

12 February 2021

3CS Newsletter

EMPLOYMENT

No jab, no job

A recent survey from YouGov suggests that a fifth of the public are unwilling to get the Covid-19 vaccination. Reasons for this vary, from a lack of confidence in the safety of the vaccination to being opposed to vaccinations in general (although reasons for such opposition vary).

One of the UK's best-known employers recently announced the slogan 'no jab, no job' in relation to its employees getting vaccinated against Covid-19 before returning to work. While this approach seems straightforward in theory, whether an employer can make it mandatory for its employees to have a Covid-19 vaccine before returning to work is far from clear in employment law terms.

Reasonableness of requesting employees to get vaccinated

Under the Health and Safety at Work Act 1974 (HSWA) employers have a general duty to ensure, as far as is reasonably practicable, the health, safety, and welfare at work of all their employees.

The question of what is reasonable will be fact sensitive for every workforce and workplace and is likely to depend on the risk and implications of Covid-19 in the particular setting. For example, in a care home a non-vaccinated worker presents a higher risk to other more vulnerable staff in the workplace, and indeed to the residents themselves. Employers in other sectors arguably do not have the same strong rationale for instructing staff to take the vaccine - for example, professional services, where it has been shown that work can be done effectively from home.

At this stage, it may be risky for employers to state an employee's refusal to get the vaccine would amount to a health and safety breach, given that the government itself has not yet made the vaccination mandatory in any sectors.

Are there any discrimination risks around vaccination?

Any difference in treatment between those who have or have not been vaccinated may amount to indirect discrimination. Indirect discrimination arises where an employer enforces a policy that applies in the same way to everybody (e.g., all staff must be vaccinated) but disadvantages a group of people who share a protected characteristic.

The most relevant protected characteristics which may be asserted in relation to Covid-19 vaccinations are those of disability, sex, and pregnancy, and potentially religion or belief.

Taking these protected characteristics in turn:

- disability - there may be some individuals who are advised not to have the vaccine due to a medical condition. Employees with a disability may be unable to take up the vaccine.
- pregnancy or sex – the vaccine is not recommended for those who are pregnant, breastfeeding or planning to get pregnant.
- religion or belief – 'belief' in this context means a "philosophical belief that is genuinely held, that is cogent, serious and applies to an important aspect of human life or behaviour". The belief must also be worthy of respect in a democratic society, and not affect other people's fundamental rights. Whether the belief is protected is likely to depend on the individual circumstances - but it is theoretically possible that this type of belief could be protected, and therefore that requiring an individual to act in contravention of this belief could be discrimination.

Can employers dismiss for failure to vaccinate?

An employee's failure to follow a reasonable instruction can lead to a fair dismissal (most likely for 'some other substantial reason'). An employer contemplating dismissing an employee as a result of a refusal to be vaccinated will need to consider whether there are any alternatives to dismissal, e.g., reallocating the employee to another role (so long as this does not amount to a detriment in the particular circumstances).

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.

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The registered office of 3CS Corporate Solicitors Ltd is 35 New Broad Street, London EC2M 1NH. Mainline Tel: 0207 194 8140 Web: www.3cslondon.com



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New Hires

Under the current legal framework in the UK, The Public Health (Control of Disease) Act 1984 provides that an individual cannot be required to undergo medical treatment, including vaccination. However, this does not prevent an employer from asking an employee to consent to a contractual requirement to undergo vaccination before offering the employee work. We do have to bear in mind whether "consent" in such circumstances was in fact freely and voluntarily given. If it were felt that it was not freely given, the 1984 act would apply.

What about data protection issues?

Requiring evidence of vaccination gives rise to significant data protection issues. Employers must carefully consider why they need evidence of vaccination and whether it is appropriate for their business. Doing so will require a data protection impact assessment which must consider not only the reasons for requiring the data but also issues like how it will be held securely, who will have access and whether it is appropriate to hold the data.

Return to work

Employers remain under a duty to provide a safe working environment to all staff, with or without the Covid-19 vaccine. Failure to comply with this obligation is a criminal offence. Employers will need to consider the following before requesting employees to return to work:

- **Social distancing:** Is maintaining a two-metre gap between employees at all times possible? If not, what are the solutions?
- **Cohorting/ staggering:** To reduce the density of employees in a single workspace, employers may want to consider varying shift patterns and rotate teams of staff.
- **Hygiene and infection transmission:** What systems and policies will need to be put in place to minimise the risk of infection? How will these policies be circulated to employees? How will the employer ensure employees comply with these policies?
- **Re-induction:** Support systems for employees returning to work are imperative. Employees may be returning to work with poor mental and physical health. How will vulnerable employees be supported on their return to work?
- **Managing employees who refuse to return to work:** Employers must discern whether employees are reasonably or unreasonably refusing to return to work, and the risks associated with demanding all employees return to work.

Employers will need to ensure that Covid-19 policies, procedures, and risk assessments are robust before the resumption of work in the workplace, ensuring the safety of workers and others visiting company premises. In the event an employee does accuse their employer of failing to provide a safe working environment, it will be essential for the employer to have clear and comprehensive policies in place as evidence that government guidelines have been followed. An employer will also need to provide written evidence that risk assessments were carried out and all possible precautions were taken to provide the employee with a safe working environment.

If you would like assistance with:

- conducting a risk assessment of your work premises or preparing a home health and safety assessment for your employees;
- creating a return to work policy; or
- require any other advice before requesting employees return to work;

please contact us.

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