



ANDERSEN®



COVID-19

COVID-19

Experience in Latin America

Table of Contents



2	Andersen in Latin America
3	Andersen Global
4	Argentina
6	Brasil
8	Chile
10	Colombia
12	Costa Rica
14	Ecuador
16	El Salvador
18	Guatemala
20	Honduras
22	Mexico
24	Nicaragua
26	Panama
28	Paraguay
30	Peru
32	Dominicanan Republic
34	Uruguay
36	Venezuela

We have witnessed that pandemic of COVID-19 has triggered a health, economic and social crisis with worldwide effects. Social distancing and the generalized use of masks as policies, have shown that are not enough to stop the spread, while ensuring that vaccines are the most effective measure to mitigate, or at least, to control the health emergency.

Placed the argument that immunization is the key to overcome the pandemic, immediately it is open the debate about the unexplored risks of vaccination and the eternity discussion of the rights of individuals, against to the rights of the collective.

Andersen is willing to contribute to this debate, providing a technical analysis regarding the legal support of the mandatory vaccination and the effects on labor matter in Latin America's countries. This document has been written without considering our personal convictions over the "must be", with regards to the generalized inoculation of the population. Rather it has been conceived to understand what our laws set against to a singular situation that, as pandemic, has overwhelmed everything we thought foreseeable.

© 2021 Andersen Global. All rights reserved.

Andersen in Latin America

Andersen Global has a presence in Latin America through its member firms and collaborating firms.



Collaborating Firms



Andersen

Andersen Global is an international association of member firms, comprised of tax and legal professionals worldwide.

Our practices do not face conflicts of interest which may arise with other non-legal service providers, constituting a transcendental contribution to the development of our clients' activities.

We commit the proactive participation of a multidisciplinary task team of professionals specialized in corporate law, tax, accounting and auditing, trained in risk prevention, with a wide experience in consulting, management, application of best business practices and the use of legal and tax benefits in the exploration, implementation and development stages of investments in the production of goods and services sector.

Core Values



Best-in-class

We aim to be the benchmark for quality in our industry and the standard by which other firms are measured.



Stewardship

We hire the best and the brightest professionals and we invest in our people to ensure that legacy.



Transparency

We value open communication, information sharing and inclusive decision making.



Seamless

Our firm is constructed as a global firm. We share an interest in providing the highest level of client services regardless of location.



Independence

Our platform allows us to objectively serve as our client's advocate; the only advice and solutions we offer are those that are in the best interest of our client.

Argentina



COVID-19: Testing and vaccination for Employees, right or obligation?

The legal regime of the COVID-19 vaccination plan is regulated mainly by Law No. 27.573 and Resolution 2882/2020 of the Ministry of Health of the Nation.

In accordance with the above mentioned, Article 6 of Resolution 2883/2020 expressly sets that: "..., within the framework of the Strategic Plan for Vaccination against COVID-19, shall be voluntary, free, equitable and equal and shall be guaranteed to the entire target population, regardless of the history of having suffered the disease."

Given the clarity of the norm, employees are not obliged to participate in the vaccination plans in force in our country.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

The Argentine Government implemented different emergency regulations in the framework of the COVID-19 Pandemic.

Regarding labor law, we can group the main emergency measures as, all those that have

established the so-called triple prohibition, namely: (a) dismissals without cause, (b) dismissals for economic reasons and (c) suspensions without pay for financial reasons as well. (These measures are extended until December 31st, 2021).

Secondly, there are all those measures that aim to establish which employees can perform tasks and which ones are exempted - but preserving the right to receive wages - leaving aside those aimed at protecting employment (although of questionable effectiveness).

The conjunction of both standards and the possibility of receiving the first doses against COVID-19 have generated a legal framework that is not so clear in all cases and that we can summarize as follows:

a) Employees exempted from duties for being in the risk group: In accordance with the provisions of Resolution 207/2020 of the Ministry of Health, a clear assumption of prohibited work configures the duty of assistance to the establishment of those employees who are included in the so-called "risk group" (over 60 years or workers with previous comorbidities). This group of employees has been automatically included in a system of leave with benefits.

This group of employees can only return to activity after 14 days after the first vaccine dose. But what happens if the employee refuses to get vaccinated?

The literal application of the rule implies that the employer should continue to pay wages

(because it is a discharged worker) and the employee would continue on this leave with pay, without the link being terminated because dismissals are prohibited also, If the vaccination regime is optional, there is also no possibility of imputing a breach that justifies the termination of the employment contract with a valid cause.

From our point of view, the employee cannot be dismissed without justified cause - since dismissals nowadays are prohibited - nor the employee can be dismissed where due cause exists, since, he has the right to choose if he wants to receive the dose or not; neither can the employee be forced to return to work, because as we said it is a form of prohibited work.

In the light of the above, it should be borne in mind that it is the employee who by his decision has been placed in a prohibited work situation. So, making analogy with the regimen of incriminating diseases, the employee continues to dispense from the obligation to perform tasks but, without having any assets. In other words, although the employee cannot be forced or allowed to take up work (because of being a case of prohibited work), the employer's obligation to pay the corresponding wages ceases.

b) For other employees, the option of not receiving any of the vaccines authorized under the health plan against COVID-19 cannot be invoked as grounds for suspension or termination of the employment contract, given that our legislation recognizes the application of the vaccine as a right and not a duty. Notwithstanding this, the employee will continue to be obliged to respect and comply with the use of all Personal Protection Elements granted by his employer and/or security protocols applied for the prevention of COVID-19 at his workplace. ■



Lisandro Labombarda
Associate Lawyer

Andersen in Argentina
Member firm of Andersen Global
ar.Andersen.com



Brasil



COVID-19: Testing and vaccination for Employees, right or obligation?

The Constitution of the Federative Republic of Brazil states that the right to health and a healthy work environment is a fundamental responsibility to protect human life.

Employees have the right to "reduce the risks inherent to work, through health, hygiene, and safety norms".

It is also provided that "health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of illness and other diseases and universal and equal access to actions and services for its prevention, protection and recovery."

Law No. 13.979 (as amended by Law No. 14.035) provides for measures to deal with public health emergencies, and in its article 3 states that the authorities may adopt medical examinations, laboratory tests, vaccination, and other prophylactic measures.

The FSC (Federal Supreme Court) concluded that the State can order citizens to compulsorily submit to vaccination against COVID-19.

The understanding was established in the joint trial of Direct Actions of Unconstitutionality (ADIs) 6586 and 6587, which deal with vaccination against COVID-19, and of

Extraordinary Appeal with Interlocutory Appeal (ARE) 1267879, which discusses the right to refuse immunization for philosophical or religious convictions.

The FSC 's understanding is that the state may determine, for citizens who refuse to be vaccinated, the restrictive measures provided by law (fine, barring from going to places, school enrollment...), but cannot force immunization.

The FSC's decision on compulsory vaccination puts the collective good before the individual.

Compulsory vaccination is a way of protecting society, and this compulsoriness does not hurt individual rights, because according to the FSC 's understanding, the right to collective health prevails over individual rights.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Although there is no legislation mandating COVID -19 vaccination to date, as already pointed out, the understanding of the STF (Supreme Court) is that COVID-19 vaccination is mandatory and those restrictions can be established against those who fail to immunize themselves.

The company cannot force the employee to

take the vaccine - because it doesn't have this power - but it must guide its employees to get vaccinated.

Companies are responsible for their employees and must ensure a safe work environment for everyone, so when an employee refuses to get vaccinated, they put all their coworkers at risk.

If the employee refuses to take the vaccine, he or she must prove to the employer their inability to receive the vaccine by presenting a medical report, for example.

If the refusal is unjustified, the company can apply appropriate punishment to the employee (warnings and dismissal, for example), analyzing each specific case, since the right to collective health prevails over individual rights.

According to the STF, article 29 of provisional measure 927/20 is unconstitutional. The provision provided that cases of coronavirus contamination would not be considered occupational, except upon proof of a causal link.

The issue is not yet settled in Brazilian Courts, although in some cases, we have found that COVID-19 is considered an occupational disease, leading to employers being ordered to pay compensation.

It is worth remembering that each case is decided individually, however, it is up to the company to prove that there was training, that the work environment was safe, that there was a supply of masks and hand sanitizers, and that it removed employees with a suspicion of the disease.

In light of this, we verify that each specific case must be analyzed, considering if the company adopted the necessary measures capable of preventing the contamination of its employees, reviewing the activities performed by the employee and, in conjunction with this, the medical expert evidence, performed by a

medical expert from the INSS (National Institute of Social Security).

Regarding contract termination, the cases in which our legislation provides for dismissal with a fair cause are listed in our CLT (Consolidation of Labor Laws), however, the Technical Guide of the MPT (Labor Prosecutor's Office) on COVID-19 vaccination considers the unjustified refusal of the employee not to get vaccinated to be a serious fault. ■



Marco Lotti
Partner



Helena Riccio
Associate Lawyer

Lotti e Araújo Brasil

Collaborating firm of Andersen Global
www.lotti.com.br

Chile



COVID-19: Testing and vaccination for Employees, right or obligation?

The Political Constitution of the Republic of Chile assures all persons the right to life, physical and psychological integrity, health protection and freedom of conscience, among other fundamental rights. On the other hand, it establishes that the State protects the free and equal access to the actions of promotion, protection and recovery of health and rehabilitation of individuals, and it is also responsible for the coordination and control of such actions.

In this context, the Government's plan has declared that vaccination against COVID-19 is voluntary. Therefore, if the Government has not made it compulsory, it would not be possible for the employers to do so, so that, if they require their workers to be vaccinated, the latter could denounce the violation of their fundamental rights.

Notwithstanding, the Labor Code establishes the employer's obligation to take all necessary measures to effectively protect the life and health of workers, informing them of possible risks and maintaining adequate conditions of hygiene and safety in the workplace, as well as the necessary equipment to prevent occupational accidents and diseases. Therefore, although the employer cannot require vaccination, it must provide the means to facilitate the inoculation of workers who choose to be vaccinated.

In this matter, the new Law N° 21.342 established the employer's obligation to implement a COVID-19 Occupational Health and Safety Protocol which, among its minimum contents, includes temperature and contagion testing, physical distancing measures, periodic sanitization measures, means of protection, capacity control and definition of work shifts. Likewise, workers performing on-site work must have individual health insurance at the employer's expense, to finance or reimburse the costs of rehabilitation, hospitalization or death associated with COVID-19.

All of the above does not prevent the voluntary nature of the vaccine from changing, since the Health Code allows the President of the Republic, at the proposal of the health authority, to declare mandatory vaccination of the population against communicable diseases for which there are effective immunization procedures.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

The Labor Code establishes that when a serious and imminent risk to the life or health of workers occurs in the workplace, as could be the contagion of COVID-19, the employer must "immediately inform all affected workers of the existence of such risk, as well as the measures

adopted to eliminate or mitigate it" and "adopt measures for the immediate suspension of the affected work and the evacuation of the workers, in case the risk cannot be eliminated or mitigated". Nevertheless, the workers may not suffer any damage or detriment from the adoption of these measures; otherwise, they will be entitled to take legal action for violation of their fundamental rights.

The situation is different in the case of non-vaccination, since the Labor Directorate has expressly stated that the employer cannot prevent employees from entering the workplace by invoking the lack of vaccination, without incurring in a breach of its obligation to provide the agreed work, except in the case of an act of God or force majeure (i.e., when an unforeseen event occurs that cannot be resisted).

On the other hand, the employer cannot invoke the fact of being infected or not being vaccinated against COVID-19 to terminate the employment contract, the grounds for which are expressly regulated in the Labor Code.

However, the employer may stipulate in its Internal Order, Hygiene and Safety Regulations certain obligations and prohibitions to prevent contagion, whose non-compliance by the employee may result in the imposition of sanctions, such as reprimands and the application of fines, whose reiteration, seriousness and culpability could result in the termination of the employment relationship, depending on the specific case in question.

All these measures may eventually reduce or exonerate the employer's liability in case the worker decides not to be vaccinated anyway, and it may be considered as a reckless omission of the latter considering the functions performed by the employee, a matter for which the statement of our courts of justice will be of great importance.

Finally, it is important to point out that in our country the Mobility Pass has come into force,

which reduces the displacement restrictions for those persons who have completed their inoculation process, this being an incentive for vaccination against COVID-19. ■



Benjamín Iturrieta
Junior Associate

Chirgwin Chile
Collaborating firm of Andersen Global
www.chirgwin.cl

Colombia



COVID-19: Testing and vaccination for Employees, right or obligation?

In Colombia there are no regulations that oblige workers - or any other person in the country - to receive the COVID-19 vaccine; On the contrary, the provisions relating to the immunization strategy of the Colombian population against COVID-19 establish the need to carry out a pedagogy around vaccination, so that the informed consent of the recipients of this can be obtained, so that they manifest their free and autonomous decision to receive or not the vaccination scheme.

Currently being voluntariness is an essential element in the National Vaccination Plan to the point that, if a person chooses not to receive the vaccine, they do not lose the right to be vaccinated if they eventually change their mind, they can go to their health service provider to receive it (article 15, Decree 109 of 2021).

It cannot be lost sight of the fact that this voluntariness has its constitutional foundation in human dignity and the freedom of the people, the latter translating into what the Constitutional Court - the highest constitutional body - has called the principle of autonomy according to which "[t] Every intervention in the body of an individual must in principle have the authorization of the affected person (...)" (Sentence SU-337-99).

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Taking into account the voluntary nature of applying the vaccine, no penalties or negative consequences have been established for those who decide not to receive it.

In the workplace, however, the question has arisen as to whether the just cause of numeral 12, article 62 of the Substantive Labor Code-CST, according to which "The systematic reluctance of the worker to accept preventive, prophylactic or curative measures, prescribed by the employer's [employer] doctor or by the authorities to avoid illnesses or accidents. ", it could be applicable in the event that a worker refuses to receive the COVID-19 vaccine.

In this regard, the Ministry of Labor has ruled indicating that this just cause is not applicable in this case, as this would go against the constitutional mandate according to which the law cannot impair freedom, human dignity and the rights of workers, which are precisely the origin of the principle of autonomy that all people in Colombia have to decide whether or not to authorize an intervention in their body, considering that the Ministry that employers must and can adopt other prevention measures to adequately manage the risk of infection complying with the general biosafety protocol established by the Ministry of Health

and Social Protection (Resolution 666 of 2020 and Resolution 223 of 2021), paying special attention to epidemiological surveillance; welcoming figures, temporarily or permanently, such as work at home or teleworking, among others, and, in general, abiding by the measures recommended by the occupational risk administrators.

Thus, the primary obligation to adopt occupational health and safety measures lies with the employer, with the worker, for his part, having the obligation to observe occupational hygiene measures (CST., Article 60), that is, occupational health and occupational health policies, so that failure to comply with this obligation could constitute a just cause for dismissal (CST, article 62, numeral 6).

Finally, regarding the suspension of employment contracts due to non-vaccination or contagion, as we have pointed out, that does not have any negative consequence, for which the suspension would not be appropriate as the causes defined by the labor law do not contemplate this situation as an event that can give rise to this figure. However, in relation to contagion it may happen (i) that the worker presents symptoms, for which the doctor of the health promoting entity-EPS will grant him a disability (paid by the EPS from day 3) until symptoms disappear, usually, and (ii) disability occurs, according to medical criteria, compared to asymptomatic patients. Calling

this last event our attention, because in the case of no disability, the worker must also be isolated for at least 14 days and since this is not a cause for suspension, the possibility of adopting measures that do not imply their presence should be evaluated in the company or that allow to compensate the time once they return to their usual tasks. ■



Bibiana Buitrago
Partner

Jiménez Higuera Rodríguez & Asociados Colombia

Collaborating firm of Andersen Global
www.jhrcorp.co



Costa Rica



COVID-19: Testing and vaccination for Employees, right or obligation?

Vaccination:

In Costa Rica, the governing body in the field of health is the Ministry of Health and is ruled by the General Health Law No. 5395 (Article 2 of the law). This law establishes the obligatory nature of its mandate for all the inhabitants of the country, including the current case of pandemic due to Covid-19. (Article 367 of the law). It is reaffirmed by the Civil Code, in its article 46, which establishes the exceptions to our freedom of decision regarding our health.

The National Vaccination and Epidemiology Commission approved last September 28th the mandatory nature of the Covid-19 vaccine for all public sector officials, as well as for those employees of the private sector whose employers, within their internal labor provisions, have chosen for incorporating said vaccination as mandatory in their work centers.

The decree that formalizes said obligation of the vaccine against covid-19 will be issued and signed in the coming days. As of this publication, it has not been issued.

COVID-19 test:

We must see this issue in two ways, one that the employer wants to do a constant sampling in the company, which would not be done by the Ministry of Health, but would be in charge

of the company. It is one of the powers of the employer to ensure the health of its employees that could directly influence the development of his company. It is the duty of the worker to abide by the health standards necessary to avoid diseases or occupational accidents. The covid-19 test would be a prevention of a disease in the company.

On the other hand, if the employer suspects a case of contagion of any of his workers, he must call the Ministry of Health so that they can take charge of making a quarantine decision whether it is only done to some or all of the workers of the company.

The case of the Covid-19 Test can be seen as the right of the worker to take the test to be sure that he is not infected, and as the duty of the health authorities to carry out the test.

And at the same time, as an obligation of the worker to abide by health laws, and occupational health laws, to ensure a healthy work environment.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Contagion:

The fact that a worker is infected with Covid-19 is not cause for dismissal or termination of the

employment relationship. What occurs in the case of contagion is the same as with any other disease, the employee enters a disability that is granted by the Costa Rican Social Security Fund. There are no repercussions against the employee, unless knowing that he is with the disease he does not report it and goes to the workplace.

It is not possible to dismiss the disabled worker, if the reason for dismissal is the disability itself, as it would be contrary to law and the constitutional principles of solidarity, health, work and social security. The dismissal could be applied, if there have been causes that justify the dismissal, based on article 81 of the Labor Code, and with prior authorization from the MTSS.

No Vaccination:

Once the Government Decree ratifying the mandatory nature of the COVID-19 vaccine is published, and employers incorporate this requirement into their internal policies, the vaccine will become mandatory for all employees as of October 15, 2021.

In that case, a dismissal with just cause will be possible, that is, without compensation, if after being warned once, you do not comply with the required vaccination.

Therefore, it is imminent that vaccination will be an obligation of the employee, as well as a right, since the employer will be obliged to grant him the time to go to the health centers to get it. ■



Alfonso Carro
Associate

Central Law Costa Rica
Collaborating firm of Andersen Global
www.central-law.com



Ecuador



COVID-19: Testing and vaccination for Employees, right or obligation?

The Constitution of the Republic of Ecuador declares: "Health is a right guaranteed by the State", recognizing that its realization is linked to the exercise of other constitutional rights, among them, the right to work, to healthy environments and comprehensive health promotion and care services, for whose exercise, people are guaranteed "The right to make free, responsible and informed decisions about their health" and also the right of the worker not to be discriminated for the decision that makes about its health.

It is clear that health is a citizen's right, for whose realization the State is obliged to "Formulate public policies that guarantee (...) comprehensive health care and promote healthy practices in the family, work and community environments", through actions that facilitate and encourage the exercise of the right to be vaccinated, as a public health measure and to prevent the spread of communicable diseases.

Therefore, it is understood that the Organic Health Law, after recognizing the right of individuals to voluntarily make express decisions about their state of health and the procedures of diagnosis and treatment, confers competence to the Ministry of Public Health to: "Declare the compulsory nature of immunizations against certain diseases", which includes "immunizing workers who are

exposed to risks preventable by vaccination".

The mandatory nature of the law commits the State, its institutions and employers, without affecting the constitutional right of individuals to decide whether or not to voluntarily agree to immunization against COVID-19 or to undergo diagnostic tests for this disease.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

By Resolution MDT-2020-023 (Official Gazette 290, September 16th, 2020), the Minister of Labor clarified that COVID-19 disease does not constitute an occupational accident, in terms of the Labor Code, nor an occupational disease, "(...) except for those cases in which a direct link between the exposure to biological agents resulting from the work activities contracted by the worker could be established scientifically or by methods appropriate to the national conditions and practices". This pronouncement was surely motivated by the legal reform of June 22th, 2020, which introduced as a form of occupational disease, the "acute respiratory syndromes caused by viruses: doctors, nurses, cleaning assistants, of the departments of hygiene and health, whether of the State, or any other entity of public law, or private law with social or public purpose, or individuals".

Therefore, for legal purposes, COVID-19 is a non-occupational disease or common disease, which entitles the infected worker to medical attention as part of social security benefits, remunerated rest days paid by the employer, health benefits under the terms of the Labor Code or Social Security Law, and even the prohibition of dismissal by the employer during the time of the disease, when it does not exceed 1 year. In our labor legislation it is prohibited to "Sanction the worker with the suspension from work". The suspension due to non-professional illness of the worker can be produced when it is authorized by a doctor of the Ecuadorian Institute of Social Security.

The legal treatment is different in case the worker does not comply with his obligation to "Submit to the preventive and hygienic measures imposed by authorities"; and, the prohibition to "Endanger his own safety, that of his coworkers or that of other persons". The non-observance by the worker of the measures adopted by the employer and contained in the occupational health and safety regulations and occupational risk prevention regulations, such

as: the use of masks, hand hygiene, adequate social distancing, etc., could constitute cause for the employer to file a request (approval) before the labor authority (inspector) to authorize the termination of the labor relationship without the payment of labor indemnities, even in the case that the non-compliance has not produced a contagion. ■



Pablo Guevara
Senior Partner

Andersen in Ecuador
Member firm of Andersen Global
ec.Andersen.com



El Salvador



COVID-19: Testing and vaccination for Employees, right or obligation?

The Guarantee provided by the Constitution of the Republic of El Salvador, set forth in its first article, declares that it is the obligation of the State to ensure to the inhabitants of the Republic, the enjoyment of freedom, health, culture, economic well-being and social justice. For which, to ensure the enjoyment of these rights, it must be recognized and linked to the right to work, which must be guaranteed through harmonization between employers and employees, establishing rights and obligations between them, for the search continuous improvement of the workers' living conditions, which are embodied in the Second Chapter of the Constitution of the Republic.

It should be noted that, in El Salvador, the health of the inhabitants of the Republic constitutes a public good and, both the State and the people are obliged to ensure its conservation and restoration, as well as the State, is in charge of controlling and supervising your application.

This supervision and control is carried out by the Ministry of Public Health and Social Assistance, since it is responsible for the planning, determination and execution of the national health policy, as well as to dictate pertinent regulations, organize, coordinate and evaluate the execution of health-related activities.

It should be noted that as regards COVID-19, it is regulated in section twenty-one of the Health Code, and is considered a mandatory notifiable disease. Based on art. 131 of the same law.

Regarding the mandatory nature of the vaccine against this disease, it is necessary to consider that, being the State responsible for establishing the legal mechanisms, which guarantee the supply, availability, distribution, conservation, application and prescription of vaccines, in order to guarantee the protection of the population to prevent outbreaks and possible quarantines, it is understood that everyone is obliged to undergo the necessary treatments to reduce risks, such as the vaccine against COVID -19.

In order to carry out adequate immunization in the population, through the regulation and promotion that they guarantee in the national health system. The mandatory nature of the law makes the State, its institutions and employers responsible, without affecting the constitutional right of people to decide whether or not to voluntarily access the immunization against Covid-19 or to take tests diagnosis of this disease, since, The State complies with its obligation with respect to immunization measures, but it is already at the discretion of each citizen to submit to it or not.

El contagio o la no vacunación de COVID-19 como causa de suspensión o terminación de la relación laboral

Regarding the causes of suspension of individual work contract or termination of employment relationship, due to contagion due to non-vaccination against COVID-19, the Labor Code, in its art. 35 is limiting, since when it comes to suspension of the employment contract, it has specific causes, by which it can begin to take effect in relation to the provision of services and the payment of employees' salaries.

In the causes mentioned in the aforementioned article, it does not mention being a reason for suspension of contract or termination of employment contract, being infected by COVID-19, could have effects, in the case, that the employer or employee dies at cause of the disease and cause the suspension of work by them. The contract can be suspended due to illness by the employer, only if it complies with the temporary requirement, for the time indicated by the medical certificate.

But in legal terms, attached to Salvadoran legislation, COVID-19 is a disease that does not limit the infected employee, the right to use health-related benefits, provided by the Labor Code, as is the case of medical care. Likewise, it protects the worker from being fired by the employer, due to illness reasons. ■



Martín Guzmán
Paralegal



Fernando Argumedo
Associate

Central Law El Salvador
Collaborating firm of Andersen Global
www.central-law.com



Guatemala



COVID-19: Testing and vaccination for Employees, right or obligation?

The Political Constitution of the Republic of Guatemala, in its article 93, establishes: "The right to enjoy health is a fundamental right of the human being, without any discrimination."

In the month of January, 2021, in our country, was enacted the Law for the Financing and Acquisition of Vaccines against Coronavirus COVID-19, which establishes in its article 1, the following relevant part: "The vaccination is declared of national interest of the Guatemalan population against SARS-COV-2 virus, called COVID-19. The state will guarantee that said vaccination is carried out free of charge, universal and voluntary for the entire Guatemalan population."

From the above regulations, it is unequivocally inferred that for the State of Guatemala it is an obligation to guarantee vaccination against COVID-19 disease. Said vaccination must be, in accordance with the aforementioned regulations, universal and free, but for the Guatemalan population it is a right to be vaccinated or not, since it is clearly established that it is voluntary.

On July 6, 2021, Decree 8-2021 was published in the Official Gazette, which entered into force on July 7, 2021 and contains the Law of Exemption of Liability for the Use of Vaccines against COVID-19, that complements the law indicated above and establishes in its article 1

the following: "The purpose of this Law is to regulate what is related to the exemption of responsibility of those who are considered as protected persons, as well as the creation of a compensation mechanism by virtue of the administration of vaccines against COVID-19, based on the provisions of the National Vaccination Plan against COVID-19 in the Republic of Guatemala."

Also, Article 2 of this law, establishes: "The State of Guatemala assumes responsibility and defines the compensation mechanism for affected persons in accordance with this Law; applying to those who have been immunized with vaccines acquired by purchase or donation in the following twenty-four (24) months from the effective date of this Decree, and in accordance with Decree Number 1-2021 of the Congress of the Republic, by the Ministry of Public Health and Social Assistance."

And article 4, states: "Derived from the declaration of national interest for the acquisition of vaccines against COVID-19, contained in Decree Number 1-2021 of the Congress of the Republic, those who are considered as protected persons, in accordance with the provisions of literal c) of article 3. Who are all the persons involved in the development, manufacture, commercialization, acquisition and distribution of vaccines against COVID-19."

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

COVID-19 is a common disease, it is not an occupational disease, which is why it is the cause of partial individual suspension of an employment agreement, in accordance with the provisions of article 66 of our Labor Code.

The Labor Code, in its article 67, establishes that to determine the responsibility that the employer has, in the case of a common illness, it contemplates 2 assumptions: A) If employer is obligated to affiliate the employee to the Guatemalan Social Security Institute, he is only obligated to pay the respective contributions to said Institute; and B) In the case, that he is not obligated to affiliate the employee to the Guatemalan Social Security Institute, he must pay the employee, half a salary, depending on the length of the employment relationship.

COVID-19 is a disease that entitles the employee, in the event he has the right to Social Security, to receive benefits in money and medical services, which are contemplated in the Regulations on Protection related to Illness, contained in the Agreement 410 of the Board of Directors of the Guatemalan Social Security Institute.

If you want to fairly dismiss the employee, the legal cause to dismiss the employee is regulated by article 77, letter g), of the Labor Code, which prescribes: "When the employee refuses to adopt preventive measures or to follow the procedures indicated to avoid accidents or illnesses;". For example, that the employee refuses to use masks, hand hygiene, adequate distancing, etc., could constitute a fair cause to dismissal.

In the case of the previous paragraph, there is no responsibility for the employer, regarding the payment of severance for time served, damages and judicial costs, as long as if he is sued in court, he is able to prove the just cause of dismissal. ■



Verónica González
Associate Lawyer

Central Law Guatemala
Collaborating firm of Andersen Global
www.central-law.com



Honduras



COVID-19: Testing and vaccination for Employees, right or obligation?

The Honduran constitution recognizes the right to health protection. And it is everyone's duty to participate in the promotion and preservation of personal and community health. Likewise, the Honduran Health Code establishes that health is a state of integral, biological, psychological, social and ecological well-being, being an inalienable human right and corresponds to the State, as well as to all natural or legal persons, the promotion of its protection, recovery and rehabilitation.

The Honduran Labor Code imposes on workers the obligation to undergo a medical examination at the request of the employer, to verify that they do not suffer from any permanent disability or any professional, contagious or incurable disease, or a mental disorder that endangers the safety of his colleagues or the interests of the employer.

In accordance with these legal provisions, the State, the worker, as well as the employer are in the inescapable obligation to take care of health and occupational safety. In such a way that the employer has the right and the worker the obligation, that in the event that the employer requires the worker to take a test to detect whether he actually suffers from covid-19, he must do it, all in order to determine that there is no risk of transmitting the disease to the rest of your colleagues or people in the

work environment.

The vaccine law establishes the regulatory framework applicable to the organization and operation of the National Vaccination Scheme. And it establishes that vaccination as a priority action of the State; and it is mandatory for all the inhabitants of the Republic to undergo immunization against those diseases preventable by vaccine, as long as it is determined by the Secretary of State in the Office of Health.

The Secretary of State in the Office of Health has incorporated the vaccine against COVID-19 in the National Vaccination Scheme through the Expanded Program of Immunizations (PAI), however, to date it has not determined that the pandemic COVID-19 is a vaccine-preventable disease, for which to date it is mandatory for the inhabitants.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

The Honduran Labor Code establishes that the employer is obliged to adopt adequate measures to create and maintain the best hygiene and safety conditions at work in their companies. Likewise, the aforementioned code indicates that the worker is obliged to abide by the preventive and hygiene measures agreed by the competent authorities and those

indicated by the employer for safety and personal protection of workers and workplaces.

The aforementioned code establishes that illnesses that make it impossible for the worker to perform their duties are cause for suspension of the employment contract without responsibility for the parties. And it is established that the worker's illness is the cause of termination of employment contracts, if he is the victim of an illness that is not professional or caused by work accidents.

In accordance with the foregoing, the employer can suspend the employment contract in case the worker has contracted COVID-19, the suspension time can be up to six (06) months. And if after that time the worker is not restored to his work, the employer may terminate the contract without responsibility on his part. With the exception that there are special provisions to the contrary or that it is a case protected by the Social Security Law. The labor provisions indicate that it is understood that COVID-19 is a temporary circumstance and for these cases our legal system has other measures than the termination of the contract, such as its suspension. Since the period that the worker

would be suffering from COVID-19, it would not be for a period of six (06) months, for the termination of the employment contract to be applicable.

While it is true, vaccination against covid-19 is not an obligation for the worker, but if it arises to the worker as a contingency to prevent the virus and a possible suspension. ■



Ricardo Padilla
Partner

Central Law Honduras
Collaborating firm of Andersen Global
www.central-law.com



Mexico



COVID-19: Testing and vaccination for Employees, right or obligation?

The Mexican United States Political Constitution acknowledges the human right that all people have to the protection of health right and sets out that, in the event of severe epidemics or danger of invasion of exotic diseases in the country, the Secretariat of Health shall have the obligation to dictate immediately the preventive indispensable measures.

On its side, the General Health Law indicates that the Secretariat of Health may authorize with preventive, therapeutic or research ends, the use in human beings of medicaments or materials in respect of which even there is no sufficient scientific evidence of their therapeutic efficacy or intent of their modification of therapeutic directions of already known products, likewise, sets forth that the measures required for the disease prevention and control must be observed by the private citizens, among which are the application of vaccines and other preventive and therapeutic resources.

With the previously stated, we must understand that before a sanitary emergency like that generated by the COVID-19, the State is obligated to generate and establish the necessary policies to facilitate and propitiate the exercise of the right to vaccinate, as a public and prevention health measure of the contagion of transmissible diseases.

However, taking into consideration the recommendations of the World Health Organization (WHO), where indicates the importance of vaccinate the majority of persons worldwide without affecting the freedom of each individual to make the decision of vaccinate or not, the President of the Republic Andrés Manuel López Obrador specified that the National Vaccination Plan shall remain at the freedom of each individual in respect to decide if they want or not to be vaccinated, since in democracies, the right of privacy and the freedom to decide on their own body are fundamental.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

If it is true that Article 408 of the General Law of Health, “the actions of extraordinary immunization shall be obligatory for all individuals in the National Territory”, due to the fact that the Federal Government has not set out a zero tolerance policy, the employers shall not be able either to reject the persons that for any circumstance decide not to vaccinate, this is why, we may determine that it is not a cause of suspension or contractual termination the decision on the side of a colleague of not apply the vaccine against COVID-19.

However, the employers should realize that in the event that their workers decide to

vaccinate, shall not be able to deny the permit to attend to the vaccination campaign, neither to discount the work day in case of not attending work, because pursuant to Paragraph XIX Bis of Article 132 of the Federal Labor Law (LFT), sets out the obligation for the companies of “complying with the provisions that in the event of sanitary emergency sets the Competent Authority”. That same item indicates that the employers must “provide their workers the elements indicated by said Authority, to prevent diseases in case of declaration of sanitary emergency”, being comparable to them the permit to receive the vaccine, which may be justified with the proof of registration or of the appointment to receive the vaccine.

Also, the employers must contemplate that the Department of Labor and Social Welfare acknowledges the COVID-19 contagion as occupational disease in Article 513 of the Federal Labor Law, specifically on Paragraph 136, related to virosis (hepatitis, enterovirosis, rabies, psittacosis, viral pneumonias, infectious mononucleosis, poliomyelitis and other).

Also in this sense, the Mexican Institute of Social Security (IMSS) released on last April 3rd of 2020 the “Criteria of rating for cases as Coronavirus as labor disease”, where sets mechanisms to be able to recognize this disease not only in cases of workers of the own Institute, rather for all workers affiliated to IMSS.

With these criteria, the workers that request a temporary disability due to COVID-19, shall receive the benefit of labor risk insurance of the Institute, whenever, the investigations determine the cause-effect, work-damage.

Considering the previously stated, the companies must support and incite their workers to vaccinate, always in complete freedom, seeking that the working areas are safe and free of COVID-19, with specific measures and protocols that shall seek the safety of all workers. ■



Alfredo Pérez
Director

Andersen in Mexico
Member firm of Andersen Global
mx.Andersen.com



Nicaragua



COVID-19: Testing and vaccination for Employees, right or obligation?

Access to health is a constitutional right in Nicaragua.

The government, through the Ministry of Health, established rules, guides and protocols to eliminate the transmission of COVID-19 in all work places, applicable to the population in general, meaning that they have to be implemented voluntarily.

Likewise, the government has implemented voluntary COVID-19 vaccination programs for the population over the age of 60, and for those under the age of 60 that are vulnerable due to health conditions such as cancer.

From a labor perspective, employers have the obligation to:

- a) Guarantee an appropriate surveillance of their employees' health, especially when carrying out labor related activities in which certain elements or risk factors are present;
- b) Register all employees in the National Institute of Social Security (INSS for its acronym in Spanish), not just as part of a daily medical attention program: outpatient consultation or emergencies, medicines, hospitalizations, but as means of subsistence in case of disability, old age, professional risks, illness and maternity (Article 82 subsection 7 Constitution of Nicaragua).

Nevertheless, social health provider institutions currently do not have Covid-19 vaccination programs.

In this context, COVID-19 testing and COVID-19 vaccines are not mandatory for employees.

Employees have a right to the COVID-19 vaccine, but not as part of a corporate program, or as a Social Security derived program, but rather as part of public policies provided that they meet requirements currently established by the Ministry of Health.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Our legislation provides that a common illness (in this case due to COVID-19), that entails temporary disability, will be a cause for individual suspension of the labor relation (Article 37 subsection "b" of the Labor Code), but in no way does it extinguish or terminate the legal relation with the employer.

During the time that the individual labor suspension lasts, the employer may not adopt or communicate any measure against the employee, with the exception of criminal actions.

The Labor Code and Law 618, Law of General

Hygiene and Labor Security, jointly provide that one of employees' obligations is to comply with employers' instructions in occupational health and safety matters, for their health and personal protection, as well as for protection of their co-workers, including third parties.

In this sense, if the employee has suspicions, symptoms, or is in treatment for COVID-19, the following applies:

- a) The employee must report in an immediate manner, to its employer its condition;
- b) The employee must visit the medical institution where he/she has been registered. For this particular case, due to COVID-19, the National Institute of Social Security and the Ministry of Health, have allowed employees to visit the nearest public hospital or clinic for outpatient consultations;
- c) If a rest or medical allowance has been issued to an employee, it is mandatory for said employee to take it, and it is the employer's obligation to grant the rest or allowance.

Even though there is an obligation for the employee to comply with Occupational Health and Safety measures, our legislation does not specify the severity of the offense in case of non-compliance. In any case, this matter can be regulated by means of the Internal Labor Rules of the employer, which must be related to

the corresponding Technical Organizational Rules in Occupational Health and Safety. The Internal Rules are the tool in which employees' faults are classified as minor, serious and very serious, as well as the corresponding sanctions. It is important to mention that said rules must be approved by the Ministry of Labor.

In Nicaragua, it's a crime for an individual with a serious infectious disease (of any kind), to intentionally transmit or infect others, risking other's health or life (Article 156 of law 641, Criminal Code). ■



Leonardo Pérez
Associate Lawyer

Central Law Nicaragua
Collaborating firm of Andersen Global
www.central-law.com



Panama



COVID-19: Testing and vaccination for Employees, right or obligation?

The Political Constitution of the Republic of Panama of 1972, reform Acts of 1978, by the constitutional act of 1983, Legislation Acts No. 1 and No. 2 and Legislative Act No. 2004, in its 6th Chapter - Health, Social Security and Social Assistance states in its Article 106 "The most basic function of the State is to ensure the health of the population of the Republic. The individual, as the promotion, protection, conservation, restitution and rehabilitation of health and the obligation of preserving it, understood as the complete physical, mental and social wellbeing".

Article 110, Ordinal 4 "To fight transmissible diseases through environmental sanitation, developing the availability of drinking water and adopting immunization, prophylaxis and treatment measures, provided collectively or individually, to the entire population.

Ordinal 5 "To create, according to the needs of each region, establishments in which comprehensive health services are provided and drugs are supplied to the entire population. These health services and medicines will be provided free of charge... "

In this sense, as outlined above, human rights are the inherent rights of all human beings, without any distinction of nationality, place of residence, gender, national or ethnic origin, color, language, religion, place or any other condition.

All of us have the same rights, without any discrimination. These rights are interrelated, interdependent and indivisible.

In the 2nd. Generation - Economic, Social and Cultural Rights

- Job
- Dwelling
- Education
- Health

Upon filing these backgrounds, we make emphasis on two Human Rights: job and health. In the Republic of Panama, two types of vaccines against COVID-19 (Pfizer and AstraZeneca) are being provided for free and voluntarily, this means that the employer cannot for any reason force the employee to get vaccinated in order to perform his functions; however, the campaign is "the more people vaccinated, the faster we will finish the COVID-19", however, it has been noted the phenomenon that many people are afraid of getting vaccinated due to the side effects that some experts say they have.

Among the measures that the private and government offices have taken and to mitigate the contagion is the mandatory use of masks and in public offices masks plus the face screens as well as in public transportation.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

In the Republic of Panama, according to the Ministry of Labor and Labor Development and its resolutions as to the issue at hand of COVID-19, they mention the following points in the Private and Government Sectors:

In this sense, how the telework application is formalized. The company and the worker must make an agreement in which the terms of the remote employment relationship are established:

- If the working day will be full or partial
- Time of the working day
- The description of the worker's duties
- Subsidies for public service expenses, etc.

The details are established in Law 126 of February 18, 2020.

The addendum to the contract must be registered with the Labor Directorate of the Ministry of Labor and Labor Development, using the mitradel digital platform.

Can older adults or people with chronic illnesses be in working areas, in this sense. In accordance with MINSA's recommendations, the Ministry of Labor and Labor Development has asked companies to agree with people at risk: people over 60 years, pregnant and patients with chronic or immunosuppressed diseases, who make use of compensatory times, leave, vacations (in progress or in advance) or telework, to avoid being in work spaces with a high number of people.

It is important to establish that, if there is no written employment contract, you cannot stop paying a worker, because there is a

relationship due to a verbal agreement, the worker must receive his regular payment. The Labor Code establishes the means to terminate the employment relationship in these cases.

The worker cannot be dismissed due to COVID-19, since a National Health Emergency is not grounds for dismissal. ■



Aldemara Krainsky
Senior Lawyer

Central Law Panama
Collaborating firm of Andersen Global
www.central-law.com

Paraguay



COVID-19: Testing and vaccination for Employees, right or obligation?

In the Republic of Paraguay, life, liberty and health are constitutionally guaranteed in our Magna Carta, therefore, it is the state that is in charge of ensuring that all the inhabitants of our country enjoy these rights under equal conditions.

Since the arrival of COVID-19 to our country, the work methods had a drastic change never seen before, so that both public institutions and private companies suddenly managed to give continuity to the daily work activities; other employers, however, had to request the total suspension of the work contracts of their payroll.

After the arrival of the vaccines in Paraguay, the government promoted a vaccination campaign against COVID-19 through an Expanded Vaccination Program (PAI) by which inoculations were organized by age range in order to return the country to "normality", including the intention of the physical presence of workers in the establishments of their respective employers.

Addressing the issue that concerns us, it is important to clarify that these vaccines are available free of charge in the health posts that the government has enabled as vaccination centers, therefore, we are talking about a right for all the inhabitants of the Republic of Paraguay, which is clearly established in the

National Constitution of our country in its article number 68, in Chapter V "Health". However, immunizations against COVID-19 are not mandatory, the decision lies within individual. No Paraguayan law obliges its inhabitants to submit to such a regime.

It is important to clarify that, to date, the Ministry of Public Health and Social Welfare has not ruled that inoculation against COVID-19 is mandatory.

However, to date, the Ministry of Labor, Employment and Social Security has not made it compulsory to have been immunized as a condition for returning to the employer's physical establishment, so this is left to the discretion of the parties as long as the companies comply with the sanitary protocol established by the government.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Both the Ministry of Labor, Employment and Social Security and the Social Security Institute have not yet issued any ruling declaring COVID-19 as an occupational disease or as an occupational accident, therefore, it is considered, for the time being, a non-occupational disease or common disease that entitles the infected worker to medical care as part of the social security benefits, to paid

leave by the employer, to sickness benefits under the terms of the Labor Code.

Since there is no obligation to be immunized against COVID-19, this automatically makes it impossible for the employer to unilaterally terminate the employment contract as a justified dismissal due to non-inoculation.

It is important to re-emphasize that the qualification of COVID-19 by the Ministry of Public Health and Social Welfare has not yet been defined, so that to date this does not constitute a cause for the suspension of the employment contract of the infected worker. The Social Security Institute, in these cases, pays the infected worker an allowance for rest or preventive isolation.

It is very important to clarify that using article 81 of Law 213/93 (Labor Code), specifically clause U as a cause for termination of the employment contract due to COVID-19 is a mistake, the same article states: causes for termination of the employment contract by unilateral will of the employer are the "proof in the worker of an infectious-contagious or mental disease or other ailments or organic disturbance, provided that they permanently incapacitate him/her for the performance of the contracted tasks or constitute a danger to third parties". This must be judicially proven. If

the employer dismisses without proving judicially an infectious or mental disease or other pathologies or organic disturbance that permanently incapacitate the worker, the termination of the contract constitutes an abusive dismissal or an arbitrary dismissal, therefore, it is a null legal act due to the vice of abuse of the right or arbitrariness that it entails. (Terminación del Contrato de Trabajo - Jorge Dario Cristaldo, 2021, p. 308).



Jorge Peralta
Lawyer

Berkemeyer Paraguay
Collaborating firm of Andersen Global
www.berke.com.py





COVID-19: Testing and vaccination for Employees, right or obligation?

The Political Constitution of Peru declares that “Everyone has the right to the protection of their health, that of the family environment and that of the community, as well as the duty to contribute to its promotion and defense”, recognizing its status as a programmatic right by stating that “The State determines the national health policy. The Executive Branch regulates and supervises its application. It is responsible for designing and conducting it in a plural and decentralizing manner to facilitate equitable access to health services for all”.

In this regard, the General Health Law invokes its status as a rule of public order, establishing that the exercise of the rights to freedom of work, business, commerce, among others, are subject to the limitations established by law to protect the public health, also configuring a legal framework that reserves to the Health Authority the power to dictate the prevention and control measures of mandatory compliance under sanction, aimed at preventing the appearance and spread of communicable diseases, excepting mandatory vaccination and revaccination only for reasons medical or biological.

Within this regulatory framework, during the initial months of the pandemic, the Peruvian Government established a series of measures to stop the spread of the virus, issuing Guidelines for the surveillance of the health of

workers at risk of exposure to covid-19, with the purpose of resuming the face-to-face work of the population, being of mandatory use the application of serological or molecular tests, except for those workers with low exposure or minimal occupational contact with the public. Subsequently, it was decreed mandatory only for workers with high or very high risk, and for those who present symptoms compatible with COVID-19 or have had direct contact with a confirmed case.

Additionally, while noting the power of the State to establish mandatory vaccination as a measure to stop the spread of COVID-19, the Congress of the Republic approved Law No. 31091 in December 2020, through which free and voluntary access was guaranteed to the general population on the preventive and curative treatment of the disease generated by the aforementioned virus.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

In accordance with the provisions of the Labor Productivity and Competitiveness Law, the illness constitutes a cause for suspension of the employment contract, and nevertheless, the employing entity continues to be obliged to pay the remuneration during the first 20 days, after the which activates the right to subsidy on behalf of the Social Health Security, in



application of the Law of Modernization of Social Security in Health and other regulatory provisions. In the specific case of workers diagnosed with COVID-19, by means of Emergency Decree No. 026-2020, it was exceptionally authorized to activate the right to subsidy on account of the Social Health Security from the first day, with respect to those workers whose monthly remuneration be up to S/2,400.

Regarding the termination of the employment relationship in the face of the refusal to vaccinate against COVID-19, it should be noted that the aforementioned Labor Productivity and Competitiveness Law establishes as a just cause for dismissal related to the worker's ability, "The unjustified refusal of the worker (...) to comply with the prophylactic or curative measures prescribed by the doctor to avoid illnesses...". However, one could question the possibility of applying such an assumption of dismissal given that Law No. 31091 has guaranteed free access and voluntary vaccination against COVID-19, and also considering that there is no further legislative and / or jurisprudential development that allows to establish with greater precision on the legality of a dismissal based on such refusal. ■



Alejandro del Castillo
Associate

Picón & Asociados Peru
Collaborating firm of Andersen Global
www.piconasociados.com

Dominican Rep.



COVID-19: Testing and vaccination for Employees, right or obligation?

The Constitution establishes the effective protection of individual rights -including, the right to life, health, personal integrity- as part of the essential purpose of the State, which must guarantee a compatible exercise of these rights with the general welfare of its citizens, and as a guarantee, the State must adopt measures for the protection and restoration of the life and health of individuals and communities, for purposes of preventing and treating diseases -including detection tests and vaccines against COVID-19- subject to the protection of the integrity of the people who cannot be obliged to undergo examinations or medical procedures, unless there is an imminent danger to their life or that represents a risk to public health, such as a pandemic.

Notwithstanding labor statutes, the Ministry of Public Health dictates the rules for the prevention and control of diseases in the workplace; and is responsible for guaranteeing the population the vaccines approved and recommended by the World Health Organization, with the legal authority to order their mandatory nature, which it has not done thus far perhaps because these vaccines have only been validated for use for emergency purposes only.

The constitutional duty - legal and moral responsibility - of individuals, includes:

- Duty to abide by and comply with the Constitution and the laws, including specific provisions and orders from the health authorities; particularly those related to the control of spread diseases, such as COVID-19.
- Duty to respect and submit to the corresponding authorities (i.e. Ministries of Public Health and / or Labor).
- Duty to avoid actions or omissions that interfere with health management.
- Duty to take care of and respect such individual's own health, that of others, and that of the community.

From a labor perspective, the Constitutional Court has ruled that the protection of the safety and health of third parties prevails over individual freedom; in this sense, the obligations of the parties shall be as follows:

The employer is responsible for "health surveillance", and must guarantee adequate conditions of safety, health, hygiene and work environment, for which it will provide the necessary protection and control equipment to prevent diseases.

The worker must undergo a medical examination to verify that such worker does not suffer from a contagious disease that prevents said individual from working, or represents a danger to other workers or persons related to the company. Thus, workers contribute to the employer's obligation to (i) preserve health, (ii) assess occupational risks and (iii) prevent them in the workplace. This obligation is subject to the protection of the right to privacy,

dignity and confidentiality of information related to one's health.

Consequently, COVID-19 testing and vaccination constitutes the right of individuals - whether workers or not - before the State; whereas, with respect to the employer, the worker is obliged to submit to COVID-19 tests, subject to compliance with abovementioned conditions; likewise, workers shall rigorously comply with the preventive measures imposed by the employer, notwithstanding that currently, it cannot be affirmed that vaccination may be included within these preventive measures, because it is not mandatory in the country.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Despite the fact that contagious disease is a valid cause for suspension of an employment agreement, for which the worker has the right to receive a compensation for common sickness - except for health personnel for whom the Occupational Risk Insurance subsidy applies since it is considered as an occupational disease - this same possibility is not available in cases of non-vaccination, thus, the worker shall have the right to terminate the agreement due to a serious violation by the employer, in the event that the employer proceeded with the suspension under this scenario.

The spread of the disease does not constitute a serious violation which could result in termination of the employment agreement for just cause; nonetheless, the refusal to adopt preventive measures or to follow procedures indicated by the law, the authorities or the employers, does constitute a violation, which could be applied to the refusal to take the test for detection; however, since the vaccination is not compulsory, it will be under the court's

discretion to evaluate just cause if the employer exercises said termination. In no case, shall it be alleged as just cause that a worker has been a source of contagion for others.

Lastly, the serious danger to the safety or health of the worker due to non-compliance with preventive and security measures, constitutes a fault of the employer that grants the worker the right to terminate the agreement for just cause. ■



Carolina León
Partner



Isabel Andrickson
Senior Lawyer

Pellerano & Herrera Dominican Republic
Collaborating firm of Andersen Global
www.phlaw.com

Uruguay



COVID-19: Testing and vaccination for Employees, right or obligation?

In Uruguay life, liberty and health are rights enshrined in articles 7 and 44 of our Constitution. In particular, the latter reads as follows: "The State shall legislate on all matters relating to public health and hygiene, and shall assure the improvement of the physical, moral, and social well-being of all the inhabitants of the country. All inhabitants shall have a duty to care for their own health and to have themselves treated in the event of disease. The State shall make available, without charge, means of prevention and medical care to indigent persons or to persons lacking sufficient resources."

There are rules related to occupational health and safety, which regulate the possibility for employers to require a "Vaccination Certificate," as well as those, which stipulate the "mandatory" vaccines. Such rules were set out in Decree-Law No. 15,272, of year 1982, regarding the prevention of eight diseases (tuberculosis, poliomyelitis, diphtheria, tetanus, whooping cough, measles, rubella and mumps). This "schedule" has been changed by subsequent decrees, a procedure which legal nature has been questioned.

Besides, in Uruguay there is a "health card," enabling employees to work and required to them. In order to obtain it, the employee must have the tetanus vaccine inoculated, therefore, this is, indirectly, a mandatory vaccine, since

otherwise, the certificate to work may not be obtained. The existence and period of validity (two years) of the "Health Card" must be checked by companies.

In relation to vaccination against COVID 19, the Uruguayan government has decided that inoculation is not mandatory. Therefore, or, at first, the company may not require its employee to get vaccinated or check that this requirement has been met. The employer may promote, publicize and inform his/her employees about the benefits of vaccination but may not require it. The mandatory nature of COVID 19 vaccination must be established by legislation or, for example, indirectly, by making it compulsory for obtaining the "health card."

On the other hand, we understand that pursuant to Uruguayan government's resolutions to deal with COVID 19 pandemic, urging companies to take all mandatory preventive measures at workplaces, and also in view of the execution of collective bargaining agreements by and between employers and employees from most sectors of economic activity, where prevention protocols have been established, it should be made compulsory for the employee to undergo screening required by the company, especially, if there are positive cases in the workplace.

The infection or non-vaccination of COVID-19 as a cause of suspension or termination of the employment relationship

Except for healthcare workers (medical and non-medical staff treating patients with COVID 19), for which COVID 19 is considered as an occupational disease (Law No. 19,873), for the rest of the workers who may be infected, the ordinary sickness allowance of the Social Security Administration ("Banco de Previsión Social") (Decree Law No. 14,407) will be applicable. For the duration of the illness, the employee will receive a coverage by the State of 70 % of his/her salary.

Therefore, just like any sick employee in Uruguay, the employer may not dismiss him/her without paying a special compensation, as long as he/she is under such subsidy. Upon finalization of the latter, the employee must report to work within 24 hours from discharge. The employer must reinstate him/her to his/her former position and may not dismiss him/her for a 30-day period from his/her reinstatement. In the event that the employer dismisses the employee being under the sickness benefit, not allowing his/her reinstatement upon discharge, or that the employer dismisses the employee within the above mentioned 30-day period, he/she must pay the employee a special severance

payment equivalent to twice the amount applicable by law. The rule admits two exceptions: a. - that the dismissal is not related to the illness (the ordinary severance payment will be applicable) and b.- that serious misconduct has occurred (the employer is exempted from paying any compensation whatsoever).

In relation to the failure to comply with preventive measures and protocols stipulated by the company or even agreed in collective bargaining agreements with workers, we understand that the company may penalize the employee or even dismiss him/her for serious misconduct, depending on the seriousness of the breach. As COVID 19 vaccination is not mandatory, the same may not be required to the employee and the decision to not get a COVID 19 vaccine may not be a reason for dismissal. ■



Alfredo Susena
Senior Associate

Andersen in Uruguay
Member firm of Andersen Global
uy.Andersen.com



Venezuela



COVID-19: Testing and vaccination for Employees, right or obligation?

The Constitution of the Bolivarian Republic of Venezuela recognizes the right to health as a fundamental social right, and it is the duty of the State to promote and defend it in the interest of guaranteeing collective well-being. For this reason, the implementation of vaccines that promote the prevention of contagious diseases is a preventive measure that must be provided by the State.

The current Immunization Law establishes preventive immunization as a matter of public interest and a key instrument of national health policy. Accordingly, it provides for obligatory vaccination against diseases that can be prevented in this way, if a resolution issued by the Ministry of Health (MPPPS) is adopted.

However, given that no resolution has been issued by the MPPPS to make vaccination compulsory to date, employers cannot require the application of the vaccine against COVID-19 to their employees or job-seekers.

In consequence, labor entities cannot make the recruitment of an applicant, the resumption of the activities of an employee and the permanence in employment, conditional on the application of the vaccine, until it becomes mandatory. Requiring the vaccine may be considered a discriminatory act that violates the right to equal opportunities, since this decision would not be taking into account

aspects such as the employee's ability, quality and ability to perform the functions inherent in the position.

Also, it cannot be overlooked that as long as the vaccine is not obligatory, various factors that may influence the will of people to access or not to its application are at stake, for example: (i) pre-existing pathologies or medical conditions that make vaccination impossible, (ii) various religious views and objections to vaccines, and (iii) distrust of vaccines and their possible consequences or side effects.

Regarding the diagnostic tests, there are no regulations making them obligatory. However, the MPPPS issued a Resolution establishing the mandatory isolation measure in case of any symptom or positive diagnosis of COVID-19. In order to enable an employer to determine whether an employee is infected or not, and to specify whether he is fit to be hired, to remain in employment or to resume his activities, or whether he should be required to comply with the compulsory isolation measure, there is a need for a diagnostic test to confirm or rule out the presence of the virus in their body, so that employers may require such tests as a preventive measure in order to comply with their obligations of surveillance, control of occupational health and safety, and with the provisions of health regulations.

El contagio o la no vacunación de COVID-19 como causa de suspensión o terminación de la relación laboral

Since the World Health Organization (WHO) declared COVID-19 a pandemic, the presence of this virus constitutes a cause of force majeure that falls within the cases of suspension of the employment relationship provided for in the Law, given the impossibility of providing services for reasons beyond the control of both the employee and the employer. However, such suspension must be authorized in advance by the competent administrative authority.

This does not imply that it can be considered as a cause for termination of working relations. In Venezuela, there is a guarantee of irremovability of employment for employees in the public and private sectors, by which no employee can be dismissed, transferred or impaired in their working conditions without a justified cause previously qualified by the administrative body concerned.

Consequently, in order for an employment relationship to be terminated by unilateral decision of the employer, the employee must

be subject to one of the conditions laid down in the Law as grounds for dismissal, and prior authorization must be obtained from the Ministry of Labour.

Finally, it is the duty of employers to adopt measures to guarantee health, safety and hygiene conditions at work, through the implementation of mechanisms for employees' health control and the development of protocols, plans or programmes for health and safety in the workplace, without prejudice to the fundamental rights of employees.



Gabriel Calleja
Senior Partner

LEGA Abogados Venezuela
Collaborating firm of Andersen Global
www.lega.law





ANDERSEN®