

An obligation to vaccinate?

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Can an employer in Aruba influence the employee's decision to vaccinate?

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INTRODUCTION

In Aruba there is no legal basis for an employer to obligate its employees to get vaccinated for COVID-19 against their will. Such a general obligation to vaccinate is against the employee's fundamental right of physical integrity and the right of privacy. If an employee refuses vaccination for religious reasons, then the fundamental right of freedom of religion also plays a role in such case.

The question arises whether the employer may influence the employee's decision to vaccinate or not by attaching certain consequences to not vaccinating?

In many cases, the answer to the question above must be answered in the negative. By attaching consequences to not vaccinating, the employee's freedom to take decisions is restricted by the employer. In such case, there is no obligation to vaccinate, however, there is a certain degree of pressure to do so. Due to the fundamental rights mentioned above, this pressure will be considered against the principle of being a "good employer".

Nevertheless, only under exceptional circumstances, an infringement of the fundamental rights of the employee by the employer can be justified. It must be assessed whether the infringement has a legitimate purpose, is necessary for and proportionate to

the interests of the employer (proportionality) and cannot be achieved in a less drastic manner (subsidiarity).

THE INTEREST OF THE EMPLOYER

With regard to the vaccination of the employees, the employer's interest lies primarily in its legal obligation to ensure the safety and good health of the employees as much as possible and to take all such measures and provide guidelines in a reasonable manner to prevent an employee from suffering damage during the performance of his/her work activities. This also includes trying to prevent the spreading of infections in the workplace. Furthermore, the employer also has a certain duty of care towards third parties who come into contact with the employees or visit the business premises for business activities. Also, the interest of the company consists of preventing the obligation to continue paying wages in the event of illness of the employee.

The employer's duty of care towards its employees and third parties entails that the employer must observe hygiene regulations, inform employees about combating COVID-19 in the workplace and adequately monitor the compliance with the measures taken in this regard.

REFUSAL ACCESS TO WORK / SUSPENSION CONTINUED PAYMENT OF WAGES

Can the employer refuse an employee, who does not wish to get vaccinated, access to the workplace without continued payment of wages?

The legal starting point is: no work, no wages. However, the law also stipulates that the employee retains his/her right to receive wages if he/she is not being able to perform work due to a reason which is reasonably for the account of the employer. If the employer decides that he will no longer allow the employee, who is available and willing to work but does not wish to vaccinate himself/herself, to enter the work premises, then this can in principle be considered a reason which is reasonably for the account of the employer. The employer's duty of care towards its employees and third parties, as discussed above, does not reach to such an extent that the employer is expected to ensure that all of its employees are vaccinated and that the employees, who are not vaccinated, are denied access to work.

There are exceptions possible to said principle in case specific circumstances cause for the interests of the employer to prevail over the interests of the employee. For example, it is arguable that a healthcare institution such as a

hospital, which has vulnerable patients and an increased degree of contamination risk, has a far-reaching duty of care. In such case, the court might conclude that the cause of not performing work is reasonably for the account of the employee and decide in favor of the employer. This will be the case, in particular, if the health of the employees and third parties cannot be guaranteed in a less exhaustive manner, such as by wearing personal protective equipment. In addition, it must be determined whether transferring the employee to a less vulnerable or risky department or work environment is possible, even though this requires some adjustments by the employer.

For example, the obligation to wear a face mask during a time period, wherein there is no large-scale vaccination / herd immunity as yet, falls under the employer's duty of care to ensure compliance with the applicable health protocols to prevent infections and contaminations in the workplace. Contrary to mandatory vaccinations, this is not a (very) profound violation of the physical integrity and it is proportionate to the legitimate purpose to be achieved. In this regard, the judge ruled that the cause for the employee not to be able to conduct work was for the account of the employee, as he had not provided sufficient weighty reasons to

substantiate his refusal to comply with the reasonable instruction to wear a face mask. The employer could justifiably suspend the continued payment of wages in such case.

All in all, the judge will assess whether the employer's instruction is reasonable and within the range of its authority, and then weigh the interests of both parties against each other. The employee must substantiate his/her refusal properly. The employer must demonstrate that the vaccination is necessary, that it does not cause a risk to the health of the employee from an objective point of view and that there are no other alternatives for being able to adequately guarantee the health of the other employees and third parties.

JOB CHANGE

Another measure, which has already been discussed briefly, is the transfer of the employee to another department. If this does not entail a change in the nature of the work to be performed, the working hours or the daily commute, the employer can in principle decide unilaterally to transfer the employee to that department. After all, it does not entail any change in the terms and conditions of the employment. If it is possible, then a transfer of the employee while retaining the same job position prevails over a change of the job position.

Under current Aruban law, an employer is not allowed to unilaterally change the employee's job position. The employer must first verify whether the employee agrees to the job change or not. If the employer's proposal is reasonable under the given changed circumstances, a suitable position is offered, no other less exhaustive measures can be used and there are no (other) weighty interests on the side of the employee which are contrary to the job change, then the employee can be expected to accept the proposal. In case the employee does not accept this proposal, the court can be requested to amend the employment agreement in accordance with the employer's proposal and to suspend the employer's obligation to continue to pay wages for the period of time wherein the employee refuses to fulfill the changed job position.

INSTANT DISMISSAL

First of all, an instant dismissal must be considered the ultimate remedy. According to case law, a repeated failure to comply with a reasonable assignment/instruction given by the employer may constitute an urgent reason for instant dismissal. In such case, the employee's interest must be weighed against the interests of the employer, taking into consideration the requirements of necessity, proportionality, and subsidiarity. All other less drastic and more realistic alternatives

must be completely exhausted by the employer, both with regard to guaranteeing safety in the workplace and the measures taken towards the employee with a reluctant attitude. In addition, the objections on the side of the employee must be unreasonable or ill-founded. The standards for the employee's protection and his/her fundamental rights are so high, that it is not expected that an instant dismissal will easily hold up in court.

DISSOLVEMENT

In accordance with what has been discussed above with regard to the job change, if the employee does not accept the employer's reasonable proposal to do so, the employer can also request the court to dissolve the employment agreement on the basis of changed circumstances, instead of modifying it in accordance with the proposal. If the employee has acted extremely unreasonable and the attempts made by the employer to restore the employment relationship have been unsuccessful, then an irreparably disturbed employment relationship can also be used as a (legal) basis for the dissolution of the employment agreement in such case.

CONCLUSION

It must be considered on a case-by-case basis which interests prevail for the measures to be

taken accordingly. As the fundamental rights of the employee play an important role, there can be no general obligation to vaccinate. The measures taken by the employer against an employee who refuses to be vaccinated must not in fact result in an unauthorized pressure to vaccinate. There are several hurdles which an employer must overcome with regard to the requirements of necessity, proportionality and subsidiarity before a measure can be considered reasonable. In general, health in the workplace can be adequately safeguarded in a less drastic manner, for example by means of personal protective equipment and hygiene regulations. Only if the specific nature of the business operations causes an increased risk of contamination and additional vulnerability of employees or third parties, an exception might apply. Furthermore, the employer's proposal must be weighed against the objections of each individual employee. In addition, the employer must try to offer the employee, who refuses to vaccinate, suitable work in another department within the company and to facilitate this process. If this is not possible or if the employee refuses this offer, then the other measures may be taken, whereby the measures with regard to (instant) dismissal have the least

chance of succeeding.

QUESTIONS

Do you have questions about the options which are available to your specific case, or do you need assistance with drafting a personnel policy? Please do not hesitate to contact the specialists at HBN Law & Tax.



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

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