

COVID-19 Testing and Vaccination of Employees in France

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On December 20, 2020, the French government published a circular detailing the practical rules employers need to follow in order to test employees for COVID-19 now that tests for the virus are more available. These rules focus on three principles: (i) prioritizing employees that show symptoms or instances of contact; (ii) maintaining the voluntary nature of testing; and (iii) protecting doctor-patient confidentiality.

The Rules for Testing Employees for COVID-19

On November 16, 2020, the French government published a ministerial ruling that authorized employers to test employees for COVID-19. The ruling described general protocols that employers need to follow in order to test employees. In particular, employers are required to inform the French health authorities before conducting testing, a trained professional must execute the testing, and all results must be handled by a doctor, pharmacist or nurse and kept confidential. A key point in the rules is that testing must be punctual and can only take place when an employer suspects that the virus might be present, meaning that employers cannot simply test all employees on a daily basis.

However, the November ruling did not contain the more granular practical requirements that employers need to follow in order to proceed with testing. Now the December 20, 2020, circular has set and released these.

Under the rules provided by the circular, priority for COVID-19 testing should be given to two types of employees: those presenting symptoms, as long as those symptoms appeared fewer than four days before testing, and those without symptoms who have been in contact with individuals that have tested positive for COVID-19. Other employees can be tested, but the circular does not recommend doing so.

The circular requires that employers inform their works council of any testing campaign they plan to implement and, more importantly, that only employees that volunteer may be tested. Employees that do not wish to be tested cannot be required to be tested, and an employer cannot take any disciplinary action against them, or even record their refusal.

In addition, only the above mentioned medical staff may be privy to the results of the tests, and an employer cannot keep track of which employees are being tested or keep any data pertaining to the employees' health; only an employee can decide to reveal such information to his or her employer. If a test comes back positive, the concerned employee is required to self-isolate, and is encouraged, but not required, to inform his or her employer of the results of the test so that contact tracing may take place.

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The Upcoming Vaccination Campaign

The vaccination campaign against COVID-19 began in France on December 27, 2020, and the vaccine has been made available as a priority to the elderly and other at-risk populations. The French government has not yet commented as to whether employers will have the power to make vaccination mandatory for employees, but under current legislation in France, making any form of vaccination mandatory is illegal for employers. Given the delay with which testing has been made available to employers, and the fact that employees can only undergo testing on a voluntary basis, it seems highly unlikely that the government will change the current legislation to allow employers to make vaccination a requirement for on-site work. Employers will likely only be able to (i) recommend that employees receive vaccinations and (ii) make vaccination available on-site, similar to the practice in France for administering flu vaccinations.

In conclusion, the December circular rules confirm the approach of the French government regarding testing, and most likely vaccination, where the state, not employers, maintains responsibility for public health. However, this does not mean that employers can sit idly or cannot be held liable under some conditions if employees were to fall ill with COVID-19, in particular since employers in France must guarantee the health and safety of their employees and must continue to implement all measures necessary to limit the spread of the virus (*e.g.*, making masks mandatory, ensuring social distancing, implementing remote working when possible), which are detailed in the November 13, 2020, French National Protocol intended to protect the health and safety of employees during the COVID-19 pandemic.