

What should we include in a COVID vaccination policy?

With the Government's mass vaccination programme gathering pace, many employers are now considering implementing a COVID vaccination policy to distribute to employees. This note examines what should be contained in the policy and addresses the very difficult issue of whether or not an employer can require an employee to be vaccinated.

What are you looking to achieve?

There are two general approaches that can be taken with the policy – one of education and one of insistence. It should be borne in mind that the government has not legislated for the vaccine to be mandatory, so on balance it would be risky for employers to insist on vaccination, even in workplaces where there is close contact with vulnerable people.

Risks of insisting on a vaccine

Potential discrimination issues: Any available vaccine may not be suitable for all. For example, some of the vaccines in production are not suitable for certain individuals with suppressed immune systems. Individuals may also hold religious beliefs which could conflict with the requirement to take up a vaccine.

Personal injury claim risk: An employee who was compelled to obtain the vaccine and who suffers an adverse reaction, may attempt to bring personal injury proceedings against the employer.

Unfair dismissal: We expect that a tribunal in an unfair dismissal or constructive dismissal claim would have sympathy with an employee who did not want to get the COVID-19 vaccine and was dismissed or disciplined as a result. A tribunal would be slow to find it fair to impose what is effectively a medical procedure on employees, although we are unaware of any authority directly on the point and the nature of the workplace could be a relevant factor.

Human rights considerations: There may be scope to argue that a vaccination requirement is an unnecessary invasion of an individual's privacy, particularly when there are other, less invasive, ways to minimise the risk of transmission in the workplace. As a requirement to take a vaccine would likely be an interference with the Article 8 right to respect for private and family life, an employment tribunal would need to carefully consider whether that interference can be justified.

What should a vaccination policy include?

Overview: Restating the Company's commitment to protecting the health and safety of employees, and making it clear that vaccination offers the best opportunity to achieve this and to ensure a return to normal trading conditions which will, in turn, protect jobs going forwards.

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Education: Rather than simply insisting on employees taking up a vaccine, the focus of the policy should largely be on *encouraging* take up through education. This should include giving information on why vaccines are important, the safety of the vaccines which have been approved, the effectiveness of the vaccines and, on balance, any risks associated with the vaccines. Information should be reproduced from official sources such as the NHS website.

Company's position: Giving a clear statement that we encourage all employees to take up the vaccine. If they refuse, we make clear what measures we may implement. This could be drafted widely to take account of the many different reasons for refusing a vaccine and the very different implications across the business as a result. Those measures could include:

- 📄 Asking employees to continue to work from home for a period of time, where practicable;
- 📄 Asking employees to submit to regular COVID-19 testing;
- 📄 Asking employees to continue to comply with any protective measures for a period of time, such as wearing Personal Protective Equipment (PPE) or maintaining a prescribed distance from others;
- 📄 Amending the way in which the role is performed;
- 📄 Redeployment to a role which contains a lower risk of transmission of the virus;
- 📄 In extreme circumstances, termination of employment.

It is very unlikely that any vaccine will be 100% effective, and there may be both employees and patients/clients/customers who cannot receive the available vaccines. Employers should therefore be cautious about treating the vaccine as a mechanism to remove other measures. This may feed into a decision about whether it is appropriate to compel employees to receive it in light of the legal risks of doing so, especially at an early stage in the vaccination programme.

Attending for a vaccination: We do not know what flexibility employees will have to choose their attendance time to be vaccinated. If they need to take time off during working hours, what will your approach be? You may agree up to a couple of hours of paid or unpaid leave – remember this will likely apply to two appointments. Employers should also consider whether any leave granted will extend to those who have caring responsibilities; for example, if they are required to take an elderly dependant for their vaccination.

Encouraging dialogue: Employers should encourage all employees to discuss any concerns they have, which should flag up any particular reasons for rejecting the vaccine, such as on health or religious grounds. This will allow employers to adequately assess the risk of taking any decisions as a result and determine any protective measures to take.

Third parties: The policy attempts to manage and minimise risk by encouraging employees to have a vaccination. But most businesses require interaction with third parties – what are our rules going to be here? It could potentially be very harmful and unworkable to insist any visitors on site are vaccinated, but the policy

could set out less onerous measures such as a continuing requirement to wear PPE, or limiting attendance time on-site.

Risk assessment: Employers should already have a detailed risk assessment in place which is regularly reviewed as part of the duty to make workplaces COVID-19 Secure. The policy should confirm the commitment to keeping this under review and communicating any changes, whilst inviting input from colleagues.

Data protection: Employers are likely to want to collect data about whether employees have been vaccinated or not, in order to be able to meet its objectives under the policy. Information relating to vaccination amounts to “special category data” under the Data Protection Act 2018 and General Data Protection Regulation (GDPR). This means that, aside from identifying one or more general valid bases for processing under Article 6 of GDPR, a separate basis under Article 9 has to apply.

The lawful bases could include:

1. For the purposes of complying with the employer’s legal obligations to ensure, so far as is reasonably practicable, the health, safety and welfare at work of our employees under the Health & Safety at Work Act 1974;
2. For the purposes of complying with our implied contractual obligations towards you to protect your health and safety at work;
3. For the purposes of protecting the employee’s vital interests and those of others;
4. For the purposes of carrying out obligations in the field of employment law (as outlined above);
5. For the purposes of assessing working capacity on health grounds.

Conclusion – uncertainty remains

We are only in the early stages of the mass vaccination programme and there are many unknowns which should impact on the employer’s actions. The fairness of dismissals in this area has not been tested and we are unlikely to learn of any case law until late 2021 at the very earliest.

We also do not know precisely what impact the vaccine will have, nor the proportion of the population generally who are reluctant to take this up. The ideal position at this stage, therefore, is to adopt a policy which encourages vaccination, considers each case of refusal individually and seeks to find a solution which accommodates the wishes of the employee whilst protecting the business and its employees as far as possible.