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# Mandatory Vaccination against COVID-19 in the Employment Relationship

Merle Erikson\*

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## Abstract

In light of the recent COVID-19 pandemic, the paper analyzes mandatory vaccination in employment relationships in European countries. The paper focuses on three subtopics: who is competent to establish the mandatory vaccination requirement, in which positions mandatory vaccination is justified, and what the employer can do if the employee refuses the mandatory vaccination. The paper concludes that since the obligation to vaccinate significantly infringes on the employee's fundamental rights, such a requirement can preferably be imposed by the state, and it must always be purposeful, appropriate, and proportionate. Vaccination can be mandatory in areas of activity determined by the state and workplaces where the employee is constantly and unavoidably in close contact with other persons. Since COVID-19 is a new and changing disease, and vaccination does not prevent infection, refusal of vaccination cannot be the basis for terminating an employee's employment contract.

**Keyword:** COVID-19; Mandatory Vaccination; Fundamental Rights; The Principle of Proportionality; Termination of Employment Contract.

## 1. Introduction.

At the end of 2020, less than a year after the onset of the COVID-19 pandemic, the first vaccines against the disease were approved. As vaccines provided relatively effective protection against COVID-19 and were more convenient (and cheaper) to use than personal protective equipment, in parallel with the broader introduction of vaccines, discussions began on whether vaccination could be made compulsory in the employment relationship. Mandatory vaccination against COVID-19 has raised many questions, mainly because the disease is new, the virus mutates constantly, and vaccines have been little tested and may not be effective for all virus strains.

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\* Professor of Labour Law, University of Tartu. This essay has been submitted to a double blind peer review.

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As a universally recognized fundamental right, everyone has the right to the inviolability of private life. This, in turn, includes the right to physical integrity,<sup>1</sup> which is also guaranteed to the employee. Thus, the employee has the right to decide whether or not to vaccinate. In addition, an employee is also guaranteed the right to work as a fundamental right. On the other hand, the employer has the freedom to conduct business. It comes with the right to decide freely on the details of the business.<sup>2</sup> As the employer must ensure a healthy and safe working environment (for both employees and customers, service users, and other similar persons), he is interested in vaccinating employees to keep the company running. This is accompanied by the public interest in ensuring the functioning of the state and society's basic activities (e.g. healthcare and education system, internal and external defence, strategic services, etc.).

The paper aims to answer the question of under what conditions vaccination can be made compulsory in an employment relationship. In which case does the employer's freedom to conduct a business/public interest outweighs the employee's right to physical integrity? The legal basis for compulsory vaccination, positions where mandatory vaccination is justified, and the possibilities of the employer if the employee refuses to be vaccinated are examined in more detail.

Although the vaccination of employees was becoming increasingly mandatory, it is not the only measure to combat the COVID-19 virus, and employees' privacy rights cannot be relegated to the background. Restrictions on employees' rights must be purposeful, relevant, and proportionate.<sup>3</sup> Thus, an employee can be required to be vaccinated if other measures are not sufficient to ensure safety at the workplace.<sup>4</sup>

The paper is compiled using doctrinal research and the comparative method. It examines the mandatory nature of vaccination in employment in European countries. The relevant legal acts, interpretations, and other considerations for their establishment and labour disputes are analysed to answer the research question.

## 2. Legal Basis for Mandatory Vaccination.

### 2.1. National Legislation.

Each European country implements its immunisation programme and decides if vaccination is mandatory or voluntary in its territory.<sup>5</sup> There is no obligation for all adults to

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<sup>1</sup> Madise Ü. (ed), *The Constitution of the Republic of Estonia: Commented Edition*, 5th revised and supplemented edition, Juridicum, Tartu, 2020, section 26 comm. 7 ff. (in Estonian).

<sup>2</sup> *Ibidem*, section 31 comm. 5.

<sup>3</sup> Albin E., *et al.*, *Vaccinated and Unvaccinated Workers in the Labor Market*, Position Paper, 18 March 2021, 2-3 <https://lawprofessors.typepad.com/files/vaccine.pdf>, accessed 1 May 2022.

<sup>4</sup> It is important to note that in most countries, recovery from COVID-19 and regular testing for the SARS-CoV-2 virus is considered equivalent to vaccination against COVID-19. This paper focuses on issues related to vaccination.

<sup>5</sup> European Vaccination Information Portal, *Mandatory or recommended vaccination*, An initiative of the European Union,

be vaccinated against COVID-19 in any country.<sup>6</sup> However, an increasing number of countries were enacting legislation to make vaccination compulsory in certain areas, such as healthcare and social care facilities, police and rescue services, educational institutions and the civil service in the broader sense.<sup>7</sup> These areas are important for fulfilling the main public tasks or protecting public health so that the employees of the respective positions can continue to perform their duties.

In legal discussions, it has been found that the requirement of compulsory vaccination as a violation of several fundamental rights of an employee (right to privacy, right to work, etc.) is such an essential discretionary decision that such a decision can be adopted only by the legislator (not, for example, by the employer). The greater the violation of fundamental rights is, the higher must be the level of power that regulates it.<sup>8</sup> Therefore, it is considered lawful that only the state can impose the obligation to vaccinate.

If the state establishes the vaccination requirement, it provides clarity to the parties to the employment relationship in which areas vaccination is obligatory. It also simplifies the situation for the employer – if, according to the legislation, an employee is suitable for a specific job only if he or she has been vaccinated, the employer has a legal basis not to employ or dismiss a non-vaccinated employee.

Although the general vaccination requirement ensures that the situation is clear and debated at the national level, there is another side to the coin. National rules are general and do not take into account individual cases. Since COVID-19 spreads through human contact, vaccination is essential in workplaces where an employee comes into contact with other employees or third parties.

If the vaccination requirement is introduced by areas of activity, the obligation to vaccinate may also apply to employees (e.g., care home laundry workers) who do not come into contact with other people or where human contact can be avoided by implementing other measures that are less intrusive on the employee's privacy (e.g., in the case of the school librarian). Thus, the state's imposition of the obligation to vaccinate may also lead to disproportionate violations of the employee's fundamental rights, and a court must assess its suitability (constitutionality).<sup>9</sup>

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<https://vaccination-info.eu/en/vaccination/when-vaccinate/mandatory-or-recommended-vaccination>, accessed 1 May 2022.

<sup>6</sup> European Parliamentary Research Service, *Legal issues surrounding compulsory Covid-19 vaccination*, March 2022, 1-2:

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS\\_BRI\(2022\)729309\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS_BRI(2022)729309_EN.pdf), accessed 1 May 2022. Austria planned to introduce a universal vaccination obligation for adults but later cancelled the corresponding draft. See Oltermann P., *Austria scraps compulsory Covid jabs despite rising infections*, in *The Guardian*, 23 June 2022, <https://www.theguardian.com/world/2022/jun/23/austria-scraps-compulsory-covid-vaccine-mandate>, accessed 11 November 2022.

<sup>7</sup> *Ibidem*, 14-15.

<sup>8</sup> Härjinen K., Harkmaa P. L., *No compulsion to vaccinate? However, you must provide a vaccination certificate to avoid dismissal*, in *Eesti Päevaleht*, 11 October 2021, <https://epl.delfi.ee/artikkel/94816151/kadri-harginen-pirkko-liis-harkmaa-vaktsineerimissundi-pole-kuid-vallandamise-valtimiseks-pead-esitama-vaktsineerimistoendi>, accessed 1 May 2022 (in Estonian); see also Jöks A., Alevi J., *New NETS - we need virus-proof regulation*, in *Eesti Rahvusringhääling*, 21 April 2022, <https://www.err.ee/1608571246/allar-joks-ja-jaanika-alevi-uus-nets-vajame-viiruskindlat-regulatsiooni>, accessed 1 May 2022 (in Estonian).

<sup>9</sup> About the court cases in Hungary, see European Parliamentary Research Service, nt. (6), 11-12.

## 2.2. Employer's Decision.

In addition to the state, employers also have the option to require vaccination through occupational safety and health rules. Under *Occupational Safety and Health Framework Directive*<sup>10</sup> Article 6(1), an employer must take the measures necessary for workers' safety and health protection, including preventing occupational risks. According to Annex III (Community Classification) of the Biological Agents Directive,<sup>11</sup> the biological agents include severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes COVID-19. Annex VII (Recommended Code of Practice on Vaccination) of the Directive states that if the risk assessment reveals that there is a risk to the health and safety of workers due to their exposure to biological agents for which effective vaccines exist, their employers should offer them vaccination (point 1). Thus, according to the Directive, the employer must provide the possibility for vaccination; he cannot oblige the worker to be vaccinated.<sup>12</sup>

However, according to the national regulations based on the Biological Agents Directive, Estonian employers have been given the right to require employees to vaccinate.<sup>13</sup> Estonian Occupational Health and Safety Act<sup>14</sup> (ITOS) §8(2) provides that an employer must implement measures to protect from biological hazards present in a workplace, taking into account the infectiousness of the hazard. An employer is required to organise a risk assessment of the working environment to determine the type, extent, and duration of the risk of infection to the employee and must take measures to minimize the health risk (ITOS §13(1)3 and §13).

Under §6(2) of the Government Order on biological hazards,<sup>15</sup> the employer is obligated to reduce the risk to the health of employees to the lowest possible level by taking various measures, including the introduction of collective protection measures or personal protective equipment, complying with occupational hygiene requirements, ensuring the possibility of vaccination for employees, etc. According to §6(2)11) of the Government Order, in the event of the spread of the SARS-CoV-2 virus, the employer must protect the safety of employees exposed to other people in the work environment, *in particular* [author's emphasis] by ensuring the vaccination of employees against COVID-19 disease, checking the proof of

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<sup>10</sup> Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.06.1989, 1-8).

<sup>11</sup> Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ L 262, 17.10.2000, 21-45).

<sup>12</sup> Földes M. E., Kaposvári C., *SARS-COV-2 Vaccination and Employment: The Legal Framework in the EU and Hungary*, in *Medicine, Law & Society*, 14, 2, 2021, 256.

<sup>13</sup> From 15 November 2021 to 6 March 2022, Hungarian employers had the same right, albeit not under occupational safety and health rules, but under special rules to limit the spread of COVID-19. Government Decree 598/2021 (28 October) on protecting workplaces against the coronavirus.

See [https://njt.hu/translation/J2021R0598K\\_20211115\\_FIN.pdf](https://njt.hu/translation/J2021R0598K_20211115_FIN.pdf), accessed 1 May 2022.

European Parliamentary Research Service, nt. (6), 11.

<sup>14</sup> Occupational Health and Safety Act, passed on 16 June 1999 – RT I 1999, 60, 616; 22.12.2021, 3, <https://www.riigiteataja.ee/en/eli/528122021001/consolide>, accessed 15 April 2022.

<sup>15</sup> Occupational health and safety requirements for the working environment affected by biological hazards. Government of the Republic Order No. 144, passed on 5 May 2000 – RT I 2000, 38, 234; 12.03.2022, 25, <https://www.riigiteataja.ee/akt/114082021010>, accessed 1 May 2022 (in Estonian).

completion of vaccination against or recovery from COVID-19 disease, or testing employees with the SARS-CoV-2 test.

Although according to the Government Order, the employee must be protected, among other things, by ensuring vaccination, in the opinion of the Ministry of Social Affairs, this is still the last measure to be taken to prevent the spread of the virus. In the first instance, the employer must use all other means to minimize human contact and the risk of infection (reorganising work, installing glass partitions, providing disinfectants, etc.).<sup>16</sup>

However, due to the Government Order, it is common practice for employers to carry out a risk assessment estimating the type, extent, and duration of the risk of infection and concluding that the only measure to ensure the safety of employees is to vaccinate them.<sup>17</sup> Thus, employers in Estonia decide which employees need to be vaccinated.

On the one hand, such an approach can be accepted, as the employer can accurately assess whether the employee's vaccination is necessary for each workplace. On the other hand, the employer may not always be able or willing to evaluate the need for immunisation adequately. There are also several disputes in Estonian courts as to whether the requirement to vaccinate an employee is justified (whether it is purposeful, appropriate, and proportionate) or whether the employer could protect employees' health by other methods. These disputes concern the requirement for vaccination in medical emergency institutions, the National Opera, the army, and the police.<sup>18</sup>

### 3. Positions where Mandatory Vaccination is Justified.

#### 3.1. Mandatory Vaccination by Speciality.

As explained above,<sup>19</sup> many European countries have introduced mandatory vaccination against COVID-19 by areas of activity. In Hungary, for example, employees in the healthcare and social care sector have to be vaccinated.<sup>20</sup> The vaccination requirement has also applied to employees of educational institutions, cultural institutions, the armed forces and law enforcement agencies; social institutions providing residential care, child welfare and child protection institutions; civil servants at the government and municipal level, etc.<sup>21</sup> In Finland,

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<sup>16</sup> Labour Inspectorate of the Republic of Estonia, *COVID-19 at the workplace*, available at <https://www.tooelu.ee/en/146/covid-19-workplace#coronavirus-as-a-biological-hazard>, accessed 1 May 2022.

<sup>17</sup> Recovery from COVID-19 disease is considered equivalent to vaccination.

<sup>18</sup> For example, the requirement for compulsory vaccination has been considered justified for police and military personnel. Still, these views are changing depending on the effects of vaccines on new strains of coronavirus. See Judgment of the Estonian Supreme Court of 25 November 2021 in case No. 3-21-2241; Judgments of Tallinn Circuit Court of 23 December 2021 in cases No. 3-21-2583 and 3-21-2605; Judgment of Tallinn Circuit Court of 24 January 2022 in case No. 3-21-2918. As lower court decisions have been appealed, these disputes have not been resolved by the end of 2022. See Karnau A., *Key question of the week: why is the state losing vaccination cases?* Postimees, 12 November 2022, <https://leht.postimees.ee/7646675/nadala-solmkusimus-miks-riik-kaotab-vaktsineerimisvaidlusi>, accessed 11 November 2022 (in Estonian). See also par. 3.2.

<sup>19</sup> See par. 2.1.

<sup>20</sup> Földes M. E., Kaposvári C., nt. (12), 260 ff.

<sup>21</sup> European Parliamentary Research Service, nt. (6), 11.

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the vaccination requirement only applies in the sector of health care and social services, where employers must ensure their personnel working with vulnerable or aged patients has COVID-19 vaccine protection.<sup>22</sup>

Mandatory vaccination schemes for the prevention of SARS-CoV-2 infection have been set out in Italy for the health professionals and healthcare workers who carry out their activities in public and private health, social and care facilities, pharmacies, para-pharmacies, and professional practices; and workers employed in residential, social care and medical facilities. These are obliged to undergo free vaccination.<sup>23</sup> The obligation to vaccinate has also been extended to school staff; staff of the army, public security, police, facilities of a social-assistance and social-medical nature; and staff working in prisons.<sup>24</sup>

The obligation to be vaccinated has been introduced for healthcare professionals in Germany, France, and Greece. The commitment to vaccinate in the latter two countries also applies to firefighters.<sup>25</sup>

In general, in those countries where vaccination is required for employees in specific sectors, the requirement for vaccination was first introduced for medical and care workers. The obligation to vaccinate was then extended to other areas where the state performs public tasks, such as education, law enforcement, and rescue. Thus, the requirement for vaccination has been aimed at ensuring the state's functioning and protecting public health.

In most countries, vaccination is equated with recovery from COVID-19 and regular coronavirus testing, and vaccination may be denied for health reasons. However, the question arises as to whether the introduction of a general vaccination obligation by sector is justified, as there are jobs in each field of activity where it is possible to prevent an employee from becoming infected by measures that are less intrusive on their privacy. There may be employees in each sector who do not need compulsory vaccination.

If an employee's contact with other people is infrequent and superficial, it is questionable whether such an employee should vaccinate himself. Thus, we come back to the test of justifying the violation of fundamental rights – the requirement for vaccination must be purposeful, appropriate, and proportionate. Therefore, in many countries, the validity of a general, sector-specific vaccination requirement has been assessed by a court.<sup>26</sup>

### 3.2. Establishment of a General Principle.

As the requirement for a general sector-specific compulsory vaccination causes legal disputes, there is reason to analyse whether a narrower specification of the vaccination requirement would be a better solution in practice. In Austria, the following rule was

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<sup>22</sup> European Trade Union Confederation, *ETUC briefing note on mandatory Covid-19 vaccination schemes*, 11 February 2022, available at:

[https://www.etuc.org/sites/default/files/publication/file/2022-02/20220211\\_ETUC%20briefing%20note%20on%20mandatory%20vaccination.pdf](https://www.etuc.org/sites/default/files/publication/file/2022-02/20220211_ETUC%20briefing%20note%20on%20mandatory%20vaccination.pdf), accessed 1 May 2022, 7.

<sup>23</sup> *Ibidem*, 10.

<sup>24</sup> European Parliamentary Research Service, nt. (6), 10.

<sup>25</sup> *Ibidem*, 7-9.

<sup>26</sup> European Parliamentary Research Service, nt. (6), 11; European Trade Union Confederation, nt. (22), 17.

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introduced in November 2021: everybody who has physical contact with other people at work must prove that they are either vaccinated, recovered, or tested negative for COVID-19.<sup>27</sup> The employer also had the right to request a similar corona passport from an employee in Denmark. Which activities and jobs – were for the employer to decide.<sup>28</sup> As the virus that causes COVID-19 spreads through human contact, corona passports were presumably required from employees who came into contact with other people at work. The requirement for close contact also applies to Latvian healthcare professionals – vaccination is obligatory for persons who provide healthcare services and come into close contact with a patient.<sup>29</sup>

There is no general principle established in Estonia about the type of work that employees who can be required to be vaccinated must do. As previously analysed,<sup>30</sup> the employer decides on the mandatory vaccination of the employee, and there are no restrictions in this regard. However, there is in force the Communicable Diseases Prevention and Control Act<sup>31</sup> that obligates employers to demand, in the areas of activity where the particular nature of work may contribute to the transmission of communicable diseases, the submission of a health certificate from employees concerning the passing of a medical examination for communicable diseases (§13(1)). That subsection also lists employees subject to such a requirement (e.g., teachers, employees of childcare institutions, welfare workers, health care professionals, and employees engaged in providing beauty treatments). Noteworthy is the general criterion that characterizes these employees – they come into direct contact with other people at work.

As with other infectious diseases, contact with many people at work is a risk factor for spreading COVID-19. Thus, the principle of physical contact could also be used for mandatory vaccination against COVID-19. However, it must be borne in mind that compulsory vaccination must be the last measure taken to ensure healthy and safe working conditions in the workplace. The introduction of this obligation must be purposeful, relevant, and proportionate. Therefore, whether introducing a compulsory vaccination requirement is necessary for each position must be carefully considered. Given how the coronavirus spreads, mandatory vaccination is justified in specialities where the employee is in constant, unavoidable close contact with other persons, and the prevention of the spread of the virus by other methods cannot be guaranteed.

However, the abovementioned principle may remain too general and challenging to understand and interpret. The state's desire to ensure the fulfilment of essential public tasks

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<sup>27</sup> Euractiv, *Austria to introduce new COVID rules at work*, 21 October 2021:

[https://www.euractiv.com/section/politics/short\\_news/austria-to-introduce-new-covid-rules-at-work/](https://www.euractiv.com/section/politics/short_news/austria-to-introduce-new-covid-rules-at-work/), accessed 1 May 2022. See also European Parliamentary Research Service, nt. (6), 15.

<sup>28</sup> Horten Staff, *New act entitles employers to order employees to produce a Corona passport and a negative COVID-19 test result*, 25 November 2021, <https://en.horten.dk/news/2021/november/new-act-entitles-employers-to-order-employees-to-produce-a-corona-passport>, accessed 1 May 2022. See also European Trade Union Confederation, nt. (22), 7.

<sup>29</sup> Epidemiological Safety Measures for the Containment of the Spread of COVID-19 Infection. Cabinet Regulation No. 662, passed on 28 September 2021 – Latvijas Vēstnesis, 191A, 04.10.2021, <https://likumi.lv/ta/en/en/id/326513>, accessed 1 May 2022, section 24<sup>1</sup>(1).

<sup>30</sup> See par. 2.2.

<sup>31</sup> Communicable Diseases Prevention and Control Act, passed on 12 February 2003 – RT I 2003, 26, 160; 22.05.2021, 3, <https://www.riigiteataja.ee/en/eli/502062021001/consolide>, accessed 1 May 2022.

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and protect public health must also be accepted. Thus, there could be nationally designated fields of activity where the vaccination of an employee is mandatory. Therefore, in practice, the best solution could be a combined option – the state determines the areas of activity where vaccination could be required. Still, the employer makes the final decision on which employees have to vaccinate themselves. The employer follows the principle that these employees are in constant, unavoidable close contact with other persons.<sup>32</sup> Such an approach would probably reduce the number of disputes over compulsory vaccination, although such conflicts cannot be definitively avoided.

#### 4. Possibilities of the Employer if the Employee Refuses to be Vaccinated.

##### 4.1. Amendment of the Employment Contract.

Irrespective of whether the obligation to vaccinate arises from legislation or is imposed by the employer, the question arises as to what to do with an employee who does not comply with this obligation. If the employee's employment relationship can be maintained, his or her employment contract must be amended. According to the general rule of labour law, an employment contract can usually be amended by an agreement between the employee and the employer. In the event of a refusal to vaccinate against COVID-19, the employer is allowed to amend the employment contract unilaterally in several countries.

For example, in Greece and Italy, employees who are obliged to vaccinate themselves but do not do so must be excluded from work without pay.<sup>33</sup> In Hungary, the employer can send such an employee on unpaid leave for a maximum of one year.<sup>34</sup> In Finland, the employer must offer tasks where the employee has no contact with other persons (vulnerable patients) if the employee refuses to get a vaccination. Still, the employer may stop offering employment without compensation or social security if such duties are unavailable. Dismissal is not allowed.<sup>35</sup> A similar rule applies in France: if employees in the identified sectors or workplaces where vaccination is mandatory refuse to vaccinate, employers can suspend the work contract and remuneration but not dismiss the employee. Within three days of the communication of the employee on his or her refusal to get vaccinated, employers have to consult with the employee in question to find an alternative (within the enterprise).<sup>36</sup>

Thus, it can be seen from the practice of different countries that if an employee does not fulfil the obligation to vaccinate, he or she will not be provided with the work agreed upon. This is a suspension of the employment contract for which the employee is not paid.<sup>37</sup>

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<sup>32</sup> Analogous rules are in force in Finland, where employers must ensure their personnel working with vulnerable or aged patients has got vaccine protection in the sector of health care and social services. See European Trade Union Confederation, nt. (22), 7.

<sup>33</sup> European Parliamentary Research Service, nt. (6), 8 and 10.

<sup>34</sup> This does not apply to healthcare workers who may be dismissed immediately. If the employee has not been vaccinated after one year, the employer may terminate employment. *Ibidem*, 11.

<sup>35</sup> European Trade Union Confederation, nt. (22), 7.

<sup>36</sup> *Ibidem*, 8.

<sup>37</sup> It can also be considered unpaid leave.



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Sometimes, the employee must be offered another job before leaving work. This can be considered the best solution, as it allows the employee to continue working and earn an income in another position where vaccination is not required. This also benefits the employer, as a COVID-19 pandemic often necessitates a reorganisation of work. If the employee does not agree to do other work or there is no suitable job for him or her, they will be suspended from work.

Thus, if the compulsory vaccination is justified for the employee and the employee refuses, the first step for the employer must not be to dismiss the employee. As the spread of the COVID-19 virus is expected to be temporary (at least to that extent), the strains of the virus are changing, and the effects of vaccines on the strains are different, the employer must try to find ways to reorganise work or reassign the employee or suspend the employment relationship so that the employment relationship between the parties can continue.

#### 4.2. Termination of Employment Contract.

However, in some European countries, employers can immediately dismiss employees who refuse vaccination. For example, the employment contracts of Hungarian healthcare sector workers who did not vaccinate themselves could be terminated without notice, and they could not receive severance pay.<sup>38</sup> In Latvia, if an employee has not obtained the vaccination (or recovery) certificate without an objective justifying reason, an employer has the right to terminate the employment relationship with him or her without delay, disbursing the severance pay in the amount of monthly wage.<sup>39</sup> Thus, in the case of these two examples, special rules have been adopted to allow an employee who refuses to be vaccinated to be dismissed on a special ground and in a simplified manner.

As analysed above,<sup>40</sup> Estonia is one of the few countries where the employer decides on the mandatory vaccination of an employee after having carried out a risk assessment. If the risk assessment shows that it is impossible to reorganise work and the employee is working in a position where vaccination against COVID-19 is required, but the employee refuses to do so, the employer has the right to dismiss the employee. As there is no special regulation for such a case, there are discussions in Estonia on the legal basis for terminating an employee's employment contract.<sup>41</sup>

On the one hand, it is considered that the employment contract can be terminated due to a breach of the contract. If the employer has conducted a risk assessment that prescribes the positions where the employee's vaccination is obligatory, the employee must comply with this rule (as with any other instructions established by the employer). Before terminating the

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<sup>38</sup> Földes M. E., Kaposvári C., nt. (12), 263.

<sup>39</sup> Law on the Management of the Spread of COVID-19 Infection, passed on 5 June 2020 – Latvijas Vēstnesis, 110A, 09 June 2020, <https://likumi.lv/ta/en/en/id/315278-law-on-the-management-of-the-spread-of-covid-19-infection>, accessed 1 May 2022, section 7<sup>3</sup>(4).

<sup>40</sup> See par. 2.2.

<sup>41</sup> There is a consensus that dismissal is the last measure when it is not possible to continue working in any way (employee cannot work remotely, contact avoidance is not possible, etc.).

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employment contract, the employer must warn the employee (TLS §88(3)), giving him or her reasonable time to change their behaviour (to be vaccinated). However, if the employee does not vaccinate, the employer may terminate the employment contract without notice and compensation.

Another possibility is to terminate the employment contract because the employee is unsuitable for performing the respective position's duties. In the case of this ground for dismissal, the question arises why an employee is not suitable if he or she has the training, knowledge, and skills needed to do the job and is professionally valued. The use of this ground for termination became legally clearer in August 2021 when the Government Order on biological hazards was supplemented with §6(2)11), stating that the employer must protect the safety of employees exposed to other people in the work environment by ensuring the vaccination of employees against COVID-19 disease, checking the proof of completion of vaccination against or recovery from COVID-19 disease, or testing employees with the SARS-CoV-2 test. If an employee does not have the necessary documents to do the job, he or she may be dismissed due to unsuitability.

If possible, the employee must be offered another job before terminating the employment contract due to unsuitability for work (TLS §88(2)). Upon termination of the employment contract, the notice period must be observed (if possible; TLS §97), but there is no obligation to pay compensation. Thus, upon the termination of an employment contract due to the employee's unsuitability, more favourable rules apply than upon termination of the employment contract due to breach of contract. An employee may be able to continue working in another job. Also, if the employer does not give notice of termination of the employment contract by the period prescribed by law, the employee receives an average salary for that period (TLS §100(5)).

In Estonian practice, employment contracts are terminated on both grounds due to the employee's unsuitability and breach of the employment contract. In both cases, if the employee contests the termination of the employment contract, he or she must prove that the requirement for vaccination was not purposeful, appropriate, and proportionate. It is important to note that opinions on that issue have changed in Estonian case law. While at the end of 2021 and the beginning of 2022, the courts have found that the obligation to vaccinate is purposeful, appropriate, and proportionate (no effective more lenient measures, vaccines are effective and have few side effects),<sup>42</sup> since March 2022, the courts have also made other decisions.

For example, the County Court found that since March 2020, when the coronavirus was declared a pandemic, the information about the virus's spread, the strains, and the severity of the symptoms have constantly changed. Knowledge of who must be vaccinated with which vaccine has also changed. Thus, upon the termination of the employment contract employer could not have had sufficient knowledge that vaccination was the only and

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<sup>42</sup> Judgments of Tallinn Circuit Court of 23 December 2021 in cases No. 3-21-2583 and 3-21-2605; Judgment of Tallinn Circuit Court of 24 January 2022 in case No. 3-21-2918.

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proportionate measure.<sup>43</sup> That view must be accepted. Because COVID-19 is a new disease and its virus constantly mutates, rapidly developed vaccines may not always be an effective way to prevent infection.

The above calls on countries to review their vaccination policies – is the requirement for vaccination (in certain positions) still reasonable? As knowledge about vaccination changes, employers need to change workplace risk assessments. The right given to the employer to dismiss an employee for non-vaccination is also questionable. There can be no justification for ending an employee's employment contract if the reason for terminating the employment contract may disappear if the information concerning vaccination changes. Therefore, the employer should not be able to dismiss the employee, especially since the employer is not obligated to re-employ the employee later because the employee's dismissal at the time of termination was legal.

## 5. Concluding Remarks.

Irrespective of whether the requirement to vaccinate an employee is imposed by the state or the employer, it constitutes a serious violation of fundamental rights and must be carefully considered. While it is possible to agree that the greater the violation of fundamental rights is, the higher must be the level of power that regulates it, the vaccination requirement imposed by both the state and the employer must be purposeful, appropriate, and proportionate. Thus, a vaccination requirement can always be challenged in court.

Several European countries have determined areas of activity where the vaccination of employees is mandatory. These are usually areas related to health and welfare, but also other occupations where employees work in the interests of the functioning of the state (police, rescue, army). The problem with the general sector-specific vaccination obligation is that employees in this field may not come into contact with other people at work. Thus, the requirement to vaccinate them may be unjustified. An approach is better where the requirement for vaccination is established by areas of activity and the nature of the work, i.e., employees are in constant, unavoidable close contact with other persons at work.

If the employee does not fulfil the obligation to vaccinate established by the state or the employer, the employer may amend or terminate the employment contract. Because COVID-19 is a disease whose virus and symptoms are changing, it is not entirely evident if and which vaccines prevent it from spreading. For this reason, the vaccination requirement may quickly become unfounded. Therefore, it is unreasonable to give an employer the right not to dismiss an employee for non-vaccination. If an employee refuses to be vaccinated, he

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<sup>43</sup> RMP, *The court declared the dismissal of an employee of the Defence Forces illegal*, 08 March 2022, <https://www.rmp.ee/uudised/tooigug-uudised/kohus-tunnistas-kaitsevae-tootaja-vallandamise-ebaseaduslikuks>, accessed 1 May 2022 (in Estonian).

According to decisions from March to November 2022, the courts have declared illegal all dismissals of employees (and officials) for refusing to vaccinate. As lower court decisions have been appealed, these disputes have not been finally resolved by the end of 2022. *See also* Karnau A., nt. (18).

or she should be offered another job that does not require vaccination. The employee's employment contract should be temporarily suspended if there is no other job.

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