

## THE ASSESSMENT ON WHETHER THE EMPLOYERS CAN OBLIGE THEIR EMPLOYEES TO BE VACCINATED AND PROCESS THEIR VACCINATION INFORMATION

### 1. Can employers oblige the employees to be vaccinated?

The Turkish Constitution (“Constitution”) protects the actions and decisions regarding medical and corporeal integrity of the individuals within the scope of personality rights. Pursuant to Article 17 of the Constitution; *“the corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law”*.

Currently, even though Covid-19 has been a central topic as a global pandemic from the beginning of 2020, there is no legal regulation ruling vaccination within the scope of Covid-19. Accordingly, forcing anyone to get vaccinated shall constitute a violation of the personality rights protected by the Constitution. In this context, we believe that employers cannot oblige their employees to be vaccinated.

On the other hand, it will be appropriate for employers to take incentive and protective measures in line with their obligations to guarantee their employees’ health and safety according to the protection of general public health and the provisions of the Occupational Health and Safety Law No. 6331. With regards to the employees who do not want to get vaccinated, the employers can take the work of the Ministry of Health and other public administrations as examples to encourage their employees to get vaccinated within the scope of health and safety measures in their workplaces and through cooperation with workplace physicians.

### 2. Does the employee's lack of vaccination give the employer a “rightful” or “valid” reason for termination of the employment agreement?

Even though in practice, there are comments that the employer can rightfully terminate the employment agreement in accordance with the condition that the employee *“either willfully or through gross negligence imperils safety”*, as stipulated under Article 25/II-1 of the Labor Law, we believe that this approach would constitute a violation of the following;

- The necessity of a legal regulation for a mandatory intervention in accordance with Article 17 of the Constitutional Law,
- The principle of termination as a last resort and the principle of proportionality of intervention.

The termination of the employment agreement of an unvaccinated employee for valid reason may also lead to risks associated with invalid termination since it would again be incompatible with the principle of termination as a last resort and, in our opinion, could constitute an intervention exceeding the purpose of the measure.

Therefore, we consider that in addition to any vaccination incentives to be carried out within the scope of occupational health and safety obligations and the duty of supervision, the employers shall primarily take the following measures together with the occupational health and safety specialists and workplace physicians; continuing to regularly inform employees about hygiene rules and methods of prevention from disease, making certain adjustments regarding the number of employees and their distance in the workplace, applying rotation at workplace entrance and exits, adopting remote working systems for suitable positions.

### 3. Can employers track whether their employees are vaccinated?

On the grounds that the information on whether an employee is vaccinated is a personal data, the recording of such information in physical or electronic systems of the employer shall constitute a personal data processing activity.

The vaccination information of an employee shall be considered health data, which is among special categories of personal data. In accordance with Article 6/3 of the Personal Data Protection Law (“KVKK”), the conditions for processing special categories of personal data are as follows: *[special categories of personal data] may only be processed, without seeking explicit consent of the data subject, by the persons subject to secrecy obligation or competent public institutions and organizations, for the purposes of protection of public health, operation of preventive medicine, medical diagnosis, treatment and nursing services, planning and management of health-care services as well as their financing.*

Accordingly, it shall be lawful to track whether an employee is vaccinated in accordance with the conditions pursuant to KVKK Article 6/3, which stipulates the processing of such data by the workplace physician or nurse who have an obligation of confidentiality, and to anonymously share this data with the Human Resources department or persons carrying out these tasks.

If the vaccination information of an employee is to be processed in an identifiable manner by the Human Resources and/or different business units of the employer, it will be necessary to rely on the condition of explicit consent to process such data pursuant to Article 6/2 of KVKK. Nevertheless, it shall be noted that the validity of explicit consent obtained from employees is controversial in terms of meeting the criteria of “given with free will” determined by the KVKK. Consequently, we recommend that employers avoid obtaining explicit consent as a condition for processing such data and leave the issue of vaccination tracking to workplace physicians, who are legally authorized in this regard.

### 4. What should be done in case it is sought to be vaccinated for those who will enter 3<sup>rd</sup> parties’ workplaces within the scope of occupational health and safety measures taken by the 3<sup>rd</sup> parties with whom the employer is in a legal relation?

Due to the nature of the work performed, the employers may need to share the vaccination information of their employees with 3<sup>rd</sup> parties with whom they have legal relations (e.g. an employee providing a service in the facility of his/her employer’s client).

In such case our primary advice is that the vaccination information of the employees shall not be collected by the employers or alternatively, it shall be collected without recording in any physical and/or electronic medium. In other words, such data shall only be shared by the explicit consent of the employee in person, directly with the relevant 3<sup>rd</sup> party who requests this information, without employer’s need of transferring any information and documents

In case the employer decides to transfer the information on the employees’ vaccination status upon request from 3<sup>rd</sup> parties with whom the employer has legal relations, the employer shall inform the employee in question, and since the personal data subject to transfer will be a health data, the employer shall obtain the explicit consent of the employee before such transfer. The aforementioned reservation regarding the validity of the explicit consent obtained from the employee shall also apply here.

Furthermore, employees’ vaccination status shall be transferred within the limits of the purpose of such transfer (*transferring only in relation with the occupational health and safety measures operating in the workplace of the requesting third party in which the service is to be provided*), proportionately (*only transferring the information of the employee who will go to the requesting party’s workplace*) and in accordance with The Turkish Personal Data Protection Board’s Principle Decision dated

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31.01.2018 regarding “**Adequate Measures To Be Taken By Data Controllers In The Processing Of Special Categories Of Personal Data**”, provided that a protocol is signed between the requesting 3<sup>rd</sup> party and the employer transferring the information, which determines the obligations of the parties for data transfer.

Kind Regards,

*Koyuncuoğlu & Köksal Law Firm*

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