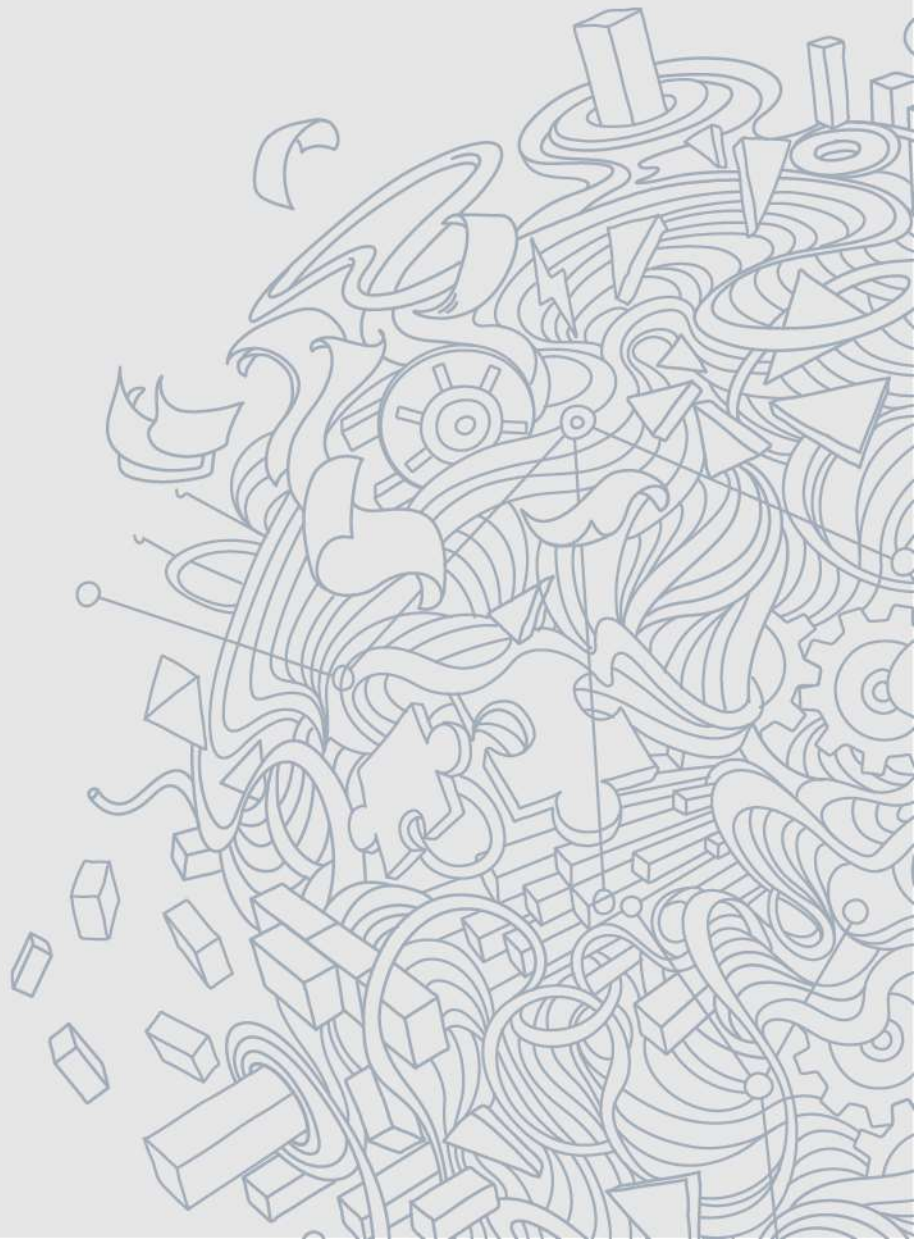


GUIDE FOR EMPLOYERS ON COVID-19 VACCINATIONS AT THE WORKPLACE

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Germany has begun vaccinating its population against COVID-19. Currently, vaccinations against COVID-19 are voluntary. However, various questions arise in the employment context. This guide outlines the respective rights and obligations of the parties involved.

NO COVID-19 VACCINATION OBLIGATION

- There is currently no statutory duty to get vaccinated against COVID-19 in Germany and, in principle, also no vaccination obligation against other infectious diseases. However, since 1 March 2020 there is a statutory obligation to get vaccinated against measles (*Masern*). This especially applies to employees born after 31 December 1970 who work in public community facilities such as kindergartens or schools as well as for employees of medical facilities (e.g. hospitals)
- Although there is a legal possibility for the Federal government already in place to regulate a vaccination obligation for certain high risk groups of persons if an infectious disease with severe outcomes is breaking out and is expected to have an epidemic spread, this possibility has not (yet) been used in case of COVID-19 and is rather unlikely to take place
- Currently, vaccination centres (*Impfzentren*) and so-called "mobile vaccination teams" established by the Federal states are running the vaccination process amongst the population. However, since vaccinations at the workplace could increase the speed of vaccinating the population, it is planned to involve company doctors (*Betriebsärzte*) in the process in the near future. Hence, employers will – at a later stage and as soon as enough vaccination doses are available – become involved in this process of providing COVID-19 vaccination opportunities for their staff at their work place

NO COVID-19 VACCINATION OBLIGATION IN THE EMPLOYMENT CONTEXT

- Employees may not demand vaccinations against COVID-19 from their employers based on the employers' obligation to provide a safe and healthy work place
- On the other hand, in general, employers may not order their employees to get vaccinated. Neither the employer's right to give instructions (*Direktionsrecht*) nor any individual employment or collective provision obliging employees to get vaccinated would provide sufficient legal foundation for ordering employees to do so. Any instruction to get vaccinated would unduly infringe the employees' constitutionally guaranteed right of privacy and right to physical integrity
- Exceptions may apply for employees with jobs at very high exposure for a COVID-19 infection, e.g. employees of hospitals. In these cases, the employers' interests (compliance with obligations under the Infection Protection Act (*Infektionsschutzgesetz*), provision of a safe work environment and running the business, especially regarding the protection of the patients' health) may outweigh the aforementioned employees' interests. However, even in these cases the employer cannot compel his employees to get vaccinated but other employment measures can become conceivable (see below)



Employers are generally not liable for "vaccination damages" incurred by the employees vaccinated at the work place, in practice usually performed by an external company doctor, since there is principally no (vaccination) treatment contract between the employer and the employee, but only between the employee and the doctor performing the vaccination. However, employers should pay attention to design the vaccination organisation and process in a way stressing that it is not the employer but expressly the company doctor inviting and performing vaccinations. Nevertheless, corresponding employers' information and disclosure duties vis-à-vis the employees still arise

- Employees are allowed to refuse an instruction of the employer to travel for business to countries with compulsory vaccination obligation either before entering the country or immediately upon arrival as the employer must exercise his right to give instructions within reasonable discretion

VACCINATION INCENTIVES FOR EMPLOYEES & CO-DETERMINATION OF WORKS COUNCILS

- Under certain conditions, employers may decide to incentivise vaccinations by, e.g.
 - offering (free) vaccinations at the employer's premises (organised for and performed by the company doctor) or
 - paying "vaccination premiums" (which is already being done in other countries, e.g. in the US)
 - granting employees continued remuneration for the time they need to get vaccinated at the vaccination centres
- Any such offers are employer benefits and as such need to be measured under the employment principle of equal treatment (*allgemeiner arbeitsrechtlicher Gleichbehandlungsgrundsatz*). Therefore, such offers would have to be granted in a way that no employees are disadvantaged without any objective reason (e. g. a distinction between full-time and part-time employees will not be not permissible). However, offering the above vaccination incentives
 - only to e.g. a group of employees with a significantly higher infection risk compared to other employees

- in order for the employer to fulfil his obligations towards his staff to provide safe and healthy working conditions as well as his economic interests to run his business at full capacity with less risk of a spread of COVID-19

may be legally permissible

- Offering vaccination incentives is generally subject to co-determination rights of the works council (if any). In any case, the involvement of the competent works council is recommended to increase workforce's willingness to partake and their acceptance



Vaccination premiums can be principally paid out to employees as so-called tax-exempt and social security contribution free "Corona Bonus" (regulation until 30 June 2021)

LEGAL IMPACTS OF EMPLOYEES REFUSING COVID-19 VACCINATION

- It is not permitted to disadvantage employees refusing vaccination or sanction their refusal with employment law measures such as e.g. issuing a written warning or terminating their employment (exceptions below)
- Where staff of e.g. hospitals refuses to be vaccinated and, as a consequence, the employer cannot comply with his statutory obligations to prevent infectious diseases under the Infection Protection Act in any other way and is not able to deploy them to other vacant positions, terminations for personal reasons (*personenbedingte Kündigung*) may become possible under high prerequisites
- On the other hand, non-vaccination will generally not lead to a loss of employees' claims to continued remuneration (*Entgeltfortzahlung*) pursuant to the Continued Remuneration Act (*Entgeltfortzahlungsgesetz*) if they fall sick and become unable to perform work. However, such claims to continued remuneration will lapse if it was employees' fault that they became sick and thus unable to perform work, e.g. as a consequence of knowingly travelling to a designated infection "hot spot" without a valid reason and becoming sick afterwards



Claims to compensation payments (*Entschädigungszahlungen*) for lost income of employees due to measures imposed by public authorities, e.g. quarantine, lapse if

- the employee could have prevented this measure by getting vaccinated
- if such vaccination was factually possible in view of availability of vaccine and
- the vaccination is either implemented as statutory law (currently not the case) or publicly recommended in the place of general residence of the person concerned. Recently, the public vaccination commission at the Robert Koch Institute (*Ständige Impfkommission*) has issued its vaccination recommendation for COVID-19 on a Federal level. To be considered publicly recommended in the abovementioned sense, this vaccination recommendation needs to be implemented at the place of general residence of the person concerned by the respective Federal state

EMPLOYERS' QUESTION ON VACCINATION STATUS & DATA PROTECTION LAW

- Employee health data such as their vaccination status are considered special personal data and therefore subject to stricter data protection rules, art. 9 of the General Data Protection Regulation (*Datenschutz-Grundverordnung*). Against this background, it is in dispute whether the employer may ask such questions. Within very narrow borders we deem such question admissible wherever the question is absolutely necessary to either enter into, process or end the employment relationship in the particular case at hand. This necessity increases with the potential infection risks of the position of the respective employee
- For employers within medical services (e.g. hospitals, doctors' practices), statutory provisions allow them to ask their employees whether they have undergone a vaccination against COVID-19 if this question is essential for the employer to comply with his obligation to prevent infections and their spread by all means deemed scientifically necessary



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