

The news that a COVID vaccine is on its way has given rise to hope that life will soon return to normal. Vaccinations in the workplace however are relatively uncommon and give rise to a number of tricky issues in the UK.

**Is it a lawful instruction?** | The government has announced that the COVID vaccine will not be mandatory even for frontline workers in the NHS or care sector. Previous statements given by the Prime Minister and the Minister for COVID-19 Vaccine Deployment are that the government will not endorse or approve any mandatory vaccination program implemented by UK employers. Nor does mandatory vaccination form part of the HSE's guidance on how to make the workplace COVID-secure. If there are less intrusive measures to make the workplace COVID-secure (which we think will apply in most cases), a blanket policy of requiring vaccinations before employees can return to the workplace will not be justifiable. Employers who discipline or dismiss employees for non-compliance may face unfair dismissal claims.

This is particularly risky for certain categories of employees (see discrimination risks). There may be some exceptional cases where disciplinary action / unpaid leave may be justifiable, for example, where the employee's role requires them to travel and the host country requires prior vaccination. However, even then, the employer should consider whether the instruction is reasonable in the individual case.

**Discrimination risks** | Employees may have a number of legitimate concerns and objections to the vaccine. These could be based on their medical health, religion or philosophical beliefs. A policy of mandating vaccinations before returning to work will likely amount to indirect discrimination for certain categories of employees unless the employer can objectively justify the requirement.

**Health and safety** | Employers are responsible for ensuring the health and safety of their employees so far as reasonably practicable, and employees have a duty to cooperate in respect of those responsibilities. Offering access to, or information about COVID vaccination as part of a package of COVID-19 protective measures (social distancing, PPE etc.) is likely to satisfy this obligation. In our view, the obligation is unlikely to extend to the requirement to be vaccinated for the reasons explained above.

- **Can employers prevent employees from returning to the workplace if they have not been vaccinated?**  
**Possibly.** Such policy will only be enforceable if it amounts to a "lawful instruction".

<b>LOW/MEDIUM RISK</b>	If the employee can work effectively from home, the risk will be low.*	If the employee cannot work from home but continues to receive their pay and benefits, the risk will also be low as there is generally no right to work in the UK. The exception is where the employee has a contractual right to work, for example, if they need to work to keep their skills up to date and avoid atrophy.*	<b>MEDIUM/HIGH RISK</b>	The risk will increase if the employee is forced to take unpaid/reduced pay leave or faces disciplinary action as a result of not having the vaccine.
------------------------	--	---	-------------------------	---

\*The risk profile will change the longer term the policy is in force.



• **Data protection** | Vaccinations data constitutes special category personal data requiring additional safeguards in place to ensure the data is processed in a fair, lawful and transparent manner. Privacy, accountability and records of processing will need to be updated and storage and retention arrangements reviewed to take into account the particularly sensitive nature of the data that employers may receive when they embark on discussions about vaccination in the workplace.

• **Cost** | Currently, the vaccine is only available in the UK via the NHS on a free of charge basis. If the vaccine becomes commercially available, employers that require employees to be vaccinated will likely have to pay the costs of the vaccine (as it won't be a contractual requirement) and we anticipate that most employers will do, similar to the flu vaccine.

• **Time off for vaccinations** | Where employers require employees to be vaccinated, the time spent in getting vaccinated will likely count as working time for national minimum wage purposes.

• **Employee relations** | The topic of vaccinations is a highly sensitive issue and potentially impacts an individual's fundamental human rights to respect for private life and freedom of thought, belief and religion. Any policy involving mandatory vaccination should be carefully considered from an employee relations perspective and employers should be prepared to consult with their workforce about their reasons for requiring such a policy.

• **Personal injury claims** | Employees who experience side effects or other health issues as a result of complying with the employer's vaccinations requirement may potentially have grounds to bring personal injury claims against their employer although the risks can be reduced by transparent communication of the potential risks and ensuring all available guidance is followed.



**Further information** | As COVID-19 continues to evolve, employers have had to implement fast-paced measures to protect their workforce and business. Stay up to date with the **Baker McKenzie Beyond Covid-19: Resilience, Recovery and Renewal Resource Hub** and please contact your usual London employment partner if you would like a further discussion.