



## Mandatory vaccines for the workplace: worth a shot?

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By **Lisa Rix** and **Deborah Margolis** - 31 March 2021

With over half the adult population having now received their first vaccine, many employers will be wondering how they can use the vaccine rollout to get employees back into workplaces.

Although some companies have announced they plan to bring in a “no jab, no job” policy, there are various employment law and data protection risks with requiring employees to get a vaccine. The current government guidance is that people are not required to take the vaccine generally: it is a personal matter for people to decide. The government is also determining the order in which people are able to get it, prioritising the older and more vulnerable.

However, employers are still keen to understand whether they can require employees to be vaccinated or what other ways they can use the vaccine roll out to get staff back to the workplace.

The key risks to navigate in almost all such options are:

### 1) Employment Risk: Discrimination

There are risks of discrimination associated with requiring employees to be vaccinated before returning to the office. Some employees will have medical conditions amounting to a disability which may mean the vaccine is not appropriate for them, it may be against some employees' religious or philosophical beliefs and some employees may be pregnant and therefore currently not advised to have it, etc. Treating such employees less favourably than those having the vaccine might lead to discrimination allegations. Furthermore, there is evidence that there is less uptake for the vaccinations in BAME communities, which may result in indirect discrimination claims being brought.

### 2) Employment Risk: Breach of contract

There is a risk to employers of breaching the implied term of mutual trust and confidence with employees by requiring them to do something which is not reasonable (i.e. to have the vaccine when there is no other legal or medical requirement for them to have it), which could lead to them claiming constructive dismissal. This is likely to be a fact specific assessment.

### 3) Data Protection Risk: That there is no legal basis for the employer to process this information

Government guidance on making it safe for employees to return to work currently does not place any importance on the vaccine. Employees might argue there is no need for employers to know about whether they have had the vaccine or not and that they cannot be required to disclose this sensitive medical data. The ICO's guidance on the point is that employers should have a "clear and compelling" reason for collecting such information, and not do so on a "just in case" basis.

There is also a practical issue in collecting such data: people receiving the vaccine are just being given little business-card style certificates, which employees might lose, or might even be easy to forge. So collecting proof could be problematic.

If employers satisfy themselves that they can process this data they should bear in mind all of the normal data protections considerations, including only holding the minimum amount of information required, providing the required information in relation to the processing of that data, ensuring confidentiality/security and only retaining it for as long as required.

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## Practical risk assessment

In terms of the various things we've seen employers exploring, this is how we would characterise the overall risks of each option (although the level of risk will be quite specific to the sector the employee works in, the role of the employee and the health and safety risks involved):

### Requiring employees to get a vaccination before returning to the workplace

Employment - High risk

Data protection - Medium risk

### Offering incentives to have the vaccine, e.g. a bonus



Employment - Medium risk

Data protection - Low risk

**Encouraging staff to have the vaccine**

Employment - Low risk

Data protection - Low risk

**Asking employees to disclose if they've had the vaccine**

Employment - Low risk

Data protection - Medium risk

These risk profiles might change if government guidance or [ICO guidance on vaccinations](#) changes, however, for now we would recommend that employers act in line with the government's guidance on who should go to work and place their focus on making their workplaces Covid-secure.

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For more information on the risks associated with mandatory vaccines please contact [Lisa Rix](#) or [Deborah Margolis](#).