

**March 2021**  
**Labour Law Department**

### **VACCINATION FROM AN EMPLOYMENT PERSPECTIVE**

In the current state of the Covid-SARS pandemic one of the most common issues that has been raised all around us, both nationally and internationally, is the issue of vaccination. And, from an employment perspective, among the many doubts raised regarding this issue is whether a company, in accordance with the legislation of our country, can "compel" its workforce to be vaccinated and even require that a future employee be vaccinated prior to joining the workforce so that upon entering into the employment contract the worker can prove said status.

We are of the view that in this debate it is crucial to start from a fairly simple basis, which is that since in Spain **the existing legal framework** (at least for the time being) **does not provide for the vaccination of citizens to be "mandatory", this obligation is not generally in alignment with any view of the employment relationship.** A different debate (and one which exceeds the subject matter of this AJ), would be to specify whether or not it is possible to enforce/demand vaccination from a health perspective, in the face of increased contagions, and perhaps even addressing the differences and distinguishing between the different autonomous communities.

That said, it is relevant to take into account the regulatory framework, the Risk Prevention Act and the Data Protection Act. In this regard, in the field of Occupational Risk Prevention companies have a duty to ensure the health and safety of their employees (art. 14 of the Occupational Risk Prevention Act –"LPRL"-); there is also an obligation on workers to cooperate to ensure safe working conditions (art. 29 LPRL).

Having said that, exposure to biological agents (among them, those of the coronavirus family) and vaccination is only addressed by Royal Decree 664/1997 for professionals with greater exposure to the aforesaid virus (i.e., healthcare professionals). In any event, in this regulation vaccination is raised as an option and the worker must give his express consent, given that information on vaccination is sensitive in terms of data protection.

In view of the above (that is, that vaccination is voluntary, not mandatory and that risk prevention services can establish some nuances for specific posts and sectors, as well as the special nature in terms of data protection), we will focus on the two possible scenarios set out below, as well as the most likely consequences in each case. These are:

- On the requirement for vaccination at work once the service provision has commenced, if the worker refuses to be vaccinated and the company dismisses him for that reason, we understand that the dismissal would be unfair.

The worker would argue that there are no grounds for dismissal because they have been working to date without being vaccinated, so that so long as they are not compelled to be vaccinated by public health laws (i.e. they are not a person subject to a special relationship, health personnel), and/or a state of alarm, it would be a decision that is their own to take, falling within the sphere of their private life, as well as an exercise of their fundamental rights regarding the possibility of accessing vaccination voluntarily. The nullity or unfairness of the dismissal, respectively, will depend on the specific case, and whether or not there has been a breach of fundamental rights.

- On the requirement for vaccination when applying for a job, that is, before entering into an employment contract, although the employer taking into account his power of management may set the requirements they want the employee to be incorporated within the workforce to meet (please note, that this case is substantially different from the more or less frequent job offer requirements such as, for example, obtaining the necessary qualification enabling the worker to do the job, or a driver's licence, if transport work is involved); it is a basic rule that under no circumstances can these requirements be discriminatory and the privacy of the worker must be respected.

The candidate could argue that he or she has felt discriminated against when compared to another worker on the grounds that that worker has been vaccinated and they have not, even more so now in the early days of the vaccination campaign, where vaccination at the citizen/worker's request is not available, but rather everyone must wait their turn. Furthermore, requesting personal data during a recruitment process entails certain risks and, where applicable, depending on the circumstances, could incur a penalty, arising from the legislation on employment breaches and sanctions.

**In conclusion, we are of the opinion that it is currently difficult in Spain to demand mandatory vaccination from the point of view of employment law.**

To be clear, we should ponder whether, if we were to say otherwise, it would lead us to the absurd situation where if it were to be mandatory, companies could require employees to be vaccinated for other illnesses, such as influenza, which is also voluntary, or, to be more precise, which, for the time being at least, is voluntary.