

## Vaccinating employees for COVID-19 in 6 questions

As the vaccination campaign against the coronavirus is going on in Luxembourg but also in neighbouring countries, the working population is now also being invited to get its injection. The worldwide COVID-19 pandemic has imposed exceptional sanitary measures and working conditions on our companies for more than a year. The marketing of vaccines against the virus is now in full swing, and although caution is still called for, some companies are gradually considering a return to work. In this context, we are going to answer the various questions that employers are asking themselves.

### I. Can employers oblige their employees to get vaccinated?

Compulsory vaccination is a matter for the law. So only the legislator sets the conditions for vaccination and is therefore the only one who can really impose an obligation to get vaccinated. **As the law currently stands, vaccination against COVID-19 is not compulsory.** Therefore, **no company is allowed to impose it on its employees**, irrespective of the sector of activity.

Vaccination in Luxembourg as in neighbouring countries **is at this time recommended but in no way compulsory**, thus leaving everyone free to choose.

In more concrete terms, vaccination is not part of the employer's role, who can only impose on the employee obligations that arise from the performance of his or her duties under the employment relationship. Consequently, employers cannot require employees to be vaccinated.

Finally, vaccination is an intrusive medical act relating to the health of each individual. It is therefore an act of the private sphere. Therefore, for an employer to impose it on his employees **is a violation of the right to control one's own body and the right to physical integrity**, both of which are fundamental freedoms.

However, the Act of 18 October 2021 gives employers an opportunity to **introduce the Covid Check scheme in the company**, either overall, or for specific places. Thus, if the employer wishes and in order to protect the health and safety of the employees, the entry of the company can be exclusively reserved for employee who can show :

- a vaccination certificate with a QR code ; or
- a certificate of recovery with a QR code ; or

- a Covid-19 test certificate showing a negative result, provided with a QR code or certified by one of the competent persons according to the law,
- or a self-diagnostic test for Covid-19 carried out on the spot, with a negative result, which will be allowed until 31 October 2021

The introduction of a Covid check within a company is an option and **not an obligation**. The employer therefore has the choice of whether or not to opt for the Covid check scheme.

## II. Can employer set up a vaccination campaign?

Employers are required to take the necessary measures to ensure the safety and physical and mental health of their employees. They can therefore encourage their employees to be vaccinated and even promote the vaccine within the company by organizing a vaccination campaign at the workplace. Some companies have also introduced screening tests or are already organizing vaccination sessions to combat the flu virus. In such a case, however, it will be important to abide by a fundamental principle: **the freedom of each individual to accept or not to accept the vaccination**.

## III. Does the employee have special leave to be vaccinated during working hours?

**No special leave** is currently granted in Luxembourg for people to go and get vaccinated. Employees will consequently have to take time off work or choose a time slot outside working hours.

There is nothing to prevent employers from granting an exemption from duty to their employees for the time they need to go to a vaccination centre, however.

## IV. Can the employer ask for proof of vaccination so as to plan a gradual return to work?

No, **medical secrecy** must be fully respected and employees are under no obligation to provide such proof to their employer, nor any other negative screening test. Thus, **an employer cannot ask the employee for proof of vaccination**.

Luxembourg's labour legislation stipulates that employers must "ensure the health and safety" of their employees, but there is nothing in the statutes that obliges a recruit or an employee already in the employer's employ to accept any kind of medical treatment.

Furthermore, in companies in which the Covid check scheme applies, employees can be exempted from mask wearing and social distancing obligations. However, the other Covid-19 pandemic control measures (e.g. ventilate premises, disinfect surfaces, wash hands, avoid physical contact) must in fact



continue to be applied to limit the spread of the virus. The employer is required to comply with these rules and to ensure that the employees apply them.

#### V. Can employers record the vaccination data of their employees?

As already mentioned, the choice to be vaccinated is a personal decision. Like other medical data, vaccination data **are personal health records** that are extremely **sensitive and confidential**.

According to the General Data Protection Regulation (GDPR), an employer may not process health data, unless the law provides for an exception or the employee concerned gives his or her free and explicit consent. This legal basis does not exist at present. On the other hand, as regards the employee's consent, as an employment relationship implies a relationship of authority, such consent is in fact never completely free.

Employers are therefore **prohibited** from keeping a **list of vaccinated and unvaccinated employees**.

If asked whether they have been vaccinated, employees are under no obligation to answer. If they provide this information nonetheless, employers **are not authorized to record such data** and it is strictly forbidden to attach any consequences thereto such as an adjustment of the employee's working hours or an obligation to work from home.

Finally, if an employer tries to obtain such data during a job interview, for example, the candidate will have the right not to respond in the name of privacy.

As part of the implementation of the Covid Chek, an application called "CovidCheck.lu" is made available by the Luxembourg authorities to perform the Covid check and scan QR codes, which does not involve any data processing within the meaning of the GDPR. The application only reveals the full name and a green or red result. The result is displayed for a few minutes and then disappears without being stored.

#### VI. Can the employer sanction an employee who refuses to be vaccinated?

As vaccination remains free, **the employer cannot sanction** or dismiss an employee who refuses to be vaccinated, even in the health sector. Such a dismissal could be qualified as abusive and/or discriminatory.

In more concrete terms, as already mentioned, vaccination is not part of the employer's role. Therefore, employees who refuse to get vaccinated, whether by the company or otherwise, cannot be sanctioned by the employer for this refusal, nor can they be forced to remain in telework until they are vaccinated, which would be tantamount to imposing vaccination.



Similarly, a worker who refuses to be vaccinated **cannot be disadvantaged in any way** compared with others. Conversely, the employer may not reward employees who has been vaccinated (for example, by granting them a specific bonus).

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