Vaccines in the workplace part 2: key practical issues for employers

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Vaccines in the workplace part 2: key practical issues for employers

In the second of two articles examining the hot topic of vaccines in the workplace, we consider how employers who do not require staff to be vaccinated should approach some of the

key practical issues arising out of the COVID-19 vaccination programme.

1. **If we don't mandate vaccination, how should we encourage staff to have the vaccine?**

In our first article on vaccines in the workplace we considered the key legal issues faced by employers who wished to mandate vaccines for staff. You can read that article here. Our conclusion was that for many employers it would not be reasonable to mandate vaccination and it could also be discriminatory. That being the case, we expect many employers to proceed on the basis of strongly encouraging, but not requiring, staff to have the vaccine. This approach will help you discharge your legal duties to minimise risks to staff and third parties in the workplace.

You can support the voluntary uptake of the vaccine in a number of different ways including:

- Consulting with staff to communicate your position about staff vaccination and discover what concerns staff have and what support is needed.
- Introducing a Vaccination Policy which explains that staff are encouraged to have the vaccine and provides signposts to the latest official information about the vaccine.The NHS has produced some useful materials here.
- Holding a Q&A session for staff with a GP or vaccine specialist.
- Allowing staff to take paid time off work to attend vaccine appointments (see below).

2. **Do we have to allow staff paid time off work to be vaccinated?**

There is no legal right to take paid or unpaid time off work to attend routine medical appointments. However, it may be a reasonable adjustment to allow a disabled worker to take time

off to attend a medical appointment related to their disability. This could extend to vaccination appointments for workers who are clinically vulnerable.

If you do not usually allow staff to take time off for medical appointments, you could insist that appointments are made outside of working hours or that lost working time is made up (save for certain disabled staff). However, this approach does not sit well with a policy of strongly encouraging uptake of the vaccine.

Given that staff vaccination is in an employer's interests and only requires two short appointments up to three months apart, we would expect many employers to permit paid time off work to have the vaccine. Indeed, permitting paid time off may encourage staff to have the vaccine more quickly than would otherwise be the case.

3. **How should we respond if an employee is unwell after having the vaccine?**

NHS guidance on the vaccine provides that some people experience mild side effects after having the vaccine. These include:

- feeling tired;
- having a headache;
- feeling achy; and/or
- feeling or being sick.

It is said that these side effects should not last more than a week and painkillers may be taken. Therefore, in most cases, staff should be able to continue working after having had the vaccine. If a worker feels too unwell to work then this should be taken, and paid, as normal sickness absence in accordance with your sickness policy. However, where you have strongly encouraged staff to have the vaccine, it would be wise to disregard such absence for the purposes of any sickness absence management threshold. Workers might say they

felt under pressure to have the vaccine and it's unfair to penalise them for the resultant sickness absence.

4. **Can we require staff to notify us of their vaccination status?**

If you have not mandated staff vaccination, workers might say that a requirement to disclose their vaccination status is an unreasonable instruction as this is private information about their health. The response would be that you need to know which staff members have and have not been vaccinated so that you can assess risk properly and put measures in place to control the risk.

However, it's true that a worker's vaccination status is health information and, as such, is classified as "*special category data*" for data protection purposes. In order to process special category data, you must satisfy yourself that there is a lawful basis to do so under data protection laws. Consent is rarely sufficient in the employment context given the imbalance of power between an employer and employee.

Instead, the lawful basis will usually be that you have a legitimate interest in understanding the vaccination status of the workforce in order to manage and discharge your health and safety duties. However, you would also need to show that it's necessary to process this data in order to achieve that legitimate interest. The ICO's guidanceprovides that an employer needs "*clear and compelling*" reasons for recording this information and should not do it on a "*just in case*" basis. The ICO also recommends conducting a Data Protection Impact Assessment if the use of the data has risks for the worker (e.g. denial of employment opportunities).

If you do decide to collect vaccination status data, the ICO says that before collecting the data you should tell staff:

- why you need to collect the information;
- what it will be used for;

- who it will be shared with;
- how long it will be kept; and
- what decisions may be made based on the data held.

You may need to update your Staff Privacy Notice to reflect the fact that you are collecting this type of data.

5. **How should we deal with unvaccinated staff?**

Early evidence suggests that vaccination reduces the risk of transmission of COVID-19 but does not eliminate it altogether. This position should be monitored as further evidence is published, although it seems likely that unvaccinated staff are at greater risk of being infected and transmitting the virus than vaccinated staff.

As part of your COVID-19 risk assessment, you should assess the risks posed by unvaccinated staff to other workers and third parties (and vice versa). You may assess the risks to be material and consider it reasonable to take additional steps to manage those risks. This could cover a range of measures such as:

- conducting regular lateral flow tests on all staff;
- requiring all staff to wear face masks at work (in addition to other COVID-19 secure measures);
- making temporary changes to seating arrangements and/or job roles to separate unvaccinated and vaccinated staff; and/or
- requiring unvaccinated staff to work from home where possible for a further period of time (e.g. until the virus recedes or becomes less harmful).

It will be vital that any such changes are managed carefully. Ideally, staff should be consulted before they are introduced. For example, an unvaccinated worker may argue that a change to their job role or work location is detrimental and – depending on their reason for refusing the vaccine – discriminatory. We would recommend that you obtain

legal advice before taking any such action.

6. **Should we tell staff if they are working with someone who hasn't been vaccinated?**

As discussed at above, a worker's vaccination status is classified as "*special category data*" for data protection purposes. The ICO's guidance provides that employers should not disclose a particular worker's vaccine status to other workers unless there is a legitimate and compelling reason to do so. For example, you may have workers who are immuno-suppressed, meaning they do not develop a full immune response to the vaccine and remain exposed to COVID-19. It's likely to be legitimate to tell them that they are working alongside an unvaccinated worker and discuss an appropriate response, but even then it should not be necessary to tell them who that person is (although in a small workplace they may be able to work it out).

7. **Once staff have been vaccinated staff can we dispense with COVID-19 health and safety measures in the workplace?**

No. The Government's COVID-19 Secure Guidelines for different industries provide that the guidelines apply even where workers have been vaccinated (regardless of whether they have had 1 or 2 doses). This means you must implement the relevant measures such as hand washing / sanitising, use of PPE where relevant, social distancing, good ventilation and regular cleaning.

8. **Should we introduce a Vaccination Policy? What should go in it?**

Even employers who are not mandating staff vaccination may find it helpful to introduce a staff Vaccination Policy, primarily to communicate your position of encouraging uptake of the vaccine. The Policy could address the following areas:

- Information about the COVID-19 vaccine, including the benefit and risks.
- The employer's position regarding encouragement of staff to have the vaccine.
- Approach to paid time off to attend vaccine appointments.
- Approach to vaccine-related sickness absence.
- If relevant, the requirement for staff to disclose their vaccination status.
- Measures that may be taken to manage risks posed by and to unvaccinated staff.
- Other COVID-19 secure measures the employer has in place.
- A point of contact within the business with whom staff can raise questions.

If you would like to discuss your approach to staff vaccination please get in touch with Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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