers may try to rely on:

- A9.2(b) – processing necessary to comply with legal obligations in the field of employment; or
- A9.2 (h) – processing necessary for the purposes of preventative or occupational medicine; or
- As a last resort: A9.2 (i) – processing necessary for reasons of public interest in the area of public health.

Given the employment setting, consent will not be an appropriate lawful basis under the GDPR

Given that vaccination is not currently required by the government, legal obligation and occupational medicine do not seem like suitable bases for such processing. The only basis available would be "reasons of public interest in the area of public health" but it is doubtful that employers could be deemed to be in a position to decide what public health commands. Therefore, it does not seem as though employers will have a lawful basis for processing vaccination data.

# Germany

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Red	Amber	Green	Red	Yes

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary.

According to the current statement of the federal government, there is no intention to mandate compulsory vaccination against COVID-19, neither in general, nor for specific sectors. However, the Infection Protection Act (*Infektionsschutzgesetz*) provides for the general possibility to mandate compulsory vaccination and in 2020 compulsory vaccination against measles was mandated for certain groups (e.g. pupils/employees in schools or childcare facilities). A compulsory vaccination against COVID-19 is especially discussed for employees in the nursing and medical sectors.

The Government's current aim is that all adults in Germany will be offered a first vaccine dose by the end of summer (end of the 3rd quarter) on a voluntary basis.

## Is there any current law or guidance relevant to employee vaccination?

There is no specific law for employees. However, the general Corona Vaccination Ordinance includes special guidance for some employees e.g. in the medical sector.

Corona Vaccination Ordinance (Corona Impfverordnung)  
[https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/C/Coronavirus/Verordnungen/CoronaImpfV\\_BAnz\\_AT\\_08.02.2021\\_V1.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/C/Coronavirus/Verordnungen/CoronaImpfV_BAnz_AT_08.02.2021_V1.pdf)

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

In principle no, as long as there is no legal obligation to vaccinate against COVID-19, employers cannot make COVID-19 vaccination of their employees mandatory or a condition of being in the workplace. As long as there is no legal obligation to vaccinate, employees are free to decide whether they want to be vaccinated and employers cannot mandate vaccination of their employees by works agreement, employment contract or other instructions.

Nevertheless, the possibility of employers mandating vaccination is discussed for employees entrusted with particularly vulnerable persons within the meaning of sec. 2 no. 2 ff. Corona Vaccination Ordinance (*Corona Impfverordnung*). However, considering the fundamental rights (the right to physical integrity and the general right of personality of the employee) of the employee, such an order could only be permissible on a case-by-case basis within narrow limits if other measures cannot ensure safe performance of work.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Since there is no obligation to vaccinate against COVID-19, employer can generally not discipline or dismiss an employee for failure to be vaccinated. The employer may not cut continued remuneration payments in the event of a COVID-19 illness due to the employees failure to be vaccinated, nor discipline the employee for this reason.

Dismissals or other disciplinary measures may only be considered for employees if and for whom vaccination may be mandated (e.g. healthcare workers, elderly care home workers). Even then dismissal would only be possible if contractual employment is no longer possible due to the refusal to vaccinate.

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### **Can employers ask employees for evidence of having been vaccinated?**

The right of the employer to ask about the vaccination status is very restricted due to the currently applicable data protection laws. Please note that in Germany, every handling of personal data of employees is subject to data protection restrictions, irrespective of whether the data are processed automatically or stored in filing systems, see sec. 26 para. 7 [German Federal Data Protection Act](#) (*Bundesdatenschutzgesetz* – BDSG).

Since there is currently no legal obligation for employers to collect the COVID-19 vaccination status of their employees and it is – in the majority of the cases – also not necessary for the performance of the employment contract, employers may only ask employees for evidence of having been vaccinated based on the employees' consent under art. 4 Nr. 11, 6 para. 1 lit. a), 7 GDPR in conjunction with sec. 26 para. 2 BDSG. Even though employees can provide valid consent in the employment relationship, the requirements for the consent to be freely given and therefore valid are very high. The employees have to be totally free in their decision whether to provide consent or not. Hence, any pressure or discrimination, e.g. making evidence of having been vaccinated conditional for a return to office, would render the consent invalid and would result in a breach of data protection laws.

Neither by collective agreement, works agreement or employment contract nor from the point of view of the duty of loyalty will it be possible to deviate from this. The only exception may be in the area in which a duty to vaccinate can be assumed, e.g. in the case of employees who work with particularly vulnerable persons.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

The question has not yet been settled by the courts. In the literature, some argue that there is no infringement of the prohibition of discrimination as long as the use of incentives is proportionate and does not disproportionately pressure an employee to waive his or her rights. In this case the co-determination rights of the works council would have to be observed. Others argue that employees who refuse to be vaccinated due to a lack of obligation to vaccinate may not then be excluded from a special payment. As long as this question has not been decided by the courts, a special payment carries the risk of discrimination. Employers are thus advised to create other benefits for employees, such as allowing them to be vaccinated during working hours or offering vaccination in the workplace.

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes, employers are allowed to inform their employees in detail about vaccination and to advocate vaccination publicly or on the intranet. This is the best approach at the moment; encouraging employees to vaccinate and supporting them to do so. It would also be possible to offer vaccination in the workplace, provided general vaccination is released by the authorities for respective employees.

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### **Can employers process data about the vaccine status of employees?**

Please see answer to question "*Can employers ask employees for evidence of having been vaccinated?*" since the same rules apply for the processing of the COVID-19 vaccine status of employees.

# Ireland

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Amber	Green	Red	No

## Is vaccination being mandated by the government or local authorities?

No. There is currently no indication that this is likely to be the case in the future.

## Is there any current law or guidance relevant to employee vaccination?

No. There are no specific vaccination laws or guidance at present, though general employment, anti-discrimination and privacy laws may apply.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Prohibiting entry to the workplace or limiting the work activities of an employee who is not vaccinated attracts the potential for constructive dismissal, breach of contract or discrimination claims. There are a number of reasons why employees may be unwilling or unable to be vaccinated, including disability, pregnancy, religion, and age (which are protected grounds under Irish equality law). A risk assessment would need to be carried out, followed by a case by case analysis, to establish whether any measure of this type amounts to a reasonable management instruction. It seems unlikely that requiring vaccination as a pre-condition to being in the workplace would be justifiable at present given that vaccination is not currently required by the government, or stipulated as part of ensuring a safe workplace.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that requiring vaccination will not be a reasonable management instructions (see above), disciplining or subjecting an employee to any detriment for failing to be vaccinated is likely to give rise to a significant risk of claims for breach of the implied term of trust and confidence and/or constructive dismissal. Any dismissal on these grounds is likely to be unfair. There is also a risk of discrimination claims on the grounds of disability, pregnancy, religion or age.

## Can employers ask employees for evidence of having been vaccinated?

Any employee data relating to vaccination status will be classified as special category data (i.e. health data) which is subject to extensive protections under GDPR and processing this type of data will be unlawful unless specific criteria are met. Given that vaccination is not currently required by the government, or recommended by public health advice as a pre-condition to returning to the workplace, it seems unlikely that, in most workplaces, obtaining vaccination status data could be considered necessary for health and safety or duty of care obligations. As such, it is questionable whether an employer will have a lawful basis for processing vaccination data and a case by case assessment will be required.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy, religion or age. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so. Practical steps for employers to take include:

- Rolling out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine; and
- Considering how to support employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid time off.

## Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR and Irish Data Protection Act 2018 – any processing of this data by employers must be fair, necessary and relevant for a specific purpose. The Irish Data Protection Authority (DPA) has not issued guidance specifically addressing the processing of vaccination status, however, general guidance has been issued in relation to data protection and COVID-19. In order to process vaccination status data, employers must ensure that:

- There is a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety

risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;

- Public health advice and government guidance should be kept under review – as the government's vaccination rollout programme continues, the situation is likely to evolve and up-to-date advice should be sought; and
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR although employers will need to undertake an assessment of this on a case-by-case basis. Under Article 9 (which applies to special category data), the general guidance issued by the Irish DPA suggests that employers may be able to rely on:
  - A9.2(b) – the employment condition, with the legal obligation to protect their employees under the Safety, Health and Welfare at Work Act 2005; or
  - A9.2 (i) – the public health condition, with Section 53 of the Data Protection Act 2018.

However, given that vaccination is not currently required by the government, nor has public health advice been updated to recommend all employees are vaccinated in order to return to the workplace, it is questionable as things stand whether an employer will have a lawful basis for processing vaccination data and a case by case assessment will be required. Given the employment setting, consent will not be an appropriate lawful basis under the GDPR.

In addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.

# Italy

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No*	Red	Red	Red	Amber	Green	Red	Yes

\*except in the healthcare sector

## Is vaccination being mandated by the government or local authorities?

Vaccination is voluntary. The COVID-19 vaccination is free for Italian nationals and the government encourages people to get vaccinated. However, on 1 April 2021, Decree no. 44/2021 came into force, which makes COVID-19 vaccinations compulsory for healthcare and pharmacy workers. This includes those who carry out their activities in public and private healthcare, social care and social assistance facilities, pharmacies, parapharmacies and professional practices.

If a worker is not vaccinated, the local Health Authority (ASL) shall immediately inform their employer and the professional association to which they belong. The employer is then required to suspend the worker from any activity involving interpersonal contacts or where they are at risk of spreading the COVID-19 virus. The professional association is also required to immediately suspend the member.

The employer may not dismiss the non-vaccinated worker but must, where possible, assign them to tasks where they are not at risk of spreading the COVID-19 virus even if they are tasks normally carried out by a less qualified position, (in this case a reduction in pay is also possible). When assignment to different tasks is not possible, the worker may be suspended without pay for the entire period. The suspension will remain in force until the vaccination obligation is fulfilled and, in any case, no later than 31 December 2021.

Only those for whom the vaccination would endanger their health, as certified by a doctor of the national health service, are exempt from the obligation.

## Is there any current law or guidance relevant to employee vaccination?

See above.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

In Italy mandatory medical treatments can only be prescribed by law. Currently there is no law stating that all employees must be vaccinated and, without this, imposing a vaccination requirement would be in violation of the employees' free will to decide on their own health. However, on 1 April 2021, Decree no. 44/2021 came into force, which makes COVID-19 vaccinations compulsory for healthcare and pharmacy workers. This includes those who carry out their activities in public and private healthcare, social care and social assistance facilities, pharmacies, parapharmacies and professional practices.

If a worker is not vaccinated, the local Health Authority (ASL) shall immediately inform their employer and the professional association to which they belong. The employer is then required to suspend the worker from any activity involving interpersonal contacts or where they are at risk of spreading the COVID-19 virus. The professional association is also required to immediately suspend the member.

The employer may not dismiss the non-vaccinated worker but must, where possible, assign them to tasks where they are not at risk of spreading the COVID-19 virus even if they are tasks normally carried out by a less qualified position, (in this case a reduction in pay is also possible). When assignment to different

tasks is not possible, the worker may be suspended without pay for the entire period. The suspension will remain in force until the vaccination obligation is fulfilled and, in any case, no later than 31 December 2021.

Only those for whom the vaccination would danger their health, as certified by a doctor of the national health service, are exempt from the obligation.

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### **Can employers discipline or dismiss an employee for failure to be vaccinated?**

No. Even though the government encourages people to get COVID-19 vaccinations, whether to get vaccinated or not is still voluntary. In general, there is no statutory ground for employers to discipline or dismiss an employee just for the lack of vaccination.

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### **Can employers ask employees for evidence of having been vaccinated?**

As a general rule, employers are prevented from investigation of employees' health status, including vaccination status, since only the company doctor is allowed to know the employee's health status.

We do not exclude, however, that in the near future the need to comply with health and safety at work protocols may authorize the employer to know (at least on an anonymous basis) the number of employees vaccinated, so as to be able to organize the working activity ensuring the health and safety of employees.

Please see the section below '*Can employers process data about the vaccine status of employees?*' for further information about the data protection requirements when asking employees for evidence of having being vaccinated.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Employers are not prevented from encouraging employees to get vaccinated. However employers will need to carefully avoid the risk that providing incentives to employees who are vaccinated turns into discrimination. The extent of such risk varies depending upon the nature of the incentive (e.g. providing support such as paid time off work to attend vaccination appointments is less risky than providing extra money).

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes. Practical steps employers might take in this respect include rolling out positive information campaigns about vaccination and supporting employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid time off.

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### **Can employers process data about the vaccine status of employees?**

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR – any processing of this data by employers must be fair, necessary and relevant for a specific purpose. The Italian Data Protection Authority (Garante) has updated its FAQs on the processing of personal data in the context of the COVID-19 pandemic, adopting a strict stance on the processing of vaccination status data by employers. In particular:

- The Garante concludes that employers cannot ask their employees to provide information on their vaccination status or copies of documents as proof of vaccination, even where the employee provides consent (given the employment setting, consent will not be an appropriate lawful basis under the GDPR). due to the imbalance of power between employer and employee). In fact, both the Garante's FAQs clarify that only medical entities that are tasked in a professional manner, such as the occupational doctor, are entitled to process personal data relating to the vaccination of employees and, where appropriate, assess employees' fitness to work for their specific task also considering their vaccination. As a consequence, the occupational doctor will act as autonomous controller and disclose to the employer only employees' fitness to work. This is also due to the fact that an employer cannot access or in any way process information relating to the diagnosis or family history of employees (e.g. consulting the reports or results of a medical test). In addition, under Italian law, the competent occupational doctor is prohibited from informing the employer about specific diseases affecting employees (including under emergency circumstances) and shall notify the employer only those cases in which, based on an employee's particular condition, is advisable to assign the said employee to tasks in areas less exposed to the risk of infection.

- In particular, according to the Italian *Protocol on the measures to prevent the contagion and the spread of Covid-19 in the workplace* jointly adopted by the Italian government and workers' representatives on the 24th April 2020 and the Garante's FAQs, only the competent occupational doctor is entitled – after a risk assessment and in consultation with the employer – to recommend employees to take special medical tests, including vaccination, as a general preventive measure against Covid-19 and in accordance with the indications of the Italian Department of Health. However, neither the Protocol mentioned above nor the Garante's FAQs specify whether the vaccination can be mandatory, although they provide vaccination as requirement for the performance of certain professions, work activities and duties in cases of employees' direct exposure to "biological agents" during work (e.g. in the health context involving high levels of risk

for workers and patients) pursuant to the Italian Legislative Decree no. 81/2008. In addition, in its FAQs the Garante highlighted that any processing of vaccination data as a precondition for accessing premises or services should be based upon national law and that, in the absence of national law, the employer cannot be involved in any data processing activity relating to vaccination of its employees. On the contrary, it would be the competent occupational doctor, acting as autonomous controller, who will process employees' health data for workplace health surveillance purposes in compliance with legal obligations relating to (i) the obligation to ensure the safety of the workplace and (ii) the requirements provided by the *Protocol on the measures to prevent the contagion and the spread of Covid-19 in the workplace* mentioned above.



# The Netherlands

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red	Amber	Green	Red	Yes

## Is vaccination being mandated by the government or local authorities?

No, vaccination is currently being rolled out on a strictly voluntary basis. The Dutch government does encourage people to get vaccinated.

Employees may not be dismissed without reasonable ground and as requiring vaccination as a condition of returning to the office is not allowed, non-compliance by the employee of the requirement to demonstrate a COVID-19 vaccination will not provide a valid reason for dismissal.

## Is there any current law or guidance relevant to employee vaccination?

Yes, on data protection. See below.

For completeness, there might also be a risk of discrimination claims, for example –

- On religion/belief grounds (religious beliefs may oppose vaccination; anti-vaccine beliefs could also arguably qualify for protection – as yet this is untested); or
- On disability grounds (for example if a disability impacts on the risks of vaccination for that disabled individual).

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

At this moment, it is not permissible to require employees to take the vaccination and as such there is also no legal basis that enables employers to require employees to be vaccinated as a condition of returning to the office.

## Can employers ask employees for evidence of having been vaccinated?

In the Netherlands the protection of medical data of employees is highly regulated and therefore it is not permitted to process the vaccination status of employees by the company under existing privacy legislation.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

In general, there is no statutory ground for employers to discipline or dismiss an employee just for failure to be vaccinated. In that context, disciplining or dismissing employees for failure to be vaccinated would give reason for employees to file a rightful claim for right to work/access to the workplace etc.

Please see the section below ‘Can employers process data about the vaccine status of employees?’ for further information about the data protection requirements when asking employees for evidence of having being vaccinated.

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## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

This is possible. However, as the vaccination is voluntary in the Netherlands, rewarding employees will mean extra pressure on those who do not participate in the voluntary vaccination. Therefore, a financial incentive could be seen as a disguised form of a coercive measure and could additionally result in equal treatment claims.

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## Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so.

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## Can employers process data about the vaccine status of employees?

The Dutch Data Protection Authority (DPA) has issued updated FAQs in relation to the processing of vaccination data of employees. The Dutch DPA has taken a strict approach to the processing of employee vaccination status data and confirms that any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under data protection legislation. Any processing of vaccination status data by employers must be fair, necessary and relevant for a specific purpose. In particular employers must have a lawful basis for processing special

category data under Article 6 and Article 9 of the GDPR. Under Article 6, employers would need to rely on legitimate interest as the basis for processing. Under Article 9 (which applies to special category data) employers may try to rely on:

- A9.2(b) – processing necessary to comply with legal obligations in the field of employment; or
- Article 9.2 (h) – processing necessary for the purposes of preventative or occupational medicine; or
- A9.2 (i) – processing necessary for reasons of public interest in the area of public health.

Consent will not be an appropriate legal basis in an employment context, as has been reiterated by the Dutch DPA on several occasions (also in light of COVID-19 testing). Whilst Article 9 provides for some exceptions to process health data in an employment context, this derogation can only be relied upon if provided for by local law. Currently, the Dutch GDPR Implementation Act does not foresee in such local derogation, particularly given that mandatory vaccination is not currently imposed by the government, allowed for employees, or recommended as part of ensuring a COVID-19 secure workplace. The Dutch DPA FAQs confirm that currently, legislation does not specifically provide that employers may process employee health data. Only the occupational health and safety service and company doctors are allowed to process health data in the event of, for example, absenteeism or reintegration of employees. Current legislation therefore does not provide a specific basis for employers to register data on employees' COVID-19 vaccinations.



# Norway

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Amber	Green	Red	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. It has not yet been decided how and when COVID-19 vaccines will be offered to all adults. According to the National Institute of Public Health's scenarios, the aim is that all adults will be offered the first vaccine dose from June/July 2021.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

For context, it is not mandatory under local law for anyone to have a vaccination and in practice the roll-out of vaccinations across the population is likely to take many months, with younger people having to wait the longest for the vaccine.

Therefore, requiring the employees to be vaccinated now as a condition of being in the workspace will be exceptionally difficult in practice.

From a legal perspective, requiring employees to be vaccinated before they can go into the workplace would give rise to a significant risk of claims for breach of contract. It could also give rise to discrimination claims, for example on religion/belief grounds (religious beliefs may oppose vaccination/anti-vaccine beliefs could arguably qualify for protection (though this is as yet untested)) or disability grounds (if, for example, a disability impacts on the risks of vaccination).

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that the employer cannot set vaccination as a condition for being in the workplace, discipline or dismissal of an employee will most likely be considered as unjust and not in accordance with the Working Environment Act (WEA).

Discipline or dismissal on this basis could also result in allegations of illegal discrimination, for example on the basis of religion (on the basis of religion and belief, there may be religious opposing vaccine), state of health/disability (people with underlying diseases/disabilities may be advised not to take the vaccine), pregnancy or breastfeeding (due to lack of research/experience, pregnant or breastfeeding women are not encouraged to take the vaccine).

## Can employers ask employees for evidence of having been vaccinated?

The protection of health data of employees is highly regulated and therefore it is not permitted to process the vaccination status of employees by the company under existing privacy legislation. Such a requirement can also lead to allegations of discrimination in the workplace. However, the biggest issue is data privacy.

Please see the section below *'Can employers process data about the vaccine status of employees?'* for further information about the data protection requirements when asking employees for evidence of having been vaccinated.

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## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

Yes, provided that where you offer a financial incentive to employees for obtaining the vaccine, their participation is truly voluntary and there is no detriment to the employee (other than not receiving the incentive) if they decide not to have the vaccine.

However, it should be noted that the incentivizing may be considered to be illegal discrimination on the basis of religion or ethnicity cf. the Norwegian Equality and Anti-Discrimination Act as this advantage may not be accessible for everyone. We recommend that this is considered further before incentives are implemented.

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## Can employers promote vaccination (e.g. by an information campaign)?

Yes. A good approach would be for the employer to encourage and support their employees to take the vaccine, when they are qualified in accordance with national guidelines.

Practical steps for employer to take includes giving employees access to well founded and secure information about the vaccine and vaccination. This helps to provide clear facts and address misinformation, boost their confidence and engage employees to take the vaccine.

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## Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR and the Norwegian DPA. Any processing of this data by employers must be fair, necessary and relevant for a specific purpose.

In particular employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR although employers will need to undertake an assessment of this on a case-by-case basis.

Under Article 9 (which applies to special category data) employers may be able to rely on A9.2(b) – the employment condition. The WEA only allows the processing of such data if considered necessary in relation to performance of the duties associated with the relevant position; for example where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified. However, although the Norwegian DPA has not issued specific guidance in relation to the processing of employee vaccination status data, the guidance issued in relation to the processing of employee health data resulting from temperature testing of employees during the COVID-19 pandemic confirmed that there is no legal basis under Article 9 GDPR that can be relied upon in order to process the data. In particular, the DPA concluded that Article 9.2(b) cannot be relied upon as a legal basis for such processing in Norway under the WEA. It is possible that the Norwegian DPA will take the same approach in relation to the processing of employee vaccine status data.

As a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.

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## Is there any current law or guidance relevant to employee vaccination?

No. However, the Government may, through regulations, make vaccination mandatory in very special cases, on the basis of the Act relating to control of communicable diseases section 3-8 second paragraph.

# Poland

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red	Amber	Green	Amber	Yes

## Is vaccination being mandated by the government or local authorities?

Currently no.

The Polish government has introduced a national vaccination programme. The aim of the programme is to achieve a level of vaccination of the population to bring the COVID-19 pandemic under control by the end of 2021.

However, currently these vaccinations are voluntary.

The order of vaccination is determined by the National Vaccination Programme against COVID-19. So far, doctors and healthcare workers, people over 70 years of age, and teachers have been vaccinated. By the end of the first quarter of 2021, the vaccination of other age groups and occupational groups (e.g. military personnel) is planned, depending on the availability of vaccines.

However, it is currently impossible to be vaccinated under this programme unless a person belongs to a specific age group or occupational group.

## Is there any current law or guidance relevant to employee vaccination?

Yes. Guidelines have been published on the government website containing the basic safety requirements and how employers should organise vaccinations for employees. Key issues are the following:

- Vaccination in the workplace takes place in cooperation with a selected healthcare provider notified to a branch of the National Health Fund as a vaccination point.

- Employers can sign up through a form provided on the government website, which was made available from 4 May 2021.
- The minimum limit of people reported by an employer is 300 people.
- Importantly, an employer can notify not only its employees but also their family members.
- The employer is responsible for ensuring adequate safety conditions during vaccination at the workplace.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No. There are no such legal regulations. Consequently, employees cannot be forced to be vaccinated. As there is no government advice stating that employees must be vaccinated, imposing a vaccination requirement, or directing non-vaccinated employees to work from home/not attend the workplace, would not be considered as a reasonable management instruction in most cases.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No. As there is no legal obligation to be vaccinated, the employer cannot force its employees to do it. The employer can only encourage and provide the opportunity for vaccination. However, employees may refuse to do so and cannot be subject to any negative consequences as a result.

## Can employers ask employees for evidence of having been vaccinated?

Any employee data relating to vaccination status will be deemed special category data (i.e. health data), which is subject to strict protection under the GDPR, and processing this type of data will be unlawful unless specific criteria are met. Given that vaccination is not currently required by the government, it is unlikely that the employer will be able to establish a legal basis under Article 9 GDPR to process this kind of personal data.

Please see the section below 'Can employers process data about the vaccine status of employees?' for further information about the data protection requirements when asking employees for evidence of having been vaccinated.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

Providing incentives to employees to be vaccinated may pose a risk of discrimination claims. However, this risk can vary depending on the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, employers can promote vaccination, for example as a measure to improve health and safety in the workplace.

For example, an employer can organise voluntary vaccination in the workplace and finance it. If an employer decides to do so, as this issue is related to health and safety at work, we recommend consulting with the trade unions (if any) or employee representatives (but consent is not required). However, the employees cannot be forced to be vaccinated.

The employer can promote vaccination, for example by running an information campaign. Such a campaign may encourage employees to disclose their sensitive personal data at their own initiative, as explained above. However, please note that the processing of such data would still need to be done on the basis of their freely given consent. This approach decreases the risk connected with data processing in these circumstances, but it does not fully eliminate it.

## Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be deemed special category data (i.e. health data), which is subject to strict protection any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;
- Public health advice and government guidance should be kept under review – currently vaccination is not required by the Polish government, or required as part of ensuring a COVID-Secure workplace; and
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. Under Article 9 (which applies to special category data), employers may refer to:
  - Article 9.2 (b) – processing necessary to comply with legal obligations in the field of employment; or
  - Article 9.2 (h) – processing necessary for the purposes of preventative or occupational medicine; or
  - Article 9.2 (i) – processing necessary for reasons of public interest in the area of public health; or
  - Article 9.2 (a) – employee's explicit consent BUT ONLY at the initiative of the employee (Polish Labour Code, Article 221a §3).

However, given that vaccination is not currently required by the government, it is questionable whether an employer will have a lawful basis for processing vaccination data other than voluntary consent (which can only be relied upon in specific circumstances – consent is generally not an appropriate legal basis under GDPR in the employment context) and a case-by-case assessment will be required.

As a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.



# Portugal

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red	Amber	Green	Red	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. According to the Government’s vaccination plan, until March/April 2021, only people of priority groups (including health and nursing home professionals and people with 50-79 years old with pre-existing health conditions or with over 80 years old) will be contacted to be vaccinated.

## Is there any current law or guidance relevant to employee vaccination?

No.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Currently there is no government advice stating that employees must be vaccinated and, without this, imposing a vaccination requirement, or directing unvaccinated employees to work from home/not attend the workplace, would not be a reasonable management instruction in most cases. The only exception will be where an employer is able to demonstrate that it has a compelling health and safety reason to require their employees to be vaccinated as identified and evidenced in a COVID-19 health and safety risk assessment, but making out this requirement in a risk assessment is likely to be extremely difficult in most working environments.

Within this framework, requiring vaccination to access the workplace, or requesting unvaccinated employees to work from home/not attend the workplace, could represent a breach of the employment contract by the company and employees would be able to refuse the order and demand to enter the premises.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that requiring vaccination will not be a reasonable management instructions (see above), disciplining or subjecting an employee to any detriment for failing to be vaccinated is likely to give rise to a significant risk of claims for breach of the employee’s rights and guarantees and/or abusive disciplinary sanction, including up to dismissal. Any dismissal on these grounds is likely to be unfair. There is also a risk of discrimination claims, for example:

- On religion/belief grounds (religious beliefs may oppose vaccination; anti-vaccine beliefs could also arguably qualify for protection – as yet this is untested);
- On disability grounds (for example if a disability impacts on the risks of vaccination for that disabled individual); or
- On pregnancy grounds (Portugal is not currently vaccinating during pregnancy).

## Can employers ask employees for evidence of having been vaccinated?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections and processing this type of data will be unlawful unless specific criteria are met. Currently, employers may only require employees’ health data where it is justified by particular requirements inherent to the nature of the professional activity and written justification is provided to employees. Nonetheless, such information must be provided to a health professional within the scope of occupational medicine and only the fitness certificate (stating only that the employee is fit or not fit for work) may be disclosed to the employer. Given that vaccination is not currently required by the government, or recommended

as part of ensuring a COVID-Secure workplace, it seems unlikely that, in most workplaces, obtaining vaccination status data could be considered necessary for a specific activity. As such, it is questionable whether an employer will have a lawful basis for processing vaccination data and a case by case assessment will be required. The risks may be less where employees are able to choose whether or not to provide the information to the employer and do so on a genuinely voluntary basis. However, due to the limitations of using consent in an employment context, there is a high risk of the consent not being deemed freely given and, as such, the processing being deemed unlawful. In any event, also in this case the employer may only have access to the fitness certificate.

### Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy, religion or belief. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

### Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so. Practical steps for employers to take include:

- Rolling out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine; and
- Considering how to support employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid time off.

### Can employers process data about the vaccine status of employees?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections – any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;

- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;
- Public health advice and government guidance should be kept under review – currently vaccination is not required by the government, or required as part of ensuring a COVID-Secure workplace; and
- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR although employers will need to undertake an assessment of this on a case-by-case basis. Under Article 9 (which applies to special category data) employers may be able to rely on:
  - A9.2(b) – processing necessary to comply with legal obligations in the field of employment; and
  - Article 9.2 (h) – processing necessary for the purposes of preventative or occupational medicine.

Given that vaccination is not currently required by the government, or recommended as part of ensuring a COVID-Secure workplace it is questionable whether an employer will have a lawful basis for processing vaccination data and a case by case assessment will be required. In any event, the employer cannot directly process such data, rather being processed by the occupational medicine services.

Given the employment setting, consent will not be an appropriate lawful basis under the GDPR.

In addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used. and who it will be shared with before any processing take place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.

# South Africa

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Red/Amber	Red	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

No, there is currently nothing in the Regulations and the COVID-19 Directive that refers to employers mandating any testing or vaccinations.

In his most recent address to the nation the South Africa president reiterated that there will be no programme of compulsory vaccination in South Africa.

work from home and receive their normal salary and benefits in the normal course then such a policy may be justified and, in any event, employees would probably not challenge it. It may be reasonable to impose a vaccination as a condition of entry into the workplace in certain environments where there is an operational requirement for employees to work close together and other health and safety measures have proved ineffective. Any such policy should be consulted on before implementation.

## Is there any current law or guidance relevant to employee vaccination?

No.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

This would be risky. If the employer were to implement a policy making it mandatory for employees to have the COVID-19 vaccination and an employee refuses such vaccination, whether or not disciplinary action can be taken would depend on the reasonableness of the instruction by the employer **and** whether the employee's refusal to obey the instruction was **unreasonable**. A determination of the reasonableness of an employee's refusal would need to be determined on a case-by-case basis. When assessing the reasonableness of the refusal the employer would need to consider the reasons why the employee is refusing. If the employee has a medical condition which would make the taking of the vaccination risky, then such a refusal would not be unreasonable and taking disciplinary action in such circumstances would be extremely risky. Furthermore, if the employee asserts Constitutional rights such as the right to freedom of religion where vaccinations are against their religion, then it would be risky to discipline and dismiss in such circumstances.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

This would be risky. In terms of section 8(1) of the Occupational Health and Safety Act, 1993 (OHSA) an employer has a duty to provide and maintain, as far as is reasonably practicable, a safe and healthy work environment and may accordingly impose conditions on entry to the workplace provided that these conditions are reasonable in the circumstances. The OHSA and COVID-19 Directive do not refer to mandatory vaccinations and instead have set out a number of health and safety measures that employers are required to implement.

At this stage we are of the view that it would be risky to introduce a mandatory COVID-19 vaccination policy if employees would suffer an adverse consequence for failing to have the vaccine such as dismissal. If the employee can continue to

There may also be options to dismiss on the basis of incapacity or the operational requirements of the employer but the employer would need to demonstrate that there is a genuine operational requirement that all its employees have been vaccinated or that it is an inherent requirement of the job to be vaccinated and this might prove quite difficult.

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### **Can employers ask employees for evidence of having been vaccinated?**

Employers can request this information but we point out that requiring the employee to disclose their medical history and vaccination history would constitute a category of special personal information under the Protection of Personal Information Act, 2013 (POPIA) as it constitutes health information. The processing of health information generally requires the consent of the data subject. Alternatively, it may be justified on the basis that it is necessary for the establishment, exercise or defence of a right or obligation in law. The latter would be applicable if legislation provides for mandatory COVID-19 testing. It may potentially be justified on the basis of the requirements under the OHS Act but, as stated above, we think that this would be quite difficult to justify as currently the OHS Act does not impose any obligation on employers to make COVID-19 vaccinations mandatory.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Yes, however, this may expose the employer to unfair discrimination claims. For example, employees may argue that, but for a religious prohibition, they would have been happy to comply with the requirement to have the vaccination, therefore being ineligible for the incentive amounts to unfair discrimination on the basis of religion, which is a protected ground in terms of the Constitution.

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes.

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### **Can employers process data about the vaccine status of employees?**

Yes, however requiring employees to disclose their medical history and vaccination history would constitute a category of special personal information under the Protection of Personal Information Act, 2013 ("POPIA") as it constitutes health information. The processing of health information generally requires the consent of the data subject. Alternatively, it may be justified on the basis that it is necessary for the establishment, exercise or defence of a right or obligation in law. The latter would be applicable if legislation provides for mandatory COVID-19 testing. It may potentially be justified on the basis of the requirements under the OHS Act but, as stated above, we think that this would be quite difficult to justify as currently the OHS Act does not impose any obligation on employers to make COVID-19 vaccinations mandatory.

If employees were to provide this information then the employer would need to comply with all the conditions for lawful processing under POPIA when processing this information. There would accordingly need to be limitations on which persons have access to this information and such persons should be bound by appropriate confidentiality undertakings. There would also need to be appropriate security safeguards and processes in place for the secure collection, storage, use and disposal of employees' health information.



# Spain

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Red	Red	Green	Red	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary and subject to a strict calendar in Spain. Employees are not able to be vaccinated except on the date decided by the Spanish Government; this may well happen very late in 2021 or even in 2022 depending on the age and personal circumstances of the employee.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No. There are very limited jobs (doctors, nurses and lab technicians) in which employees must be offered vaccination but the employee is always free to accept or not.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No. Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the GDPR. In particular, employers will need to have a legal basis for processing vaccination data under Article 6 and Article 9 of the GDPR. Please see the section below ‘Can employers process data about the vaccine status of employees?’ for further information about the data protection requirements when asking employees for evidence of having been vaccinated.

## Can employers ask employees for evidence of having been vaccinated?

No

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

We understand that the answer is no, particularly because for the time being employees cannot be vaccinated when they want but subject to a calendar decided by the authorities; these incentives might also be deemed discriminatory.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, we understand that information campaigns are allowed.

## Can employers process data about the vaccine status of employees?

No. Spanish law does not automatically grant employers the right to collect and process health information about their employees. In principle, employers only have access to the Yes/No format answer to the question of whether the employee is fit for work. The details for the Yes or the No must remain with the National Health System/Mutual Insurance doctor conducting the health review. Vaccination status data would go beyond that point. The fact that the information is provided “voluntarily” would provide little help, since Spanish authorities consider that the consent of the employees is normally granted under duress in Spain and, therefore, the processing will be deemed unlawful. Finally, vaccination is subject to a strict calendar in

Spain (employees not being able to get vaccinated except by the date decided by the Spanish Government; this may well happen very late in 2021 or even in 2022 depending on the age and personal circumstances of the employee). On top of this, taking the vaccine is not mandatory in Spain. This means that collecting and processing this information could easily be seen by the Spanish privacy regulator as excessive, disproportionate and discriminatory (since people willing to get vaccinated are prevented from doing so by law and people deciding not to get vaccinated need to implicitly disclose their personal viewpoint on this matter).

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### **Is there any current law or guidance relevant to employee vaccination?**

No, there is not. Attention should be paid not only to any legislation approved by the central government but also by the (17) regions.



# United Arab Emirates

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Green	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Currently there is no government advice stating that employees must be vaccinated and, without this, imposing a vaccination requirement, or directing unvaccinated employees to work from home/not attend the workplace, would risk employees resigning and claiming constructive dismissal by the employer, the maximum compensation for which is three months' total salary.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that requiring vaccination is not lawful currently in the UAE, disciplining or subjecting an employee to any detriment for failing to be vaccinated is likely to give rise to a significant risk of claims for constructive dismissal. Any dismissal on these grounds is likely to be arbitrary. There is also a risk of discrimination claims, for example –

- On religion/belief grounds (religious beliefs may oppose vaccination);
- On disability grounds (for example if a disability impacts on the risks of vaccination for that disabled individual); and
- On pregnancy grounds (the UAE is not currently vaccinating during pregnancy).

Although there are legislative protections in place for the above categories, there are no prescribed remedies.

## Can employers ask employees for evidence of having been vaccinated?

Yes, however any such information must be provided on a voluntary basis.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy or religion. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus. In any event, as above, there are no prescribed remedies for breach of discrimination provisions as contained in UAE employment legislation. An employee may however resign and claim constructive dismissal.

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### Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so. Practical steps for employers to take include:

- Rolling out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine; and
- Considering how to support employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid time off.

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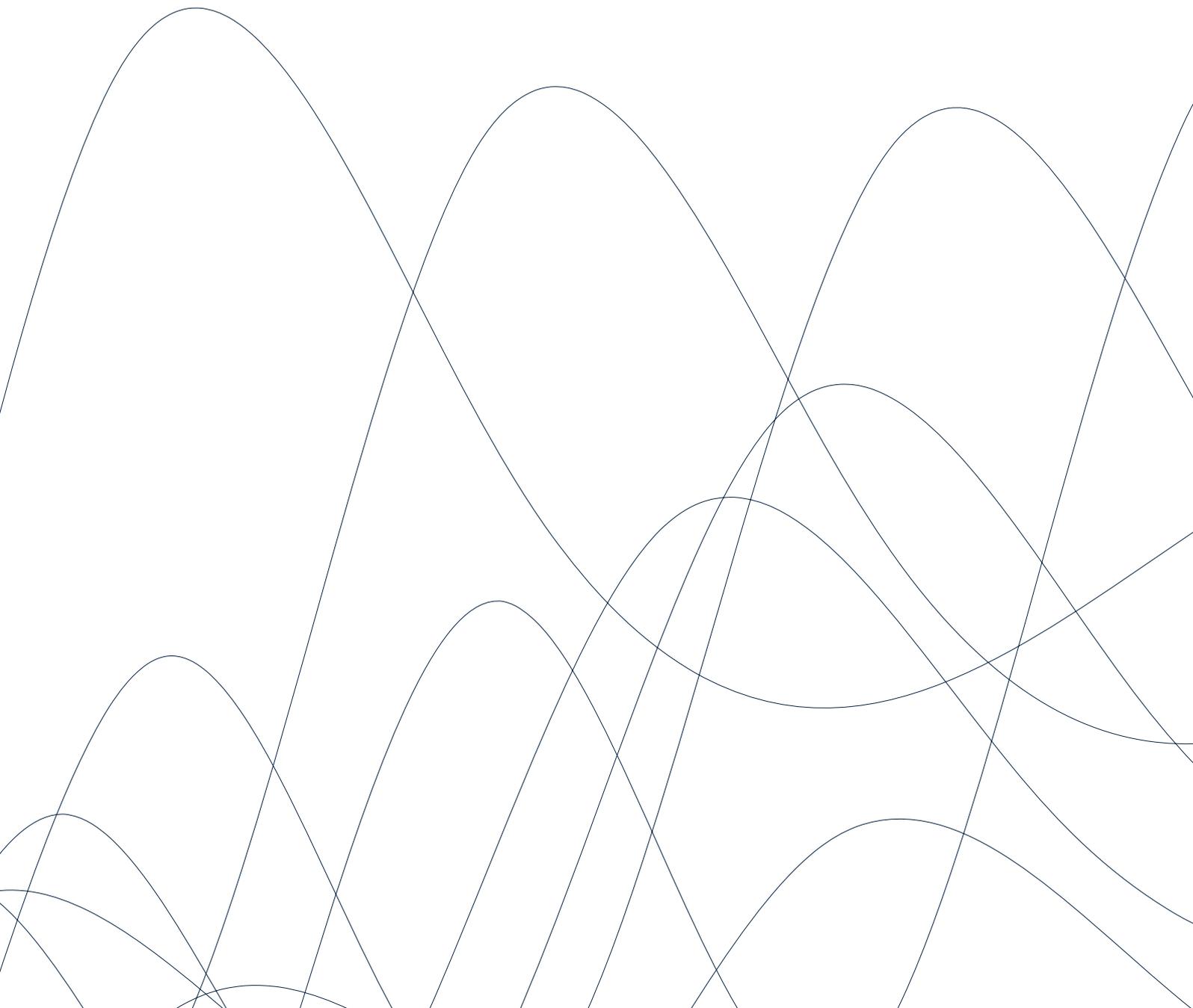
### Can employers process data about the vaccine status of employees?

Yes, provided that the information is provided on a voluntary basis and the employees expressly consent to the manner in which the information is to be processed.

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### Is there any current law or guidance relevant to employee vaccination?

No.



# UK

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Amber	Green	Red	Yes

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. The Government’s current aim is that all adults in the UK will be offered a first vaccine dose by 31 July 2021.

## Is there any current law or guidance relevant to employee vaccination?

Yes, the UK Information Commissioner has issued Guidance on vaccinations and data protection.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Given that requiring vaccination will not be a reasonable management instructions (see above), disciplining or subjecting an employee to any detriment for failing to be vaccinated is likely to give rise to a significant risk of claims for breach of the implied term of trust and confidence and/or constructive dismissal. Any dismissal on these grounds is likely to be unfair. There is also a risk of discrimination claims, for example:

- On religion/belief grounds (religious beliefs may oppose vaccination; anti-vaccine beliefs could also arguably qualify for protection – as yet this is untested);
- On disability grounds (for example if a disability impacts on the risks of vaccination for that disabled individual); or
- On pregnancy grounds (the UK is not currently vaccinating during pregnancy).

## Can employers ask employees for evidence of having been vaccinated?

Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the UK General Data Protection Regulation (UK GDPR) and Data Protection Act 2018. The UK Information Commissioner (ICO) has issued guidance in relation to COVID-19 vaccinations and data protection requirements (ICO Vaccination Guidance). Please see the section below ‘*Can employers process data about the vaccine status of employees?*’ for further information about the data protection requirements when asking employees for evidence of having being vaccinated.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There are a number of legitimate reasons why employees may be unwilling or unable to be vaccinated, such as disability, pregnancy, religion, or belief. Providing incentives to employees who are vaccinated therefore carries a risk of discrimination, but how great that risk is may vary depending upon the nature of the incentive – for example, providing support such as paid time off work to attend vaccination appointments is likely to be less risky than providing a financial bonus.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach at present is to encourage employees to have the vaccine when they become eligible and to support them in doing so. Practical steps for employers to take include

- Rolling out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine; and
- Considering how to support employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid time off.

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## Can employers process data about the vaccine status of employees?

The ICO has issued guidance in relation to COVID-19 vaccinations and data protection requirements (ICO Vaccination Guidance). Any employee data relating to vaccination status will be special category data (i.e. health data) which is subject to extensive protections under the UK GDPR and Data Protection Act 2018 – any processing of this data by employers must be fair, necessary and relevant for a specific purpose. In particular:

- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;
- When assessing whether the processing of vaccination data is justified, employers should take into consideration factors such as: the sector that the employees work in, the kind of work that the employees undertake; and the health and safety risks in the workplace. For example, where employees may pose a risk to clinically vulnerable individuals, such as in a healthcare setting, it is more likely that the processing of their vaccination status data will be justified;
- Public health advice and government guidance should be kept under review – currently vaccination is not required by the UK government, or required as part of ensuring a COVID-Secure workplace but guidance in this area is likely to develop; and

- Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the UK GDPR. For the majority of employers, legitimate interests is most likely to be the appropriate basis under Article 6 UK GDPR although employers will need to undertake an assessment of this on a case-by-case basis. Under Article 9 (which applies to special category data) the ICO Vaccination Guidance confirms that employers may be able to rely on:

- A9.2(b) – the employment condition, with Schedule 1, Part 1(1) of the DPA 2018; or
- A9.2 (i) – the public health condition, with Schedule 1, Part 1(3) of the DPA 2018.

Given the employment setting, consent will not be an appropriate lawful basis under the UK GDPR.

In addition, as a minimum, employers should take the following measures to help minimize data protection risks:

- Be clear and transparent with employees about how and why their personal data will be used, and who it will be shared with before any processing takes place;
- Ensure the data is kept secure and confidential;
- Limit the nature and volume of personal data processed to that which is absolutely necessary and proportionate;
- Only retain information for as long as necessary and ensure that personal data processed remains accurate;
- Carry out a data protection impact assessment to record the risks and mitigation steps taken before processing any vaccination status data; and
- Only use the information for health and safety management during the current COVID-19 pandemic.



# ASIA-PAC

## Australia

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Green	Green	Amber	Yes

### Is vaccination being mandated by the government or local authorities?

No. The policy of the Australian Government is that receiving a vaccination is voluntary, although it is encouraging people to get vaccinated.

State and Territory Governments in Australia may make public health orders requiring the vaccination of certain workers in their state or territory (e.g. for frontline health workers). However, no public health orders requiring COVID-19 vaccinations have been made currently.

### Can employers require existing employees to be vaccinated as a condition of being in the workplace?

The Fair Work Ombudsman (FWO), Australia’s primary workplace regulator guidance provides that the “overwhelming majority” of employers should assume that they will not be able to require their employees to be vaccinated against COVID-19.

However, the FWO guidance does outline certain limited instances in which an employer may require an employee to be vaccinated. These limited circumstances will be dependent on the facts of the relationship, including:

- Whether a specific law (such as a state or territory public health law) requires an employee to be vaccinated;
- Whether an enterprise agreement, other registered agreement or employment contract includes a provision about requiring vaccinations;
- If no law, agreement or employment contract applies that requires vaccination, whether it would be lawful and reasonable for an employer to give their employees a direction to be vaccinated (which is assessed on a case by case basis).

Additional considerations may include whether employees have a legitimate reason for not being vaccinated (for example, a medical reason), and how protections for employees under anti-discrimination laws may apply.

Employers may be able to direct their employees to be vaccinated provided the direction is lawful and reasonable, such as for aged care workers. However, the FWO guidance states that, on its own, the coronavirus pandemic does not make it reasonable for an employer to direct their employees to be vaccinated against COVID-19. Instead, whether a direction is lawful and reasonable has to be assessed on a case by case basis having regard to the industry in which the employer operates, the duties of the employee and personal circumstances of the employee.

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## Can employers discipline or dismiss an employee for failure to be vaccinated?

The FWO guidance provides that an employer may be able to take disciplinary action, including termination of employment, against an employee for refusing to be vaccinated if the employee's refusal is in breach of a specific law or a repeated lawful and reasonable direction requiring vaccination.

However, this must be assessed on a case by case basis and it is expected that for the vast majority of employers, such action will not be available.

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## Can employers ask employees for evidence of having been vaccinated?

If an employer has provided a lawful and reasonable direction to be vaccinated for COVID-19, the employer may be able to ask the employee to provide evidence of their vaccination.

Where an employer directs an employee to provide evidence, the direction to provide evidence must also be lawful and reasonable. As noted above, this will depend on all of the circumstances surrounding the direction to get the vaccine itself.

The employer's request for the employee to provide evidence of their vaccination will raise privacy considerations with which the employer must comply. An employee's vaccination status is considered sensitive health information under Australia's privacy legislation and additional protections apply for its collection, use and disclosure. Employers must only collect this sensitive health information if the employee consents and the collection is reasonably necessary for the business' functions or activities (which may include preventing or managing COVID-19), unless a specific exception applies.

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## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

Yes. Employers may incentivise employees to be vaccinated, for example, by providing paid time off for the employee to take the vaccine.

Prior to formulating a policy incentivising vaccinations, employers need to consider their responsibilities under:

- Commonwealth, state and territory discrimination laws; and
- General protections provisions under Australia's Fair Work Act.

Under Australian law, employers are prevented from taking adverse action against an employee on the basis of certain protected characteristics, referred to as the general protections provisions. Protected characteristics that are likely to be relevant in considering whether to incentivise vaccinations include disability, pregnancy and/or religious beliefs. These claims are similar to discrimination claims available under Commonwealth, state and territory discrimination laws.

Providing incentives to employees to be vaccinated carries a discrimination risk given the above factors. However, the significance of that risk will vary depending upon the nature of the incentive and specific workforce.

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## Can employers promote vaccination (e.g. by an information campaign)?

Yes, employers can encourage employees to have the vaccine when they become eligible and support them in doing so.

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## Can employers process data about the vaccine status of employees?

An employer should only collect information about an employee's vaccination status if they are satisfied that the collection is permitted under Australia's privacy legislation. An employee's vaccination status is considered sensitive health information under Australia's Privacy Act and additional privacy protections apply.

An employer must only collect health information if the employee consents and the collection is reasonably necessary for the business' functions or activities (which may include preventing or managing COVID-19) unless an exception applies. The employer must also take reasonable steps to notify employees of the matters set out in Australia's Privacy Act, including the purposes of collection and how the information may be used or disclosed.

For private sector employers, the employee records exemption under Australia's privacy legislation may apply in some circumstances after an employer lawfully collects this information. If the employee records exemption applies, then certain requirements under Australia's Privacy Act may not apply to the handling and processing of the information.

## Is there any current law or guidance relevant to employee vaccination?

Yes.

**Fair Work Ombudsman Guidance:** <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/health-and-safety-in-the-workplace-during-coronavirus/covid-19-vaccinations-and-the-workplace>

**Safe Work Australia Guidance (for Offices):** <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/office/vaccination?tab=tab-toc-employer>

**Office of the Australian Information Commissioner (Privacy Obligations to Staff):** <https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff/>

**See also DLA Piper Australia (COVID-19 Vaccination Alert):** <https://www.dlapiper.com/en/australia/insights/publications/2021/02/covid-19-vaccination-alert---updated-guidance-for-employers/>



# China

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Green	Green	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. The COVID-19 vaccination is free for Chinese in China now and the government encourages people to get vaccinated.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There is no issue with doing so.

## Is there any current law or guidance relevant to employee vaccination?

No.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes. There are no collective consultation obligations. There is no clear formal requirement on the payment or time off for vaccination. If the employer would like to promote vaccination, the employer may consider to provide paid time off for vaccination.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No. Even though the government encourages people to get COVID-19 vaccinations, whether to get vaccinated is still voluntary. In general, there is no statutory ground for employers to discipline or dismiss an employee just for failure to be vaccinated.

## Can employers process data about the vaccine status of employees?

Unless required by government to process or collect vaccine data, employers must provide sufficient notification to the employees and obtain explicit consent of employees under applicable data privacy laws and regulations in China. Processing of this information is strictly limited to the purpose consented by the employees at the time of collection, and not used or disclosed disproportionate or excessive to the appropriate purpose. Companies need to be particularly careful if collecting and processing data involving large number of individuals as security assessment may be required by the government authorities.

## Can employers ask employees for evidence of having been vaccinated?

Employers asking for such evidence is not an issue by itself. Employers must provide sufficient notification to the employees and obtain their explicit consent to obtain the evidence. However, if the employee is notified to take vaccination through the employer, then employer will very likely know, automatically as part of the process, whether the employee is vaccinated or not.

# Hong Kong

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Green	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

No, under current government plans the vaccinations will be provided by the government on a voluntary basis. The government may choose to mandate for certain parts of the workforce (e.g. healthcare workers ) as we approach the date for rollout.

There is a risk of discrimination claims from employees who have a disability (which is defined very broadly in Hong Kong). There is a limited exception if the disability is an infectious disease (e.g. COVID-19) and the action taken is reasonably necessary to protect public health. However, these questions have not yet been tested in the courts and the Hong Kong government has so far not issued any guidance on this issue. It is also prudent to check on a case by case basis what reason an employee may have for not wishing to take the vaccine (e.g. pregnancy, breastfeeding).

## Is there any current law or guidance relevant to employee vaccination?

There are no specific laws at this stage.

The government has a dedicated webpage for vaccine-related information at <https://www.covidvaccine.gov.hk/en/vaccine>.

There may also be a (lower) risk of claims with respect to any attribute that is protected in the employer’s antidiscrimination/ equal opportunities policies and which go over and above the statutory minimum requirements e.g. religion, philosophical belief.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

There is no statutory right to require employees to have the vaccine. Employers have an obligation under health and safety legislation to take reasonably practicable steps to protect the safety and health of their employees at work. Whether requiring a vaccination is justified as part of a risk assessment measure is only likely to be justified for particular sectors/groups of employees which are particularly high risk e.g. healthcare workers, elderly care home workers. A general blanket policy of mandated vaccination is unlikely to be viewed as reasonable.

There are no statutory consultation obligations in Hong Kong. However, it is prudent to check whether any collective groups have been set up by the employer.

Employees will likely need to be paid for time taken to attend authorised vaccination appointments. While there is no formal guidance, the Labour Department has generally encouraged employers to treat employees with flexibility and compassion during COVID-19. Failure to pay wages is also an offence under Hong Kong law.

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### **Can employers discipline or dismiss an employee for failure to be vaccinated?**

This is only likely to be reasonable for the particular sectors/groups of employees noted above e.g. healthcare workers, elderly care home workers, and even then any failure to be vaccinated would need to be considered on a case-by-case basis before any sanction was imposed. For other employees who are dismissed, this would likely amount to unreasonable dismissal which would entitle those with at least 2 years' continuous service to bring a statutory claim in the Labour Tribunal and/or civil claims. Any disciplinary action could also entitle the employee to resign and claim constructive dismissal depending on the seriousness of the sanction and the manner in which it was imposed and/or bring other claims based on their particular case (e.g. breach of trust and confidence, discrimination).

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### **Can employers ask employees for evidence of having been vaccinated?**

Yes, provided this is given on a voluntary basis and any data is collected, processed and used in accordance with the Personal Data (Privacy) Ordinance. Employers generally cannot require employees to provide medical records except in certain limited circumstances such as evidence of childbirth in connection with maternity leave or evidence of sickness.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Yes, provided the incentive is offered on a completely voluntary basis.

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes, provided the encouragement is completely voluntary and does not impose any sanctions on employees for refusing to be vaccinated.

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### **Can employers process data about the vaccine status of employees?**

Yes. However, this will likely amount to personal data and must only be collected, used and/or transferred in accordance with the Personal Data (Privacy) Ordinance. Employers should review the terms of their existing data privacy policy and Personal Information Collection Statement to check whether the processing of this data will fall within their existing scope.



# Japan

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Red	Red	Amber	Amber	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

It is not being mandated and unlikely that it will be mandated in the future.

## Is there any current law or guidance relevant to employee vaccination?

No.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

The Ministry of Health, Labor and Welfare has stated that the decision of whether to vaccinate should be made solely by the employee without potential negative action, like being barred from the office, if they do not vaccinate.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Please see above.

## Can employers ask employees for evidence of having been vaccinated?

It is not illegal to ask employees if they have been vaccinated. It must be made clear to the employees that they do not have to respond and no negative action will be taken if they do not provide the information.

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

There is no statute or guidance that addresses this issue so it is not prohibited. It would be acceptable to grant a day off to be vaccinated but doing more than this could potentially be seen as unduly influencing an employee to decide to be vaccinated. There may also be employees who have legitimate reasons for not getting vaccinated like an underlying health condition that makes it unsafe who may feel that they are being discriminated against.

## Can employers promote vaccination (e.g. by an information campaign)?

As long as this is done in a way that is not coercive to the employees it would be permissible.

## Can employers process data about the vaccine status of employees?

Yes but the vaccine status is special care-required personal information under the Act on the Protection of Personal Information. Collection of the special care-required personal information is subject to consent of employees.

# New Zealand

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Red	Green	Amber	Yes

## Is vaccination being mandated by the government or local authorities?

No, vaccination is voluntary. The COVID-19 vaccination is free and the government will encourage people to be vaccinated, but it is not mandatory. The vaccination rollout is still in its very early phases, with only border workers and front-line healthcare workers (and their families) being vaccinated currently.

## Is there any current law or guidance relevant to employee vaccination?

<https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/covid-19-vaccination-and-employment/>

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Employers cannot require an individual to be vaccinated. However, employers can require a specific role be performed by a vaccinated person. Employers must have first done a health and safety risk assessment to support this requirement, and must work alongside workers, unions and other representatives in doing so.

If a particular role requires vaccination, employers can make changes to an employee's duties for health and safety reasons, or they may negotiate variations to existing conditions of employment to require vaccination. This process must be fair and reasonable, and carried out in good faith.

Employers can also require vaccination as a condition for new employees, but this must be reasonable for the role.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Employers must avoid unfair disadvantage. Employers, in consultation with employees, must consider options, such as changing work arrangements, alternative duties or leave. If leave is used, this must be agreed, and we encourage this to be paid. Employers and employees may agree to a negotiated end of employment, but individual dismissals are unlikely to be justifiable in almost all cases.

## Can employers ask employees for evidence of having been vaccinated?

Employers can ask workers if they have been vaccinated. However, workers do not have to tell their employer if they have been vaccinated or why they are unable or choose not to be vaccinated.

If workers have consented, the Ministry of Health can inform employers whether Group 1 and Group 2 workers (i.e. border and MIQ workers and their household contacts; then frontline healthcare workers and healthcare workers protecting the most vulnerable and priority populations) have been vaccinated.

If workers do not tell employers what their vaccination status is, employers may assume workers are unvaccinated, but should first inform workers of this assumption.

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### Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

To a certain extent, for example by having some food available when doing vaccinations on-site, this would be acceptable. However, there is risk of a disadvantage claim where employees cannot receive a benefit by virtue of not being vaccinated. Offering financial incentives or extra leave would not be acceptable.

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### Can employers promote vaccination (e.g. by an information campaign)?

There is no issue with employers promoting vaccination, by facilitating vaccinations on-site at work, and allowing workers to get vaccinated during work hours without loss of pay.

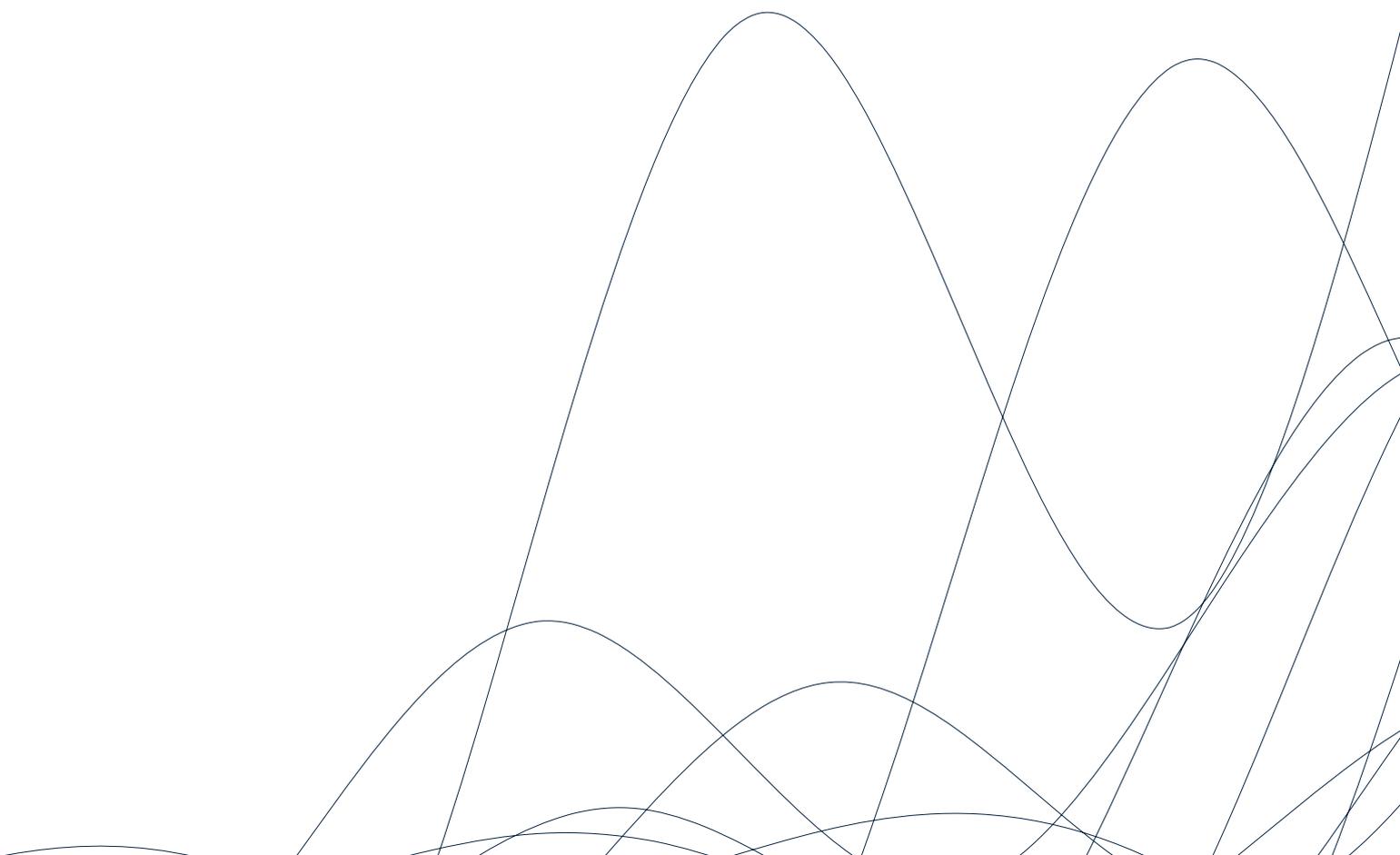
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### Can employers process data about the vaccine status of employees?

From a privacy perspective, employers can process the vaccine status of employees provided that:

- The purpose for collection is lawful and connected with the functions/activities of the employer, and collection of the information is necessary for that purpose – employers should have a clear purpose for collection related to the nature of their business;
- The information is collected from the individual and in a manner that is not unfair or overly intrusive; and
- The employer complies with their usual disclosure/privacy statement requirements – e.g. ensuring the employees are aware this information is being collected, the purposes of collection, the intended recipients of the information and the consequences if the employee does not allow collection of the information.

In general, the information should only be used and disclosed for the purposes for which it was collected (which highlights the importance of making this clear to employees prior to collection).



# Singapore

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Green	Green	Amber	No

## Is vaccination being mandated by the government or local authorities?

No, under current government plans the vaccinations will be provided by the government on a voluntary basis.

## Is there any current law or guidance relevant to employee vaccination?

There are no specific laws at this stage.

The government has a dedicated webpage for vaccine-related information at <https://www.moh.gov.sg/covid-19/vaccination>.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Yes, employers can make it a condition for being in the office if an employer is entitled under its employment contract to nominate the place that the employee works in Singapore.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Employers should not however take any disciplinary action against employees who refuse to take the vaccine and need to provide for alternatives, such as working from home and will have to continue to pay the employee.

## Can employers ask employees for evidence of having been vaccinated?

Yes, provided this is given on a voluntary basis with the employee's prior consent and any data is collected, processed and used in accordance with the Personal Data Protection Act 2012 (No. 26 of 2012).

## Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

Yes, provided the incentive is offered on a completely voluntary basis.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes, provided the encouragement is completely voluntary and does not impose any sanctions on employees for refusing to be vaccinated.

## Can employers process data about the vaccine status of employees?

Yes, provided the employee's prior consent is obtained. However, this will likely amount to personal data and must only be collected, used and/or transferred in accordance with the Personal Data Protection Act (No. 26 of 2012). Employers should review the terms of their existing data privacy policy and Personal Information Collection Statement to check whether the processing of this data will fall within their existing scope.

Disclaimer: DLA Piper is restricted for regulatory reasons from practicing local law in Singapore, as are most international law firms. Where advice on Singapore law is required, we will work with a local firm to provide such advice while leveraging our own knowledge and experience as international counsel in international advisory and transactional work.

# AMERICAS

## Brazil

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Amber	Amber	Red	Green	Amber	Yes

### Is vaccination being mandated by the government or local authorities?

The National Quarantine Law provides for vaccination as a compulsory measure to address the public health emergency of international importance resulting from COVID-19, and the Supreme Court also ruled in 2020 that the COVID-19 vaccine is mandatory, with the reservation that people should not be forced to be immunized. There is a Bill awaiting approval by the President of the Chamber of Representatives that aims to prohibit mandatory vaccination.

informing the worker about the benefits of the vaccine and the importance of collective vaccination, besides providing medical care, with explanations about the effectiveness and safety of the immunizer. Furthermore, it is a constitutional duty of employers to promote a safe work environment that safeguards the employee's physical integrity.

### Is there any current law or guidance relevant to employee vaccination?

[https://mpt.mp.br/pgt/noticias/estudo\\_tecnico\\_de\\_vacinacao\\_gt\\_covid\\_19\\_versao\\_final\\_28\\_de\\_janeiro-sem-marca-dagua-2.pdf](https://mpt.mp.br/pgt/noticias/estudo_tecnico_de_vacinacao_gt_covid_19_versao_final_28_de_janeiro-sem-marca-dagua-2.pdf)

### Can employers discipline or dismiss an employee for failure to be vaccinated?

There is still no consensus on the possibility of companies requiring their employees to have a vaccine against COVID-19, as well as the restrictions and punishments applied to those who do not get the vaccine, considering that vaccination is mandatory, but not forced. However, the Public Ministry of Labor has already pronounced its understanding of the potential that a company can dismiss their employees that refuse to get the vaccine for cause. This is no case law in this respect yet.

### Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Although there is no legal provision requiring that existing employees must be vaccinated as a condition to be in the workplace, the Labor Prosecutor's Office conducted a technical study on vaccination, which by analogy to the terms of occupational health and safety, states that if there is an unjustified refusal by the employee to be vaccinated, it can be characterized as an unfaithful act, under the terms of the legislation. However, the company must not use, immediately, the maximum penalty or any other penalty, without first

### Can employers ask employees for evidence of having been vaccinated?

Although there is still no specific legislation about vaccination within the employment relationship, the Federal Supreme Court has established an understanding recognizing the possibility of COVID-19 being known as an occupational disease, after a medical examination delineating the link between the work and the employee's contamination, so that, despite not being the object of law or guidance, the employer is allowed to control employees who have taken the vaccine.

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### Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?

No, as neither the Labor Court nor the Government has established what the restrictive measures will be for those who refuse to take the vaccine, or the incentives allowed for those who wish to be vaccinated, so until such provisions are actually established, the granting of benefits is controversial as may be considered as discrimination against non-vaccinated employees. The Brazilian labor legislation expressly provides for equal conditions and benefits for those employees occupying the same position. A case-by-case analysis should be carried out.

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### Can employers promote vaccination (e.g. by an information campaign)?

Yes, the best approach is to encourage employees to have the vaccine when they become eligible and to support them in doing so by launching out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine.

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### Can employers process data about the vaccine status of employees?

Yes. Data about the vaccine status of employees are health data, so they are considered sensitive personal data, according to art. 5, II of the Brazilian General Data Protection Law no.13,709/18 ("LGPD"). Therefore, the processing of these data must follow some requirements of the LGPD, as follows:

- As determined under Article 11 of the LGPD, the employer will have to rely on a proper legal basis for processing this type of data. As consent is not an appropriate legal basis for processing employee information and the legitimate interest cannot be used as the proper legal basis for sensitive data, employers may try to rely on:
  - Processing necessary to comply with a legal or regulatory obligation; or
  - Protecting life or physical safety of the data subject or a third party.
- Due to the principle of transparency, employees must be duly informed regarding the processing of their data in Privacy Notices, including, among other information, the purpose and duration of the processing; the correspondent legal basis; international data transfers and the data subject's rights provided in the LGPD; and
- It is advisable to conduct a Data Protection Impact Assessment, part of which will require the employer to identify what it is trying to achieve and whether the employee information is necessary for that purpose.

Although the Brazilian Federal Supreme Court has ruled that vaccination against COVID-19 is mandatory, but not forced, and that restrictive rights measures can be adopted for those who do not prove immunization, this is still a controversial issue, so a case-by-case analysis must be carried out.



# Canada

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Amber	Amber	Green	Green	Amber	Yes

## Is vaccination being mandated by the government or local authorities?

No, there is no federal, provincial or local law that specifically directs that individuals be vaccinated against COVID-19, or authorizes employers to do likewise. However, government officials have suggested that not getting vaccinated could lead to public health restrictions for an individual.

## Is there any current law or guidance relevant to employee vaccination?

Yes. Several districts have enacted laws requiring employers to provide paid vaccination leave.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

There is no clear direction from government on this issue. However, employers have an obligation to ensure a safe work environment under applicable occupational health and safety obligations. Specifically, employers have a general duty to take every precaution reasonable in the circumstances for the protection of a worker. In light of COVID-19, this duty includes an employer’s obligation to protect workers from exposure to COVID-19. Vaccines may be considered another important tool an employer may use to protect workers and visitors from being exposed to COVID-19 in the workplace.

In determining whether or not the vaccine is a reasonable precaution to protect the safety of employees in accordance with employers’ occupational health and safety obligations, employers should assess the risk of a COVID-19 outbreak in the workplace and the needs/realities of the workplace.

In addition, refusals will need to be assessed on a case-by-case basis. It is unlikely that blanket policies requiring workers to be vaccinated for COVID-19 as a condition to return will be enforceable.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

Just cause discipline or dismissal arises from misconduct in employment and, unless taking the vaccine can be demonstrated to be a bona fide requirement for working in the workplace and lesser measures would not otherwise be sufficient and the employee’s refusal to take the vaccine is not related to a protected ground (for example a medical condition or religious belief), an employee does not commit any misconduct by refusing to take the vaccine.

## Can employers ask employees for evidence of having been vaccinated?

Yes, employers can ask employees if they have been vaccinated, but should only do so if it is relevant to the employee’s employment and the health and safety obligations of the employer (i.e. likely not relevant to remote workers).

However, most employers likely will not be able to compel employees to disclose personal medical information such as whether they have taken the vaccine. As such, most employers could likely could treat an employee that refused to disclose as having not taken the vaccine.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Yes. However, employers will need to determine if an incentive is right for its workplace. Unless the incentive is significant, it is unlikely to motivate employees who would not already get vaccinated. Further, it could create a negative incentive for employees to “jump the queue” in order to get their vaccine earlier (leading to potential public relations issues).

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### **Can employers promote vaccination (e.g. by an information campaign)?**

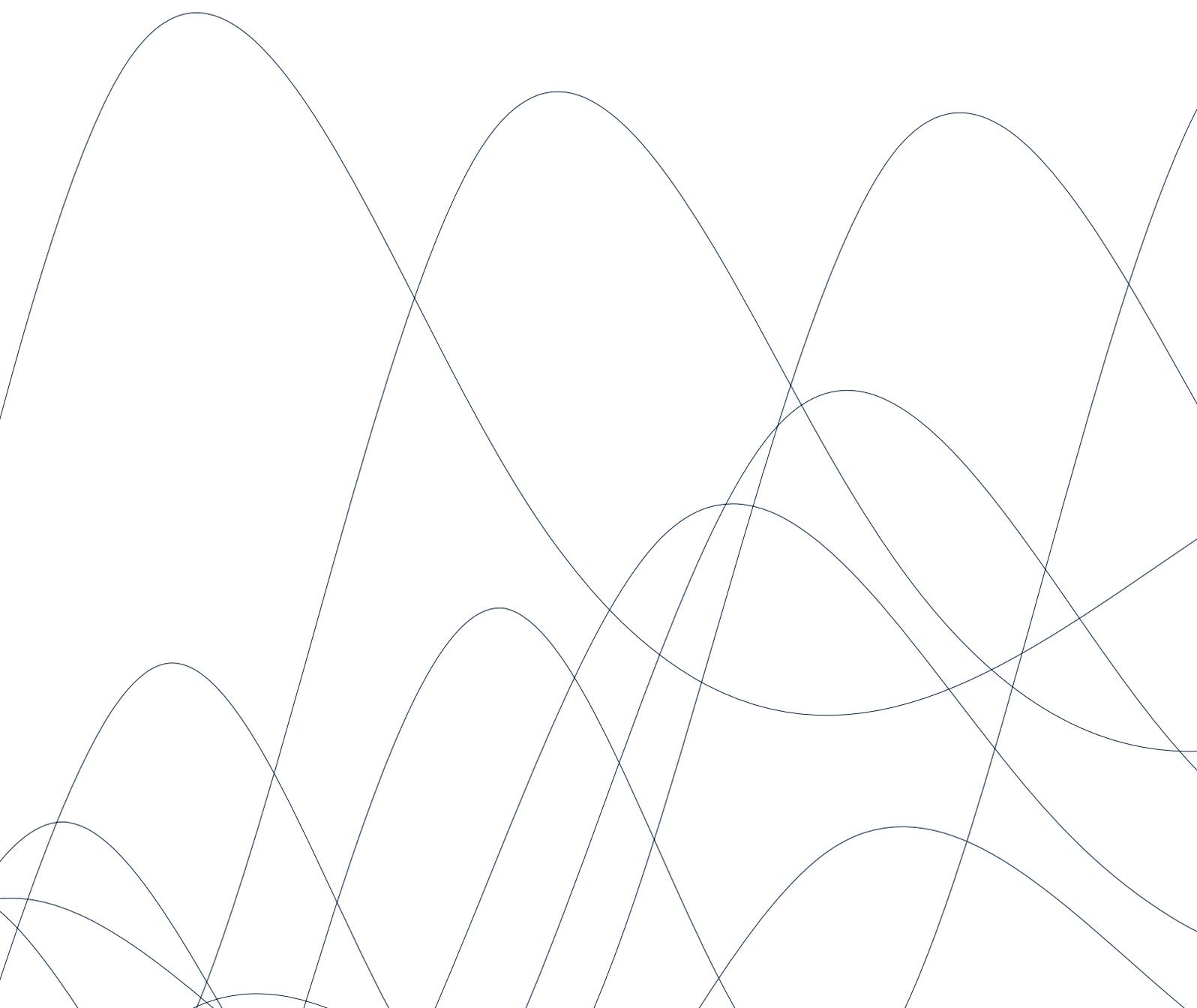
Yes.

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### **Can employers process data about the vaccine status of employees?**

Any collection, use or disclosure of personal information must only be for purposes that a reasonable person would consider appropriate in the circumstances and must be proportionate to that purpose.

In any event, employers will need to take reasonable measures to insure that the information it collects is accurate as well as reasonable measures to safeguard the information from unauthorized disclosure.



# Chile

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Green	Green	Amber	Yes

## Is vaccination being mandated by the government or local authorities?

This point has not been regulated yet by law nor by an administrative pronouncement of the Chilean Labor Authority, except in relation to health sector employees, critical personnel of the State Administration, the armed forces working in areas of risk of contracting COVID-19 teachers, laboratory employees, among others, who are already receiving the vaccination, at the same time as the population at risk such as people over 70 to 80 years old and people with certain diseases.

## Is there any current law or guidance relevant to employee vaccination?

There is a calendar in place for vaccination, which applies according to age and for certain individuals that provide critical services.

<https://www.minsal.cl/calendario-de-vacunacion-masiva-contracovid-19/>

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

This point has not been regulated yet by law nor by an administrative pronouncement of the Chilean Labor Authority. However, article 184 of the Chilean Labor Code states that the employer shall be obliged to take all the necessary measures to effectively protect the life and health of its employees and to maintain adequate hygiene and safety conditions at the sites of the company. According to the above rule and depending on the activity of the company, employers could be considered to be allowed to require employees to receive the vaccine as a condition of their return to their employment.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

As it is still not mandatory to receive the vaccination, this point has not been regulated yet by law nor by an administrative pronouncement of the Chilean Labor Authority. Therefore, in our opinion companies cannot dismiss or discipline employees, unless the nature of the business requires vaccination according to the instructions of the authority.

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### **Can employers ask employees for evidence of having been vaccinated?**

The company could require the document that certifies the vaccination, which is provided by the Sanitary Authority.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Yes, they can. We do not see any risk with this.

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### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes they can. We do not see any risk with this.

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### **Can employers process data about the vaccine status of employees?**

In order for the employer to process said information, it would be necessary to have written authorization from the employee who has been vaccinated to report the vaccination, clearly specifying for what purpose said information would be disclosed and with respect to which entities, guaranteeing the employee that the information under no circumstances may be used for other purposes or shared with other entities, in order to comply with the Chilean Data Protection Law (Law N° 19.628).



# Colombia

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Green	Green	Green	Yes

## Is vaccination being mandated by the government or local authorities?

No.

However, considering that vaccination is voluntary, if employees decide not to get the vaccine employer may not require them to be in the workplace. Nevertheless, every case and policy regarding vaccination must be reviewed carefully by the employer as constitutional rights are involved.

## Is there any current law or guidance relevant to employee vaccination?

Yes, Law 2064 of 2020 establishes the strategy for the immunization of the Colombian population against COVID-19. Also, the Ministry of Health issued Decree 109 of 2021 that governs the national COVID-19 vaccination plan.

[http://www.secretariassenado.gov.co/senado/basedoc/circular\\_supersubsidio\\_12064020.html](http://www.secretariassenado.gov.co/senado/basedoc/circular_supersubsidio_12064020.html)

<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO-109-29-ENERO-2021.pdf>

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

No. Vaccination is voluntary and cannot be required to be in the workplace. Employers need to consider that the vaccine will not be available for the entire Colombian population in 2021.

Employers may require existing employees to be vaccinated as a condition of being in the workplace if the employee has pre-existing comorbidities identified as risk factors for COVID-19.

## Can employers discipline or dismiss an employee for failure to be vaccinated?

No, the vaccination is voluntary in Colombia; therefore, employers may not discipline or dismiss an employee for failure to be vaccinated.

## Can employers ask employees for evidence of having been vaccinated?

Employers may ask employees for evidence of having been vaccinated, although employees are not obliged to answer considering that this is sensitive data. However, if the employer provides an incentive to receive the vaccine, the employer may require proof of the vaccination to recognize the incentive.

The employer must request and obtain previous authorization from the employees for this purpose, considering that the employers will be processing personal data. Thus, to this extent, the employer must specify the purpose for which this information will be processed.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Yes, employer may provide incentives for employees who receive the vaccine, i.e., vaccine bonus, extra holidays, or any other benefits. Any benefit must be objective, reasonable, and justified. Otherwise, employees who do not receive the benefit may allege discrimination.

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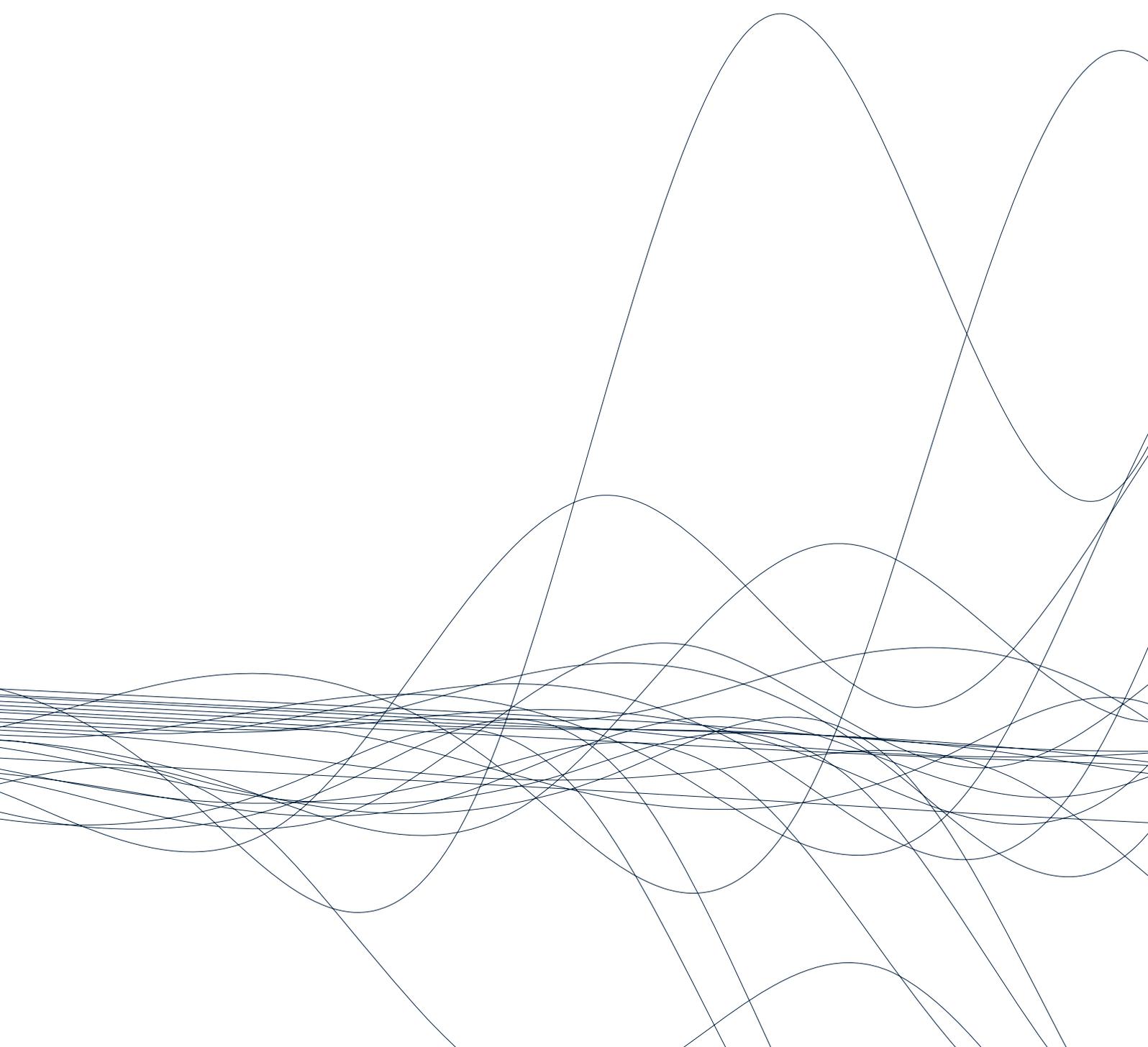
### **Can employers promote vaccination (e.g. by an information campaign)?**

Yes, employers may promote vaccination and raise awareness under the occupational health and safety management system (SG-SST for its acronym in Spanish).

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### **Can employers process data about the vaccine status of employees?**

Yes, provided that employer previously obtains explicit authorization for the purposes for which data will be processed.



# US

Is vaccination being mandated by the government or local authorities for all employees?	Level of risk in requiring existing employees to be vaccinated as a condition of being in the workplace	Level of risk in disciplining or dismissing an employee for failure to be vaccinated	Level of risk in asking employees for evidence of having been vaccinated	Level of risk in incentivizing employees to be vaccinated (with money, extra holiday, or some other benefit)	Level of risk in promoting vaccination (e.g. by an information campaign)	Level of risk in processing data about vaccine status of employees	Any current vaccination law or guidance?
No	Amber	Red	Amber	Amber	Green	Amber	Yes

## Is vaccination being mandated by the government or local authorities?

No, and federal, state and local governments are unlikely to mandate vaccination for all residents in the future particularly while vaccines are approved under the Emergency Use Authorization (EUA). Fact sheets for those administering or receiving the vaccines indicate that individuals have the right to take or decline the vaccine, that certain individuals should not get the vaccine (e.g., if they had a severe allergic reaction) and that certain individuals (e.g., those pregnant or breastfeeding) should discuss options with their healthcare provider. At least two manufacturers have sought full FDA approval.

## Is there any current law or guidance relevant to employee vaccination?

Yes. Various laws and guidance are implicated by vaccines. Both the Centers for Disease Control (CDC) and Equal Employment Opportunity Commission (EEOC) have issued guidance for employers. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html> and <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. Employers are also urged to be mindful of state and local laws, requirements and guidance. For example, some states have executive orders or laws related to vaccinations (eg, Florida, Texas, Montana). Legislation that

would limit or prohibit an employer’s ability to require employees to be vaccinated (or even disclose their vaccine status) and/or protect those who refuse vaccinations is pending in more than a dozen states. Other states and localities (eg, New York, California, Chicago) may require paid or unpaid leave related to receiving or recovering from COVID-19 vaccinations.

## Can employers require existing employees to be vaccinated as a condition of being in the workplace?

Based on current federal guidance, employers likely can mandate employee vaccination as a condition to being physically present in the workplace, subject to state laws and various required exemptions and generally being mindful of risks. For example, employers are strongly encouraged to take account of the process for reasonable accommodation that may apply under the Americans with Disabilities Act (ADA) and be prepared to respond to an employee who indicates that they cannot receive the COVID-19 vaccine due to a sincerely held religious practice or belief.

In addition, employers that administer or contract with a third party to administer the vaccine to employees should note that pre-screening questions for the vaccine may elicit information about a disability – and therefore could trigger the ADA’s medical exam provision. However, the ADA’s restrictions on disability-

related inquiries are not implicated if the employee receives an employer-required vaccine from a third party that does not have a contract with the employer (e.g., pharmacy, health care provider).

Other issues to consider include the bargaining obligations for unionized employers, wage and hour issues, vaccine costs, and federal and state confidentiality and privacy requirements.

Employers are encouraged to review state laws, which may prohibit mandatory vaccination in certain settings or impose additional requirements (eg, exemption for other objections such as medical or philosophical), and to track proposed state legislation that would prohibit or limit mandatory vaccination (eg, prohibit employers from requiring vaccination as a condition of employment, prohibit employers from requiring proof of vaccination, prohibit employers from requiring vaccination unless the vaccine receives general FDA approval).

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### **Can employers discipline or dismiss an employee for failure to be vaccinated?**

Possibly. According to the EEOC, “if there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.” For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations, such as performing the current position remotely. The employee may also have leave and other rights under federal, state, or local laws. Employers also are encouraged to review state laws, which may prohibit mandatory vaccination in certain settings or impose additional requirements (e.g., exemption for other objections such as medical or philosophical) and to track proposed state legislation that could prohibit or limit mandatory vaccination (e.g. prohibit employers from requiring vaccination as a condition of employment, prohibit employers from requiring proof of vaccination, prohibit employers from requiring vaccination unless the vaccine receives general FDA approval).

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### **Can employers ask employees for evidence of having been vaccinated?**

Yes; unless otherwise prohibited by state or local law. Based on CDC guidance, if an employer requires an employee to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof. EEOC guidance further provides that employers may want to warn employees not to provide any medical information as part of the proof in order to avoid implicating the ADA or GINA. Similarly, asking an employee why they did not receive the vaccine may qualify as a medical inquiry and require an analysis of whether the inquiry is “job-related and consistent with business necessity.” State privacy laws may also be implicated.

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### **Can employers incentivise employees to be vaccinated (e.g. with money, extra holiday or some other benefit)?**

Likely yes, being mindful of potential risks under federal laws, including the Employee Retirement Income Security Act of 1974 (ERISA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA).

In February 2021, the EEOC withdrew proposed rules issued by the prior Administration on 7 January 2021, regarding what level of incentives employers may offer to encourage employee participation in wellness programs that require disclosure of medical information without violating the ADA and GINA. On February 5, 2021, a coalition of employer groups asked the EEOC to provide guidance on this issue. In the meantime, employers should be mindful of employees who cannot receive a COVID-19 vaccination because of religious beliefs or other medical conditions. Under the ADA, employers are obligated to provide reasonable accommodations so that employees with disabilities can enjoy the same “benefits and privileges of employment” as similarly situated employees without disabilities. Similarly, Title VII of the Civil Rights Act of 1964 requires accommodations for employees’ religious beliefs. Employers that opt to provide a vaccination incentive are urged to consider how those employees that require an exemption can still obtain the incentive.

## Can employers promote vaccination (e.g. by an information campaign)?

Yes. According to the CDC, employers may encourage employees to have the vaccine when they become eligible and support them in doing so. Practical steps for employers to consider include:

- Hosting a vaccination clinic at the workplace consistent with local health department guidance;
- Developing an education campaign about vaccination to provide clear facts and address misinformation;
- Using promotional posters/flyers to advertise locations offering COVID-19 vaccination in the community and displaying posters about COVID-19 vaccination in break rooms, cafeterias, and other high traffic areas; and
- Encouraging employees to obtain the vaccine by, for example, allowing paid or unpaid leave to seek vaccination in the community (but see above regarding incentives).

Notably, President Biden has called on employers to give their workers paid time off for getting vaccinated against COVID-19. Federal tax credits for smaller businesses may also apply.

## Can employers process data about the vaccine status of employees?

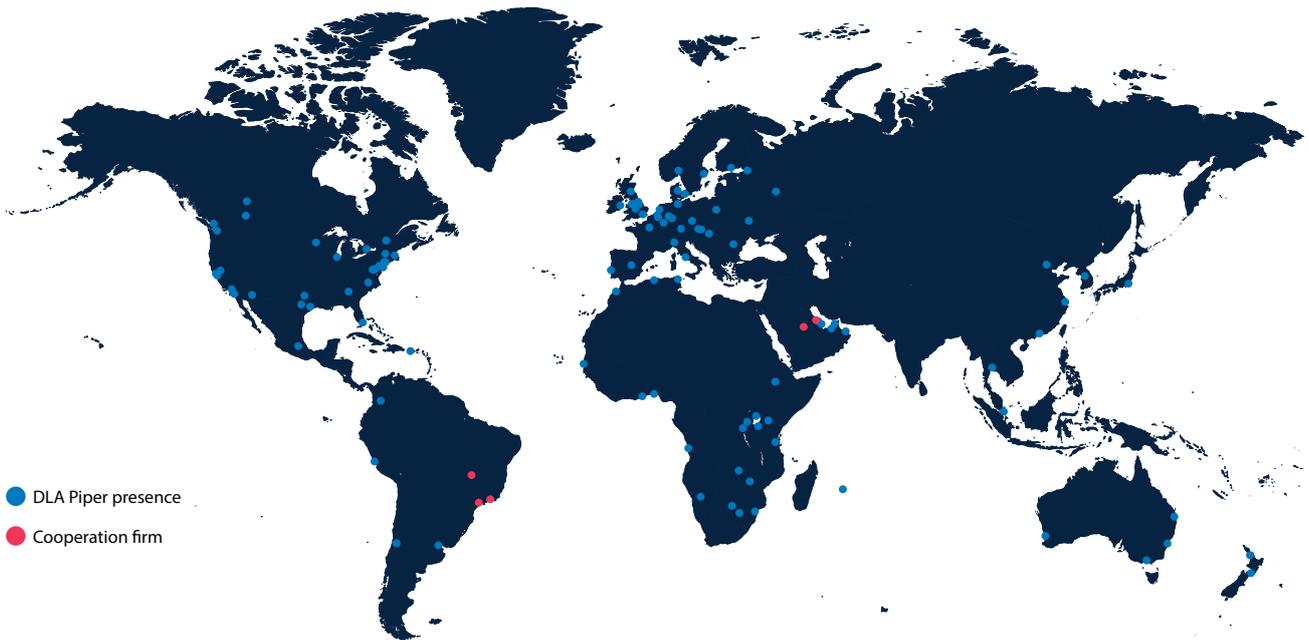
Yes; subject to various requirements and compliance risks. See above regarding “proof of vaccination.” While EEOC guidance provides that a record of COVID-19 vaccination itself is not a confidential medical record, vaccination status may constitute health or medical information under some states’ laws. Depending on the type of information collected and the manner in which it is used and recorded, additional legal obligations may apply such as privacy notices prior to collection, recordkeeping and retention requirements, and employee confidentiality.



# About the employment group

DLA Piper's Employment group is a market-leading global practice with a strong reputation for delivering solutions based advice and supporting clients in the day-to-day management of their people legal issues and risk. It includes over 400 specialist lawyers globally, on a strategic and operational level, on both contentious and non-contentious matters across the public and private sectors. The group advises on all areas of employment,

including trade union and employee relations, discrimination and diversity management, global mobility and data privacy. We also advise on the legal, tax and regulatory aspects of remuneration, employee share incentives and other benefits, and we assist clients generally in designing and delivering their reward strategies.



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