



No job, no job? The legal implications for employers



Can an employer dismiss an employee who refuses to have the vaccine?

Other than the care and health and social care sectors in England, there is no legal requirement to be vaccinated against coronavirus. There may however be some organisations where vaccination will be a requirement for an employee to carry out their role such as if an employee needs to travel to another country which requires vaccination requirements to be met.

Any blanket policy by an employer however, requiring all staff to be vaccinated could be considered unlawful and pose discrimination and health and safety risks.

An employee's contract terms must always be factored in to ensure any alternative option to dismissal has been fully considered. If an employee has refused to be vaccinated and is not medically exempt, care must be taken in relation to each individual employee's reasons for not having the vaccination, whilst being aware of any potential discrimination issues. Employers requiring employees to be vaccinated without their express agreement could amount to repudiatory breach of contract entitling them to claim constructive dismissal.

In sectors where compulsory vaccination is not a legal requirement, an employer cannot force an employee to be vaccinated without their consent. Employers need to be mindful of being exposed to potential unfair dismissal claims if they have not followed a fair process or do not have a justifiable reason for dismissing the employee refusing vaccination. This could be on grounds such as disability age, religion or belief for example. An employment tribunal is unlikely to find a vaccination requirement reasonable unless it is legally required or essential for the employee's role.

Lisa Aitken, employment law solicitor at Moore & Tibbits looks at the legal implications the 'no job, no job' has for employers.

On the 11th November 2021 it became law that anyone who works or volunteers at a Care Quality Commission (CQC) registered provider of accommodation for those requiring nursing or person care in a care home must be fully vaccinated against coronavirus unless they are exempt. The vaccination requirement also applies to people who go inside a care setting such as professionals and tradespeople, hairdressers, beauticians and friends and relatives who enter the indoor setting.

Care homes will need to include the vaccination requirement in any recruitment policies and job adverts and take into consideration any medical exemptions during the recruitment process.

The government has announced that from 1 April 2022, vaccination against coronavirus will also become mandatory for health and social care workers unless they are exempt. This applies to those involved in patient care eg. doctors, nurses, and dentists as well as those who may have contact with patients during the course of their work such as receptionists, porters, cleaners etc.

Review your policies

It is essential for employers to consult with their staff and/or trade union before introducing a company vaccination policy. Employers in the health and care sectors should ensure their policies clearly outline the vaccination requirement for staff and also for those visiting the care home and that entry will not be permitted without evidence of vaccination or a medical exemption.

Can an employer request an employee's vaccine status?

A person's vaccination status is classed as special category data, ie. it is their private health information. An employer's use of this data must be fair, relevant and necessary for a specific purpose to comply with data protection requirements.

In some circumstances, an employer may be able to justify asking an employee their vaccination status if their work means they could pose a risk to a clinically vulnerable individual. The information should not result in any unfair or unjustified treatment of employees and should be kept secure and limited to only those that reasonably need to know the information eg. HR and managers.

Employers need to be mindful of difficult situations which may arise eg. if an employee raises concerns for their health and safety if they believe that a colleague has not been vaccinated. In this situation, personal information relating to another employee should not be disclosed by the employer. An informed risk assessment should take place and the employee's individual concerns should be addressed to ensure they feel adequately protected at work, eg. alternative working areas of reduced contact with others. The vaccination status of employees should not be disclosed to others.

How employers can help

Employers can try and encourage and support their staff to be vaccinated without making it a requirement by various means. This could include:

- Offering staff paid time off to attend the vaccination appointment
- Paying the usual rate of pay where staff are off sick with vaccine related side effects
- Consider an extra day's holiday if double vaccinated.

A safety net for employers Employment Disputes Insurance

With the number of employment claims constantly increasing, we are delighted to be able to offer Employment Disputes Insurance to businesses.

As part of an employment/HR retainer service employers will get:

- | Minimum 9am until 5pm advice line
- | Yearly review of your policies and procedures
- | Yearly review of your employment contracts
- | Protection from any future claim brought against you by a current or former employee as long as you have followed the advice provided by the advice line
- | Legal fees will be covered to defend the claim and may cover any out of court settlements or Tribunal awards subject to certain conditions
- | Provide you with advice and assistance as and when situations arise to help reduce the risk of litigation to your business long term
- | We will become an integral part of the businesses team and get to understand your needs during the retainer period.

If you are interested in how our employment team can help your business or if you have further questions regarding the Disputes Insurance, please contact Lisa Aitken on **01926 491181/07960 469988** or email LisaA@moore-tibbits.co.uk.

Self-employed/Workers/ Employees???

March 2021 saw a landmark Supreme Court decision where Uber drivers are to be classed as 'workers' rather than self-employed contractors. The judgment reinforced the position that a tribunal or court will not be bound by contractual terms if they do not reflect the true nature of the relationship between the parties in practice. This principle could also apply to workers who may in reality be employees.

It is essential that contracts accurately reflect the working relationship in practice. If you engage self-employed individuals or workers, then it is essential contracts are reviewed and updated if necessary to help protect against any future claims for compensation.



Flexible working requests

With more and more employees seeking flexible working, the case of a working mum being awarded over £185,000 by an employment tribunal who found she had been indirectly discriminated against highlights the importance of considering every request carefully.



TOP TIPS FOR EMPLOYERS:

| ENSURE YOUR POLICIES ARE UP-TO-DATE

The pandemic has seen many working practices change and it is imperative your policies are kept up-to-date and relevant. We provide fixed fee packages in relation to contracts, policies and procedures and HR procedures.

| HAVE AN OPEN MIND

Throughout the process, it is imperative to remain objective and considerate to ensure good working relationships with employees. All requests should be considered carefully and the benefits weighed up for the employee and the company against any potential adverse impact. Any decision should not be discriminatory.

| COMPROMISE AND ALTERNATIVES

In some situations, it may not be possible to accommodate a specific request. It is essential that all options are considered that can accommodate the employee request whilst allaying any legitimate business concerns. Eg. the employer may adopt the requested changes on an initial trial period rather than rejecting the request to assess the impact of the changes in reality. Tribunals will favour that you have attempted to be reasonable by offering alternative options. If it is not possible to make any changes, ensure you have one of the legally defined reasons for rejecting the request and the relevant evidence to support this.

For more information on the current laws relating to flexible working requests, please see our website.



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