



## Deloitte Legal Newsflash

### Employment, Pensions & Benefits

## Can employers ban non-vaccinated workers from the workplace?

Even though coronavirus vaccination is not mandatory in Belgium (yet), once everyone had their chance to get vaccinated, the question could rise whether an employer can ban employees from the workplace if they refuse to get vaccinated.

Indeed, the presence of non-vaccinated employees may entail that all kinds of prevention measures must be maintained (e.g. keeping safe distance and mandatory mouth masks).

### Employer and employee obligations

According to recent numbers, 40% of COVID-19 outbreaks in Belgium happen at the workplace. Getting infected with COVID-19 at the workplace is therefore an existing risk.

Legislation on the well-being of workers mandates employers to:

- take all necessary measures to promote workers' well-being, prevent all risks and *if*, nevertheless, risks remain, primarily tackle these risks at source, and
- give their employees the opportunity to get vaccinated, if they can be exposed at the workplace to biological substances, such as viruses, for which an effective vaccine is available. Although there is discussion in the doctrine, it could be argued that these stipulations are applicable to all employees.

Violating these obligations can be severely sanctioned – especially if this violation results in damages to the worker's health. Furthermore, if an employee leaves the workplace because of a serious and immediate danger, he/she cannot be sanctioned.

Finally, employees must, to the best of their ability, take care of their own safety and health and that of others. They must refrain from any behaviour that can cause damage.

## Is it possible to ban non-vaccinated employees from the workplace?

Getting vaccinated means that, in principle, chances that you get infected and that you spread COVID-19 are significantly lower, especially after a second dose is administered (click [here](#) for more information).

The law mandates employers to tackle the risk of getting infected with COVID-19 at source. Therefore, the best way to avoid infection at the workplace is to only allow vaccinated people *or* workers with a recent negative PCR-test to enter the workplace. All other measures, such as keeping safe distance or wearing masks, are not as effective.

However, such policy triggers some questions:

- banning non-vaccinated workers would mean that employers know whether their employees are vaccinated. In other words, health information needs to be processed by the employer – which is, according to GDPR, only possible under strict conditions. Although GDPR provides for several exceptions which could apply, the Data Protection Authority is currently of the opinion that no sufficient legal basis exists to support this processing (see [here](#)).
- banning non-vaccinated workers from the workplace means that they are treated unfavourably in comparison with vaccinated workers. A difference in treatment based on a possible future health status (or possibly indirectly on the worker's religious beliefs) is only justified if (i) the purpose of the different treatment is legitimate (which can be argued as safeguarding the safety and health of others), and (ii) the means are proportionate and necessary. Whether the proposed measure is necessary and proportionate is debatable depending on the type of work (i.e. is there a higher than normal risk of infection?), whether other measures can be envisaged (see the [Generic Guide](#)) – in which case, for measures offering equal protection, that with the least impact ought to be chosen –, and so on.

Unfortunately, no definitive answer can be provided to the above question. In the absence of specific legislation, employers will have to weigh the interests of each party, examine all possible measures, working conditions and possible risks. It goes without saying that the health and safety committee, if it exists, should be involved in the process.

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