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Vaccine Requirements – UK





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United Kingdom

Since its widespread roll out over the past year, the UK Government's COVID-19 vaccination programme has been largely successful. To date, over 70% of the population are fully vaccinated and a vaccination booster programme has now been implemented. Currently, compulsory vaccination only applies to those working in registered care homes in England (n.b. there are some exemptions). Because of the high uptake of vaccination amongst all constituent parts of the UK, it is unlikely that the devolved administrations or the UK Government will extend vaccine mandates to further sectors. Indeed, the trend appears to be going in the opposite direction with the UK Government recently abandoning compulsory vaccination for National Health Service (NHS) staff in England and the Scottish Government halting any extension of their vaccine certification schemes to further venues.

Can UK employers legally mandate vaccination against COVID-19?

As the "work from home" requirement gradually lifts for all nations across the United Kingdom, and the statutory position set out above is unlikely to change, the question becomes whether employers can lawfully mandate workers to be vaccinated against COVID-19. Last year it was heavily featured in UK media that companies such as Pimlico Plumbers intended to require new recruits to have had the vaccine – a so called 'no job, no job' policy. However, there are a lot of questions raised by these types of policies and whether they are legal and/or justifiable.

Issues around vaccination of employees are not without precedent, such as those working in the NHS, who as part of standard screening checks are checked for serious infections such TB, hepatitis and HIV. They are generally offered vaccination, which is encouraged, and face potential restriction on carrying out certain procedures if they fail screening or are not vaccinated – but even here vaccination is not absolutely mandatory. The more widespread and broad nature of COVID makes this situation more complex, as well as the fact that it is highly infectious as compared to the likes of hepatitis.

If employers are seeking to mandate vaccination for existing staff, this would effectively require a change to terms and conditions to make it a contractual requirement, a prerequisite of which is consultation to try and seek agreement to the change. If there was resistance, imposing the change without agreement poses risks of claims for constructive dismissal (where the employee has over 2 years' continuous service). If the business sought to dismiss and re-engage on new terms, this could result in claims for unfair dismissal (again, where the employee has over 2 years' continuous service). Where there is agreement employers must still tread carefully as there would always be a question mark over whether "consent" was freely and voluntarily given. If it was felt that it was not freely given, it would be unlawful.

**Miller Samuel Hill
Brown**



RWF House
5 Renfield Street
Glasgow, G2 5EZ
Scotland

Marie Macdonald
mem@mshblegal.com

Anna Fox
avf@mshblegal.com

www.mshblegal.com

Tel: 0141 473 6745
Fax: 0141 221 3796



United Kingdom – (cont'd)

Miller Samuel Hill
Brown



If a requirement was to be brought in, consideration would also have to be given to the ultimate consequences of an employee refusing – what would be the end result if an employee ultimately refused to get the vaccine? Depending on the circumstances they could potentially be facing dismissal. There are anecdotal stories of employees who refuse the vaccine not being dismissed, but effectively prevented from working by not being given shifts, not being put on the rota etc. This could also lead to claims of constructive dismissal. If an employee were to be dismissed for refusing to be vaccinated, a potential unfair dismissal claim may arise (where the employee has at least 2 years continuous service), where the onus is on the employer to establish the dismissal was for one of the potentially fair reasons set out in law at the employment tribunal. This is an untested issue and it is likely an Employment Judge would be slow to find a dismissal fair unless there were clear reasons for policy in the context of the work being carried out, and it could be shown that all other steps had been taken, considered or were not appropriate. Our view is that the employment tribunal would be unlikely to find that dismissal was reasonable in all the circumstances and would expect measures short of dismissal to have been taken first. Dismissal *may* be found reasonable in circumstances where an employee has chosen not to be vaccinated and refuses to follow other safety procedures which the employer has put in place. Employers also need to be careful not to discriminate against existing staff by mandating vaccinations – see the list for new employees below which also applies to existing staff.

Mandating vaccination, for example, by including a vaccination clause in contracts, for new employees is less risky because the issues noted above are minimised or non-existent in these circumstances. However, prospective candidates (as well as existing employees) would still have the right not to be discriminated against. Vaccination clauses and/or policies may discriminate on the following basis:-

- Age, as those outside of a prioritised age group are disadvantaged compared to those that are. N.b. this is less likely now that all age groups are entitled to receive the vaccine on the NHS.
- Disability, as some vaccines are not suitable for certain individuals with suppressed immune systems, specific allergies, or mental health reasons.
- Pregnancy/maternity, as the changes in advice may lead to pregnant employees being cautious about getting vaccinated, a woman who is disadvantaged by an employer's vaccination policy due to pregnancy or maternity could bring an indirect sex discrimination claim.



United Kingdom – (cont'd)

- Sex, women may wish to delay vaccination because they are trying to conceive.
- Religion or belief, it possible that the protected characteristic of religious or philosophical belief could protect certain religious or moral objections to the vaccine.

In April 2021, the Equality and Human Rights Commission (EHRC) warned that blanket mandatory vaccination policies, applied inflexibly, are "likely to be unlawful". For employers seeking to rely on such clauses/ policies, it is important to *include wording that allows for exemptions* to prevent any potential discrimination claims arising (as noted above). Employers must also ensure that any vaccination requirement specified in job advertisements or through recruitment agencies is clearly caveated that those exempt from vaccination will not be excluded from applying.

Finally, there are also UK data protection laws that merit consideration if asking employees for *proof of vaccination* before a job offer or returning to work and processing that data. A person's COVID status is classed as health data, which has the protected status of 'special category data' under data protection law. This means that it requires extra protection. Employers must be able to demonstrate that the processing is necessary for employment. This doesn't mean that the processing must be absolutely essential, but they must be able to show that they cannot achieve the same purpose by less intrusive means.

The UK's position on vaccine requirements for returning to work is unlikely to change, in fact, the direction of travel appears to be quite the opposite and for now unless a registered care home, requiring workers to be vaccinated against COVID-19 will be tricky. Whether a policy of mandatory vaccination is justifiable will be very fact specific and depend on the circumstances. However, broadly we tend to the view that mandating vaccination should be a last resort and other steps taken first. Practically, if the workforce all are happy to get the vaccine, then it would be unnecessary to make it mandatory. The need is more likely to arise where employees are resistant, consideration should instead be given to steps to *encourage* vaccination in the first instance.

