

## Changes to the Infection Protection Act adopted: 3G rules in the workplace and reinstatement of the obligation to work from home

Dr. Alberto Povedano Peramato

In order to curb infection rates significantly gaining momentum again the German Federal Parliament (Bundestag) passed an amendment to the German Infection Protection Act (Infektionsschutzgesetz, IfSG) on 18 November 2021, which has far-reaching consequences on working life. The Act was unanimously approved by the German Federal Council (Bundesrat) on Friday 19 November 2021 so that the amendments came into force on 24 November 2021 after their publication in the Federal Gazette.

What do employers and staff need to bear in mind in the future? An overview:

### Content of the new regulation

#### 1. 3G rule in the workplace

The “3G” rule applies in future in the workplace in accordance with [section 28b \(1\) IfSG](#). This means that members of staff are only permitted to enter workplaces where contact between persons cannot be excluded if they can provide corresponding evidence that they have been vaccinated against, recovered from or tested for Covid-19 [In German this is ‘geimpft’, ‘genesen’ or ‘getestet’ which all start with the letter G, hence the 3G rule.]. One of the following **supporting documents** must be carried or kept available by staff for verification purposes or submitted to their employer (see also [section 2 \(3\), \(5\) and \(7\) of the COVID-19 Protective Measures Exemption Regulation \(COVID-19-Schutzmaßnahmen-Ausnahmeverordnung\)](#)):

- a **vaccination certificate** for a completed preventative vaccination;
- a **recovery certification** for an infection that was at least 28 days ago and no longer than 6 months ago; or
- a **test confirmation** of a negative Covid-19 test. The test must have taken place a maximum of 24 hours ago for a rapid test and a maximum of 48 hours ago for a PCR test. In addition the test must have either been carried out under the supervision of the employer, staff members at the employer who have been trained for this purpose or in an official test centre.

The access ban does not apply if the member of staff is being vaccinated or tested on the employer’s premises directly before commencing work. In any case, the employer must inform the members of staff of corresponding access regulations when required.

Employers are obligated to **monitor** the relevant proof of compliance with the 3G rule **on a daily basis** and to **regularly document** the status (section 28b (3) IfSG). Therefore, Employers are permitted to **process** the personal **data** of their staff members, in particular vaccination status, serostatus and test status related to COVID-19, if required to fulfil this obligation. This data may be used to develop or adapt operational hygiene concepts on the basis of a risk assessment drawn up under employment law. This also includes the **storage** of some data ([see Art. 4 \(2\) of the General Data Protection Regulation \(GDPR\)](#)), to the extent this is required to adhere to monitoring and documentation obligations. The data shall be erased no later than 6 months after its collection. As soon as the 3G rule and the resulting obligations lapse the data may, however, be erased before the expiry of the 6 months period as the storage is no longer viewed as necessary.

Members of staff entering their employer’s premises without relevant 3G proof commit an **administrative offence**, which can be punished with a fine of up to 25,000 EUR ([section 73 \(1a\) no. 11b and section 73 \(2\) IfSG](#)). The same applies to employers who do not or do not properly fulfil their monitoring obligation ([section 73 \(1a\) no. 11d IfSG](#)).

#### 2. Reinstatement of the obligation to work from home

An additional central measure to reduce contact amongst the population is the return of employees’ *obligation to work from home*. Employers are once again obligated as per section 28b (4) IfSG to provide their staff who work in the office or perform similar jobs the opportunity to work from home. This does not apply if there are compelling operational reasons against working from home. Staff members are in turn obligated to accept this offer, provided there are no factors on their part which speak against working from home.

## Comments

### 1. How can employers monitor whether their staff members have the relevant 3G evidence?

The legislature has not imposed any specific requirements regarding the manner in which the monitoring of whether staff members have the relevant 3G evidence should be carried out. In accordance with a communication from the Federal Ministry of Labour and Social Affairs (BMAS), ticking off the name of a staff member on a list is sufficient on the respective day of monitoring. Processing digital barcodes or QR codes which result from a vaccination or recovered status or a negative test result is also permitted. This lends itself to an electronic access control system. Alternatively, the employer could initially deactivate any existing access cards and only reactivate them upon presentation of corresponding evidence. Vaccinated and recovered staff could voluntarily submit the corresponding evidence to their employer so that further monitoring is unnecessary for the validity period of the certificate.

### 2. How should employers react if a member of staff who does not have sufficient evidence wants to enter the premises?

If there is no facility to carry out a Covid-19 test in the workplace that satisfies statutory requirements, then members of staff without sufficient 3G evidence may be **refused access** to the workplace. This is currently due not least to the otherwise applicable administrative offence that would be committed.

If staff refuse to provide corresponding evidence employers may issue a warning. In the event of recurrence termination may even be considered. Moreover, there are also good reasons showing that staff without sufficient 3G evidence are not efficient so that (proportional) salary reductions for the resulting absences must be taken into account. In this respect the employment law principle of “no work, no pay” applies.

### 3. Who bears the costs of any employee Covid-19 tests?

The law imposes the obligation upon employees to have corresponding 3G evidence and to present this before entering the workplace. It therefore follows that the employer is not obligated to assume the costs of any required tests.

### 4. Must employers offer any (additional) rapid tests?

The employer's obligation imposed by [section 4 \(1\) of the SARS-CoV-2 Occupational Health & Safety Ordinance \(SARS-CoV-2-Arbeitsschutzverordnung\)](#) to provide staff with a minimum of two Covid-19 tests per week continues to apply even after the changes to the law. It should be noted that the self tests provided are not suitable as 3G evidence. Self tests are only permissible in this regard if it was carried out under the supervision of the employer or staff members at the employer who have been trained for this purpose (see the requirements for test confirmations as per [section 2 \(7\) of the COVID-19 Protective Measures Exemption Regulation \(COVID-19-Schutzmaßnahmen-Ausnahmeverordnung\)](#)).

### 5. What co-determination rights does the Works Council have?

If there is a Works Council established at the company, it may be granted co-determination rights regarding 3G rules in the workplace. These do not extend to the implementation of the 3G rules under the statutory requirements. Questions regarding the detailed arrangements may, however, be subject to the co-determination process.

The specific arrangements of the now required obligation to work from home may trigger numerous matters related to co-determination. It should, in particular, be observed that in the event of the relocation of an employee's duties to work from home this may be considered a transfer subject to the co-determination process in accordance with [section 99 of the Works Council Constitution Act \(Betriebsverfassungsgesetz, BetrVG\)](#).

## 6. For what reasons can working from home be rejected?

The employer is not obligated to offer the employee the opportunity to work from home if there are compelling operational reasons to the contrary. This may be the case if business operations are significantly restricted or cannot be maintained at all.

Specific examples are dealing with mail, repair and maintenance work and necessary emergency services.

It should, however, be assessed how many staff are actually required to operate the facilities to ensure unrestricted operations. Whereas there are no particular requirements on the part of the employee to reject the opportunity to work from home as the obstacles are correspondingly lower. Lack of technical equipment to work from home is sufficient, or an environment that is not conducive to concentrated work.

### 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 Dr. Alberto Povedano Peramato unter +49 221 33660-544 or by email to [apovedano@goerg.de](mailto:apovedano@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

### Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

#### BERLIN

Kantstraße 164, 10623 Berlin  
Phone +49 30 884503-0, Fax +49 30 882715-0

#### COLOGNE

Kennedyplatz 2, 50679 Köln  
Phone +49 221 33660-0, Fax +49 221 33660-80

#### FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main  
Phone +49 69 170000-17, Fax +49 69 170000-27

#### HAMBURG

Alter Wall 20 – 22, 20457 Hamburg  
Phone +49 40 500360-0, Fax +49 40 500360-99

#### MUNICH

Prinzregentenstraße 22, 80538 München  
Phone +49 89 3090667-0, Fax +49 89 3090667-90