

## Vaccination and Testing Guide

The employment law position

# Vaccinations



## Introduction

There seems to be a light at the end of the tunnel in this COVID-19 pandemic, with the approval of a number of vaccines that, at the time of writing, have good efficacy rates against most of the variants that are cropping up.

The question that is coming up more often now, though, is whether employers can require employees to get vaccinated when they are able to. As you can probably imagine, the answer is not straightforward.

## Health and safety obligations

All employers are under a duty to protect the health and safety of employees and provide safe systems of work under health and safety legislation. An employer will be expected to have undertaken a risk assessment to identify what steps need to be taken to meet that obligation. It is likely that appropriate control measures will include employees being vaccinated given that this is one of the clearest ways of protecting the individual from serious illness, as well as testing, if available.

Employers should be strongly encouraging employees to be vaccinated where they can.

## Can an employer require the employee to be vaccinated?

You could not physically force an employee to be vaccinated against their will, since this would amount to assault. But could you require them to do so because, say, the risks within the workplace were such that this was the surest way to protect staff and also service users if relevant? Maybe.

This is obviously an untested area and there are various views on this, as well as there being differing approaches across the UK governments, with England making vaccines mandatory in care settings as of 11 November 2021 (details [here](#)), and the rest of the UK deciding not to take this particular route at this time and continue to encourage people get vaccinated. There are also plans to make vaccination a condition of deployment for patient-facing health and social care workers from 1 April 2022, although at the time of writing this has not been approved by Parliament – see [here](#).

In terms of whether an employer in the UK could require employees to be vaccinated, if there is a legal requirement to be vaccinated, as there is in England in care homes as of 11 November 2021, this will require the employer to enforce this. If there is no such legal obligation, the relevant factors to consider appear to be:

- The risk profile within the workplace itself. For example, a care home might have a pretty strong argument to say that in order to protect staff and vulnerable service users, you cannot come into work unless you have been vaccinated or have a valid reason for not doing so.
- The workplace itself means having to work in small spaces where it is not possible to maintain recommended social distancing measures. For this, though, it's arguable that the employer may still have to be able to show that other steps, for example reducing the number of workers were in the area at any time, would be feasible.

- Whether there was a need for the employee to be vaccinated in order to do their job, for example, if someone needed to travel and the country to which they were going required entrants to be vaccinated.
- The services carried out by the employer will be severely affected if lots of employees are off sick with COVID. An employer that provides important services, e.g. care homes, may not be able to provide services if lots of people are off for a not insignificant period. It is likely to be harder to argue this point if the only adverse effect is a hit to the employer's profits.

## Does requiring an employee to be vaccinated breach their human rights?

Article 8 of the European Convention of Human Rights protects the right to private and family life. The right for an individual to choose whether to be vaccinated is likely to fall within this right. It is possible to interfere with this right "in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Therefore, if there is real need to protect health or economic wellbeing, that may be capable of overriding the Article 8 right to private life. It requires a careful balance between the rights of the individual and employer (which could also include the service users of the employer).

## What is the employer seeking to achieve?

As mentioned above, there are obligations on employers to protect the health and safety of employees as well as those to whom they provide services. Clearly one aim of the vaccine is to protect the individual who is vaccinated.

However, it is also hoped that it will help in reducing transmission. The [Operational Guidance](#) issued in respect of care homes in England suggests that there is evidence it does reduce transmission. It is arguable, in our view, that the higher the risk profile of the workplace (e.g. a care home), the more leniency there may be from a Tribunal on the issue of evidence of preventing transmission. It will be important to ensure that any risk assessment takes this into account.

For further guidance specific to care settings, please see the [Compulsory Vaccination in Care Homes Guide](#) available on our Coronavirus Advice Hub.

## On what basis could an employer require staff to be vaccinated?

Employers could only require employees to be vaccinated where there is a legal obligation to be vaccinated, or it is identified within a risk assessment as a necessary requirement. The potential reasons for this being a requirement will include those highlighted above.

If it is identified as a requirement, then it may be that an instruction to staff of this will amount to a reasonable management instruction.

## What happens if an employee refuses to be vaccinated?

This will depend on several factors:

- Whether there is a legal requirement to be vaccinated in order to do their job;
- The reason for the instruction to be vaccinated;
- The reason why they are refusing;
- The employee's length of service;
- Whether there are other employees who have refused; and
- Whether it is possible for the employee to carry out their work from home or in another role.

If an employee does refuse, the process should be as follows:

1. In the first instance, you will need to explain why the employee needs to be vaccinated. Any action against the employee is predicated on the fact that the instruction to be vaccinated is reasonable in the first place. This is a high bar, unless there is a legal requirement to be vaccinated to carry out that job. In many roles and many sectors, a request to be vaccinated will never be reasonable given the type of work the employee does. The employer's business, the employee's role and the reason why vaccination is necessary will need to be considered carefully before arriving at a conclusion. If an instruction to be vaccinated is not reasonable, then no further action can be taken.
2. Investigate why they are refusing. If they are refusing because they have been advised not to because of health issues, e.g. they have previously experienced serious allergic reactions, they are pregnant, or they can't because of their religious/philosophical beliefs, then see below.
3. If none of these apply and their reasons for not wanting to be vaccinated are because of perceived risks of taking the vaccine, or because of a conspiracy theory, then the employer should take steps to try and understand fully what the issue is.
4. The employer should try and alleviate any concerns the employee may have about the vaccine by using official information and explain why it is necessary to be vaccinated within that particular role.
5. If the employee continues to refuse, then explain that the options that will have to be considered are alternative roles for as long as the risk assessment identifies this as a required measure; not being able to attend work, which will be unpaid; or possibly disciplinary action, which could result in dismissal.
6. If after that warning the employee still refuses, consider alternatives, and if none are available, consider whether to say that they are not allowed on the premises, which will be with no pay, or whether to go down the disciplinary route for unreasonably refusing to follow a reasonable management instruction.

## Disciplinary action

Normally if an employee unreasonably fails to follow a reasonable management request, it may be possible to discipline and dismiss on grounds of gross misconduct.

If the employee has less than two years' service and no protected characteristics, then they would not be entitled to bring an unfair dismissal claim in any event.

Those with two or more years' service will have unfair dismissal rights, so care needs to be taken.

While it may seem more reasonable to dismiss someone who is refusing to follow a reasonable management instruction to be vaccinated because of a conspiracy theory, it may seem less so for an employee who is simply concerned about the safety of the vaccine itself in the long term. For the latter type of individual, if it is not possible for them to carry out their role without being vaccinated, then you could consider dismissing for 'some other substantial reason' (SOSR). You would be following the same procedure as set out above, but any dismissal would be with notice rather than with none as would be the case in a gross misconduct dismissal.

From a practical perspective, this may be a more palatable route for employers to take since it would not place as much fault on the individual as treating it as misconduct would, although it will be important to ensure that alternatives are considered before dismissing.

For either route, it would be necessary to ensure that a full investigation is carried out, with a formal hearing and appeal process.

For employees who refuse because of a health reason that does not amount to a disability under the Equality Act, any dismissal is likely to be unfair on the basis that they are not unreasonably refusing to be vaccinated, unless it is decided that they cannot do the role without being vaccinated and you consider a SOSR dismissal. If you aren't dismissing, you are then looking at either allowing them to continue to work if the risk assessment allows or saying that they cannot work and would be on unpaid leave, unless they are considered to be sick, in which case they would be entitled to statutory sick pay (SSP).

Another factor that may play a part in the fairness of the dismissal is whether the employer has a vaccination policy in place which sets out their stance to staff. A template **Immunisation and Testing Policy** is available on our Coronavirus Advice Hub.

As mentioned above, this is an untested area and it's not known how Tribunals will approach this issue, particularly given the wide-ranging views on the topic. The employer should make sure that the requirement to be vaccinated is backed up with as much evidence as possible and, of course, that it is indeed reasonable, which will likely fall into one of the categories highlighted above.

**It's important that you seek advice from your WorkNest Employment Law Adviser before taking any action. If you are not an WorkNest client and would like support, please call 0345 226 8393 or email [enquiries@worknest.com](mailto:enquiries@worknest.com).**

## Protected areas

If the employee refuses to be vaccinated because of:

- Pregnancy;
- Disability; and/or
- Religion or belief,

they will be protected from discriminatory treatment. Therefore, they should not be disciplined for refusing to be vaccinated. Instead you are looking at either allowing them to continue to work if the risk assessment allows or saying that they cannot work and would be on unpaid leave (unless they are considered to be sick while off, in which case they would be entitled to SSP). However, pregnant employees who cannot come into work because of health and safety concerns will be entitled to full pay. It will be important in all of these cases to consider alternatives, including working from home or making adjustments to their role.

## Alternatives to making vaccination a requirement

Whether there are alternatives to requiring employees to be vaccinated to comply with health and safety obligations will depend on the results of the risk assessment, or whether there are other legal obligations in place.

However, it may be that not requiring employees to be vaccinated, at least in the first instance, may mean you have enough people vaccinated voluntarily without there being a need to go down this route (again, subject to there not being a legal requirement to be vaccinated). As mentioned above, employees should be strongly encouraged to take the vaccine when available and the employer can assist with this by ensuring that official information is made available to employees.

It may be that implementing workplace testing also reduces the risk within the workplace. As mentioned, this will depend on what your own risk assessment establishes.

## Can employers make workplace COVID-19 testing mandatory?

Potentially, although the same considerations as above will be relevant. It is likely that only where it is necessary to do so because of the risk profile of the workplace and/or because of the nature of the employee's role could this be made mandatory.

## Health and safety consultation obligations

If an employer is considering introducing any measures affecting the health and safety of employees, there are obligations to consult with employees or health and safety representatives about those measures before implementing. There is some information on the Health and Safety Executive's website, [here](#). Introducing a vaccination and testing policy, particularly if either or both are going to be mandatory, is likely to trigger this obligation. Separate health and safety advice should be sought.

## Data protection

Whenever the employer obtains information about an employee's vaccination or testing status, they will be processing special category personal data (formerly known as sensitive personal data). It will be important to comply with the Data Protection Act 2018 and the GDPR in this regard. See the ICO's website, [here](#), for further details.

**Please speak to your Employment Law Adviser before taking any action in respect of forcing employees to be tested or vaccinated. The information contained in this note is correct at the time of writing (2 December 2021). This is an evolving area and this note will be updated as new information becomes available.**