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COVID-19 Legal Insights



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Discrimination issues in the context of the national vaccination campaign for SARS-CoV-2

Currently Romania undergoes a vaccination campaign for COVID-19. Vaccination is voluntary; Romania did not adopt any legislation to mandate vaccines - either directly, by imposing an obligation to take the vaccine on all persons, or certain categories of persons, or indirectly, by limiting unvaccinated persons' access to certain activities or spaces. Nor did Romania adopt any generally applicable legal norms to condition the access of persons to social or professional activities on presenting a SARS-CoV-2 test; the only such regulations, *administrative* in nature, exist in international transportation and sanitary domains.

Vaccination and testing being both medical procedures, they are regulated by the Oviedo Convention, which provides (in Art. 5) that any medical intervention requires the *free and informed consent* of the person undergoing the intervention. Medical procedures also fall under the remit of the European Convention on Human Rights, which recognizes and protects the right to private life (Art. 8) (which includes the physical integrity of the person, the right to autonomy, the right to self-determination, the right to take decisions regarding one's own body) as well as the freedom of thought, conscience and religion (Art.9).

According to Art. 53 para (1) of the Constitution of Romania, the exercise of rights and freedoms can only be restricted by law.

Against this background, we note that, according to public information, certain organizations are taking measures to restrict the exercise of rights for persons that do not present proof of vaccination or testing. A recent example is Resolution No. 6/4640/1 March 2021 of the Administrative Board of "Victor Babeş" University of Medicine and Pharmacy, Timișoara, which recommends students who are not vaccinated/immunized continue their studies on-line (link to the resolution [here](#)).

Such measures can qualify as discrimination and can successfully be challenged before the competent fora. We briefly analyze below the legal condition of a discriminatory act and the procedural remedies available to the person who falls victim to discrimination.

1. The Discriminatory Act

1.1. General conditions:

Discrimination is regulated both at the EU level (especially Art. 14 of the European Convention on Human Rights and practice of the Strasbourg Court - e.g., *Carson et al/United Kingdom, D.H. et al/Check Republic, Burden/United Kingdom*) and nationally (*Government Ordinance No. 137/2000 on the prevention and punishment of all forms of discrimination*).

In Romanian law, the concept of discrimination is defined in Art. 2 of GO 137/2000 as follows: “discrimination means any difference, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, conviction, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, the person’s belonging to a disfavored category or any other criterion which aims at, or effects a restriction or removal of the acknowledgment, use or exercise in equal conditions of the fundamental rights and freedoms or of rights recognized by the law in matters political, economical, social, cultural and in any other domain of public life”.

By this legal definition, the discriminatory act exists where the following conditions are met:

- There is a difference in treatment afforded persons in similar situations;
- The difference in treatment is based on one of the criteria expressly provided by the law or a similar criterion;
- The difference in treatment lacks a reasonable objective justification.

1.2. Discriminatory acts in the context of the COVID-19 pandemic:

As noted, against the backdrop of a voluntary vaccination campaign, information has been made public about possible restrictions of certain fundamental rights of the unvaccinated person; concretely, suggestions have been made of (i) restricting unvaccinated students’ right to physically attend classes and limiting them to on-line classes only; (ii) limiting the unvaccinated persons’ right to certain forms of travel (e.g., by plane); (iii) forbidding the unvaccinated persons’ access to certain cultural or sports events; (iv) limiting the access to certain professional spaces of activities to persons who do not present proof of having taken the vaccine or a recent test etc.

As a matter of principle, these measures are affecting fundamental rights and freedoms, such as the right to intimacy, family and private life (Art. 26 of the Constitution of Romania), the freedom of thought, opinion and religious belief (Art. 29 of the Constitution of Romania), the right to education (Art. 32 of the Constitution of Romania), the freedom of movement (Art. 25 of the Constitution of Romania), access to culture (Art. 33 of the Constitution of Romania).

The exercise of the fundamental rights and freedoms cannot be restricted without condition and by any entity (governmental or private) might wish to do so; the following conditions must be met: (i) the restriction can only be imposed *by law* (not by administrative act, let alone by acts issued by private entities or mere factual imposition, such as simply refusing access to an unvaccinated person to a certain space or activity), (ii) the restriction must be deemed necessary in a *democratic* society,

and (iii) the measure must be *proportional* with the situation causing it and applied *without discrimination and without affecting the very existence of that right or liberty*.

By such conditions and restrictions, vaccination and testing (both being optional medical procedures under the law) are transformed - through the decision of entities lacking the power under the law to impose such limitations - into genuine obligations, as long as the unvaccinated person is made subject to privations that significantly affect their personal development (by restricted access to education or culture), living standards (by e.g., restricted access to work) or a normal social and family life (by restricted travel, restricted access to certain public spaces etc.)

Such measures restricting the rights of unvaccinated persons raise serious legal doubts as to compliance with anti-discrimination laws.

Applied to the hypothesis of such restricting measures, the legal conditions of the discriminatory act are as follows:

- Persons in similar situations are afforded different treatment depending on whether they have taken the vaccine or not;
- The difference in treatment, manifested by the exclusion of a category of persons from the free exercise of certain fundamental rights and freedoms, is predicated upon a criterion of only apparent relevance - whether the vaccine was taken or not;
- A reasonable objective justification for this difference in treatment is difficult to argue. Public health can in principle constitute reason for certain restrictions of fundamental rights during pandemics. (Certainly, such restrictions can only be imposed by law). However, in our hypothesis, the discrimination criterion is the proof of having taken an anti-SARS-Cov-2 vaccine, while incontestable scientific evidence is currently absent on a number of essential aspects of these vaccines such as (a) whether the vaccinated persons can transmit the virus, (b) how long does the immunization last, (c) which are the secondary effects of the vaccine, (d) for some of the available vaccines, the very safety and efficiency of the technology used to make the vaccine is unknown, since this technology has not been previously used in human vaccines etc. According to public information, including information from the producers, the clinical studies regarding the available vaccines are still to be finalized, both as regards the therapeutic and preventive effects and as regards adverse effects, which can be explained by the unprecedentedly short interval in which these vaccines have been developed. Under these circumstances, it is difficult to identify a reasonably objective cause for discrimination.

2. Procedural Remedies

People who consider themselves victims of discrimination may file complaint before the National Ant-Discrimination Council (Consiliul Național pentru Combaterea Discriminării - CNCD), or directly to the court of law, to have the discriminatory act ascertained and the damages compensated.

Where the complaint is filed with the CNCD, the prescription term is of 1 year **as of the date of the discriminatory act or the date when the victim could have known of the existence of the act**.

The CNCD may oblige the entity guilty of discrimination to cease the discriminatory conduct, remove its effects and pay a misdemeanor fine. Decisions by the CNCD can be appealed in **administrative court**.

Where the victim chooses to address the court of law, the action may seek annulment of the discriminatory act, removal of the prejudicing effects and reinstatement of the previous conditions, as well as compensation for damages incurred. In this case, the prescription term is of 3 years **from the date the victim knew or should have known they have a right to action**.

Discrimination is sufficient reason for the annulment of the act. Nevertheless, the victim may also raise as reason for nullity the restriction of rights by acts (civil law or administrative law acts) issued outside the exclusive competence reserved by the Constitution to the legislative power (as mentioned, Art. 53 of the Constitution provides that such restrictions can only be imposed by law).

Therefore, in the case of discrimination following, for instance, from a normative administrative act, the action filed in administrative court may seek annulment of the act, reversion to the status quo ante, and compensation for damages. Reasons of nullity for such action may include only the discriminatory character of the act or extend to other reasons of nullity as well (such as the violation of the rule that rights cannot be restricted by administrative or private act, but rather only by law and in compliance with the conditions provided by Art. 53 of the Constitution).

People who consider themselves victims of discrimination can freely choose to address either the administrative-jurisdictional body (CNCD) or the court of law. In both cases, the action can be filed by one person alone, or by a group of persons subject to the same discriminatory act (class action).

Given the specificities of a court procedure (adversarial character, oral character, right of defense procedural guarantees), most victims will most likely go to court, which furthermore allows the victims to obtain compensation for damages sustained under the discriminatory act (while the CNCD can only apply a fine to the guilty party).

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Editors

COVID-19 - Legal Insights is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To be up to date with the news in these matters, you may access the resources available at the following link: <http://www.tuca.ro/covid-19/>



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