

COVID-19

# COVID-19 vaccination:

key HR considerations  
for employers

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Navigating change with Citation's Employment Law experts.



**Citation**

# COVID-19 vaccination: key HR considerations for employers

The rollout of the COVID vaccine has provided a light at the end of the tunnel for many business owners, bringing with it the promise of a return to normality. However, there still remains many questions for employers, largely surrounding the extent to which their Health & Safety obligations require them to create a vaccination policy.

In this guide, our HR & Employment Law experts are going to be exploring those questions, looking at the risks of taking a compulsory approach, what government guidance is out there to help you inform your approach and consider what you should be putting into any policy you develop, as well as some of the data protection considerations.

## Can you force your employees to have the vaccine?



The short answer to this question is no. Not even the government, under its current legislative powers could enforce vaccination on people.

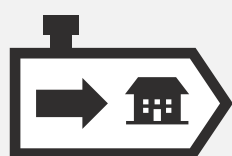
This is something the UK has steered away from, and the Prime Minister, back in December 2020 when the vaccine was approved, made it very clear that this was not the government's aim.

## Could making the vaccine compulsory be considered a 'reasonable management instruction'?

Although the government's stance is clear that vaccination will not be made compulsory, they have said that employers should decide what is best for their business. Because you're responsible for the Health & Safety of your employees at work - could you insist on vaccination as a reasonable management instruction?

It's unlikely this would be considered a reasonable management instruction for most businesses as it would fall outside of the scope of the reasonable expectations in most existing employment relationships

So, if you did want to go down the compulsory vaccine route, you would have to introduce a new policy to the workplace making vaccination a requirement of their employment.



# What are the risks of taking a compulsory approach with your vaccination policy?



There is a distinction in the level of risks involved in implementing this kind of policy for existing employees and the risks faced by incorporating this into your recruitment policy.

## Existing employees

For existing employees, if they have two years or more of service, they have the right to bring unfair dismissal claims, or constructive dismissal claims, and that's where the potential danger is for you as an employer.

As you probably can't justify asking employees to take the vaccine as a reasonable management instruction, you would have to introduce this request as a new term in the employment relationship.

You have two ways to do this:

1. Make a unilateral change to your employee's terms and conditions – which risks triggering constructive dismissal claims if an employee does not agree to the changes.
2. Formally dismissing employees and offering to re-engage them on new terms. This risks potential unfair dismissal claims and potentially triggers collective consultation obligations if you dismiss 20 or more employees within a 90-day period (regardless of the offer to re-engage).

## Recruitment candidates

In terms of recruitment, if you made it a condition that prospective candidates must be vaccinated to apply for a role within your business, there's the possibility of discrimination claims on a number of fronts.

- Given that the vaccination programme is being rolled out on the basis of age, if you were to say that a vaccination was a condition of employment, then for at least a few months you'd be ruling out younger candidates.
- There's also the issue for those who are recommended not to have the vaccination based on underlying medical conditions.
- The guidance for pregnant people has changed significantly over the last few months. Although currently pregnant people are offered the vaccine along with others in their age group (or before if they have a specific medical condition), many may be reluctant to get vaccinated during their pregnancy.

All of these situations pose quite difficult considerations for a manager to decide as to whether or not that would be an acceptable reason not to have the vaccine.



## IMPORTANT

Before taking any kind of drastic action outlined on this page, it's essential that you take legal advice from an Employment Law expert. If you'd like to work with our team when it comes to implementing any kind of policy or change to your contracts, give us a call on **0345 844 1111** to discuss how we can help.



## What does the government say?

There's actually very little by way of government guidance on the issue of employers introducing any kind of vaccination policy. And, as with any other COVID-related issues, the situation tends to move very quickly.

The official stance is that vaccination is not compulsory and will not be made compulsory (with the possible exception of adult care settings discussed below). At the same time, the government recognises that vaccination uptake is critical, especially when it comes to the continued lifting of restrictions.

The Vaccine Minister Nadhim Zahawi has said that "it's up to businesses what they do".

So the message is that the responsibility is on businesses to introduce the policies they believe to be appropriate to their particular circumstances, and ultimately it will be up to Employment Tribunals to decide what is reasonable.

But that doesn't help employers who need to set their stance now, to have to wait potentially years to see what any initial Tribunal rulings decide upon.



## What the Justice Secretary says...

*The government's view is that future contracts and contracts of employment are indeed matters between employers and employees. I think that where such conditions are imposed there needs to be a very clear rationale for them. In a care home, a closed environment where there are vulnerable residents, I would argue there does seem to be an obvious rationale, but I think it will depend very much on each setting and the particular context. That is why I don't think it would be right to say there can be a blanket approach here because we need to go back to the fundamental fact that vaccines are not compulsory here in the UK and I think there is very good reason why we don't do that.*

**- Justice Secretary Robert Buckland**

It's clear that there isn't a lot of support from the government to clearly back up a policy of mandatory vaccinations. So what's important for employers at this stage are the considerations you need to make when consulting on and implementing any kind of policy in the workplace.



## The situation in care

This issue of mandatory vaccinations is a particularly topical one for care service owners. In mid-April the government launched a five-week consultation on a proposal to introduce compulsory vaccination in older adults care settings.

This would mean care providers could only use staff who have received the COVID-19 vaccination 'or those with a legitimate medical exemption' in those settings. They're also consulting on whether to extend this to include other professionals who visit the care home, such as NHS workers providing close personal care to people living in the care home.

The deadline for responding to the consultation was Wednesday 26 May 2021.



## What Health & Safety guidance is there?

Some employers have questioned whether they could justify a compulsory vaccination policy based on an employer's duty to safeguard their employees' Health & Safety.

Earlier this year, in March, IOSH produced their guidance on vaccinations. They recommend:

- ✔ Undertaking a risk assessment
- ✔ If one of the measures identified to control the risks of COVID in the workplace is administration of the vaccine then employers would have to make that available (when that's possible for employers, as it's currently a strictly public sector rollout)

However, it highlights that any employee has the right to refuse the vaccine and if an employee does refuse, the risk assessment must be reviewed to determine whether further control measures are required.

It's clear then, that at this stage, vaccination is still viewed as the last line of defence and should not be the sole protection against COVID in the workplace. That means other Health & Safety control measures are still essential and required. In fact, according to current government guidance, employers would still have to follow all their COVID-secure measures in the workplace even if their entire workforce were vaccinated.







## What to consider when creating a vaccination policy

Probably the most important thing to remember when you're developing a vaccine policy is that, given the changing nature of the situation, what you decide to do now might not reflect the position you're in six months down the line.

The key thing to do here, is to **keep your policies under constant review**, particularly in relation to vaccination, especially while we don't yet have the full picture on how the vaccine affects transmission of the virus.

Here are a few essential considerations to make before you put pen to paper on a vaccination policy:

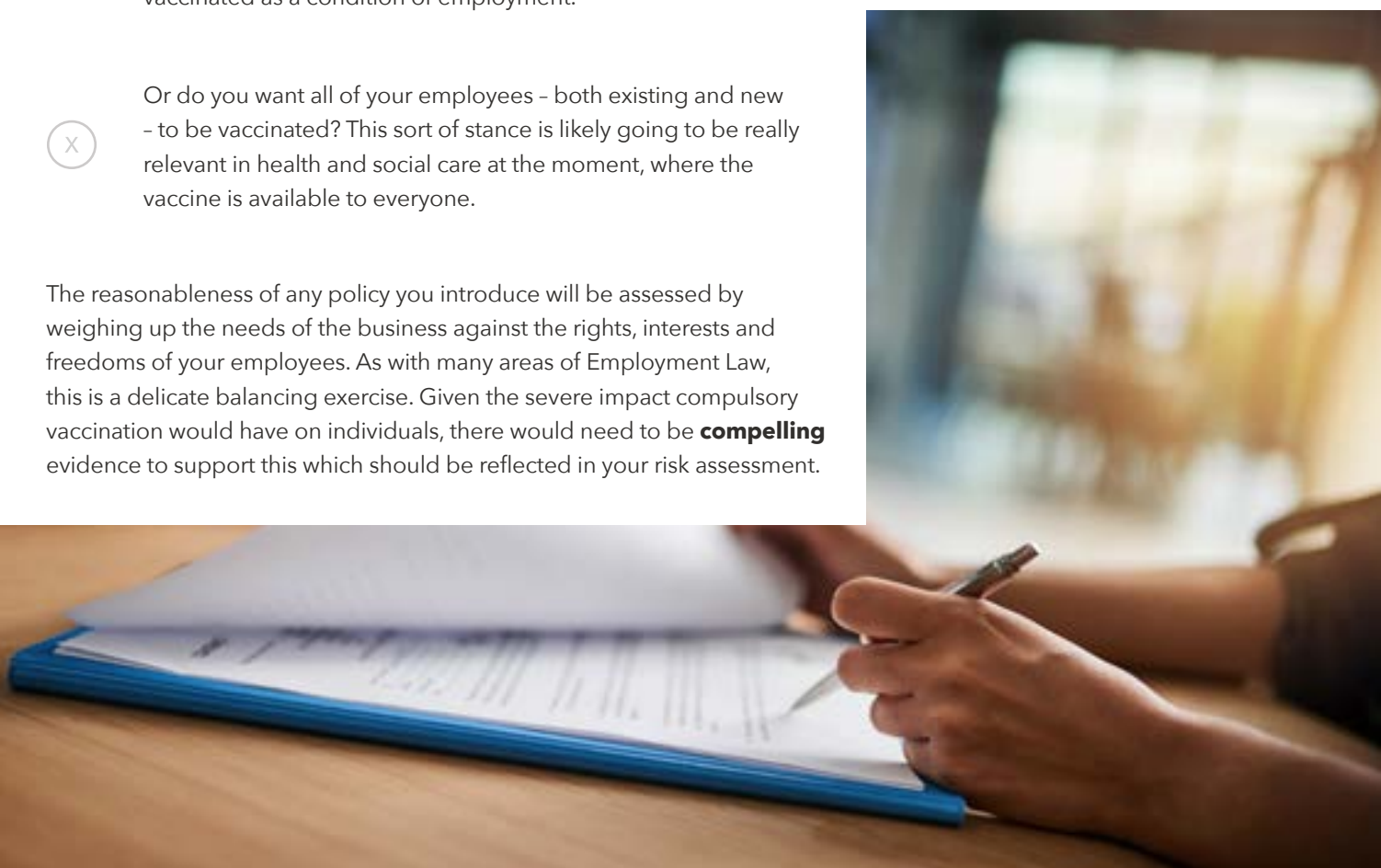
-  What are you trying to achieve with your vaccination policy? Do you want to simply encourage vaccination? Do you want to inform your employees and wait until there's more clinical evidence and the vaccine is available to more people before you take another stance?
-  Do you want to introduce a policy of recording vaccination status, even if not many of your employees have been offered the vaccine yet?
-  Do you want to introduce a recruitment policy on vaccination? This would be where you require job applicants to be vaccinated as a condition of employment.
-  Or do you want all of your employees – both existing and new – to be vaccinated? This sort of stance is likely going to be really relevant in health and social care at the moment, where the vaccine is available to everyone.

The reasonableness of any policy you introduce will be assessed by weighing up the needs of the business against the rights, interests and freedoms of your employees. As with many areas of Employment Law, this is a delicate balancing exercise. Given the severe impact compulsory vaccination would have on individuals, there would need to be **compelling** evidence to support this which should be reflected in your risk assessment.



### IMPORTANT

Whatever policy you decide to introduce should be **clear but very flexible**. Blanket policies do not work with issues like vaccination, because you don't want to find yourself backed into a corner with potential discrimination claims to contend with further down the line.



When trying to weigh up the needs of the business, you need to consider



- (X) What is the level of risk that people are facing within your business? The risks posed to a care business versus a typical office-based workplace are very different.
- (X) How adequate are your existing control measures? Are your COVID-secure measures – which remain a legal obligation to have in place – sufficient to control the risk within your workplace, without making vaccination mandatory?
- (X) How frequently are your people coming into contact with others?
- (X) Can you control exposure risks through other means before introducing a policy?
- (X) Will your vaccination policy only relate to certain roles? While it may be tempting to treat everyone fairly and so introduce the policy across the board, is it really necessary for every role, based on their activities and existing control measures?
- (X) If you're creating a compulsory policy, what will you deem acceptable reasons to refuse? You need to make sure your managers are taking a consistent approach toward decision making in instances of refusal.
- (X) If an employee needs time off to attend a vaccination appointment, will this time be paid or unpaid?
- (X) Will you ask to see proof of a vaccination appointment? Will you ask an employee to return straight to work once they've received their vaccination?
- (X) Have you considered including something in there about employee behaviour around the topic of vaccinations? It can be a divisive issue, how do you plan to make sure your people treat each other with respect, regardless of whether someone agrees to have the vaccine or refuses?

## What are the data protection implication of introducing a vaccination policy?

Collecting data on vaccination status is processing 'special category' under the Data Protection Act 2018 which means you need additional justification for doing so.



## Data Protection Impact Assessment

The Information Commissioners Office (ICO) says employers should carry out a Data Protection Impact Assessment.

This sets out the activity being proposed, (in this case, recording vaccination status), the associated data protection risks, whether the proposed activity is 'necessary and proportionate', the mitigating actions that can be put in place to counter those risks and a plan or confirmation that mitigation has been effective.

Your Data Protection Impact Assessment should be reviewed regularly.

Be clear with your employees on what you're trying to achieve and how collecting this data will help you achieve this. And remember, the reason for doing so must be 'clear and compelling'.

If you do decide to record the vaccination status of your employees, your policy should cover:

- ✓ What personal data will be required
- ✓ What you're going to use that data for
- ✓ Who will the data be shared with - this will be particularly important if you send employees onto client/customer sites and they request information on whether your employee has received their vaccination
- ✓ How long you plan to keep the data
- ✓ What decision you intend on making based on the data
- ✓ And you must also give employees the opportunity to discuss the collection of their data if they have any concerns



# How can Citation help?

Creating and implementing any kind of COVID vaccination policy is a new and complex area of Employment Law, one that has no precedent and requires careful management. After working with many businesses across the country throughout the pandemic, we know how tough it can be to get your meet your obligations while protecting your business.

But you don't have to do that alone. When you partner with us, our team of experts become an extended part of your team. So, we're on hand to make sure that you've got access to all the information you need to keep you compliant from day one.

If you are considering introducing a vaccination policy in your business and you want the help, guidance and advice of our expert team, you can call us on **0345 844 1111** for a chat about your business' needs or you can drop us a line [here](#).



## Citation