

### No sector-wide right for employers to ask questions about vaccination and recovery status under the new regulations

Dr. Alberto Povedano Peramato

Is an employer allowed to ask about the vaccination and recovery status of its employees? This has been a controversial topic since the beginning of the vaccination campaign. Whilst employers' associations go to court over this, employee representatives and data protection-ists are critical of the issue. Now the German parliament and council have recently approved the proposed Draft law on the employer's right to ask questions regarding the vaccination and recovery status of its employees proposed by the coalition factions CDU/CSU and SPD (see Bundestag document 19/32275 (advance copy), pg. 12). This grants employers in certain designated sectors a corresponding right to ask questions. Unfortunately, the aim pursued with the act, preventing a further out-break of Covid-19, can only be achieved to a lesser degree due to its very narrow scope. In order to come into effect, the act must still be executed by the Federal President and subsequently published in the Federal Law Gazette (Bundesgesetzblatt). Both are expected to take place in the near future.

#### Content of the new regulation

At this time, it is already possible to request someone's vaccination and recovery status as per section 23a sentence 1 German Prevention of Infection Law (Infektionsschutzgesetz, IfSG) **in medical facilities** in terms of section 23 (3) IfSG which includes hospitals and doctor's offices. The act that is now getting off the ground envisages a change to section 36 (3) IfSG which will expand the employer's right **to request information at care facilities and shared accommodation** (section 36 (1) and (2) IfSG), provided that there is an "epidemic situation at national level" and "to the extent this is required to prevent the spread of coronavirus (COVID-19)". The right to information as per section 36 (3) IfSG will consequently apply, in particular, to childcare facilities and schools. The declared aim of this is to better protect the risk groups looked after in these facilities. The risks for employees should also be reduced in that the information obtained through the right

to information will be used as part of tailor-made personnel scheduling and hygiene concepts (Bundestag document 19/32275 (advance copy), pg. 29). This is in line with the latest amendments

#### Comments

The method expressly permitted by law, which is therefore legally secure for employers, to ask about their employees' vaccination and recovery status for safety and prevention purposes will unfortunately continue to only be available to a few sectors. Outside of this area of application of the IfSG, it remains possible to process corresponding personal health information data on the basis of the **employee's express** consent as per section 26 (3) sentence 2 German Federal Data Protection Act (BDSG) in conjunction with Article 9 General Data Protection Regulation (GDPR). In principle, data processing as per section 26 (3) BDSG can occur without the express consent of the employee. The employer, however, requires a legitimate interest in processing the data which overrides the confidentiality interests of the employee on a case-by-case basis. Looking at the justification for the new version of section 36 (3) IfSG, which leaves the occupational health & safety regulations unchanged (Bundestag document 19/32275 (advance copy), pg. 29), it can be argued in this respect that the employer is responsible for safeguarding health at work as effectively as possible (section 241 (2), 618 (1) German Civil Code (BGB) and sections 3 to 5 German Occupational Health & Safety Act (ArbSchG)). In addition, employees are also obligated by law to cooperate in this context (sections 15 and 16 ArbSchG). Furthermore, an overriding interest of the employer in obtaining information may be assumed if options to deploy staff need to be clarified between the customer and contracting parties when the 2G rule (vaccinated or recovered) applies within your premises. In the meantime, the admissibility of such data processing is decided on a case-by-case basis and is therefore risky. It may be practical to conclude a Works Agreement which regulates the right to ask

questions about vaccination and recovery status and further details about data processing (see section 26 (4) BDSG).

As a result, outside of the care and medical sectors, employers are advised to persuade their employees to provide information about their vaccination and recovery status on the basis of their voluntary consent or a Works Agreement. Whether an overriding legitimate interest in data processing is sufficient to go against the

will of the employee in particular hazardous situations can only be decided on a case-by-case basis. The hurdles for this will continue to increase in light of the new version of section 36 (3) IfSG. The legislature has, in any case, wasted the opportunity to legally establish a sector-wide right to ask questions, thereby achieving a legally certain and thus practical regulation for all employers.

## 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