

Employer's Right on Requiring or Incentivizing COVID-19 Vaccination for Employees

There is no clear legislation regulating the legal measures available to the employer with respect to the employees refraining from COVID-19 vaccination. In addition, the approach of the judiciary on the issue is also unclear, as a precedent-setting decision has not yet been issued.

Since there is no legislation and caselaw, this is currently a highly discussed subject and there are different opinions on it in the legal doctrine;

1- According to an opinion that Atty. Mehmet Durakoğlu, the President of the Istanbul Bar Association, also supports; forcing employees to be vaccinated constitutes a violation of the employees' constitutional and fundamental rights and freedoms. Therefore, the employer cannot force the employees to implement measures such as getting vaccinated, submitting a vaccination card or PCR testing. In case of termination of the employment agreement due to breach of such measures, the employees would have the right to file reinstatement lawsuit, to claim compensation based on bad faith, discrimination and due to restriction of fundamental rights and freedoms. According to this view, it is highly likely that such lawsuits will result in favor of the employee.

2- According to another opinion, the employer may require the employees to be vaccinated based on the employer's obligation to ensure order, occupational health and safety in the workplace in order to prevent the spread of the disease in line with the Article 4 of the Health and Safety Law No. 6331. However, breach of such a measure would not give the employer the right to terminate the employment agreement.

Since, as a principal, termination of the employment agreement is of last resort, below stated measures should be prioritized with respect to the employees who refuse to be vaccinated;

- a- paid leave (without any deduction from the employees' salary and side benefits),
- b- remote work,
- c- changing the position of the employee.

Lecturer Assoc. Dr. Tolga Şirin (Marmara University Faculty of Law, Department of Constitutional Law), is of the opinion that the issue should be evaluated on a case-by-case basis. According to Şirin, it should be considered whether the employee has contact with other employees or customers. If there are such risk factors, the above stated measures should be applied primarily. In cases where such measures cannot be applied, the employment agreement may be terminated for "valid reason" and by paying severance and notice indemnities.

3- According to the minority opinion; the employer may require vaccination for the employees and, moreover, in case of breach, the employer may terminate the employment agreement based on just cause due to the fact that the employee willingly or negligently endangers the workplace safety.

In addition to above,

a Circular¹ has been issued by the Ministry of Labor and Social Security on September 2, 2021 with respect to COVID-19 related measures to be taken by the employer. In such Circular,

- it is reminded that employers are obliged to inform all their employees about the protective and preventive measures against the health and safety risks that may be encountered in the workplace, and employers are also requested to inform their employees, whose COVID-19 vaccine has not been completed, additionally in writing.
- the employees who are not vaccinated even after receiving such information should be notified by the employer of the possible consequences of a definitive diagnosis of COVID-19, in terms of labor and social security legislation.
- as of September 6, 2021, employees who are not vaccinated against COVID-19 may be required to have a mandatory PCR test once a week by the workplace/employer, and the test results will be recorded at the workplace for necessary procedures.

The Circular has not yet been interpreted in the doctrine. However, in case the employer terminates the employment agreement due to lack of vaccination, such a sanction would likely not be deemed as a just cause for termination. Therefore, considering the characteristics of the situation (way of working, working conditions, nature of work, etc.), the principle of termination being the last resort (i.e. other measures that can be taken instead of termination) should be considered as a priority.

Our opinion;

The employer's mandatory requirement for a vaccine, which has not been scientifically proven to prevent transmission and which does not constitute a medical and/or legal requirement, would clearly interfere with the employee's personal and fundamental rights and freedoms.

If such action is planned, we believe that the employer should take the following points into account, in summary and in the order stated;

- workplace practices to encourage vaccination should be exercised instead of requiring vaccination (eg: being on paid leave on the day of vaccination, informing the workplace doctor about the subject, publishing informative brochures, etc.),
- taking measures such as remote working, paid leave, position change (each measure should be considered based on the facts of the case),
- if the termination of the employment agreement is considered, mutual termination should be proposed,
- in case of unilateral termination, following the procedure of termination for valid reason by paying compensation (we would like to remind you that in such case the risk of reinstatement lawsuits is high.)

¹ Information Letter dated 02/09/2021 and numbered 41515602-000/99 of the General Directorate of Labor of the T.R. Ministry of Labor and Social Security.