

COVID JAB: WHAT DO YOU NEED TO KNOW FROM AN HR PERSPECTIVE?

Mini Guide



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Since the announcement of the government's Covid-19 vaccination programme, several UK employers have stated that they will be setting up systems to track which of their staff have received the vaccine. Others have gone a step further and announced that they will be amending their contracts of employment to include a requirement that their staff take the vaccine or have said that they will dismiss or decline to hire any employee who refuses to do so.

A significant minority of employees may not want to be vaccinated, however, and this stance could be linked to the individual's religion, beliefs, age or health.

If you wish to require that your staff be vaccinated in order to work, the potential risks and liabilities depend on whether it's a reasonable requirement in the circumstances.

You should be aware of the following points when considering your approach.

#1 Health and safety

Employers have several legal duties in relation to the health and safety in the workplace. You need to consider the level of risk posed to your workforce by Covid-19 and what steps should be taken to reduce this risk in the workplace. There are also important rules regarding an employer's obligation to consult with employees in respect of health and safety measures, which you'll need to follow.

You may feel that requiring your workforce to be vaccinated against the virus would be an easy solution. However, you need to question whether this could be a reasonable step to take, and therefore a reasonable management requirement. This will depend on the sector in which you operate and the working arrangements in place.

For example, a stronger case can be made in the care sector, where staff are more likely to have regular exposure to both the virus and vulnerable people than in the professional services sector, where interactions with colleagues and clients can be distanced or limited. Even then, it is not necessarily going to be reasonable in all care settings.

The current guidance doesn't include compulsory vaccination as one of the wider measures it recommends for making workplaces "COVID secure". There's no suggestion in current government guidance that vaccines should be made compulsory in any particular workplace setting. Your biggest priority should therefore be following these guidelines.



#2 What if an employee refused to comply?

Before answering this question, you need to decide if it's a reasonable management instruction to mandate that staff be vaccinated. You also need to consider if the employee's refusal to comply is reasonable in the circumstances.

Relevant considerations include whether the employee's refusal is linked to:

- a medical condition
- medical advice
- existing medication
- pregnancy
- the fact that the employee has already had the virus and believes themselves to have immunity
- incompatibility with a religious or philosophical belief

An unreasonable refusal to follow a reasonable management instruction could merit disciplinary action or even dismissal. However, any decision to dismiss would also have to be proportionate and reasonable in the circumstances – is there no alternative, less onerous, course of action you could take to resolve the issue?

A fair process must be followed, including giving the employee the opportunity to set out their rationale for the refusal and considering if this is reasonable before deciding whether to discipline or dismiss.

If the requirement that staff be vaccinated was not reasonable in the circumstances, or their refusal was reasonable, then disciplinary action or dismissal is likely to be unfair.

#3 Potential discrimination issues

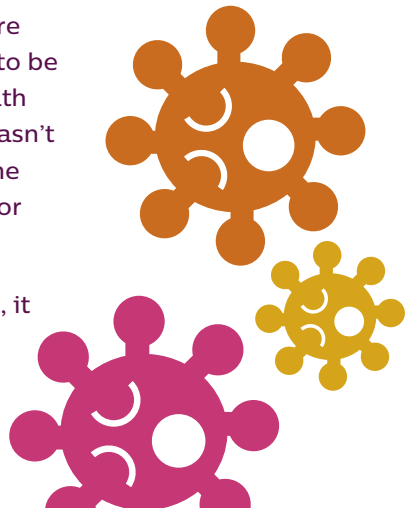
Employees (and job applicants) who refuse to be vaccinated based on the following grounds may be protected from disciplinary action, dismissal and any other detriment, under the Equality Act 2010:

- religion
- philosophical belief
- pregnancy
- sex
- disability
- age

Disciplining or dismissing these employees, or subjecting them to any other form of detriment for not taking the vaccine, may be indirectly discriminatory, and so unlawful.

Indirect discrimination can be lawful, but only if it can be objectively justified, which means showing it to be a proportionate means of achieving a legitimate aim. This would require the employer to show that the requirement to be vaccinated was intended to protect the health and safety of its workforce and that there wasn't a less discriminatory way to achieve the same outcome (for example, via social distancing or PPE).

Given the current health and safety position, it will be hard for an employer to justify discrimination in this instance.



#4 Personal injury claims

If a link can be established, requiring vaccination could also give rise to personal injury claims from employees who suffer an adverse reaction to the vaccine. You need to consider whether medical advice for employees may be required if vaccination is to be mandated.

Also check what your insurance provider has to say about it.

#5 Data protection

Requiring evidence of vaccination will also give rise to significant data protection issues and obligations. The vaccination data itself will be “special category personal data”, so extra care will be needed when processing it about your employees. Your use of such data must be fair, necessary and relevant for a specific legitimate purpose. You must therefore be clear on what you are trying to achieve and how recording the data will help to do that.

You need to carefully consider:

- why you need evidence of vaccination
- whether it is appropriate in the context of your business
- how long to retain it
- who will have access to such data, where it will be stored and how it will be kept secure

You'll also need to comply with the additional data protection rules which apply to special category data.

So, what should employers do next?

Clearly, the question of whether an employer can require their employees to be vaccinated is far from straightforward and has significant potential to lead to liability for unfair dismissal and indirect discrimination, as well as giving rise to personal injury and data protection issues.

The starting point should therefore be for you to:

- have an open, transparent dialogue with staff to encourage vaccination, for example by giving paid time off for it (and any recovery)
- educate on its benefits and support staff access to the vaccine, rather than making it mandatory

Legal advice should be sought before any mandatory vaccination requirement is imposed on staff, to help assess whether such a requirement might be reasonable in the specific circumstances, and to better understand the risks and liabilities associated with it.

Finally, this is a rapidly evolving topic, so keep any decisions you make under regular review.



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