

Employers' challenge on tracking vaccination status of employees

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COVID-19 has had perhaps the greatest impact on businesses and their working dynamics. Consequently, ensuring occupational health and safety in the workplace has become a priority.

Employers' obligation to ensure occupational health and safety in the workplace includes updating their occupational health and safety measures to be in line with changing conditions, as well as monitoring and ensuring that those measures are complied with. In light of employers' aforementioned obligations, many employers are changing their occupational health and safety measures for the COVID-19 period. Unfortunately, there is no specific legislation that instructs employers on what changes must be adopted. For this reason, employers are making use of various advisory resources, such as the Epidemic Management and Working Guide published by the Ministry of Health, as well as the article on COVID-19 Measures in Workplaces published by the Ministry of Labor and Social Security. While implementing the measures suggested to in these advisory sources, employers must also abide by the relevant constitutional regulations and the Personal Data Protection Law.

The Turkish constitution states that the physical integrity of a person cannot be violated except for medical reasons and in cases specified under the law. In this regard, the Public Health Law ensures that individuals who are exposed to certain illnesses listed thereunder must be vaccinated; however, COVID-19 is not one of those illnesses. Hence, under the current legislative

framework, employers cannot compel their employees to be vaccinated. However, they can still request information about their employees' vaccination status, provided that the data protection legislation is adhered to.

The Personal Data Protection Law ensures that employees' health data, including information on vaccination status, can be processed by the employer provided that those employees are informed throughout the process and - as a general rule - only if those employees have given their explicit consent. Therefore, employers can track their employees' vaccination status if their employees have provided their explicit consent; nevertheless, considering the hierarchy between the parties, the validity of such consent is a controversial issue. There are two exceptions to the provision of explicit consent.

Pursuant to the first exception, health data can be processed without the explicit consent of employees in certain cases stipulated under the law. However, currently there is no legislation enabling employers to track their employees' vaccination status during or after the COVID-19 pandemic. The second and more useful exception states that the explicit consent of employees is not required if the health data is processed for certain purposes and by persons under the obligation of confidentiality or by authorized institutions and organizations. Currently, the Public Announcement on COVID-19 PCR Test Result and Vaccine Information Applications published by the Personal Data Protection Authority ensures that the Personal Data Protection Law will

not apply to cases requiring the processing of vaccination status due to the preventive and protective responsibilities of public institutions and organizations; yet, it does not provide a clear explanation of whether employers' ability to track their employees' vaccination status is included within its scope. Consequently, employers need to obtain their employees' explicit consent to track their vaccination status. Within the scope of this second exception, employers that cannot obtain the explicit consent of their employees can have their occupational physician track the vaccination status. However, occupational physicians can only share with the employer employees' vaccination status within certain limits and for certain purposes, such as making risk assessments within the scope of the occupational health and safety legislation. They cannot share with the employer employees' vaccination status in a manner that discloses the identity of the vaccinated or unvaccinated employees.

Long story short, currently there is no explicit regulation enabling employers to track their employees' vaccination status without obtaining those employees' explicit consent, even for cases where tracking is carried out pursuant to the employers' occupational health and safety obligations. Hence, the safest way for employers to track their employees' vaccination status would be to have their occupational physician to carry out the entire process. In order to resolve any confusion for employers, issuance of an explicit legislation on this topic is critical.

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