

Citation



# Vaccination:

## Key HR considerations for employers

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# COVID-19 vaccination: key HR considerations for employers

We are now seeing a shift to a new 'normal', where the vaccine programme and milder Omicron variant has allowed the lifting of COVID restrictions. However, there still remains many questions for employers, particularly in the construction sector.

With the removal of compulsory vaccinations in care homes/NHS and the lifting of restrictions, there are far less businesses looking to enforce any kind of compulsory vaccination policy. However, there will still be issues around vaccines that employers must consider. Although the vaccination programme is very well established, there is very limited guidance available for businesses on this issue and we cannot be sure of the view employment tribunals will take, particularly in terms of drawing the line between necessary and unnecessary infringement on individuals' rights. If in doubt, you should always seek your own independent professional advice.

## Questions covered in this:

- 1** Do I need a vaccine policy?
- 2** Can I ask my employees if they have been vaccinated?
- 3** Can I keep a record of whether my employees have been vaccinated?
- 4** Can I suggest to my employees that they should be vaccinated?
- 5** Can I require any job applicants to declare whether they've been vaccinated or not?

Please Note: All information is correct at time of writing on 31 March 2022. We do our very best to make sure our information is as up to date as possible, but we'd encourage you to check the relevant government website for updates as they happen.



# 1. Do I need a vaccine policy?

If you are going to make any decisions regarding your employees based on vaccinations, you should have a vaccine policy to ensure consistency and a level playing field for all employees.

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 in six months' time.

The key thing is to keep your policies under constant review, particularly in relation to vaccination. Indeed, this is perfectly illustrated by considering the differences in the English restrictions and legislation between November 2021 and March 2022.

**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 introduce a policy of recording vaccination status? If so, what is the business need to process this information? The Information Commissioner's Office have made it clear that recording this information 'just in case' is not an acceptable reason for processing vaccination information which, as special category data, is subject to additional protections.
- ✔ If you previously had in place a compulsory vaccination policy that required new recruits or even existing employees to be vaccinated, this may be even more difficult to justify going forward, especially with the removal of compulsory vaccinations in the care sector/NHS and the lifting of restrictions generally.

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. You should also bear in mind that government guidance has not identified vaccination as a requirement of providing a safe working environment and employers should risk assess the risk of transmission, regardless of whether employees have been vaccinated.

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

- ✔ What is the level of risk that people are facing within your business? The risks posed to a construction business versus a typical office-based workplace are very different.
- ✔ How adequate are your existing control measures? Are your Health & Safety measures - including measures to manage COVID risks - sufficient to control the risk within your workplace?
- ✔ How frequently are your people coming into contact with others?
- ✔ Can you control exposure risks through other means before introducing a policy?
- ✔ Will your vaccination policy only relate to certain roles? While it may be tempting to treat everyone consistently and so introduce the policy across the board, is it really necessary for every role, based on their activities and existing control measures?
- ✔ Do any of your clients have a requirement that workers supplied are vaccinated?
- ✔ If an employee needs time off to attend a vaccination appointment, will this time be paid or unpaid?
- ✔ 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?
- ✔ Have you considered including something about employee behaviour around the topic of vaccinations? It can be a divisive issue, so, how do you plan to make sure your people treat each other with respect, regardless of their views on vaccination?

Whichever 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.



## 2. Can I ask my employees if they have been vaccinated?

The first question to ask yourself is why you need this information and what will you do with it? If you want to record it just in case it may be useful some day, this would be very difficult to justify from both an employment law and data protection perspective.

If it does seem to be fair to ask, but an employee objects and disciplinary action is taken, the strength of your defence relies on how robustly you can justify requiring the employee to reveal their vaccination status.

Employers might find it helpful to have a discussion with the individual about their concerns for not wanting to disclose their status e.g. if they are worried about data protection.

You should also be mindful of private concerns such as underlying medical conditions.

Ultimately, this is less onerous than a policy requiring vaccination but it is still necessary to weigh up the rights and impact on the individual against the needs of the business, as well as ensuring staff are treated consistently.

It could also be a reasonable question if an employer's third party client has required assurance that the staff they are sending onto their site have been fully vaccinated. However, it must be remembered that vaccine status is sensitive personal data, so it is important to confirm to the employees what the employer is doing with the information and who it will be disclosed to.

## 3. Can I keep a record of whether my employees have been vaccinated?

Collecting information on vaccination status is processing 'special category data' under the Data Protection Act 2018, which means you need additional justification for doing so - it must be 'clear and compelling'.

Be clear with your employees on what you're trying to achieve and how collecting this data will help you achieve this.

**If you do decide to record the vaccination status of your employees, you should have a clear policy which covers:**

- ✔ What personal data will be collected
- ✔ 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 vaccinations
- ✔ How long you plan to keep the data
- ✔ What decisions 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

## 4. Can I introduce policies to encourage or require my employees to be vaccinated?

Education and encouragement are a far better approach for ensuring high uptake than attempting to make vaccination a mandatory requirement.

Some employers have considered a policy to reward employees for having had a vaccine, for example, additional holiday or a one-off payment.

These policies arguably set the wrong tone, as employees do have a legal right to refuse the vaccine. They could even be deemed to be discriminatory as vaccine hesitancy is seen to a higher degree in certain religious and ethnic groups. There is also a sizeable proportion of younger people who don't want to be vaccinated. This includes some younger women who say they don't want to take any risk with fertility/pregnancy - albeit the official NHS advice is that it is safe (and very much recommended) if pregnant (with a preference to use the Pfizer/BioNTech or Moderna vaccines) and doesn't affect fertility/chances of conceiving.

Such a policy would probably not be engaging for the workforce as a whole. It may therefore be better to encourage vaccination through paid time off to get vaccinated and full pay for sick days if they suffer vaccine side effects.

Vaccination policies pose risks that either the policy itself is unreasonable or the enforcement of it in relation to a particular employee is unreasonable. If employees have over 2 years service, imposing this requirement could lead to potential claims for constructive or ordinary unfair dismissal. There is also a risk of potential discrimination claims such as from pregnant and younger employees, objections on the grounds of religion or belief, or serious underlying medical conditions.

Given the government has not advised that vaccination is a necessary requirement to establishing a COVID safe work environment, a compulsory policy would have to be based on a robust risk assessment which has identified that vaccination is a necessary control which cannot be achieved through alternative measures. If you wish to introduce such a policy, it is strongly recommended that you take legal advice. Any policy you adopt should be clear about exemptions to the requirement to be vaccinated.

The justification for such a policy has significantly lessened with the lifting of restrictions, high take-up overall of the vaccines and the milder variants.

## 5. Can I require any job applicants to declare whether they've been vaccinated or not during their job interview or before applying for a role?

In terms of recruitment, if you make 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 such as disability, pregnancy, religion or belief and age.

To give yourself the best chance of successfully defending these claims it is important to:

- ✓ Have a clear rationale for introducing this policy. This could be based on the fact that it has been identified as a necessary control in a risk. However, again this will be harder to justify now than it was previously.

- ✓ Make it clear that the requirement will not apply to those who are medically exempt from COVID vaccination. The government have launched a scheme whereby those who are medically exempt can be granted formal medical exemption status. Time-limited exemptions are also available if the reason the individual should not be vaccinated is temporary. This time-limited exemption is also available to pregnant individuals if they wish to take this option (they can also demonstrate exemption through production of their MAT B1). In the case of pregnancy, the temporary exemption will expire 16 weeks after the birth of the baby.

## Support and guidance available to Build UK members

Citation is a Partner of Build UK and operates the Build UK HR and Health & Safety Helpline. To access this helpline, please phone Citation on **0345 844 4848** and quote '**Build UK - Advice Card Number 95730**'.

If you'd like to chat about how Citation can additionally help with the HR and Health & Safety side of your business, just give them a call on **0345 844 1111** and they'll get right back to you. Please also mention that you are a Build UK member to receive preferential rates'.

