

LEGAL UPDATE

Can employers require employees to get vaccinated?

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Although the Netherlands was one of the last countries in the race to administer the first vaccinations, the programme is now underway and a large number of care workers has been vaccinated. The vast majority of Dutch people are pleased with this development but there is a small group that has doubts about the effectiveness of the vaccine and concerns about possible side effects. This raises questions, e.g. may an employer require its employees to get vaccinated? And what may employees expect of the employer?

To start with the first question: no, an employer may not demand mandatory vaccination. Every person is entitled to the right to the protection of their privacy (including physical integrity) and the inviolability of one's person. Although, in principle, these fundamental rights only have effect between citizens and the government, employees may also derive protection from them in their relationship with an employer. The interests of both sides would have to be considered and that would generally fall in favour of the employee.

At the same time it is important to realise that an employer has an obligation to its employees to provide a safe work environment. This means that the employer must reduce the risk of catching covid-19 at work as much as possible, especially for vulnerable employees. In a previous Legal Update, Lisan Homan and Petra Klein Gunnewiek discussed the employer's obligation to provide a safe and healthy work place (both at home and at work). How does that obligation relate to the employees' right to refuse to get vaccinated?

It is possible to think of situations where the employer's duty of care and the employee's right to the inviolability of one's person will clash. However, such situations will not arise easily. The fact is that there are many other, less invasive measures that an employer can take to prevent or in any event limit catching covid-19. The employer's duty of care will usually carry insufficient weight to oblige an employee to get vaccinated. Allowing a non-vaccinated employee to continue their work will not, in most cases, be inconsistent with the employer's duty of care to the other employees.

For employers in the care sector another interest is at play, i.e. patient safety. Care institutions must provide proper care and that entails the responsibility to prevent infections where possible. Because care often involves vulnerable or very vulnerable patients, this may, in certain circumstances, mean that a non-vaccinated employee cannot be deployed in patient care. In that situation, the interest of proper patient care can clash with the fact that employers cannot require their employees to get vaccinated. It is then up to the employer to take measures to ensure that the employee can continue working without posing an unacceptable health risk to the patient. For example, transferring non-vaccinated employees to departments with less vulnerable patients or requiring those employees to wear personal protection equipment.

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In other words, the employee cannot be required to get vaccinated. The employer does, however, have a duty of care to employees and third parties (e.g. patients) to keep the infection risk to a minimum. It is always up to the employer to take measures to perform that duty of care, even if employees are unwilling to get vaccinated. Not an easy task.

If you have any questions, please feel free to contact us.

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