

Vaccination: employers must seek medical attention from their doctor

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While the Covid-19 vaccine is deployed in France, it is time to question it. Can the employer find out whether its employees are vaccinated? What will happen if the vaccine is mandatory for employees who travel? Camille-Frédéric Pradel, a lawyer at the firm Pradel Avocats, is considering the new issues that will be raised in the coming weeks.

Can the employer now offer a vaccination to its employees?

This depends on whether the vaccination in question is compulsory or not. If it is, the employer must ensure that the employee is properly vaccinated. For example, vaccination against tetanus is compulsory for certain professions. The employer must therefore

seek medical attention from the doctor at work to ensure that the vaccination is carried out.

If vaccination is not compulsory - as Covid-19 will be, according to recent statements by the Labor Minister - the labor code provides that employers may recommend vaccinating employees exposed to certain biological risks. This recommendation must always be made on the proposal of the occupational doctor (*Article R.4426-6 of the Labor Code*).

For employees working in the medico-social sector, the situation is particular, and the obligation to vaccinate is much stronger. In these establishments, the occupational doctor must ensure that employees have benefited from all compulsory vaccines. It can carry out these vaccinations itself, "as well as those that would be imposed by an epidemic" (*Article R.4626-25 of the Labor Code*). It therefore appears that these provisions make it possible to impose, by a decision of the occupational doctor, a vaccination on the staff of health and medico-social establishments.

Where the obligation to be vaccinated is required by law, the case-law has already held that the employer can punish the failure to vaccinate, with the penalty being up to dismissal. But what about Covid-19? Will this particularly harsh solution for the employee prevail if the obligation to be vaccinated results, not from the law, but from an individual decision of the occupational doctor?

Many questions will arise in the coming weeks and months. Depending on the risk assessment in the company and the recommendations of the occupational doctor, the employer can propose a vaccination in the company. It remains to be seen what the consequences of this proposal will be.

Under what material conditions must an in-house vaccination take place?

At the moment, we have little information. The latest version of the health protocol in enterprises, dated 6 January 2021, does not say anything about the organization of vaccination in enterprises. Only the law or the occupational doctor may provide for the organization of such vaccination. In practice, it will be organized in inter-company health services, or in the internal occupational health services of large companies that have their own occupational doctor.

What happens if, despite the company's recommendation, the employee does not wish to be vaccinated against Covid-19?

This raises a number of questions. Will the employer be relieved of its responsibility once it has recommended vaccination to its employees? If this is the case, the employer will be able to settle for continuing to apply the gestures barriers in the company - as well as all the preventive measures already applicable - to fulfill its safety obligation.

If the risk assessment reveals a high risk of contamination, one could also imagine that the occupational doctor would recommend a job arrangement for workers who are resistant to vaccination, similar to that which currently exists for vulnerable employees. This solution would involve keeping teleworking as soon as possible, or even the possibility of benefiting from the partial activity scheme (for vulnerable employees). But will partial employment be available to workers who do not get vaccinated by choice?

Can the employer find out which employees were vaccinated?

In principle, medical confidentiality means that the employer does not have access to data relating to the employee's health. However, if the occupational doctor recommends a job arrangement linked to the employee's refusal to be vaccinated, the employer will be indirectly notified. Similarly, if the employer wishes to challenge the accommodation, it will be difficult to reconcile medical confidentiality with the right to appeal against a decision justified by medical evidence.

Other situations may arise for employees whose missions require them to travel. If air transport is reserved for vaccinated persons, can the employer legitimately ask the employee for a vaccination certificate?

On the other hand, some countries may require that foreigners entering the country have received some type of vaccine. Will a French company then be able to draw the consequences on the employment contract of a failure to vaccinate in accordance with the requirements of another country?

Jurisprudence will soon have to answer questions never asked before. In the meantime, we will have to grope. I would first advise employers to ask their doctor about their position on vaccinating employees.

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