

Employer Considerations Regarding the COVID-19 Vaccine

February 25, 2021

On December 2, 2020, the UK granted emergency use authorization for a COVID-19 vaccine.¹ On December 11, 2020, the CDC followed suit in the United States.² In both countries, the authorizations have raised questions relating to whether employers can require their employees to receive the vaccine.

United States

While Equal Opportunity Employment Commission (the “EEOC”) guidance released on December 16, 2020 answered some of these questions,³ there are still several considerations for employers to take into account when making decisions regarding employees and the COVID-19 vaccine. Set out below is a summary of issues American employers should consider when deciding if, and how, to mandate employee vaccinations and the consequences that could follow from such a decision.

Exemptions to Employee Vaccination Requirements

The EEOC guidance did not prohibit employers from requiring employees to be vaccinated.⁴ However, even if employers are legally permitted to require as a condition of continued service that employees get the COVID-19 vaccine, some employees will qualify for certain statutory exemptions to an employer-mandated vaccine.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

NEW YORK

Jennifer Kennedy Park
+1 212 225 2357
jkpark@cgsh.com

Audry X. Casusol
+1 212 225 2430
acasusol@cgsh.com

Rebecca Prager
+1 212 225 2695
rprager@cgsh.com

LONDON

Melissa Reid
+44 20 7614 2395
mreid@cgsh.com

Benjamin Bolderson
+44 20 7614 2348
bbolderson@cgsh.com

¹ New York Times, *U.K. Approves Pfizer Coronavirus Vaccine, a First in the West* (December 2, 2020), available at <https://www.nytimes.com/2020/12/02/world/europe/pfizer-coronavirus-vaccine-approved-uk.html>.

² Centers for Disease Control and Prevention, *ACIP Evidence to Recommendations for Use of Pfizer-BioNTech COVID-19 Vaccine under an Emergency Use Authorization* (December 11, 2020), available at <https://www.cdc.gov/vaccines/acip/recs/grade/covid-19-pfizer-biontech-ctr.html>.

³ U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (December 16, 2020), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁴ *Supra* n.3.



The Americans with Disabilities Act (ADA)

Under the Americans with Disabilities Act (the “ADA”), employees who have a disability covered by the ADA that prevents them from taking the COVID-19 vaccine can claim an exemption under the statute.⁵ The EEOC guidance stated that employers cannot exclude employees who are exempt from the vaccination requirement under the ADA from the workplace unless (i) the unvaccinated employee would pose a risk of exposure to other employees at the workplace, and (ii) there is no way to provide a reasonable accommodation to eliminate the risk of exposure without causing undue hardship to the employer.⁶ When evaluating whether the unvaccinated employee would pose a threat to other employees in the workplace, employers should conduct an individualized assessment using factors outlined in the guidance.⁷

If an employer cannot provide reasonable accommodations for an employee exempt under the ADA, the employer can lawfully exclude the employee from the workplace.⁸ However, this does not mean the employer can automatically terminate the employee.⁹ Before terminating an employee exempt from vaccination for whom reasonable accommodations cannot be made, employers should also consult local, state, and federal law, as well as EEO laws, to ensure that termination of the employee would not violate the employee’s rights on separate grounds.¹⁰

The good news for employers is that while the ADA limits their ability to require medical examinations for employees and make disability-related inquiries, the guidance states that a COVID-19 vaccine does not constitute a medical examination under the ADA,¹¹ nor

does requiring proof of vaccination constitute a disability-related inquiry.¹²

Title VII

Under Title VII of the Civil Rights Act of 1964, employees whose sincerely held religious beliefs, practices, or observances would be violated through receipt of the vaccine may also be exempt.¹³ Similarly to the ADA, in order to defeat this exemption, an employer must show that accommodating the employee would cause the employer undue hardship; however, undue hardship under Title VII only requires a more-than-*de-minimis* cost to the employer, a much lower standard than under the ADA.¹⁴ Also similarly to the ADA, while an employer can legally exclude an employee who claims an exemption under Title VII from the workplace if the employer cannot provide reasonable accommodations,¹⁵ such a situation does not automatically permit the employer to terminate the employee.¹⁶

Other Issues for Employers Considering Vaccine Mandates

There are other obstacles of which employers considering a vaccine mandate should be aware beyond the ADA and Title VII exemptions.

Local Laws

Employers should consult applicable local and state laws when deciding whether to institute an employee vaccine mandate. In some cases, employers may be hindered by local statutes: Alabama, Kentucky, Massachusetts, North Carolina, Pennsylvania, and Tennessee permit an employee to refuse a workplace-mandated influenza vaccine for any reason as long as the employee was informed of the health

⁵ National Law Review, *Can Employers Mandate Employees to Take a COVID-19 Vaccine?* (November 30, 2020), <https://www.natlawreview.com/article/can-employers-mandate-employees-to-take-covid-19-vaccine>.

⁶ *Supra* n.3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Supra* n.3. However, screening questions that an employee must answer before being vaccinated by the employer or a third party with whom the employer contracts do constitute disability-related inquiries and must be related to the employee’s job and consistent with business necessity.

¹³ *Supra* n.5.

¹⁴ *Id.*

¹⁵ *Supra* n.3.

¹⁶ *Id.*

risks of not receiving the vaccine.¹⁷ On the other hand, local laws may benefit the employer. Illinois prohibits healthcare employees from refusing a workplace-mandated vaccine for general philosophical or moral reasons (like being an anti-vaxxer).¹⁸ California, Texas, New York, and New York City explicitly permit employers to require employee vaccinations, subject to exceptions similar to the federal exceptions based on disability¹⁹ and religion.²⁰

While so far, no states or localities have enacted laws addressing an employer's ability to require employees to receive the COVID-19 vaccine specifically, employers should keep an eye out for the passage of such legislation in their applicable jurisdictions.

The National Labor Relations Act (NLRA) and Unions

If an employer institutes, or attempts to institute, a vaccine mandate for its employees, there is the possibility that the employees may come together to protest the mandate. The National Labor Relations Act (the "NLRA") protects employees' right to engage in "concerted activities" for the purpose of "mutual aid and protection," and a vaccine mandate protest could fall under this category.²¹ If so, the employer could

face legal implications if it were to try to disrupt the protest.²²

In addition, if the employer operates within a unionized industry, there are additional considerations, as mandating a vaccine for employees could be considered a mandatory subject of bargain giving rise to a duty to bargain.²³ Employers in unionized industries should consider existing labor contracts and collective bargaining agreements.²⁴

Workers' Compensation or Tort Claims

If an employer institutes an employee vaccine mandate, and an employee gets sick from the vaccine or suffers from adverse side effects, the employee could bring a workers' compensation claim against their employer²⁵ (and, notably, employers cannot legally indemnify themselves from actual and potential workers' compensation claims through a release or waiver).²⁶ However, whether the employee can successfully do so depends on various factors.

While there are still many questions remaining in regards to the COVID-19 vaccine, the flu shot can serve as a precedent. If an employer requires an

¹⁷ Morgan Lewis, *COVID-19 Vaccines: Considerations for US Employers* (November 9, 2020), available at <https://www.morganlewis.com/pubs/2020/11/covid-19-vaccines-considerations-for-us-employers-cv19-1f>.

¹⁸ *Id.*

¹⁹ In California, under the Fair Employment and Housing Act, and New York, under the New York State Human Rights Law (and New York City's equivalent, New York City Human Rights Law), disability is defined more broadly than under the ADA. *Supra* n.5.

²⁰ SHRM, *New York Lawmaker Wants to Require COVID-19 Vaccine* (December 14, 2020), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-lawmaker-wants-to-require-covid-19-vaccine.aspx>; KCRA, *Q&A: Can California employers require workers to get COVID-19 vaccination* (December 13, 2020), available at <https://www.kcra.com/article/can-employers-require-workers-covid-19-vaccination/34952141>; Los Angeles Times, *Newsletter: Can employers require workers to get flu shots?* (September 29, 2020), available at <https://www.latimes.com/business/newsletter/2020-09-29/flu-shot-mandatory-work-business>; KVUE, *Can employers require employees to get the COVID-19 vaccine*

once approved? (December 4, 2020), available at <https://www.kvue.com/article/news/health/coronavirus/can-employers-require-employees-to-get-the-covid-19-vaccine-once-approved/269-89b23e2b-9004-4a77-a2b8-bf52336d248d>.

²¹ *Supra* n.17.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; Washington Post, *Employers start preparing for the coronavirus vaccine with a question: Can we require it?* (December 2, 2020), available at <https://www.washingtonpost.com/road-to-recovery/2020/12/02/workplace-mandated-coronavirus-vaccine/>.

²⁵ Seyfarth, *Top Ten Considerations for Employers When it Comes to Potential COVID-19 Vaccine Programs* (October 7, 2020), available at <https://www.seyfarth.com/news-insights/top-ten-considerations-for-employers-when-it-comes-to-potential-covid-19-vaccine-programs.html>.

²⁶ Rudman Winchell, *Do employers have liability risks with employee flu shots?*, available at <https://www.rudmanwinchell.com/do-employers-have-liability-risks-with-employee-flu-shots/>.

employee to get the flu shot and the employee suffers from any negative side effect as a result, the employee is likely to have a viable workers' compensation claim. In fact, the employee might still have a claim even if the employer did not require vaccination.²⁷ In determining whether a vaccination is work-related, workers' compensation boards will consider whether the employer benefitted from the vaccination; whether the vaccination was a term, condition, or custom of employment; whether the vaccination occurred at the site of employment; how strongly the employer encouraged vaccination; whether the employee was permitted to get vaccinated during work hours; whether the vaccine was paid for or offered at a discounted rate by the employer; as well as the nature of the illness itself.²⁸ Courts reviewing the decisions of workers' compensation and similar boards often consider the same factors when determining whether a claim is compensable,²⁹ as well as how widely the vaccination program was available (i.e., available only to some employees, all employees, or the general public),³⁰ whether the vaccine was administered by another employee,³¹ and more nebulous factors including whether the injury "flow[ed] as a natural

consequence of employment."³² Of course, the decisions made by boards and reviewing courts are always dependent on applicable state law.³³

In terms of the success of COVID-19-vaccination-based workers' compensation claims, it's not yet clear how courts will react. Some in the legal industry think the claims would be hard to prove in court.³⁴ Courts may be hesitant to punish employers for pushing vaccination, given the unprecedented nature of the pandemic. On the other hand, given drug companies are immune from liability for negative consequences of their vaccines under the Public Readiness and Emergency Preparedness Act (the "PREP" Act),³⁵ and the FDA enjoys sovereign immunity,³⁶ courts might be more willing to provide legal recourse for employees who can't find it elsewhere. The good news for employers is that damages for workers' compensation claims are often capped,³⁷ so any adverse economic consequences may be limited.

In the event that the employer gave the employee the choice of getting vaccinated or losing their job, the employee might be able to bring a tort claim by arguing that the ultimatum was the proximate cause of any vaccine-related side effects.³⁸ However, employer

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Case of Hicks*, 62 Mass. App. Ct. 755, 763-67 (2005) (considering scope of employment, nature of employer's industry, site and timing of vaccination, and benefit to employer); *Monette v. Manatee Mem'l Hosp.*, 579 So. 2d 195, 197 (Fla. Dist. Ct. App. 1991) (considering nature of employee's employment, including recognition of her responsibility as hospital worker to protect patients from flu); *Rolsen v. Walgreen Co.*, 8th Dist. Cuyahoga No. 104431, 2016-Ohio-8304, 2016 WL 7427246, ¶¶ 11-18 (finding injury was not compensable because drugstore employer did not require vaccination generally nor by employer itself, vaccination was akin to personal errand, and vaccination was not within scope of employment); *E.I. Dupont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1052 (Del. Super. Ct.), *aff'd sub nom. E. I. Dupont Denemours & Co. v. Faupel*, 860 A.2d 810 (Del. 2004) (noting employee received vaccination on-site, during working hours, after strong encouragement by employer).

³⁰ *E.I. Dupont*, 859 A.2d at 1052 ("There was no evidence presented by DuPont that the vaccination program was open to the public; instead, the vaccine program was part of a

non-occupational health service that DuPont has historically provided to employees only.").

³¹ *Hicks*, 62 Mass. App. Ct. at 765 (noting vaccination was provided by employer's employee); *E.I. Dupont*, 859 A.2d at 1053 (same).

³² *Monette*, 579 So. 2d at 197.

³³ *Rolsen*, 2016 WL 7427246, ¶ 17. ("We acknowledge that other states have taken a different approach to the question of whether adverse reactions to vaccinations received during working hours are compensable under workers' compensation laws . . . On the other hand, other states take an approach similar to the one adopted in Ohio.").

³⁴ CNBC, *You can't sue Pfizer or Moderna if you have severe Covid vaccine side effects. The government likely won't compensate you for damages either* (December 17, 2020), available at

<https://www.cnbc.com/2020/12/16/covid-vaccine-side-effects-compensation-lawsuit.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Jones Day, *Legal and Practical Considerations for Employers Weighing COVID-19 Vaccination as a Condition*

liability for adverse effects of vaccines has historically been limited to the workers' compensation context.³⁹ Indeed, proving negligence may be difficult given the vaccine has been approved by the FDA and most employees would receive the vaccine through a third-party provider.⁴⁰

In addition, employers covered under the PREP Act providing the vaccine on-site enjoy liability immunity against claims of injury or loss arising out of administration of the vaccine (except for willful misconduct).⁴¹ Such employers must administer the vaccine in accordance with its directions and obtain authorization from the federal government or their state or local health authority for vaccine administration to enjoy immunity, though.⁴²

Non-Legal Repercussions

In addition to the legal consequences employers could face, there are also serious non-legal repercussions that could result from an employee vaccine mandate. Such consequences may be internal, such as decreased employee morale, or external, including consumer backlash and reputational effects.

Recommendations for Employers Who Decide to Require Employee Vaccinations

Employers who choose to require that employees be vaccinated should clearly articulate to employees how vaccination is related to their employment, what the vaccination requirement policies are, and how employees can seek an exemption.⁴³ Such employers

of Continued Employment (December 2020), available at <https://www.jonesday.com/en/insights/2020/12/legal-and-practical-considerations-for-employers-weighing-covid19-vaccination>.

³⁹ SHRM, *COVID-19 Vaccines and Employer Liability* (January 20, 2021), available at

<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/covid-19-vaccines-and-employer-liability.aspx>.

⁴⁰ *Id.*

⁴¹ Department of Health & Human Services, *Notice of Declaration under the Public Readiness and Emergency Preparedness Act for medical countermeasures against COVID-19* (February 4, 2020), available at <https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx>; *supra* n.17.

should also have an accommodation scheme in place in the event employees seek exemptions under the ADA or Title VII.⁴⁴ To reduce the potential for legal repercussions relating to side effects, employers should use third-party providers for vaccine administration. Employers who choose to let employees get vaccinated during work hours; provide on-site vaccination; and pay for employee vaccinations should carefully consider the attendant legal risks, and, before instituting any vaccine mandate, should check to make sure their workers' compensation insurance policy covers side effects and injuries from employer-required vaccinations.⁴⁵ Finally, employers (especially larger, public-facing employers) who choose to institute employee vaccine mandates may want to consider engaging a public relations firm to help both market the mandate to employees without lowering morale and avoid public backlash against the decision.

Encouragement vs. Requirement

Some employers may choose to encourage employees to be vaccinated, rather than require they do so. Such a measure may be more effective than one might think: one survey showed that 61% of employees said they would likely get the vaccine if their employer recommended it.⁴⁶

Employers can create incentives to encourage employees to get vaccinated like incorporating a vaccination program into the employer's own wellness

⁴² *Supra* n.17.

⁴³ Fisher Phillips, *Vaccine Resource Center For Employers*, available at <https://www.fisherphillips.com/vaccine-resource-center#Insights>.

⁴⁴ *Id.*

⁴⁵ *Supra* n.39.

⁴⁶ Nature Medicine, *A global survey of potential acceptance of a COVID-19 vaccine* (October 20, 2020), available at <https://www.nature.com/articles/s41591-020-1124-9>; Washington Post, *Employers start preparing for the coronavirus vaccine with a question: Can we require it?* (December 2, 2020), available at <https://www.washingtonpost.com/road-to-recovery/2020/12/02/workplace-mandated-coronavirus-vaccine/>.

or health initiatives,⁴⁷ making vaccination easily available (like programs where employees can get a flu shot on the employer’s premises),⁴⁸ or using messaging from the top to promote the vaccine (such as circulating a photo or video of the CEO receiving the vaccine).⁴⁹ Employers should also take care to ensure that benefits and workplace opportunities incentivizing vaccination are not denied to individuals who cannot get vaccinated on the basis of grounds qualifying them for an ADA or Title VII exemption.

Risks Accompanying Encouragement

Employers may still face legal consequences even if they encourage employees to be vaccinated rather than mandate that they do so. If an employee is exposed to and becomes sick from COVID-19 at their workplace, and their employer didn’t mandate vaccinations, the employee could potentially bring a tort claim.⁵⁰ However, to successfully bring such a claim, the employee would be required to identify a relevant duty and demonstrate that the employer breached that duty, which could be difficult to do in this context.⁵¹

Conclusion

In summary, American employers may legally require employees to be vaccinated, and employers who choose to do so should be sure to have schemes in place for those who wish to seek exemptions and accommodations; be cognizant of NLRA and union-related implications and the risk of potential workers’ compensation claims; and be prepared with a public

relations strategy to justify the mandate internally and externally. Employers who instead merely encourage employees to get vaccinated rather than requiring them to do so may find the path surprisingly effective, especially if the employer institutes vaccination incentives, and on balance, for some employers, this route may carry fewer legal risks.

United Kingdom

The United Kingdom has adopted a staggered rollout of its “most ambitious vaccination program ever”⁵² through the National Health Service (the “NHS”), having been the first country to give regulatory approval to a COVID-19 vaccine tested in large-scale trials, and having ordered sufficient doses to vaccinate the UK’s entire eligible adult population. Phase One of the rollout started on December 8, 2020, and involves nine priority groups determined on the basis of age, residential setting, occupation, and clinical vulnerability.⁵³ The UK government’s current aim is for everyone in Phase One to have received the necessary two doses of the vaccine by mid-July 2021,⁵⁴ and, so far, the uptake has been extremely high at over ninety percent.⁵⁵ The strategy for Phase Two of the rollout is still being developed, but the UK government aims to have offered all remaining individuals who are aged 18 and above a first dose of the vaccine by July 31, 2021.⁵⁶

Although the vaccine is being offered on a voluntary basis,⁵⁷ the UK government has invested £23 million into a comprehensive Vaccine Uptake Plan,⁵⁸ which

⁴⁷ The Hill, *Employers debate whether to require COVID-19 vaccine for workers* (December 6, 2020), available at <https://thehill.com/business-a-lobbying/528867-employers-debate-whether-to-require-covid-19-vaccine-for-workers>; Washington Post, *Employers start preparing for the coronavirus vaccine with a question: Can we require it?* (December 2, 2020), available at <https://www.washingtonpost.com/road-to-recovery/2020/12/02/workplace-mandated-coronavirus-vaccine/>.

⁴⁸ Employers that provide on-site vaccinations, however, should note that, as discussed above, compensation boards will consider whether an employee was vaccinated on-site when considering workers’ compensation claims.

⁴⁹ *Supra* n.25.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² HM Government, *HM Government COVID-19 Response – Spring 2021* (February 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963491/COVID-19_Response_-_Spring_2021.pdf, at ¶ 36.

⁵³ *Id.* at ¶ 40, table 2.

⁵⁴ *Id.* at ¶ 44.

⁵⁵ *Id.* at ¶ 46.

⁵⁶ *Id.* at ¶ 51.

⁵⁷ In the United Kingdom, there is no statutory power for the government to require vaccination of citizens.

⁵⁸ Department of Health & Social Care, *UK COVID-19 vaccine uptake plan* (February 13, 2021), available at

involves partnerships between the NHS, local authorities, and voluntary, community, and faith sectors to increase uptake. It is not yet possible for individuals or employers to privately purchase a COVID-19 vaccination in the United Kingdom.

As yet, there is no published government guidance on the extent to which UK employers can require employees to be vaccinated (if they are eligible under the NHS rollout or because the employer has, in the future, been able to procure its own supply of the vaccine) as a condition of continued employment, return to the workplace, or new employment. Instead, the UK government minister in charge of the COVID-19 vaccine rollout, Nadhim Zahawi MP, has stated that it is “up to businesses to decide” what their vaccination policies will be.⁵⁹

When asked as part of a televised briefing on February 22, 2021 whether he could ever see vaccination being a condition of employment in NHS and care settings, Professor Chris Whitty, the UK government’s Chief Medical Adviser, expressed the view that accepting the vaccine was a matter of professional responsibility for doctors and other health and social care staff.⁶⁰ He also suggested by way of precedent that surgeons are generally contractually required to be vaccinated against Hepatitis B.⁶¹

In the same briefing, the UK Prime Minister was asked about the possible future role of a “certificate of vaccination” within the UK economy as a way of relaxing other COVID-19 secure measures.⁶² Whilst the Prime Minister acknowledged that there may be role for such a certificate, he announced that there would be a full government review of the issue given

<https://www.gov.uk/government/publications/covid-19-vaccination-uptake-plan/uk-covid-19-vaccine-uptake-plan>.

⁵⁹ The Telegraph, *Vaccine passports could shut young people out of pubs and nightclubs until autumn* (February 18, 2021), available at

<https://www.telegraph.co.uk/news/2021/02/17/vaccine-passports-could-shut-young-people-pubs-nightclubs-autumn/>.

⁶⁰ Evening Standard, *Chris Whitty: Medics and care staff have ‘professional responsibility’ to get Covid vaccine* (February 23, 2021), available at

the “quite complex” ethical and discrimination issues raised by it.⁶³ The government has since published its stated intention to complete such a review (which will also cover certification based on testing data), covering ethical, equalities, privacy, legal, and operational aspects by June 21, 2021.⁶⁴ In the meantime, the UK government’s focus is on public and community measures to boost voluntary take-up; employees continuing to work from home where they can until at least June 21, 2021;⁶⁵ and regular workplace testing in the event that employees are unable to work from home.⁶⁶

Against this background, UK employers who are currently considering introducing a vaccination condition or requirement at work should monitor the outcome of the government’s review. In the meantime, some of the principal legal issues implicated in an employer’s decision as to whether or not to require employee vaccinations are explored below.

Legal Bases for a Vaccination Requirement

There are certain situations in which it may be permissible, and in some cases necessary, for an employer to require employees to receive the COVID-19 vaccine as a condition of new or continued employment or of return to the workplace.

Health and Safety Duties

The Health and Safety at Work Act 1974 (the “HSWA”) imposes a general duty on employers to ensure, so far as is reasonably practicable, the health, safety, and welfare at work of their employees. This includes a requirement to take reasonably practicable

<https://www.standard.co.uk/news/health/chris-whitty-doctors-care-staff-covid-vaccine-responsibility-b920828.html>.

⁶¹ *Id.*

⁶² BBC, *Covid-19: PM promises review on issues of vaccine passports* (February 23, 2021), available at <https://www.bbc.com/news/uk-56169616>.

⁶³ *Id.*

⁶⁴ *Supra* n.52, at ¶¶ 36, 130-131.

⁶⁵ *Id.* at ¶ 145.

⁶⁶ *Id.* at ¶¶ 147; 156, table 3; 158.

steps to maintain a safe working environment. Employers also have a common law duty to take reasonable care for the safety of their employees,⁶⁷ and it is an implied term of UK employment contracts that employers will take reasonable care of the health and safety of employees and provide a reasonably suitable working environment for performance of employees' contractual duties.⁶⁸ Similarly, UK employees have statutory duties under the HSWA: (i) to take reasonable care for the health and safety of themselves and of other persons who may be affected by their acts or omissions at work; and (ii) to cooperate with their employer so far as is necessary to enable it to comply with statutory health and safety duties. In certain circumstances, these parallel duties may translate to an obligation to require employees to be vaccinated as a condition of new or continuing employment or of returning to the workplace, and to an obligation to comply with such a requirement.

In evaluating whether a vaccination condition or requirement is required to reduce workplace risks to acceptable levels, employers should take into account such factors as the extent to which their employees (i) work in contact with vulnerable populations (i.e., workers in nursing homes and assisted living facilities); (ii) are at a materially increased risk of exposure to, or transmission of, the virus in the workplace (i.e., health and social care workers, and potentially also employees in 'close contact' roles or in the aviation industry or prison services); and (iii) are required to travel overseas for work. However, if employees are able to work effectively from home or can work safely in the workplace in full compliance with the government's COVID-19 secure guidelines, requiring employees to be vaccinated as a condition of service may not be a reasonably practicable measure necessary to ensure workplace safety.

The assessment as to whether and how employees can work safely will form part of the employer's statutory

risk assessment under the Management of Health and Safety at Work Regulations 1999. Employers should factor the vaccine into their COVID-19 risk assessments as a potential additional measure to control the risks associated with contracting the virus at work, taking into consideration factors such as the time at which the vaccine will be available to different employee groups under the NHS rollout and the likely level of take-up by employees in light of medical conditions or protected characteristics.

Employment Contracts

UK employees have an implied (and, often, an express) duty to obey the lawful and reasonable instructions of their employer.⁶⁹ However, whether it is reasonable for an employer to instruct its employees to obtain a vaccine as a condition of new or continued employment or of return to the workplace is likely to be a fact-specific question. Requiring vaccination may not be considered reasonable in a professional services context where employees are capable of working effectively from home, and any attempt to enforce such an instruction through disciplinary action could expose the employer to potential grievances or unfair dismissal claims.

At the other end of the spectrum, it may well be reasonable to instruct an employee working in close contact with vulnerable persons in health and social care settings to be vaccinated. Indeed, the government's COVID-19 guidance for healthcare workers states, "We . . . expect that vaccinated health and care staff will be less likely to pass infection to their friends and family and to the vulnerable people that they care for."⁷⁰ However, there are significant gray areas on the spectrum between frontline health and social care workers and office workers working effectively from home, and it is likely that, in the majority of cases, employers will not be able to rely on

⁶⁷ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

⁶⁸ *Walker v Northumberland County Council* [1995] ICR 702.

⁶⁹ *Ottoman Bank v Chakarian* [1930] AC 277.

⁷⁰ Public Health England, *COVID-19 vaccination: guide for healthcare workers* (January 27, 2021), available at <https://www.gov.uk/government/publications/covid-19-vaccination-guide-for-healthcare-workers/covid-19-vaccination-guide-for-healthcare-workers>.

this duty to lawfully institute vaccination conditions or requirements in the UK.

Alternatively, an employer could, with the employee's consent, seek to amend an employee's employment contract to include an express contractual obligation on the employee to receive the vaccine in certain circumstances, such as before undertaking business travel. In the event the employee did not consent to the contractual change, the employer would have to unilaterally impose the contractual term in breach of contract or terminate the existing contract and offer re-engagement on new terms. However, either avenue carries significant legal and reputational risks that should be carefully considered, especially taking account of the potential human rights and discrimination issues discussed below.

Taking Action Against an Employee who Refuses Vaccination

In the event that an employer sought to introduce a vaccination condition or requirement on HSWA-related or contractual grounds, and an employee refuses to be vaccinated, an employer could consider subjecting the employee to a disciplinary process which may lead to disciplinary action including, ultimately, dismissal. Of course, where formal action is warranted, what action is reasonable will depend on the circumstances of the particular case, and the usual principles of substantive and procedural fairness would apply.

Alternatively, employers could consider making accommodations for such employees. Such accommodations could include temporarily reassigning the employee to a workplace, work station, or role with a lower risk of exposure and transmission; permitting the employee to work (or to continue to work) remotely; letting the employee take a leave of absence; or providing regular COVID-19 testing.

⁷¹ *Id.*; Public Health England, *COVID-19 vaccination: a guide for women of childbearing age, pregnant or breastfeeding* (January 28, 2021), available at [https://www.gov.uk/government/publications/covid-19-](https://www.gov.uk/government/publications/covid-19-vaccination-women-of-childbearing-age-currently-pregnant-planning-a-pregnancy-or-breastfeeding/covid-19-vaccination-a-guide-for-women-of-childbearing-age-pregnant-planning-a-pregnancy-or-breastfeeding)

Equality and Human Rights Issues

A blanket vaccination condition or requirement with detrimental consequences for non-complying employees is likely to give rise to discrimination concerns under the Equality Act 2010, and human rights concerns under Article 8 of the European Convention on Human Rights (the "ECHR").

Equality Act 2010

Even if an employer could establish a valid legal basis for the introduction of a vaccination condition or requirement (or, alternatively, it introduced benefits, incentives or opportunities tied to receipt of the vaccine as a way of boosting voluntary uptake), not everyone can safely receive the vaccine, and some employees may be strongly opposed to the vaccine for non-medical reasons.

Treating such employees less favorably than a comparator employee by reason of the fact that he or she has not been vaccinated because of a "protected characteristic" is likely to constitute direct discrimination under the Equality Act 2010, whilst indirect discrimination claims could be raised against an employer if benefits, incentives or opportunities for vaccinated employees were made available to all but they put individuals with protected characteristics at a particular disadvantage as compared to others. For example, if an employee suffers from a medical condition putting him or her in the category of persons for whom vaccination is not recommended, any resulting adverse consequences could constitute disability discrimination.

UK government guidance also currently does not recommend that low-risk pregnant women should receive the vaccine,⁷¹ and employers should take this into account as well to avoid pregnancy or sex discrimination claims.

As mentioned above, the UK's vaccine rollout program is currently based largely on age and clinical

[vaccination-women-of-childbearing-age-currently-pregnant-planning-a-pregnancy-or-breastfeeding/covid-19-vaccination-a-guide-for-women-of-childbearing-age-pregnant-planning-a-pregnancy-or-breastfeeding](https://www.gov.uk/government/publications/covid-19-vaccination-women-of-childbearing-age-currently-pregnant-planning-a-pregnancy-or-breastfeeding/covid-19-vaccination-a-guide-for-women-of-childbearing-age-pregnant-planning-a-pregnancy-or-breastfeeding).

vulnerability. Generally speaking, older workers are being offered the vaccine in preference to younger workers, and mandating vaccination when younger employees have not yet been offered the vaccine could constitute age discrimination.

It is also possible that individuals who refuse to be vaccinated may be protected on grounds of their religion or belief under the Equality Act 2010. For example, there are a small number of religious groups that disapprove of vaccinations, while other groups, such as vegans, may disapprove of the vaccine because animal products have been used in its production.

Human Rights

Article 8(1) ECHR provides protection for an individual's private and family life and includes the right to dignity, personal autonomy, and physical and psychological integrity. It has been suggested that a compulsory vaccination policy could constitute an interference with the right to private life protected by Article 8(1) ECHR for people who would refuse vaccination given the choice.⁷² However, Article 8(1) ECHR is a qualified right and interference with an individual's private life may be justified to the extent that the interference is in accordance with the law and necessary in a democratic society in pursuit of the legitimate aims listed under Article 8(2), which include public safety or the economic well-being of the country, the protection of health or morals, and the protection of the rights and freedoms of others. Whether a vaccination condition or requirement is a necessary and proportionate means of achieving these legitimate aims requires fact-specific examination and raises the prospect of employee claims against employers carrying out public functions.

⁷² Drs. Lisa Forsberg, Isra Black, Thomas Douglas, and Jonathan Pugh, *Compulsory vaccination for Covid-19 and human rights law* (July 22, 2020), available at <https://committees.parliament.uk/writtenevidence/9253/pdf/>.

⁷³ Health and Safety (Consultation with Employees) Regulations 1996; Safety Representatives and Safety Committees Regulations 1977.

Other Legal Considerations

Collective Issues

Employers have a statutory duty⁷³ to consult in good time with their employees or any recognized trade union on a variety of workplace health and safety matters, including the introduction of any measure which may substantially affect their health and safety at work. This obligation is very likely to be triggered by a proposal to introduce a vaccination condition or requirement at work. Consultation requires the provision of information, as well as listening to employees and taking account of what they say before making a health and safety decision.⁷⁴ Failure to comply with this statutory duty constitutes an offense, and could also lead to workplace disputes or industrial action in the case of a unionized workforce.

Similarly, changing terms and conditions of employment to make receipt of a COVID-19 vaccine a condition of continued or new employment or return to the workplace may result in obligations to collectively bargain where trade unions are recognized. Though UK trade unions have generally refrained from publicly expressing their views on workplace vaccination requirements, the Trade Union Congress has said that “unions should ensure that nobody feels forced to have a vaccine, nor should it be used as part of staff contracts or linked to pay.”⁷⁵ The introduction of any such measures in an organization with collective representation should be handled with particular sensitivity.

If, after consultation, an employer proceeds with implementing a vaccination requirement, the employer should clearly outline in a written COVID-19 vaccination policy⁷⁶ (i) the reasons for such a mandate

⁷⁴ Health and Safety Executive, *Consulting Employees on Health and Safety; A brief guide to the law* (2013), available at <https://www.hse.gov.uk/pubns/indg232.pdf>.

⁷⁵ Trade Union Congress, *Covid-19 Coronavirus - Guidance for unions* (January 4, 2021), available at <https://www.tuc.org.uk/resource/covid-19-coronavirus-guidance-unions-updated-04-jan-2021>.

⁷⁶ Acas, *Working Safely During the Coronavirus: Getting the Coronavirus Vaccine for Work*, available at

and why it is necessary instead of relying on less-intrusive measures, tested against the reasonable practicality standard under the HSWA and taking into account on a case-by-case basis the type of work an employee is engaged in and the associated risks to themselves and others; and (ii) procedures for employees to obtain an exception from such a mandate for medical reasons or other reasons relating to their protected characteristics such as religion.

Data Protection Issues

For a compulsory vaccination policy to be effective, employees would need to disclose to their employer whether they have had the COVID-19 vaccination, as well as any protected characteristics or other reasons justifying their refusal to be vaccinated. Measures taken in response to COVID-19 involving the processing of personal data, including health data, must be necessary and proportionate and processed in compliance with the General Data Protection Regulation (the “GDPR”) and the Data Protection Act 2018 (the “DPA”), as each is interpreted and informed by guidance or under the directions of public health authorities or other relevant authorities.

The Information Commission’s Office, the UK data protection regulator, has not yet issued any specific guidance on the collection, processing, or retention by employers of personal data related to vaccinations. However, to the extent it is permissible to request the data from an employment law and occupational health and safety perspective, and the approach taken is reasonable, fair, and proportionate to the circumstances, English data protection law should not stand to prevent an employer from requiring employees to confirm whether they have had the vaccination, although general data protection principles under the GDPR must be applied. This broadly involves (but is not limited to) (i) minimizing the data collected to that which is necessary; (ii) providing GDPR-compliant information about data processing to employees in advance or at the time of data collection (i.e., via an employee privacy notice);

(iii) ensuring any data collected is stored securely and retained only for as long (in identifiable form) as is necessary to achieve the purpose (i.e., for as long as there is still a risk of infection or until the entire workforce is vaccinated); and (iv) having in place appropriate data protection policy documentation as required by the DPA.

Requirement vs. Encouragement

Given the various legal issues outlined above and in the absence of clear government support for vaccination certificates or requirements at the present time, employers might choose to encourage employees to take up their opportunity for a free NHS vaccine (or, once it is available privately, an employer-funded vaccine) rather than require, or even incentivize, them to do so.

A UK employer can encourage vaccination uptake in the same ways that an American employer can, including by incorporating a private vaccination (once available) into the employer’s health and wellness benefits and instituting top-down corporate campaigns in which positive messaging regarding vaccination comes from within the organization. Employers can also encourage vaccination uptake by making accurate medical information about the vaccine available to employees and seeking support from employee representatives.

What if an Employer Does Nothing?

In light of the statutory and common law health and safety duties imposed on employers, could UK employers who take *no* positive steps with respect to the COVID-19 vaccine potentially face an enforcement action under health and safety legislation, which could lead to criminal prosecution? With respect to a failure to implement an employee vaccination condition or requirement, the risk of facing an enforcement action seems extremely small given the complex equality, human rights, and other legal issues involved. However, Prof. Whitty’s comments around professional responsibilities, described above,

<https://www.acas.org.uk/working-safely-coronavirus/getting-the-coronavirus-vaccine-for-work>.

may be food for thought for employers in the health and social care sector. Notably, the situation would be different if an employer (perhaps in accordance with its own religious beliefs) were to actively discourage employees from receiving the vaccine, impose barriers or restrictions on doing so (such as not allowing reasonable time off work to attend an appointment), or subject employees who received the vaccine to punitive measures or dismissal.

Conclusion

In certain limited circumstances, it may well be lawful for certain UK employers to introduce a vaccination condition or requirement in connection with continued employment, returning to the workplace, or the commencement of new employment. Indeed, UK employers should consider whether they may even have a duty to do so in order to comply with their health and safety duties and any relevant professional obligations. Prior to introducing any such requirement, the equality, human rights, data protection, and collective issues mentioned above should be fully considered.

However, this course of action may not be justifiable under the law for the vast majority of UK employers at the present time, pending the UK government's detailed review of the issue in the coming months. Employers without legal basis to require employees to be vaccinated can instead encourage employees to take up their free NHS vaccine when it is offered to them (or, once it is available privately, offer an employer-funded vaccine), and monitor future developments over the coming months.

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