

Can employees refuse to have the COVID-19 vaccination?

COVID-19 vaccinations have begun and as more of the working population becomes eligible, the question of whether an employee can refuse their employer's request to be vaccinated has been raised.

It might be thought that getting protected against COVID-19 would be a desirable prospect but there are those for whom the prospect of vaccinations is genuinely concerning, for a variety of reasons. There is therefore a chance that employers will find they have employees who refuse a request to have the vaccination.

What the law says

There is currently no legal right for an employer to insist that any current or new employee receives a vaccination for COVID-19, even where they are working in a key sector such as the NHS or social care. Under the Public Health (Control of Disease) Act 1984, a vaccination is not mandatory.

Under the Health and Safety at Work Act and the Control of Substances Hazardous to Health Regulations, employers have a responsibility to protect the health and wellbeing of their employees (Section 2), and the employee has a duty to co-operate with their employer's efforts to do so (Section 7). Where an employee might come into contact with a biological agent causing ill health, such as COVID-19, the employer must have effective control measures in place. These can include offering a vaccination programme to employees, but can also include other measures such as PPE, regular testing, handwashing/sanitising, face coverings, social distancing etc.

It is also worth bearing in mind that there have been no employment tribunal cases regarding refusal of an employer's request for an employee to be vaccinated. As cases begin to arise, the legal position may well become clearer. Since this is a new and evolving area of employment law, it is well worth obtaining specialist legal advice on the matter.

Under no circumstances can an employer physically force a vaccination on the employee, as that would amount to an assault.

Recruitment

When making a formal offer of employment, employers may ask in their pre-employment medical questionnaire whether the candidate has had a vaccination, or if they would be willing to have one prior to starting work. If the candidate answered no to either, the offer should not automatically be retracted. Instead, the employer could review how business critical it is for all the workforce to be vaccinated and discuss the candidate's reasons, which may be related to a protected characteristic.

If the employer still wants to retract the job offer, they will need to have a 'proportionate means of achieving a legitimate aim' for doing so; otherwise, they could be taken to an employment tribunal for discrimination on the grounds of that protected characteristic.

Where a job offer is retracted after being accepted, the employer may be liable to pay the employee compensation in the form of the notice pay set out under the contract of employment.

Immunisation policies

Where an employer insists on its workforce being immunised against COVID-19, such as in the health or care sectors, the company will - at the very least - need to have a clear immunisation policy in place, which covers:

- Full explanation of the requirement for the immunisation
- The employer's and employees' responsibilities under the policy
- To whom it applies
- How it will be applied
- How data will be stored and processed, in line with GDPR and Data Protection.
- Terms of pay for any period of suspension from duty intended to prevent the spread of infection

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- Consequences for non-compliance with the policy – being mindful of the discussions within this article around this area.

However, even with such a policy, an employer still does not have the right to automatically dismiss someone if they decline to have a vaccination.

Workplace communications

A clear communication strategy should be in place, including a platform for employees to raise any questions or concerns they may have.

Where the organisation has a recognised trade union and/or a collective agreement in place with a trade union, it is important that employers collaborate with the union(s) to deliver clear and precise communication to all employees.

This includes consulting with the union before introducing any plans to deliver a vaccination programme, immunisation policy or issuing requests for employees to have a vaccination.

Disciplinary, suspension or dismissal

The employer should not move straight to threats of disciplinary, suspension or even dismissal in situations where an employee refuses to have a vaccination. Instead, they should talk to the employee about their reasons so that they can be clearly identified and understood.

Examples of grounds of refusal could be, but not limited to:

- A fear of medical repercussions, side effects or allergic reactions from having the vaccination
- Medical reasons, such as an employee may be allergic to some of the ingredients in the vaccination.
- A phobia of needles, vaccinations and/or of medical procedures.
- A religious belief - a handful of religions do uphold a theological objection towards immunisation and vaccinations, or to the ingredients of the vaccines.

In all circumstances where suspension occurs, it should be a very last resort and only after the employer has first sought to:

- Understand the employee's reasons for refusal in detail
- Measure the risk posed to employees, workers, contractors, service users etc.

- Investigate what other measures could be taken to reduce the risk, including conducting a risk assessment and implementing any other reasonable adjustments measures to reduce such risks without the requirement for a vaccination.
- Where appropriate, obtain the employee's consent to seek advice from occupational health or their GP.
- Discuss the health & safety risks with the employee, and their duty of care towards themselves and others (where appropriate).

An employer will need to be able to provide tangible evidence that where such action was taken, the period of suspension was:

- As brief as possible
- Ideally on full pay
- There were no other alternatives to suspension, such as placing the employee in a different role temporarily
- A last resort measure taken intended to avoid the spread of the virus, and subsequently protect the health & safety of those in the workplace, where all other options have been exhausted including the use of testing and PPE.

Where the employee refuses to comply with those additional measures without good reason, there may be grounds to proceed to a disciplinary for that refusal, which should be wholly unrelated to the fact they refused to have a vaccination. This assumes that the test of reasonableness has been met, along with ensuring the ACAS Code of Practice and the company disciplinary policy are also followed in full.



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