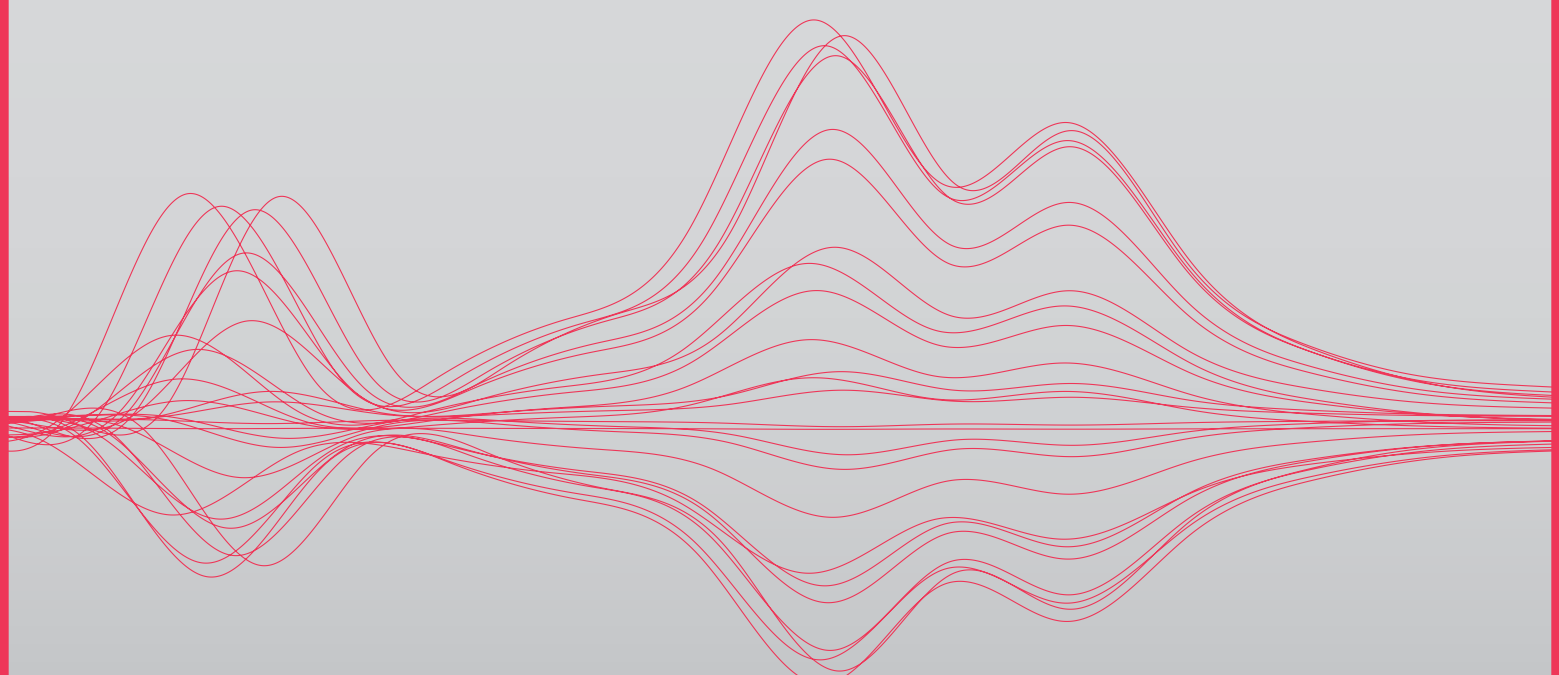


Global COVID-19 Vaccine Guide for Employers



Overview

As more workers are returning to workplaces and business travel, many employers are considering what their approach should be to issues around vaccination for their workforce, with a view to accelerating a return to some kind of normality whilst still taking steps to protect health and safety. This is an area where law, guidance and best practice continues 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 continue to be rolled out, economies and borders begin to open up again and more people return to the workplace, whether on a full-time or hybrid basis.

Can employers require employees to be vaccinated?

In almost all countries covered by this guide the vaccine is not mandated by government (or only in specific sectors) 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 – available vaccines 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 have been advised not to have the vaccine or may be reluctant to do so.

It may be possible to justify such potential discriminatory impacts, but this is as yet 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 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.

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.

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 may 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?

A logical first step for employers considering measures and policies in relation to vaccines is 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 most 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?

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 to workplaces or business travel should also consider updating risk assessments to include vaccination considerations.

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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?
EMEA								
Austria	Possibly with effect from February	Amber	Amber	Amber	Amber	Green	Amber	No
Belgium	No	Red	Red	Amber	Amber	Green	Red	Yes
Czech Republic	No	Red	Red	Amber	Amber	Green	Green	No
Denmark	No	Red	Red	Red/Amber	Amber	Red/Amber	Red	No
Finland	No	Red	Red	Red	Amber	Green	Red	Yes
France	No	Red (in general) Green (in some sectors)	Red	Red	Red	Green	Red	Yes
Germany	No	Red	Red	Red	Amber	Green	Red	Yes
Ireland	No	Red	Red	Amber	Amber	Green	Red	Yes
Italy	No (except for the over 50s and in certain sectors)	Red	Red	Red	Amber	Green	Red	Yes
Luxembourg	No	Red	Red	Red	Red	Green	Red	Yes
Netherlands	No	Red	Red	Amber	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
Romania	No	Red	Red	Amber	Amber (provided consent remains freely given)	Green	Amber	No

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?
South Africa	No	Amber	Red	Amber	Red	Green	Amber	Yes
Spain	No	Red	Red	Red	Red	Green	Red	No
Sweden	No	Red	Red	Amber	Amber	Green	Red	No
UAE	No	Amber	Red	Amber	Green	Green	Amber	No
UK	No (except for care home workers)	Red	Red	Amber	Amber	Green	Red	Yes
APAC								
Australia	Only in limited circumstances	Amber	Red	Green	Green	Green	Amber	Yes
China	No	Amber	Red	Green	Green	Green	Amber	No
Hong Kong	No	Amber	Amber	Amber	Green	Green	Amber	No
Japan	No	Red	Red	Amber	Amber	Green	Amber	Yes but not binding
New Zealand	No	Amber	Red	Amber	Red	Green	Amber	Yes
Singapore	No	Green	Red	Green	Green	Green	Amber	Yes
Thailand	No	Green	Red	Green	Amber	Green	Green	No
Americas								
Brazil	No	Amber	Amber	Amber	Green	Green	Amber	Yes
Canada	Not yet	Amber	Amber	Amber	Green	Green	Amber	Yes
Chile	No	Red	Red	Amber	Green	Green	Amber	Yes
Colombia	No	Amber	Red	Amber	Green	Green	Green	Yes
US	Please see pages 77 to 80							

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?
Possibly, with effect from some time in 2022	Amber	Amber	Amber	Amber	Green	Amber	No

Is vaccination being mandated by the government or local authorities?

Not yet. Currently, vaccination remains voluntary. The vaccination against COVID-19 is currently free for all people in Austria and the government encourages people to get vaccinated. However, the government is proposing to make the vaccine mandatory for all over 14s, possibly with effect from February 2022.

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

There is no legislation specifically dealing with vaccination. However, from 1 November 2021, every employee who is working in a workplace, where there is a chance to meet other employees, has to either be vaccinated, recovered from Covid-19 or tested (3G-Status). This does not apply to employees who are working from home, but does apply to employees coming into the office even if they have their own isolated office (as they could meet other employees on the floor or in any other generally accessible areas in the office).

Employees are required to fulfil one of the three criteria or, if agreed with the employer and possible, work from home. If this is not possible they could be sent home without pay.

Please note that currently the basis for being “tested” is fulfilled either by an Antigen Test (valid for 24 hours from taking the sample) or by a PCR Test (valid for 72 hours from taking the sample). Since 8 November 2021, home testing and antibody detection tests are no longer sufficient.

The employer has the obligation to check the status of employees (however, not on a day to day basis). If there are controls conducted by the authorities and there is an employee in the workplace without 3G-Status evidence there could be fines imposed. Any violation can be sanctioned with a fine of up to EUR 3,600 for the employer. Each employee that refuses to comply with the 3G-Status can be sanctioned by the authority with a fine of up to EUR 500.

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.

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 centre). 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.

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.

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.

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	Amber	Amber	Green	Green	No

Is vaccination being mandated by the government or local authorities?

No, the vaccination is strictly voluntary. Vaccination of the population is currently underway, with people aged 12 and over eligible to be vaccinated. Vaccination of children above 5 years old is currently discussed. As of 20 September 2021, the renewal vaccination is possible (8 months after the finalized previous vaccination).

Since 11 June, it has also been possible to vaccinate foreigners in the Czech Republic who do not have public health insurance in the Czech Republic or the European Union and are long-term residents of the Czech Republic. Vaccination is carried out by selected vaccination centers and paid for by the vaccinated. GPs are also integrated in the vaccination process.

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 and also some local vaccination strategies for specific regions have been published. Current information about vaccination (and other COVID-19 related topics can be found here: <https://koronavirus.mzcr.cz/en/>

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 justifiable. 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?

As the mandatory testing of employees has been cancelled as of 1 July 2021, there is no longer any reason to ask all employees about their vaccination status.

However, there is still an obligation for employees returning from foreign countries to prove their non-infection status by testing procedure and in some cases there is mandatory quarantine. Such obligation does not apply to vaccinated employees or employees who suffered COVID-19 in the past 180 days. It is

therefore within the legitimate interest of the employer to obtain information about whether the employee has been vaccinated/suffered from COVID-19 in certain situations.

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)?

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.

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:

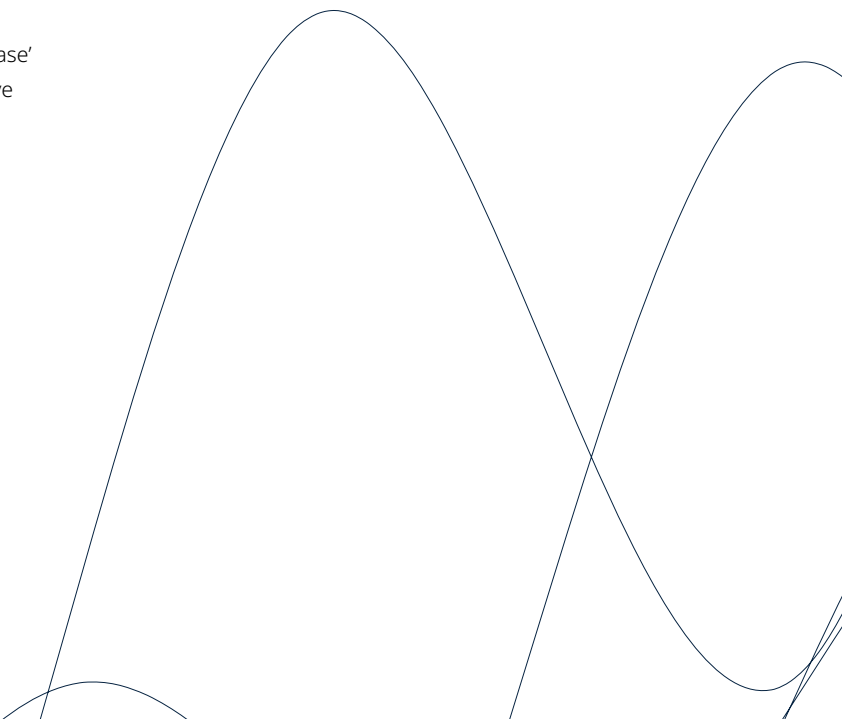
- There should be a specified use for the vaccination information (i.e. an employer cannot record it on a 'just in case' basis) and an employer should assess whether it can achieve the same goal without collecting the vaccination data;

- 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 employees returning from foreign countries, legitimate interests is most likely to be the appropriate basis under Article 6 GDPR in certain situations. 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 to access the workplace after returning from a foreign country. 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.

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.

Finland

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 voluntary unless otherwise stipulated by virtue of the Act on Infectious Disease. COVID-19 vaccination is not among such mandatory vaccinations.

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

The Office of the Data Protection Ombudsman has given guidelines for processing vaccination data and the Occupational Safety and Health Administration has given guidance on how to arrange safe working.

<https://tietosuojafi/en/coronavirus-covid-19>

<https://www.tyosuojelu.fi/web/en/working-conditions/biological-agents/corona>

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

From a legal perspective, requiring employees to be vaccinated before they can go into the workplace may give rise to a 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 ask employees for evidence of having been vaccinated?

No. 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 Employment Contracts Act.

Discipline or dismissal on this basis could also result in allegations of illegal discrimination, for example on the basis of religion or state of health/disability.

Can employers discipline or dismiss an employee for failure to be 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.

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

Yes. A good approach would be for the employer to encourage and support their employees to take the vaccine.

Practical steps for employer to take includes giving employees access to well founded and secure information about the vaccine and vaccination. In addition, when returning to workplaces, the employers should update the risk assessment at the workplace in accordance with the Act on Occupational Safety. In connection with the assessment the employers should identify the risk of an infection in different tasks and situations. Based on this assessment, the employer may decide on the required protective measures at the workplace and also recommend vaccinations on this basis. It is advisable to discuss about the assessment with the employees in order to promote understanding on what safety working requires.

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

Basically, purely from an employment law perspective, 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.

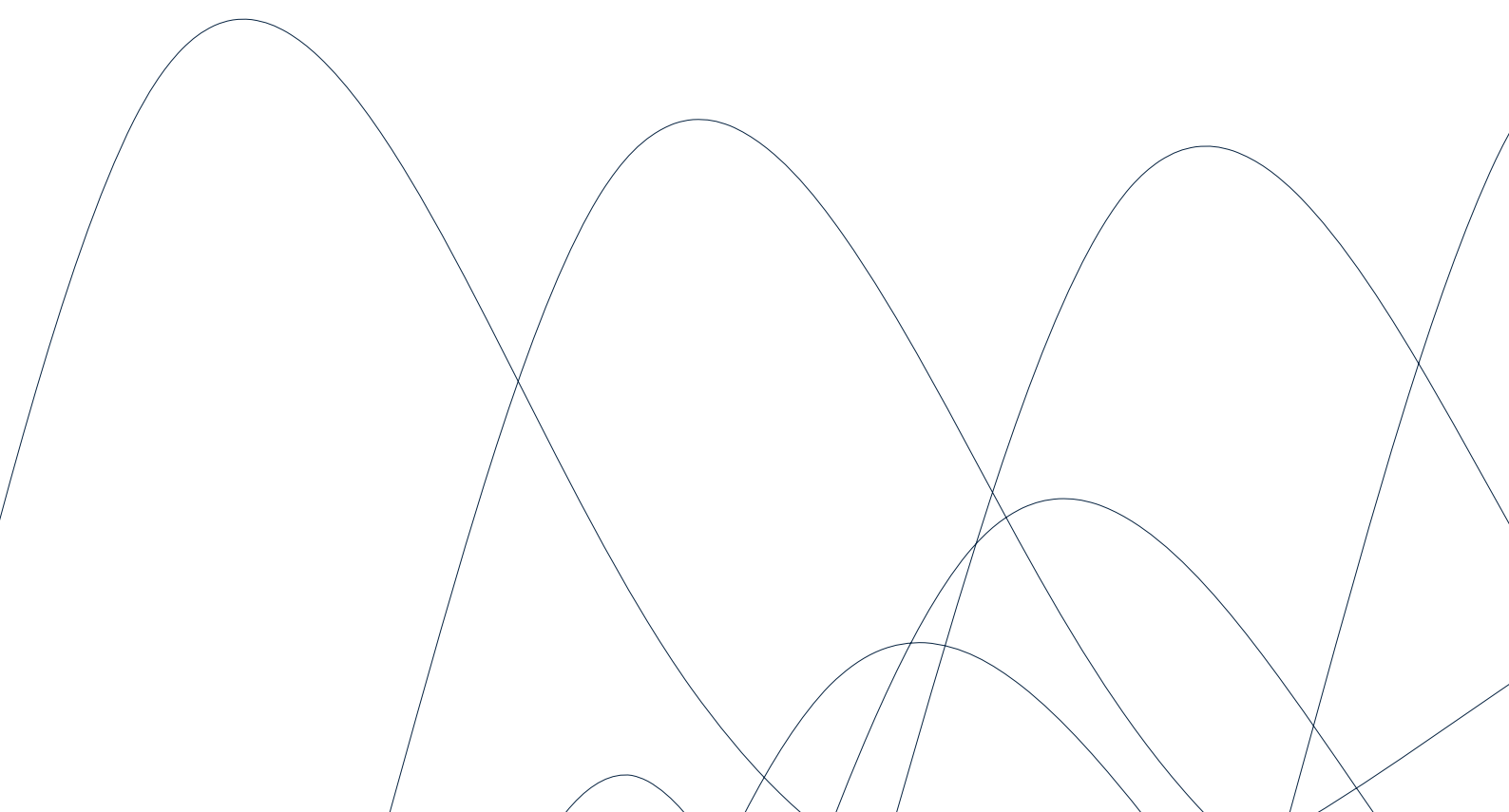
However, it should be noted that the incentivizing may be considered to be illegal discrimination on the basis of for example religion or ethnicity Act as this advantage may not be accessible for everyone. We recommend that this is considered further before incentives are implemented.

Can employers process data about the vaccine status of employees?

Vaccine status is considered as a health data and thus, processing data about the vaccine status is only permitted if directly necessary with regard to the employment relationship. Employers must carefully consider whether this necessity requirement is met. It is not possible to derogate from the necessity requirement with the employee's consent.

The employer is permitted to process and employee's health data if it is necessary for the payment of sick pay or comparable health-related benefits, or to determine whether the employee has a justified reason for absence. Processing health data is also permitted if an employee specifically requests their capacity for work to be determined on the basis of health data.

Employers can, however, process statistical data on their employees' vaccination coverage.



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 (in general) Green in some sectors	Red	Red	Red	Green	Red	Yes

Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary. However, as of 7 August 2021, a new law has been introduced whereby limited categories of companies belonging to specific sectors can require employees to be vaccinated as a condition of being in the workplace, when provided by statute.

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

As of 9 August 2021, a new law has been introduced where limited categories of companies belonging to specific sectors can require employees to be vaccinated or have a valid sanitary pass as a condition of being in the workplace, when provided by statute.

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

The National Health Protocol provides guidance since 1 September 2021.

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

As of 9 August 2021, a new law has been introduced where limited categories of companies belonging to specific sectors can require employees to be vaccinated or be provide a valid sanitary pass as a condition of being in the workplace, when provided by statute.

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

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

In general, no, this is not possible. Employers cannot condition employees' presence to 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.

- 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 ;
 - on pregnancy grounds: there is a debate regarding whether pregnant women should be vaccinated and with which vaccines.

- However in the situation where the sanitary pass is mandatory, in the event an employee is not able to provide a valid sanitary pass, the employee can either take some days off/paid leaves or the employer notifies immediately the suspension of his/her contract. A meeting shall be scheduled at the end of the 3rd day following the suspension to discuss options with the employee: provide valid pass, temporary move to a role that does not need the pass or telework. This applies until 15 November 2021 included for the moment.
- The sanitary pass is valid in case it validates (i) the result of a negative virological test for Covid-19, (ii) the proof of full vaccination status, or (iii) a certificate of recovery from Covid-19 infection).

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, unless the employee is required to be vaccinated as per law (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).

If the employee is supposed to provide a valid sanitary pass (because he attends an event in the location or works there), it would not be possible to ask the question to employees subject to the sanitary pass itself but only to check the QR code showing that the pass is valid (but not showing if the employee has been vaccinated, or tested, or if he had Covid).

This concerns in particular:

- Leisure activities, which in our view include day care centres, amusement parks, museums, cinemas, etc.
- Commercial catering or drinking activities, with the exception of collective catering, take-away sales and professional road and rail catering;
- Fairs, seminars and trade shows;
- Except in emergencies, health, social and medico-social services and establishments, only for persons accompanying or visiting persons admitted to these services and establishments, as well as for those admitted for care;
- Long-distance travel by interregional public transport (train, plane, etc).

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

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 on employees' rights and freedoms. By encouraging employees to be vaccinated via a bonus, employers could be seen to infringe on 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 constitute discrimination.

The new law provides that the employees are entitled to be absent from work to get vaccinated and this absence shall not entail any reduction in remuneration and are assimilated to a period of effective work for the calculation of paid leave as well as for the legal or contractual rights acquired concerned in respect of their seniority.

The employee is invited to contact his employer to determine the best way to organize this absence.

The law also provides that this authorization may be granted to an employee who wishes to accompany a minor or a protected adult in his or her care to be vaccinated.

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.

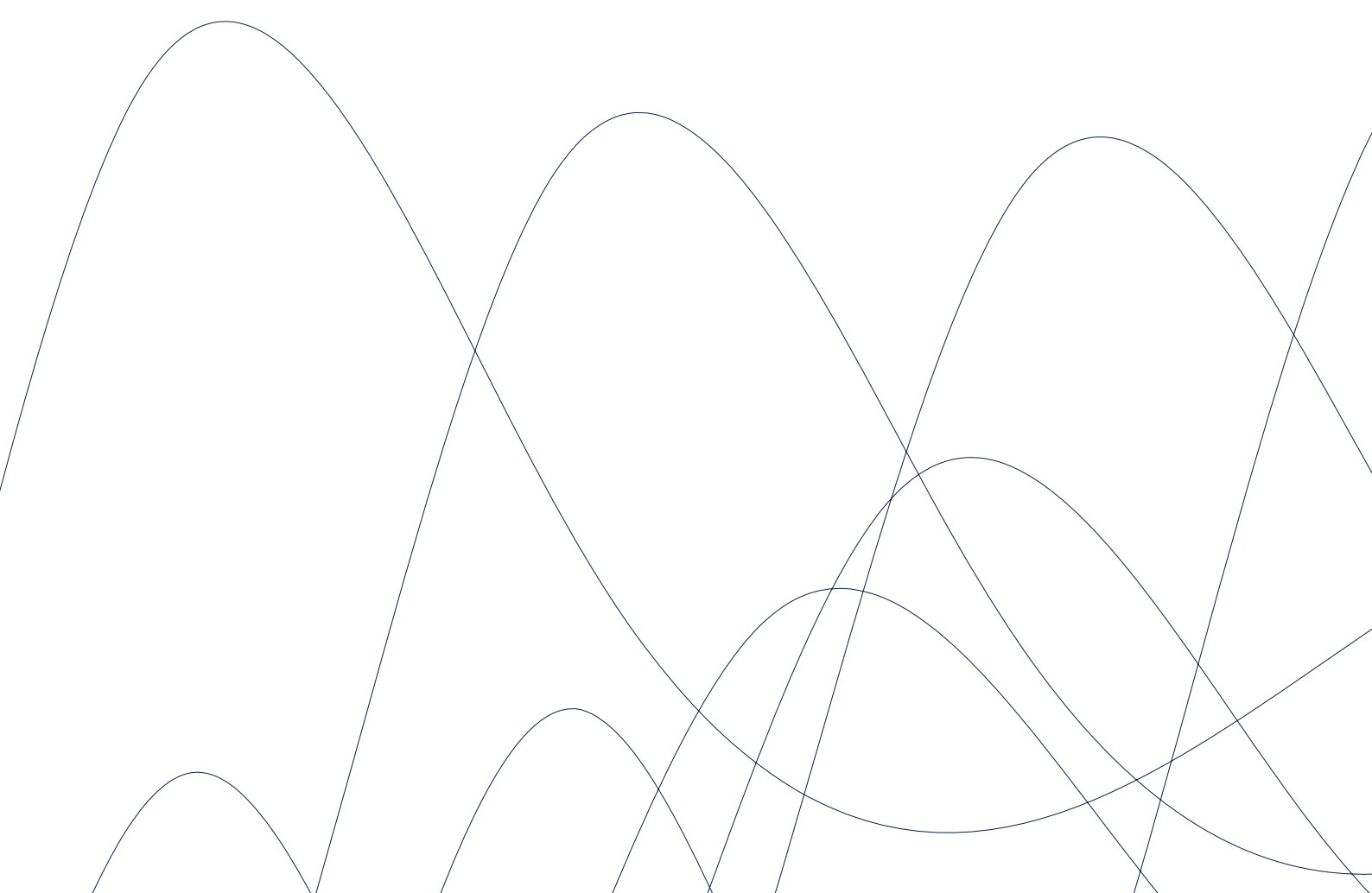
Can employers process data about the vaccine status of employees?

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	Red	Red	Red	Amber	Green	Red	Yes

Is vaccination being mandated by the government or local authorities?

No. Vaccination is voluntary.

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 future mandate can therefore not be completely excluded, at least for certain groups, depending on the further development of the pandemic. A compulsory vaccination against COVID-19 is especially discussed for employees in the nursing and medical sectors.

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

There is no specific law for employees. However, the general Corona Vaccination Ordinance entitles all citizens, that is including employees, over the age of 12 to become vaccinated. Furthermore, the amended Corona Occupational Health and Safety Ordinance with effect from 24 September 2021 and until at least 24 November 2021 provides that employers are required to inform their employees about the risks of COVID-19 and the existing option to become vaccinated. In addition, employees must be released from work for COVID-19 vaccination.

Amendment of the Corona Occupational Health and Safety Ordinance.

(Coronavirus Impfverordnung) https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/neufassung-sars-cov-2-arbeitsschutzverordnung-sep.pdf?__blob=publicationFile&v=4

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

No, since 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. It is therefore also not possible to order vaccination by works agreement, employment contract or other instructions.

Nevertheless, the possibility of employers mandating vaccination is discussed for employees entrusted with particularly vulnerable persons. So far, however, no compulsory COVID-19 vaccination has been mandated for these groups either, but the employer is entitled to enquire about the vaccination status of these employees in order to guarantee safe work performance. Considering the fundamental rights (the right to physical integrity and the general right of personality of the employee) of the employee, mandatory vaccination would only be possible upon statutory regulation.

With effect from 24 November, if employees are not obliged to work from home, strict workplace entry restrictions apply. This is the case for employees who either (a) do not receive a work from home offer from their employer (due to compelling operational reasons on the part of the employer), or (b) reject the employer's work from home offer (due to reasons preventing them from working from home).

The restrictions apply to workplaces where physical contact between employers and employees or with third parties cannot be avoided.

Entry to such workplaces is allowed only if employees are fully vaccinated against, recovered from, or tested negative for COVID-19 (the so-called "3G model"). Individuals need to be in the possession of a vaccination certificate, recovery certificate, or negative test result (COVID-19 pass). The certificate or test result needs to be made available for inspection by the employer or on file with the employer no later than on entry into the workplace.

The negative COVID-19 test results need to be based on a test conducted no later than 24 hours before (or, in case of PCR tests, no more than 48 hours before) entry into the workplace. Formal test certificates are required, ie, self-testing by employees at home will not be sufficient.

Employees will generally need to bear the costs of any required COVID-19 testing (unless the employer voluntarily offers to reimburse the costs or to conduct and certify supervised testing on workplace entry).

Stricter regulations apply to certain businesses and facilities such as hospitals or nursing homes.

Employers must monitor compliance on a daily basis by means of verification checks, and they must also document them on a regular basis. Employees are required to provide proof of their vaccination, recovery, or testing status on request.

Employers may process personal data, including data on employees' vaccination, recovery, and testing status, for the above purposes.

If employers or employees do not comply with the above obligations, they may ultimately be subject to sanctions under the Act, including administrative fines of up to EUR25,000. Further, employees may face disciplinary measures in case of noncompliance which can include loss of income, formal warnings, and termination of employment. The new obligations will remain in force until 19 March 2022.

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. However, now that all employees have

been offered vaccination, from 1 November 2021 only vaccinated employees will be entitled to continued payment of salary in the event of a quarantine due to COVID-19.

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) which is currently not the case. Even then dismissal would only be possible if contractual employment is no longer possible due to the refusal to vaccinate.

Can employers ask employees for evidence of having been vaccinated?

The right of the employer to ask about vaccination status is restricted due to the applicable data protection laws. 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). However, there are exemptions in the Infection Protection Act (*Infektionsschutzgesetz*) according to which employers in the healthcare sector are obliged to take measures to prevent the further spread of communicable diseases. To the extent necessary, these employers may also process the employees' vaccination status or immunity status in order to establish an employment relationship or decide on the type and manner of employment: please refer to sec.23a Infection Protection Act and sec.36 para.3 Infection Protection Act.

the processing of the vaccination status or immunity status of employees in sectors to which the Infection Protection Act does not apply, the general requirements of data protection law must be met.

Employers must monitor compliance with the requirement to show a COVID-19 pass for access to workplaces. Employees are required to provide proof of their vaccination, recovery, or testing status upon request.

Employers may process personal data, including data on employees' vaccination, recovery, and testing status, for the above purposes. Otherwise, in principle employers may 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. Please note that the requirements regarding freely given consent of employees are particularly strict in

Germany according to sec. 26 para 2 BDSG. Hence, any pressure or discrimination, 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.

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

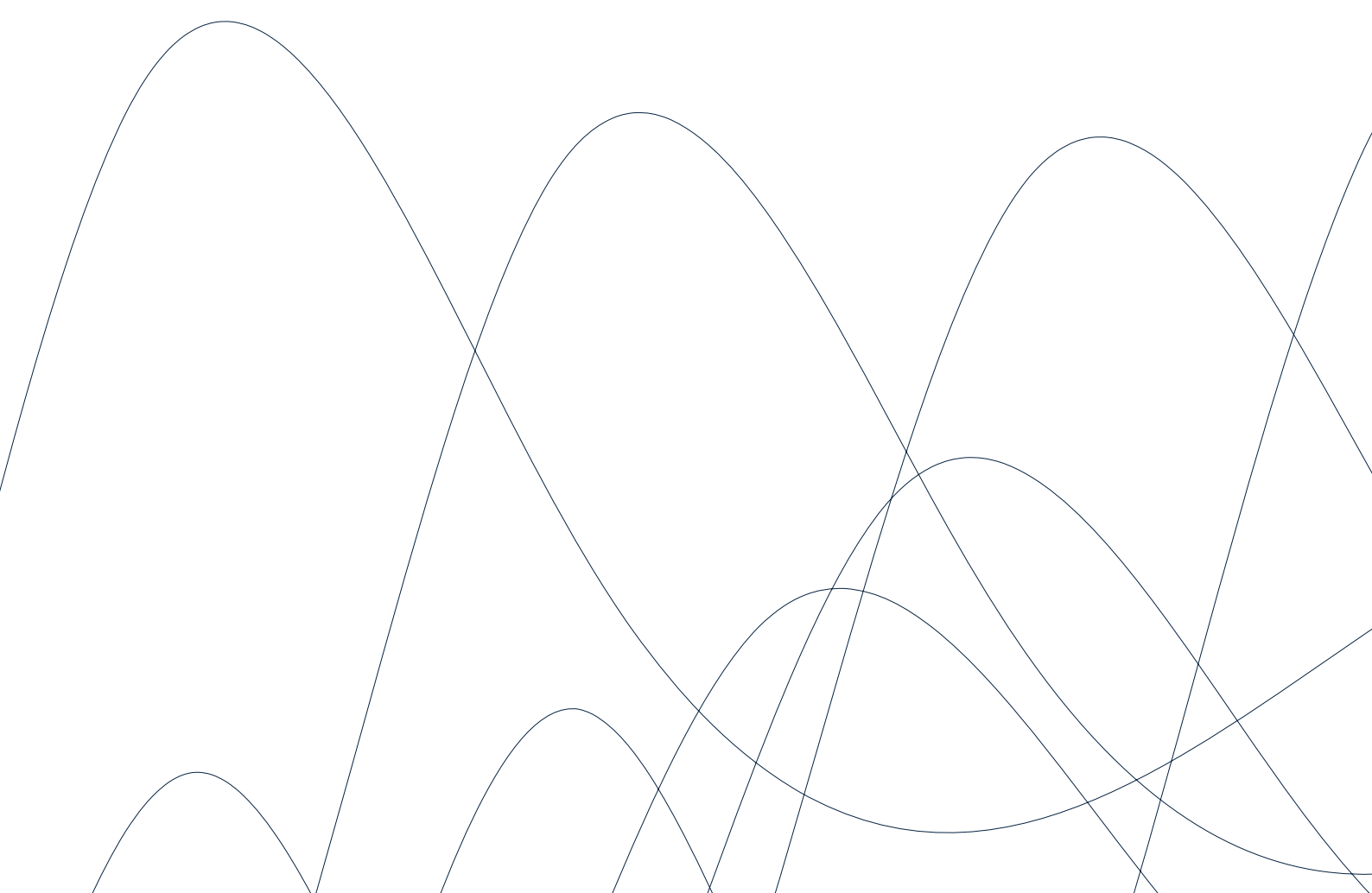
The question has not yet been settled by the courts. In the literature, some argue that there is no infringement of the prohibition of discrimination as long as the use of incentives is proportionate and does not disproportionately pressure an employee to waive his or her rights. In this case the co-determination 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 offering vaccination in the workplace.

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; 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. Since 7 June 2021, company doctors have also been included in the nationwide vaccination campaign and can vaccinate the employees of the respective company depending on the availability of vaccine. In addition, the new Corona Occupational Health and Safety Ordinance with effect from 10 September 2021 contains the obligation on employers to inform employees about the risks of COVID-19 disease and existing options for vaccination, to support company doctors with vaccination offers and to release employees to take advantage of vaccination offers.

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	Yes

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?

There are no specific vaccination laws at present, though general employment, anti-discrimination and privacy laws may apply. However, the Data Protection Commission ("DPC") in Ireland has published important guidance for employers on the processing of COVID-19 vaccination data for HR purposes (see "*Can employers process data about the vaccine status of employees?*").

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. 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.

The Data Protection Commission (“DPC”) in Ireland has published important guidance for employers on the processing of COVID-19 vaccination data for HR purposes. The DPC’s guidance is that in the absence of advice from the public health authorities in Ireland that it is necessary for all employers to establish vaccination status of employees, the processing of vaccine data is likely to be unnecessary and excessive data collection for which no legal basis exists. As such public health guidance remains key and should be monitored closely.

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 and, from 15 December, certain other sectors

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. From 15 December this will be extended to certain other sectors including schools.

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.

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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.

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.

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.

However Decree Law No.52/2021 introduced the so-called "COVID-19 Green Pass", an electronic document (QR Code) that can be obtained by every citizen who has:

- been vaccinated against COVID-19;
- or recovered from a COVID-19 infection;
- or had a negative COVID-19 test result.

In this case the certification is valid for 72 hours after the molecular or antigenic test.

On 16 September 2021 Decree Law No.127/2021 strengthened the scope of application of the COVID-19 Green Pass, providing that – as far as private employers are concerned – effective 15 October 2021 all employees working in the private sector are required to have and show a COVID-19 Green Pass. Employees who fail to show their COVID-19 Green Pass cannot access the workplace and must be considered as absent from work without pay until the COVID-19 Green Pass is duly exhibited. The COVID-19 Green Pass cannot, however, be considered as a simple vaccination certification; in fact it is a certification issued by the Ministry of Health which proves one of the three conditions (without specifying which one): vaccination, full recovery from COVID-19 or a recent negative test. From 15 February, employees aged 50 and over will only

be able to access the workplace with a so-called 'Super Green Pass' which provides evidence either of vaccination or full recovery; testing will no longer be sufficient.

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)?

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).

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.

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.



Luxembourg

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 against COVID-19 is voluntary. However, the government is discussing making vaccinations mandatory and are currently looking at expert opinions.

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

See "Can employers require existing employees to be vaccinated as a condition of being in the workplace?" below.

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

No, this is not possible. As vaccination is a medical act, it is related to the health of each individual and is a private matter. An organisation has no right to demand anything on this point from its employees. If they were to impose it, this would constitute an infringement of privacy as provided for in Article 8 of the European Convention on Human Rights and the Luxembourg law of 11 August 1982 concerning the protection of privacy. However, from 15 January 2022, only employees who have been vaccinated, recovered or tested will be allowed to enter the workplace – a 3G model. The requirement will apply until 28 February 2022.

In order to enter the workplace employees must present a Covid-Check certificate that either shows:

- a vaccination certificate;
- a COVID-19 recovery certificate;

a negative COVID-19 test result (either a PCR test no more than 48 hours old or a **certified** rapid antigen test no more than 24 hours old); or

a medical exemption and a negative COVID-19 test result (either a PCR test no more than 48 hours old, a **certified** rapid antigen test no more than 24 hours old, or a test taken on site).

If an employee refuses to show a valid certificate they will not be allowed to enter the workplace. The employee can also not be sanctioned or dismissed for their refusal.

Employers are allowed to retain a list of employees and their certificates until 28 February 2022, if the employee consents.

If an employee fails to comply they will be fined EUR 500 to EUR 1,000, and employers will be fined up to EUR 4,000 for failing to monitor employees.

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

No, because it would be considered as an act of discrimination which is strictly forbidden under Luxembourg law (Article 454 of the Luxembourg Criminal Code). In addition, the dismissal of an employee for failure to be vaccinated could be declared void (discriminatory dismissal – Article L. 241-8 of the Luxembourg Labour Code).

Can employers ask employees for evidence of having been vaccinated?

No. Employers are not allowed to process records about, or otherwise process, health data (including body temperature) relating to COVID-19 even regarding employees having voluntarily informed their employer that they have tested

positive for coronavirus or are presenting symptoms. As a result, the employer cannot ask employees specifically for evidence of having been vaccinated. However, from 15 January in order to enter the workplace employees must present a Covid-Check certificate that either shows:

a vaccination certificate;

a COVID-19 recovery certificate;

a negative COVID-19 test result (either a PCR test no more than 48 hours old or a **certified** rapid antigen test no more than 24 hours old); or

a medical exemption and a negative COVID-19 test result (either a PCR test no more than 48 hours old, a **certified** rapid antigen test no more than 24 hours old, or a test taken on site).

If an employee refuses to show a valid certificate they will not be allowed to enter the workplace. The employee can also not be sanctioned or dismissed for their refusal.

Employers are allowed to retain a list of employees and their certificates until 28 February 2022, if the employee consents.

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

The decision to get vaccinated is based on several fundamental rights such as freedom of conscience, freedom of religion, freedom of belief, corporal integrity, right to privacy. As a result, providing incentives for vaccinated employees could be considered as discriminatory regarding the consideration of those rights.

Time off can be negotiated for vaccination but this will be done on an amicable and case by case basis.

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

Yes. In a professional environment, private and public entities have a legal obligation to guarantee the health and safety of their employees/agents in the workplace (Article L. 312-1 of the Luxembourg Labour Code). In order to limit risks, they should implement prevention, information and training actions and issue internal instructions to this end. However, the employer's

obligation is also to balance with the employee's privacy.

The information campaign will have to specify that vaccination will only be done on a voluntary basis.

In addition, companies with more than 15 employees must elect a staff delegation (Article L. 411-3 of the Luxembourg Labour Code) and a safety and health representative (Article L. 414-14 of the Luxembourg Labour Code) who control the measures adopted by the employer. Staff delegation and representatives may request specific measures and may be consulted for several questions such as the assessment of occupational safety and health risks.

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. except for the purposes of checking their COVID certificate for entry to the workplace.

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	Amber	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.

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

Yes, on data protection. Also, the government has announced (September 2021) that employers are now allowed to **ask** for employee vaccination status. However, employees are not required to answer and employers cannot process/store employee vaccination data in any way. See below.

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 have 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 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. 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.

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 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. From an employment law perspective, employers are now allowed to **ask** for employee vaccination status. As privacy legislation remains unchanged, employers are not allowed to ask for **evidence** of having been vaccinated and furthermore employees cannot be obliged to answer.

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)?

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.

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.

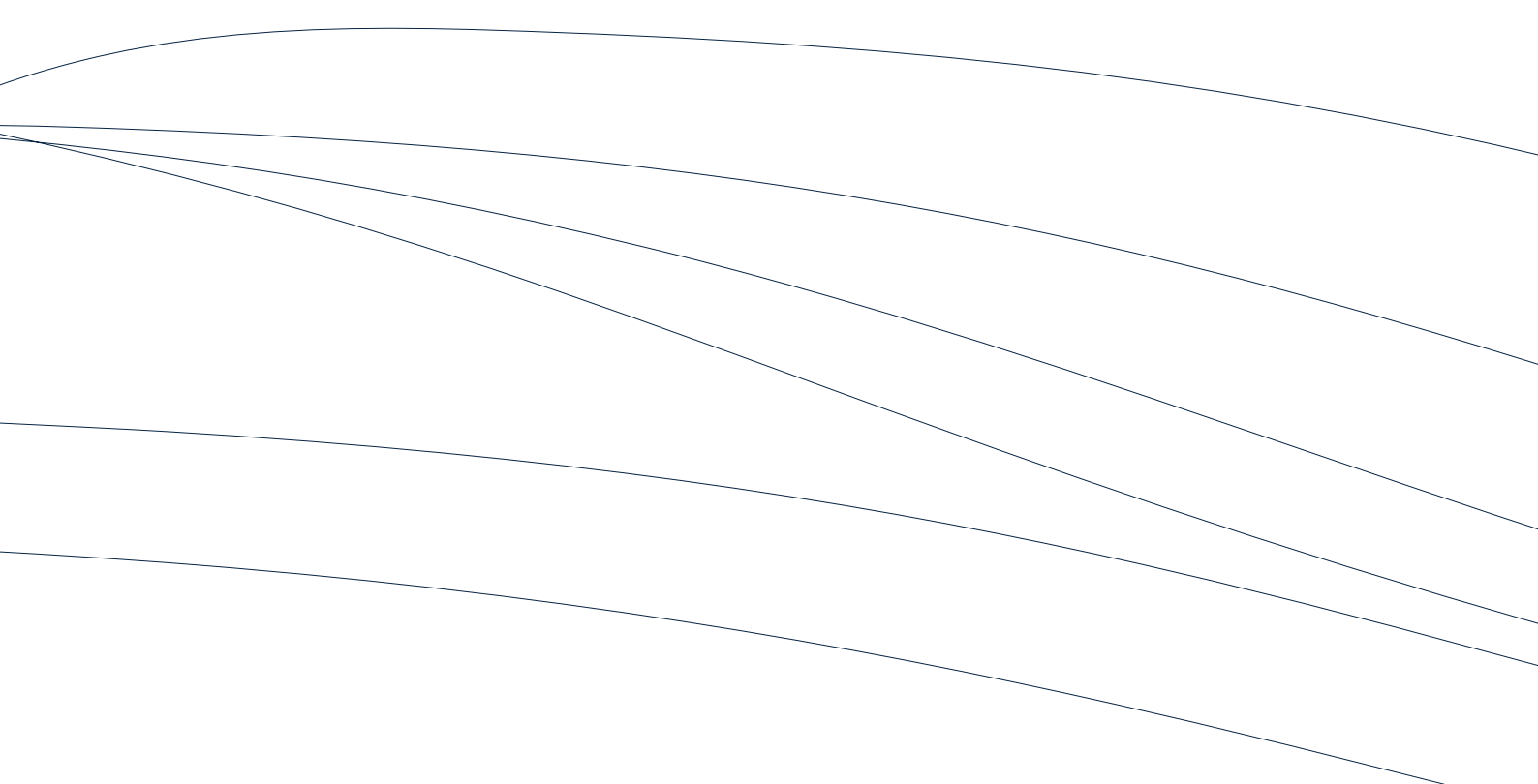
Can employers process data about the vaccine status of employees?

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, or allowed for employees. 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.

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.

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.

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.

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.

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.

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.

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 order of vaccination is determined by the National Vaccination Programme against COVID-19. Currently, all persons who are 12 years old or older can sign up for the COVID-19 vaccination.

- 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.

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.

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 being 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 decide 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.

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, could be deemed as not being a reasonable management instruction in most cases.

The 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. Making out this requirement in a risk assessment can be 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, may represent a breach of the employment contract by the company and employees may be able to refuse the order and demand to enter the premises.

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

Whereas requiring vaccination may not be a reasonable management instruction (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 (the recommendation in Portugal is to be vaccinated only after the 22nd week of 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 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.

Romania

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 (provided consent remains freely given)	Green	Amber	No

Is vaccination being mandated by the government or local authorities?

No, vaccination is voluntary and free.

Our view is that this will remain voluntary and optional in the future, as it currently is. However, the authorities encourage people (including through advertising campaigns) to get vaccinated.

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

There is no legislation currently available regulating vaccination in an employment context.

There is however secondary legislation that refers to the *degree/percentage of vaccinated employees out of the total headcount* as one of the elements to consider on return to (office/site) work. However, the legal provisions are silent with respect to how employers can request such information from their employees and how exactly this information should be used. We monitor this for further information and guidance.

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

No. This is not expressly forbidden by law, but it is clearly expressed in the relevant authorities' official position on this (including labour authorities). Prohibiting entry to the workplace or limiting the work activities of an employee who is not vaccinated may trigger the employer's liability for example – for unlawful restriction of the right to work and/or discrimination.

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

No. There is a high risk that the respective measure is nullified by a court upon the employee's request as there is no legal ground/basis for enforcing such disciplinary action. Additionally, the risks of discrimination claims and other related claims (such as damages) cannot be excluded.

Can employers ask employees for evidence of having been vaccinated?

As this involves processing of personal data, please see our answer to "Can employers process data about the vaccine status of employees?" below.

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

This is not addressed by the legislation. However, such an approach can raise several risks; for example, this could be seen as a disguised form of coercing employees into getting vaccinated and discriminating against those who refuse it. However, if consent is ensured to remain freely given, such benefits could be considered on a case-by-case basis.

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

Arguably yes. However, this should not in any way translate into imposing on/forcing the employees to get vaccinated – it is recommended to remain purely informative.

Can employers process data about the vaccine status of employees?

Information on vaccination status represents personal data concerning health, deemed by the GDPR as special category data and subject to additional protection under data privacy laws.

For such processing to be lawful, employers would need to identify an exemption under Article 9 of the GDPR. As consent is unlikely to represent an appropriate legal basis, employers may try to rely on:

- Article 9.2 (b) – processing necessary to comply with legal obligations in the field of employment (likely the most appropriate candidate); or

- Article 9.2 (h) – processing necessary for the purposes of preventive or occupational medicine; or
- Article 9.2 (i) – processing necessary for reasons of public interest in the area of public health (just as a last resort).

Given the lack of detailed regulation on these matters in Romania, for the time being it remains questionable if, and to what extent, an employer may rely on one of the exemptions listed above.

Furthermore, a Data Protection Impact Assessment is likely mandatory, both under the GDPR and local data privacy laws. This may also be regarded as an opportunity for the employer to argue why the processing is both necessary and proportional in relation to the purpose pursued.

Finally, all other principles and rules under the GDPR should be observed and privacy safeguards should be put in place. To this end, as a minimum employers should ensure that:

- Employees are accurately informed about the conditions of the processing of their personal data;
- The data is kept secure and confidential, with access given to a limited number of persons on a need-to-know basis;
- The nature and volume of the collected data is limited to what is absolutely necessary and proportionate;
- The information is stored for no longer than necessary for achieving the purpose pursued; and
- The data is processed solely 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	Amber	Red	Green	Amber	Yes

Is vaccination being mandated by the government or local authorities?

No, however, the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued by the Department of Employment and Labour ("Directive") has recently been updated to refer to COVID-19 vaccinations. In this regard, it provides that employers have the option of making COVID-19 vaccines mandatory after doing an assessment of the workplace and developing a plan regarding vaccines. Annexure C to this Directive sets out the guidelines for an employer that makes vaccines mandatory.

The Guidelines require that every employee who is identified as requiring vaccination should be notified of:

- The obligation to be vaccinated as and when the vaccination becomes available for the employee;
- The employee's right to refuse to be vaccinated on medical or constitutional grounds; and
- The opportunity for the employee to request to consult a health and safety representative or trade union official.

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

The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces ("Directive") issued by the Department of Employment and Labour refers to COVID-19 vaccinations. In this regard, it provides that employers have the

option of making COVID-19 vaccines mandatory after doing an assessment of the workplace and developing a plan regarding vaccines. Annexure C to this Directive sets out the guidelines for an employer that makes vaccines mandatory.

The Guidelines require that every employee who is identified as requiring vaccination should be notified of:

- The obligation to be vaccinated as and when the vaccination becomes available for the employee;
 - The employee's right to refuse to be vaccinated on medical or constitutional grounds; and
 - The opportunity for the employee to request to consult a health and safety representative or trade union official.
- In addition, the Directive provides that if an employee refuses to have the vaccination the employer should: refer the employee for medical evaluation should there be a medical reason for the employee's refusal; and if necessary, make reasonable accommodation for the employee in a position that does not require the employee to be vaccinated. Reasonable accommodation may include allowing an employee to work from home or off site or in isolation within the workplace such as in a separate office or warehouse. It may also include allowing the employee to work outside of normal working hours or in instances of limited contact with others in the workplace. The Directive also refers to the fact that the employee may be required to wear a N95 mask as a reasonable accommodation measure and we are seeing a number of organisations requiring unvaccinated employees to have periodic COVID-19 tests from time to time.

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

This is permissible in terms of the Directive, which provides that employers may implement a mandatory vaccination programme subject to the requirements in the Directive. Furthermore, 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 does not refer to mandatory vaccinations and instead sets 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. This is because the Directive provides that the employer must reasonably accommodate those employees who refuse to be vaccinated and therefore dismissal should be a measure of last resort. If the employee can continue to work from home and receive their normal salary and benefits in the normal course then risks are low. Annexure C to this Directive sets out the guidelines for an employer that makes vaccines mandatory. See *“Is vaccination being mandated by the government or local authorities?”* above.

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.

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. Furthermore, dismissal should be a measure of last resort.

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 vaccinations. It may potentially be justified on the basis of the requirements under the OHSA but, as stated above, we think that this would be quite difficult to justify as currently the OHSA does not impose any obligation on employers to make COVID-19 vaccinations mandatory.

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.

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

Yes.

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 vaccinations. It may potentially be justified on the basis of the requirements under the OHSA but, as stated above,

we think that this would be quite difficult to justify as currently the OHSA 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 in Spain for the time being.

Can employers ask employees for evidence of having been vaccinated?

No

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

We understand that the answer is no, particularly because these incentives could trigger discriminatory situations.

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

Vaccination is voluntary in Spain. This is the reason why it is not possible for a company to dismiss an employee for not being vaccinated, nor to impose a sanction for this reason. Dismissal for non-vaccination would be unjustified or even null and void, as it could imply the violation of fundamental rights. Additionally, 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 being vaccinated.

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. 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).

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

There is no law relevant to employees' vaccination against COVID-19.



Sweden

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?

Covid-19 vaccines are voluntary, there are no obligations for any citizens to take the vaccine. At this stage all adult citizens in Sweden have been offered the vaccine.

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

No. There is no legislation regarding employee vaccination for employees in private companies relevant to COVID-19. Employers are however obliged to follow the guidelines provided by the Ministry of Health and the Work Environment Act regarding the workplace environment.

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

No. The employer cannot require employees to be vaccinated. Employers face a significant risk to discriminate employees due to e.g. an employee's religious beliefs (religious beliefs may oppose vaccination) or gender (female employees in early stages of pregnancy).

The employer can, if it is deemed necessary to secure a safe work environment, mandate that employees are vaccinated to access the workplace. This however must be a reasonable and just action and other precautions should be considered before an employer implements this action. In practice, the circumstances where this may be required are so extreme that it is essentially not an option.

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

No. Given that the employer cannot require an employee to be vaccinated disciplinary actions or dismissal will be considered as unjust and not in accordance with the Employment Protection Act. Such actions could result in claims for wrongful termination, discrimination lawsuits against the employer and that the employer is obliged to pay damages to the employee.

Can employers ask employees for evidence of having been vaccinated?

No. The protection of health data of employees is highly regulated, and employers is not permitted to process whether employees are vaccinated under existing privacy legislation. The employer can ask if an employee is vaccinated. The employee is however not required to answer the question. Nor can the employer register or otherwise process any response provided. The employer cannot require that the employee provides any evidence that the employee has been vaccinated.

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

Yes, employers can encourage and support employees to take the vaccine. Practical steps for employers to take includes giving employees access to accurate information about the vaccine and vaccination.

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

No, as giving such preferential treatment to employees who take the vaccine over those who do not is likely to be seen as a violation of the anti-discrimination rules.

Can employers process data about the vaccine status of employees?

Employers must have a lawful basis for processing special category data under Article 6 and Article 9 of the GDPR. There are not any situations at this moment that could be seen as a lawful basis for employers to process employee's vaccination status.

An employer in Sweden can neither require employees to disclose their vaccination status nor require any proof of vaccination nor process personal data about vaccination status.



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.

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:

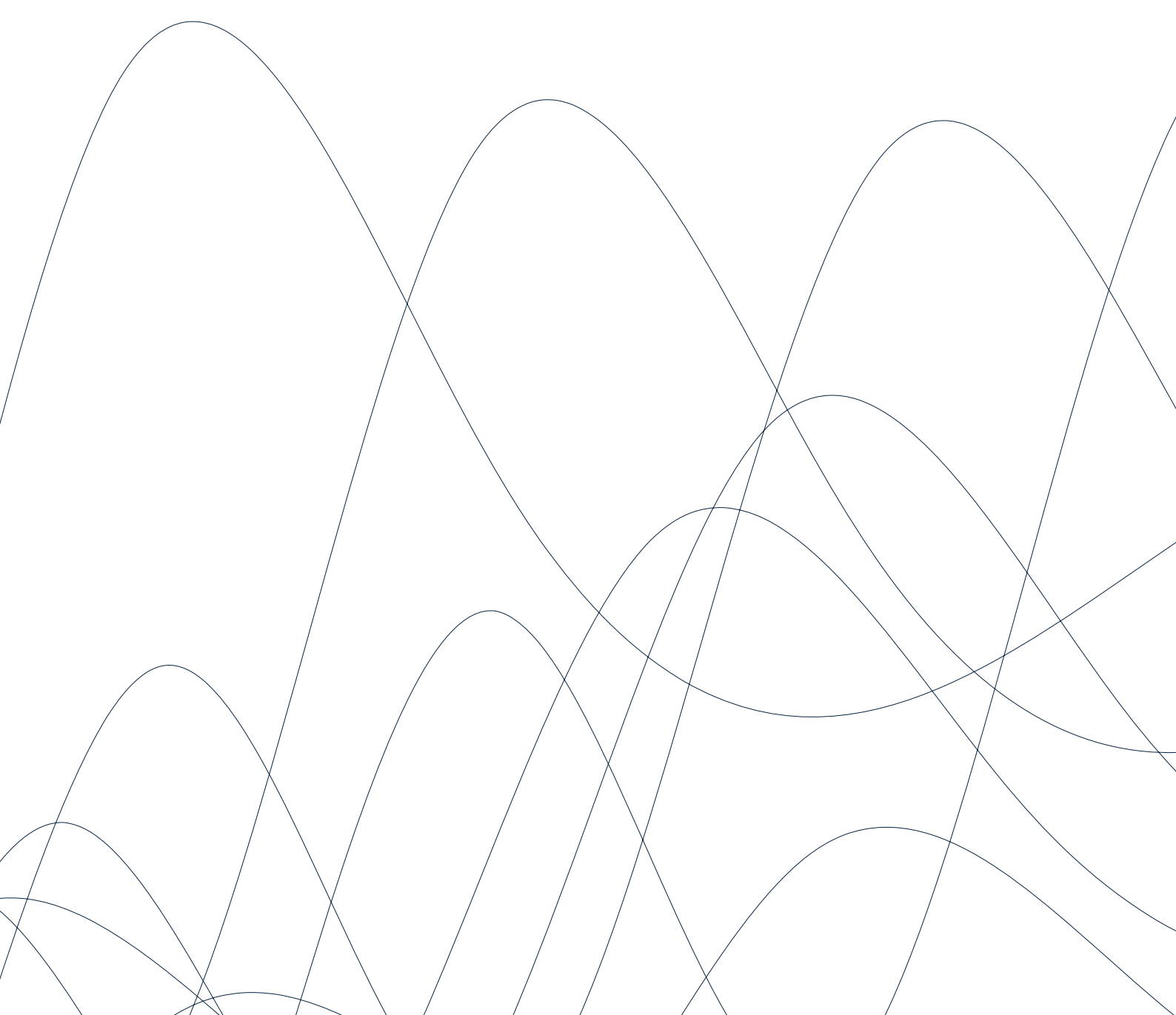
- Rolling out positive information campaigns about vaccination, to provide clear facts and address misinformation, boost confidence and engage employees to take the vaccine; and
- Considering how to support employees to receive the vaccine when it is offered, for example, through allowing paid or unpaid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

Can employers process data about the vaccine status of employees?

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.

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 except for care home staff and front line NHS)	Red	Red	Amber	Amber	Green	Red	Yes

Is vaccination being mandated by the government or local authorities?

In the majority of cases, vaccination is entirely voluntary. However, the UK government has implemented a mandatory vaccination requirement for workers in care homes by amending the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 with effect from 11 November 2021. The requirement applies to all care homes in England registered with the Care Quality Commission (CQC) and to all persons who enter a care home building, regardless of their role, rather than just care home staff and volunteers. This will therefore include (for example) other health professionals, hairdressers, beauticians, tradespeople and CQC inspectors.

However, residents, their friends and family, anyone who is medically exempt, anyone assisting with an emergency or carrying out urgent maintenance work, anyone working only in the external grounds, and anyone under the age of 18 are exempt.

Those covered by the rules will need to produce evidence of having had a complete course of an authorised COVID-19 vaccine (or evidence that they are medically exempt from vaccination).

The vaccination requirement will be extended to front line NHS staff from April 2022.

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

Yes, the UK Information Commissioner has issued Guidance on vaccinations and data protection and there is legislation requiring vaccination which applies to care home staff.

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 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.

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

Given that requiring vaccination will not generally be a reasonable management instruction, outside the care sector 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. (although pregnant women are now advised to be vaccinated)

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, 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?

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.
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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?
Only in limited circumstances	Amber	Red	Green	Green	Green	Amber	Yes

Is vaccination being mandated by the government or local authorities?

The policy of the Australian Government is that receiving a vaccination is voluntary, although it is encouraging people to get vaccinated.

However, State and Territory Governments in Australia have made public health orders requiring the vaccination of certain workers in their state or territory. Where there are government health orders or other legislation that require or allow mandatory vaccinations for an industry or workers, employers must ensure compliance. For example, the NSW government has introduced Public Health Orders that require 'authorised workers' who live in certain local government areas of concern to have at least 1 dose of a COVID-19 vaccination (or evidence of a medical exemption) in order to leave their local government area for work. Similarly, in each State and Territory there are mandatory vaccination requirements for various sectors (eg aged care). Victoria has made it compulsory for virtually all employees to have had two vaccine doses unless a strict medical exemption is available. From 26 November, employers in that state can only allow unvaccinated employees to work from home and employers are permitted to require evidence of, record, hold and use vaccination status of employees to enforce the requirements. A similar position exists in New South Wales however the rules in that state also apply in many cases to any non-employees (e.g. contractors or visitors) entering workplaces.

Other states, have specific industry mandated vaccination for employees, for example Western Australia has mandated it for employees in the financial services industry.

Rules around compulsory vaccination and exclusion from workplaces or venues are likely to be reviewed as vaccination rates continue rising with New South Wales indicating that at 95% it may allow unrestricted movement for all people irrespective of vaccination status. However the recent Omicron variant and its possible impact will mean this continues to be a fluid issue.

Employers in many industries in those states have begun standing down employees without pay or dismissing them if they are unvaccinated or cannot produce a valid medical exemption. Given that the Public Health Orders vary between each State and Territory, employers should seek further advice on the requirements under particular laws in the States/Territories in which they operate.

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

It depends. Employers can only require their employees in Australia to be vaccinated where:

- a specific law (such as a state or territory public health order) requires an employee to be vaccinated;
- the requirement is permitted by an enterprise agreement, other registered agreement or employment contract; or
- 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.

In the absence of government directives or the agreement of the employees, employers that wish to legally enforce mandatory vaccinations for their employees will need to rely on a common law basis to argue that requiring employees to be vaccinated in order to work is *a reasonable and lawful direction*. The Fair Work Ombudsman (FWO), Australia's primary workplace regulator, guidance originally provided 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, there has been updated guidance published by the FWO for employers considering mandating a Covid-19 vaccine for their employees.

Key features of the updated guidance include:

- A direction from an employer to require employees to be vaccinated is more likely to be reasonable and lawful where an employee's role involves in-person interaction with customers/colleagues/the public and the employee is working in an area where community transmission is currently occurring. The guidance sets out a Four Tier system, with a vaccine direction to "Tier 1" employees (including hotel quarantine or border control employees who are required to interact with individuals at a high risk of being infected with Covid-19) or "Tier 2" employees (including aged or health care employees in close contact with vulnerable individuals) being more likely to be reasonable given their increased risk of contracting Covid-19 whereas a direction to "Tier 4" employees who have minimal face-to-face interactions with the community or work from home, will likely be unreasonable, given the more limited risk of transmission of Covid-19. Notwithstanding the above guidance, the question of whether it is lawful and reasonable to mandate vaccination for certain employees must ultimately be determined on a case-by-case basis, having regard to the nature of the employee's role and any other factors which may be relevant to the determination. This also includes (without limitation) whether any employees have a legitimate reason for not being vaccinated (for example, a medical reason).
- If an employer is considering implementing a vaccination policy, prior to implementing that policy, it must follow the consultation obligations under the applicable work, health and safety (WHS) laws. This would include consulting with workers and their health and safety representatives about the policy in the manner required by WHS legislation.

If an employer has issued a lawful and reasonable direction that an employee be vaccinated then generally the employer must also provide the employee with paid time off if the vaccination appointment is during work hours

Notwithstanding the revised guidance, the FWO has warned employers to be cautious about mandating vaccinations in their workplaces and recommended employers obtain legal advice before doing so.

The updated guidance is accessible here: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations>.

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.

An employer should seek further advice prior to any decision to take disciplinary action, as the lawfulness of a decision is determined on a case by case basis.

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.

Unless there is a specific law which provides otherwise, the question of whether an employer can mandate disclosure of vaccination status is the same assessment as whether the employer can mandate vaccination itself. That is, the employer can only mandate disclosure of vaccination status if that mandate is reasonable and lawful.

An employer can request (but not mandate) the vaccination evidence be provided, so long as the employee is given the option to not respond and provides informed consent and its collection, use and disclosure is in accordance with Australian data privacy requirements.

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. If an employer asks an employee to provide information about their vaccination status, then employees must consent to the collection of the information, and the employer must have clear and justifiable reasons for collecting the information (ie it is reasonably necessary for the employer's

functions or activities which may include preventing or managing COVID-19, and the information is not being collected on a 'just in case' basis or for monitoring purposes only), unless a specific exception applies.

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.

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.

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 sensitive information if the employee provides informed consent and the employer has clear and justifiable reasons for collecting the information (ie it is reasonably necessary for the employer's functions or activities which may include preventing or managing COVID-19, and the information is not being collected on a 'just in case' basis or for monitoring purposes only), unless a specific exception applies.

The employer must also take reasonable steps to notify employees of the matters set out in Australia's Privacy Act prior to obtaining the consent of employees, including but not limited to, the purposes of collection and how the information may be used or disclosed. This may require the employer to provide employees with a privacy notice when collecting the vaccination evidence. Employers should obtain legal advice to ensure they comply with the requirements under Australia's privacy legislation regarding the collection of sensitive health information. 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. The Australian workplace regulator, the Fair Work Ombudsman (**FWO**) continues to update their guidance for employers considering mandating a Covid-19 vaccine for their employees.

- Notwithstanding the revised guidance, the FWO has warned employers to be cautious about mandating vaccinations in their workplaces and recommended employers obtain legal advice before doing so.

The updated guidance is accessible here: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations>.

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

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/>

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.

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

No.

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 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.

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

There is no issue with doing so.

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 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.

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	Amber	Amber	Green	Green	Amber	No

Is vaccination being mandated by the government or local authorities?

No, vaccinations are currently provided by the government on a voluntary basis. Having said this, in an effort to increase Hong Kong's vaccination rate, the government and/or the relevant local authorities have recently implemented vaccination in lieu of regular testing (VRT) arrangements whereby only vaccinated employees of the Hong Kong government, the Hospital Authority and secondary schools, primary schools, special schools, schools offering non-local curriculum, kindergartens, kindergarten-cum-childcare centres and private schools offering non-formal curriculum would be exempted from undergoing regular COVID-19 testing. The Airport Authority has taken this one step further and implemented an arrangement whereby all Targeted Group employees (including staff of airlines) would be mandatorily required to be vaccinated with no option for regular testing in lieu of vaccination.

The government has also (in a press conference) strongly urged private sector employers to adopt similar mandatory vaccination or regular testing in lieu of vaccination policies. There is currently no legal obligation imposed on private sector employers to follow the government's direction but we envisage this may change in the coming weeks.

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

There are no specific laws at this stage.

For general information regarding the vaccination program in Hong Kong, please refer to the government's dedicated webpage <https://www.covidvaccine.gov.hk/en/vaccine>.

The Labour Department has also provided a general FAQ on COVID-19 employment-related issues which includes some degree of guidance relevant to employee vaccination and is accessible at https://www.labour.gov.hk/eng/news/pdf/EO_related_QAs_on_COVID-19_eng.pdf.

The Department of Health also provides some guidelines on precautionary measures which should be implemented at workplaces which includes a recommendation on having employees complete a vaccination course. Please refer to the following link: https://www.chp.gov.hk/files/pdf/nid_guideline_workplace_eng.pdf.

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

Generally, no. There is no statutory right to require employees to be vaccinated and to date this has not been a common market practice. This is starting to change in some sectors, but typically those where health and safety issues more clearly require it or where there is a requirement from the government or the relevant local authority.

Employers can generally only implement such a condition if it can show that requiring employees to be vaccinated is a "reasonably practicable step" to take in order to protect the health and safety of their employees at work. The prudent view is that this would only be more likely to be justified for particular sectors/groups of employees which are (i) particularly high risk e.g. healthcare workers, elderly care home workers; or (ii) subject to government guidelines where vaccination is either necessary in order to benefit from social distancing exemptions where not having vaccinated staff would have a material impact on

business operations (ie those working in the food and beverage catering industry). A general blanket policy of mandated vaccination is unlikely to be viewed as reasonable. Having said this, should an employer implement a mandatory vaccination policy, we consider the overall risk of a successful challenge from an employee as being low in practice (absent some discrimination risk set out below), especially in light of the recent positions taken by the government and other local authorities on vaccination.

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 therefore prudent to check on a case-by-case basis what reason an employee may have for not taking the vaccine (e.g. pregnancy, breastfeeding).

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

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.

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

Generally, no. 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. It would be prudent to also look at any reasons for refusal, whether there is any medical exemption applicable and whether there are any alternatives

such as to redeploy the employee to lower infection-risk roles (eg non-client facing). 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).

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 (which may include vaccination records) except in certain limited circumstances such as evidence of childbirth in connection with maternity leave or evidence of sickness.

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 and does not impose any sanctions on employees who refuse to be vaccinated.

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. 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	Yes but not binding

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?

The Ministry of Health, Labor and Welfare has issued Q&As regarding vaccines and employees but these are not binding and there are no clear penalties if they are not followed.

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. New Zealand began its vaccination program on 19 February 2021. The vaccination is free and everyone in New Zealand aged 16 and over is eligible. Whilst the government will encourage people to be vaccinated, it is not mandatory. The rollout plan has 4 phases, prioritizing those at higher risk of catching COVID-19:

- Group 1 – Border and managed isolation and quarantine workers (and their household contacts). This is approximately 50,000 people.
- Group 2 – High-risk frontline workers and people living in high risk places (e.g. aged care facilities). This is approximately 480,000 people. Group 2 vaccinations began in March 2021.
- Group 3 – People who are at risk of getting very sick from COVID-19, this is approximately 1.7 million people. Group 3 estimated start date is May 2021.
- Group 4 – General population, this covers approximately 2 million people. Group 4 estimated start date is 28 July 2021, and will be phased by age group.

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.

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.

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

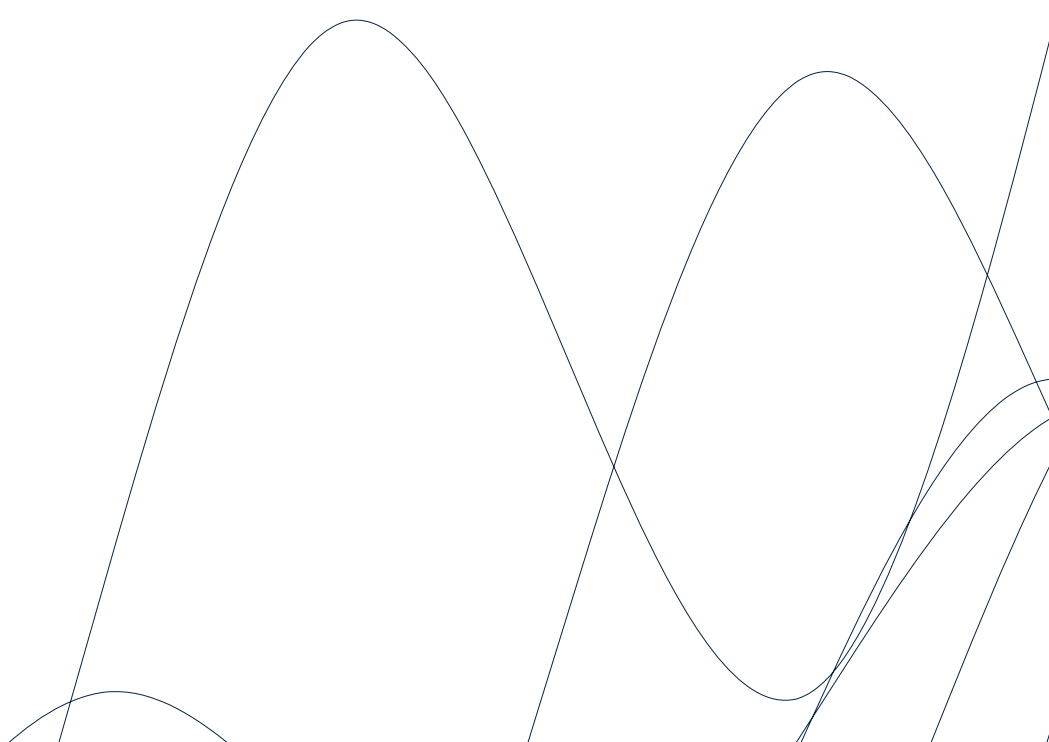
There is no issue with employers promoting vaccination, by facilitating vaccinations on-site at work, and allowing workers to get vaccinated during work hours without loss of pay.

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	Green	Red	Green	Green	Green	Amber	Yes

Is vaccination being mandated by the government or local authorities?

No, vaccinations are currently provided by the government on a voluntary basis.

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

On 26 December 2021, Singapore's Ministry of Health announced changes to the Workforce Vaccination Measures which came into effect from 1 January 2022 onwards. The tripartite partners (Ministry of Manpower, National Trades Union Congress and Singapore National Employers Federation) have also made corresponding updates to the latest COVID-19 advisory.

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

From 15 January 2022 onwards Only employees who are fully vaccinated, certified to be medically ineligible or have recovered from COVID-19 within the past 180 days may return to the workplace. Partially vaccinated employees will still be allowed at the workplace with a negative Pre-Event Test (PET) up to 31 January 2022, after which they must be fully vaccinated.

For unvaccinated employees, employers can choose to:

- redeploy them to suitable jobs which can be carried out from home if such jobs are available, and provided the remuneration is commensurate with the responsibilities of the alternative jobs; or
- place them on no-pay leave based on mutually agreeable terms; or
- as a last resort, terminate their employment (with notice) in accordance with the employment contract.

For those who are medically ineligible or pregnant, employers should consider allowing the employee to work from home or redeploy them to suitable jobs which can be carried out from home. The advisory now clarifies that pregnant employees should not be dismissed and employers are instead strongly encouraged to give special consideration to their needs and concerns e.g. allowing them to work from home, redeployment or placing them on no-pay leave until after they have been vaccinated. In addition, from 1 February 2022 onwards, full COVID-19 vaccination will be a condition for approval for any renewal or grant of new long-term passes, work passes and permanent residence applications. This does not apply to individuals who are medically ineligible, below the age of 12 years and individuals aged 12 to below 18 years (although they must make a declaration to complete their full vaccination after arriving in Singapore).

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

An employer should not terminate or threaten to terminate the service of an employee on the basis of vaccination status alone. However, employers may exercise their right to contractually terminate employment if unvaccinated employees cannot work from home, be redeployed to a job which can be done from home or placed on no-pay leave. See *'Can employers require existing employees to be vaccinated as a condition of being in the workplace?' above.*

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). Employees who refuse to do so may be treated as unvaccinated for the purposes of the Workforce Vaccination Measures and are not allowed to return to the workplace from 15 January 2022.

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

Yes, the government has publicly encouraged employers to offer incentives for employees to get vaccinated. This should be 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. See *"Can employers ask employees for evidence of being vaccinated?" above.* 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 privacy policy to check whether the processing of this data will fall within their existing scope.

Disclaimer: DLA Piper is restricted for regulatory reasons from practising 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.



Thailand

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	Green	Red	Green	Amber	Green	Green	No

Is vaccination being mandated by the government or local authorities?

Vaccination for COVID-19 is voluntary, as are all vaccinations in Thailand, and people maintain the option to choose.

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?

Presently there are no provisions of law which either expressly permit an employer to, or prohibit an employer from, mandating vaccination as a condition for working in the workplace. However, in practice, many employers provide early access to vaccines for their employees and ask that employees have the vaccination.

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

No, as of present, employers cannot discipline or dismiss employees by reason of failure to be vaccinated. Section 119 of the Labour Protection Act provides limited grounds for termination with cause, namely the employee:

- Performs his/her duties dishonestly or intentionally commits a criminal offence against the employer;

- Intentionally causes damage to the employer;
- Causes serious damage to the employer as a result of negligence;
- Violates the working regulation, regulations or order of the company which is lawful and just, and after written warnings have been given by the company, except in a serious case where the employer is not required to give a warning (the written warning shall be valid for one year from the date the employee has committed the offence);
- Neglects his/her duties without justifiable reason for three consecutive working days regardless of whether there is a holiday in between or not; or
- Is imprisoned by a final judgment of imprisonment.

Dismissal due to failure to be vaccinated may amount to an unfair dismissal, entitling the dismissed employees to claim compensation due to unfair dismissal.

Can employers ask employees for evidence of having been vaccinated?

Yes, employers may ask for evidence of vaccination. Since evidence of vaccination is considered sensitive personal data, employers will need to comply with the requirements under the Personal Data Protection Act ("PDPA"), which is expected to be fully enforceable from 1 June 2022 onwards. This includes obtaining explicit consent of the employees before processing such personal data.

However, since the full enforcement of the PDPA is expected from 1 June 2022, employers can presently process such sensitive personal data without having obtained the employees' explicit consent.

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

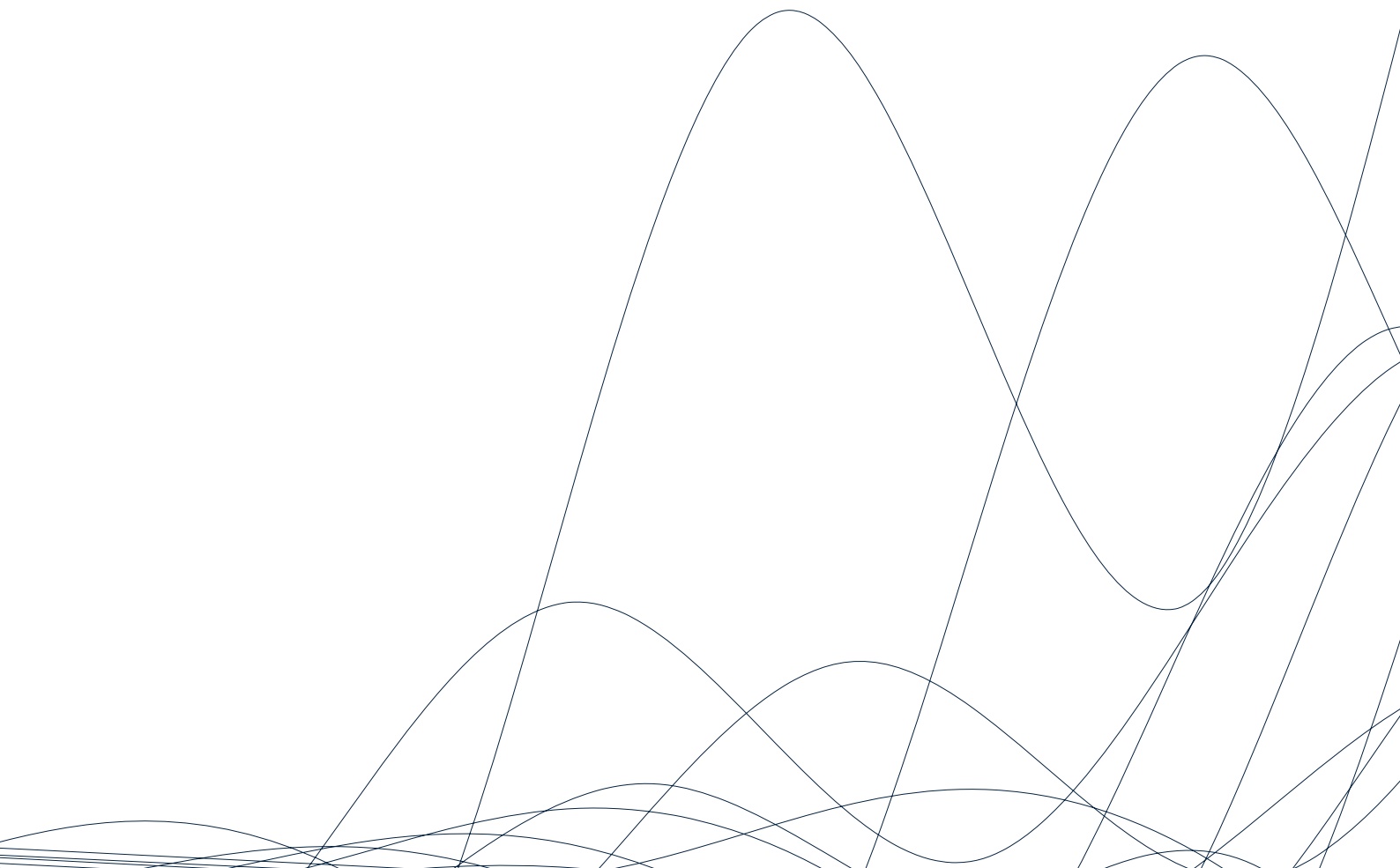
Yes, employers may incentivise employees to be vaccinated provided the incentive is offered on a completely voluntary basis.

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

Yes, employers may promote vaccination 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, employers are currently permitted to process employees' vaccination status data. Once the PDPA is fully enforceable, employers will be required to comply with the PDPA requirements before processing any such data (see "*Can employers ask employees for evidence of having been vaccinated?*" above).



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	Green	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 at the end of 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.

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

There is no law on this issue up to now, only guidance issued by the Public Prosecutor Office and the Superior Labor Court in the sense that employers have the duty to provide a safe workplace and, for this reason, requiring employee vaccination is legitimate.

https://mpt.mp.br/pgt/noticias/estudo_tecnico_de_vacinacao_gt_covid_19_versao_final_28_de_janeiro-sem-marca-dagua-2.pdf

On Monday 1 November 2021, the Ministry of Labor and Social Security published Ordinance n.620/2021 ("Ordinance") which states that employers may not require a vaccination certificate from an employee to maintain or obtain a job and that doing so would amount to discrimination. However, on Friday 12 November, the Supreme Court granted an injunction in a claim filed by 4 political parties against Ordinance 620. This means that, for the time being, Ordinance 620 is suspended

and employers are not prohibited from asking for vaccine certificates. The merits of the claim by the political parties are expected to be judged by 3 December.

The Supreme Court suspended certain provisions of Ordinance 620 on the basis that there is no comparison between the vaccine obligation and discrimination based on gender, race, color, age and other grounds that usually apply in the labor legislation. The Ministry of Labor, when it issued Ordinance 620, based the legal argument on the fact that requiring vaccine proof would be deemed discriminatory. Article 1 of the Ordinance prohibits the adoption of any discriminatory practice for access to employment on the basis of gender, origin, race, color, marital status, family situation, disability, professional rehabilitation, and age. Paragraph 2 states that: "It is considered a discriminatory practice to require a vaccination certificate in selection processes for the admission of workers, as well as by dismissing for just cause an employee due to the failure to present a vaccination certificate."

The position is subject to further change, we will update when there is more information available.

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

The Ordinance states that employers may not require a vaccination certificate from an employee to maintain or obtain a job, and that doing so would amount to discrimination.

Article 1 of the Ordinance prohibits the adoption of any discriminatory practice for access to employment on the basis of gender, origin, race, color, marital status, family situation, disability, professional rehabilitation and age. Paragraph 2 of this article states that: "It is considered a discriminatory practice to require a vaccination certificate in selection processes for the admission of workers, as well as by dismissing for just cause an employee due to the failure to present a vaccination certificate". If it is found that an employee's dismissal was due to a discriminatory act, the employee may file a lawsuit seeking reinstatement with full reimbursement for the entire period of absence, or to receive double remuneration for the period of absence, adjusted for inflation and legal interest, in addition to compensation for moral damages.

The Ordinance emphasises that failure to present a vaccination card against any illness is not listed as a reason for just cause for termination of employment in accordance with art.482 of the CLT (Consolidação das Leis do Trabalho – Consolidated Labor Laws in Brazil).

However, the Ordinance is subject to challenge: On Friday 12 November, the Supreme Court granted an injunction in a claim filed by 4 political parties against Ordinance 620, summarized in our update here, which states that employers may not require a vaccination certificate from an employee to maintain or obtain a job as doing so would amount to discrimination. This means that, for the time being, Ordinance 620 is suspended and employers are not prohibited from asking for vaccine certificates.

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 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.

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 and the President of the Superior Labor Court already pronounced their understanding of the potential that a company can dismiss their employees that refuse to get the vaccine for cause. There are only a few decisions in this respect as yet but all of them confirmed that employees can be terminated in case of refusal to have the vaccine, particularly if the employee works in hospitals, medical centres etc.

Can employers ask employees for evidence of having been vaccinated?

The Ordinance states that employers may not require a vaccination certificate from an employee to obtain or maintain a job, and that doing so would amount to discrimination. See "Can employers require existing employees to be vaccinated as a condition of being in the workplace?" above. COVID-19 may be deemed an occupational disease if the link between the work and the employee's contamination, is evidenced so that, despite not being the object of law or guidance, the employer is allowed to control employees who have taken the vaccine. to check if the return to on-site activities is safe or not, for example.

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

Yes. The Ordinance of 1 November provides that employers can establish incentive programmes for the vaccination of their employees. Although the granting of benefits is controversial as may be considered as discrimination against non-vaccinated we consider that in general the risk is not significant, particularly if the incentive is not money but a benefit like a free day when the employee is vaccinated or a dinner voucher. A case-by-case analysis should be carried out.

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.

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?
Not yet	Amber	Amber	Amber	Green	Green	Amber	Yes

Is vaccination being mandated by the government or local authorities?

No, there is currently no generally applicable federal, provincial or local law that specifically directs that individuals be vaccinated against COVID-19, or authorizes employers to do likewise. However, a number of jurisdictions have enacted public health restrictions for individuals who are not vaccinated limiting access to indoor restaurants, event venues etc. In addition, However, on 13 August 2021 the federal government announced that it will require all public servants to be vaccinated. The federal government also expects Crown corporations and other employers in the federally regulated sector, including banking, will also require vaccination for their employees. Organizations in the federally regulated sector are called on to implement their own vaccination strategies drawing on the advice and guidance from public health authorities and the [Canadian Centre for Occupational Health and Safety](#).

At the provincial level, some jurisdictions are mandating that employers in certain sectors implement a vaccination policy. As an example, in Ontario, the Chief Medical Officer of Health mandated that hospitals and home and community care service providers, among other high risk setting such as post-secondary institutions, would need to have a COVID-19 vaccination policy for employees, staff, contractors, students and volunteers. The vaccination policy would require an individual to provide proof of one of: (i) full vaccination against COVID-19; (ii) a documented medical reason for not being vaccinated against COVID-19; or (iii) completion of a COVID-19 educational session. Individuals who do not provide proof of full vaccination against COVID-19 would be required to undertake regular antigen testing.

Moreover, provincial jurisdictions, such as Quebec, Ontario, Alberta and British Columbia, have announced that individuals will need to provide proof of full vaccination and have or will be introducing a “vaccine passport” in order to access certain public settings (indoor restaurants, event venues etc). For example, in Ontario, individuals now need to show proof of full vaccination in order to access designated public settings, including restaurants and bars, facilities used for sports and fitness, sporting events and concerts, among others. Employees, however, in these locations are not required to show proof of full vaccination unless mandated by their employer.

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

Yes. Several provinces have enacted laws requiring employers to provide paid vaccination leave. In addition, several provinces have imposed vaccine passport requirements to access certain public settings.

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 in the workplace. Vaccines are 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, unless they account for accommodation based on protected grounds (for example, a substantiated medical condition or religious belief).

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 substantiated 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 whether they have taken the vaccine and if not, why not. Employers should allow employees to refuse to answer recognizing that an individual who refuses to answer will be treated as not having received the vaccine.

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

Yes.

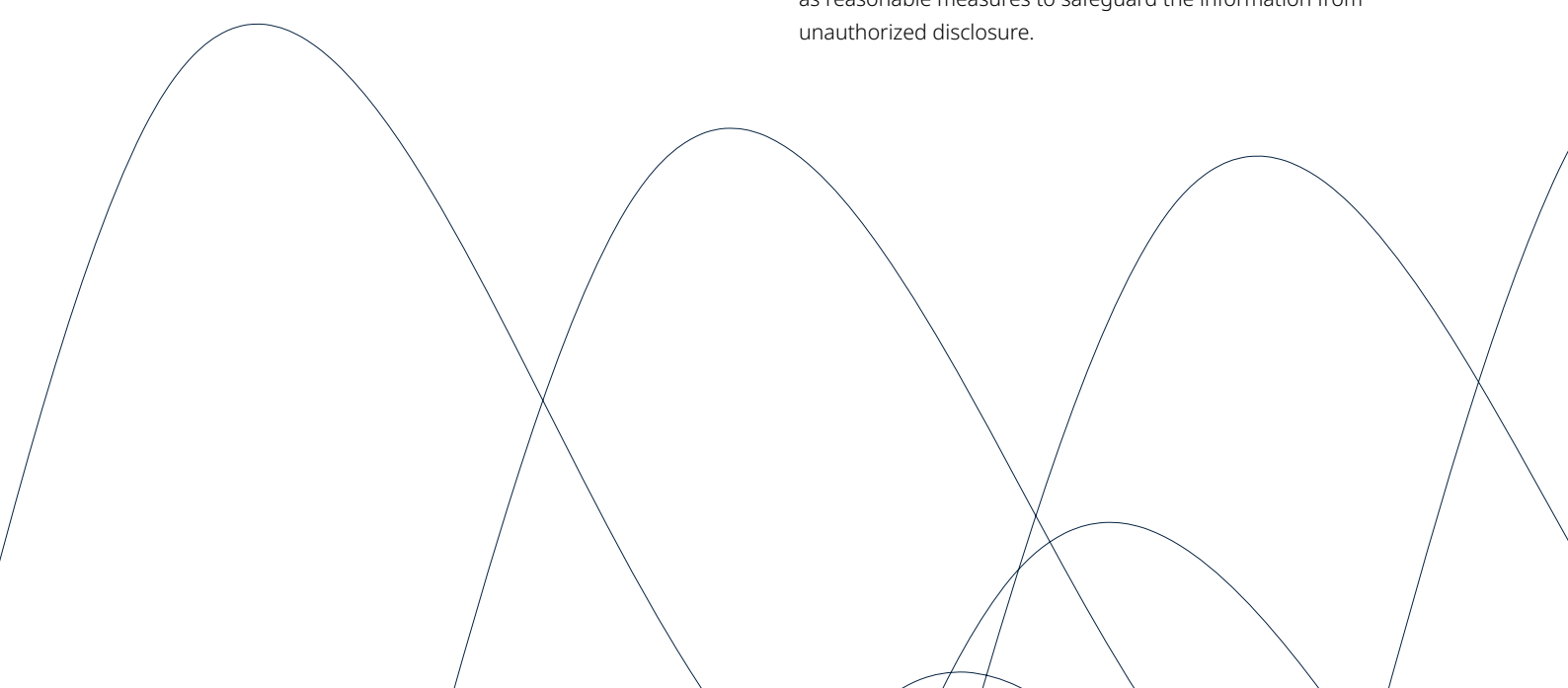
Can employers promote vaccination (e.g. by an information campaign)?

Yes, and employers are being encouraged to do so in many jurisdictions with guidance from local public health authorities.

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	Red	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 had priority to receive the vaccination and already received it, notwithstanding being voluntary.

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 also for certain individuals that belong to certain segments of the population that are more exposed to COVID-19. In Chile, the population is currently being vaccinated with a booster dose.

<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. According to, article 184 of the Chilean Labor Code the employer is 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 can be considered to be allowed to require employees to receive the vaccine as a condition of their return to their employment at the workplace. However, requiring employees to get vaccinated, as vaccination is not mandatory by law, may be considered discrimination and expose the company to possible lawsuits for violation of fundamental rights. Therefore, in our opinion, it is not advisable that companies require employees to get vaccinated, unless the nature of the business requires vaccination according to the instructions of the authority.

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, without being considered discriminatory and a violation of the employee's fundamental rights.

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, provided the employee is clearly informed regarding the use that the company will make of such information and expressly provides his/her consent to give it, as health status is considered sensitive data by our legislation and therefore has special treatment..

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.

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

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

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.

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.secretariasenado.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 may require existing employees to disclose their vaccination status as a condition of being in the workplace if the employee has pre-existing comorbidities identified as risk factors for COVID-19. With the purpose that employer that employer takes the relevant bio-safety measures. The Ministry of Health issued Resolution 777 of 2021 introducing new guidelines for

biosafety protocols and face-to-face work. Face-to-face work may be introduced by employers for fully vaccinated employees and employees who decided not to get vaccinated. Nevertheless, every case and policy regarding vaccination must be reviewed carefully by the employer as constitutional rights are involved.

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.

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

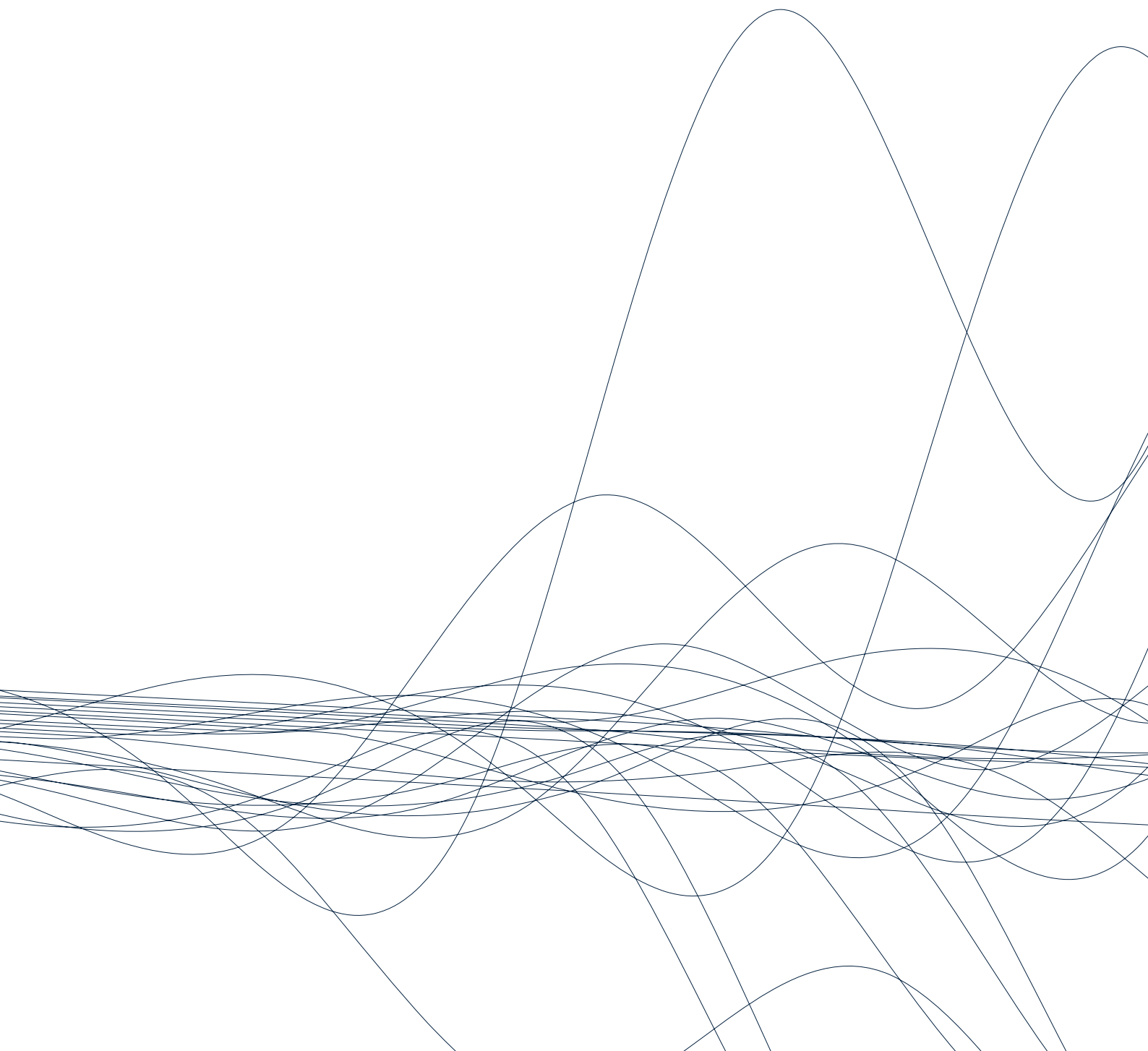
Yes, employer may provide incentives for employees who receive the vaccine, i.e., vaccine bonus, extra holidays, or any other benefits. Any benefit must be objective, reasonable, and justified. Otherwise, employees who do not receive the benefit may allege discrimination.

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).

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?

Yes. While federal, state and local governments have not mandated vaccination for all individuals, some are imposing vaccination requirements for certain workers (with many mandates being challenged in the courts).

The federal government has enacted three separate mandates – President Biden’s Executive Order 14042 (mandating vaccination for covered federal contractors), the Center for Medicare and Medicaid Services’ (CMS) Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (mandating vaccination for staff working for CMS-certified health care providers and suppliers), and the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) (mandating that private employers with 100 or more employees require either vaccination or weekly testing for employees). All three mandates were enjoined by federal courts, leaving covered employers in an uncertain position while legal challenges play out. In a 2-1 decision on December 17, 2021, the Sixth Circuit granted a request to dissolve the Fifth Circuit’s stay of the ETS, holding that the ETS was likely consistent with OSHA’s statutory and constitutional authority. This controversial decision was immediately met with multiple applications to the US Supreme Court. On January 13, 2022 the Supreme Court reinstated the stay. In a separate decision the Court granted the government’s applications to stay two district courts’ preliminary injunctions of the CMS vaccine rule pending disposition of the government’s appeals in the Fifth and Eighth Circuits.

At the same time, states and localities have taken differing positions, with some enacting laws to restrict or even prohibit mandatory vaccine programs and others enacting vaccination mandates of their own. State and local executive orders and/or legislative pronouncements vary in scope and permissible exemptions, but most if not all allow for exemptions because of a sincerely held religious belief, medical condition, or other disability consistent with requirements under the federal Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, as well as corresponding state and local nondiscrimination laws.

States and localities also have announced vaccine mandates for state employees or private employees in specific industries or settings. For example, in late July 2021, California Gov. Gavin Newsom announced a standard requiring all state employees and workers in healthcare and “high-risk congregate” settings to prove that they are fully vaccinated or be tested regularly

and wear masks. New York City’s Key to NYC requires certain businesses that provide indoor dining, fitness and entertainment to ensure staff are vaccinated (with some exceptions). On December 6, 2021, New York City Mayor Bill de Blasio announced the “first-in-the-nation” COVID-19 vaccine mandate for all private sector employees in the city.

Other states and localities have issued vaccination orders – which vary in coverage, scope, requirements, and exemptions – including for healthcare workers and other workers in high-risk settings. Some mandates may allow for employees to undergo regular testing and adhere to other health and safety measures (eg, masking, social distancing) in lieu of getting vaccinated.

At the same time, a number of other states have passed legislation or issued executive orders that prohibit state and local government agencies from issuing documentation to certify vaccine status or requiring people to prove their vaccination status. Some also prohibit businesses from requiring a patron or customer to provide any documentation certifying the customer’s COVID-19 vaccination or post-transmission recovery on entry to, to gain access to or receive service from the business. Laws inconsistent with the OSHA ETS and other federal mandates in effect are likely to be challenged in the courts and may be preempted to the extent the federal standards remain in effect.

Some laws may impact private employers and their employees. Employers are strongly encouraged to monitor federal, state and local developments, as well as industry responses, related to vaccination, as conditions are changing rapidly.

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

Yes. In addition to the OSHA ETS regarding vaccination, (now stayed by the Supreme Court) various laws and guidance are implicated by vaccines. The Centers for Disease Control (CDC), Occupational Safety and Health Administration (OSHA) and Equal Employment Opportunity Commission (EEOC) have issued guidance for employers. See <https://www.cdc.gov/coronavirus/2019-ncov/community/workplaces-businesses/index.html>; <https://www.osha.gov/coronavirus>; and <https://www.eeoc.gov/wysk/whatyou-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. Current OSHA guidance suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated.

Employers are also urged to be mindful of applicable state and local laws, requirements and guidance. As noted above, some states have executive orders or laws that restrict (based on whether the employer is public or private) or prohibit employer vaccine mandates. For example, Montana House Bill 702 makes it unlawful for an employer to discriminate against a person based on their vaccination status or whether they have an immunity passport, including in the terms and conditions of employment (with special provisions for health care facilities). Florida HB 1B / SB 2B prohibits private employers from imposing a COVID-19 vaccination mandate for any full-time, part-time or contract employee unless the employer provides certain exemptions that allow an employee to opt out of such a requirement. Texas Governor Abbott's executive order requires employers to provide exemptions for personal conscience, religious belief and medical reasons, including prior recovery from COVID-19. Other states (eg, Alabama, Arkansas, Iowa, Tennessee) similarly have adopted laws requiring broader exemptions or otherwise restricting the use of vaccine mandates. 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 a number of other states. As noted above, to the extent federal directives take effect, they purport to preempt laws that are inconsistent with those federal rules.

In addition, states and localities (eg, New York, California, Chicago) may require paid or unpaid leave related to receiving or recovering from COVID-19 vaccinations.

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

Based on current federal guidance, private employers may mandate employee vaccination as a condition to being physically present in the workplace, subject to state laws and applicable, legally protected exemptions and being mindful of potential risks. For example, employers are urged to account for reasonable accommodation process that may apply under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 and be prepared to respond to an employee who seeks an exemption from a vaccine mandate due to either a medical contraindication or 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 collective 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, reasonable accommodation obligations for other categories such as pregnancy). For example, the New York City Human Rights Law requires covered employers to provide reasonable accommodations to employees who require them because of a disability, pregnancy, religious belief, or their status as a victim of domestic violence, stalking, or sex offenses. Guidance issued by the New York City Commission on Human Rights provides that if an employee requests an exception to the vaccine requirement or additional time to provide their proof of vaccination for one of the reasons listed above, the employer must engage with them in a cooperative dialogue to see if a reasonable accommodation is possible.

As noted above, employers are also urged to track proposed state legislation that would prohibit or limit mandatory vaccination and review preemption issues based on federal mandates in effect.

May 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.

Employers are also encouraged to determine if any other rights are afforded under EEO laws or other federal, state and local laws. Employers are urged to also be mindful of exemption requests based on sincerely held religious beliefs and medical accommodations. Some states have passed laws that prohibit an employer from terminating a worker for failure to be vaccinated or that allow employees terminated for such reasons to collect unemployment benefits.

May 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. State or local law may also proscribe the form of proof required, which can vary.

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

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 ADA and the GINA. Under current EEOC guidance, employers are permitted to encourage employees to voluntarily obtain the COVID-19 vaccination by: (i) providing employees and their family members with information to educate them about COVID-19 vaccines, including information and materials that raise awareness about the benefits of vaccination and that address common questions and concerns; and (ii) offering incentives to employees who provide proof of COVID-19 vaccination. However, because vaccinations require employees to answer disability-related screening questions, EEOC guidance provides that, if an employer is operating a vaccination program, such employer is prohibited from offering employees substantial incentives that may be considered coercive (as such incentives may result in the employee feeling pressured to disclose protected medical information). The guidance also addresses vaccination incentives for family members. According to the EEOC, under GINA, an employer may not offer an incentive to an employee in return for an employee’s family member getting vaccinated by the employer or its agent. However, an employer may still offer an employee’s family member the opportunity to be vaccinated by the employer or its agent if it takes steps to ensure GINA compliance.

These limitations do not apply if an employer, in designing an incentive program, offers an incentive to employees to voluntarily provide documentation or other confirmation that

they or their family members received a COVID-19 vaccination on their own from a third-party provider not acting on the employer’s behalf (eg, pharmacy, doctor, health department). However, such an employer is encouraged to evaluate whether a proposed incentive would be taxable to employees.

Some employers are considering how to handle costs of increased testing for unvaccinated employees. For example, it is not clear whether employers may require unvaccinated employees to pay the cost of weekly testing. Federal, state, or local laws or collective bargaining agreements may require employers to pay such costs. One conservative approach some employers are considering is covering the cost of COVID-19 tests through an employer-paid program. Other employers require employees to pay the full cost of the testing each week or administering tests at work and requiring a nominal co-payment. Employers considering requiring their employees to pay for testing are encouraged to review the impact of applicable state and local laws.

Some employers are also reviewing their approach to health plan premiums and considering surcharges for unvaccinated employees to encourage employees to get vaccinated or to account for potential increased costs of treating employees who become seriously ill due to COVID-19.

May 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).

As discussed above, some state and local laws require leave for vaccination.

May 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.

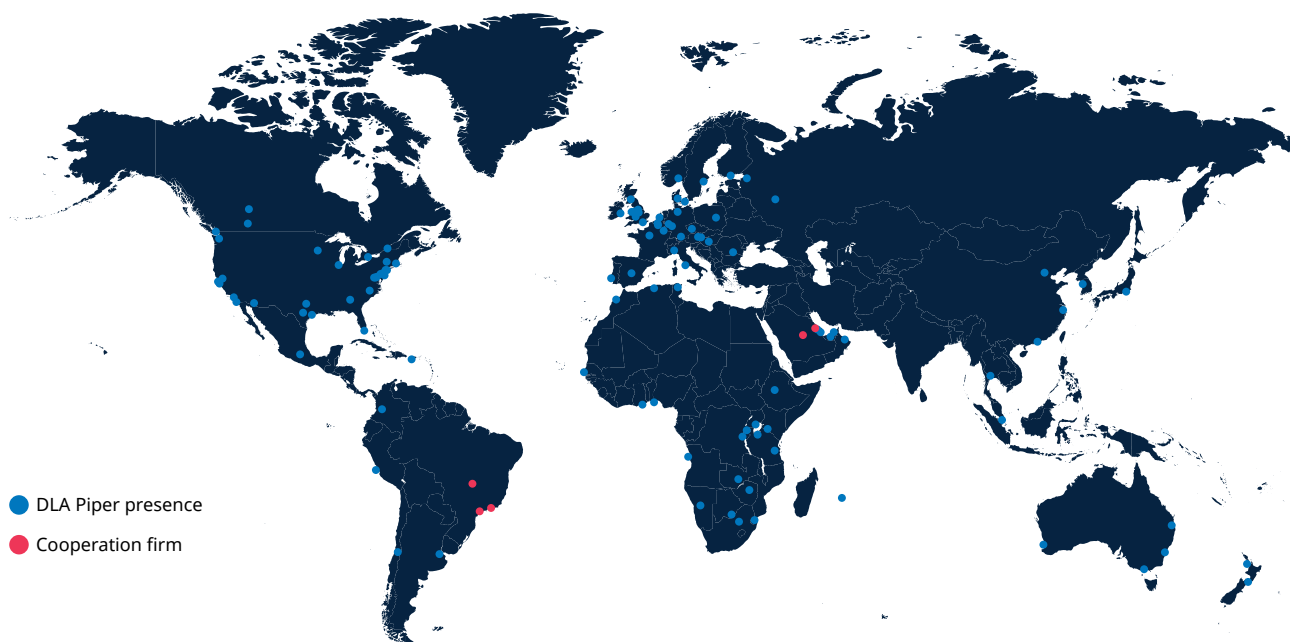
Depending on the type of information collected and the manner in which it is used and recorded, additional legal obligations may apply such as privacy notices prior to collection, recordkeeping and retention requirements, and employee confidentiality.



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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