

COVID-19 Vaccinations: Key Considerations for UK Employers

February 8, 2021

The UK's COVID-19 vaccination rollout is well under way. Many employers are hoping this will facilitate a return to the workplace in 2021 and may be considering whether they can make vaccination of their workforce mandatory. In short, our advice to employers is to encourage and incentivise, rather than require staff to take the vaccine, and make allowances for those unwilling to do so. Penalising those who refuse could lead to discrimination and unfair dismissal claims.

Can an employer instruct workers to be vaccinated?

Employer's Reasonable Instructions

Employers have a legal duty to ensure the health and safety of their workforce so far as reasonably possible. The vaccine should certainly be considered as part of an employer's COVID-19 risk assessment; however, health and safety law does not require an employer to compel workers to be vaccinated.

Instructing staff to take the vaccine may be a "reasonable instruction" in certain circumstances and depending on the employer's sector (e.g., it is likely to be reasonable in the health and social care sector, where vulnerable people are at risk, but less likely in professional services, where it is proven work can be done from home). In most cases, employers will benefit from encouraging workers to take the vaccine and stressing its importance, rather than requiring them to take it, to maintain workforce morale, respect for the employer and (crucially) to avoid potential legal claims.

Can an employer discipline and/or dismiss an employee who refuses to take the vaccine?

Employee's Reasonable Refusal

Employers need to strike a delicate balance between keeping their workplaces, customers and the wider community safe on the one hand and respecting the needs, wishes and liberties of their workers on the other. However, employers should be wary against imposing vaccinations and taking disciplinary action against those who refuse. There are a raft of genuine and reasonable reasons why individuals may not wish or be able to be vaccinated – from disability, faith, religion, belief and needle phobias, to the limited knowledge of potential side effects or simply because they do not want it.

Aside from potential criticism and reputational concerns from a moral and ethical perspective, employers could be exposed to claims for discrimination and/or unfair dismissal, each discussed below, if they impose disciplinary measures on or dismiss employees who refuse the vaccine.

Potential Discrimination Claims

The Equality Act 2010 (EqA) lists nine "**protected characteristics**" which can form the basis for a direct or indirect discrimination claim. Disability, race, religion, belief, age, sex and pregnancy are all protected characteristics that employees could assert to bring a discrimination claim in relation to a mandatory vaccination policy.

“Direct discrimination” may occur if an employer treats a worker less favourably, because of a protected characteristic that worker has, than they do or would treat others in a comparable situation and this causes detriment to the worker. An employer may be able to avoid liability if it has an “objective justification”. Generally, direct discrimination is not justifiable, save that age and disability discrimination can potentially be justified if the employer’s actions were a proportionate means of achieving a legitimate aim.

“Indirect discrimination” may occur if an employer implements a vaccination policy that disadvantages a particular group with a protected characteristic in some way, despite the policy treating everyone equally on the face of it, unless the employer’s actions can be objectively justified as a proportionate means of achieving a legitimate aim. Indirect discrimination applies to all protected characteristics save for pregnancy and maternity.

- **Disability.** Some individuals may be advised not to have the vaccine due to an existing medical condition or allergy, or they may be unable to take it due to a disability. Such individuals may be considered “disabled” for the purpose of the EqA and their choice not to be vaccinated may be “something arising from” that disability. They may be treated less favourably than their colleagues due to their disability should an employer require vaccination and could bring a direct discrimination claim if they suffer detriment as a result. Employers have a duty to make reasonable adjustments for disabled employees.
- **Race and Ethnicity.** Requiring vaccination could disadvantage certain racial groups and lead to indirect discrimination claims. Availability of the vaccine may depend on where an individual lives and, for example, London has a lower rate of vaccination overall, which particularly affects ethnic minority groups. Research also suggests certain communities (e.g., Black, Asian and minority ethnic) are less likely to take up the COVID-19 vaccine e.g. due to government mistrust. An employer could face direct discrimination claims if they require certain racial groups in particular to have the vaccine (e.g., on the basis that the evidence may suggest that the virus is higher risk to them and has worse symptoms).
- **Religion.** Individuals may have concerns that the vaccine goes against their religious beliefs – e.g. Jews, if it contains or requires the use of animal-based products (e.g. pork gelatine); Muslims, if it isn’t Halal; or if they rely on faith healing (as do certain Christian churches). Indirect discrimination claims on the grounds of religion could be brought if a particular religious group is disadvantaged by an employer’s policy or instructions.
- **Belief, ‘Anti-’Vaxxers’ and Vegans.** The Equality Act 2010 defines ‘belief’ as “a philosophical belief that is genuinely held, that is cogent, serious and applies to an important aspect of human life or behaviour”. The belief must also be worthy of respect in a democratic society and not affect other people’s fundamental rights. Whilst unlikely, it is, in theory, possible that a belief against the vaccine could be protected under this definition. Ethical Veganism has been found to be protected and Vegans may disagree with a vaccine due to its ingredients (e.g., pork gelatine) or testing methods (e.g., animal testing). Requiring workers to act in contravention of such a belief may disadvantage them and lead to indirect discrimination claims.
- **Age.** Vaccine rollout in the UK is largely based on age groups – older workers are more likely to be offered it through the National Health Service (NHS), or at least they are likely to be offered it sooner. Younger workers may be directly discriminated against should an employer mandate vaccination of workers when it is not yet available to them.
- **Pregnancy and/or Sex: Direct Discrimination.** There is insufficient evidence to recommend routine use of the COVID-19 vaccines during pregnancy and the current government advice is for pregnant women to consider vaccination where they have underlying conditions putting them at a high risk of complications caused by COVID. If a female in such a position is subjected to unfavourable treatment because she has not been vaccinated, she could claim direct discrimination.

Vaccination policies could potentially be objectively justified as a proportionate means of achieving a legitimate aim. For example, health and safety and maximising safe workplace attendance may be legitimate aims in high-risk sectors. Vaccination policies may be proportionate for achieving those aims, depending on their impact on individuals. For

example, a policy which allows staff to return to the workplace only if they have been vaccinated and leaves others working from home may be justifiable. Whether such a policy is proportionate may vary over time – for example, not making exceptions for those who refuse vaccination may be more difficult if ‘herd immunity’ is established in the UK.

Potential Unfair Dismissal Claims

Faced with a worker’s unreasonable refusal to follow a reasonable instruction, an employer could instigate disciplinary proceedings and ultimately dismiss the worker. To fairly dismiss, an employer must have a fair reason and follow a fair process. If they do not, the dismissed employee could claim unfair dismissal.

Fair reasons may include conduct (i.e., unreasonable failure to follow reasonable instructions) or ‘some other substantial reason’ (SOSR) (e.g., for the employer to comply with health and safety obligations).

The employee should be given an opportunity to set out their reasons for refusing the vaccine. Only an employee who has *unreasonably* refused to comply with an employer’s request can be fairly dismissed. If an employee’s reason relates in any way to a protected characteristic, the employer should take extra care to avoid a discrimination claim – for example, by ensuring those making decisions relating to the individual’s employment are not aware (or reasonably ought not to have known, in the case of disability) of their protected characteristic (unless it is disability in which case reasonable adjustments are required). Ideally, an employer should accommodate all reasons for refusing the vaccine: an employment tribunal is likely to consider the employer’s justifications for making any allowances for other employees when looking at the proportionately of the decision to dismiss. An employer may have difficulties justifying why it has made concessions for some (e.g., pregnant individuals) but not others.

As always, the employer should give careful thought to whether there are any reasonable alternatives to dismissal (e.g., reallocation to a role where non-vaccination would not be problematic or working from home arrangements).

Employer’s should consider that an employee faced with a ‘no job, no job’ scenario could resign and claim constructive unfair dismissal.

Data Protection Issues

Requiring evidence of vaccination and/or reasons for refusal gives rise to significant data protection issues. Employers should:

1. Conduct a data protection impact assessment. Consider the reasons for requiring any data you will collect in relation to vaccines, how to hold it security, who will have access to it, retention periods and what data it is necessary and appropriate to hold.
2. Update privacy policy. Ensure your privacy policy is up to date and complies with applicable laws.
3. Consider whether explicit consent is required to be obtained from employees to process special category data. Personal data revealing an individual’s health and medical records, racial or ethnic origin, religious or philosophical beliefs, are types of “special category” personal data under the EU General Data Protection Regulation (GDPR) and UK data protection legislation. Processing such data (e.g., collecting, storing, using or transferring it) is prohibited unless a specific exception applies, which includes explicit consent from the data subject.

CONTACTS

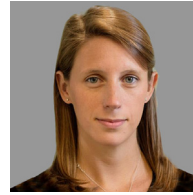
For more information on employment and data privacy concerns, contact your Katten lawyer or any of the following:



Christopher Hitchens
+44 (0) 20 7776 7663
christopher.hitchens@katten.co.uk



Brigitte Weaver
+44 (0) 20 7770 5235
brigitte.weaver@katten.co.uk



Emma Phillpot
+44 (0) 20 7776 7657
emma.phillpot@katten.co.uk

Georgina Vale, a trainee in the Employment practice group, contributed to this advisory.

Katten

katten.com

Paternoster House, 65 St Paul's Churchyard • London EC4M 8AB

+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

Katten Muchin Rosenman UK LLP is a Limited Liability Partnership of Solicitors and Registered Foreign Lawyers registered in England & Wales, regulated by the Law Society.

A list of the members of Katten Muchin Rosenman UK LLP is available for inspection at the registered office. We use the word “partner” to refer to a member of the LLP. Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

Katten Muchin Rosenman UK LLP of England & Wales is associated with Katten Muchin Rosenman LLP, a US Limited Liability Partnership with offices in:

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

2/8/21