

Vaccines in the workplace

part 1: unpicking the key legal issues

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Vaccines in the workplace part 1: unpicking the key legal issues

In the first of two articles examining the hot topic of vaccines in the workplace, we bring you up to speed with the UK's COVID-19 vaccination programme, and explore the key legal

issues faced by employers wishing to mandate vaccines for staff. In our second article on the topic, we will consider how employers should manage practical issues such as managing disclosure of employees' vaccination status and what should go into a staff vaccination policy.

What is the UK Government's COVID-19 vaccination programme?

There are currently two COVID-19 vaccines in use in the UK, namely the vaccines produced by Pfizer/BioNTech and Oxford/AstraZeneca. A third vaccine produced by Moderna has been licenced for use and should be available in the UK in Spring 2021. Further vaccines may be available in due course. The Joint Committee on Vaccination and Immunisation (JCVI) has advised that the UK's vaccination programme is delivered in phases.

Phase 1 covers approximately 32 million people and includes all adults aged 50 or over, plus anyone aged under 70 who is classified as "clinically extremely vulnerable" and anyone aged under 65 who is classified as "at risk". The Government is currently on track to complete phase 1 by 15 April 2021.

Phase 2 of the programme covers the remainder of the UK adult population (i.e. those aged between 18 and 49), comprising approximately 21 million people. On 26 February 2021, the JCVI advised against vaccination by occupational groups. Instead, the vaccine will be offered to all adults in descending age bands. The Government's target is to complete phase 2 by 31 July 2021.

Vaccination is not mandatory in the UK, meaning that individuals are free to refuse the vaccine.

Is everyone able to have the vaccine?

No, there are some groups who will not be routinely offered the vaccine or for who it may not be suitable. These are:

- **Under 18s:** as the vaccines have not been trialled on younger people, the programme does not cover children and the under 18s. However, this may change in future.
- **Pregnant women:** the vaccines have not yet been tested in pregnancy, so until more information is available, those who are pregnant will not routinely be offered the vaccine. However, the JCVI recognises the potential benefits of vaccination are particularly important for some pregnant women. Women in that cohort are advised to discuss the vaccination with their doctor to decide whether to receive the vaccine or not.
- **Breastfeeding mothers:** although there is no data on the safety of COVID-19 vaccines in breastfeeding or on the breastfed child, COVID-19 vaccines are not thought to be a risk to the child. The JCVI has recommended that the vaccine may be received whilst breastfeeding, however, it is acknowledged that some mothers may prefer to wait until they have finished breastfeeding.
- **People suffering from long COVID symptoms:** guidance states that the vaccine should be deferred for those who have contracted COVID-19 in the past and are suffering from ongoing symptoms.
- **People who are immunosuppressed:** guidance states that people who have suppressed immunity may not develop a full immune response following vaccination, meaning the vaccine will not be as effective for them as it is for others. Therefore, they can have the vaccine, but they may remain exposed to COVID-19.
- **People with an allergy to products within certain of the vaccines:** a small minority of people are allergic to some products found in the Pfizer/BioNTech and Moderna vaccines. However, such products are not present in the Oxford/AstraZeneca vaccine and so anyone in this position will still be able to be vaccinated (subject to availability).

Why do employers need to be concerned with whether their

employees are vaccinated?

Employers have legal duties to protect the health and safety of their employees and third parties who come into contact with their staff. The principal statutory duties are set out in the health and safety legislation set out below. If an employer fails to comply with these obligations, it may be subject to enforcement action by the Health and Safety Executive.

- **The Health and Safety at Work Act 1974:** this is the primary piece of legislation covering occupational health and safety in Great Britain. It imposes a general duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and third parties who are affected by work-related activities.
- **The Management of Health and Safety at Work Regulations 1999:** these regulations require employers to assess the risks of work-related activities and identify and implement measures to control such risks. Employers must also develop a coherent overall risk prevention policy and issue appropriate instructions to employees.
- **The Control of Substances Hazardous to Health Regulations 2002:** these regulations govern the control of occupational exposure to “biological agents”. This includes micro-organisms which may cause infection, including COVID-19. Employers must take steps adequately to control exposure to biological agents.

In addition to these statutory duties, employers also have a common law duty to take reasonable care of the health and safety of employees and third parties. A breach of this duty may give rise to a claim for personal injury. Further, employers may be exposed to Employment Tribunal claims from employees who feel the employer has not taken sufficient protective steps. Employees are protected from detriment and dismissal for blowing the whistle about health and safety

dangers or taking certain actions in relation to health and safety matters.

Given these obligations and risks, employers must assess the risk of allowing unvaccinated employees into the workplace and consider what, if any, measures should be taken to control that risk.

Can employers require employees to have the vaccine?

As mentioned above, the COVID-19 vaccine is not mandatory in the UK: an individual must consent to receiving it. [Guidance published by Acas](#) provides that employers should “support” staff to have the vaccine. It’s likely that a voluntary approach will be preferable for many employers, with staff strongly encouraged, but not required, to have the vaccine.

However, there may be some limited cases where an employer decides it’s necessary to require that some or all staff are vaccinated. This will most commonly occur where, after assessing the risks, it’s considered necessary in order to discharge the duty to protect the health and safety of staff and third parties. For example, the care home operator, Barchester Healthcare, has introduced such a requirement in order to “deliver on its duty to protect...residents, patients and staff”. This is most likely to arise in the health and social care sector and it will be more difficult for employers operating in lower risk environments (such as offices) to justify such a requirement.

There may also be cases where it’s necessary for specific employees to be vaccinated in order to perform their role, for example where they need to travel to countries which require visitors to be vaccinated.

It’s advisable for employers to consult with staff about their preferred approach and address any questions or concerns before taking a final decision. It’s also a good idea to communicate the chosen approach in a staff Vaccine Policy.

Can employers discipline or dismiss employees who do not comply with a requirement to have the vaccine?

If an employer introduces a requirement to have the vaccine, what can it do when faced with an employee who does not comply? As discussed above, there will be some employees who are unable to have the vaccine at all. Further, many working age people will not be vaccinated until phase 2 of the roll out is completed. No action should be taken against anyone who falls into one of these groups, since the decision to have the vaccine is out of their hands.

However, there are likely to be some employees who could have the vaccine but simply refuse to have it. Can an employer discipline or dismiss a vaccine-refusing employee? This is a difficult and novel issue and employers in this situation should always seek legal advice before taking action.

Employees are subject to an implied duty to comply with reasonable management instructions. Here, the employer would say the requirement to have the vaccine is a reasonable management instruction and a refusal to comply amounts to misconduct justifying disciplinary action up to dismissal. The Acas Guidance suggests that a refusal to be vaccinated may justify disciplinary action where:

- vaccination was **required** by the employer's policy;
- vaccination was **necessary** for an employee to do their job; and
- the action was **not discriminatory** (this is discussed further below).

Dismissal would expose the employer to an unfair dismissal claim where the employee has 2 years' service or more. Therefore, an employer would need to show there was a fair reason for dismissal and that they acted reasonably in treating that reason as sufficient to dismiss. Here, the reason for dismissal would be misconduct (or possibly "some

other substantial reason"). The battleground will be whether the employer has acted reasonably in the circumstances. The employee's reason for refusing to comply with the instruction will be highly relevant here: it will be risky to dismiss an employee who can show that they had a good reason for refusing to comply.

The presence of a clear policy and the ability to demonstrate the necessity of vaccination will be important. In the recent case of [Kubilius v Kent Foods Limited](#), an Employment Tribunal held that a lorry driver was fairly dismissed for refusing to wear a face mask on a client's premises. This was in breach of the employer's policy requiring compliance with instructions relating to health and safety and PPE.

Could a requirement to have the vaccine be discriminatory?

On the face of it, a requirement for staff to have the vaccine is neutral, but it could put individuals with certain protected characteristics at a particular disadvantage compared to others. The "disadvantage" would be having a vaccine that they do not wish to have or face disciplinary action. This could give rise to a claim for indirect discrimination.

A number of protected groups are less likely to have the vaccine and might be able to say that they have suffered a particular disadvantage. For example:

- **Disability:** employees with certain mental impairments (e.g. anxiety) may be especially fearful of having the vaccine.
- **Age:** research shows that there is greater vaccine hesitancy amongst 18 to 29-year olds.
- **Race:** statistics show that take up of the vaccine is lower amongst black and Asian people due to a variety of factors, including low confidence in the vaccine and mistrust.

- **Religion or belief:** most mainstream religions support vaccination, however, employees with certain philosophical beliefs might reject the vaccine. For example, ethical vegans may refuse to have the vaccine because it has been tested on animals. Alternatively, subscribers to naturopathy may refuse the vaccine on the basis that it is not a natural intervention. However, it's unlikely that anti-vaxxer or conspiracy theory beliefs would be protected.

Employers are able to justify indirect discrimination where they can show that there is a "legitimate aim" and the requirement is a "proportionate" means of achieving that aim. In most cases where an employer is introducing a vaccine requirement, the aim would be the protection of the health and safety of staff and third parties. This is likely to be a legitimate aim. The challenge for employers will be showing that they have acted proportionately.

Adopting a blanket approach, without considering less discriminatory measures will not be proportionate. For example, could alternative health and safety measures be put in place to mitigate the risks posed by, and to, unvaccinated staff (e.g. social distancing, mask wearing, regular hand washing or segregation in the workplace)? If not, could unvaccinated staff be redeployed to a lower risk environment or allowed to work from home indefinitely? Ultimately, these alternatives may not be feasible, but it will be necessary for the employer to show that it has, at least, considered them.

Even where alternatives can be discounted, it is important that the requirement is kept under review as the situation changes. If COVID-19 recedes to negligible levels, then it may become more difficult to justify a requirement to have the vaccine.

If you would like to discuss your approach to staff vaccination please get in touch with Amanda Steadman

(amandasteadaman@bdbf.co.uk) or your usual BDBF contact.

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