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Requiring employees to be vaccinated? A false good idea

"Can I ask my employees to confirm that they have been vaccinated and keep track of their statements for follow-up?"

I. The response in principle

It can be tempting to ask employees such a question. After all, isn't the employer obliged to ensure the protection of his employees in accordance with art. 328 CO? As such, is he not entitled to ask them to be vaccinated or, at least, if they have been vaccinated?

While it is understandable that employers might be tempted to ask such a question at a time when vaccinations are in full swing, asking such a question is certainly a possibility, but no employee is obligated to answer it.

The question of whether or not a person is vaccinated is indeed health data and, as such, is considered sensitive under the Federal Data Protection Act.

Under Swiss law, data processing is unlawful unless justified by consent, an overriding private or public interest, or the law.

Some might argue that there is an overriding interest on the part of the employer to be able to ascertain the vaccination status of its employees, if only to provide the necessary safety for all its employees.

However, the federal law on data protection only allows such processing, and therefore the collection of such information, if it appears necessary and is not disproportionate. However, alternatives are available to ensure a safe working environment, as shown today by the [cantonal test plans](#) aimed at allowing workers to return to their place of work and the various measures planned by [SECO](#).

Requiring employees to be vaccinated or to answer the question does not, therefore, appear to be necessary in itself in view of the alternatives available, so that no overriding private interest justifies such treatment.

II. The exceptions

There are exceptions to every principle. First of all, it should be remembered that the employer may ask such a question, according to a protocol defined below, but that the employee must remain free to answer or not at his or her own discretion.

However, there may be situations where vaccination is simply required for the employee to fulfill his or her duties. For example, an employee who is required to travel regularly and who refuses to be vaccinated or to disclose his or her status in this regard when vaccination is the only possible way to travel to the concerned country.

In this case, such a refusal would ultimately make it impossible, in my opinion through the fault of the employee as the infringement of his personal freedom seems tenuous and justifiable, to perform his obligations. Such a refusal could thus, in the end, lead to a termination of the employment relationship.

III. The possible protocol

In a few days, we will all be able to have a [COVID certificate](#). Let's bet that, given the advantages it will offer, its success is guaranteed.

If an employer wished to establish a health protocol to ensure the safety of its work environment, we believe it would have two options among others:

First, allow employees to present their COVID certificate once and for all (or at least as long as the effects of the vaccination are felt) and, if they refuse, submit to the protocol set up by the employer, which is certainly more restrictive for the individual.

Alternatively, the employer could try to initiate a modest protocol of questions upon each employee's return to site, asking them, for example, (1) if they have been vaccinated, (2) if they are considering it, while giving them the option (3) if they do not wish to answer. Whether or not such a questionnaire should be done on an anonymous basis depends on the intended purpose and should be assessed on a case-by-case basis.

Regardless of the choice made, it is the employer's responsibility to inform employees of the protocol in place, the objectives of the protocol (to ensure the safety of the work environment for the benefit of everyone), who has access to the information (which should be limited to what is strictly necessary), where it is stored and how long it is kept (for as long as there are any restrictions that require employers to take certain safeguards in light of the evolution of the pandemic).

IV. Conclusion

In conclusion, this is a theme where the adage "to ask the question is to answer it" is not appropriate.

While employers may ask their employees about their vaccination status, they cannot force them to answer, except in special cases. For this reason, the employer must provide alternative protocols to ensure the safety of the work environment.

If the employee's vaccination status is one of the alternatives, then the employer must establish a protocol to ensure compliance with data protection requirements, including what information is to be provided to employees, who are then free to provide such information or to comply with the alternative protocol in place.

Source : <https://www.wg-avocats.ch/en/news/data-protection/requiring-employees-vaccinated-false-good-idea/>