

Webinar Employment Law

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GGI

*COVID-19 and mandatory testing, mandatory vaccines and masks
from a Dutch law perspective*

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PROGRAM

1. Mandatory vaccination, test and/or mouth cap in The Netherlands?
2. The right to issue instructions
3. Consideration framework
4. Legal consequences for employee if non-compliant with reasonable and necessary instructions?
5. Particular aspect regarding vaccination instructions
6. Particular aspect regarding testing instructions
7. Particular aspect regarding mouth cap instructions

1. MANDATORY VACCINATION, TEST AND/OR MOUTH CAP IN THE NETHERLANDS?

- Fundamental human rights
 - inviolability of the human body
 - Freedom of belief and religion
- Legal duty of care for employees and ‘third parties’
- Balancing of interest between fundamental rights and legal obligations employer

2. THE RIGHT TO ISSUE

INSTRUCTIONS

- (un)Lawful distinction between people
 - Legitimate purpose?
 - Measure appropriate and necessary?

3. CONSIDERATION FRAMEWORK

- Criterion A: The worker's occupational exposure to SARS-CoV-2 can be transmitted through transmission and this can lead to significant disease burdens for third parties.
- Criterion B: The [measure] leads to a reduction of the transmission and to significant reduction of the burden of disease (health gain) for third parties.
- Criterion C: Possible adverse (health) effects of [measure] (side effects) for the employee are in reasonable proportion to the health gains of third parties.
- Criterion D: The burden that the employee experiences as a result of [measure] is in reasonable proportion to the health gain for third parties.
- Criterion E: The ratio between costs and health gain is proportional compared to other options for reducing the burden of disease on third parties.

4. LEGAL CONSEQUENCES FOR EMPLOYEE IF NON-COMPLIANT WITH REASONABLE AND NECESSARY INSTRUCTIONS?

- Stimulate dialogue with employee
- (Temporarily) unfit for position?
- (Temporary) adjustment of position or reassignment to suitable position?
- Non-active status / exemption from work?
 - With or with-out continued payment of wages?
- Termination of employment?

5. PARTICULAR ASPECT REGARDING VACCINATION INSTRUCTIONS

- No mandatory vaccination against COVID-19 in The Netherlands
- If employee does not want to get vaccinated, and criterion A to E are being checked, then to our consideration it is possible that
 - the employer can instruct the employee to (at least temporarily) adjust or fulfil a different position (reassignment)
 - or in some cases non-active status if a fitting position cannot be found and just a short period is expected.
 - With pay.

6. PARTICULAR ASPECT REGARDING TESTING INSTRUCTIONS

- No mandatory testing against COVID-19 in The Netherlands
- Consequences for employees who don't comply with reasonable and necessary instructions of the employer, are imaginable.
 - For example the employee who resists to get tested and resists to work in a well-protected work environment and can't work at home due to the nature of his activities.
 - Possible sanction; no payment during obligated quarantine period.

7. PARTICULAR ASPECT REGARDING MOUTH CAP INSTRUCTIONS

Court Midden-Nederland, 13 January 2021 (ECLI:NL:RBMNE:2021:51).

- Two legitimate objectives: (i) the legal obligation of the employer to provide a healthy and safe working environment and (ii) the protection of his business interests, because he has an obligation to continue to pay wages in the event of illness.
- The employee should have followed the employer's instruction (Section 7:660 Dutch Civil Code).
- Sanction: the employer was entitled to suspend the salary and deny the employee access to work as long as he did not comply with the obligation.