

Testing the Easy Way? – Be Wary of “Online Citizen Tests“ for “3G“ at Work!

INTRODUCTION

Last Wednesday, a new version of the Infection Protection Act came into effect which basically establishes that access to work locations is only permitted for employees who have a so-called “3G” status (vaccinated (*Geimpft*), recovered (*Genesen*) or with a current negative test (*Getestet*)). Employers are obliged to monitor and document compliance with these rules.

The situation that the test certificate for the unvaccinated is viewed less by some as a duty in the interests of the common good and more as an unreasonable burden or even as harassment has prompted some clever vendors to promise an easy solution.

One vendor in Hamburg, who had gained notoriety in the past with online doctor's certificates (for a discussion of the lack of evidentiary value of such doctor's certificates cf. Labor Court of Berlin, judgment of April 1, 2021 – 42 Ca 16289/20), has been providing the opportunity to obtain test certificates online after carrying out a self-test in the comfort of one's home.

ONLINE TESTING PROCEDURE

The procedure could not be simpler: The person to be tested first buys a self-test that can be carried out at home (without any monitoring). In addition, the date of the test and the initials of the person being tested should be scratched into the plastic test case with a fork or another sharp object (!) and a photo of the test case before and after the test should be made. In a further step, a pretty short online questionnaire is filled out and then, according to the statement of the vendor, one receives a test certificate in the form of a PDF document after “verification” by medical personnel. This document, together with the two photographs, an ID card and the test case are supposed to be “valid” according to the claims of the vendor.

ABILITY OF THE SELF-TESTS TO COMPLY WITH THE 3G RULE

The procedure described here begs the question of whether a test certificate created in this way is at all able to fulfill the legal requirements. The answer in our view is: **No**. The new Infection Protection Act makes reference to the provisions of the COVID-19 Protective Measures Emergency Regulation of May 8, 2021 with regard to the requirements placed on test certificates. Although Sec. 2 No. 7c) of this Regulation does, in fact, provide that tests can be conducted outside of the test centers operated by the health authorities, e.g. at a doctor's office (so-called “service providers” within the meaning of Sec. 6 (1) Corona Virus Test Regulation), the law requires that these tests are then **carried out or monitored** by the relevant service provider – in this case by the physician.

One certainly cannot say that the test in question here has been “carried out” by the doctor's office, nor is it warranted with the solution propagated by the vendor that the test is being “monitored” by a doctor, at least not with the offer of a free self-test (and this without any observation of the test process). As shown in the legal opinions cited by him, the vendor takes the standpoint that “monitoring” within the meaning of the legal regulations can be warranted by subsequent medical “verification” as described by him (whereby what exactly is actually being “verified” and how this exactly takes place remains vague). However, this view should be very difficult to support when one considers the wording of the current regulations.

PRACTICAL CONSEQUENCES

Employers and employees should therefore clearly understand that it is highly likely that they will be acting outside of the applicable laws if the online self-tests described here are carried out (by employees) or accepted (by employers) as proof of a Corona test.

If employees submit an improper test, they run the risk of losing pay claims and of being subjected to employment law sanctions by their employers. Employers must understand that it is highly likely that they are in violation of the law and are also risking sanctions when they accept these kinds of test certificates and allow employees access to their places of employment on the basis of such certificates. In the event of non-compliance and/or the improper monitoring of the 3G Rules, fines of up to EUR 25,000 can be imposed.

Of course, it is ultimately the constitutional duty of the courts to evaluate the legality of such models. It can already be seen that various forms of online self-tests are being offered and that they may need to be evaluated differently. Generally speaking, great care needs to be taken, however, even if one can understand the desire for more modern and digitalized medicine.

Resistance has also arisen from the authorities: The counties of Osnabrück and Kleve have recently issued advice that the test certificates of the vendor described here do not meet the requirements of the 3G Rule.

The FAQs of the Federal Health Ministry regarding COVID-19 tests have also stated that test certificates as referred to in the law may not “be based on a video-monitored self-test”.

Finally, the statements by the Hamburg vendor on his homepage in this regard are extremely revealing (in the FAQs regarding online self-tests and recovered certificates), where it is stated in the context of the statements of the Federal Health Ministry regarding the lack of acceptance of the procedure that the “loser politicians” evidently do know what is right but that they are “paralyzed, bribed or blind”. He writes further that it is the job of employers, employees and citizens to do what is “right” and to engage in the “fight against Corona and for unity and law and freedom for all” with the online citizen tests. These statements speak for themselves.

Should you have questions concerning the ongoing pandemic situation and the employment law issues this entails, feel free to contact us at any time!

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