

Lateral testing and the workplace: where do you stand?

The Government has now expanded its rapid workplace lateral flow testing programme. From 9 February 2021, employers with more than 50 employees will now be able to test staff for COVID-19.

Previously, testing was only available to organisations with more than 250 staff. Lateral flow tests will be **provided to organisations free of charge until at least 31 March 2021**. Rapid testing in the workplace, using lateral flow tests, aims to help protect both employees and members of the public they come into contact with - either directly or indirectly - to reduce the risk and prevent transmission. It can also provide peace of mind to employees unable to work from home during the global pandemic.

Background

As a starting point, an employer's duties to both employees and members of the public in relation to requiring employees to get tested against COVID-19 falls under UK health and safety legislation. The Health and Safety at Work Act 1974 requires businesses to ensure a safe workplace environment and to take reasonable steps to reduce workplace risks. Employees also have a duty under the same Act to co-operate with their employer so that it can comply with its own obligations.

Organisations will need to build in consideration of a requirement that staff are tested as part of their 'COVID Secure' risk assessment. In carrying out that assessment, a reasonable balance needs to be struck depending on the close contact risk between staff and members of the public that your organisation poses, before any lateral testing policy is produced requiring employees to get tested. That risk assessment will differ from sector to sector.

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Sectors for which vaccination may be a requirement

In terms of employers insisting that their employees take a lateral flow test, much will depend on the nature of the workplace and the type of work being undertaken. It may be argued that it is a reasonable management instruction to request that those operating in the healthcare, food, manufacturing, retail, energy and transport sectors - where employees are coming into close contact with members of the public - take a test. This includes the elderly and those in the vulnerable category, and/or if there are other health and safety considerations. The rationale behind this request is to protect both staff and members of the public.

As we emerge from lockdown, hospitality and education may be other sectors where employers could reasonably argue testing of staff is necessary.

Dealing with employees' objections and refusal to be vaccinated

Organisations in the relevant sectors identified above, where it can be argued there is a compelling health and safety based requirement for testing, will still need to tread carefully and follow fair procedure in dealing with any refusals from their employees to be tested. It may also be argued in those sectors that failure to follow a reasonable management instruction can amount to a substantively fair reason for dismissal, most likely 'for some other substantial reason' (SOSR) under the Employment Rights Act 1996.

Before any such dismissal can take place though, organisations would need to take the following procedural steps as part of ensuring a fair dismissal process including:

- > Giving the employee the opportunity to set out the reasons for their objection;
- > Properly considering those reasons;
- > Giving careful consideration as to whether there are any alternatives to dismissal e.g. relocating an employee's workspace away from others and working from home.

Dismissal ought to be considered as very much a last resort. Failure to follow fair procedures in dealing with employees reluctant or refusing to be tested could amount to an unfair dismissal. Employees feeling pressurised into being tested may also seek to resign and claim constructive dismissal.

A far better approach, designed to avoid such pitfalls, would be for employers to explain why testing is being requested and consult over the reasons as to why the employee is concerned. Listening, addressing concerns and providing reassurance should help to alleviate any worries before they agree to take a test.

NB: Businesses should note also that, whilst generally speaking employees need at least two years' service to claim unfair dismissal, in the case of a dismissal for health and safety reasons (the employee's own) there is no length of service requirement to bring a claim.

Rapid testing and discrimination

In insisting that employees take a test, it is important that employers take an even handed approach requiring testing for staff where a health and safety risk is identified as opposed to singling out one particular group based on age, gender or ethnicity for example so as to avoid the risk of inadvertently triggering a claim for discrimination under the Equality Act 2010.

Final thoughts

It is important that organisations and their HR teams have a clear and comprehensive understanding of the employment law related risks involved in making testing for COVID-19 compulsory in the workplace before implementing COVID-19 prevention policies. This will be the only way to avoid unanticipated claims and potential liabilities.

***Source: 'Lateral testing and the workplace: where do you stand?', by Julian Cox Head of Employment, BLM Law, www.blmlaw.com**

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