

COVID-19

Vaccination: Key HR considerations for employers

Produced by the HR and Employment Law experts of Citation in partnership with Build UK, the leading representative organisation for the UK construction industry.



COVID-19 vaccination: key HR considerations for employers

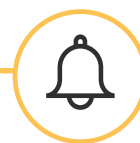
The rollout of the COVID-19 vaccine has provided a light at the end of the tunnel for many businesses, bringing with it the promise of a return to normality. However, there still remains many questions for employers, particularly in the construction sector.

Citation has explored some of those key questions that businesses need to consider before they create and implement any kind of vaccination policy for staff. However, it is still early days and there is limited guidance available so we cannot be sure of the view employment tribunals will take, particularly in terms of drawing the line between necessary and unnecessary infringement on an individual's right. If in doubt, you should always seek your own independent professional advice.

Questions covered in this guidance:

- 1 Do I need a vaccination 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?
- 6 How can I prove that an employee is exempt from self-isolation if they've been vaccinated?
- 7 How should I deal with employees who are required to quarantine after travelling abroad?

Please Note: All information is correct at time of writing on 16 August 2021. 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.



NEED HELP WITH YOUR CONTRACTS?

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 us a call on **0345 844 1111** and we'll get right back to you. Please also mention that you are a Build UK member to receive preferential rates.

Do I need a vaccination policy?

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

Probably the most important thing to remember when you're developing a vaccination 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 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 encourage vaccination? Do you want to simply 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?
- ✔ 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?

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.

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-19 risks – sufficient to control the risk within your workplace, without making vaccination mandatory?
- ✔ 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 fairly and so introduce the policy across the board, is it really necessary for every role, based on their activities and existing control measures?
- ✔ 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.
- ✔ 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 in your policy 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?

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.



Can I ask my employees if they have been vaccinated?

With the vaccine rollout still in progress, there is little guidance on this, and we cannot be sure where employment tribunals will draw the line between necessary and unnecessary infringement on the individual's right.

Employees are under no medical obligation, and the government isn't making it compulsory for employees to disclose their vaccination status (with the exceptions of specific roles/sectors, such as those in primary care).

It is a fair question to ask, but where an employee objects and action is taken, the employer will have to justify the need for requiring them 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 and to chat through their concerns, e.g. if they have data protection concerns.

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

Ultimately, this is less onerous than a vaccination policy but still required to find a balance between the rights and impact on the individual against the needs of the business, as well as a business ensuring consistency in how they treat staff.

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

Collecting data 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 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

Can I suggest to my employees that they should be vaccinated?

Education and encouragement are a far better approach for ensuring high uptake than attempting to make vaccinations mandatory (though there may be some roles that an employer cannot undertake without getting a vaccine).

A vaccination policy poses risks that either the policy itself is unreasonable or the enforcement of it in relation to a particular employee is unreasonable.

There is also a risk of potential discrimination claims such as from pregnant employees, objections on the grounds of religion or belief, or serious underlying medical conditions.

Some employers have considered a policy to reward employees for having had a vaccine, for example, additional holiday or a one-off payment. Others have looked at no longer paying full sick pay for self-isolation after a close contact, as was their policy, as this would not be applicable to fully vaccinated people after 16 August.

These policies arguably set the wrong tone, as employees do have a legal right to refuse the vaccine. Some younger people don't want to be vaccinated.

There could certainly be a discrimination risk with such a policy. Employers also need to remember that younger members of staff may not have had a chance to be double vaccinated, as any that have an underlying health condition will have been prioritised, so they shouldn't lose out on any benefit/pay for this reason (e.g. from this year's holiday year). Further, such a policy would probably require employers to try to label what is a 'fair' reason for not having had the vaccine - e.g. allergy.

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

If you are thinking of making vaccine mandatory, ACAS have given some brief guidance on that while employers cannot force an employee to have a vaccine, they could require it as part of their role. They have used the example of someone who must frequently travel abroad, and those countries require evidence of vaccination. Again, there should be a written policy in place as highlighted in question 1.

Can I require any job applicants to declare whether they've been vaccinated or not?

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 vaccination was a condition of employment, then for at least a few months, you may 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.

How can I prove that an employee is exempt from self-isolation if they've been vaccinated

The key question is what the business is going to do with that information and how it would affect what they are currently doing:

If it is just for planning purposes, e.g. to get an idea on how many employees may still need to self isolate post 16 August if they have close contact, we do not believe this is a reasonable reason. Just because someone doesn't have to self isolate does not give any guarantee that they will be in work because (e.g.) they could actually get COVID-19, and it wouldn't result in the business doing anything differently.

It would be reasonable to ask the question if (post 16 August) the employer knew specifically that the employee had come into close contact with someone with COVID-19, to the extent that they would normally need to isolate. Therefore, for example, if there was a COVID-19 case in the office, then it would be reasonable to ask the question to ascertain whether the close contact employee needed to self isolate. However, if the employee had had a close contact in the community, but knew they didn't need to self isolate because they were double jabbed, then it may be that the employer wouldn't even find out that they had been in close contact and so this would not result in them asking the question.

It would also be reasonable to ask if this is appropriate as part of the risk assessment, and new CIPD guidance recommends that risk assessments should take vaccines into account.

It could also be a reasonable question if an employer's third party client has asked for assurance that the staff they are sending 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.



How should I deal with annual leave requests where the employee would be required to quarantine after travelling abroad if they've had the vaccine?

The best approach is to make sure employees are aware of the potential implications of travelling abroad – particularly the fact that quarantine periods would be unpaid.

If the business wants to introduce a policy on employee's travel abroad – either instructing employees not to do so or to only do so with their manager's prior written authority, this will have to be communicated clearly to all employees.

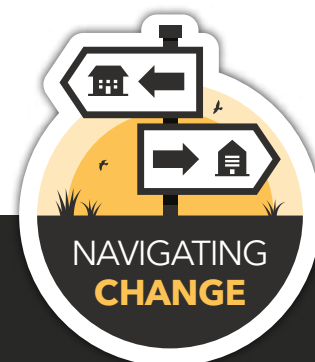
However, there would have to be excellent business reasons to justify this approach as usually it is entirely up to employees how they use their holidays. Even requiring employees to get written consent before booking is fraught with the risk that managers will handle these decisions inconsistently, potentially giving rise to allegations of discrimination or unfairness.

It would be reasonable to ask employees to inform you if they have booked travel abroad, and where, as this information is necessary to understand the potential impact of quarantine on the business if the employee is unable to work from home.

Travel related periods of self-isolation should not be treated as unauthorised absence. Where quarantine is necessary, employees are under a legal obligation to comply and therefore it would be entirely inappropriate for the employer to require an employee to come into work during this period (they can continue to work from home where this is possible).

Finally, businesses have asked if an employee flags to their employer that they're travelling to an amber country post 19 July, is it justifiable to ask them whether they have been double vaccinated – i.e. to know whether they are going to be off for another 10 days once they're back.

It's reasonable to have a policy that employees must inform the employer if they're going abroad so that they can take any quarantine into account in terms of capacity/granting other leave requests etc. An employer can justify this question, although they should flag in advance that it is going to be asking it. An employer can also justify recording the answer to prove why they allowed the employee back into the workplace, although they should only be using this information for the purposes of the holiday rota.



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 us a call on **0345 844 1111** and we'll get right back to you. Please also mention that you are a Build UK member to receive preferential rates'.