

**INTERNATIONAL REGULATION OF EMPLOYER COVID-19 VACCINATIONS:
VARYING APPROACHES IN AFRICA, THE AMERICAS, ASIA-PACIFIC, AND EUROPE**

As labor and employment attorneys from countries across the world, we noticed a striking similarity in the questions our respective clients have regarding COVID-19 vaccinations in the workplace. Can employers mandate that employees get vaccinated? Can employers require proof of vaccinations? What employment and privacy regulations apply? Although the concerns of and challenges faced by businesses are largely the same, the regulations on these issues in each country vary. We have summarized below a sampling of the laws in a diverse range of countries on some common questions.

Some themes emerged. Currently, vaccinations in most countries are voluntary, although some countries permit employers to mandate vaccination. Every country recognizes that employers must recognize exceptions to vaccination of persons in certain protected classes, such as persons with disabilities that prevent them from being vaccinated without serious health consequences. Likewise, most countries recognize that there are important privacy concerns in collecting information from employees about their vaccination status. The differences in approach among various countries depend in part on the rate of infection in the country and existing jurisprudence. For example, and not surprisingly, Europe’s limitations on collection and disclosure of vaccination by employees is much stricter than in the U.S.A. Read on for more detail.

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AFRICA

Nigeria

1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?

Presently, there is no governing statutory law in Nigeria regulating the employer's obligation regarding vaccination of its workforce. There has also been no directive or circular from the Federal Government of Nigeria or any of its agencies mandating vaccination of employees in different sectors of the economy and by extension, her citizens.

In fact, the published circulars with respect to the COVID-19 vaccine focuses on its availability to the public however with an order of priority targeting the frontline health workers, laboratory staff, COVID-19 rapid response team, etc. as the first recipient of the vaccine.

Notwithstanding the above, the Federal Government of Nigeria has made provision of vaccines for all her citizens in the various states within the country at no cost. Furthermore, the **Lagos State Coronavirus Pandemic Emergency Law, 2021** provides for the administration of vaccines in Lagos State (which is the economic hub and second most populous state) in Nigeria and the corresponding fine for failure to adhere/comply with the law. Section 16 of this law provides the following

- i. The administration of vaccines in each state shall be regulated and supervised by the Governor.
- ii. Only State hospitals and government accredited private hospitals shall administer vaccines to individuals;
- iii. Any person, or corporate body who contravenes the provisions of this section commits an offence and is liable on conviction to a term of five (5) years imprisonment or a fine of ₦5, 000,000.00 (Five Million Naira Only) or both.

This law however does not mandate citizens to get vaccinated. It only makes provisions for the process of administering the vaccine and streamlined the administration of vaccines to the public sector and only private hospitals approved by the Government.

2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?

- a. **If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**
- b. **If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**
- c. **If so, who would be responsible for the vaccine costs?**

As at the time of preparing this newsletter, there is no legislation enforcing compulsory vaccination in the workplace. Furthermore, getting vaccinated is a matter of choice except the nature of an employee's job requires them to be vaccinated like the health workers.

Employers can however educate and encourage the employees on the need to be fully vaccinated to ensure a safe working environment for all employees and to further enforce workplace health and safety measures.

Notably, except the contract of employment for new recruits provide that there is a need for an employee to be vaccinated before joining the workforce of an organization or the Human Resource policies/ workplace rules, practices and code of conduct provide same, an employee cannot be dismissed or suspended arbitrarily for refusal to get vaccinated. Thus, where applicable, an employee has the contractual obligation to adhere/comply to the health and safety measures established in the workplace by an employer and failure to comply is a legal basis for termination of employment or suspension.

In addition, where a mandatory term for vaccination is included in an employee's contract of employment prior to employment or varied at a later date, it is could be assumed that the principle of informed consent has been granted in such instance. As such, an employer can mandate the employee to get vaccinated, especially to shield employers from claims of negligence and occupational liability as the **Employees' Compensation Act, 2010** defines an occupational disease as a disease that is contracted in the course of an employment or due to exposure to risk factors at work which includes viruses.

An employer can also sanction an employee who has willfully refused to comply with the lawfully recognized safety measure in the prevention of the COVID 19 virus within the workplace and in extreme cases failure to comply with the rules and regulations of an organization including regulations regarding Covid protocols may be a ground for terminating an employee's employment.

Furthermore, the **Employees' Compensation Act, 2010**, provides for the need for adequate compensation for an employee exposed to any risk (inclusive of health hazards; COVID 19 virus) contracted while in the course of an employment.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

Presently, there is no statutory /enabling law mandating the compulsory vaccination of employees in the workplace. Employees are however encouraged to take the vaccines. Various employers' partner with Primary health care centers/locations where the vaccines are being administered to get their employers vaccinated. What currently operates where such partnership exists is that the centers allot time slots for the employees to get their vaccines and the employers ensure compliance by excusing the employees from work at the allotted time to enable them to get the vaccines. Certificates stating the date, time and detail of the vaccine given are issued after administering the vaccines. However, taking the vaccine is a matter of choice and at the discretion of an employee and in the absence of any law mandating employees to get vaccinated, employers do not require proof of receiving the COVID-19 vaccine from the employee for now. This position may change if the Government enacts any law mandating all citizens to get vaccinated.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

The Nigeria Data Protection Regulation, 2019 (NDPR) is the main data protection regulation in Nigeria. It defines sensitive personal data as data relating to religious or other beliefs, sexual orientation, health, race, ethnicity, political views, trades union membership, criminal records or any other sensitive personal information.

Consequently, any information obtained within the course of employment from an employee as it pertains to his/her medical record can be categorised as 'Sensitive Personal Data/Information'. This also applies to all medical records relating to COVID 19 vaccination.

Thus, an employer is not permitted and is prohibited to use such data/information against the employee as such information is derived without prejudice. Therefore, this data/information cannot be used to take decisions or actions against an employee.

Consequently, such information (in this case data pertaining his health) is an employee's personal data and cannot be used without the explicit consent of the employee. An exception to this is where such data is required to protect the employee or the data is required for reasons of substantial public interest.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

There are none applicable as at the date of this publication.

Nonetheless, some laws have been implemented to curtail the spread of COVID 19 in Nigeria and the necessity of vaccination of persons in the country, which employers should consider. Some of these laws include the following:

- i. **Infectious Diseases Act, 2020**, which is targeted at the prevention of infectious diseases and the vaccination of all persons in the country.
- ii. **Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020** aimed at preventing and curtailing the further spread of the virus within Lagos state.
- iii. **Lagos State Coronavirus Pandemic Emergency Law, 2021** (stated above) which is also aimed at combating and stopping the spread of the Coronavirus 'pandemic' in Lagos State.
- iv. **Federal Government Of Nigeria COVID 19 regulations, 2020** targeted at preventing and curtailing the effect of the COVID-19 pandemic on economic activities and livelihood of citizens in Nigeria.

The common thing that all these laws possess is that they seek to curtail the spread of COVID-19 and flatten the curve. The laws put restrictions on all social gatherings and also reduced the number of workforce required to be physically present at their jobs per time.

Employers are encouraged to permit their employees' work virtually by virtue of these laws.

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THE AMERICAS

Brazil

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

Yes. Article No 3 of the Law No 13.979/20 states that COVID-19 vaccines are mandatory for the whole population. Currently the vaccines are not available for companies or individuals to buy, being provided solely by the government. States and municipalities have their own schedules of vaccination.

- 2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**

As a rule, yes. In Brazil the Federal Supreme Court, based on the Law n° 13.979/2020, has stated that vaccination is mandatory. However, an employee may refuse receiving it if he or she proves that due to medical conditions, there is a recommendation for not having it.

- a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**

Yes. Mainly due to medical conditions.

- b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**

The employer should try to keep non-vaccinated employees working remotely until they are vaccinated. In case the role performed by the non-vaccinated employee cannot be performed remotely the employer can either terminate the employee without cause or keep him at home until he/she is vaccinated, with payments. In Brazil, employers are not allowed to suspend employees without pay due to the lack of vaccination.

- c. If so, who would be responsible for the vaccine costs?**

As previously stated, in Brazil vaccination is free for the population.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

Yes, but only if there is a risk to the employees', applicants' and/or third-party's lives due to the nature of their activities (with higher exposure), especially considering the current scenario of the Covid-19 pandemic in Brazil. In this regard, the legal basis for the collection of the vaccination status would be based on the intent to protect the employees', applicants' and/or third-party's lives in the work environment as set forth in Article 11, II, "e", of the Law No. 13,709/18 and its further amendments ("Brazilian Personal Data Protection Law" or "LGPD"). If such risk is not present, it would be advisable not to ask for such information as it would not have the proper legal basis for it and could violate employees' and/or applicants' privacy rights

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

Yes, LGPD sets forth some limitations on this matter as described herein. Vaccination status is considered health information, and as such, sensitive personal data under article 5, II of the Brazilian Personal Data Protection Law, with limited scenarios in which it could be asked for by the employer. In general, asking for employees' vaccination status (including the refusal of taking the vaccine) would have to be considered relevant, proportionate and justifiable under legal grounds. The main points of concern here would be making sure that the principle of necessity (article 6, III, LGPD) - which establishes that processing of personal data must be limited to the minimum necessary for the fulfillment of its purposes and shall be proportional and not excessive – and also the principle of non-discrimination (article 6, IX, LGPD), prohibits to process personal data in an abusive and discriminatory way, given that non-vaccinated individuals could be discriminated in the workplace, are present when asking for the vaccination status.

Therefore, if there is a risk to the employees', applicants' and/or third-parties' lives due to the nature of their activities which could expose them when working on the field or on the company's facilities, the employer could ask for the vaccination status in order to protect the employees' and/or third-party's lives in the work environment based on Article 11, II, "e", of the LGPD.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

Even though Brazil has a national Law stating that vaccination is mandatory, there are other rules that may vary depending on the locality in which the company is established. It is highly recommended that before taking any steps on employee's COVID-19 vaccination, the companies contact their external counsels for a deep analysis on the local rules.

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Canada

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

Canada is divided into ten provinces and three territories. For the provinces and territories that have placed obligations on employers with respect to vaccinations, at the time of writing, there are two main approaches:

1. British Columbia, Alberta, Saskatchewan and Manitoba have legislated changes to their respective existing employment standards legislation to provide workers up to three hours of paid time off to obtain each dose of their COVID-19 vaccine. Generally, workers are also entitled to protective unpaid leave if they need longer to obtain their vaccine or need to accompany dependent family members.
2. Ontario, Nova Scotia, and Prince Edward Island have enacted new legislation where employees are entitled to paid time off (for between three and six days) for COVID related absences. The permitted absences generally include obtaining a vaccination. Employers in these provinces can then apply for reimbursement from the government for up to a maximum dollar amount (between \$160 and \$200 per day).

The vaccine is free in Canada. Employers are not required to pay anything towards the cost of administering the vaccine. The goal of all the aforementioned legislation is simply to facilitate employees getting to their vaccination centres.

- 2. Can employers in your country mandate that its employees be vaccinated against COVID19 in order to be employed with the employer?**

Employers may be able to mandate that certain employees be vaccinated, but this would require the employer to show strong grounds why vaccination is necessary for the safety of staff and customers, and could not be accomplished by making other working arrangements or by personal protective equipment. For example, even some provincial health authorities are not mandating that their frontline staff (including nurses) receive the vaccine, only strongly recommending it.

- a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions, or religious belief)?**

If the employer could establish such a policy is necessary based on its circumstances, it would still need to accommodate any employee with disabilities (including medical issues, pregnancy, and religious beliefs) up to the point of undue hardship (to comply with obligations pursuant to the human rights legislation of its province).

- b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**

Unless contracted for in the employment contract, in Canada, a suspension can amount to a constructive dismissal. However, where the employer meets the threshold to legally enact a mandatory vaccination policy, a short suspension with pay may be permitted

without being found to be a constructive dismissal, subject to whether there was a human rights ground to refuse the vaccine.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

If the employer can establish that a mandatory vaccine policy is required for the employee, the employer can ask for basic information to prove the employee received the vaccine. The employer must be careful to protect the privacy rights of the employee and comply with all privacy legislation.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

Yes. Generally, employers should collect only the minimum amount of data as necessary and then comply with each province's privacy legislation (or absent any, then the federal privacy legislation) for the use, storage, and destruction of personal information.

Generally, it appears most employers are not attempting to implement a mandatory vaccine policy for employees. Surveys are indicating greater than 80% of Canadians intend to be vaccinated and vaccine hesitancy levels are declining. This suggests that employers are content to avoid the potential human rights and privacy issues of attempting to implement such a policy and would simply prefer to wait for employees to get it themselves.

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Mexico

1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?

To this day, this National Vaccination Policy set forth by the Ministry of Health, entirely controls the import, distribution and administration of COVID-19 vaccines in Mexico. Although the abovementioned agreement, issued last January, established the possibility that state-level authorities, as well as public and private healthcare providers could import vaccines, these authorizations have not been granted. The administration of vaccines is coordinated by the Ministry of Health with state-level health authorities and is free of charge pursuant to the National Vaccination Policy.^{1 2}

Article 132 of the Federal Labor Act³ establishes that employers have an obligation to comply with regulations and official Mexican standards regarding safety and health, comply with the provisions established by the authorities in the event of a health emergency, and

¹ General Health Act, Article 157 bis 1 to bis 16.

² Mexican Official Standard NOM-03655*2-2002. "Prevention and control of diseases, administration of vaccines..."

³ Federal Labor Act, Article 132, sections XVII; XIX and XIX bis.

provide workers with the items specified by the authorities in order to prevent diseases in the event that a healthcare emergency is declared. Therefore, the state is responsible for administering the vaccine, and employers are obliged to comply with the guidelines issued by the authorities, regarding the staff protection measures that must be implemented in the workplace and abide by the measures restricting their operations and activities.

Article 134 of the Federal Labor Act⁴ establishes, among other worker obligations, compliance with the provisions set forth in the regulations and Official Mexican Standards regarding safety, health and the working environment, as well as those set forth by employers for their safety and protection, the obligation to attend medical examinations provided for in the internal regulations and other company rules, in order to verify that they do not suffer from any contagious work-related disease.

On the other hand, the Safety, Hygiene and the Working Environment Federal Regulation establishes additional obligations for both workers and employers in terms of occupational health and noncompliance in the case of the employers, leads to the imposition of important fines, as well as an increase in the Social Security Occupational Risk Insurance premium, which also has a significant economic impact on employers. Employer obligations include conducting an occupational health and safety diagnosis as well as a risk analysis; putting together an occupational health and safety program; arranging for workers to receive medical examinations; notifying the Ministry of Labor and Social Security of accidents in the workplace (including COVID-19 cases) and deaths resulting from accidents. For their part, workers must comply with the control measures set forth by the employer to prevent risks. It is of essence, to detail the actions related to the protection of workers' health, such as the administration of medical examinations, COVID-19 detection tests and process to limit the access to the premises to non-vaccinated employees in the company's internal rules and collective bargaining agreements, including the possibility of requesting information on vaccination from the employer.

2. **Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**
 - a. **If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**
 - b. **If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**
 - c. **If so, who would be responsible for the vaccine costs?**

There is no regulation under the Mexican Federal Labor Law specifically for vaccines, but there is the obligation for employees and employers to comply with safety measures due to a pandemic or sanitary contingency. Therefore, there are no exceptions.

We consider that employers have a justified cause of termination but not a cause for suspension of the employment relationship, unless it is agreed between both parties.

⁴ Federal Labor Act, Article 134.

The cause of suspension contained in the Federal Labor Law (section 42, I) is when the employee has a contagious disease or when the authorities declare a sanitary contingency.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

In light of the requirements and risk of fines under the Safety, Hygiene and the Working Environment Federal Regulation, obtaining information on the worker's vaccination status is valid in Mexico, as long as this is provided for in the company's Internal Labor Regulations and policies, thereby guaranteeing the confidentiality of information regarded as sensitive under the Federal Law for the Protection of Personal Data in Possession of Private Parties⁵ ⁶, which requires the worker's express consent for its handling, and states that said data can only be stored for the minimum indispensable period and under conditions of maximum security, the sensitive information that has been kept on file by the employer.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

Yes, in addition to the requirements discussed above, the possibility of transferring sensitive personal data must be included in the company's Privacy Notice; having employee's consent. Exceptions to the obligation to obtain workers' consent for the transfer of information are: when the transfer is necessary for prevention purposes or a medical diagnosis, the provision of health care, medical treatment or the management of health services, or transfers made in the interest of public safety.

Therefore, the processing of sensitive personal data by the company, such as that derived from vaccination is limited by law, as well as its transmission except in the above-mentioned cases such as the management of healthcare services in the interest of public safety. Based on the foregoing, we consider that an official order issued by the authorities would be required in order to transfer to third parties the information regarding vaccination.

Finally, it is important to point out that each state has established its own guidelines regarding the management and control of the pandemic (abiding by the general guidelines issued by the federal government); such is the case of Mexico City's government, which has made it mandatory for companies with 100 workers or more to conduct COVID-19 detection tests to 10% of their staff that is actually working on the premises.⁷

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⁵ Federal Law for the Protection of Personal Data in Possession of Private Parties, Articles 3, 9, 12 and 13.

⁶ Federal Labor Act, Article 51 f XII, 423 f VIII.

⁷ Mexico City Government Agreement, Official Daily Gazette of the CDMX, Dec 18 2020.

USA

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

Employer obligations in the United States are governed by a combination of federal (national), state and local (city and county) laws. There is not a specific statute that generally requires or regulates employer vaccinations of its workforce. Existing statutes protecting employees with disabilities or sincerely held religious beliefs, and in some cases pregnancy, can impact employer vaccination programs. For companies with unionized workforces, mandatory vaccination programs are likely a mandatory subject of bargaining with the union.

The federal Occupational Health and Safety Administration (OSHA) recently issued Emergency Temporary Standards (ETS) regarding COVID19 for healthcare services. The ETS require employers of persons providing healthcare services and certain healthcare support services to provide support and paid time off for vaccination and recovery. The ETS does not mandate vaccination.

Currently, the COVID19 vaccine in the United States is free.

- 2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**
 - a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**
 - b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**
 - c. If so, who would be responsible for the vaccine costs?**

As of the date of this article, there is not a specific federal law that prohibits employers from mandating COVID19 vaccines for their workforces. One state, Montana, prohibits discrimination against employees, including refusing to employ someone, based on their vaccination status. Only certain nursing homes, assisting living facilities and long term care facilities are exempted. A number of lawsuits have challenged mandatory vaccination requirements and employee terminations for refusing to be vaccinated on the theory that US Food & Drug Administration (FDA) regulations require that users of products approved under an emergency use authorization (EUA) be notified that use of the product is voluntary. Recently, a federal court in Texas dismissed such a lawsuit holding that these FDA regulations do not apply to private employers. *Bridges v. Houston Methodist Hospital*, Civil Action H-21-1774 (USDC Texas June 12, 2021). The United States Department of Justice issued an opinion in July stating that the EUA status of the vaccine does *not* prevent private entities from mandating vaccines. <https://www.justice.gov/olc/file/1415446/download>

On May 28, 2021, the federal agency that enforces various discrimination laws, the Equal Employment Opportunity Commission (EEOC), issued guidance on mandatory vaccination and incentive programs. The guidance clearly states that during the pandemic, employers *can* mandate that employees receive the COVID 19, subject to exceptions such as required accommodations for persons with disabilities (see <https://www.eeoc.gov/wysk/what-you->

[should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws) at K.5.) In addition:

- Pregnant employees who decline to be vaccinated may be entitled to certain accommodations (such as telework or other job modifications) if the employer provides such accommodations to other employees with similar limitations as the pregnant employee (see K13);
- Employers can offer incentives to employees to get vaccinated (see starting with K14), but to avoid issues under the Genetic Information Nondiscrimination Act (GINA), the best practice is to have the employee receive the vaccine from a third party (i.e., pharmacy, government vaccination site) to avoid the employer collecting medical information from the pre-vaccination questionnaire, and if the employer offers the vaccine itself or through an agent, the vaccine incentive should not be “so substantial as to be coercive,” because the pre-vaccine questionnaire requires disclosure of medical information.
- Employers can’t offer an incentive to the employee to have the employee’s family member to be vaccinated by the employer or its agent, because this would involve providing an incentive in exchange for the receipt of family medical information of the employee which is not permitted under GINA (see K20).

This is only guidance from the EEOC. It is not law. The guidance also does not preempt state or local law, nor does it address the issue of the FDA regulations requiring notice to individuals that use of a product authorized under an Emergency Use Authorization is voluntary. The court in *Bridges* noted the EEOC guidance in holding that employer mandatory COVID19 vaccination programs do not violate public policy, although the court recognized that the guidance is not binding.

Employers in the USA cannot refuse to employ an employee who is entitled to a reasonable accommodation under the Americans with Disabilities Act because of a qualifying disability that prevents the employee from being vaccinated or under Title VII of the Civil Rights Act of 1964 because the employee’s sincerely held religious belief, practice, or observance prevents him from taking the vaccine, unless the accommodation would cause an undue hardship. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (K.5, 6 and 12).

The EEOC also clarified in December 2020 that when the employer mandates employees to be vaccinated, and the employer requires an employee to answer questions as part of a pre-vaccine medical inquiry or using an agent to ask those questions, the employer is engaging in a medical inquiry under the ADA, and such inquiry must be job related and consistent with business necessity. This means that the employer must show that if the employee does not answer the questions and does not receive the vaccine, the employee will pose a direct threat to the health and safety of himself or others. If the employer sends the employee to a third party for the vaccine (such as a pharmacy or a health care provider who does not have a contract with the employer), then the ADA is not implicated by the third party’s questions. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (K.2) If the employer’s vaccine program is voluntary, then the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. [42 U.S.C. 12112\(d\)\(4\)\(B\)](#); [29 C.F.R. 1630.14\(d\)](#). If an employee chooses not to answer the questions, the employer cannot retaliate against the employee.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (K.2.)

Note that some states prohibit adverse employment actions against employees who take time off to receive or recover from the vaccine. See e.g.

https://www.governor.wa.gov/sites/default/files/proclamations/proc_21-08.pdf

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

Yes, under federal law, employers in the USA can require employees and applicants to provide a copy of their vaccine card or other proof of vaccine.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> Such documentation is not a “disability related inquiry” under the Americans with Disabilities Act. However, such documentation is a confidential medical record and must be kept confidential.

Note that employers in Montana cannot discriminate against employees who are not vaccinated and employers cannot require a vaccine passport. A number of other states, including Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Montana, North Dakota, South Carolina, South Dakota, Texas and Wyoming have banned vaccine passports while not expressly prohibiting employers from requesting that its employees disclose their vaccine status. Employers in those states should carefully review those laws to ensure compliance. In Montana, employers who request proof of vaccine status should be sure to carefully document the legitimate nondiscriminatory grounds for any discipline or other adverse employment action related to an employee or applicant, to avoid a discrimination claim.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee’s vaccination or (ii) the employee’s refusal to be vaccinated?

Yes, proof of vaccination must be kept confidential, and stored in a separate, secure file separate from the employee’s personnel file. Some states include medical information as “personally identifiable information” under their privacy, data security and identity theft laws. As a result, employers should ensure that employee vaccination records are securely stored and that proper notice and consent procedures are followed.

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⁸ Thank you to Sarah Negus and Precious McLoughlin for their assistance with this article.

ASIA-PACIFIC

Hong Kong

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

In late February 2021, the Government of the Hong Kong Special Administrative Region (the “Government”) commenced a territory-wide COVID-19 Vaccination Programme (the “Programme”) free of charge for all Hong Kong residents. Eligible Hong Kong residents are encouraged to receive free vaccination as soon as practically possible.

Currently, the Government offers two types of COVID-19 vaccines to the public, being the Inactivated virus technology platform by Sinovac Biotech (Hong Kong) Limited, and the mRNA technology platform by Fosun Pharma in collaboration with the German drug manufacturer BioNTech (BNT162b2 mRNA vaccine). Each individual is to receive two doses of the same vaccine.

While there are currently no regulations providing the absolute right to employers for insisting that their employees take the COVID-19 vaccine, under common law and the Occupational Safety and Health Ordinance (“OSHO”) in Hong Kong, every employer has the general duties to ensure the safety and health at work of all its employees, so far as reasonably practicable. The question then needs to be considered is whether requiring employees to be vaccinated could be considered a reasonably practicable measure for the employer to take for the purpose of ensuring safety and health in its workplace. There is no clear answer to this and such question will need to be addressed with reference to the particular facts of each case. Certain workplaces, such as those related to the health and medical field, may be exposed to higher risks associated with COVID-19. Requiring vaccination for employees at such workplaces may, therefore, be defensible to be regarded as reasonable, although it remains a sensitive matter and there is no easy and straight-forward conclusion to this.

Further, when considering whether to make COVID-19 vaccination compulsory for employees, employers will need to take into account any potential legal liability that may arise if the vaccination results in illnesses or even death of the employees. Again, the potential liabilities are subject to argument and have never been tested in Hong Kong courts thus far.

- 2. Can employers in your country mandate that its employees be vaccinated against COVID19 in order to be employed with the employer?**

Generally speaking, there is no mandatory vaccination at the workplace at the moment in Hong Kong. Having said that, the Government has made it a pre-condition that for bars and some restaurants to reopen, staff members have to be vaccinated. This then creates a problem for bars and restaurant owners for want of legal authority to compel staff members to get vaccinated. Whether or not employers can compel their employees to take the vaccine is a matter that needs to be considered carefully given the potential legal issues involved.

Ultimately, there is nothing unlawful in the employers encouraging their employees to take the COVID-19 vaccine, but it should be handled in a cautious manner not to create an impression that they are forcing the employees to take the COVID-19 vaccine, and that the employers should keep in mind and be aware of any relevant concerns that the employees may have. It is perhaps also worth noting that more recently, in order to further encourage early COVID-19 vaccination, the Government announced in late May 2021 that its employees including civil servants, non-civil service contract staff and post-retirement service contract staff, will be entitled to a day of vaccination leave for each vaccination dose received. Many employers have now followed suit to offer two days of paid leave and some even provide for cash incentive payments.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

Employers may request employees to provide proof of their vaccination records. However, they must make sure that they comply with the relevant data privacy laws during the collection and retention of the data. Employers should be mindful to ensure that they do not discriminate against any particular employee upon having knowledge of the employee's vaccination status.

The Disability Discrimination Ordinance (“DDO”) makes it unlawful to discriminate against someone on the ground of their or their associates’ disability in respect of their employment and requires employers to accommodate employees’ medical conditions and/or disabilities. The definition of “disability” under the DDO is wide and includes the presence in the body of organisms causing, or capable of causing, illness or disease. Accordingly, less favourable treatment to employees who refuse to be vaccinated may be in contravention of the DDO and considered to be discrimination and unlawful.

By the same token, generally speaking, employers should not make hiring decisions on the basis of whether the job candidate has received COVID-19 vaccination.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee’s vaccination or (ii) the employee’s refusal to be vaccinated?

Employees are obliged to follow lawful and reasonable orders of their employer. An order for employees or job candidates to provide proof that they have received the COVID-19 vaccine may be considered a lawful and reasonable order in some circumstances. The lawfulness and reasonableness should be determined on a case-by-case basis, with reference to the particular facts of each case.

If such disclosure is required by the employer, then the employer must comply with the Personal Data (Privacy) Ordinance (“PDPO”) during the collection and handling of the proof and/or information of the employees as these would most likely fall within the definition of “personal data” in the PDPO.

Pursuant to the PDPO, among other things, the employer must ensure that the personal data collected is necessary and adequate but not excessive for such purpose, and that the means of collection is lawful and fair. Further, the use of personal data for any new purpose which is not or is unrelated to the original purpose when collecting the data is prohibited, and written

consent of the employees must be obtained before any relevant personal data can be transferred.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

Although there are currently no regulations or policies to further clarifying the stance of COVID-19 vaccination in workplaces, in view of the active implementation of the Programme, it would not be surprising if the Government provides more guidance and announce updates in the future to assist employers in considering their positions as to whether COVID-19 vaccination could be and should be mandatory in their workplaces.

Given all the uncertainties surrounding COVID-19 in general, the situation as discussed above is subject to changes. Employers are encouraged to keep a close eye on any new developments, and in the meantime, act in accordance to existing laws and regulations with the aim to provide their employees a workplace that is safe and healthy.

Victor Ng
Emily Chow
Oldham, Li & Nie

India

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

The Union Ministry of Health and Family Welfare has recently issued FAQs clarifying that vaccination for Covid-19 is voluntary¹.

To ensure a speedy vaccination of people of its working population, the Union Government has subsequently also issued a Guidance Note² to operationalize COVID Vaccination Centers at Work Places (both public and private). The Union Health Ministry has written to all States and Union Territories that COVID-19 vaccination sessions may now be organized at workplaces (both public & private) which are having about 100 eligible and willing beneficiaries by tagging these workplaces with an existing COVID Vaccination Centre (CVC). States have been further advised to initiate due consultations with private/public sector employers and management to prepare for the launch of workplace vaccination. Organizing vaccination at Work Place will not only be convenient to the staff at Work Places but also help to avoid travel and hence reducing the risk of exposure to COVID-19 virus.

The Union Government has decided to bear the cost of vaccinating all above the age of 18 years. Vaccination for children are at a trial stage in India at present.

- 2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**
 - a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**
 - b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**
 - c. If so, who would be responsible for the vaccine costs?**

Since vaccination for Covid 19 is voluntary as per the Government's directive, it simply means an employer cannot force any of its employees to undergo compulsory COVID-19 vaccination for continued employment.

- 3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?**

Yes, an employer can require its employees to submit proof that he/she has been vaccinated in case such employee claims that he/she has been vaccinated. Further, the employer can, as part of its new contract for employment, put down a stipulation for the new employees to submit their vaccination certificate as a mandatory document for the employment to safeguard its already existing and vaccinated employees.

¹ Vaccination for COVID-19 is voluntary. However, it is advisable to receive the complete schedule of COVID-19 vaccine for protecting oneself against this disease and also to limit the spread of this disease to the close contacts including family members, friends, relatives and co-workers.

² Posted On: 07 APR 2021 7:02PM by PIB Delhi

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

Yes, the vaccination certificate shall fall under the category of "medical records" which falls under the category of "sensitive personal information" under Section 3 of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ("Rules"). Therefore, all certificates as provided by the employees and the linked information shall be processed and retained as per the Rules. The employer can mandate submission of a vaccination certificate for the purpose of visiting the workplace by an employee subject to obtaining the express consent of the employee prior to submission of such vaccination certificate.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

There are few points which are based on the Government's directive on vaccination being voluntary for Covid 19 and are relevant for both the employers as well as the employees in India. They are as below:

- In case the employee gets vaccinated pursuant to employer's condition to visit the office post-vaccination, it is likely that the employee may file a lawsuit against the employer claiming a medical expense or such other damages for any medical side effects suffered by him/her. However, since non-vaccination is a voluntary decision under the law and non vaccination does not pose a threat to the employment of the employee, the chances of the employer being held guilty is very low, unless the employee is able to prove before the court that the employer took away employee's discretion in this regard.
- An employee will be well within his/her right to refuse to be vaccinated. However, employers are required to set up a strict protocol to be followed by the employees as a safety measure, like sanitization, social distancing, wearing face masks, hand washing, temperature check, etc. at the workplace, the protocols must be in line with what is specified by the Government authorities. However, at the same time given that the vaccination is voluntary, a vaccinated employee cannot refuse to work with employees who are not vaccinated, although an employee may certainly raise a concern if a co-worker is found to be suffering from symptoms suggestive of COVID, or in situations where adequate social distancing measures and safety protocols are not undertaken at the workplace by the employer in accordance with the SOP issued by the Ministry of Health and Family Welfare.
- Not taking the vaccine does not entitle an employer to terminate the services of its employee under the employer's vaccination policy. However, one has to also see the industry/ area of business or activity in which the employee is working and the specific circumstances of each case.
- In order to sensitize employees to get vaccinated when they are able to in accordance with the Government's policy, several companies are either covering the vaccination cost for their eligible employees (in case they opt to get vaccinated through private hospitals), or partnering with health care service providers to ensure a smooth process of vaccination.

- No separate leave for vaccination has been prescribed under the currently applicable guidelines. Accordingly, granting of such leave is completely at the employer's discretion.

Further, simultaneously with announcing the vaccination for all decisions on June 7, 2021, the Union Government also announced to administer COVID-19 vaccines on priority to people going abroad for educational purposes and employment opportunities.

The competent authority will check the following before according permission for the administration of the second dose before the period of 84 days after the date of the first dose:

1. Whether a period of 28 days has elapsed after the date of the first dose;
2. Genuineness of the purpose of travel based on documents related to:
 - a. Admission offers or associated formal communications for the education.
 - b. Whether a person is already studying in a foreign educational institution and has to return to that institution for continuing their education.
 - c. Interview calls for a job or offer letters for taking up employment.

It has been advised that vaccination may be availed in cases through Passport which is one of the permissible ID documents as per the current guidelines so that the passport number is printed in the certificate. If a Passport was not used at the time of administration of the first dose, the details of the photo ID card used for vaccination will be printed in the vaccination certificate and mention of the Passport in the vaccination certificate is not to be insisted upon. Wherever necessary, the competent authority may issue another certificate linking the vaccination certificate with the passport number of the beneficiary.

This facility shall be available to those who need to undertake international travel for these specified purposes in the period up to August 31, 2021.

Sindhu Shree
Abacus Legal Group

Indonesia

To contain the COVID-19 pandemic, Indonesia is now racing to vaccinate 181.5 million citizens or around 67% of its population. To achieve the goal, currently, two vaccination programs are running in motion, one carried out by the Indonesian government through the Ministry of Health of the Republic of Indonesia (or the "**MoH**"), known commonly as the Vaccination Program or '*Program Vaksinasi*', and the other one initiated privately by the Indonesian Chamber of Commerce and Industry (*Kamar Dagang dan Industri Indonesia* or "**KADIN**"), commonly known as Gotong Royong Vaccination Program or '*Vaksin Gotong Royong*'.

Starting in the early months of 2021, the Indonesian government has taken the initial step to anticipate the needs for mass vaccination of its vast population by issuing the MoH Regulation No. 10 of 2021 on the Implementation of Vaccination to Mitigate the Corona Virus Disease 2019 ("**MoH Regulation 10/2021**"). This regulation serves as the umbrella and guideline on how COVID-19 vaccination programs will be carried out in Indonesia.

1. What Is Being Offered: Vaccination Program and Gotong Royong Vaccination Program?

To get the ball rolling, on 13 January 2021, the government has started the Vaccination Program as marked by the vaccination of President Joko Widodo. In its initial stage, the Vaccination Program is addressed only for a specific priority groups, such as healthcare workers, including healthcare assistants and support workers who work at the Healthcare Facilities, elderly community, public service workers/officers, and vulnerable community from geospatial, social, and economic aspects. Due to the limited availability of vaccines, the MoH will also determine the priority area which can receive the vaccine first by taking into account the number of COVID-19 cases in said area. The expenses of the Vaccination Program is entirely paid by the State Revenue and Expenditure Budget and Regional Revenue and Expenditure Budget.

Gotong Royong Vaccination Program, on the other hand, is designed to reach private sectors, including companies' employees and their families, with the primary aim to assist the recovery of the health and economic sector. The companies will pay the expenses for Gotong Royong Vaccination Program as the employer. However, a company's participation in this Gotong Royong Vaccination Program does not automatically reiterate the same into a mandatory obligation for their employees to participate in the program.

To be vaccinated with the Vaccination Program, the government will list the prospective vaccine receiver from the priority group. At the same time, companies/employer will also list their employees who are willing to be vaccinated through the Gotong Royong Vaccination Program, provided that the company has signed up for the Gotong Royong Vaccination Program with KADIN. Under both programs, vaccines are given free of charge to individuals.

2. Is It a Must?

While vaccination is not pushed to society as mandatory, MoH Regulation 10/2021 regulates that every person who has been determined as the recipient of the COVID-19 vaccine must attend the vaccination. It implies that once a person is scheduled to be vaccinated, either through Vaccination Program or Gotong Royong Vaccination Program, he/she shall not

refuse the vaccination. However, the obligation set by MoH Regulation 10/2021 is not supported with any punishment tools that, such as sanction, that can push people to obey.

As a parallel effort to push people to get vaccinated, Article 13A and 13B of the President Regulation No. 14 of 2021 regarding the Amendment of President Regulation No. 99 of 2020 regarding Procurement of Vaccines and Implementation of Vaccination in the Context of Dealing with the Corona Virus Disease 2019 (COVID-19) Pandemic ("**PR 14/2021**"), as well as Law No. 6 of 2018 regarding Health Quarantine ("**Law 6/2018**") set forth administration sanctions towards anyone who refuses to be vaccinated, in the forms of (i) postponement or termination of social security or social assistance from the government; (ii) postponement or termination of government administration services for the said person; and/or (iii) fine. Said administrative sanctions would also apply to the people who are designated as the target recipient, either with Vaccination Program or Gotong Royong Vaccination Program, but refuses to get vaccinated, with limited exceptions only if the person does not meet the required health qualification for vaccination. In addition, Article 13B of PR 14/2021 expands the consequences by taking on the fine and imprisonment sanctions stipulated in Article 93 of Law 6/2018, so if the refusal to get vaccinated is obstructing the prevention measure to stop the spread of COVID-19, the person can be imposed by 1 (one) year imprisonment and/or IDR 100,000,000 (one hundred million Rupiah) fine.

3. Vaccine for Workers

Currently, the Indonesian government does not mandate vaccination as a requirement for working, or in a more lucid expression, there is no regulation that obliges the employer/company to provide their employees with the vaccine, nor in opposite require the employees to be vaccinated prior to commencing their work.

Despite the above situation, to voluntarily get the vaccine, the workers in Indonesia can use the two vaccination programs organized by the government and KADIN. Per 18 May 2021, KADIN has registered 22.736 companies with over 10 million workers participating in the Gotong Royong Vaccination Program. The enthusiasm shows significant improvement in the effort to battle the COVID-19 pandemic in Indonesia. Nevertheless, given the number of daily cases that are still increasing, we may expect the battle to continue for some time.

Suppose workers vaccination is seen as an essential issue for the employer. In that case, theoretically, it is possible to push this agenda to the workers by using the legal basis of MoH Regulation No. 48 of 2016 regarding Occupational Health and Safety Standards for Office Space ("**MoH Regulation 48/2016**"). This MoH Regulation 48/2016 allows the head of the office or the building manager to take disease prevention activities, which can be interpreted as requiring its workers to receive the COVID-19 vaccine. However, this approach is not yet applied in Indonesia, and it is possible to implement this kind of pressuring solid measure, a specific labor regulation should be established first by the government.

4. Vaccination Programs and Participant's Personal Data

There is no specific regulation in place on how the data given by the employees in the vaccination program, including employee's statements to refuse the vaccination, should be used or limited. For your information, currently, Indonesia does not have umbrella regulation on data protection. Consequently, the data protection requirements are dispersed within

various regulations, such as Law No. 11 of 2008 on Electronic Information and Transaction as lastly amended by Law No. 19 of 2016, Government Regulation No. 71 of 2019 on the Implementation of the Electronic System and Transaction, and the Ministry of Communications and Informatics Regulation No. 20 of 2016 concerning Personal Data Protection in Electronic System.

Consent is the critical principle of personal data processing under the prevailing regulations in Indonesia. Consequently, consent from the data subject, in this regard, the employees or vaccine participants, is always required, except in certain events as stipulated in the prevailing laws and regulations. To collect the consent, the organizer must use a consent form made in the Indonesian language, which form should also clearly express the employee or vaccine participant's consent on the collection, use, and process of his/her personal data by the employer.

Bagus Enrico & Partners

Japan

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

No. At this moment, there are no specific laws that regulate employers' obligations in relation to the COVID-19 vaccination.

- 2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**

No. If an employer dismisses an employee based on the facts that he/she has not been vaccinated, it is highly likely that such dismissal would be considered illegal.

- If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?
- If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?
- If so, who would be responsible for the vaccine costs?

- 3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?**

No.

- 4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?**

Generally speaking, when obtaining personal information, it is necessary to clarify the purpose of its use, and the personal information can be used only within that scope. In addition, with certain exceptions, providing personal information to a third party is not permitted without consent.

Information on vaccination status falls within the category of “special care-required personal information” and requires more careful handling by an employer.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

Issues of work-related accidents; For example, if a vaccination is required for occupational reasons, such as healthcare professionals, and health damage is caused by the vaccination, it may fall under the category of work-related accidents.

In general, employees should be vaccinated voluntarily, not by the order by employers, and the time required for vaccination does not fall under working hours. However, considering the fact that vaccination is likely to contribute to preventing the spread of Covid-19 virus, it is advisable for employers to consider allowing special leave for vaccination.

Issues of workplace vaccination; In order to reduce the burden of vaccination on local communities and to accelerate vaccination, vaccination maybe implemented at companies, universities, etc. in each workplace starting from June 21, if such companies, universities, etc. choose to. The government recently announced the implementation of workplace vaccination and we do not have enough information at this moment. Details have been and will be released by Ministry of Health, Labor and Welfare and should be checked continuously.

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Australia

1. **Can an employer direct an employee to receive the COVID 19 vaccine?**

An employer may direct an employee to take the COVID-19 vaccine where it is a **lawful and reasonable direction**.

Recent guidance from the Fair Work Ombudsman (**FWO**) and Safe Work Australia (**SWA**) suggests that most employees in Australia will not meet this requirement and therefore employers cannot compel employees to receive the vaccine.

Whether a direction is *lawful and reasonable*, will depend on the circumstances of each case. Employers cannot assume that they may direct employees to take the vaccine. Additionally, employees that are vaccinated may not be able to refuse to come to work, where fellow employees are not vaccinated.

Some relevant factors when considering whether a direction to receive the vaccine may be lawful and reasonable includes:

- the nature of the work carried out by the employee and the business.
- whether the vaccine is required in order for the employer to meet their legal work health and safety obligations;
- whether the vaccination is an inherent requirement of the employee's role;
- whether it is discriminatory to require certain employees to receive the vaccine; and
- what alternative arrangements can be put in place to reasonably manage the risk relating to employees who do not have the vaccine?

For now, employers seeking to have their employees vaccinated will be required to include relevant provisions within their employment agreements moving forward, or alternatively seek to direct their employees to receive the vaccine in circumstances where such a direction is considered '*lawful and reasonable*'.

An employer may not require an employee to receive the vaccine where there are legitimate grounds. Legitimate grounds include:

- persons for whom the vaccine has not been approved for use (e.g. people who are less than 16); and
- persons have been identified as not suitable for COVID-19 vaccination, e.g. pregnant women, people with a history of severe allergic reactions, and immunocompromised individuals.

There may also be other legitimate grounds for objecting to be vaccinated, such as religious grounds. However, this is to some extent fact-specific and will depend upon the individual employee's circumstances and whether the direction is reasonable in all of the circumstances, having regard to the risks in the workplace.

2. **Has the Government mandated COVID 19 vaccines in the employment context**

While the Federal Government had previously ruled out introducing legislation mandating vaccinations, on 30 June 2021, National Cabinet announced that from September 2021,

COVID-19 vaccination will be mandatory for all aged care workers and all workers involved with hotel quarantine facilities – including those transporting flight crew and passengers. State Governments in Queensland and Western Australia had previously issued public health directions under their respective Public Health Acts requiring certain classes of employees to be vaccinated.

For example, in Queensland, hospital employees, hospital contractors and Queensland Ambulance Service employees, who may come into contact with a positive COVID-19 case, must be vaccinated.

3. Who Bears the Costs of the COVID 19 vaccine?

The Federal Government has stated that the COVID-19 vaccination will be free and available to all Australians eligible to receive it. However, the FWO recommends where an employer requires their employee to be vaccinated that the employee's costs (including travel) are covered and where the appointment is during work hours, that they allow them to attend without loss of pay.

4. What are the Privacy requirements?

The Office of the Australian Information Commissioner (**OAIC**) has issued privacy guidance to clarify the effects of the existing *Privacy Act 1988* (Cth) (**Privacy Act**) on employer's obligations relating to the collection, use, storage and disclosure of employee health information. The OAIC has stated that privacy is just one of the factors that employers should consider when asking employees about the COVID-19 vaccine.

Employers will need to make the following considerations:

- employers will only be able to collect information about an employee's vaccination status in very limited circumstances;
- only the minimum amount of personal information reasonably necessary to maintain a safe workplace should be collected, used or disclosed;
- vaccination status information may only be collected if the employee consents and the collection is reasonably necessary for the entity's functions and activities, unless an exception applies;
- one exception that may allow collection without an employee's consent is circumstances where the collection is required or authorized by law;
- if vaccination status information is collected, the entity must advise employees' how this information will be handled.
- vaccination status information should only be used or disclosed on a "need-to-know" basis; and,
- entities should ensure they take reasonable steps to keep employee vaccination status and related health information secure.

The Privacy Act will continue to permit critical information sharing to ensure employers can adequately meet their obligations, such as maintaining a safe workplace. The OAIC suggests that employers merely limit the collection, use and disclosure of personal information to what is necessary to prevent and manage COVID-19.

Importantly, this will not prevent employers from continuing to implement appropriate controls in the workplace where there is any risk due to COVID-19. From a practical perspective, employers should already have appropriate policies and practices in place to handle employee health information. If not, there may be significant financial penalties imposed on an employer who breaches employee privacy.

5. Is There An Alternative to Providing a Direction to Employees?

Employers should consider alternatives to directing employees to take the vaccine. This could include:

- incentivizing employees to take the vaccine willingly, for example providing paid time off for the employee to take the vaccine, or allowing it to be administered during working hours;
- considering alternative working arrangements for employees who do not wish to take the vaccine, and for who it would be unlikely that a direction would be lawful and reasonable; and / or
- increasing other COVID-19 safety measures to account for employees who may choose to not take the vaccine.

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EUROPE

France

- 1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require? Who would be responsible for the vaccine costs?**

The French employment code distinguishes between vaccines that are compulsory in the workplace and those that may only be recommended by the employer. To that extent, according to Article R.4426-6 of the French employment code, the employer may recommend where appropriate and on the proposal of the occupational health doctor, workers who are not immune to the biological pathogens to which they are or may be exposed to undergo appropriate vaccinations. In such a case, the employer may be responsible for the vaccine costs. However, to date, the COVID-19 vaccination is not mandatory in the workplace. For the sake of clarity, the employer may not mandate its employees to be vaccinated against COVID-19 and may only recommend the vaccination.

- 2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?**
 - a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?**
 - b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated?**
 - c. If so, who would be responsible for the vaccine costs?**

It should be noted that, in France, only the law may mandate employees to be fully vaccinated against COVID-19 in the workplace. As the COVID-19 is not mandatory for the employees, the employer may not force the same to be vaccinated against COVID-19. As a consequence of the foregoing, the employer may neither:

- Dismiss an employee for not having be vaccinated;
- Suspend the latter from his/her employment until he/she is fully vaccinated; nor
- Forcing its employees to remain in remote working until they are vaccinated.

On the contrary, the employer must follow the recommendations established by the health protocol of the Health Ministry in its company such as social distancing and provision of masks or hydroalcoholic gel.

- 3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?**

As the Covid vaccination is not mandatory, the employer may not require any proof in relation thereto.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee’s vaccination or (ii) the employee’s refusal to be vaccinated?

With regard to the *Loi informatique et libertés* inserting and adapting the General Data Protection Regulation (EU) 2016/679 (the “**GDPR**”) in France, should be considered as “*data concerning health*” (i.e. “*means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status*”¹) the indication that an employee is vaccinated or not or refuses to be.

As a matter of principle, the processing of data concerning health is prohibited (Article 9 of the GDPR). By exception, may be authorized the processing of data concerning health if, in particular:

- the data subject has given explicit consent to the processing of those personal data for one or more specified purposes;
- processing is necessary to protect the vital interests of the data subject;
- processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorized by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject; or
- processing is necessary for reasons of substantial public interest.

Thus, except with the explicit consent of the employees, the employer is prohibited from collecting and processing “*data concerning health*” related to the employee’s vaccination including their refusal in complying thereto.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

An order dated 2 December 2020 authorized the company's occupational health doctors to vaccinate the employees against the Coronavirus with their prior consent. Such authorization has been extended to the occupational health services by an order dated 25 February 2020.

However, it should be noted that medical confidentiality applies to occupational health doctors as well as occupational health services who are not allowed to disclose to the employer the fact that an employee is vaccinated or refuses to do so.

Jordan Le Gallo
Cohen Amir-Aslani

¹ Definition from the GDPR.

Italy

1. Does your country regulate employer obligations regarding vaccination of its workforce that are relevant to the COVID19 vaccines? If so, which laws? What do the laws require?

1: Yes.

If so, which laws? What do the laws require?

1.1 According to the Law Decree 1st of April 2021, no. 44 converted into Law n. 76 /2021, vaccination is mandatory until the 31st of December 2021, only for the following categories of workers:

- healthcare personnel and health workers working in health care facilities, social care, public and private, in pharmacies, parapharmacies and doctor's surgeries;
- all Extended Care Units' employees (also external staff like catering services and cleaning services).

Moreover, the Law Decree no. 52/2021, converted into Law no. 87/2021 provides for the Green Pass, which is a Certification valid also in the EU countries and in the Schengen area.

The certification is valid only:

- after 15 days since receiving the first dose of vaccine, until the complete vaccination and for 180 days after; (it is expected to become one year in the next law)
- for 48 hours after having a molecular test or regular rapid lateral flow test with a negative result.

The following categories of employees can choose between undergo to a Covid test every 48 hours or being vaccinated in order to have the Green Pass certification and enter into the workplaces until 31 December 2021:

having access to Schools, High Schools and Universities in order to work (employees and external staff like catering services and cleaning services).

Please consider that the Government is proposing an extension of the Green Pass obligation to all the employees (public and private sector included) since October 15th.

Who would be responsible for the vaccine costs?

According to the Ministry of Health guideline no. 15126 of the 12nd of April 2021, if an employer would like to give the employees the chance of being vaccinated in the workplaces, he must provide an area for vaccination in the workplaces or he can ask to do it in private hospitals or to use the territorially competent INAIL structures. In this case, the employer is responsible for the vaccine costs.

Vaccinations outside the workplace are free of cost for the individuals; they are fully paid by the National Sanitary System, while the tests for those who doesn't vaccinate are paid by the employees.

2. Can employers in your country mandate that their employees be vaccinated against COVID19 in order to be employed with the employer?

1. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)? b. If so, can the employee be suspended from their employment (with or without pay) until they are vaccinated? c. If so, who would be responsible for the vaccine costs?

2. Generally speaking the employer may not mandate its employees to be vaccinated against COVID-19 and may only recommend the vaccination.

The employers of the industries mentioned at point 1.1 are allowed to suspend those who are not vaccinated (in the health industry) or those employees who don't own a valid Gren Pass while accessing the schools, high schools and Universities.

The same consequence will be extended to all the categories of employees since October 15th in case of approval of the new law.

2a. If so, are there any exceptions (for example, based on disability, pregnancy, medical conditions or religious belief)?

In case of impossibility of the employee to be vaccinated because of a health risk, which is established with the evidence of specific documented clinical conditions attested by a specific Green Pass, vaccination is not mandatory and may be omitted or deferred.

2b. can the employee be suspended from their employment (with or without pay) until they are vaccinated? Yes, if a worker (who is not exempted) is not willing to vaccinate or to test, the employer can provide for remote working or suspend the same if the tasks cannot be performed by remote. During the period of the suspension the employee is not going to receive the salary.

2c. If so, who would be responsible for the vaccine costs?

The national healthcare system.

3. Can employers in your country require employees or applicants to provide proof that they have received the vaccine?

Only in the sectors where it is mandatory. Moreover, it can be partially done indirectly through the control of the Green Pass in those sectors where such a certification is mandatory in order to access the workplace.

Moreover, a third party appointed by the employer, both in the private and public sectors, can verify the Green Pass (with the National application for mobile phones "VerificaC19") in order to let the employees, have access to the plant canteens or to specific areas for catering facilities without discovering whether he/she was vaccinated or just undergo a negative Covid test.

The owners or managers of services and activities such as catering and cleaning services that must access a school or an hospital are required to verify that access to those services and activities is exclusively provided by employees with the Green Pass.

After two breaches of this provision, committed on different days, the additional administrative penalty of the closure of one to ten days shall apply from the third infringement onwards, according to art. 13, c.1, Law Decree no.52/2021, modified by the art. 4 Law Decree no. 105/2021. The subjects who violate the controls will be punished with a sanction, as it is read in paragraph 5 of art. 2, from 400 to 1,000 euros. The "fine" will be applied both to workers without certification, and to managers and employers who are entrusted with the controls.

The same will be extended to all the categories of employees since October 15th in case of approval of the new law.

4. Do the privacy laws in your country place any limits on what employers can do with data provided by employees or applicants regarding (i) the employee's vaccination or (ii) the employee's refusal to be vaccinated?

The Italian Privacy Authority has clarified that the employer cannot ask his employees to provide information about their vaccination status or copy of documents which prove the occurred vaccination against Covid-19. This is not permitted by the emergency provisions and regulations on health and safety at work.

The employer can not consider lawful the data processing regarding the vaccination even if based on the employee's consent.

Such rule doesn't apply to those areas of business where vaccination is mandatory or where the Green Pass is mandatory, but it cannot be used for taking any further decisions.

5. Are there any other special issues in your country related to COVID19 vaccination of employees that employers should consider?

No.

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