

Vaccination and the workplace: where do you stand?

In recent months, with a number of vaccines against COVID-19 now available, this has raised the question as to whether an employer can require its employees to be vaccinated. There are a number of issues, together with potential pitfalls and bear traps for the unwary policyholder. Head of Employment at law firm BLM, Julian Cox, outlines the key steps to consider.

Background

An employer's duties to both employees and members of the public in relation to requiring employees to get vaccinated 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 consider a requirement that staff are vaccinated 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 an organisation poses, before any vaccination policy is produced requiring employees to get vaccinated. That risk assessment will differ from sector to sector.

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Sectors for which vaccination may be a requirement

For those operating in the residential care sector, where staff are highly likely to come into day to day contact with elderly/ vulnerable patients, and the vaccine is already being offered to staff as a priority group, then it may be argued that asking them to take the vaccine amounts to a reasonable management

instruction. The rationale behind this request is to protect both staff and members of the public. Similarly for hairdressers and beauty salons, where close contact with customers is part of the job, such a request may be considered reasonable when the vaccine becomes more freely available.

In other sectors such as financial services, where staff can work from home, it could be said there is less of a justification. Each organisation needs to assess the risk individually.

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 vaccination, will still need to tread carefully and follow fair procedure in dealing with any refusals from their employees to be vaccinated. It may be 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; and
- > 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 vaccinated could amount to an unfair dismissal. Employees feeling pressurised into having the vaccine may also seek to resign and claim constructive dismissal.

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.

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Discrimination considerations

In addition, in dealing with any representations made by employees giving reasons for refusing to take the vaccine, organisations should be particularly mindful of the following categories of employees:

- > Those advised by their GP not to take the vaccine due to underlying health conditions, such as allergies;
- > Those who are pregnant or attempting to get pregnant, for whom the vaccine is not recommended;
- > Those who have objections to taking the vaccine due to religious or philosophical beliefs because of the vaccine components; and
- > Those for whom the vaccine is not available e.g. as at this present time, younger employees under the age of 50 for whom the vaccine may not be available for a number of months.

Given the nature of these objections, the member staff may be protected from discrimination (both direct and indirect), together with harassment and victimisation under the Equality Act 2010 ('the Act') based on disability, religious or philosophical belief or age respectively. Such protection is afforded to workers under the Act, not just employees, and may therefore extend to casual and agency workers. Organisations need to be aware that the Act also affords protection to job candidates.

Faced with such objections, in order to avoid unanticipated discrimination claims and liabilities, it's important that all businesses follow proper procedures in addressing the objections; together with considering practical steps to deal with them, including offering alternative work arrangements once again.

Lateral flow testing

The Government's workplace COVID testing programme is being expanded. As of 9 February 2021, businesses with more than 50 employees are now able to access lateral flow tests. In terms of those requiring employees to take lateral flow tests, the same health and safety based principles and employment law risks will apply as for compulsory vaccination.

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

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