

Guidance on COVID-19 vaccinations

August 2021

Introduction

There is growing evidence of employers demanding evidence of vaccination. UNISON strongly urges all members to use the vaccination programme, however, this guidance can assist stewards and branches in terms of offering immediate action to support members. **Any members who require assistance should contact their local UNISON branch or contact UNISON Direct on 0800 171 2194.**

Key points

- 1) All members should be supported in their meetings with any employer following this course of action.
- 2) The member should be assisted to explain why they have not taken the vaccine. In doing so we should note verbally at the meeting and then within 24 hours in writing;
 - a. that whilst in England, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, will make it mandatory for a person working or entering a care home to have the Covid-19 vaccine, there are no such provisions at this time in Scotland to invoke public health measures;
 - b. that there is no contractual obligation on them to be vaccinated;
 - c. that by refusing the vaccine, they are not increasing the risk of harm to services users or colleagues and the employers actions (in terms of dismissal) are unreasonable;
 - d. where applicable that the employers actions may amount to discrimination (you will need to insert the protected characteristic i.e. sex, race, disability, age, religion/belief, pregnancy – note this should be checked and confirmed with Legal Officer through regional organiser before identified to the employer).
- 3) The employer should be asked at the meeting (followed up in writing) to:
 - a. explain in writing what grounds they feel they have to dismiss the member;
 - b. provide a copy of the company policy concerning mandatory COVID vaccinations;
 - c. provide a copy of the members current contract of employment.
- 4) Any dismissal should be appealed (again seek advice on grounds).
- 5) All relevant documents should be bundled together with a CASEform and provided to Legal Officer at the point of dismissal (preferably via CASEWEB).

Guidance on COVID-19 vaccinations

Mandatory vaccination

There is not currently any legal requirement in the UK for vaccination against COVID-19. The basic legal position is that an employer cannot force its staff to be vaccinated without their agreement and consent.

In England, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, will make it mandatory for a person working or entering a care home to have the Covid-19 vaccine. Unvaccinated non-residents over the age of 18 will also be unable to enter the residential accommodation unless that person has provided evidence that they have clinical reasons he or she cannot be vaccinated. There are currently no known proposals for a similar requirement in Scotland.

Health and safety

Under the Health and Safety at Work, etc. Act 1974 and the Management of Health and Safety at Work Regulations 1999, employers must, so far as is reasonably practicable safeguard the health and safety and control the risk of harm in relation to people their work may foreseeably affect, including their employees and persons other than employees.

The 1974 Act also requires all employees to take reasonable care for the health and safety of themselves and other persons who may be affected by their acts or omissions at work and co-operate with their employers so far as is necessary to enable the employer to comply with their health and safety duties.

Although medical evidence shows that vaccination reduces the chance of the vaccinated individual becoming ill, the extent to which vaccination reduces transmission is still not fully understood. Furthermore, it is not known how long the protection obtained from vaccination will last or whether it will be effective against all new variants. In light of this, and the HSE and Government guidance, vaccination is not a substitute for having wider workplace COVID secure measures in place in order to comply with health and safety obligations.

Employers who require workers to be vaccinated

Employers who introduce mandatory vaccination will face a number of legal risks, particularly on the following issues;

1. Unfair Dismissal

Employers who insist on vaccination, are most likely to argue that the requirement to be vaccinated amounts to a reasonable instruction for the purposes of protecting health and safety. However, it is unlikely to be sufficient to rely on health and safety as a blanket justification

Failure to follow an employer's reasonable instructions could lead to a disciplinary process and potentially dismissal. Whether the instruction is found by an Employment Tribunal to be reasonable will depend on the circumstances of the particular case in relation to the role that the employee carries out and the particular workplace context.

If a worker deals with clinically vulnerable clients or service users on a face to face basis or works with vulnerable colleagues, then it is more likely to be found to be reasonable by an Employment Tribunal. Whether duties can be done in a different way or remotely to reduce risk and whether all other workplace mitigations are in place will be relevant.

An employer requires to consider alternatives to dismissal, such as allowing an exception, redeployment to another role, working from home or implementing some other safety measures, such as testing or PPE.

Dismissals relating to a refusal to be vaccinated are likely to be argued as dismissals on grounds of conduct or 'some other substantial reason'.

Misconduct

Refusal to comply with a reasonable instruction can amount to misconduct as a potentially fair reason for dismissal under section 98(2)(b), ERA 1996. Again, the factors in relation to the employee's particular job and workplace are going to be relevant to the Tribunal in considering how reasonable the instruction is. A requirement to be vaccinated is not likely to be considered reasonable unless it is necessary for the employee to carry out their role and all other alternatives have been looked at. The employer will need to show that they have acted reasonably in all the circumstances and a tribunal will consider both whether the employer's instruction was reasonable and whether the employee's refusal was unreasonable. Factors to consider include;

- What are the reasons for the refusal?
- Has the employee been consulted with and had any concerns addressed?
- Has it been made clear why vaccination is necessary?
- Have they been warned that dismissal could result?
- Have alternative duties/redeployment been considered?
- Have other health and safety measures been put in place?
- Does the employer's risk assessment suggest that vaccination is necessary for certain roles?
- Has a fair procedure been followed?

Some other substantial reason (SOSR)

Alternatively, employers may also seek to argue that a refusal by an employee to be vaccinated is enough to amount to 'some other substantial reason' as a potentially fair reason for dismissal under section 98(1)(b) ERA. This 'other reason' might be;

- an unreasonable refusal to accept changes to terms and conditions, where the employer is seeking to change contracts to introduce a vaccine requirement.
- pressure from third parties eg. where service users insist on only dealing with staff who are vaccinated, or
- reputational risk.

In a situation where an employer cannot utilise an employee because customers refuse to deal with an employee who is unvaccinated, or where the safety of vulnerable clients would be put at risk, it may be possible to establish a fair SOSR dismissal, the same considerations in relation to reasonableness that are listed above regarding conduct would apply.

Constructive dismissal

Requiring an employee to be vaccinated as a condition to providing work could amount to a repudiatory breach of contract, entitling them to resign and to claim constructive dismissal. Further, threatening to withhold pay, refuse entry, discipline, demote or significantly change duties could all amount to a breach of the implied term of trust and confidence, which could form the basis of a constructive dismissal claim. Again, the above factors would require to be considered to determine whether there had been a repudiatory breach of contract depending on the individual member's circumstances. UNISON should never recommend that a member resign in these circumstances, instead the member should be referred for legal assistance for their case to be assessed.

Changing terms and conditions

If an employer decides to change the contracts of existing employees in order to introduce a requirement to be vaccinated, they will need to consider all the usual considerations concerning changes to terms and conditions. The safest way to proceed would be by way of consultation with employees and an agreed change.

However, if agreement cannot be achieved, or if there are some who refuse to agree, an employer will either have to impose the change (with the risk of constructive unfair dismissal claims) or dismiss and re-engage (with the risk of actual unfair dismissal claims).

Whether such dismissals are fair will bring into play the considerations looked at above in terms of how reasonable the employer's requirement is in the context of the particular roles and the particular organisation and how unreasonable the employee's refusal is.

If there is a risk that changing terms and conditions will result in the termination and re-engagement of 20 or more employees within a period of 90 days or less, then the collective consultation obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 will apply. The duty to notify the Secretary of State under section 193 of TULRCA will also be triggered. Failure to comply with the collective consultation obligations may result in the employer being ordered to pay a protective award of up to 90 days' actual pay to each affected employee. Failure to provide the notification to the Secretary of State is a criminal offence (section 194, TULRCA) and the employer can be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

2. Unlawful deduction from wages

Withholding pay of staff who are willing to work but are unvaccinated may also amount to an unlawful deduction from wages, depending on the member's individual circumstances and the factors mentioned above.

3. Failure to adequately inform and consult on health and safety.

Employers must undertake (and regularly update) it's risk assessment. In recognised workplaces, it must also consult union appointed health and safety representatives on arrangements which will enable the employer and employees to co-operate effectively in promoting and developing health and safety measures and in checking their effectiveness.

4. Data protection

Information about health such as vaccination status is a 'special category' of data that should only be processed and retained by the employer in a limited way after a data impact assessment has been carried out. Employers need to consider the data protection implications of requiring employees to provide information on their vaccination status, verifying its accuracy, and retaining that data. Complaints could be made to the Information Commissioner's Office (ICO) by members if there are data protection breaches in relation to the processing of information about their health. The ICO's website has a useful section on this; <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccination-and-covid-status-checks/>

Employers require to be clear about what they are trying to achieve and how recording staff vaccination status will help them achieve this. The use of this data must be fair, necessary and relevant for a specific purpose. Employees must be informed and understand what personal data is required, who it will be shared with, how long it will be kept for and what decisions will be made based on the data.

Employers need to identify a legitimate interest and show that processing is necessary to achieve it, taking into account the employees' interests, rights and freedoms. In terms of the grounds for

processing special category data under Article 9, it is likely that most employers will have to rely on the 'employment condition' i.e. show that the processing is necessary for the performance of rights and obligations in connection with employment. This could include processing in order to ensure the health, safety and welfare of workers and service users, for example, to carry out a risk assessment.

5. Discrimination

Indirect discrimination

A mandatory vaccination requirement for employees or job applicants is likely to amount to a provision, criterion or practice (PCP) that puts individuals with a protected characteristic at a particular disadvantage compared with others who do not share that protected characteristic, contrary to Section 19 of the Equality Act 2010

A vaccination requirement could put employees with one of the following protected characteristics at a particular disadvantage:

- **Age.** The government prioritised older individuals for vaccination so employees outside of a priority age group are disadvantaged compared with those that are. In addition, younger workers may be more cautious of being vaccinated due to the lower risk of hospitalisation, intensive care admission and death from COVID-19 and the slightly higher risk of blood clots from the vaccination.
- **Disability.** Some of the vaccines in production are not suitable for certain individuals with suppressed immune systems. An employee with certain allergies may also be advised against vaccination due to the risk of anaphylaxis. Other employees may refuse the vaccine for mental health reasons, or due to a phobia of needles.
- **Pregnancy or maternity.** Current government advice is that pregnant women should be vaccinated, however, previously, the advice was that pregnant women should not be vaccinated. The change in advice may lead to some pregnant employees being cautious about getting vaccinated. Indirect discrimination does not apply to the protected characteristic of pregnancy and maternity. However, a woman who is disadvantaged by her employer's vaccination policy due to pregnancy or maternity could bring an indirect sex discrimination claim.
- **Sex.** Women may wish to delay vaccination because they are trying to conceive with many citing worries about fertility. Current guidance is that there is no need to avoid pregnancy after vaccination and there is no evidence that the vaccines have any effect on fertility or on the chances of becoming pregnant.
- **Race.** Vaccine take-up in previous national vaccination programmes has been lower in areas with a higher proportion of ethnic minorities. The greater hesitancy in minority ethnic groups was due to low confidence in the vaccine, distrust, access barriers, inconvenience, socio-demographics and lack of communication from trusted providers.
- **Religion or belief.** It is possible that the protected characteristic of religious or philosophical belief could protect certain religious or moral objections to the vaccine. For example, employees may reject the vaccine because embryonic tissue was used to test or develop the vaccine. Other employees may have a strongly held belief that vaccines are harmful to public health (anti-vaxxers). It is unlikely that this will amount to a protected belief under the test set out in *Grainger v Nicholson* [2010] IRLR 4 which includes requirements that a belief:
 - attains a certain level of cogency, seriousness, cohesion and importance;
 - is worthy of respect in a democratic society;
 - is not incompatible with human dignity; and
 - does not conflict with the fundamental rights of others.

Therefore, employers need to ensure that any mandatory vaccination requirement is justifiable as a proportionate means of achieving a legitimate aim or is couched in terms which allow for exceptions. The burden is on the employer to show justification. It must show that:

- It was pursuing an identified legitimate aim.
- The measures taken to achieve that aim were appropriate and proportionate

Establishing a legitimate aim is likely to be the easier part of the test for employers in this situation. Protecting the health and safety of staff, service users and third parties will very likely be an uncontroversial legitimate aim for employers.

The employer must show that its actions actually contribute to the pursuit of the legitimate aim. While there is currently insufficient evidence to support the position that vaccination prevents transmission in the workplace, this is likely to be established in the future. In any event, it would be difficult to criticise an employer for trying to reduce transmission in its workplace by encouraging vaccination, even if it was subsequently shown that this had little or no impact.

To establish that a vaccination policy was a proportionate means of achieving its legitimate aim, an employer must demonstrate that the measures taken were "reasonably necessary" to meet the legitimate aim. However, it does not need to show that it had no alternative course of action. An employer's actions will not be considered reasonably necessary if it could have used less discriminatory means of achieving the legitimate aim.

Proportionality may be a more difficult hurdle for employers at the current time. Compliance with the COVID-secure guidelines, introducing regular testing, homeworking or redeployment into a role suitable for homeworking could be more effective and less discriminatory means of achieving a health and safety legitimate aim.

Direct discrimination

An employer's actions in requiring vaccination of a particular employee, or in treating them less favourably because they are unvaccinated, could directly discriminate against them contrary to section 13 of the Equality Act 2010. Unlike indirect discrimination, direct discrimination cannot be justified unless it is on the ground of age.

6. Human Rights

A requirement to be vaccinated could be a breach of Article 8 of the European Convention of Human Rights (ECHR) (the right to respect for one's privacy and family life) and Article 9 (the right to freedom of thought, conscience and religion). The UK remains a member of the Council of Europe and a signatory to the ECHR, which is incorporated into UK law by the provisions of the Human Rights Act 1998 (HRA). Courts and tribunals are bound to interpret legislation in a manner compatible with the ECHR and it is unlawful for public authorities (which would include public sector employers) to act in a way which is incompatible with the ECHR. There could therefore be the potential for judicial review of a decision of a public sector employer to make vaccination compulsory and any Tribunal case involving detriment, dismissal or discrimination will be obliged to take human rights arguments into account when interpreting the law.

Both Articles 8 and 9 are qualified rights meaning that there shall be no interference except such as is necessary and proportionate in a democratic society in the interests of

- national security,
- public safety or the economic well-being of the country,
- for the prevention of disorder or crime,
- for the protection of health or morals, or
- for the protection of the rights and freedoms of others.

- Proportionality will be key when considering whether a vaccination requirement is a necessary interference of an individual's Article 8 right to privacy. If there are other ways to minimise health risks in the workplace that do not interfere with privacy rights then the requirement is not likely to be proportionate.

However, there could be circumstances where such interference is justified if the health and safety arguments were strong enough in relation to a particular role and workplace setting. It is possible for an employer to interfere with an employee's private rights where it was necessary in the interests of public safety.

In terms of Article 9, it will be difficult for an employer to show that it is proportionate to compel an employee to be vaccinated contrary to their religious or other beliefs if there are alternatives to reducing risk in the workplace that do not impinge on those beliefs.