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Mandatory Vaccination in Employment Relationships under Civil Law:

The recent breakthroughs announced by various pharmaceutical companies in the development of a vaccine to protect against the lung disease Covid-19 raise hopes. For employers, the question arises whether and to what extent they can require their employees to be vaccinated in the event of a pandemic.



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Can protective vaccinations be ordered in an employment relationship in the event of a pandemic?

Currently, the possibility of mandatory vaccination is being discussed intensively. However, a general obligation to vaccinate the entire population seems unlikely today. Without an obligation to vaccinate, employers may be faced with the question of whether and under what conditions they can require their employees to be vaccinated in an employment relationship under civil law.

Vaccination Obligation?

In the spring of 2020, the world was overrun by the first Corona wave, and the world came at least a little bit out of joint. Society faced an unprecedented threat, and headlines about excess mortality, full intensive care units and overworked funeral homes were widely covered in the media. Against this background, public authorities of affected areas are forced to take measures, some of them very restrictive. The recent breakthroughs announced by major pharmaceutical companies in the development of a vaccine to protect against Covid-19 have raised hopes worldwide that the restrictions on public and economic life imposed by the authorities might come to an end in the foreseeable future. Although experts and the media agree that the suspension of the pandemic-related measures will only be possible if and when high vaccination coverage among the population is attained, the hopes placed in the vaccines are very high.

Considering the widespread vaccination scepticism in parts of the population, the possibility of mandatory vaccination for everyone or at least for specific population groups is discussed intensively by the general public. Anyhow, prerequisite for

state-mandated vaccination is a sufficient legal basis. The Epidemics Act authorizes the Federal Council in the event of a special situation and under certain conditions to declare vaccinations mandatory for vulnerable population groups, for particularly exposed persons or for people engaged in certain activities. The focus of a possible mandatory vaccination is on population groups that are regularly in contact with people at particular risk, especially nursing staff in hospitals and retirement homes. Such a decree issued by the competent authority must not only have a sufficient legal basis, but also meet the constitutional requirements of public interest and proportionality.

It is uncertain at this point whether mandatory vaccination will ever be introduced in Switzerland and, if so, for which population groups. An intensive discourse is also taking place in Europe about a potential obligatory vaccination for certain groups of people, for example in Denmark, where the legal basis for the option of state-mandated vaccination is currently being debated. But even without mandatory vaccination ordered by the state, the question arises whether employers can require their employees to undergo a protective vaccination in a pandemic situation based on civil

employment law. Potential motives for the obligation of a protective vaccination are diverse. Private clinics, nursing homes or medical practices may likely focus on the protection of patients or residents from a potential infection by its staff in order to prevent liability risks. In addition, the employer's duty to maintain occupational safety and the well-being of the personnel may suggest protective vaccination under some circumstances. Finally, vaccination may reduce absences from work due to illness or generally facilitate the continuation of business operations.

Order of Protective Vaccination Based on the Employer's Right to Give Instructions

It is debatable whether an employer may instruct its employees to undergo vaccination during a pandemic situation solely based on the right to give instructions. The right to instruct enshrined in article 321d Swiss Code of Obligation authorizes the employer to issue instructions regarding the performance of work and the conduct within the company and obliges the employee to comply with such instructions. The right to give instructions is not absolute but only admissible insofar as the law and ordinances, collective employment contracts, company regulations or the individual employment contract leave room for it. Furthermore, the right to instruct is subject- or function-related, respectively, and limited by the protection of the employee's personality. This process requires a balancing of interests. The more intensive the operational interest of the company is, the further personal rights may be interfered with. Vice versa, if an instruction interferes with an employee's personality, it must be limited to what is operationally necessary. If the protection of legal interests of employees or third parties requires it, an employer may not only be authorized but obliged to instruct. For example, art. 82 para. 1 Accident

Insurance Act obliges an employer to take all measures necessary (by experience, applicable in accordance with the state-of-the-art technology and appropriate to the given circumstances) in order to prevent occupational accidents and diseases.

The order to undergo vaccination based on the right to instruct affects the physical integrity of the concerned employee and therefore interferes with the individual's personal rights. Such an intrusion into personal rights can only be justified by intensive operational interests.

Consequently, an order to vaccinate based on the right to instruct must be justified by the nature of the business activity and, additionally, there must not be less intrusive measure available which would achieve the same result. Possible measures include the use of protective suits and face masks, a home-office directive, prohibition of physical meetings, closing of cafeterias etc.

In places where employees interact closely with persons at risk, for example in a nursing home or on an oncology ward, the instruction to undergo vaccination in order to protect the residents or the patients might be justified, especially since no less intrusive measures which would lead to the same result seem to be apparent. Similarly, the intensive nursing care of Covid-19 patients in an intensive care unit could justify a protective vaccination against Covid-19, however, taking into account that, contrary to the situation in a nursing home, the protection of the employees would probably be more important in this constellation and that in an intensive care unit other protective measures such as protective suits etc. would typically be available. This comparison implies, in our opinion, that intensive care units would have a lower operational interest in protective vaccination than nursing homes. Ordering employees of a law firm to undergo vac-

ination would, in our opinion, rather be inadmissible as most employees are able to perform their work remotely from home. Overall, we hold the view that the protection of life and limb of third parties may justify the instruction of to undergo vaccination, but the mere prevention of illness-related absences cannot justify the intrusion into the personal rights of an employee associated with a vaccination.

If an instruction is given lawfully, employees are obliged to follow it in good faith. On the other hand, the employee does not have to follow inadmissible instructions. A dismissal due to the refusal of an unlawful instruction could be considered as wrongful termination by a court. In case an employee refuses to undergo a protective vaccination despite having been lawfully instructed to do so, the usual disciplinary measures such as formal warnings etc. are applicable to enforce the order. However, according to the view represented here, physical coercion to enforce the instruction is in no case permissible.

Contractual Vaccination Obligation

It is conceivable that an obligation to undergo vaccination is contractually agreed between the employer and employee. The freedom of contract allows for such an agreement, however, it is limited by the principle of prohibition of excessive self-commitment (art. 27 Swiss Civil Code). In simple terms, this provision protects individuals from themselves by invalidating contractual obligations which restrict their personality rights in an excessive way.

A contractual vaccination obligation, ultimately, entails a balancing of interests between the appropriateness of such obligation and the protection of the individual person. This requires an overall assessment of the circumstances. According to the view held by the authors,

the prohibition of excessive self-commitment does not prevent a contractual duty to vaccinate, provided the vaccination is functionally related to the professional activity and is objectively justified. In contrast to the vaccination obligation based on an instruction, a much more liberal standard should be applied in the assessment of the objective justification. In our opinion, a contractual obligation to vaccinate for personnel outside the health care system could be justified in a pandemic situation if the employee in question is exposed accordingly. For instance, sales personnel with frequent contact to customers or employees who travel a lot by air. However, even a contractual vaccination obligation may not be a sufficient basis for an employer to demand any protective vaccination at any time.

The obligation to undergo vaccination due to contractual agreement may not be enforced by means of physical coercion as well. If an employee refuses to be vaccinated despite his/her contractual duty, disciplinary measures such as a formal warning or, if agreed upon, a contractual penalty of a disciplinary nature may be imposed.

Finally, it should be noted that an obligation to vaccinate must be agreed upon in individual contracts, considering the severity of the intrusion into an employee's personality. Hence, if such a provision is included in the personnel regulation or in the general terms of employment, it would most likely not be enforceable due to the unusual nature of such agreement. If an employer wants to stipulate an obligation to vaccinate in existing employment contracts, notices of termination with the option of altered conditions (*Änderungskündigung*) must be issued. It should be noted that in the event of a large number of such terminations the rules on mass redundancies may apply if the relevant thresholds are met.

Conclusion and Recommendation

In conclusion, a vaccination obligation for employees is only conceivable in fields of activity where this measure is objectively necessary and a substantial endangerment of the employer's operational interest justifies such an intrusion into the personal rights of the employee. In our opinion, employers may request from all employees who have physical contact with persons in the risk group (e.g. geriatric nurses; persons in contact with pregnant women, cancer patients, diabetics, etc.) to undergo the vaccination. There is more leeway for the employer in case of a contractual vaccination obligation compared to the unilaterally ordered vaccination – but the obligation to vaccinate must be based on sufficient operational interest in both possible scenarios. In principle, we recommend restraint in ordering a protective vaccination via the employer's unilateral right of instruction.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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