

Law Bulletin

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EMPLOYEE RIGHTS UNDER LABOR LAW AND PERSONAL DATA PROTECTION LAW RELATING TO THE COVID-19 VACCINE

COVID-19 has caused changes in many areas of our lives, and has interfered with fundamental rights and freedoms within the scope of administrative measures that have been taken, bringing new legal questions and problems with it. Among them are the legal problems that have arisen due to the vaccination process, which has gained momentum in recent months. This bulletin addresses the effects of the vaccination process on employee-employer relations within the scope of the labor law and, in this context, under which circumstances employers may process employees' personal data for the purpose of tracking their vaccination status.

1. Legal Nature of Vaccination Implementation

In accordance with Article 17/2 of the Constitution, "Except for medical requirements and in cases prescribed by law, the physical integrity of the person cannot be touched; cannot be subjected to scientific and medical experiments without his/her consent." Pursuant to the relevant Article, mandatory vaccination, which is a practice that may interfere with physical integrity, can only be in question in cases of medical necessity, or if an exceptional regulation that will affect persons' fundamental rights and freedoms is stipulated by law. The cases in which mandatory vaccination is stipulated in Turkish law are determined within the scope of General Public Health Law No. 1593, and the coronavirus epidemic is not among them. COVID-19 vaccination implementation is not regarded as a legal obligation in Turkey since there is no legal regulation on this subject to date.

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2. Impact of Vaccination Implementation on Employer-Employee Relationships

One important issue is the path employers should pursue regarding employees' vaccination process within the scope of the COVID-19 vaccine implementation. In accordance with Occupational Health and Safety Law No. 6331, the employer is obliged to ensure the health and safety of its employees and to take necessary precautions. However, since being vaccinated against COVID-19 is not mandatory, it is not legally possible for employers to require employees to be vaccinated even for occupational health and safety purposes.

In the doctrine, scholars reconcile that termination by the employer for just cause would be a very severe sanction if an employee refuses to be vaccinated. Under Labor Law No. 4857, being unvaccinated against COVID-19 cannot be direct grounds for termination based on just cause.

In terms of termination based on valid reason, it is considered that the employee refusing to get vaccinated cannot be a direct ground for termination. Within the framework of the principle of ultima ratio in termination, it would be reasonable for employers to consider other measures such as providing the employer with the option to work from home or transferring them to more suitable positions, in order to avoid possible disputes. In the current situation, instead of resorting to termination, this could be an opportunity for employers to encourage vaccination such as providing additional benefits to vaccinated employees.

3. Processing of Employee's Health Data

Pursuant to Turkish Personal Data Protection Law No. 6698 (the "PDPL"), employees' data regarding vaccination constitutes health data, which is classified under special categories of personal data. In this regard, and in principle, health data can be processed through obtaining the employee's explicit consent. Pursuant to PDPL Article 6, health data can be processed by persons who are under a confidentiality obligation and are authorized institutions and organizations for the purposes of public health protection, preventive medicine, medical diagnosis, execution of treatment and care services, planning and management of health services and financing. Thus, within the scope of the protection of public health, and in accordance with the general principles set forth in the PDPL, employees' health data may be processed without their explicit consent by workplace doctors who are under a confidentiality obligation. However, for example, the processing of the relevant health data by employees other than the workplace doctor for the purpose of tracking employees' vaccination status will only be considered lawful if the employees' explicit consent has been obtained. Due to the hierarchical inequality between the employee and the employer, it is crucial that while the employers fulfill their disclosure obligation to inform the employees of the related data processing activity, they must emphasize that if the employees do not give their explicit consent, they will not face adverse consequences.

However, as per Article 9/2 of the General Data Protection Regulation (the "GDPR"), employees' health data, including vaccination information, may be processed without explicit consent under basic principles, and in the interest of public health such as protection against serious cross-border

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threats to health. Unlike the regulations in the PDPL, within the scope of the relevant GDPR Article, there is no restriction as to who can process the relevant data. Also, the Information Commissioner's Office has further stated that employees' vaccination information may be processed under the legal basis of public health protection.

4. Conclusion

In summary, there is no legal basis for employers to impose the obligation on employees to be vaccinated and refusing to be vaccinated does not constitute a just cause for termination in terms of the labor law. Considering the restrictive regulations within the PDPL, processing employees' health data for the purpose of tracking employees' vaccination status will mostly be possible by obtaining explicit consent. Since the issue of COVID-19 vaccinations is a new subject, there are uncertainties and much to explore in terms of both the labor law and personal data protection law. It is anticipated that in the near future, more detailed legal regulations will be introduced and decisions will be taken on these issues.

CONTACT



Deniz Erkan



Evin Kutlay

derkan@kolcuoglu.av.tr

ekutlay@kolcuoglu.av.tr