



# BOFAXE

## COVID-19 Vaccines and Work-Related Rights (Part 1)

As States' capacities to provide COVID-19 vaccines rise, questions on whether employers can lawfully require their employees to get vaccinated arise accordingly. As the lawfulness of States imposing compulsory COVID-19 vaccinations has been already addressed (here and here), this post will focus on the lawfulness of employers' indirect imposition of COVID-19 vaccinations and the work-related rights of employees in this context.

### Dismissals on Grounds of Non-Vaccination

The initial vital question regarding COVID-19 vaccinations and work-related rights concerns the legality of employees' dismissals for objecting to getting vaccinated. Can one get fired for denying a COVID-19 vaccination?

The European Court of Human Rights ('ECtHR') has underlined that States also bear a positive obligation to ensure that the right to respect of one's private life, with which the requirement to undergo a vaccination interferes (*Vavříčka and others v. the Czech Republic*, paras. 263-264), is respected even between private parties (*Bărbulescu v. Romania*, paras. 108-111; *OC-18/03*, para. 140). Specifically, the ECtHR noted that employment-related disputes will engage ECHR Article 8 (right to respect of one's private life) either where a person loses a job because of something s/he did in their private life or when the loss of job impacts on private life (*Denisov v. Ukraine*, paras. 115-117). It is beyond doubt that a putative dismissal on the grounds of non-vaccination constitutes a loss of one's job for a reason related to one's private life, on which the dismissal has such extensive negative impacts that the "threshold of seriousness" required for an issue to be raised under ECHR Article 8 is reached (*Denisov v. Ukraine*, paras. 126-133).

Such being the case, what needs to be assessed is whether the employers' interest in preserving a good/healthy working environment outweighs the employees' interests in maintaining their jobs and having their private lives respected. In the case of *I.B. v. Greece*, which concerned an HIV-positive employee's dismissal due to his co-workers' refusal to work along with him, the ECtHR underlined that even though he was HIV-positive, he had not shown any symptoms of the disease (para. 72). Noting the reassurances provided by the occupational-health doctor, who was invited by the employer to explain the mode of transmission of the disease to the dismissed person's coworkers (para. 71), it considered that the national Court of Cassation, which held that the dismissal was justified on the ground of the employer's interests to restore peace in the company and of the manifestly inaccurate premise that the applicant's illness was "contagious", failed to balance the competing interests in a manner compatible with the State's obligations under ECHR (para. 88). In this sense, a dismissal of an unvaccinated employee may not be seen as justified, unless sufficient grounds indicate that there is in fact a danger of COVID-19 contagion to co-workers that outweighs the employee's right to their private life.

After all, while assessing the lawfulness of compulsory children's vaccination in *Vavříčka and others v. the Czech Republic*, the ECtHR paid particular attention to the fact that the measure was actually implemented via means of a protective rather than punitive nature (para. 306), namely via the imposition of fines to the parents, who had not duly vaccinated their children or via the prevention or cancellation of unvaccinated children's enrolment to nursery school. It further observed that unvaccinated children were not deprived of all possibility of development, even though the available alternatives required more effort and expense on behalf of their parents (para. 307), while the effects of the prohibition of enrolment were limited in time, as upon reaching the age of mandatory school attendance, unvaccinated children's admission to primary school was not prohibited (para. 307). In other words, the Court's favourable view of the measure was influenced by the fact that the means through which it was implemented were of moderate intensity; they were limited in effect and in time. In this sense, a measure that allows employers to dismiss employees who refuse to get vaccinated will most likely be seen as disproportional to the legitimate aim pursued, as the dismissal's effects are permanent and of absolute (rather than moderate) intensity. Alternative measures of lower intensity and short-term effect may however pass the proportionality test.



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## COVID-19 Vaccines and Work-Related Rights (Part 2)

### Employment and Access to Employees' Vaccination-Related Data

Another crucial question in this context relates to whether (prospective) employers can get access to vaccination-related data of (prospective) employees to decide on their promotion (or employment).

In cases concerning employers' access to information about their employees' mental and physical health, the ECtHR pays attention to whether this access was indeed in accordance with the relevant national provisions as well as to whether the latter were compatible with the respective State's international obligations (*Surikov v. Ukraine*, para. 70-71; *Radu v. Moldova*, para. 28). Indeed, the Court seems rather easily convinced regarding the legitimate aim of such access and particularly understanding towards the employers' legitimate interest in such data, while they are deciding on assigning certain job functions (*Surikov v. Ukraine*, para. 82, 91). It notes however that the collection and processing of this information must be lawful and such as to strike a fair balance between the employer's interests and the privacy-related concerns of the candidate for the relevant position (*Surikov v. Ukraine*, para. 91). Specifically, while determining whether an employer's access to sensitive information concerning a promotion candidate's mental health was "necessary in a democratic society", the ECtHR recalled that the reasons adduced to justify it must be relevant and sufficient (*Surikov v. Ukraine*, para. 73). As this parameter suggests, employers' access to an employee's vaccination-related data will only be relevant and sufficient if the position for which the candidate is being considered reasonably requires the person holding it to be vaccinated. After all, the ECtHR held that a national legal framework entitling employers to quasi-automatically obtain sensitive health-related data concerning employees will only be proportionate, if it is accompanied by strong procedural guarantees for ensuring that such data would be kept confidential, only used for the purpose it was collected kept up-to-date (*Surikov v. Ukraine*, para. 86).

Lastly, what should be underlined is that in the only major parallelisable (to the author's best efforts) cases, namely the ECtHR's above-mentioned *Surikov v. Ukraine* and *Radu v. Moldova* judgements, the employer-employee relationship had been already established before the employers accessed sensitive health-related data of their employees. Given that the ECtHR is more abstemious regarding the disclosure of sensitive information to prospective employers (*M.M. v. the United Kingdom*, para. 204), one can conclude that employers accessing vaccination-related information may be justified only for employees, not for job candidates.

### A Right for Health Professionals Not to Vaccinate?

Can health care professionals claim a right not to perform vaccinations based on their objection to COVID-19 vaccines?

To this question, the answer enshrined in relevant jurisprudence is negative. Indeed, two parallelisable claims were brought before the ECtHR by healthcare professionals prohibited from working as midwives due to their religiously-based refusal to assist in abortions (*Grimmark v. Sweden*; *Steen v. Sweden*). The ECtHR held that even if there was an interference with the applicants' rights under ECHR Article 9 (freedom of thought and conscience), this interference pursued the legitimate aim of protecting the health of women seeking abortion and was necessary in a democratic society and proportionate to the legitimate aim pursued (*Grimmark v. Sweden*, paras. 20-26; *Steen v. Sweden*, paras. 17-21).

Against this background, it becomes rather clear that, even if one's skeptical attitude towards vaccines reaches the level of seriousness required for it to constitute a belief protected under ECHR Article 9 (see analysis [here](#)), it would not entitle health professionals to refuse performing COVID-19 vaccinations.

### Businesses' Obligation to Grant Access to Vaccines

The Inter-American Commission on Human Rights recently added another perspective to existing discussions on access to vaccines. Specifically, in its [resolution 1/2021](#), it noted that 'States must require businesses to include workplace vaccination as a collective measure of protection in the vaccination programs they establish in their business' (para. 30). As it further underlined, '[t]he effective implementation of these duties impacts businesses, [...] even when States are not complying or not adequately complying with their obligations regarding the COVID-19 vaccines (para. 31). These remarks do not, however, suggest that the Commission perceives the imposition of the vaccination obligations to businesses' employees as compatible with the Inter-American human rights system, especially since, earlier in its resolution, it explicitly noted that all COVID-19 vaccinations must be subject to the 'free, prior, and informed consent of the individual being vaccinated' (para. 16). The Commission seems to be rather suggesting that businesses also have human rights obligations vis-à-vis their employees, which require them to facilitate access to vaccines, even when States neglect to fulfill such obligations.

### Epilogue

The Committee on Economic, Social and Cultural Rights has warned that the protection of public health is often used as the basis for differential treatment at work ([General Comment No. 20](#), para. 33) and as [recent applications](#) indicate, these warnings are well-grounded. What remains to be seen is whether States will act proactively to mitigate such dangers and how human rights courts will react to these claims.