

19 November 2021

3CS Newsletter

EMPLOYMENT

Coronavirus - Employee Vaccination Issues

Employers are obliged under the Health and Safety at Work Act 1974 to take reasonable steps to reduce workplace risks to health. Encouraging uptake of the Covid vaccination among employees to protect themselves and everyone else at the workplace is one way to reduce such risks but how far can or should an employer go?

What's the issue?

It is desirable to have as many staff vaccinated as possible as this reduces the risk of Covid transmission to them and serious illness if they do become infected. Unvaccinated staff within the workplace - whether because they can't for medical reasons or won't because they have chosen not to - is less than ideal because of the risk of serious illness to them and because they might present a higher risk of virus transmission in the workplace.



Can we make vaccination mandatory for employees?

This is not recommended. Mandatory vaccination only applies in some limited health and care settings under government regulations. For a small number of people, vaccination is not medically possible but if you tried to make vaccination mandatory for everyone else there would be significant risks associated with disciplining or dismissing any employees who refuse the vaccine. The risks include unfair dismissal claims from employees with over two years' continuous service, and the potential for discrimination claims from employees with protected characteristics under the Equality Act 2010 (e.g. age, disability, or philosophical belief).

Can we ask employees to share details about their vaccination status?

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Yes, potentially, but this will involve collecting special category health data so there are data protection issues to consider. The Information Commissioner's Office (ICO) has published advice to organisations who are collecting vaccination status data confirming that collection of this data must be necessary and relevant for a specific purpose. It confirms that if there is a good reason for collecting the information, there is a lawful basis to process it. Preventing the spread of the virus and complying with your duty of care to employees is likely to be a valid reason for processing this data. When collecting data about vaccination status, you need to make sure that you comply with general data protection obligations also.

What if employees refuse to provide the information?

Asking staff about vaccination status is likely to be a reasonable management instruction, which means employers may be able to discipline employees who refuse to answer. However, each case will depend on the facts; for example, employers should be able to justify asking health care professionals if they have been vaccinated, as they are much more likely to be exposed to coronavirus and pass it to others. Employers whose staff have limited contact with others may find it harder to justify. We would recommend seeking legal advice before taking any disciplinary action against employees who refuse to respond to requests for information.

What if employees reveal they have not been vaccinated?

Existing coronavirus risk assessments should be updated to refer to the vaccination status of staff. Risk assessments should include safety measures that can be an alternative to a fully vaccinated workforce to protect the health and safety of employees. This might involve continued working from home, testing, social distancing, the use of PPE and handwashing.

May we treat unvaccinated staff differently from vaccinated staff?

Some people can't be vaccinated for medical reasons and treating them less favourably presents a disability discrimination risk. But some people oppose vaccination in general or the Covid one in particular, for no good reason. If they objected to a requirement to be vaccinated, or any less favourable treatment because they were unvaccinated, they might try to argue that it was discrimination based on a philosophical belief, but such a claim has not been tested and therefore a cautious approach is recommended.

A cautious approach would be to take steps in respect of unvaccinated employees that are justifiable as a proportionate means of ensuring the health and safety of other employees. For example, as unvaccinated staff may present a higher risk of virus transmission, you might think of amending their duties; requiring them to stay at home; or requiring them to show evidence of a negative lateral flow test before attending the office.

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