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# FAQ ABOUT THE COVID CHECK SCHEME IN COMPANIES

**Frequently asked questions about the Covid check scheme in companies outside the horeca, hospital and public service sectors in accordance with the amended law of 17.07.2020 on measures to combat the Covid-19 pandemic (hereinafter referred to as the „amended law on Covid measures")**

*The purpose of this FAQ is to help companies implement the Covid check system as provided for in the amended law on Covid measures.*

1. **What is the Covid check scheme? Is the employer obliged to use it?**

The Covid check scheme provided for in the amended law on Covid measures is the scheme applicable to establishments receiving the public, gatherings, demonstrations or events where entry is exclusively reserved for persons who can show

- a vaccination certificate with a QR code ; or
- a certificate of recovery with a QR code ; or
- a Covid-19 test certificate showing a negative result, provided with a QR code or certified by one of the competent persons according to the law,
- or a self-diagnostic test for Covid-19 carried out on the spot, with a negative result, which will be allowed until **31 October 2021** (see question 2).

Persons under 12 years and 2 months of age are exempt from mandatory testing.

The introduction of a Covid check within a company is an option and not an obligation. The employer therefore has the choice of whether or not to opt for the Covid check scheme (see question 5).

According to the legislator (cf. draft law no. 7897/09), this *„scheme meets a demand from many employers and employees in that it allows them to operate and work in circumstances that guarantee safety and health without having to submit to strict health restrictions and measures, such as wearing a mask or physical distancing".* The aim, according to the legislator (see bill no. 7897/09), is *„to guarantee respect for the rights and freedoms of persons who have been vaccinated and to allow a return to 'normal' life."*

The Covid check regime exempts people from mask wearing and social distancing obligations. However, it is recommended to continue to respect the other Covid-19 pandemic control measures (e.g. ventilate premises, disinfect surfaces, wash hands, avoid physical contact) in order to ensure the health and safety of employees (see question 8).

2. **When does the Covid check scheme come into force? What is the deadline?**

The Covid check scheme as set out in the amended law on Covid measures can be used in companies from **19 October 2021**.

Until 31 October 2021, self-diagnostic tests for Covid-19 that are carried out on site and have a negative result are still permitted. From **1 November 2021** onwards, they will not be permitted (see question 1).

The Covid check scheme is possible in companies under the amended law on Covid measures until **18 December 2021**, without prejudice to a possible extension by law beyond this deadline.

3. **What is the role of employee representatives in the implementation of the Covid check scheme?**

The Covid check scheme falls within the framework of the employer's obligations in terms of health and safety at work as provided for in Articles L. 312-2 et seq. of the Labour Law. Common law and in particular the provisions of the Labour Code are applicable as regards co-decision with the staff delegation for companies with 150 or more employees (Article L. 414-9 3° of the Labour Law), consultation and participation of the staff delegation (Article L. 414 (1) 7° of the Labour Law) as well as the competences and missions of the health and safety delegate for all questions relating to health and safety at work.

4. **What are the obligations to the authorities under the Covid check scheme?**

If the employer chooses to implement the Covid check scheme, he/she must give prior electronic notification to the Health Directorate and publish visible signage.

When notifying, the perimeter of the venue of the event must be precisely determined and the notification must include the dates or periods covered.

5. **Where, when and to whom does the Covid check scheme apply?**

The employer can decide to place all or only part of his/her company under the Covid check scheme protect the safety and health of the workers concerned. The employer is therefore free to apply the most suitable scheme for his/her company, or to limit the application of the Covid check scheme to certain events – such as meetings, conferences, training courses or examinations – or to certain locations within the company. For example, the employer could decide that the Covid check scheme only applies in areas that are not accessible to the public. It could also decide that the scheme applies in meeting rooms for the duration of the meeting.

The employer should therefore clearly delimit the geographical area and the periods in which the Covid check scheme applies. This information should be notified to the Health Directorate (see question 4).

When the Covid check scheme is applicable, any person who wishes to enter the area (e.g. workers, visitors, customers) is obliged to present a certificate of

vaccination, recovery or test admissible under the amended law on Covid measures (see question 1).

6. **When and by whom should the Covid check under the scheme be carried out?**

The check must be carried out each time a person wishes to enter an area where the Covid check scheme applies, and the check is mandatory for any person who wishes to enter that area. The employer should bear in mind that the results of the check may vary over time, especially as the validity of the tests and natural immunity are limited in time.

The employer may carry out the test him/herself or delegate it to one of his/her employees or to a third-party provider. The employer could decide to limit access areas in the company to facilitate the test and to close off other areas or to leave them only as exit doors.

7. **To what extent can the employer process the data received in the context of the Covid check?**

Health data are sensitive personal data whose processing is in principle prohibited by the GDPR. An application called „CovidCheck.lu" is made available by the Luxembourg authorities to perform the Covid check and scan QR codes. The application only reveals the full name and a green or red result. The result is displayed for a few minutes and then disappears without being stored. The employer is not allowed to collect and store the results that are displayed by the application during the check. This prohibition also applies to the vaccination status.

8. **Who should the employer inform? What should be documented?**

The employer should ensure that employees and other persons affected by the Covid check scheme are provided with sufficient information in good time (signage, internal communication, notification to the Health Directorate, etc.).

It is recommended to clearly document the measures taken and the means implemented to ensure compliance (see question 4 on obligations to notify the authorities), all the more so as the employer must ensure that it is able to prove that the Covid check scheme implemented complies with legal provisions (see question 7 on the processing of personal health data).

9. **Should the time needed to carry out the Covid check be considered as working time for the employees concerned?**

The employee is at the employer's disposal while waiting for and having the check performed. Therefore, the time needed for this purpose should be considered as working time.

The employee should not be penalised if the arrangements chosen by the employer lengthen the time needed to carry out the check in practice (e.g. only one employee is responsible for carrying out the check of a hundred people arriving at the premises at the same time).

The employee should also not be prejudiced by possible malfunctions during the control. The employer should put in place alternative solutions: use of another GDPR-compliant application to carry out the check, wearing of a mask on the company's premises and respect of physical distancing, authorisation of teleworking, etc.

10. **Is the cost of any test to be carried out by an employee under the Covid**

**check scheme to be borne by the employer? Should the time for this test be considered as working time?**

The cost of any test to be carried out by an employee does not have to be borne by the employer, and the time taken to carry out the test should not be considered as working time.

The employer is not entitled to process data on the employee's vaccination status in terms of data protection and the GDPR. If the employer were to pay for the cost of the tests, it would *de facto* know the vaccination status of certain employees and would have to process such data.

The legislator assesses this issue of the financial burden of testing as follows: *„As to the costs of the tests – either RAT or NAAT certified – to be carried out by persons who are neither vaccinated nor recovered, in order to comply with the Covid check scheme, and as to the financial cost that may result, the representatives of the Government consider that vaccination constitutes an opportunity for the employee or public servant to comply with the safety, hygiene and health measures imposed by the Covid check scheme without any additional costs.*

*Furthermore, given that the delay resulting from the deferred implementation of the new Covid check scheme may not be sufficient for people who decide at the time of implementation of the new provisions to be vaccinated so as to benefit from full vaccination protection, the Government has announced that the cost of the tests will be covered for people who have been vaccinated for the first time during a transitional period.*

*Testing will continue to be free of charge for those who cannot be vaccinated for medical reasons.*

*In general, the more restrictive measures, particularly with regard to testing, decided by the Government are intended to encourage the part of the population that has not been vaccinated up to now to be vaccinated – the aim being to achieve a vaccination rate of between 80 and 85% of the population and to follow the example of other countries which, because of a high rate of vaccination allowing collective immunity to be achieved, have lifted all or most of the restrictions. The aim is to guarantee respect for the rights and freedoms of people who have been vaccinated and to allow them to return to 'normal' life."* (cf. bill no. 7897/09).

11. **What are the consequences for a person who refuses to undergo the Covid check or whose result does not allow access??**

The person will not be allowed access to the area where the Covid check scheme applies.

Where the person is an employee, he or she is obliged under employment law to comply with the health and safety measures provided for in the company. The employee cannot unilaterally impose teleworking, holiday leave or other work organisation arrangements upon the employer. The employee may therefore, on a case-by-case basis and without prejudice to possible isolation or quarantine obligations, be subject to the sanctions allowed under labour law, including for example a warning or even loss of pay for the hours of absence concerned, unless the employer is committing an abuse of rights. The question of possible dismissal will be assessed in the light of the criteria generally used in this context (seriousness of the fault, duration of the absence, context of the refusal, seniority, etc.).

12. **Where can the employer find more information?**

Official website of the Luxembourg Government on the Coronavirus:
https://covid19.public.lu/en.html

Amended law on Covid measures:

- from 19.10.2021
- from 01.11.2021

For any further information, please do not hesitate to contact Philippe Heck (philippe.heck@fedil.lu), Ella Gredie (ella.gredie@fedil.lu) or Marc Kieffer (marc.kieffer@fedil.lu).