



## Q&A – COVID-19 Vaccines – What do they mean for employers

### Return to work

#### Enforcement

##### 1. Can you enforce the COVID-19 vaccine and how does this differ from any other vaccine?

In terms of enforceability, you cannot force an employee to have the vaccine. That said, employers may make vaccination a condition of being permitted to work in certain environments, on health and safety grounds. This may include healthcare, social care and other high risk sectors, where an employer's obligation to ensure staff do not pose a risk to patients or clients and vice versa may include an obligation to ensure such staff members are vaccinated against infections, like the flu.

Like all mandatory vaccines, employers will need to carry out a risk assessment on a case-by-case basis, taking into account (i) the role in question (including the working environment, the risk posed by the staff member to others and vice versa); and (ii) the health and needs of the staff member, to determine whether it is reasonable to impose such a condition. Employers should note that there are many reasons why an individual might legitimately be unable, or refuse, to be vaccinated. Employers will need to consider objections carefully and individually; they run the risk of claims and unwanted media attention if they apply a blanket mandatory vaccination policy or punish employees who refuse to comply. The employer will need to sit down with the employee to discuss what reasonable adjustments can be made to the employee's job role and likewise for the employees who refuse to work with unvaccinated members of staff.

Currently, vaccines are only available from the NHS. If and when vaccines are available privately, employers could make vaccinations available to staff and actively promote vaccination. Employers who do so should plan ahead, have a clear, consistent communication strategy and actively engage with staff.

We expect the government to issue guidance for employers in due course when the vaccination is ready and available for use. Given that the Health and Safety at Work Act 1974 (**HSWA**) obliges employers to take reasonable steps to reduce any workplace risks, it would be fair to say that employers should at the very least be encouraging their employees to be vaccinated to protect themselves and everyone else at the workplace.

The Acas guidance also advises that employers should support staff in getting the vaccine, but cannot force them to be vaccinated. However, it acknowledges that it may be necessary to make vaccination mandatory where it is necessary for someone to do their job, for example where they travel overseas and need to be vaccinated.

## **2. What if an employee refuses to return to work because of unvaccinated employees in the workplace?**

Under the Employment Rights Act 1996, employees are protected from being subjected to any detriment or dismissal because they have refused to return to the workplace because of a genuine and reasonable belief that there is a serious and imminent danger to their health and safety. The issue here will be whether the employee's belief that there is serious or imminent danger is reasonable, given that they have been vaccinated and that there will be a health and safety risk assessment in place which allows for a safe return to office working. Generally, it is likely to be unreasonable for employees to refuse to return to the office should they have had the vaccine even if there are employees who have not had the vaccine.

The first step to take would be having a discussion with the employee to discuss their concerns and explain the precautions that are in place for example, social distancing and PPE requirements. A refusal to return to the office may be a refusal to comply with a reasonable management instruction and may be misconduct under the employer's disciplinary procedure. If the employee can work from home, this may well resolve the issue. If not, the employer would need to consider the current public health advice, the specific reason that the employee is concerned about attending work and whether it would be discriminatory to refuse home working, take disciplinary action, or withhold pay in light of the employee's refusal. Where an employee has a particular health issue such as a pregnant woman, they would have a special protection against dismissal and detrimental treatment if they want to leave work to protect themselves.

The context of the refusal to attend work would need to be closely considered before disciplinary action were taken. Certain dismissals related to the raising of health and safety concerns amount to automatically unfair dismissals which do not require qualifying service.

### **3. Can someone refuse to be vaccinated and continue working from home permanently?**

This will be a balancing act between the employer's duty under the HSWA to take reasonable steps to reduce workplace risks and the desire of the employee who has refused to be vaccinated. If the employee who has refused to be vaccinated does not want to work from home any longer then depending on the reason for the refusal of the vaccine, there could be a claim for indirect discrimination or a claim for something arising from a disability with the employee arguing that they are being subjected to unfavourable treatment by having to work from home when other employees are allowed to return to the office. Both these claims can be defended where the actions taken by the employer are a proportionate means of achieving a legitimate aim. The legitimate aim the employer would rely upon in this case would be their obligations under HSWA, they would then need to show that requiring those who have not been vaccinated to stay away from the office is proportionate in that circumstance. Where there are a number of employees who have not been vaccinated it is likely this would be considered proportionate as there are a number of employees who could still contract the virus from each other as they have not been vaccinated.

Where the employee can work sufficiently from home and both the employee and the employer are happy to facilitate this request then the employee, could continue working from home permanently. Employer's may want to consider whether home working arrangements need to be formalised in some cases, such as amending the employment contract to reflect the employee's home as the place of work. However, the employer may want to retain some flexibility to require employees to attend the office in certain circumstances such as for training purposes (subject to the health and safety risk assessment in place) or consider making agreement to homeworking conditional on certain conditions being met, such as satisfactory performance being maintained. The employer may also want to leave some flexibility to allow for that employee to return to working from the office in the event they change their mind and receive the vaccine or once herd immunity has been established. The employee handbook and existing policies may also need updating to ensure health and safety, data protection and confidentiality and other provisions can sufficiently be met for homeworking.

If the employer does not want to enable the employee to work from home permanently, then it would depend on whether the instruction to get the vaccine is reasonable considering the level of risk in the workplace and the close contact with vulnerable people such as in care homes. If this can be satisfied, then it

would need to be balanced with the reason for the employee refusing the vaccination and whether this was reasonable or not. If there was no reasonable reason (such as a disability, or potentially a religion or philosophical belief) to refuse the vaccine, then the employer could consider disciplining or dismissal but this would still present a potential risk giving rise to unfair dismissal or discrimination claims. However, it is important to consider alternatives before making a decision such as continuing to allow the employee to work from home on a temporary basis. Legal advice should be sought before taking any action that might involve any detriment, including dismissal, to an employee who refuses vaccination, given the fact-specific nature of these issues. Where employers decide to instruct their staff to return to the workplace, they will need to keep evidence to show they adopted reasonable measures to provide a safe working environment after conducting their COVID-19 specific risk assessment.

**4. If an employer's clients require their employees to be vaccinated to enter their premises, how do they manage this without mandating the vaccine for their employees?**

If an employer's clients are demanding that anyone must be vaccinated on their premises, then the employer could consider discussing with the client the current health and safety risk assessment that they have in place and whether this could be met without the need to mandate vaccinations. The employer should encourage their employees to be vaccinated where possible and where there is any resistance to this the employer could consider other alternatives such as a different role within the company which would not require the employee to work on a site. Alternatively, the employer could also take the position to mandate the vaccine after considering the relevant justifications outlined above, however this could still potentially result in indirect discrimination claims being made against the employer. The issue here will be whether the request to obtain the vaccine is reasonable and whether that refusal is unreasonable, this will be decided on a case-by-case basis and a Tribunal would assess each case on its own facts, and so is something that needs to be carefully considered before action is taken against an employee who refuses. This point is currently untested in the Tribunal and we will not know the employment tribunal's standpoint until cases have been brought in this area.

**5. If an employer insists on their employee's having the vaccine before returning to work, is there a risk of age discrimination during the rollout period given that the rollout is on an age basis?**

Any differentiation in treatment between those who have or have not been vaccinated may amount to indirect discrimination. The most likely protected characteristics which will be asserted are those of age, disability, sex, pregnancy and maternity and religion or belief. A policy that requires employees to be vaccinated in order to return to work could likely see allegations of age discrimination arise where a younger worker argues that they are unlikely to receive the vaccine until the last phase of immunisation, the employee would need to show that younger people are suffering from a disadvantage when compared to older people due to the policy. If they are able to do so then the policy requiring an employee to be vaccinated before returning to work could be indirect discrimination. However, any claims for direct or indirect age discrimination are able to be objectively justified where the actions taken by the employer are a proportionate means of achieving a legitimate aim. As with previous questions, the legitimate aim would be the employer's health and safety obligations under HSWA. The action of allowing only those who have been vaccinated to return to work would then need to be assessed as to whether this is proportionate or not. The Tribunal will consider a number of different factors, such as whether there are any other health and safety measures that could have been put in place to allow all employees to return to the office. It is also worth noting that the vaccine is not commercially available and the vaccine rollout is mandated by the Government and so employer's themselves have no input on when employees will be vaccinated, this may be a mitigating factor when considering policies such as this.

**6. Can an employer insist on an employee attending the workplace for essential work where they do not have a shielding letter?**

The government's current advice is that everyone must work from home unless it is not possible. Where working from home is not possible, the employer should make every effort to comply with COVID-19 health and safety guidance. Any clinically extremely vulnerable people are also advised to shield and stay at home and not attend work even if they cannot work from home.

If the employer considers that an employee cannot work from home (and they are not a clinically extremely vulnerable person), they should carry out a COVID-19 workplace risk assessment and actions should be taken to minimise the risk of transmission before insisting on a return to the workplace. If they are considered to be at higher risk, the employer must take this into account when carrying out the risk assessment.

## **Return to work/ vaccine policies**

### **7. Are return to work policies or vaccine policies post COVID necessary?**

An alternative to introducing a contractual requirement would be to introduce a policy on COVID-19 immunisation which requires that all employees who can be immunised, are immunised. However, the absence of a contractual requirement may make it more difficult to fairly and reasonably discipline or dismiss the employee.

In view of the risks of a mandatory vaccination programme, it is advisable for employers to consider how best to achieve voluntary vaccination within their workforces. Collective consultation with employee or trade union representatives in addition to a sensitive internal communications plan may contribute towards voluntary take-up of the vaccine.

## **Testing**

### **8. Can we test our employees?**

The guidance specifically states that employers must not advise individuals without symptoms to get a test from NHS Test and Trace, which has only a limited supply of tests, but may offer an alternative private provision in accordance with the guidance. It is a voluntary decision for employers to run testing programmes for their staff. If done correctly, testing can provide confidence to workers and customers in the workplace and may help to protect and enable business continuity.

Regarding testing generally, the Information Commissioner's Office recommends that employers consider whether the tests achieve their objective in running a testing regime. Other than established viral or antibody tests, the employer may choose to consider alternative measures to monitor symptoms related to COVID-19 or social distancing. These could include using CCTV to monitor behaviour, or temperature checks. Employers should consider how effective these measures are at providing accurate results. Employers need to be mindful of the latest government advice about the most effective and reliable tests for indicating that an employee may have contracted COVID-19. If the organisation is providing a service for testing employees, it must ensure that it is processing

personal information lawfully, fairly and transparently. Before carrying out any tests, the employer must tell their staff what personal information they require, what it will be used for and who it will be shared with.

In the context of test results, employers need to ensure they do not collect unnecessary or excessive information from employees. The ICO recommends that employers consider which testing options are available to ensure that only necessary and proportionate results are being collected. The ICO stresses the importance of the accuracy principles – employers should record the date of any test results, because the health status of individuals may change over time and the test result may no longer be valid. As an employer, you must also ensure that any lists you maintain on individuals' temperature readings do not result in any unfair or harmful treatment of employees, such as through recording inaccurate information or a failure to acknowledge an individual's health status changing over time. It would also not be fair to use or retain information collected about the number of staff who report COVID-19 symptoms for purposes they would not reasonably expect.

Government guidance advises that employers are clear on the following before deciding to establish a testing programme:

<ul style="list-style-type: none"> <li>• who the testing will cover – for example, whether this is all directly employed staff, or includes individuals working onsite, like contractors</li> </ul>	<ul style="list-style-type: none"> <li>• what the arrangements will be for any individual who does not wish to be tested</li> </ul>
<ul style="list-style-type: none"> <li>• what the focus of the programme is: staff with symptoms or without symptoms</li> </ul>	<ul style="list-style-type: none"> <li>• how the employer will use test results, including its policies on matters like handling health information, absence from work, self-isolation, diversity, non-discrimination, and so on</li> </ul>
<ul style="list-style-type: none"> <li>• how often staff will be tested, or when certain events occur such as after isolation</li> </ul>	<ul style="list-style-type: none"> <li>• the compatibility of the programme with its legal responsibilities to staff including under health and safety, equalities, data protection and employment law</li> </ul>
<ul style="list-style-type: none"> <li>• the appropriate facilities for carrying out the tests</li> </ul>	<ul style="list-style-type: none"> <li>• how, and by who, the legal duty to report test results to Public Health England (PHE) will be carried out</li> </ul>

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| <ul style="list-style-type: none"> <li>• which test should be used (to be clear, virus tests are designed to detect active infection whereas antibody tests only reveal evidence of previous infection)</li> </ul> | <ul style="list-style-type: none"> <li>• the affordability of implementing a testing programme</li> </ul> |
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**9. What are our obligations with regard to test and trace, can we test employees who are self-isolating and if the result is negative ask them to return to work?**

The NHS Test and Trace service helps trace close recent contacts of anyone who tests positive for COVID-19 and, if necessary, notifies them that they must self-isolate at home to stop the spread of the virus. If an employee needs to self-isolate, eg because they have tested positive, or have or someone in their household or support bubble has coronavirus symptoms or because they have been advised to do so under the test and trace programme, they must not come into the workplace during the isolation period.

Government guidance states that employers should support workers who are told to self-isolate and must not ask them to attend work. These staff should be enabled to work from home where possible. If this is not possible, they will be treated as incapable of work for statutory sick pay (SSP) purposes. In England, it is an offence for an employer to knowingly allow staff (including agency workers), who are required to self-isolate, to attend their workplace or any other place in connection with their job. Employers in breach of this provision can be fined based on a sliding scale, starting at £1,000 (increasing for repeat offences).

The guidance points out that while having staff self-isolate may seem disruptive, it is less disruptive than an outbreak of COVID-19 in an employer's workplace, and much less disruptive than periods in lockdown.

**Social Distancing in the work place**

**10. What are employers obligations if they cannot maintain social distancing guidelines?**

If it is not possible to comply with the social distancing guidelines, workplaces should consider whether an activity can be redesigned to maintain the two metre (or more) suggested distance or one metre with additional risk mitigation measures where two metres (or more) is not viable.

Where the social distancing guidelines still cannot be followed in full in relation to a particular activity, even though redesigning the activity, businesses should consider whether that activity needs to continue for the business to operate, and, if so, take all the mitigating actions possible to reduce the risk of transmission between their staff. If people must work face to face for a sustained period with more than a small group of fixed partners, then employers will need to assess whether the activity can safely go ahead. No one is obliged to work in an unsafe work environment.

Public Health England guidance suggests that, as far as possible, where employees are split into teams, organisations should fix these splits, so that where contact is unavoidable, this happens between the same individuals.

The government guidance says employers should keep a temporary record of staff shift patterns for 21 days and to assist the NHS Test and Trace programme with requests for that data if needed, to help contain local outbreaks.

**11. Can an employer organise a seating plan depending on the employees who been vaccinated? Could this be seen as a discriminating factor?**

There is a risk that this policy could constitute indirect discrimination. Indirect discrimination arises where there is a policy or practice that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic. If this happens, the employer must show that the policy or practice was a proportionate means of achieving a legitimate aim, known as objective justification. If an employer has determined from their health and safety risk assessment that organising a seating plan based on who has been vaccinated would mitigate the risks of transmission, then implementing this policy could potentially be a discriminatory action. However, it is important to consider what would be the disadvantage faced by those forced to sit next to each other who have not been vaccinated. This could possibly place someone who has not been vaccinated due to a disability at higher risk of catching the virus. Before deciding whether to implement such a policy the employer will need to weigh up the relevant health and safety factors and whether the action is proportionate to determine if there is an objective justification for imposing such a policy.

## Data Protection

### **12. For an employer who has large numbers of staff who travel overseas, would the processing of vaccination information then fall into the 'public health' condition or, could this only apply if a COVID vaccine becomes a condition of travel?**

Processing of some health data can potentially be justified where it is necessary in order to comply with employment and social protection law obligations or for reasons of public interest in the area of public health. If being vaccinated is not a legal condition of travel it may be difficult for an employer to demonstrate that either of those conditions is satisfied.

Where travel abroad is only permitted for people who have received the vaccine, this should strengthen the argument for mandatory vaccinations of employees who need to travel abroad, and potentially help to demonstrate that one of those two conditions is satisfied. However, you must still consider alternative measures available and take into account the reasons for the employee who may not want to receive the vaccine in order to avoid claims of indirect discrimination. An indirect discrimination claim can be defended where the employer has a legitimate aim they are trying to achieve and they are using proportionate means of achieving that aim. In this case it would be the duties under the HSWA to reduce workplace risks. The issue would be whether requiring all employees to get the vaccine is a proportionate means of achieving that aim and is something that must be seriously considered.

### **13. Can an employer ask if their employees and prospective employees have been vaccinated or require proof?**

In relation to prospective employees, Section 60 of the Equality Act 2010 makes it generally unlawful for questions about disability and health to be put to an applicant during an interview or job applications process, before the offer of a job has been made to that applicant. However, asking an employee for proof of vaccination is unlikely to be a disability-related enquiry because simply asking if they have been vaccinated is unlikely to reveal any potential disabilities of the employee. It is important that employers are careful when asking any further questions, especially regarding why an employee did not receive the vaccine. These types of questions become a slippery slope and might reveal information about a disability, which must meet the standard of being "job-related and

consistent with business necessity". Should further questions be asked that are not "job related and consisted with business necessity" then this will likely leave employers open to discrimination claims.

It is not yet known what evidence individuals will be provided with once they have been vaccinated, whether this consists of official documentation or simply a doctors letter. However, many employers will be keen to record who has and has not received the vaccination in order to contain and control the risk of COVID-19 in the workplace. From a UK GDPR and privacy perspective, this creates its own challenges as the mere fact that someone has or has not received a vaccine will constitute special category data concerning health. Employers will therefore need to ensure that any records are collected and kept in accordance with UK GDPR and privacy laws and that information is not retained any longer than is necessary. Employee Privacy Policies should be reviewed and updated accordingly. Employers will also need to consider whether a data protection impact assessment is required before starting to collect this kind of data.

**14. Are you able to ask employees to sign a declaration saying that they understand the risks of attending an office if they have not been vaccinated?**

There is nothing that prevents an employer to ask their employees to sign a declaration ensuring that they understand the risks of returning to the workplace, however this does not remove their duty to ensure the health and safety of their employees. If the declaration reveals that the employee has or has not been vaccinated then the declaration will count as health data and the employer will need to comply with all of the corresponding data protection obligations when using the declaration. Before returning to the workplace employers must consider detailed risk management approaches to safeguard employees' health and minimise the risk of infection, basing plans on up-to-date government and public health guidance.

It's crucial to regularly communicate to staff the practical measures that are being taken in the workplace to help reassure them that their health, wellbeing and safety is the top priority and to make sure they are clear about the rules and procedures they should follow both in the workplace. Employers should also keep records to show that they have conducted appropriate health and safety risk assessments to identify and manage risks appropriately and that they have trained employees and communicated new policies and procedures to them. It is also essential to ensure that employers are enforcing the current rules within the workplace which will help protect their workforce and show that reasonable steps were taken to protect the health and safety of their employees in the workplace should any claim be made against them.

## Sick pay

### **15. Can an employer refuse to pay contractual sick pay if an employee refuses to be vaccinated in a case where it has been determined by comprehensive risk assessment that a vaccine is required (depending on the nature of the job and other particular genuine considerations)?**

It is recommended that employers consider any provisions in the employee's contract of employment and circumstances when they may be entitled to contractual sick pay. If the employee is entitled to contractual sick pay and the employee follows the requirements of the policy then they will be entitled to that pay, unless contracting COVID-19 after choosing not to be vaccinated has been expressly carved out of the policy (employers should exercise caution here where the employee has not been vaccinated due to a disability, religious or philosophical belief or because they are pregnant or planning to get pregnant). If there is discretionary sick pay, there needs to be caution exercising discretion due to potential discrimination issues. However, practically employees may just say they are absent due to other reasons such as a cold. If the employee is considered vulnerable it may be that the most appropriate course of action is to draw the employee's attention to the fact that they may be entitled to receive statutory sick pay (SSP) subject to absence reporting. However, they will only be entitled to SSP whilst self-isolating. This would unlikely be the case if the employee is unable to work due to then refusing to be vaccinated.

## Tax

### **16. Could lateral flow test kits amount to a taxable benefit?**

The government has confirmed that any Coronavirus tests provided by the government, as part of its national testing scheme, are not treated as a benefit in kind for tax purposes. This means that if you employ healthcare workers and other eligible front-line staff who get a test through this programme, there is no tax due and you do not need to report a benefit to HMRC.

If you are providing antigen testing kits to your employees, outside of the government's national testing scheme, either directly or by purchasing tests that are carried out by a third party, no Income Tax or Class 1A National Insurance contributions will be due. Similarly, employers and their employees will not be liable to any Income Tax or National Insurance contributions, where an employee receives money from their employer for obtaining a test.