

INTRODUCTION

This brief looks at the employment issues surrounding vaccination and testing for COVID-19.

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DECIDING YOUR VACCINATION POLICY

Developing (or updating) a policy on vaccination allows employers to outline the organisation's stance on vaccination and explain the role of and expectations on managers, HR and employees.

The recommended approach for employers who want a vaccinated workforce is to encourage staff and publicise the benefits to improve take up of the vaccine. Engagement and good communication will help workers make informed decisions regarding their vaccination.

Explaining and encouraging workers with impartial, factual information will keep them informed about the workplace impact and risks of COVID-19. In any event vaccination and testing should only be one part of an employer's COVID-19 secure measures.

[Information and resources](#) for employers to help support their staff and promote the coronavirus (COVID-19) vaccination programme is available from GOV.UK.

Vaccination policies should take into account the legal aspects, for example, with respect to discrimination claims, as well as providing information on data protection and health and safety duties.

Organisations should follow a voluntary approach when setting out its aims and objectives in a policy. As well as the legal and financial risks of adopting a mandatory approach, engaging workers with a voluntary approach will build trust and encourage workers to appreciate the benefits for themselves and others. The policy can help explain the benefits of vaccination and how workers can contribute to wider public health by protecting themselves and other workers and the wider community by being vaccinated. Issues to be addressed in your policy include:

Risk assessments

Existing risk assessments should be updated to refer to being vaccinated. Risk assessments must also include alternative safety measures to receiving the vaccine (for example the continued use of PPE).

Other aspects to be explored when carrying out risk assessment include:

- Special measures for any clinically extremely vulnerable staff and potential health and safety, discrimination or other claims resulting from vaccination or failure to vaccinate.
- Review of other COVID-19 secure measures and reasonable alternatives to or additions to vaccination such as working from home, social distancing, use of PPE, handwashing and so on. This consideration should include people unable to have the vaccine, those who are pregnant, trying to conceive or those with an allergic response.
- The potential for individual workers to refuse a vaccination and additional measures the employer can put in place if any staff refuse vaccination.

Workers who can't have the vaccine

Some individuals may be advised not to have the vaccine due to a medical condition, while others may be allergic or have a fear of needles. These people could be protected by the disability provisions within the Equality Act 2010 if they refuse the vaccine.

MHRA has advised that individuals with a history of anaphylaxis to food, an identified drug or vaccine, or an insect sting can still receive any COVID-19 vaccine, as long as they are not known to be allergic to any component of the vaccine. The policy for recipients of the current Pfizer COVID-19 vaccines is that the person should wait for a minimum of 15 minutes before leaving the vaccination site and especially before driving. All vaccination sites should have equipment for managing an anaphylactic reaction.

For workers with a genuine medical reason that prevents vaccination, employers may take other steps with regards to health and safety, for example reinforcing their COVID-19 secure working environment, facilitating remote working where possible, or considering a different role. In some cases, medical advice may need to be taken with the worker's consent.

Workers who may be hesitant

'*Vaccine hesitancy*' is the term used to describe either a delay in taking vaccines, or a refusal to have them.

Employers should listen to any concerns workers have around vaccination with empathy and understanding.

Line managers will likely be the first port of call for most employee concerns – hopefully the relationship they have with their team will be based on trust and the kind of environment that enables honest conversation. Managers also need to be briefed on the organisation's vaccination policy and any awareness campaign around vaccinations, possible questions and concerns they could face from workers about the vaccine, and how to deal with them.

Pregnant or breastfeeding workers

COVID-19 vaccination is **strongly recommended for pregnant and breastfeeding women** .

Women do not need to avoid pregnancy after vaccination. However, those who avoid vaccination because they are planning a pregnancy may be able to use this to assert sex discrimination if they are then treated less favourably or are later dismissed due to this refusal.

Employers should consider any cases of hesitancy individually, offering support and directing to NHS and government advice where possible.

Workers who refuse the vaccine

Workers may refuse vaccines for many reasons, ranging from concerns about potential allergy, a phobia of needles or misplaced concerns about fertility. There is also misinformation around vaccines including disbelief about the rigorousness of the approval process, which could lead to concerns or refusal.

Whatever reason a worker has for refusing to be vaccinated, employers must consider each case individually, taking into account the issues outlined below. Some of the concerns people may have could reflect deeply held views or feelings of apprehension, and these are taking place against a backdrop of heightened levels of fear and anxiety due to the pandemic and the challenging circumstances many are experiencing.

■ Refusal due to philosophical belief

Some workers have an anti-vaccination belief. They could argue this is a protected philosophical belief under the Equality Act 2010. For example, a worker who believes in natural medicine only could try to establish that this belief is genuinely held and worthy of respect, which could lead to a claim that would need to be evaluated by a tribunal if progressed.

Similar claims may arise from vegans who may also be protected under the Equality Act if a vaccine includes animal products. The COVID-19 vaccines do not contain any products derived from animals so this should be made clear to workers.

Employers should discuss someone's concerns and objections and take them seriously, by listening to their reasons for refusing vaccination and, if necessary, exploring other COVID-19 secure ways of working.

■ Refusal due to religious belief

Some workers may refuse to be vaccinated on the basis of their religious beliefs. Religious beliefs do not have to be shared by everybody within that religion. Therefore, an anti-vaccination belief could be held by some people of a certain faith and potentially be protected, even though others of the same faith are in favour of vaccination. Employers will have to take each case on its merits and listen to a worker's reasons for refusing vaccination and if necessary explore other COVID-19 secure ways of working.

Although pork gelatine is historically used in some vaccines, which could lead to refusal on the grounds of religious belief for people of Muslim, Jewish or Hindu faith, the COVID-19 vaccines being used in the UK do not use pork gelatine. In fact, the UK COVID-19 vaccine rollout is endorsed by the British Islamic Medical Association, Hindu Council UK, and the Board of Deputies of British Jews. Full information on the ingredients of the Oxford-AstraZeneca, Pfizer-BioNTech, Moderna and other vaccines can be found on their websites and patient information leaflets. This information can be used to discuss any objections based on religious beliefs.

Other religious groups with an objection to vaccines include religions that rely on faith healing including some Christian churches. Some Amish may be reluctant to vaccinate. Employers should listen to any reasons for refusing vaccination and, where needed, consider other COVID-19 secure ways of working.

Options if staff refuse vaccination

If workers refuse vaccination employers should seriously consider the worker's reasons and any concerns they may have, and look to implement alternative solutions, if relevant. This could include working from home if possible, social distancing within the workplace, screens, the use of PPE and so on. The employer may be willing to consider changing the worker's work responsibilities or role if this could enable them to work remotely or in a safer working environment.

Ultimately, if their return to the workplace could pose a threat to the wider workforce's health and safety, employers may consider not allowing unvaccinated workers to return to the workplace. This entails a legal risk for the employer. Indirectly pressurising workers to be vaccinated (such as with disciplinary action) is likely to result in claims and will be less successful, ultimately, than the encouragement approach of sharing educational factual information.

HOW TO EVIDENCE VACCINATION STATUS

COVID-19 status is shown in the UK by using the NHS COVID pass to show coronavirus vaccination details or test results.

England and Wales

The [NHS COVID Pass](#) is accessed through the free NHS App on a mobile device such as a smartphone or tablet. This modified NHS app is based on the app that many people use to book appointments with their GP, so it can now show whether people have been vaccinated and tested for the virus.

People without access to a smartphone, computer or tablet, can call 119 from within the UK. Select the 'NHS COVID Pass service' and ask for an NHS COVID Pass letter to be posted to them.

The certification is available to people two weeks after the second dose of the Moderna, AstraZeneca or Pfizer vaccines, or one dose of the Janssen vaccine. Alternatively it can be used for people who have had a negative PCR test or rapid lateral flow test within the past 48 hours. A positive PCR test will also lead to an NHS COVID pass after the person has finished self-isolating and for up to 180 days after taking the test. The NHS COVID Pass is not available for children under 15.

Scotland

The [COVID Status app](#) (or COVID passport) can be downloaded through the free app on a mobile device for anyone over the age of 17.

COVID-19 vaccination status from vaccinations received in Scotland can also be obtained by requesting a printed copy of status online or by telephoning the COVID-19 status helpline to request one by post. The letter can be requested by anyone who has had a full dose of the coronavirus vaccine including those aged 16 and 17.

Northern Ireland

The [COVIDCert NI app](#) is available for those who received their vaccination in Northern Ireland to download to a mobile device.

A digital certificate or a letter can also be applied for from [Applying for a digital COVID certificate|COVIDCert NI|nidirect](#).

CORONAVIRUS TESTING

Risk assessments

Employers must consider whether to test as part of their risk assessments. A testing programme may reduce the risk of a workplace outbreak but protecting the health and safety of employees, and the views of the employees, themselves needs to be balanced.

Choice and quality of tests

Before deciding to test staff, employers should decide upon the type of testing to be used, the reliability and longevity of the test and what the test result means. Employers should keep up to date with the forms of testing available as the science is evolving rapidly. The main forms of test are summarised below.

The main forms of test are:

- **PCR tests** are used primarily in people who have symptoms and are the main type used on the NHS website. The PCR swab test is the most accurate means of testing but takes some time to perform. These tests identify the genetic material of the virus and the swab kits have to go to the lab, rather than be tested on site. The PCR tests are better at finding smaller amounts of the virus, especially early in infection.
- **Lateral flow devices** (LFDs) are one of the tests being used to help detect the presence of the COVID-19 from a nose and throat swab sample and is taken by people who do not have COVID-19 symptoms. Results can usually be delivered in under 30 minutes.
- **LAMP tests** (loop mediated isothermal amplification) provide results in about 90 minutes, but trained staff are required to operate the testing.
- **Antibody tests** involve blood samples and check if the person has had coronavirus. This second type of test indicates past, rather than current, infection. These are mainly being used by scientists to estimate what percentage of the population has had COVID-19, rather than to diagnose individuals.

The Medicines and Healthcare products Regulatory Agency (MHRA) has issued [guidance](#) explaining how both virus and antibody tests work and regulates the law on medical devices in the UK including safety and quality of tests. Employers are obliged to ensure that any test kit they use has a "CE mark" to designate a certain standard, as without it the tests may not be permissible in the EU or UK.

DECIDING YOUR TESTING POLICY

Employers who do decide to request testing of their workers should consider putting a COVID-19 testing policy in place to outline your stance on the need for testing and ensure processes are consistent and transparent. Policies and procedures should cover:

Voluntary or mandatory testing?

Agreement is critical as any attempt to test workers without their agreement could be an assault. In a minority of cases the employment contract may already contain the worker's agreement if there are provisions requiring workers to take medical tests (as with drug testing).

If there is no original contractual clause and no subsequent agreement to being tested employers could try to insist workers must agree because to refuse would breach the following obligations:

- The implied term to obey the reasonable instructions of the employer. Because of the health, safety duty below it could be a reasonable management instruction to require private testing.
- The obligations to ensure staff health and safety under the Health and Safety at Work Act 1974.
- The implied duty of mutual trust and confidence to other workers- justifying requesting other workers to take a test.

The best course of action will likely be for employers to encourage staff to agree to be tested and publicise the benefits. Employers can emphasise the extent of their duty to protect the health and wellbeing of other workers.

If employers try to make testing a compulsory condition of employment the legal problems could include discrimination claims on grounds of disability, pregnancy or religion and belief, or unfair dismissal claims or constructive unfair dismissal if employers discipline, dismiss or threaten workers because they refuse to be tested.

Workers who refuse to be tested

If workers refuse to be tested an employer could consider taking action against them under the appropriate conduct or disciplinary procedure. However, the testing should be necessary and proportionate and the employer should consider the reasons why the worker refused as they may have a legitimate reason for refusal.

If there is no agreement and no contractual clause to be tested employers must try and rely on the implied duties to obey an employer's reasonable instructions, the implied term of trust and confidence and their obligations to ensure staff health and safety under the Health and Safety at Work Act 1974.

To ensure the health, safety and welfare of staff, an employer can argue it is a reasonable management instruction to be tested. Workers' refusal to comply could be in breach of these duties as well as a failure to comply with their Health and Safety obligations but this depends on the overall context.

Employers may decide (based on their health and safety duty to other workers) that testing is so critical to their workplace safety measures they will discipline those who don't agree. Disciplining workers who refuse testing for COVID-19 basically involves the same issues as asking workers to disclose a previous test or attempting disciplining them for failure to agree to vaccination. The legal hurdles and risks of disciplining workers who refuse testing depends on the nature of the workplace, the reasons for the refusal, any local outbreaks, whether there are particularly vulnerable colleagues and the extent of risk.

If alternatives such as working from home are available this makes it harder for employers to justify testing. Workers may argue that testing is not necessary or proportionate because the employer's health and safety obligations can be met in other ways.

The risks, in summary, are data protection, disability, philosophical belief or pregnancy discrimination or unfair dismissal claims.

Ultimately employers have to decide if they are prepared to risk disciplining or even dismissing workers who refuse to be tested.

Testing vaccinated people

It is still sensible to test workers who have had the COVID-19 vaccine as a precaution. Government advice says once vaccinated, people must keep following the health guidance and rules. No vaccine is 100% effective.

Time off for testing

If employers are encouraging LFD testing then it is logical that the half an hour or so spent taking the test is considered as working time. The preliminary indications from HMRC are that:

- Employers encouraging testing: the time should count as working time.
- Employers making testing mandatory: the time should count as working time.
- Employers with completely voluntary testing: the time would not count as working time.

Unfair treatment

Employers must ensure that positive test results do not lead to unfair or harmful treatment of workers. For example, if a worker tests positive for antibodies employers cannot assume that they are immune, and allocate them more high-risk people facing roles just because they have antibodies.

Data protection and confidentiality

Test data confirming negative or positive virus testing is special category (or sensitive) data because it is medical information. If employers do carry out testing they need to store and process the data in accordance with the Data Protection Act 2018 and the GDPR.

The Information Commissioner's Office has published guidance for businesses on managing data protection obligations during the pandemic on the its website, including [FAQs on data collection relating to COVID-19](#)

For further information see [government guidance on COVID-19 tests and testing kits](#) and testing guidance for employers.

ACCESSING TEST KITS

Employers can engage third-party providers to operate an in-house testing system. There is guidance for third-party testing companies to follow. The government has also published a [list of private testing providers](#) which meet the requisite standards including reporting results to Public Health England and having the relevant systems in place to report any issues.

TAKING WORKERS' TEMPERATURE

The issues involved in testing temperatures at work involve the same contractual and legal issues as those discussed above for vaccination and other forms of testing.

Employers can decide if there is any merit in temperature testing especially with the availability of LFD and other form of testing. Displaying a high temperature is one of the main symptoms (along with a new continuous cough and loss of smell or taste) of a COVID-19 infection but equally someone who is infected may show no symptoms at all. On the other hand, employers may decide to include temperature testing as part of discharging their health and safety duties and consider it as part of their general risk assessments.

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