

**Dear Readers,**

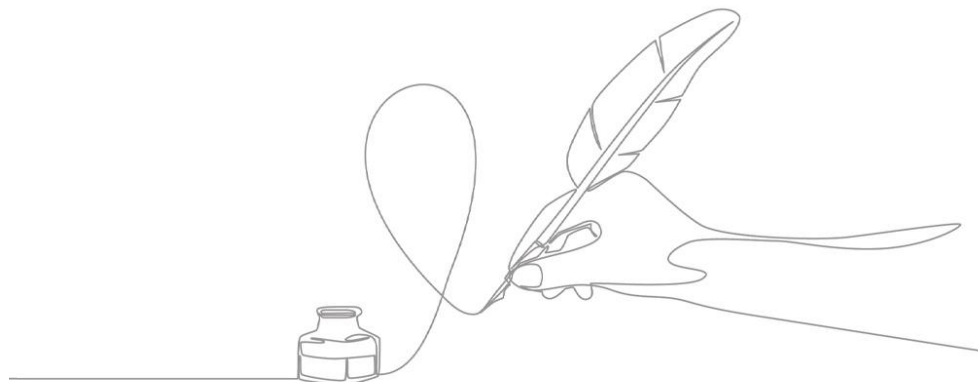
we are happy to present the February issue of *HR Perspectives*.

This issue focuses on employers' rights and duties related to COVID-19 vaccination. The topic of employee vaccination has stirred a lot of controversy and heated debates, revolving particularly around the questions of whether vaccination is obligatory and can be required by employers, and how to encourage and motivate employees to take the jab.

Below, we share our thoughts and insights into the matter. We discuss, among other things, whether an employer may legitimately order an employee to have the vaccine as well as collect information on vaccine receipt in employee personal files. Furthermore, we touch upon the subject of vaccine taxation and benefits for employees as a reward for taking the jab.

**Enjoy your reading!**

**Sławomir Paruch,  
Robert Stępień**



## Employer's duties related to COVID-19 vaccination

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### 1. No obligation to provide vaccination

There is no obligation for employers to provide employees with vaccinations against COVID-19. The vaccination program is carried out at the national level and only selected professions are given priority for vaccination due to epidemiological reasons. Employers are therefore not in a position, let alone under obligation, to provide workers with COVID-19 vaccines.

### 2. Order to vaccinate

An employer cannot force an employee to be vaccinated (including against COVID-19). If such an order is given, the employee may refuse to comply.

However, in some jobs with high exposure to a biological agent in the form of a coronavirus, failure to vaccinate may contribute to health loss not only in a particular employee but also in the whole team, for which the employer may be liable. The Labour Code requires the employer to use all available means to eliminate or reduce exposure to harmful biological agents if they occur in the workplace. One of such means is undoubtedly vaccination. Therefore, in such special circumstances, the employer may refuse to allow an unvaccinated employee to work and, for example, transfer the employee to another work station or even terminate the employment of the employee. Such a termination would not be carried out because of the refusal to vaccinate, as every employee has the right to refuse, but because it would not be possible to allow the employee to work, which is a reason not down to an employee.

### 3. Priority for vaccination - selected industries

Employers in certain industries can expect their employees to be prioritized in the vaccination program.

The schedule of the National Vaccination Program provides for the following vaccination phases:

- **phase 0** – vaccination available to, among others, health care workers, as well as support and administrative staff in medical institutions;
- **phase 1** - vaccination available to, among others, people over 60 years, starting with the oldest, as well as uniformed services and teachers;
- **phase 2** - vaccination available to, among others, persons who "directly facilitate the functioning of basic state activities and are exposed to infection due to frequent social contacts" (such as critical infrastructure workers, workers of water, gas and electricity providers, as well as ICT and postal services providers);
- **phase 3** – vaccination available to the rest of the adult population.

### 4. Exemption from work during vaccination

The employer is not required by law to give employees time off to take COVID-19 vaccination. However, due to the fact that vaccination dates and times are assigned quite randomly it is reasonable for the employer to facilitate employee vaccination. However, the employer has the right to decide whether to consider the employee's time off to receive the vaccine

as a private leave (which the employee should then work off) or, for example, as an excused absence without loss of pay.

### **5. Personal data on vaccination**

It is unacceptable to carry out surveys in workplaces to enquire about employees' vaccination plans. Such information does not contribute to the improvement of working conditions in any way, therefore it is hardly a justified reason for the processing of this kind of data.

As for collecting the information about which employees have already been vaccinated, everything depends on whether in a given case this information is really necessary to ensure safe and hygienic working conditions.

According to the law, the employer has a duty to protect health and life of employees by ensuring safe and hygienic working conditions using suitable scientific and technical means. This may constitute a basis for the processing of employee vaccination data. If, in a particular case, the processing of such data proves necessary to ensure safe and healthy working conditions, it will be permitted. However, this option has to be exercised with caution and upon prior analysis and assessment of the data processing necessity.

Even if there is a legitimate reason for the processing of such data, it should be borne in mind that the data collected on this basis must be adequate, relevant and limited to what is necessary for the processing purpose.

### **6. Vaccination certificates in personal files?**

Even in the exceptional situations mentioned above, vaccination certificates cannot be kept in employee personal files. The list of data and documents that should be kept in personal files is set out in the Regulation of the Minister of Family, Labour and Social Policy on employee records. Such documents as vaccination certificates are not included in the list. Furthermore, taking into account the general principle of personal files integrity, the certificate would have to be kept in the file for the entire statutory period. The employer would not be allowed to remove it, which in turn could be considered as a violation of the data minimization principle, purpose limitation or storage limitation under Article 5 of GDPR. Therefore, in certain cases, the employer is allowed to collect information on employee vaccination in certain circumstances, but should not keep vaccination certificates in the employee personal files.

### **7. Recruitment**

There is no clear legal basis for an employer to request information from a candidate as to whether they have been or plan to be vaccinated. On the other hand, we believe that if the nature of the job or safety reasons justify collecting such information, it should be allowed. Especially considering that the subject of introducing different restrictions, prohibitions and orders for vaccinated and non-vaccinated people is slowly moving from theoretical discussions to practice. This may be relevant for the proper performance of statutory duties.

However, we would like to point out that such questions may be treated as a violation of data protection principles or acts of unequal treatment or discrimination. Therefore, unless the applicable law is changed, such questions should only be asked when it is really necessary and justified.

### **8. Vaccination incentives and benefits for employees**

Employers have been contemplating how they can encourage employees to get their vaccine shots. The type of benefits that could be offered should be tailored to the employer's business. These can range from purely monetary benefits (e.g. for those with a prominent public function, if this could be used to promote vaccination - such solutions are adopted in some countries), to more complex social benefits (e.g. additional holiday leave or the opportunity to participate in training courses/events in countries where vaccination is a condition of entry).

### **9. Taxation of vaccines**

Employers should pay particular attention to changes in the tax regulations on vaccinations offered to employees. Flu vaccination carried out from 1st March 2020 have been exempted from taxation for the duration of the epidemic. Those employees who have received an employer-reimbursed vaccine do not have to pay tax on the receipt of a free benefit.

Similar legislation has not been adopted for COVID-19 vaccine as it is not available for private purchases. However, this may change in the future.

### **10. Unequal treatment**

The whole subject of COVID-19 vaccination and all the actions taken by the employer in relation to the vaccination may raise doubts from the perspective of the equal treatment principle. For example, there should be an objective justification for giving extra financial benefits to vaccinated employees or excluding unvaccinated employees from certain projects. If an employer grants benefits to everyone, there are no risks. However, if benefits are to be granted only to a selected group of employees, there must be an objective justification (e.g. those employees belong to a high risk group). The same applies to excluding unvaccinated employees from certain projects – it is justified for safety reasons (such as in the abovementioned situation, where it would not be possible to allow the unvaccinated employee to perform a job with a high risk of exposure to a biological agent, i.e. coronavirus). However, an employer may not treat employees differently or harass them simply because they have not been vaccinated.

### **11. Information campaigns**

Carrying out information campaigns to promote COVID-19 vaccination in the workplace requires the employer to be considerate and take an individual approach to employees. However, employers are free to use various promotional activities to encourage employees to get a jab and to explain to them the benefits of vaccination. Meetings with specialists, thematic newsletters or a new tab on the intranet are tools that can help employers to achieve that. However, all such initiatives should comply with employee personal rights and data protection rules and should not disturb the work process. In particular, the privacy of employees and the rules for processing data on vaccination should be respected. For example, if an employee gets a vaccine, the rest of the staff cannot be informed about it without the employee's explicit consent. Another crucial point is to make sure there is clear communication on time off for taking vaccination (e.g. whether time off is given only for the period of vaccination or for the whole day).



**PCS | MeetUp: Workplace bullying during the epidemic - what effective actions can an employer take?**

We would like to invite you to another PCS | MeetUp event addressed exclusively to PCS Paruch Chruściel Schiffter | Littler Global Clients.

Date: 18th March 2021, 11:00-11:30 am.

Speaker: Karolina Kanclerz, attorney-at-law, partner.

Please register here: [perspektywyhr@pcslegal.pl](mailto:perspektywyhr@pcslegal.pl). More info: [here](#).