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Our freedoms:

Use data – protect data

Guidance –

3G proof in

employment relationship

(§ 28b paragraph 1 and 3 IfSG)

3G proof in

employment relationship

(§ 28b paragraph 1 and 3 IfSG)

Orientation guide of the LfDI

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PGP Fingerprint: E4FA 428C B315 2248 83BB F6FB 0FC3 48A6 4A32 5962

Status: 27.11. 2021

1. Background

The vaccination or test status of employees is particularly worthy of protection

date of health (Article 9 (1) of the General Data Protection Regulation, GDPR).

With the amendment of the Infection Protection Act (IfSG) of November 22, 2021, the Federal

legislator with the revised § 28b IfSG ("Nationally uniform protective

measures to prevent the spread of coronavirus disease-2019

(COVID-19)") a regulation was introduced, which for the first time comprehensive and concrete

te employer powers and obligations for collection and processing

standardized based on employee health data. In this range, that's one

Novelty for labor and data protection law; also the new ones

Rules accompanied by threats of fines.

It would have been all the more important to have a clear, understandable and implementable rule

to meet lung – unfortunately this did not succeed. The Federal Ministry's attempt

for work and social affairs to be sharpened using FAQ lists is not convincing; of the

Authorization in § 28b paragraph 6 IfSG to issue a more specific regulation

This option has not been used to date either.

Therefore, the state commissioner for data protection and information

Baden-Württemberg is the name of this guide for workplaces that do not

the particularly vulnerable facilities mentioned in § 28b paragraph 2 IfSG and

company owned, available. You cannot definitively answer all open questions answer, but will be answered by both the employer side and the employee ten support for the implementation of the 3G rules in the workplace. For last Only federal legislators and legislators can provide clarity – they should in terms of the conscientious employer and the protection of sensitive employees do dates.

1 Federal Ministry of Labor and Social Affairs, workplace infection control, answers to the most frequently asked questions:

<https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten-ASVO/faq-corona-asvo.html>; 1/1/20;

Status: 22.11.2021.

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2. Core statements of § 28b IfSG

- If there are physical contacts² between employers and with each other or with third parties cannot be excluded according to § 28b paragraph 1 sentence 1 IfSG, only employees left the workplace with a 3G status (vaccinated, recovered, tested). enter. According to § 28b paragraph 3 IfSG, the employer makes a control obligation, compliance with which you have to document.
- For the first time, the law grants employers with § 28b IfSG nationwide legal basis for a 3G access regulation at work workplace and an express authorization to process.
- Even after the revised § 28b IfSG came into force, there is no However, the nursing and healing industry does not have a comprehensive information and Employer's right to ask questions about the vaccination/recovery status of the busy. Employers must now ask their employees one require proof that one of the 3Gs is met; when testing the 3G status, however, it must be borne in mind that employees are not

location of a specific proof are required. workers can

Rather, they are free to decide which proof they want to provide. in particular

special can also be vaccinated and recovered instead of an immunization

proof of a daily updated test proof. The employer

is therefore not authorized to require employees to specifically name the

to request the respective vaccination status (which of the 3 G applies?).

3. Legal basis for processing

Legal basis for the processing of health-related data

with the access regulations to a workplace according to § 2 para. 1 and 2 work

Site Ordinance is Article 6 Paragraph 1 Clause 1 Letter c, Article 9 Paragraph 2 Letter i of the Data Protection

Basic Regulation (DS-GVO) in conjunction with § 28b paragraph 1 sentence 1, paragraph 3 IfSG. 4. Range of

Processing authority and control options of the employer.

2 The term "physical contact" only appears at this point in the Infection Protection Act. One will not use this term

physical contact in the narrower sense, but must relate to all encounters between people (cf. BT-Drs. 20/89, p. 6:

"meeting other people"), in which transmission of the virus SARS-Cov-2 by way of aerosol or droplet

Infection cannot be completely ruled out.

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4. Scope of processing authority and

Employer control options

§ 28b IfSG leaves unanswered essential questions about the scope of the control authority

nis, the scope of the necessary documentation and regarding the process of the

concrete controls of 3G status.

- Are visual inspections sufficient to meet the inspection obligation?
- Does the validity of the evidence also have to be checked?
- Which group of people may carry out the checks?
- Is a comparison with identification documents necessary?

- Can the immunization status be saved by the employer, if necessary

how long?

According to § 28b paragraph 3 sentence 1 IfSG, compliance with the obligations from paragraph 1 sentence 1 (namely, in particular, to enter the workplace only if they have vaccinated sons, recovered persons or tested persons and proof of vaccination, carry proof of recovery or proof of a test with them for control purposes keep available or have deposited with the employer) "through verification to monitor trolls daily". This means that follow-up labor law questions and consequences linked to the query of the 3G status, so that a consolidated control role must take place.

a) Visual inspection at the gate

§ 28b IfSG initially leaves open the form in which the controls are to be carried out.

A check upon entry at the company entrance, for example, seems permissible and sensible.

The wording of the standard suggests that a visual inspection is fundamental is sufficient. Because the employees comply with the regulations to be checked obligations from paragraph 1 even if they "have proof of vaccination, a gene senenproof or a test proof within the meaning of § 2 No. 2, No. 5 or No. 7 of the COVID-19 Protective Measures Exemption Ordinance, for control keep available or have deposited with the employer". The employer can therefore do not require them to "deposit" the relevant evidence.

The employees are also not obliged to provide proof in the form of a digital to keep a legible certificate. Because according to § 28b paragraph 1 sentence 1 expressly suffices proof as defined in Section 2 No. 2, 5 or 7 of the COVID-19 protective measures acceptance regulation. However, the proofs mentioned there can all be "in German" shear, English, French, Italian or Spanish language in embodied or digital form". As far as the report of the main committee of the

Bundestag was carried out³:

"Secure control is primarily guaranteed when it is carried out digitally appropriate technical solutions (e.g. the CovPass app) are implemented."

it cannot be concluded from this that the employer can demand that the must provide the proof electronically - for example via an app - provide proof in paper form must remain possible at all times.

Only the employer's authorized persons (see b below)

may have access to the evidence and the control documentation. open

ne lists or survey interviews in which other employees or external

eavesdrop, as well as those that can be seen by others, the 3G

indicates "traffic lights" for the survey.

If the employee is unknown to the controlling employer, an additional

Additional visual comparison of the 3G proof with a works ID card or - if

no factory ID card exists - with an official ID document obvious.

It is not clear from the Infection Protection Act whether it is also necessary.

Such ambiguities cannot be at the expense of the obligated employer,

a state sanction can therefore be attached to the failure to match a

Identity document not be linked. Since the employer at the same time

In accordance with the GDPR (here: the principle of data minimization Art. 5 Para. 1 lit. c

DS-GVO) has to be observed, at this point no more than a random sample

review is required. The Federal

legislators clearly set norms.

This is not opposed to the fact that in § 6a of the ordinance of the state government

Baden-Württemberg about infection protection measures against the

Spread of the SARS-CoV-2 virus (Corona Ordinance - CoronaVO) from 15.

September 2021 (in the version valid from November 24, 2021),

that the control of test, vaccination or recovery evidence "jointly

by inspecting an official identity document in the original

follow" and that vaccination certificates have to be presented in a digitally readable form

be. Because these regulations only apply to those listed in Part 2 of the Corona Ordinance

tion-regulated submission obligations of visitors,

participants, etc., but not for the employee relationship, for the

the 3-G controls in § 28b IfSG are conclusively regulated in this respect.⁴

3 DBT-Drs 20/89, November 17, 2021, p. 18.

4 See also the justification for the third amending ordinance of November 23, 2021 of the Corona Ordinance of September 15

2021, available at https://www.baden-wuerttemberg.de/fileadmin/redaktion/instrumente/PDF/Coronainfos/211123_Begrue-

[dung_zur_dritten_AenderungsVO_zur_11.CoronaVO.pdf](https://www.baden-wuerttemberg.de/fileadmin/redaktion/instrumente/PDF/Coronainfos/211123_Begrue-), on Section 18 CoronaVO: "After the operational testing of

non-immunizable

1 and 3 IfSG are finally regulated under federal law in § 28b Paragraph 1 and Paragraph 3

operational testing of employees."

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The same applies to the scope of the controls: although the legal

lien that an "implementation that is as comprehensive and complete as possible

the obligation to provide evidence of the status vaccinated, recovered or tested in the

to ensure"⁵ is, an obligation for full control results from the word

but not according to the law. "Without gaps" are certainly those in § 28b paragraph 1

Sentence 1 IfSG stipulated entry ban without 3G status and the related

Obligation to provide evidence - whether this also applies to the employer's obligation to verify evidence

applies leave the wording of the law as open as the legislative materials.

In this respect, the report of the Main Committee of the Bundestag does not incompletely

loose, but only "efficient and therefore daily control mechanisms"⁶. A duty

this is not associated with the daily full inspection of all employees;

on the contrary: The focus of these controls is on the daily proof

tested via updating the status" - which probably means that the con-

trols of the status vaccinated or recovered do not take place in the same intensive way

got to. And also a random partial inspection carried out every day

a "daily check" within the meaning of Section 28 b (3) IfSG.

This lack of clarity is also unfortunate for everyone involved: An employer who

refrains from carrying out a full daily check, runs the risk of violating the

being accused of having to be accused of the protection against infection – an employer who daily

carries out full controls runs the risk of violating data protection

Basic Regulation (because of unnecessary data collection).

to have to. In view of these obligations, the employer may only precisely

control what he needs to control - and no more. Given the-

State sanctions probably separate these (no fault of our own) obligations here as well

out; the fine of § 73 paragraph 1a number 11d IfSG ("who intentionally

or negligently ... contrary to § 28b paragraph 3 sentence 1, compliance with a

ten obligation not or not properly monitored") appears in this respect at least

not sufficiently determined.

b) Selection of suitable authorized employees

The Federal Ministry of Labor and Social Affairs assumes that the

donor "in compliance with the requirements for employee data protection

[Can] also delegate control to suitable employees or third parties."⁷

⁵ See the report of the Main Committee of the Bundestag, op. a. O.

⁶ Bundestag printed paper 20/89, November 17, 2021, p. 18.

⁷ Federal Ministry of Labor and Social Affairs, workplace infection control Answers to the most frequently asked questions:

<https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten-ASVO/faq-corona-asvo.html>; 1.1.10.

In principle, this corresponds to the delegation's understanding of labor law of concrete employer-side obligations, which now the employer through the obligation to carry out daily checks. The circle of control authorized persons must be limited to a small group of people who about appropriate sensitization in handling personal data has. This ability is regularly demonstrated through participation in training courses took to prove. In addition, the employer has the persons authorized to inspect to maintain confidentiality when dealing with health data.

Primarily, employees in the human resources department or personnel circles with regard to the confidentiality of personnel matters are already sworn to secrecy. In addition, task lists to avoid collisions and conflicts of interest; who about questions of continued wage 8 or home office agreements should not also be used as a control act person. This means that the direct or additional superior of the employee not an ideal controller.

Especially for SMEs and craft businesses that do not have external service providers, gate services or have their own human resources department from the size of the company, special features regarding the suitability of the fugitive staff.

Based on the operational and local conditions, a control should therefore be alerted to exceptional cases by employees with managerial limited and only take place if the employees employed for this purpose clear and transparent reporting channels exist and these are complied with will. Employers should have appropriate written work instructions for the authorized persons, in which the data protection compliant environment

process is clearly and comprehensibly described with the control documentation.

It must also be taken into account that the control obligation also applies to "collective
porten" takes effect, since employers "transport several employees to work
place or from the place of work" may only be carried out if appropriate

Checks have been carried out, see Section 28b (1) IfSG.

8 Cf. on consequences under labor law: Federal Ministry of Labor and Social Affairs, Company Infection Protection Answers to
the

most frequently asked questions:

<https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten-ASVO/faq-corona-asvo.html>; 1.1.20.

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c) Voluntary deposit of immunization status

Alternatively, and in order to be exempt from the recurring check-

to be exempted, it is possible for workers to have immunity status

to prove it once to your employer and save it there

to let. In this respect, employees are free to grant their employer the right

ment to document that an immunity status has been in place for a period of time.

In this case, the employee is "disengaged from the daily access controls

excluded" when he no longer has to submit proof of these. "This way

submission is voluntary".⁹

In principle, no differentiation is required when filing according to

whether the person concerned is vaccinated or recovered. Only if the status

"recovered" should end before March 19, 2022, it may be necessary to

to save the running date (which can be indirectly recognizable that the affected

ne person is not vaccinated but recovered).

However, such storage can only take place on the basis of an express

and informed consent of the employee (Art. 6 Para. 1 S. 1 lit. a, Art. 9 Para.

2 lit. a DS-GVO, § 26 paragraph 2 and paragraph 3 sentence 2 of the Federal Data Protection Act)

follow. The filing of proof with the employer must be voluntary

follow and cannot be made mandatory by the employer. In addition

every employee is free to give their consent to storage

to revoke his vaccination status at any time without giving reasons (Art. 7 para. 3

GDPR). The employee must be informed of this (Article 7 (3) sentence 3 GDPR). To

The obligation to present the proof from § 28b paragraph 1 sentence 1 lives on after the revocation

IfSG up again.

Section 28 (3) sentence 1 IfSG requires daily monitoring of compliance with the 3G

gear control. The report of the Main Committee of the Bundestag can be found

men¹⁰ that

"the technical and organizational measures of data security

[are] added, which are also sent in the companies and facilities for others

sensitive data of the employees or the persons accommodated there for display

come turn. Also digital forms of collection and storage of

Evidence are admitted to additional ways of reducing

of the operational implementation effort."

9 Applicable Federal Ministry of Labor and Social Affairs, Occupational Infection Protection Answers to the most frequently asked questions:

<https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten-ASVO/faq-corona-asvo.html>; 1.1.11.

10 BT-Drs 20/89, November 17, 2021, p. 18; Emphasis by LfDI.

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The aforementioned

ten questions from the employees responsible and suitable for storage. away

a sufficient company size and corresponding local conditions

usually only the human resources department comes in as part of the

tion in question.

Access to the stored data is fundamental to a limited, sensitive

group of people obligated to secrecy and at a central location

Position, usually in Human Resources, to be limited and only when necessary

(e.g. for access control or to supplement, correct or delete the data)

allow it.

The filing must be designed in such a way that acknowledgment of

unauthorized is excluded. This assumes that employers are within the framework

the documentation on the one hand corresponding technical-organizational measures

32 DS-GVO, such as a strictly limited access concept

the stored data sets. In particular, all are excluded in this respect

Markings on company ID cards, e.g. with a stamp for "vaccinated"

or "recover". Internally, it must be clearly regulated who has access to this data

may have.

Stored data from the 3G access control and the associated documents

tation may not be combined with other due to the applicable strict earmarking

Employee data - for example in the personnel file - are brought together.

Every employee who does not have it at work must have the 3G certificate.

donor has "deposited", always carry it with them and present it in the event of inspections by authorities

be able to show. The obligation to carry the proof with you applies before the

Background of random checks by authorities only the employee

even.

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5. Documentation of the control

§ 28b paragraph 1, paragraph 3 IfSG also leaves open how the regular documentation

has to be done by the employer.

Employers are both in control and documentation

obliged to protect personal data of their employees within the limits of the principle of necessity (Article 5 (1) (c) GDPR).

The starting point for considerations regarding the obligation to document is the processing of personal data relevant proof obligation of the person responsible according to Art. 5 Para. 2 DS-GVO. Proof of compliance with data protection legal processing principles according to Art. 5 Para. 1 DS-GVO sets planning Action of the controller ahead, through which in advance the data collection and further processing systematically laid out, documented and thus verifiable is made cash. The processing steps and their consequences must therefore be documented compliance, but not the individual processing operations themselves.

This means for the documentation of the employer's 3G controls: He must determine in advance how it will be used by whom and where evidence of the employees and he must ensure compliance with these requirements on a regular basis be confirmed by a statement from the person responsible for the control task.

The individual control processes themselves. Such an obligation does not result from the Infection Protection Act, it is replaced by subsequent statements, for example in FAQs by a ministeriums also not justified. This also applies to the listing of the controlled persons; such control processes could become the subject of a Documentation requirements are made, but this has not been the case so far.

For the required regular documentation that the access requirements are complied with by the employer, it is therefore sufficient if employees providers have established verifiable processes in their company in which It is written how the 3G status of the employees is checked on a daily basis becomes.

The employer is therefore not obliged to save supporting documents

where this is therefore not permitted under data protection law (principle of data minimization

tion, Article 5 (1) (c) GDPR). Making copies, scans or similar

Duplications of the documentation of the employees by the employer

about is illegal.

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The documentation produced in this way without personal data from employees

used by the employer as proof of control for the controlling

hear.

Outside the particularly vulnerable facilities and companies (cf. §

23a, § 28b paragraph 2, § 36 paragraph 3 IfSG) is a differentiation between the

current immunity status (vaccinated or recovered) of employees within the framework

of the documentation is not required.

6. Retention Period

According to § 28b paragraph 7 IfSG, the provision of § 28b IfSG will come into force at the end of March 19th

2022 and the employer's obligation to carry out daily 3G checks

carry out and to document these controls on a regular basis.

The employer's control documentation does not show any personal

gene data from controlled employees, but data from with the con-

troll agents. They are also subject to data protection law

Duty of deletion.

The Federal Ministry of Labor and Social Affairs assumes that the data from

Documentation for official controls "no later than six months after their

[are] to be deleted"¹¹. This period only gives a maximum storage

time at which may not be exploited by companies if this is the purpose

access control or documentation is no longer required. Thereon

points out the Infection Protection Act in Section 28b Paragraph 3 Sentence 8, 2nd half-sentence ("the determination provisions of general data protection law remain unaffected").

For any information on immunization status stored with the employer

March 19, 2022 is also decisive for the time being. In the case of revocation of the consent

The stored information is to be deleted immediately. In this case meet

the general control and access regulations are restored to employees.

The six-month retention period expressly regulated in Section 28b (3) sentence 8 IfSG

period, however, only affects the institutions specified in Section 28 b (2) sentence 1 IfSG

ments and companies and cannot be transferred across the board.

11 Federal Ministry of Labor and Social Affairs, workplace infection control Answers to the most frequently asked questions:

<https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten-ASVO/faq-corona-asvo.html>; 1.1.14.

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7. Information for employees

Employers have their employees - regardless of whether they use the 3G station

tus in a file system (cf. § 26 paragraph 7 BDSG) - via the processing

according to Art. 13 DS-GVO.

8. Further specification of the requirements

Section 28 (6) IfSG gives the Federal Ministry of Labor and Social Affairs the

ability to issue more specific regulations by way of a legal ordinance

sen what measures employers take to implement the obligations

§ 28b IfSG have to meet and how the employees have to behave in order to

to fulfill their respective obligations arising from § 28b IfSG.

It remains to be seen if and when the Federal Ministry of Labor and Social Affairs

makes use of this authority to issue ordinances and the requirements in particular

special on the submission and documentation requirements. It will be there

the requirements of higher-ranking law, in particular the GDPR, to

have respect.