

Vaccination and the return to in-person work

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As vaccination against covid-19 advances in Brazil, companies that migrated to remote work during the pandemic are starting to plan their return to in-person work, whether full time or under a hybrid work arrangement, and are asking whether they can require that their employees provide proof of vaccination, and what disciplinary measures are appropriate when employees refuse to be vaccinated.

The Ministry of Health's National Vaccination Plan guarantees vaccination against covid-19, free of charge, throughout Brazil. To date, around 50% of Brazil's population has been fully immunized.

Ideally, company policies that require vaccination and impose disciplinary measures on those who refuse the vaccine should contemplate a scenario in which free vaccines are available in sufficient quantity to all employees. In other words, before the course of vaccination against covid-19 under the national campaign is complete, requiring proof of vaccination is not reasonable and employers must decide whether (i) to maintain remote work (if distance working is in place) or (ii) to allow in-person work or hybrid arrangements, with implementation of sanitary measures to prevent contagion by covid-19.

As for the disciplinary measures – including dismissal for cause – that might be applied to employees who refuse the vaccine, the question continues to be a controversial one, since it involves conflicting constitutional guarantees. On one side, there is the employees' right to physical integrity, to private life, and to freedom of conscience. On the other, there are employers' fundamental guarantees, such as the right to free enterprise and to property, which give them the right to manage their business as they see fit. Another aspect of great importance is the employer's legal obligation to maintain a healthy workplace, and the right to life and to health of the other employees in the workplace.

In short, what are employers' rights and duties in this matter? And what are the rights and duties of citizens in general?

The solution is to weigh the various rights, based on criteria of reasonability. Brazil's constitutional court, the STF (Supremo Tribunal Federal), dealt with the issue in December 2020, and ruled in favor of compulsory vaccination. According to the STF's decision, although vaccination cannot be forced, the State may impose restrictive measures on citizens who refuse vaccination, such as fines and restrictions on engaging in certain activities or frequenting certain places, for example. In making their decision, the Justices relied on the constitutional principle of solidarity, under which the rights of society must prevail over individual rights.

The same line of reasoning was taken by the Public Labor Prosecutors' Office

in a study conducted by the Covid-19 National Working Group, which concluded that vaccination is "not just an individual right, but a collective right and duty", and that, saving exceptional situations where there is good reason not to vaccinate (such as a medical contraindication), workers do not have an individual right to oppose vaccination, and employers may apply the disciplinary measures provided for by law.

Recently, a number of Labor Appeal Courts have issued decisions in favor of dismissal (for cause, in some cases) of employees who have refused to be vaccinated without good reason. The decisions take the line that it is not reasonable to allow employees' private interests to prevail over the collective interest, since to do so during the pandemic would put other employees at risk and make it impossible for the employer to provide a safe and healthy workplace for all.

Thus, based on collective safety, and preserving health in the workplace, it can be argued that employers may require that their employees be vaccinated against covid-19, especially in activities where they are more exposed to risk, such work in the healthcare sector, on ships and oil platforms, and in bars and restaurants, as long as the privacy and confidentiality of employees' information is guaranteed. Employers may also impose disciplinary measures when employees refuse, without good reason, to be vaccinated or to provide proof of vaccination, as long as the employer has given clear instructions, and the penalties for non-compliance are graded from the least to the most severe.

Consequently, when employers are faced with an unjustified refusal by employees, the employer should explain the benefits of vaccination, provide the employee with information on the nearest vaccination centers, and give the employee a period of time to be vaccinated. If, without good reason, the employee continues to refuse the vaccination, the employer may prevent the employee from returning to in-person work and impose warnings and suspensions, and even dismiss the employee for cause. It is not yet clear whether an unjustified refusal to vaccinate always constitutes cause for dismissal, and so the decision to dismiss should be made on a case-by-case basis, after other disciplinary measures have failed, taking into account the nature of the work performed by the employee, the reason given for refusing the vaccination, and awareness measures implemented by the employer.

***This article can be found in the e-book "Current Employment Issues: the end of the pandemic and new ways of working". [Click here to read the whole content.](#)*

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