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Covid-19: mandatory vaccination

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Introduction

As of 8 December 2021, only 72% of people in Austria had received one dose of a vaccine against covid-19, while 74.8% of people had received two doses and 28.2% of people had received three doses. On 9 December 2021, in response to this low vaccination rate, the Ministry of Health presented a draft bill regarding mandatory vaccination, which is open for comments until 10 January 2022.⁽¹⁾ Although Austrian politicians have rejected mandatory vaccination in the past, discussion in this regard accelerated in November and resulted in the draft bill, which will enter into force in February 2022.

Draft legislation

To whom does the legislation apply?

The draft provides for mandatory vaccination for persons over 18 years of age domiciled in Austria. Persons domiciled in Austria aged between 14 and 18 shall also be vaccinated, provided that they have the necessary decision-making ability. Vaccination cannot be applied by immediate coercive power. The draft excludes the following groups of people from mandatory vaccination:

- pregnant women;
- persons who cannot be vaccinated without danger to their life or health, unless this danger can be overcome by the choice of vaccine; and
- persons who have overcome covid-19 within 180 days from taking a sample.

The reason for exemption and the lack of decision-making ability must be certified by a physician. The physician must register the certificate in the central vaccination register.

What does the legislation comprise?

Mandatory vaccination comprises:

- the first dose;
- a second or further dose, given between 14 and 42 days after the first dose; and
- a third or further dose, given between 120 and 270 days after the previous vaccination.

If the legal situation regarding the centrally authorised vaccines is amended, or there is a modification to the state of the art in respect of the interval between the doses, the authorised vaccines or the number of vaccinations sufficient to provide protection, the minister of health may enact a regulation to modify these rules.

How will compliance with the legislation be monitored?

The tracing of persons subject to mandatory vaccination shall be made on 15 February 2022 and every three months after that. For this purpose, the central register of residence and the central vaccination register shall provide the minister of health with personal data and data on covid-19 vaccinations. Following the alignment of this data, the minister of health shall remind any unvaccinated persons to comply with the mandatory vaccination policy on 15 February 2022 and every three months after that.

What penalties exist for non-compliance with the legislation?

Persons who fail to comply with the mandatory vaccination policy are subject to a fine of up to €3,600. However, contrary to ordinary administrative law, the fine is not converted into a prison term if it is not paid. The fines accrue to local hospital providers.

Who pays the costs of vaccination?

State governors must provide low-threshold vaccination offers. The cost of the vaccination is borne by the federation.

For how long will the legislation be in effect?

The law shall be in effect until 31 January 2024.

Comment

The mandatory vaccination policy shall result in the Austrian population being immunised to the greatest possible extent. The Ministry of Health expects a significant increase in vaccinated persons due to the vaccine mandate, and that this increase will reduce the necessity of imposing other protective measures and minimise the burden on the health system. The financial exposure is estimated to be €150 million until 2024.

The protective purpose of article 8 of the European Convention on Human Rights (ECHR) warrants, among other things, respect of private life. This includes the protection of individuals' physical and psychological integrity, and also the ability to choose freely whether to undergo medical treatment. However, interventions in article 8 of the ECHR are justified if they are legally provided and necessary in a democratic society to achieve an aim according to article 8(2) of the ECHR.

This necessity can be assumed if an urgent social need is fulfilled – in particular, in consideration of the seriousness of the disease, its

infectiousness and the danger to the public. SARS-CoV-2 is a pathogen of exponential distribution potential (particularly the new Omicron variant). The course of the disease varies in seriousness from infections without symptoms to severe pneumonia and death, while persons without symptoms may also be disease carriers. The pandemic has so far demonstrated the dangers of covid-19 to the public, including the immediate danger of overloading the health system. Mandatory vaccination serves the legitimate aims of article 8(2) of the ECHR, as has been recognised by the European Court of Human Rights⁽²⁾ – namely, the protection of health and the protection of others' rights.

In the light of the low vaccination rate in Austria and the slow increase of the vaccination rate since July 2021, it seems unlikely that the necessary vaccination rate will be achieved by carrying on the existing measures to increase vaccination readiness. Although there is no exact percentage that would result in a lessening of the severity of the pandemic, the bill aims to reduce the circulation of the virus by achieving and maintaining a vaccination rate of over 90%.

In the absence of empirically established figures from existing experience with covid-19 vaccines, mandatory vaccination can be justified by the strict authorisation process and the severe effects of the pandemic on society as a whole. Damage resulting from the vaccines' rare and very rare adverse effects is subject to liability under the Vaccine Injury Act. Also, mandatory vaccination shall not be enforced by immediate coercive power, but only by administrative fines. A high vaccination rate not only serves the protection of individuals but also the protection of vulnerable persons and society as a whole, thus justifying public interest.

Although the draft bill provides for mandatory vaccination, there is no intention to modify the "3G-rule" (ie, *geimpft, genesen, getestet* – vaccinated, recovered, tested) on workplaces or the "2G-rule" (ie, vaccinated and recovered) in retail and restaurants. A modification of these rules to "1G" (ie, vaccinated) could also boost the effectiveness of mandatory vaccination.

For further information on this topic please contact Rainer Herzig at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) 164/ME XXVII.GP – ministerial draft bill.

(2) European Court of Human Rights, 8 April 2021, 47.621/13, *Vavříčková*; European Court of Human Rights, 15 March 2012 *Solomakhin*, 24.429/03.