
Frequently asked questions Covid-Check in companies

What does the new law say about Covid-Check in companies?

The law that has just been passed on 18 October 2021 provides that an employer (respectively the head of a public administration) can decide on the introduction of the Covid-Check for access to his company/administration. This means that the employer's premises, or part of these premises, or other job sites are only accessible if the employee can present a valid Covid-Check certification (cured, vaccinated or certified valid negative antigen test). However, in the Horeca sector (which includes company canteens), the Covid-Check will be mandatory, both for customers and staff.

Are these new measures already in force?

Yes and no. The Covid-Check scheme as set out in the amended Covid Measures Law may be used in companies from 19 October 2021. Until 31 October 2021, self-diagnostic tests for Covid-19 that are carried out on-the-spot and have a negative result are however still allowed. They will no longer be allowed from 1 November 2021 (see question). The Covid-Check is possible in companies until 18 December 2021, without prejudice to a possible extension by law beyond this deadline.

Does this mean that Covid-Check is being imposed throughout the economy?

No. The law leaves it up to employers to decide whether or not to introduce it. Several large companies have already announced that they do not want to introduce it given the many questions raised by its application from both a legal and organisational point of view.

We are talking about a voluntary Covid-Check. Can an employee refuse to undergo the Covid-Check if it is planned in his company?

No. The Covid-Check is voluntary for the employer, but compulsory for the employee.

What is the role of the staff delegation?

The law does not specify this, but the Minister of Labor has clarified that it is a health and safety measure as defined by the Labor Code and that it is therefore necessary for the staff delegation and the employer to agree to the introduction of the Covid-Check in a company with 150 or more employees (the number of employees being calculated at the time of the last social elections - if the company has exceeded 150 employees in the meantime, there is no co-decision). In companies with fewer than 150 employees, the delegation must be informed and consulted, but the employer can unilaterally decide to introduce Covid-Check.

What if the employer does not respect the rights of the staff delegation?

This is an offence of obstruction by the employer against the competences of the delegation. Such an offence is covered by criminal law and can result in fines and, in the event of a repeat offence, prison sentences for the



employer. In such cases, we request the delegation concerned to contact their central secretary directly in order to prepare judicial action against the employer.

The Minister of Labor says that for all open issues, labor law applies. What sanctions will apply then?

In fact, labor law does not specify the sanctions that are applicable in case of non-compliance with health and safety rules in the company. The company's internal procedures apply. This may include reprimands, work exemptions without pay, or even dismissal for serious misconduct. As the law is silent on this matter, the employer is ultimately free to decide whether or not to impose sanctions. He can also decide on a case-by-case basis, i.e. it depends whether he likes the look of you.

Is a dismissal really proportional to a refusal to be tested?

In our view, no, especially since the new law does not provide that the implementation of a Covid-Check scheme must not be motivated by the employer by particular health and safety considerations beyond the persistence of the pandemic. However, Luxembourg jurisprudence does indeed hold that an employee's systematic refusal of safety rules at work is a valid reason for dismissal, even without notice (for serious misconduct). So it is a real risk, and in the last instance it will be up to the labor court to assess whether it is justified.

What consequences can this have for the person concerned?

Whether the dismissal is made with or without notice, the employee will no longer be able to work and will no longer receive a salary. He/she will be deprived of the right to unemployment benefit and will be disaffiliated from the Luxembourg social security system. This can therefore create situations of extreme social precariousness. Delegations must therefore be very careful to provide for alternatives to sanctions if they agree to the introduction of the Covid-Check.

Are rapid tests (antigenic self-tests) still allowed?

As of 1 November, rapid tests are only allowed if they are officially certified. With the exception of children's access to schools, the test can be certified by «a doctor, a pharmacist, a nursing assistant, a medical technical assistant, a nurse, a nurse in anaesthetics and intensive care, a paediatric nurse, a psychiatric nurse, a graduate nurse, a midwife, a social hygiene assistant, a laboratory technician, a physiotherapist, an osteopath, authorised to exercise their profession in the Grand Duchy of Luxembourg». In addition, PCR tests are permitted.

PCR tests and medical certification have a considerable cost. Is this cost covered?

If the test is not prescribed by a doctor, the cost is a priori to be borne by the employee. However, there is nothing to prevent the employer from bearing the costs if he chooses to do so, and this is one of the elements to be negotiated when a joint agreement between delegation and employer is put in place.

Why should the employee have to pay for the tests when the Labor Code states that health and safety measures should not constitute a financial burden for the employee?

The government's argument is that the vaccine (somehow identified to a «personal protective equipment») is made available free of charge, so it would be a personal choice of the employee to use tests instead of taking advantage of this free offer, and therefore they should pay for the test. For the OGBL, this argument is dubious to say the least. In our view, if the employer decides to impose Covid-Check, which is only optional, he should also bear the costs of the test. Moreover, the costs for employees who would have to be tested several times a week are considerable. In the end, high earners will be able to afford not to be vaccinated, while low earners will risk being fired for not being able to afford the tests.

Is the time spent getting tested counted as working time?

A priori no. This is a subject to be discussed at the level of delegation-employer co-determination if necessary.



Could teleworking be an alternative to the use of more or less severe sanctions?

Yes, even if, as a general rule, telework is done by mutual agreement between the employer and the employee, the use of telework as a health and safety measure could be taken as an alternative to sanctioning those who cannot present a valid Covid-Check certificate. However, it should be kept in mind that telework is only possible for about 50% of the jobs in Luxembourg.

Are other health and safety schemes, without Covid-Check or telework, possible?

Yes, employers can continue to operate with a mask and social distancing or arrange the workplace differently. They can also provide their employees with self-tests for regular self-monitoring, but in the knowledge that these will no longer be valid in a Covid-Check regime.

Is the Covid-Check in the company compatible with medical secrecy and data protection rules?

According to the government's argument, this is no longer a problem, as the Covid-Check app only shows the name of the person and whether the certificate is valid or not. The National Data Protection Commission (CNDP) has nevertheless issued a critical opinion, stating that many questions regarding data protection in companies are not resolved at all. Again, the lawfulness of the measures is left to the courts, who may usefully refer to the opinion of the CNPD, an independent administrative authority.

Does the trade unions' opposition to the new law on Covid-Check in companies mean that they have joined the camp of opponents of vaccination and that they will participate in the next "Marche blanche"?

Clearly not. The OGBL has always been in favour of people getting vaccinated in order to achieve a high rate of vaccination, which we believe is still the best way to return to normality. The amalgamation made by some media and politicians with the «anti-vax» movement is inadmissible. However, for the OGBL, the choice to be vaccinated must remain a personal choice and not an obligation. And the law on Covid-Check as adopted now simply raises a plethora of questions (test fees, working hours, practical organisation in companies...) and risks endangering the jobs and lives of employees in a way that is simply unacceptable to us as a trade union. Defending jobs and securing the lives of employees is a central task of the union.

What is the OGBL planning now?

As the law has been passed despite our opposition, we will now enter into discussions with the employers' representatives in order to prevent the Covid-Check from being implemented in random and risky ways and to protect the employees as much as possible. In parallel, we will continue to put pressure on the government to clarify and improve the legal text until it is implemented on 1 November. If the government does not move, we will consult with other nationally representative unions on the next steps to be taken, which may include legal action.