

Newsletter

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“EMPLOYERS RIGHT TO DEMAND VACCINATION FROM EMPLOYEES”

The Baltic States are making serious efforts to contain and control the Covid-19 virus to protect the people and economies. All 3 countries have developed and adopted their unique approaches which they believe will lead to best outcomes. Since the virus and pandemic is still rather new and the legislation tends to always be a “*step behind*” of the real-life events then there are a lot of debates about what can be done by employers to protect their employees and businesses against the virus. To give our readers a better overview of the situation in the Baltic States, LEA DELL law offices have prepared a comparison of the most relevant aspects and restrictions in work relationships during these difficult times.

In all three countries there are possibilities for employers to gather medical data, but the regulations for doing so are very different

EMPLOYERS RIGHT TO DEMAND MEDICAL DATA FROM IT'S EMPLOYEES

In Estonia, the employer does not have the right to demand medical data, including data about vaccination, without the necessity for employees to be vaccinated. The employer of more than 30 employees may present an inquiry to the Health Insurance Fund about the vaccination of one's employees. The Health Insurance Fund may reply in three ways – 1) under 50%; 2) a specific percentage between 50% and 80% or 3) over 80% of employees are vaccinated. This inquiry is often used to consider the necessity of inviting a medical professional to administer vaccinations at the workplace.

However, the employer has the right to inquire about whether the employee is vaccinated when a risk assessment of working environment has indicated vaccination to be a proportional measure for increasing safety in the working environment.

In case the employee stays or is permanently at the workplace in Latvia, then the employer has the right to request and process information obtained from the employee on the employee's compliance with the status of a fully vaccinated person or a person who has recovered from the virus (including the period of validity of the certificate if the person has the recovery certificate), as well as Covid-19 test results. The person must present the relevant interoperable certificate or test result at the request of the employer. The employer should exercise his rights to ensure appropriate labor protection requirements and should not exercise them, for example, in relation to teleworkers.

If an employee has been at work and has been diagnosed with Covid-19, the employee should immediately inform the employer - as the circumstance that may adversely affect the normal course of work in the company. From 21 October to 14 November 2021, an employee who is working in person (including fully vaccinated and recovered from the virus persons) must certify in writing to the employer upon arrival at the workplace that he/she has no acute signs of a respiratory infectious disease and are not obliged to observe isolation, home quarantine or self-isolation and are not known to have they have been in direct contact with a person infected with Covid-19.

In Lithuania the employer generally does not have the right to demand from its employees to disclose medical data about themselves. However, on 16th of July, 2021, due to coronavirus pandemic the Government of the Republic of Lithuania has amended the resolution No. 544 *"In regard to the list of jobs and activities in which only workers who are subsequently periodically tested for infectious diseases are allowed to work, approving the list of state-level emergencies and / or quarantines and approving the procedures for medical examinations of the workers"*, which establishes the list of employees required to:

- a) get vaccinated; or
- b) be periodically tested; or
- c) provide sufficient evidence that the employee was diagnosed with the infectious disease (coronavirus

included) and has recovered from it. Therefore, the employee has natural immunity.

It should be noted that even if the national legislation imposes an obligation on the employer to collect health data, the employer must also comply with the other requirements of the GDPR. One of the requirements is to process as little data as possible. Therefore, it is recommended to the employer to require from the employees only to show the relevant documents without requiring submitting the hard copy of the documents. The employer could only keep the employee's confirmation of compliance with one of the criteria (vaccinated, infected with Covid-19 and recovered or tested), without keeping any record of documentation, as well as the name, signature, date of approval and the period (date) after which the employee will again be obligated to show the relevant documents to the employer. The employer must ensure that only a specific person responsible for keeping such records has access to this data. These records should be kept for a pre-determined period, but not beyond the end of the employer's obligation to process such data or the lifting of the state emergency and/or quarantine. The employer must also inform employees about such data processing, its purposes, deadlines, etc.

Meaning that employees, who are listed in the No. 544 of the Government of the Republic of Lithuania are obligated to disclose relevant information about their health. The employees that are not listed in the resolution are only required to inform employer if they have contracted coronavirus (or any other infectious disease). In that case, the employee must inform the employer immediately.

HOW IMPORTANT IS THE WORKPLACE IN TERMS OF DEMANDING VACCINATION?

In Estonia the enforcement of a vaccine mandate for employees is dependent on a risk assessment of working environment. The risk assessment must identify and assess all hazards in the working environment. The employer must establish the nature, magnitude and duration of an employee's risk of infection with regards to all jobs that involve a possible contact with a biological hazard (e.g. Covid-19). Employees working in a higher-risk environment such as a nursing home or hospital may be subject to a requirement of vaccination more often than those for example working in separate well-ventilated rooms, due to increased hazards at the workplace.

The requirement for vaccination in Latvia is related to the employee's workplace and particular job responsibilities. During the emergency situation, from 15.11.2021, employees of state and local government institutions (including capital companies) may perform their duties only if they are in possession of a vaccination or recovery certificate. For those working in the private sector, the employer provides teleworking opportunities if the characteristics of the job permit such working model. In the case of full-time on-site employed employees, the employer carries out an evaluation (considering job responsibilities, on-site working conditions, risks of infection, etc.) and determines which employees, volunteers and outsourced workers need a vaccination or recovery certificate. As of 15.12.2021. employees, including volunteers and outsourced persons, for whom the employer did not require a certificate but who perform on-site working duties, will also need to be in possession of a vaccination or recovery certificate.

The requirement to be vaccinated, tested or to have natural immunity In Lithuania depends on the job duties of the employee. As mentioned, in the resolution No. 544 lists groups of employees who must comply with strict measures to prevent the spread of the coronavirus. For example, all employees at healthcare institutions, schools and daycares, public transportation and etc. must undergo preventative measures of provide the employer with a certificate confirming the possession of natural immunity form coronavirus.

VACCINATION OF THE EMPLOYEES – CAN IT BE MADE MANDATORY

In Estonia an employer may have the right to require full vaccination from their employees pursuant to a risk assessment of working environment that has indicated vaccination to be a proportional measure for increasing safety in the workplace. This quality of proportionality is analogical with the proportionality test known in European Union law, meaning that 1) there must be a legitimate aim for vaccination, 2) it (vaccination) must be suitable to achieve said aim, 3) it must be necessary to achieve said aim without there being a less onerous way of doing it, and lastly it must be reasonable considering the competing interests at hand. Due to the interference with the right to bodily integrity, vaccination is to be treated as *ultima ratio* (i.e. last resort) measure. This means that other, less interfering, but at least as effective measures (e.g. separation of employees, working from home etc.) must be considered before mandatory vaccination. It is

to be said that in no case may vaccination be physically involuntary.

Latvia has declared emergency from 11.10.2021 – 11.01.2022, and during this period the employer must evaluate the job responsibilities and working conditions of each employee, including volunteers and persons with outsourced contracts, who perform their work in the workplace, determining the risk of infection and the potential risk posed to other people's health. Based on the evaluation of those risks of infection in the workplace and considering the principles of proportionality, legality, and equality, the employer shall require the employee to have a vaccination or recovery certificate if any of these conditions is met:

(a) if the employee is in direct contact with customers, comes into physical contact or is permanently closer than two meters from the customer during the performance of his/her duties, or several employees are in long-term contact, physical contact or are permanently closer than two meters during the performance of their duties;

(b) if the employee has an increased risk of infection through direct contact with a large number of persons of which the status of their health is unknown;

(c) if the employee's on-site duties are critical to the functioning of the society, as well as to the continuity of the business.

Employees whose job characteristics permit them to work remotely shall be provided with telework opportunities and there shall be no reason to request a certificate.

In Lithuania the employer cannot demand employees to be fully vaccinated. In cases when employees are obligated to take measures against infectious diseases, one has a few options, i. e. to be fully vaccinated, to be periodically tested or to prove having natural immunity after recovery from the virus.

In Estonia and Latvia vaccination can be made mandatory in the workplace if certain requirements are met.

TERMINATION OF EMPLOYMENT CONTRACT IN CASE OF NOT VACINATING

In Estonia it is possible for the employer to terminate an employment contract in case of not vaccination only if a prior risk assessment of working environment has

been conducted and it has concluded vaccination as a proportional measure for ensuring safety in the workplace. If the risks discovered in the risk assessment of working environment can be mitigated with other measures, then vaccination is not necessary. Considering the mentioned prerequisites (the vaccine mandate being *ultima ratio*, warning the employee about the terminating etc.) for mandatory vaccination at the workplace, the employer can terminate the employee's employment contract pursuant to the Employment Contract Act due to non-suitability for the position.

Latvia has decided for a different approach. Meaning that in the absence of a vaccination or disease certificate, an employee may be suspended or given downtime without having to pay salary. The employer has the right to terminate the employment contract if the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason or if the employee has grossly violated labor protection regulations and has jeopardized the safety and health of other persons. Furthermore, on an exceptional basis, an employer has the right, within one month, to bring an action for the termination of employment relationship in court in cases not referred to in the general grounds for the termination if he or she has an important reason (a condition which does not allow the continuation of the employment relationship on the basis of considerations of morals and fairness). The question of whether the absence of vaccination is a ground for terminating the employment relationship shall be assessed on a case-by-case basis.

Lithuania has come up with its's own unique regulation. Meaning that if the employee is not vaccinated, refuses to be periodically tested and has not contracted coronavirus (thus, does not have natural immunity), the employer must suggest for such employee to work remotely or transfer the employee to work in the other area at the same workplace, where the employee could legally perform his or hers work duties without posing a risk for other colleagues or costumers. If none of the above is possible, the employee must be suspended without receiving the salary during the time of suspension. The employment contract cannot be terminated solely since employee is not vaccinated, tested or does not have natural immunity. However, if employee grossly violates labor protection regulations, he or she may be dismissed for doing so.