



## **Quick Q&A on Vaccinations**

### **1. Can an employer force employees to have the Covid-19 vaccination?**

Generally, as things stand, no, it is unlikely to be reasonable for an employer to require an employee to have the vaccination as a condition of their employment. In some limited circumstances it may be reasonable, for example in a care home setting or NHS frontline setting, where work is carried out in a small space which cannot be made Covid-secure, potentially where a client insists on it, or where work requires travel to countries which insist on vaccination to enter the country. The threshold for when vaccination becomes a reasonable instruction will be high, at least initially.

### **2. Can I make vaccination a pre-condition of Employment?**

At least one high profile employer has publicised their intent to do just that but it risks claims of discrimination on the grounds of:

- Age: because older people are being offered the vaccine first, which could preclude younger workers.
- Disability: employees with health conditions may not be able to have the vaccine on medical advice.
- Pregnancy or sex: the vaccine is not recommended for women who are pregnant, breastfeeding or planning a pregnancy within the next two months.
- Religion: because someone's religious belief may prevent them from accepting the vaccine.
- Philosophical belief: an anti-vaccination belief could qualify for protection if it is "genuinely held, cogent, serious and applies to an important aspect of human life or behaviour" in the same way that ethical veganism is protected.

### **3. What about Health and Safety in the Workplace?**

Health and safety legislation requires employers to provide a safe working environment. Risk assessments should be updated to include vaccination and, in time, individual risk assessments may need to be carried out for workers who have not been vaccinated. Employers cannot eliminate risk completely but should aim to keep it as low as possible. This means that hand hygiene and social distancing measures are likely to continue in the workplace for some time to come.

### **4. Could a care home operator fairly dismiss an employee who refuses to have the vaccination?**

That would very much depend on the employee's personal circumstances, although any disciplinary action would need to be a last resort. The employer should first consider whether it is necessary for the employee in question to have the vaccine in order to do their job. Secondly, the employer should act in accordance with its vaccination policy, which businesses anticipating these decisions should have in place. Thirdly and most importantly, the employer will need to genuinely listen to the employee and attempt to understand why they do not wish to or cannot have the vaccine, as well as trying to reassure the employee. If the employee's reason for not wanting the vaccine may be protected under the Equality Act 2010, it is important to seek legal advice.

**5. Should employers keep records of who has had the vaccine and who has not?**

This may sound inevitable, however, it is important to remember that keeping such records will be classed as processing special category personal data under the Data Protection Act 1998 and GDPR. A Data Protection Impact Assessment (DPIA) should be conducted to assess whether keeping records is necessary for the "purposes of carrying out the obligations and exercising specific rights of the controller or the data subject in the field of employment". The employer will also have to demonstrate a lawful basis for processing the data such as a legitimate interest or a legal obligation.

**6. Should employers be encouraging voluntary vaccination?**

Yes, it is reasonable for employers to encourage employees to get vaccinated and boosted to protect themselves and everyone else in the workplace. Employers should ensure that *accurate* information about the vaccine and its benefits is provided and discussed with staff. As always, communication with the workforce is essential not to mention the best way to adapt to the constant changes which the coronavirus pandemic is causing.

**7. Can employers refuse to pay sick pay to those who are unvaccinated who have to self-isolate?**

Some high profile employers such as Ikea have taken the decision not to pay contractual sick pay to the unvaccinated who have to self-isolate because they've been identified as a close contact of someone who has COVID-19. Instead they pay Statutory Sick Pay (SSP) which is currently £96.35 per week. Unvaccinated workers who contract the virus still receive contractual sick pay.

It really depends upon the terms of the individual's contract or the employer's policy contained the right to contractual sick pay. If it's contained in a policy, does that policy have contractual force? Does the term or policy cover the situation where an employee who does not have the virus but has to self-isolate? Pre-pandemic terms and policies won't address this situation. If it does, does the employer retain discretion in the policy or contract to amend its sick pay provision? If it does, has it exercised that discretion in a reasonable manner?

There is also the risk that removing contractual sick pay may discriminate against those who can't or won't have the vaccine because of a protected characteristic for example those with a disability which prevents them from having the vaccine. An employer would have to show that removing contractual sick pay in such circumstances would be objectively justified, i.e. a proportionate means of achieving a legitimate aim.

## **8. Are employers required to have a Vaccination Policy?**

Although there is no legal requirement, a vaccination policy is advisable if your business may reasonably require staff to be vaccinated or the work involves contact with vulnerable people. The policy will need to be a proportionate means of achieving a legitimate aim, such as maximising the number of employees who can attend work safely. It should therefore be closely aligned with the health and safety risk assessment or any other coronavirus-related policies.

## **9. Should employers pay for the vaccination?**

At the moment, vaccines are not commercially available. However, should they become so, where an employer reasonably requires an employee to be vaccinated it may need to consider paying for the vaccination and making the necessary arrangements. Longer-term, it is possible that Covid-19 vaccinations will be as common as flu vaccinations which many employers are already happy to provide.

## **10. Will the workplace go back to normal after the vaccination roll-out?**

It is too early to tell how quickly the vaccination programme will affect virus rates and/or different mutations or variants of the virus

therefore vaccination should not be viewed as a 'magic fix' or a substitute for safe working practices. As coronavirus will be around for some time yet, Covid-secure working arrangements will need to continue in-line with government guidance.

## **11. Are there any other potential issues to the vaccine roll-out?**

Vaccination has the potential to cause conflict in the workplace where people have opposing views on the subject or object to it required for them to do certain work, or to colleagues not being able to do certain work because they have not been vaccinated. It is important that employers recognise this and manage any disputes, which may be difficult where people are working from home. Patience and common sense remain key in these unique times and circumstances which are challenging us all.