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The refusal of compulsory vaccination at workplace in French law

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1. *Introduction*

The Covid-19 health crisis gave rise to emergency regulations in France, as in many countries. In the context of labour relations, the public authorities favoured the soft-law approach to regulate the resumption and the continuance of work. A protocol was very regularly updated on the website of the Ministry of Labour. Since 16 May 2022, it has been replaced by a guide, following the gradual uplifting of the measures and the end of the obligation to wear a mask inside. This protocol provided for preventive measures and “rules” of work organization, such as distancing people from each other, wearing a mask, hand hygiene and a number of days per week of teleworking. These measures did not seem sufficient to the public authorities, who gave priority to vaccination. Following an announcement by the President of the Republic, several pieces of legislation dealt with labour relations. The health crisis introduced exceptional regimes that disrupted the ordinary mechanisms. Numerous obligations have been created for certain categories of employees: a health pass which subsequently became a vaccination pass or a vaccination obligation. An Act of 5 August 2021 introduced an obligation of vaccination mainly for nursing staff¹. The same Act introduced a

¹ Loi n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire.

health pass for employees working in leisure facilities, some public transport and some department stores. This pass concerned staff in contact with customers. Employees had to present their employer with either proof of vaccination, a negative virological test result or a medical contraindication to vaccination. An Act of 22 January 2022 transformed this health pass into a vaccination pass². The vaccination pass is either a proof of vaccination status attesting to a complete vaccination schedule, or a certificate of recovery from Covid-19, or a medical contraindication. During the parliamentary debates, the trade unions and employers' organisations expressed their refusal to generalise passes to all workplaces. These different passes raised fears that medical secrecy and the protection of personal data would be violated, even if the employer did not have access to information on the employee's state of health³.

Following the relative improvement in the health situation and, above all, progress in vaccination, an Act of 30 July 2022 puts an end to these exceptional regimes⁴. However, there is still an obligation to vaccinate certain health workers or those in contact with vulnerable people. The Conseil Constitutionnel (Constitutional Council), which is the highest constitutional authority in France, validated this obligation, considering that the legislator had achieved a balanced conciliation between the protection of health on the one hand and the freedom of enterprise and the right to employment on the other hand⁵. For its part, the Conseil d'Etat (Council of State), the supreme administrative jurisdiction in France, considered that it did not have jurisdiction to verify whether the objective of protecting health could have been achieved by other means, since the methods adopted by the law were not manifestly inappropriate to the objective sought⁶. In several cases involv-

² Loi n° 2022-46 du 22 janvier 2022 renforçant les outils de la gestion de la crise sanitaire et modifiant le code de la santé publique.

³ See European Data Protection Board (EDPB), *Statement on the processing of personal data in the context of the covid-19 outbreak*, statement, 19 March 2020; v. GUÉRIN-FRANÇOIS, *Coronavirus et protection des données personnelles: un enjeu mondial*, in *Dalloz actualité*, 1^{er} April 2020; KEIM-BAGOT, MOIZARD, *Santé au travail et pandémie: les droits du salarié en recul?*, in *RDT*, 2021, pp. 25-36; LANNA, *Les données personnelles de santé, nouvelle composante de la prévention sanitaire*, in *DA*, 2020, 6, Étude 7.

⁴ Loi n° 2022-1089 du 30 juillet 2022 mettant fin aux régimes d'exception créés pour lutter contre l'épidémie liée à la covid-19.

⁵ Conseil Constitutionnel, décision 2022-835 DC du 21 janvier 2022 (loi renforçant les outils de gestion de la crise sanitaire et modifiant le Code de la santé publique).

⁶ Conseil d'Etat, 28 janvier 2022, no. 457879.

ing hospital staff, the Conseil d'Etat found that the vaccination requirement did not seriously and manifestly infringe the right to life⁷, freedom of association⁸, freedom of work⁹, respect for the principle of equality¹⁰, respect for physical integrity, human dignity, the right of patients to give their free and informed consent to medical care and individual freedom¹¹. This priority given to the protection of health was reflected in all aspects of social life, with a few rare exceptions concerning the exercise of religion¹² and the right to demonstrate¹³.

In response to the pandemic, each State has defined its vaccination policy¹⁴. States that have imposed a generalized vaccination obligation are in the minority. Several States, including France, preferred to impose obligations on non-vaccinated persons and to limit the vaccination obligation to certain persons, taking into account their professions and sectors of activity. There is no question here of minimizing the importance of the pandemic, nor of discussing the effectiveness of the vaccine against the virus or its effects on the human body. Vaccination requirements already exist for health care workers, but this one has the particularity of being part of a pandemic. It is indicative of a shift in the execution of public policies towards companies and an increased responsibility of employees. It is useful to focus on the consequences of an employee's refusal to comply with this obligation.

First, this article notes the lack of mass resistance to the legal requirement to vaccinate. Secondly, it examines the compulsory procedure for employees who refuse to comply. Finally, since the French legislator remained in the middle of the road, some comments will be given regarding the ways out of this impasse.

⁷ Conseil d'Etat, ord., 27 sept. 2021, no. 456571.

⁸ Conseil d'Etat, ord., 20 oct. 2021, no. 457101.

⁹ Conseil d'Etat, ord., 8 oct. 2021, no. 456947.

¹⁰ Conseil d'Etat, ord., 18 oct. 2021, no. 457213.

¹¹ Conseil d'Etat, ord., 18 oct. 2021, no. 457216.

¹² Conseil d'Etat, réf., 18 mai 2020, no. 440366.

¹³ Conseil d'Etat, réf., 13 juin 2020, no. 440846, 440856, 441015.

¹⁴ See MTIMKULU-EYDE *ET AL.*, *Mandatory COVID-19 Vaccination: Lessons from Tuberculosis and HIV*, in *HHR*, 2022 1, pp. 85-91. In a European perspective, EUROPEAN PARLIAMENT, *Legal issues surrounding compulsory Covid-19 vaccination*, EPRS, March 2022.

2. *The absence of mass resistance*

The obligation of vaccination has not raised widespread resistance. The refusal to be vaccinated is not massive. Caregivers very often ended up complying. They have either sought a professional reorientation, or made early requests for retirement, or resigned. However, some have not regularised their situation yet. According to government estimates, there are around 12,000 of them. Even if the number of people concerned is small, their absence weighs on the organisation of the services, which are short of staff. With each new Act on the health situation, some advocate the “reintegration” of these staff. Following a parliamentary amendment, the Act of 30 July 2022 provides that health personnel suspended because they have not been vaccinated, may be reinstated when the vaccination obligation is no longer medically justified. This will require the favourable opinion of the National Health Agency (*Haute Autorité de Santé*), an independent public authority, which is tasked with the evaluation of health products from a medical and economic perspective. In July 2022, this authority ruled against lifting the vaccination obligation for health and medico-social workers. The vaccination obligation is thus prolonged, as the pandemic has not disappeared. Collective associations of healthcare workers and firefighters have been created and continue to demonstrate to alert public opinion to their social situation. The employees’ unions, for their part, did not make this a priority. Most of them were reserved in the face of the constraint, preferring a consultation aimed at convincing reluctant or hostile employees.

3. *A compulsory procedure for reluctant employees*

Unless there is a medical contraindication, the legislation imposes an obligation to vaccinate healthcare personnel, i.e. people working in health and medico-social establishments and services and professionals in contact with vulnerable people (at home or during medical transport). Firefighters are also subject to this obligation. The obligation concerns those who are in contact with vulnerable people and is based on a very broad professional criterion. This includes all health professionals, but also psychologists, psychotherapists, osteopaths and their secretaries. This obligation applies to both

the public and private sectors, but in this study we will limit ourselves to private law employees who are subject to the Labour Code.

The employee must present his documents to his employer, who must draw certain consequences. The employees concerned must either present a complete vaccination schedule or a medical contraindication to vaccination. The employer participates in the public policy of generalising vaccination against Covid-19¹⁵. It participates in a “decompartmentalization” between public health and occupational health. Some companies have even organised vaccination within their medical services. The employer is becoming a link in a broader movement to decentralise public policies in the company¹⁶. This trend can be found in other areas¹⁷. For example, companies are asked to end gender inequalities in the workplace through collective bargaining, although the phenomenon is due to factors that go beyond the framework of labour relations.

If he refuses to present proof of the vaccination requirement, the employee is no longer authorised to work. The legislative innovation consists in a suspension of the employment contract which is binding on the parties. The employer has no discretionary power. According to the legislation, he “notes” that the employee can no longer carry out his activity. At no point is this presented as a disciplinary suspension or a prohibition of employment. The underlying idea is that the employee will comply with his obligations. The risk of suspension is intended to act as a deterrent¹⁸. The social effects are radical. During this period, the employee is not paid and the period cannot be considered as a period of actual work counting for paid holidays, nor for rights acquired under seniority.

The Defender of Rights reported numerous complaints from public servants who were suspended while on sick leave¹⁹. The Defender concluded that this practice constituted discrimination on the grounds of health. The

¹⁵ See MEIFFRET-DELSANTO, *Obligation vaccinale contre la Covid 19: une protection de la population nocive pour l'entreprise?*, in *DS*, 2022, 2, pp. 104–112; GAMET, JUBERT-TOMASSO, *Controverse: En quelle mesure, l'employeur peut-il prendre en compte le statut vaccinal du salarié?*, in *RDT*, 2021, 9, pp. 484–492.

¹⁶ See SUPIOT, *La gouvernance par les nombres*, Fayard, 2015, 520 p., p. 279.

¹⁷ This is the situation in the fight against irregular employment.

¹⁸ See FABRE, *Les obligations de vaccination et de présentation d'un passe sanitaire*, in *RDT*, 2021, 9, pp. 512–518; KAHN DIT COHEN, *La suspension du contrat de travail: pari (politique) et difficultés (juridiques)*, in *DS*, 2022, 2, pp. 113–118.

¹⁹ Défenseur des Droits, *Rapport annuel d'activité 2021*.

Conseil d'Etat considered that the suspension could only take effect from the date on which the employee's sick leave ended²⁰. As soon as the employee has complied with his or her vaccination obligation, he or she can return to work.

The legislation provided for a consultation procedure in the event of non-compliance with the health and vaccination pass. In this case, the employer was obliged to summon the employee after three days "in order to examine with him the means of regularising his situation, in particular the possibilities of assignment, if necessary temporary, within the company to another post not subject to this obligation". Nothing of the sort is provided for employees subject to the vaccination obligation. The labour administration only considers that when the employee refuses the vaccination, the employer is "invited" to encourage dialogue with the employee and to organise a meeting with him or her to discuss ways of regularising the situation. The scope of this obligation, which is linked to contact with vulnerable persons, no doubt implicitly justifies this greater severity. Suspension is a protective measure justified by a public health imperative. Moreover, one may wonder about the usefulness of such an interview if no possibility of adapting the position is authorised in the company. For health structures, either you are vaccinated or you are suspended.

The suspended employee can, in agreement with the employer, take days off work or paid leave, but we are then in a situation of waiting for regularisation, which is totally inappropriate in the event of a definitive refusal to be vaccinated. It is also impossible to wait for the lifting of the vaccination obligation, which will persist as long as the pandemic continues. Otherwise, the employer will be obliged to suspend the employee's employment contract until the situation is regularised. There is no time limit. Ways out of this impasse need to be considered.

4. *The French legislator has remained in the middle of the road*

An employee who refuses to work will not be entitled to unemployment benefits. Several departmental councils that deliver the Active Solidarity Income (RSA) have explicitly stated their refusal to pay the income to suspended employees. They have either referred these carers to their individual

²⁰ Conseil d'Etat 2 mars 2022 no. 458353.

responsibilities in the public interest or argued that these people do not fall within the scope of the scheme. However, whatever their opinion, departmental council are not entitled to create new exemptions to the payment of this income.

In the mind of the legislator, an employee who refuses to be vaccinated is making a personal choice that is contrary to the general interest and especially to the protection of the weakest people. Access to the workplace is conditional on vaccination. There is no end to this situation, which may therefore continue as long as the parties have not broken the employment contract.

The employer could attempt a change of job, compatible with the vaccination requirement, provided that this change does not modify the employment contract. This would otherwise require the employee's agreement. In the case of a protected employee, such as a trade union delegate or an elected employee, the employee's agreement would have to be obtained, even if the employment contract is not modified. However, this solution is difficult to envisage, as no distinction between functions is made by the legislation. It applies to everyone working in the structures concerned, with the exception of certain people responsible for carrying out a specific task.

In situations other than a health crisis, the legislator has sometimes given precedence to the interests of the company over the individual refusal of the employee. It has thus been provided that when an employee refuses changes to his or her employment contract resulting from a collective performance agreement, which is a collective agreement on employment with specific effects on the individual employment relationship, a *sui generis* dismissal procedure applies. The employee makes a choice contrary to the collective interest, for reasons of his own, and he will be dismissed, without being able to effectively challenge the lawfulness of his dismissal. No such provision is made for refusal of vaccination. It was discussed during the parliamentary debates. The initial draft of the Act of 5 August 2021 provided that the fact that an employee was unable to carry out his activity for lack of vaccination for a period of more than two months justified his dismissal. The legislator thought that it would provide a secure way for the parties to terminate the contract. It had to back down in the face of hostile reactions from trade unions and the risk of conflict with ILO Convention No. 158, which imposes the possibility of a review of the grounds for dismissal.

Even if the legislation is silent, the employee's job is at stake. If the employee does not get vaccinated and does not resign, the employer who wishes

to terminate the employment contract must implement the common law procedures for terminating the employment contract. No litigation has developed on this issue so far. We have seen above that employees who have left their jobs have done so in other ways.

The parties may wish to break the contract by mutual agreement. Provided that the employee agrees, the contract can be terminated by a homologated conventional rupture²¹. Of course, there must be no fraud or lack of consent. The employee will thus be entitled to unemployment benefits but the employer will have to pay a sum corresponding to the legal redundancy allowance, which he will not always be inclined to do, as the termination is for reasons beyond his control.

The employee may resign. However, this decision must be clear and unequivocal. The employee must not have been pressured and his voluntary departure from work due to lack of vaccination does not constitute a clear intention to resign.

If no agreement is reached and the employee has not resigned, then the employer must take the initiative to terminate the contract by dismissal. This is not prohibited in any way. As the Constitutional Council has noted, by renouncing a *sui generis* dismissal procedure, the legislator excludes the refusal to vaccinate from constituting in itself a reason for dismissal. Some scholars envisage the possibility of disciplinary dismissal for failure to fulfil the safety obligation²². A decision of the social chamber of the *Cour de cassation* (Court of Cassation), which is the highest court in the French judiciary²³, in 2012 goes in this direction with regard to the repeated refusal of an employee of a funeral home to be vaccinated against hepatitis B²⁴. However, this hypothesis gives rise to some unease. The link with disciplinary law should have been established by the legislator itself. Suspension is more a means of putting pressure on the employee than a step towards sanctioning an employee who is at fault in terms of his or her professional obligations. As one author points out, “the legislator wanted to preserve the legal situation arising from a contract whose execution is momentarily rendered impossible by the employee’s

²¹ See DALMASSO, *Traîtres ou refusniks? Le délicat renvoi des salariés réfractaires au vaccin*, in *DS*, 2022, 2, pp. 119–123.

²² See RADÉ, *Et maintenant, que vais-je faire?*, in *DS*, 2021, 11, p. 865.

²³ The Court of Cassation has jurisdiction over all civil and criminal matters triable in the judicial system.

²⁴ *Cass. soc.* 11 juillet 2012, no. 10-27.888; *Bull. civ. V*, no. 221.

health condition”²⁵. Moreover, the employer’s decision could be directly or indirectly discriminatory because of “philosophical or religious convictions”²⁶. The refusal to be vaccinated finally affects the employee’s personal convictions, his consent to medical care and his private life. The disciplinary ground here borders on personal privacy.

Another procedure generally applied to an employee in long-term absence. The Social Chamber of the Court of Cassation allows an employee to be dismissed for “objective disorder”²⁷. This is a non-disciplinary personal reason justified by the objective disorganisation of the company. This disorganisation must concern the entire company and not just the department or establishment. The employer must also demonstrate the need to replace the employee permanently. This obligation will be easy to demonstrate in the highly stressed health sector. Another possibility of dismissal is sometimes put forward. An employee who is no longer able to meet the new conditions of practice of the profession might be dismissed.

All these methods of terminating the employment contract are only hypotheses, which will probably not be applied. The situation created by the legislator shows that it has remained in the middle of the road. It did not impose a general obligation to vaccinate. Several measures, such as passes, were intended to put pressure on people to be vaccinated. The President of the Republic had even stated that he wanted to “piss off” the anti-vaccine campaigners²⁸. France finds itself in a peculiar situation, in which unvaccinated health workers are recruited by neighboring countries while it itself lacks a workforce in this sector. In labour relations, the legislator has put the employer in the position of a controller of compliance with a public policy obligation. This control is limited to compliance with a procedure. It should not go any further by allowing an employer to have access to the employee’s medical file. By not having carefully created a specific cause for dismissal, the legislator did not go to the end of his logic. The suspension of the employment contract is, as we have seen, a strong incentive to be vaccinated in order to return to work. But the system is not complete. Implicitly, it means that the reluctant employee must leave his workplace if he does not want to give in.

²⁵ FABRE, *cit.*

²⁶ PEYRONNET, *Covid 19 et égalité*, in *DS*, 2020, 07-08, pp. 588-592; MOIZARD, *Crise sanitaire et discriminations au travail*, in *RDT*, 2020, 4, pp. 257-259.

²⁷ See for example, Cass, ch. Mixte, 18 mai 2007, no. 05-40.803.

²⁸ See *Le Monde*, 4 January 2022.

Abstract

During the Covid-19 health crisis, French public authorities introduced an obligation to vaccinate health workers. Many of them refused to comply with this obligation. Their employment contract has been automatically suspended. This is not a disciplinary measure but, during this period, the employee is not paid and he will be not entitled to unemployment benefits. There is no term limit. The legislator did not expect any specific provisions to terminate the employment contract and established therefore a legal insecurity.

Keywords

Covid-19, obligation to vaccinate, health workers, suspension of employment contract, termination of employment contract.