

Mandatory CovidCheck in companies will soon be real!

Categories : News

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Although the CovidCheck system was optional for Luxembourg companies outside the HORECA sector[1], as we indicated in our previous newsletters[2], the law of 17 July 2020 on the measures to fight the Covid-19 pandemic[3], as amended by the laws of 16 December 2021[4] and 24 December 2021 (the "Law") now provides that all Luxembourg companies, regardless of their sector of industry, are required to set up a CovidCheck system applicable to their employees as of 15 January 2022[5].

In its current state, the Law provides that this measure must remain in place until 28 February 2022. However, extending this measure beyond that deadline cannot be excluded and seems highly possible given the current evolution of the health situation.

A. What are the consequences for employers?

As of 15 January 2022, all Luxembourg employers will be required to verify (personally or through a designated person) that each of their employees has a valid "3G" CovidCheck certificate before they can enter their workplace.

The Law currently defines the 3G CovidCheck certificate as either:

- a vaccination certificate (complete vaccination scheme) with a QR code or issued by the Luxembourg Director of Health or its representative;
- a recovery certificate with a QR code;
- a negative certificate based on a PCR test performed within the previous 48 hours or an antigen test performed within the previous 24 hours, both by certified health professionals; or
- a certificate of contraindication to the Covid-19 vaccination, provided that a certificate of a negative test as mentioned in the previous bullet point or a negative result of a self-diagnostic test performed on site is also provided.

The Labour and Mines Inspectorate oversees checking the application of the CovidCheck system. Any employer refusing to submit their employees to this system will incur administrative fines[6], or even criminal sentences[7].

To facilitate the verification of employees' CovidCheck certificates, the Law provides that a list of vaccinated or recovered employees may be kept by the employer (personally or through a designated person). However, it should be noted that only employees who have given their consent[8] may be included on this list, and that the list may only contain their full names and the period of validity of their certificate. Employees may request to be removed from the list at any time, without having to justify their decision. In this respect, the internal policy(ies) relating to the processing of employees' personal data should be adapted[9]. This list may only be kept

as long as the Law is in force^[10] and must be destroyed afterwards.

For employees who do not wish to be on this list, the employer will have no choice but to perform a daily check via the CovidCheck application to permit them access to the company's premises.

With regard to this list, it is surprising to note that the legislator expressly refers to only two of the three CovidCheck certificates, i.e. vaccination and recovery, but not to negative certificates based on a PCR or antigen test. However, the latter are also to be considered as valid 3G CovidCheck certificates, in the same way as vaccination or recovery certificates. This point raises questions: does this mean that employees with a valid certificate based on a negative PCR or antigen test cannot be included in this list, even if this is their wish? Is this the legislator's deliberate intention so as to encourage vaccination (in anticipation of the introduction of a "2G" CovidCheck)? Or has the legislator simply overlooked them for practical reasons, as the extremely short duration of validity of such certificates (24 or 48 hours) renders the usefulness of being included on such a list very limited?

To prevent falsification or usurpation of CovidCheck certificates, the legislator requires the employer to verify (personally or through a designated person) that the identity indicated on the CovidCheck certificate and the identity of its holder match. This is an important power given to employers (who will have to use it only for the purposes and within the limits of the Law), which causes heated debates in cross-border countries^[11].

Finally, while the 3G CovidCheck system is compulsory for employees to access their employer's premises, the same rules do not apply to third parties (such as customers and service providers), as the Law only provides the employer with the option to impose such a system on third parties. However, for customers of companies in the HORECA sector, this is not optional since the 3G CovidCheck system is mandatory since 1 November 2021, and for whom, as of 15 January 2022, it will be mandatory to provide a "2G+" CovidCheck certificate^[12].

B. What are the consequences for employees?

If the employee refuses or is unable to present a valid CovidCheck certificate, they will not be allowed to enter their employer's premises.

As opposed to the previous legal provisions, which remained silent on this point, the Law now explicitly provides that where an employee refuses to present a valid CovidCheck certificate and is thus absent from their workstation, no disciplinary action can be taken against them, nor does that refusal give rise to grounds for dismissal of the employee.

The Law specifies that such a dismissal would be and void and that the employee may consequently request the President of the Labour Court, within fifteen days of dismissal and by simple request, to declare the ity and order reinstatement of the employee. Unlike the situation for members of the staff delegation, the Law does not provide for the possibility for a wrongfully dismissed employee to choose between an action for ity of the dismissal or an action for wrongful dismissal. However, upcoming case law decisions may well allow for this possibility, as they have done previously for employees who were dismissed while pregnant or on maternity leave.

If the Law expressly forbids dismissal of employees for the sole reason that they cannot, or do not want to, present a valid CovidCheck certificate, we nevertheless still consider, as mentioned in our previous newsletter[13], that if the employer is able to demonstrate that extended or repeated absences of the employee lead to a disruption of the company or the services, this disruption could justify a dismissal with notice.

In any event, the days of absence of an employee who was unable or unwilling to present a valid CovidCheck certificate may be deducted, by mutual agreement with the employer, from the employee's statutory and/or contractual annual leave entitlement. In the absence of any agreement between the employer and the employee, or if the employee does not have enough untaken vacation days left, unworked hours will not be paid.

In the latter case, and contrary to the rules relating to unpaid leave, the employment contract will not be suspended such that:

- the employee will remain affiliated to the social security system (but the calculation of the contributions will be impacted); and
- the period of unpaid absence will be treated as a period of actual work for the purpose of calculating paid leave and seniority rights.

However, this period of unpaid absence will not be taken into account for the purpose of calculating unemployment or reclassification benefits and employees who do not have, or refuse to present, a CovidCheck certificate to their employer will not be eligible for short time working.

[1] <https://molitorlegal.lu/back-to-work-the-health-situation-in-businesses-with-regard-to-covid/> et <https://molitorlegal.lu/sesame-ouvre-toi-covidcheck-en-entreprise/>

[2] For companies in the HORECA sector, this regime has been mandatory inside premises for customers and employees since 1 November 2021 by virtue of a law dated 18 October 2021 (<https://legilux.public.lu/eli/etat/leg/loi/2021/10/18/a732/jo>)

[3] For a consolidated version of the law of 17 July 2020, applicable as of 15 January 2022: <https://legilux.public.lu/eli/etat/leg/loi/2020/07/17/a624/consolide/20220115>.

[4] <https://legilux.public.lu/eli/etat/leg/loi/2021/12/16/a875/jo>: Law of 16 December 2021, amending:

1° the amended law of 17 July 2020 on measures in the fight against the Covid-19 pandemic;

2° the amended law of 6 January 1995 on the wholesale distribution of medicines;

3° the amended law of 20 June 2020 on 1° temporary derogation from certain provisions of labour law in relation to the state of crisis linked to Covid-19; 2° amendment of the Labour Code;

4° the amended law of 24 June 2020 introducing temporary measures relating to the amended Municipal law of 13 December 1988 and the amended law of 27 March 2018 on the organisation of civil security in connection with the fight against Covid-19;

5° the amended law of 24 June 2020 introducing a temporary measure relating to the application of Article 12 of the amended law of 19 July 2004 on communal planning and urban development in the context of the fight against Covid-19 ;

6° the amended law of 24 June 2020 on celebration of marriage in a communal building other than the communal house in the context of the fight against Covid-19 pandemic ;

7° the law of 24 July 2020 providing temporary exemptions to Articles L. 524-1, L. 524-2, L. 524-5, L. 541-1 and L. 541-2 of the Labour Code;

8° the amended law of 19 December providing a temporary exemption to Article L. 121-6 of the Labour Code;

9° the amended law of 19 December 2020 establishing a temporary State financial contribution to uncovered costs of certain businesses;

10° the amended law of 19 December 2020 establishing a new economic recovery support program; and

11° the amended law of 22 January 2021 providing for: (1) amendments to Articles L. 234-51, L. 234-52, and L. 234-53 of the Labor Code; and (2) temporary exemptions to the provisions of Articles L. 234-51, L. 234-52, and L. 234-53 of the Labour Code.

[5] <https://legilux.public.lu/eli/etat/leg/loi/2021/12/24/a939/jo>: Law of 24 December 2021 amending:

1° the amended law of 17 July 2020 on measures in the fight against the Covid-19 pandemic;

2° the amended law of 19 December 2020 establishing a temporary State financial contribution to uncovered costs of certain businesses; and

3° the amended law of 19 December 2020 establishing a new economic recovery support program.

[6] The Labour and Mines Inspectorate will be able to issue administrative fines, the level of which will be determined depending on the severity of infringement, to companies that refuse to comply with its orders (Article L.614-3 of the Labour Code).

[7] Article L.314-4 of the Labor Code states that any violation of the employer's obligation to ensure the safety and health of its employees is punishable by a criminal sentence (a prison sentence of 8 days to 1 month and/or a fine of 251 to 25,000 Euros).

[8] In our opinion, and even if the Law includes no specifics on this point, consent should be given in writing for probatory reasons - we recommend employers to obtain consent by means of a dedicated form signed in duplicate for each party.

[9] To provide for the possibility for the employer to keep such a list and specify its purpose.

[10] 28 February 2022 as the Law currently stands.

[11] Of the bordering countries, only Germany seems to have taken a similar decision, for the time being, although it limits this power to restaurant owners and cultural event managers. The possibility of carrying out checks is under consideration in France and Belgium but is still being vigorously disputed.

[12] In addition to presenting a certificate of vaccination or recovery, customers who have reached the age of twelve years and two months must either perform a self-diagnostic test for SARS-CoV-2 on site or present a valid PCR or certified SARS-CoV-2 rapid antigen test. The customer is exempt from the testing requirement if they have already received the booster vaccination (3rd dose or "booster"). This applies to both indoor and outdoor areas.

[13] <https://molitorlegal.lu/back-to-work-the-health-situation-in-businesses-with-regard-to-covid/>