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EUROPEAN EMPLOYMENT LAW UPDATE – RETURN TO WORK - JULY 2021

To Our Clients and Friends:

In this update, we look at the key employment law considerations our clients face across the UK, France and Germany connected to a return to the workplace in the near future, including: (i) ensuring a “Covid-secure” workplace’ and whether to continue to offer flexible working arrangements in the future; (ii) whether to implement an employee Covid-19 vaccination policy (and if so, whether it should be compulsory or voluntary); and (iii) vaccination certification logistics and the facilitation of Covid-19 testing for employees. The legal and commercial issues around Covid-19 continue to be fast-developing, alongside guidance from governments and national authorities, which employers and lawyers alike will continue to monitor closely in the coming months.

1. A return to the workplace

UK

On 5 July 2021, the Prime Minister announced the UK government’s plans to lift the remaining Covid-19 legal restrictions in England from 19 July 2021 following a further review of the health crisis on 12 July 2021 (with varying timeframes across the other nations of the United Kingdom). Should the lifting of restrictions be confirmed on 12 July, it is expected that there will no longer be legal limits on social contact or social distancing, or mandatory face covering requirements except in certain specific settings (such as healthcare settings). Event and venue capacity caps are also expected to be dropped and venues such as nightclubs should be permitted to reopen. UK employers are therefore anticipating a return to the workplace over the next few months, with the government’s message of “*work from home where you can*” expected to be removed from 19 July 2021.

With a safe return to the workplace in mind, to the extent they have not done so already, employers should be ensuring their workplaces are “Covid-secure” and risk assessments have been conducted in line with the UK’s Health and Safety Executive’s regularly updated [guidelines](#) which are scheduled for further review on 19 July 2021. Practical measures to be put in place will vary depending on the nature of the workplace and industry-specific guidelines, but employers may need to (or wish to) produce policy documents to outline protocols covering meetings, hand washing, mask-wearing, shielding and self-isolation in the event of exposure to Covid-19. In terms of the practical logistics of a return to the workplace, employers should consider whether they wish to continue flexible working arrangements that may currently be in place for their workforce including working from home, the rotation of teams with allocated days to attend the workplace and even specifying arrival and departure times to avoid “bottle necks” in reception areas. UK employers have a duty to consult with employees on matters concerning health and safety at work so will need to engage with their workforce and any relevant unions in good time in advance of a return to the workplace.

Some UK employers will also be preparing for the anticipated end of UK government financial support towards employer costs through the Coronavirus Job Retention Scheme (which is currently set to run until the end of September 2021), the reintegration of furloughed employees, managing levels of accrued untaken annual leave which employers may seek to require their employees take at specific times to ensure it is well distributed, the management of employees who are reluctant to return to the workplace and their options in terms of disciplinary processes and navigating potential employment claims associated with any such processes, as well as potential headcount reductions and redundancies.

Germany

The home office regulations in Germany were tightened in spring of this year, ending in June. Unlike the UK, Germany had to face a serious “third wave” of Covid-19 infections in spring. Until April 2021, German law only stipulated an obligation for employers to provide working-from-home opportunities whenever possible. However, after intense public discussions, the government imposed an additional and enforceable obligation for employees to actually make use of such offers. Due to the rapidly falling numbers of infections in Germany during early summer, the government announced that the working-from-home obligation shall cease from the end of June.

However, a fast return to the status before the pandemic is still highly unlikely. Many large entities have already announced that they will provide non-mandatory work-from-home opportunities to their employees after the end of June in order to allow all employees to return to the office when they feel comfortable doing so. Some entities may no longer have the capacity to provide office space to all employees every day, five days per week.

Due to the recent and unpredictable development of the Delta variant and generally possible increasing infections in autumn, employers are well advised to keep the work-from-home infrastructure for a potential mandatory return to the home office in place.

France

The health crisis has led employers in France to adopt strict measures to prevent the spread of Covid-19 which have varied in intensity depending on the period of the pandemic in question. These measures have required a great deal of work by Human Resources personnel, who have had to adapt to many recommendations from the French government including the National Health Protocol for companies (hereinafter the “Health Protocol”) - a driving force which is regularly updated according to the ever-evolving health situation.

On Thursday, 29 April 2021, President Emmanuel Macron unveiled a 4-step plan to ease lockdown in France, with key dates on 3 May 2021, 19 May 2021, 9 June 2021, and 30 June 2021, which is progressively accompanied by an easing of the Health Protocol. As of 9 June 2021, working from home is no longer the rule for all workplaces and, where applicable, it is now up to the employer to prescribe a minimum number of days per week for employees to work from home or from the workplace within the framework of local social dialogue. In this way, the easing of the Health Protocol is slowly handing back decision-making authority to employers by allowing them to determine the right proportion of at

home/onsite days for their employees. However, all hygiene and social distancing rules must continue to be followed by employers, as well as the promotion of remote meetings where possible.

As the physical risks of returning to the workplace reduce, employers must continue to monitor and account for the psychosocial risks, insofar as a return to the workplace may be a source of anxiety for employees (such as the fear of having lost their professional reflexes or the fear of physical contamination). Employers must therefore remain vigilant on these issues as they manage the return of their workforce.

2. Vaccination policies

UK

The UK government's Department of Health and Social Care has said that it is aiming to have offered a Covid-19 vaccination to all adults in the UK by the end of July 2021, although the vaccination is not mandatory. In his 5 July 2021 announcement, the Prime Minister confirmed that the government plans to recognise the protection afforded to fully-vaccinated individuals in relation to self-isolation requirements upon return from travel abroad or contact with an individual who has tested positive for Covid-19. Employers are therefore considering some of the following issues with respect to the vaccination of their workforce:

(i) ***Whether to introduce voluntary vaccination policy or vaccination as a contractual obligation or pre-requisite to employment for new recruits:*** UK health and safety legislation requires employers to take reasonable steps to reduce workplace risks, and some employers will be of the view that requiring (or encouraging) employee vaccination is a reasonable step to take towards protecting their workforce from the risks of Covid-19 in the workplace. This assessment is likely to depend largely on the nature of the work being done, the workforce (its interaction generally and with third parties) and the nature of the workplace.

Proposed amendments to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936) will make it mandatory from October 2021 for anyone working in a regulated care home in England to be fully vaccinated against Covid-19 (subject to a grace period). This includes all workers, agency workers, independent contractors and volunteers who may work onsite. The government is currently considering whether this mandatory vaccination policy should apply to other healthcare and domiciliary care settings. In the meantime, many employers who are not bound by this policy are nevertheless considering introducing a vaccination policy, whether voluntary or compulsory. Any vaccination policy must be implemented carefully and thoughtfully.

(ii) ***Employees who refuse the Covid-19 vaccination:*** Employees may be reluctant or refuse to have the Covid-19 vaccination for a variety of reasons such as their health, religious beliefs or simply personal choice. Depending on whether employers choose to encourage their employees to have the vaccination through a voluntary policy, or make vaccination a mandatory contractual requirement, where employees decline vaccination, employers will need to consider: (a) whether they need to take additional steps to protect the health and safety of those unvaccinated employees or others, including addressing any measures to ensure the workplace is "Covid-secure" or extending working-from-home flexibility for

unvaccinated employees; (b) whether disciplinary action (including dismissal) is an option; and (c) how best to manage the risk of potential employment claims.

Employers will be seeking to balance their obligations to protect their workforce under health and safety legislation (which may in part be achieved through high levels of workforce vaccination), reporting obligations in respect of diseases appearing in the workplace (which include Covid-19) and their general duty of care towards employees on the one hand, with employees' right to refuse the vaccination and the risk of potential employment claims on the other.

(iii) **Data protection implications:** Employers who collect information relating to whether their employees have been vaccinated will be processing special category personal data, which means they must comply with the requirements of the UK data protection laws in respect of such processing. As such, employers processing vaccination data will need a lawful basis to do so under Article 6(1) of the UK GDPR as well as meeting one of the conditions for processing under Article 9. Furthermore, any such processing must be done in a transparent way so relevant privacy notices will need to be updated and employers must ensure that they also take account of data minimisation and data security obligations. Specifically, they should ensure they do not retain the information for longer than necessary or record more information than they need for the purpose for which it is collected (i.e., protecting the workforce), as well as ensuring any such data remains accurate and safe from data breaches.

Whether an employer has a legal basis for processing this special category personal data will depend on the context of their employees' work, the relevant industry and other factors such as the interaction of their workforce with each other as well as clients or other third parties.

Germany

The German government lifted its vaccination prioritization system on 7 June 2021. Most recently, occupational doctors (*Betriebsärzte*) have been involved in the vaccination campaign as well in order to accelerate it.

Employers may be interested in reaching the highest possible vaccination rate amongst their employees. There are not only economic reasons for such an approach (e.g., to mitigate the risk of disrupted production as a result of quarantine measurements), employers also have a legal obligation towards their employees to protect them and create a safe work environment. In this regard, however, there are crucial points to consider:

(i) ***So far, there is no indication for the lawfulness of an obligatory vaccination:*** It is quite clear that there is no justification for the state to make vaccination mandatory for its citizens – mainly for constitutional reasons. The legality of a contractual vaccination obligation imposed by the employer is also widely opposed in Germany.

(ii) ***Alternatively – and less risky from a legal perspective –, employers may consider a cooperative approach to achieve a high percentage of vaccinated employees:*** This could include different measures to increase willingness to be vaccinated amongst the workforce, e.g., by providing information about the vaccine, highlighting the advantages, or offering the vaccination through the company's medical

provider. A more controversial method is to consider rewards for vaccinated employees. There is no case law yet on the issue of whether employers can legally grant such bonuses. However, an incentive will most likely be considered lawful if the bonus stays within a reasonable range. Only in such a case, a completely voluntary decision for each employee to decide for or against a vaccination can be assumed. Even negative incentives can be justified under special circumstances. Therefore, absent any statutory rules on this issue it seems reasonable and appropriate to deny non-vaccinated employees access to common areas like close-area production areas, warehouses, or the cafeteria in order to avoid a spread of infections. On the other hand, it is not admissible to threaten an employee with termination if that employee decides against vaccination.

(iii) **Data protection implications:** Given the fact that the new UK GDPR is an almost verbatim adoption of the EU GDPR, the data protection implications for the UK and the EU, including Germany and France, are basically identical. Articles 6 and 22 of the EU GDPR can provide the necessary basis to legally handle the processing of health data like the vaccination status. Nonetheless, employers will have to make sure this is done in a transparent fashion and the information is not kept longer than absolutely necessary.

In the event that employers offer bonuses to employees for getting vaccinated, compliance with the EU GDPR is less problematic as the employees will likely provide their personal data on a voluntary basis. However, to comply with the EU GDPR, employers must ensure they have explicit consent for the data processing.

France

In France, vaccination against Covid-19 has been progressively extended to new audiences in stages and in line with accelerated vaccine deliveries. Since 31 May 2021, vaccination has been available to all over 18 years' old including those without underlying health conditions. As of 15 June 2021, it has been available to all young people aged between 12 to 18 years' old.

(i) **No obligation to get vaccinated:** Employees are encouraged to be vaccinated as part of the vaccination strategy set out by France's health authorities. However vaccination against Covid-19 remains voluntary and there should be no consequences from an employer if an employee refuses vaccination. Indeed, the mandatory or simply recommended nature of any occupational vaccination is decided by the French Ministry of Health (*Ministère de la Santé*) following the opinion of the French High Authority of Health (*Haute Autorité de Santé*). In the case of Covid-19, the mandatory nature of the vaccination has not yet been confirmed. Therefore, employers cannot request employees get vaccinated as a condition of returning to the workplace. In the same way, vaccinated employees will not be able to refuse to return to the workplace on the grounds that their colleagues have not been vaccinated.

As an employer cannot force an employee to be vaccinated, one big question arises in relation to those employees whose jobs require them to travel abroad regularly, particularly to countries where entry is allowed or denied according to Covid-19 vaccination status. Although no position has been taken in France on this subject for the moment, it seems likely that an employer will be able to require such an employee to prove that they has been vaccinated before allowing them to travel on company business.

(ii) ***Compliance with strict confidentiality and the EU GDPR:*** An employer cannot disclose information relating to an employee's vaccination status, nor their willingness to be vaccinated, to another person under the EU GDPR. It is therefore, not possible for an employer to organise for a vaccination invitation to be sent to individual employees identified as vulnerable or whose job requires proof of vaccination. Indeed, such a process would allow the employer to obtain confidential information concerning the health of the employees in question, which is contrary to medical secrecy and which data is considered “sensitive” health data under the EU GDPR.

(iii) ***Involvement of occupational health services:*** The Covid-19 vaccination may be performed by occupational health services. If an employee chooses to go through this service, they are allowed to be absent from work during their working hours. No sick leave is required and the employer cannot object to their absence. In other situations, in particular if an employee chooses to be vaccinated in a vaccinodrome or at their doctor's practice, there is no right to leave. However, in our opinion, the employer must facilitate the vaccination of employees in order to comply with its health and safety obligations.

3. Vaccination certification and Covid testing

UK

Vaccination certification

The UK government has introduced a Covid-19 vaccination status certification system known as the “NHS COVID Pass”. The Pass can be downloaded onto the NHS App on an individual’s smartphone and be used within the UK and abroad by those who have received a Covid-19 vaccination to demonstrate their vaccination status. In his 5 July 2021 announcement, the Prime Minister confirmed that a Covid-19 vaccination certificate will not be legally required as a condition of entry to any venue or event in the UK, but businesses may make use of the NHS Covid Pass certification if they wish to do so. Employers may therefore ask their employees to show their NHS Covid Pass as a condition to returning to the workplace or participating in certain activities, but to the extent they do so, the employment and data privacy issues noted above will need to be considered in advance to ensure employers do not expose themselves to risk of claims.

Covid testing

Since April 2021, the UK government has made Covid-19 lateral flow tests available at no cost to everyone in England. Under its current workplace testing scheme, free rapid lateral flow tests will continue to be made available until the end of July 2021. UK government guidance encourages employers to offer regular (twice weekly) testing to their on-site employees to reduce the risk of Covid-19 transmission in the workplace, although such testing programs are voluntary. Employers who propose introducing Covid-19 testing for their workforce will need to consider the risks and implications of doing so, including: (i) the terms of any policy around Covid-19 testing, including whether testing will be mandatory or voluntary and the extent to which they need to consult with the workforce ahead of introducing such policy; and (ii) how to manage employee reluctance to submit to testing, and whether

disciplinary proceedings will be appropriate or feasible, taking into account the risk of claims from their employees.

Germany

Vaccination certification

On 17 March 2021, the European Commission presented its proposal to create a Digital Green Certificate. It aims to standardize the mechanism by which a vaccination certificate is verified throughout the EU and to facilitate the right of free movement for EU citizens. Germany recently presented a new digital application for this certificate, the “CovPass-App”. Additionally, the newest version of the “Corona Warn App” is also capable of saving and displaying an individual’s vaccination certificate. It is possible to check their immunization status by scanning a QR-code on “the CovPassCheck App” and users are able to get their certificate uploaded to the application on their smartphone at selected pharmacies and doctors.

Regardless of the abstract possibilities of verification, employers in Germany and the EU will have to consider if and how they would like to use these tools. For instance, certificates might open up options to release employees from potential test obligations or work-from-home orders. At the same time, employers will have to observe aforementioned data protection implications and avoid unlawful discrimination or indirect vaccination obligations.

Covid testing

In Germany, rapid testing is currently free of charge and widely available. In addition, employers are required to offer at least two rapid tests a week for employees that are required to work onsite. The German government has declared that whilst employers’ no longer have an obligation to offer work-from-home opportunities, their obligation to offer rapid tests to employees will remain after the end of June. However, employees are not legally required to make use of this offer. This raises the question for employers whether or not they should make these tests mandatory. The legality of mandatory testing has not been assessed by a German court yet. It will depend primarily on the outcome of the balancing of the conflicting interests of employers and employees. While employees may claim a general right of privacy and cannot be required to undergo medical testing, employers can argue that they have a legal obligation to ensure the safety of their other employees.

Currently, one can argue that, due to the current extraordinary pandemic situation, the interests of the employer generally outweigh reservations of the employee against being tested or testing themselves. However, this might very well change when the number of cases continues to drop and the vaccination rate rises. Thus, employers electing to apply such measures are well-advised to monitor the nationwide and even local epidemiological developments closely and adapt their policies accordingly.

Again, the test results are “health data” that fall within the scope of the EU GDPR. Therefore, the data protection implications mentioned above apply accordingly. In the event that entities are having a works council, potential questions of co-determination rights according to the Works Constitution Act (*BetrVG*) have to be considered as well.

France

Vaccination certification

The French government has deployed a new application feature called *TousAntiCovid-Carnet*, which is part of the European work on the Digital Green Certificate. It is a digital “notebook” that allows electronic storage of test result certificates as well as vaccination certificates. For the French Data Protection Authority (“CNIL”), the voluntary nature of the use of this application must remain an essential guarantee of the system. Consequently, its use must not constitute a condition for the free movement of persons, subject to a few exceptions. Employers are therefore (in line with the health and safety obligations) invited to publicize this system and to encourage employees to download the application, but they cannot make it compulsory, either through internal regulations or by any other means. Any attempts to do so would be vitiated by illegality. Moreover, if the application is installed on a work phone, the employer will not be able to access the declared data, according to the French Ministry of Labor (*Ministère du Travail*).

In any case, if a French law that required people to have a vaccination passport and/or to download an application was to be enacted, each employer would have to ensure compliance with such a law. But, until then, this is not the case.

Covid testing

Companies may carry out Covid-19 screening operations with antigenic tests at their own expense, on a voluntary basis and in compliance with medical confidentiality. They may also provide their employees with self-tests in compliance with the same rules, along with instructions provided by a health professional. On the one hand, employee rights to privacy prevent a negative test result from being communicated to the employer - an employee does not have to inform their employer that they have taken a test at all in such a situation. On the other hand, in the event of a positive test, an employee must inform their employer of the positive result - an employee, like an employer, has a health and safety obligation to take care of their own health and safety, which in turn impacts his colleagues.

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We are looking forward to navigating these issues with our clients in the coming months and would be pleased to discuss any of the points raised in this alert.



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Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these and other developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, or the following authors and members of the Labor and Employment practice group in Europe:

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