

COVID-19 infection figures in Germany have risen significantly in recent weeks – mainly due to the highly contagious Delta variant and vaccination rates still lagging behind much of Europe. As we move into winter, the cold weather encourages people to stay indoors and so compounds the problem. In response, an amendment to the Federal German Infection Protection Act has been passed by both the Bundestag and the Bundesrat. A new section 28b has been introduced, which is intended to help break up the massive fourth wave of COVID-19 as quickly as practicable by measures to contain the general rate of infection across the country. To this end, possible chains of infection in the workplace must also be broken.

For the first time, workplace access controls have become mandatory through a new obligation on employees to provide evidence of their status of vaccinated, recovered or tested as a condition of entry to the workplace. The new Section 28b came into effect on 24 November and will apply (initially at least) until March 19 next year. It provides for considerably stricter measures under employment and occupational safety laws. In particular, it includes:

1. Access Ban Without Proof of “3G”

- **Workplaces may only be entered by employees who are vaccinated (“Geimpft”), recovered (“Genesen”) or tested (“Getestet”) and carry the relevant proof (3G evidence).** There are **no medical or other exemptions** from this requirement – those employees who may have a medical condition or disability that could be triggered or worsened by the vaccination, or cultural or religious views that lead them to be reluctant to have it, must use the tested or recovered options instead. Employers have the right to impose similar checks on others who wish to enter their premises – **visitors, clients, contractors, etc.** – but are not obliged to do so. Equally they can impose an even stricter 2G entry criterion on those third parties, allowing in only the vaccinated and recovered and not those whose reassurance is only a recent negative test result.
- **Exceptions to the access ban** apply only to:
 - Use of testing services at the workplace under the supervision of the employer for the purpose of obtaining a test certificate (which is not part of working time).
 - Use of any vaccination services provided at the workplace (for which paid time off has to be granted).
- **The new regulations apply to every workplace** – regardless of the activity performed or the degree or risk of actual “physical contact” with others. So long as there “might be” indoor or outdoor contact with others, a very low threshold of possibility, those rules will bite.

2. Employer Control Duties

- The **employer has to control operational access** in order to ensure full compliance with the verification requirement for vaccinated, recovered or tested status. Thus, employees have to carry either proof of vaccination or recovery or proof of testing when entering the workplace every time – it is not enough for the employer to carry out random checks only or to skip the verification process on busy days.
- This means that the employer has to **request and document personal data such as the name and the existence of a valid 3G certificate**, including the period of validity in case of “recovered” status. The second vaccination jab necessary to obtain “vaccinated” status must have taken place at least 14 days prior to entry. However, the employer may not collect or process any further employee health data beyond that required to comply with the verification requirements of Section 28b.
- Once the employer has **verified proof of vaccination or recovery and documented that check**, employees with valid vaccination or recovery records can be exempted from daily access checks thereafter, at least until the recovery validity period expires. However, all employees are still required to carry proof with them while on site and to present it to the employer on request.
- The employer is permitted to **use the data in order to inform and develop the company’s hygiene practices and procedures**.
- Employers must **ensure that unauthorised persons (e.g. third parties or colleagues not properly involved in the verification process) cannot gain access to the data collected**.
- The personal data contained within the employer’s records of an employee’s 3G evidence may be **retained for up to six months** from the date it was collected (for now – this may be extended depending on further developments in the pandemic).

- The Infection Protection Act provides for a **fine of up to €25,000 for violations of the employer's obligations to control access to the 3G evidence.**

3. Test Requirements

- An official antigen test or an antigen test taken in line with arrangements made by the employer **must have been taken not more than 24 hours before the time of access to the workplace.**
- A negative PCR test result **must not be more than 48 hours old at the time of entry.**
- It is **the employee's responsibility to provide valid 3G evidence.** For this purpose, the state offers free COVID-19 tests or any arrangements made by the company to provide tests can be used. However, in-company tests can only be used if they are carried out and certified by an authorised third party or if they are carried out and documented in the company under supervision. If employers only provide self-testing twice a week (the minimum required by an ordinance of the Federal Ministry of Labour), employees must present a current external test record every working day.

4. Homeworking

- All employees should **work from home where** there are no compelling operational or personal reasons to the contrary.
- However, unvaccinated or unrecruited employees **do not automatically have a right to work from home** under the new regulations. While the employer can agree to this, it is not obliged to do so nor to facilitate it in the same way as for vaccinated staff.
- There is **no test or 3G evidence requirement for employees working wholly from home.**

5. Penalties

- If the employee does not want to disclose his/her 3G status or cannot provide proof and is, therefore, not able to perform work on site/in the office, it needs to be determined whether the employee could work from home. If working from home is not possible, the employee is **no longer entitled to remuneration.**
- If the **employee persistently refuses to provide proof of 3G,** termination of employment may be considered as a last resort after one or more warnings/warnings in advance. Whether termination is appropriate is to be decided on a case-by-case basis in light of the individual facts and circumstances. A right to terminate immediately will exist in the case of deliberate violations of 3G and the access restrictions.

- If an employee falsifies the vaccination certificate or a test (and thereby also puts colleagues at risk by concealing a COVID-19 infection when submitting the falsified evidence), termination for good cause with immediate effect may also be considered (as well as criminal prosecution).
- The Infection Protection Act provides for a **fine of up to €25,000 also for employees who persistently violate the obligation to carry 3G evidence.**

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