

### Covid-19 vaccinations and employment – what can employers do to incentivise their staff?

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The number of people having had their first and second vaccinations continues to increase after the vaccination campaign in Germany has gained momentum and appointments should be available from 7 June for those not on the priority list. Vaccinated and recovered people are currently enjoying the privileges of everyday life. Whether it is possible for such vaccinated people to also be in a better position in employment and how employers are permitted to motivate their staff to get vaccinated is examined in the following article.

#### **Vaccination not compulsory**

**No obligation to be vaccinated is imposed by law, contract or the employer's right to give instructions**

First of all it should be noted that in accordance with current law there is no general obligation upon people to get vaccinated against coronavirus SARS-CoV-2. Only people in certain occupational groups (such as carers in institutions) must get vaccinated by law against measles as per Section 20 (8) German Protection against Infection Act (Infektionsschutzgesetz, IfSG). It is also not currently planned to impose a statutory obligation to get vaccinated against coronavirus SARS-CoV-2.

A contractual agreement which means an employee must get vaccinated may only be possible in very limited circumstances in the future. It is likewise not possible under most employment contracts for an employer to force employees to get vaccinated by issuing binding instructions. There may be exceptions if need be for employees in the healthcare sector (hospitals, care institutions etc.).

#### **Negative vaccination incentives or back door compulsory vaccination?**

**Restrictions on social contact**

Employers cannot force their employees to get vaccinated. However, there is much to suggest that they may be permitted to treat non-vaccinated employees working on site differently from those who have already been vaccinated. This applies, in particular, to spaces where employees typically gather together. The employer may

make access to spaces which are not directly connected with where the employee carries out their contractual duties contingent upon vaccination. This may mean that employees could be completely excluded from visiting the canteen or spending time in break rooms. This especially applies if the employer cannot carry out protective measures in these rooms under [Section 618 German Civil Code \(Bürgerliches Gesetzbuch, BGB\)](#), [Section 3 German Occupational Health & Safety Act \(Arbeitsschutzgesetz, ArbSchG\)](#) and the [German SARS-CoV-2 Occupational Health & Safety Regulation \(SARS-CoV-2-Arbeitsschutzverordnung\)](#). For example in canteens mouth-nose coverings cannot be worn the whole time. That increases the risk of being infected with Covid-19. However, a general ban on access by the employer exercising their power to set and enforce house rules is hardly a good way to motivate people to get vaccinated. An indiscriminate ban would make it impossible for the employees who are not under any obligation to get vaccinated to carry out their work and the employer would then be in default of acceptance and would still have to continue to pay wages as per [Section 615 sentence 1 BGB](#).

Other means beyond the above are not available to the employer. As a last resort dismissal can only be considered in a few exceptional cases.

#### **Refusal of continued remuneration or compensation**

Refusing to continue to pay wages as per Section 3 German Continued Payment of Wages and Salaries Act (Entgeltfortzahlungsgesetz, EFZG) of an employee who falls ill with Covid-19 after refusing to be vaccinated may also fail in that the refusal to get vaccinated cannot be construed to be neglect of one's own interests ("Verschulden gegen sich selbst"), especially since the effectiveness of the vaccine cannot be established with absolute certainty. The situation is different for compensation as per Section 56 (1) sentence 3 IfSG. This states that the entitlement to compensation for being unable to attend work due to quarantine imposed by the authorities will lapse if a work ban could have been avoided by getting a vaccination which had been officially recommended.

## Positive inducements to get vaccinated

The employer can attempt to use positive inducements to motivate their employees to get vaccinated.

## Workplace vaccinations

First of all, it is quite practical for companies to get directly involved in campaigning for vaccinations. Instead of the employee having to be referred to their GP or a vaccination centre, the vaccination can be offered during the working day at the office from the company doctor. This incidentally reduces employees' downtime that could occur from attending external appointments. Information about the liability risks involved in workplace vaccination and how to avoid them can be found [here](#).

## Exemption from distance, hygiene and mask (AHA) regulations

If employees are vaccinated the question arises whether the hygiene regulations implemented to prevent the spread of Covid-19 can be lifted for these employees. As long as the [German SARS-CoV-2 Occupational Health & Safety Regulation](#) does not allow such relaxation in favour of vaccinated people, the answer to this question is no. Only relaxation of measures that go beyond that required by law would be possible.

## Additional benefits

Additional benefits for those who have been vaccinated could be particularly motivating.

A "vaccination bonus" could be considered in the form of a one-off special payment. The unequal treatment of those employees who have not been vaccinated could be justified on objective grounds. The Covid-19 vaccination has been recommended by STIKO, the Standing Commit-

tee on Vaccination at the Robert Koch Institute. The employer as a company also has an economic interest in ensuring the business can maintain and continue operations. In addition, the employer has an obligation to protect their employees (see above). As long as the vaccination bonus is proportional and the employees who are not willing to be vaccinated do not feel disproportionately pressured to waive their right to "vaccination freedom", then a bonus is permissible. However, it should be noted that the case law for special benefits has been rather restrictive. An infringement of the prohibition of victimisation under [Section 612a BGB](#) cannot be excluded. As long as the bonuses are small there are good grounds, however, for such a possibility. The Works Council's right to exercise its powers of co-determination as per Section 87 (1) (10) German Works Council Act (Betriebsverfassungsgesetz, BetrVG) must be considered here.

Additional benefits such as vouchers for the in-house canteen or non-cash gifts are also feasible in accordance with these principles. The same applies to granting additional annual leave to those who have been vaccinated.

## Summary

A Covid-19 vaccination cannot be made compulsory. This also applies in the contractual relationship between employer and employee. The options for the employer to motivate employees to get vaccinated are therefore limited. This is why employers should be very pragmatic when it comes to providing attractive offers to get vaccinated. Vaccinations can effectively be offered in-house from the company doctor during working hours. Granting a bonus to those who have been vaccinated should be legally permissible if the amount is proportional. The Works Council's right of co-determination must be taken into account when granting financial benefits to those who have been or are willing to be vaccinated.

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Autor Konstantin Axnik on +49 221 33660-548 or [kaxnik@goerg.de](mailto:kaxnik@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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