

# The new workplace: how vaccines and testing impact employers in England and the United States

As many employers move from remote working and return to the office, a hybrid work format, or other flexible working arrangements, businesses will need to grapple with employee preferences and individual circumstances, as well as ongoing obligations to manage the health and safety risks of COVID-19. This is particularly evident when it comes to vaccinations and testing in the workplace, especially if employers can implement policies requiring staff to show proof of vaccination and requiring them to undergo regular (lateral flow) testing as a condition of employment or attendance in the workplace. Employers may seek to rely on such policies as part of their recruitment process or to discipline or dismiss staff who refuse to comply. Employers with a global workforce must manage laws and regulations and ensure compliance in multiple jurisdictions.

We review the landscape in England and the United States as it relates to vaccine mandates, health and safety issues, privacy concerns and accommodations, and what employers need to know.

## The landscape in England

### COVID-19 vaccines in England

There is currently no law in England mandating that employees working outside of the regulated care industry be vaccinated in order to perform their duties, nor is there anything more than a strong recommendation that individuals undergo regular lateral flow tests to avoid the spread of the virus. The decision to mandate vaccinations or testing as a condition of employment or attendance at the workplace is left to employers. This differs from the rules in the U.S., which we address in an adjoining article.

This is an evolving area, and there are inherent risks for employers who are looking to require that their employees be fully vaccinated, tested, or both as a condition of employment or of being present at the business premises absent legislation. Employers will need to account for a variety of factors, including their health and safety obligations, employment law and employee relations issues, as well as data protection considerations when deciding how to proceed.

### Health and safety considerations

In consultation with staff or health and safety representatives, employers should be assessing the risk in the workplace and putting reasonable and appropriate measures in place to mitigate the exposure to COVID-19 generally.

Government guidance recommends, as a minimum, focusing on things like cleaning, ventilation, social distancing, and reducing contact. Guidance also identifies other appropriate measures that can be taken: tracking employees who enter office premises (this can be done via online questionnaires or logbooks); and requiring staff to declare that they do not have symptoms, have not had a positive test result, and – before entering the workplace – have not had contact with someone who has tested positive for COVID-19. Government guidance also advises encouraging staff to take personal responsibility for themselves and others when making decisions about attendance.

This guidance does not refer to the introduction of mandatory vaccine requirements or regular testing when discussing appropriate measures that employers may take to make workplaces safe. This is a surprising omission and seems to ignore the role that vaccination plays in enabling workplaces to reopen, as well as the value of testing. It also does little to alleviate uncertainty for employers since implementing mandatory vaccination or regular testing requirements is not rendered unlawful by their omission from the guidance but is not clearly supported either. However, what can be understood from the guidance is that vaccination and testing requirements are not in themselves an answer to securing the workplace. Where such requirements are to be implemented, they must build upon the other measures set out in the guidance but not replace those other measures.

### Including requirements within the employment contract

The employment contract is a key document, setting out terms and conditions of employment and the consequences of noncompliance. Employers may, therefore, consider using this as a place to set out their vaccination and testing requirements. For new hires in particular, continued employment could be made conditional (at least from a contractual perspective) upon meeting those requirements. If considering this step for new hires, employers would still need to be mindful of discrimination risks and data protection considerations, both of which are discussed in further detail below. Unfair dismissal risks would also remain relevant once the employee has reached the two years of continuous service necessary to be able to bring such a claim.

In relation to an existing workforce that has already entered into employment contracts, individual employee consent would be needed in order for new terms concerning vaccination and testing to be incorporated. Accordingly, a move to introduce new terms and conditions could become challenging where employee agreement is not forthcoming and an employee relations problem emerges. As a potential way forward from such an impasse, the employment contracts of those who do not agree to the vaccine and testing requirements could be terminated with an offer of new terms that contain those requirements. However, this could prove to be quite a complicated and, potentially, risky strategy. Depending on the numbers involved, collective consultation requirements could be engaged, and there is always the prospect of dismissal-related claims from those who choose not to sign up to the new terms. A very careful analysis of the workforce's likely response should, therefore, be carried out in advance of taking action.

### Unfair dismissal risks

At the time of writing, there have been no Employment Tribunal decisions providing guidance on the approach that might be taken in the event of an unfair dismissal claim by someone who is terminated for not meeting vaccine or testing requirements. For employers with an established workforce, this makes the potential outcome of imposing such requirements uncertain, as it is difficult to predict how any consequential unfair dismissal claims would be dealt with.

In order to defend an unfair dismissal claim, an employer must be able to demonstrate that a “potentially fair” reason for dismissal existed and that it was reasonable to have dismissed for that reason. Commentators seem to agree that two of the five statutorily prescribed fair reasons for dismissal – namely conduct and “some other substantial reason” – may be applied to a dismissal for noncompliance with vaccine or testing requirements. However, whether it is reasonable to dismiss an employee for those reasons should be considered on a case-by-case basis.

With regard to the reasonableness test, employers would likely be required to demonstrate, among other things, the importance of the vaccination and testing requirements to their business and operations. It is also likely that employers would be required to demonstrate that they have also taken other measures to protect against the risk of COVID-19 and are not seeking to rely solely on the vaccine. This again underscores the importance of using vaccination and testing requirements as part of a strategy for managing the COVID-19 risk and not as a replacement for other steps.

Employers also need to be mindful of the potential unfair dismissal risk when dealing with those who object to returning to the workplace due to health and safety concerns (for example, if an employee refuses to return to the workplace if colleagues are not vaccinated). If the employee can demonstrate that they have a reasonable belief of a serious and imminent danger to health and safety and has not returned to work for this reason, dismissal would give rise to an automatic unfair dismissal. Employers will therefore need to deal with such circumstances carefully. It also underlines the need to put in place a comprehensive set of measures to put employees' minds at rest and mitigate against the possibility of any employees forming a belief (reasonable or otherwise) of danger from a health and safety perspective.

#### Discrimination risks

Job applicants and employees of any length of service are able to bring discrimination claims. The Equality Act 2010 covers those with protected characteristics (as defined under the Act) from being treated less favorably as a result of those characteristics. The application of a broad-brush policy mandating the vaccine and regular testing for the purposes of receiving a job offer, ongoing employment, or attending the workplace, can potentially be argued as constituting discrimination, unless the employer can objectively justify its approach.

The protected characteristics of particular relevance to this debate and where there may be an inability or unwillingness to receive the vaccine are disability, religion or belief, race, and pregnancy.

- Disability discrimination: Individuals with certain disabilities may be unable to get the vaccine.
- Religion and belief discrimination: Some people may practice a religion that prevents them from receiving the vaccine (for example, by reason of the vaccine containing products forbidden by the candidate's faith). Others may have a moral or other belief system under which they are opposed to the vaccine (for example, those considered "anti-vaxxers" (albeit this is a broad term, and the onus would be on the candidate to demonstrate a genuine belief system in this regard).

- Race discrimination: The statistics suggest that certain racial and ethnic groups are more vaccine hesitant than others.
- Pregnancy/maternity (breast-feeding): Employees may refuse to agree to be vaccinated on the basis that they are pregnant or breast-feeding, especially where guidance is changeable and the effects are not known.

Discrimination risks can be avoided where employers can objectively justify their policy on mandatory vaccines. However, the ability to put in place such justification cannot be guaranteed. The risk could otherwise be mitigated by having some flexibility to take into account the circumstances of individuals who are not vaccinated and permit exemptions from vaccination requirements on a case-by-case basis.

#### Data privacy issues

Any information that an employer asks its job candidates and staff to provide to confirm COVID-19 test results and vaccine status would constitute "special category personal data" under data protection laws, and so particular care is needed with the processing. To comply with the "data minimization" principle, employers should ask for the minimum amount of data required. Ideally, only a "yes" or "no" response would be given to a question as to whether an individual has been fully vaccinated, rather than actual evidence being stored, and if any further health information is provided (for example, the type of vaccination received), this should be deleted as soon as possible. Further, if an individual has a clinically approved exemption status, the company should not request further information about the clinical reason behind the exemption.

Prior to carrying out any processing of data concerning test results and vaccine status, companies must undertake a Data Protection Impact Assessment (DPIA) given that the processing is of high-risk data. This will need to document, in particular, the reasons for checking or recording people's COVID-19 status since data protection laws would not enable a company to process it on a "just in case" basis. The UK Information Commissioner's Officer has a template DPIA form that can be used.

There must also be a lawful basis for processing the data, and this must be documented. This would likely be "legitimate interests" (requiring the completion of a Legitimate Interests Assessment, which could be done at the same time as and combined with the DPIA). Since health data is being collected, employers can then rely on the protection of the health, safety, and welfare of employees under schedule 1 of the UK Data Protection Act 2018 (often referred to as "the employment condition"). This condition additionally requires that the company have an "appropriate policy document" regarding the processing which is a prescribed form under the legislation.



Companies should also update their privacy notices to staff and candidates to explain the processing of this data and their rights in relation to it. Details should be included in the company's records of processing.

There should be clear protocols and processes in place to ensure that the information is not kept longer than is necessary, that it is only viewed on a need-to-know basis with firm access controls in place, and that it is kept secure.

From a UK GDPR perspective, there is no set retention period for sensitive information, but the general principle is that it should not be kept for any longer than necessary for the purpose for which it was collected. For example, if vaccination status data is kept in order to facilitate international travel, the data should be deleted once the individual has traveled since afterward, it will no longer be needed for the purpose collected.

We hope this summary of the position in England was helpful. For those of you with global operations or who are just curious, we set out a similar analysis in the following article as it applies to the United States.

#### Authors:



**Carl De Cicco**  
Counsel, London



**Elle Todd**  
Partner, London



**Carlene Nicol**  
Associate, London



**Allison Heaton**  
Knowledge Management  
Lawyer, London

## The U.S. landscape

### Mandated vaccination policies in the United States

Generally speaking, U.S. employers can, and may even be required to, implement a mandatory vaccination policy, but there are some key issues employers should consider. In guidance issued in late May 2021, the U.S. Equal Employment Opportunity Commission (EEOC) took the position that mandatory vaccination policies are generally permissible under federal antidiscrimination laws. Just a few weeks later, in June 2021, a U.S. federal court – in the first ruling on this issue – echoed this sentiment in concluding that such policies are generally permissible. The following month, the U.S. Department of Justice issued a detailed memo reaching the same conclusion.

Building off of these developments, on September 9, 2021, President Biden announced several measures intended to expand the use of mandatory workplace vaccination policies amongst United States employers. The measures include: (1) an executive order that requires certain government contractors and subcontractors to mandate COVID-19 vaccinations for their workers; (2) an announcement that the Centers for Medicare & Medicaid Services are taking steps to require vaccinations for workers in health care settings that receive Medicare or Medicaid reimbursements; and (3) an emergency temporary standard (ETS) to be issued by the Occupational Health and Safety Administration (OSHA) that will require all employers with 100 or more employees to ensure their employees are vaccinated or tested weekly for COVID-19. Employers subject to the ETS will also be required to compensate employees for time spent receiving a COVID-19 vaccine or recovering from the vaccine's side effects. While President Biden's measures will face legal challenges, the success of the legal challenges is hard to predict, particularly without the full details of the ETS.

Notably, however, there are limits to the breadth of US workplace vaccination policies. Specifically, employers who implement a mandatory vaccine policy must consider potential accommodations or exceptions to the mandate for employees with disabilities, certain medical conditions, and a sincerely held religious belief, practice, or custom. If an employee requests an exemption from a mandatory vaccination policy on one of these grounds, the employer must engage in the so-called interactive process with the employee and may be required to provide the employee with a reasonable accommodation. In addition to legally required accommodations, the EEOC also cautions employers to be cognizant of any potential disparate impact created by a vaccine mandate.

Additionally, several states have enacted legislation (or, as of this writing, are attempting to enact legislation) that bans employers from imposing vaccine mandates. Most of the bans are limited to employees of state and local governments. The exception is Montana, which has passed legislation that effectively prohibits employers

from implementing a mandatory COVID-19 vaccine policy. It is unclear how the Biden Administration's mandates regarding vaccines will interact with state laws prohibiting mandatory vaccination.

Employers must also be cognizant of the potential obligation to pay non-exempt employees for the time employees spend being tested or vaccinated – including any recovery time – pursuant to a mandatory vaccination or testing program.

### Employees who will not or cannot get vaccinated

If an employee certifies that they cannot get vaccinated due to a disability, medical condition, or a sincerely held religious belief, the employer must engage in the interactive process with the employee. Based on the information gathered from the employee and the circumstances of the employer, a reasonable accommodation may need to be made. In the context of exemptions from a mandatory vaccination policy, reasonable accommodations could include: (1) minimizing contact with coworkers; (2) eliminating contact with the public; (3) remote working arrangements; (4) alternative safety equipment or personal protective equipment; or (5) reassignment.

If an employee cannot get vaccinated against COVID-19 because of a disability, medical condition, or a sincerely held religious belief and there is no reasonable accommodation possible, then it may be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker, however. Employers will need to determine if any other rights apply under applicable federal, state, or local laws, rules, and regulations. Employers should consult legal counsel before taking any such action.

Absent a medical, disability, or religious exemption from a mandatory vaccination requirement, an employer can make a COVID-19 vaccination a condition of employment and terminate employees who do not comply. Again, employers should tread carefully with this practice and consult legal counsel prior to making any such decisions.

### Asking employees about vaccine status or requiring proof of vaccination

Under federal law, a narrow inquiry into whether an employee or job applicant has been vaccinated is generally permissible. However, employers should be mindful of any state or local laws that may restrict such inquiries.

The EEOC has taken the position that simply requesting proof of vaccination is not a prohibited disability-related inquiry under the federal Americans with Disabilities Act (ADA) and is permitted under federal law. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit

information about a disability and would be subject to the pertinent ADA standard that inquiries be “job-related and consistent with business necessity.” Employers also should be mindful that asking about the vaccine status of an employee's family members may implicate the federal Genetic Information Nondiscrimination Act (GINA). Additional state and local laws may also apply.

### Confidentiality and privacy concerns regarding vaccine status and related information

Employers are required to keep all information about their employees' vaccination status confidential. Additionally, all employee vaccination records (and related information) must be kept separate from employee personnel records. Companies should be mindful of what information they are requesting because the inquiry might trigger heightened data-privacy and document-retention requirements. Companies should request only the information they require to confirm the vaccination status of the employee and should not collect any other information that is not necessary for that purpose.

Additionally, companies should be mindful of the privacy, security, and other legal requirements involved in communicating with employees about any requested exception to a mandatory vaccine program based on a medical condition. The interactive process would likely include asking employees disability-related questions – and potentially questions implicating genetic nondiscrimination and health data privacy laws (such as GINA or the Health Insurance Portability and Accountability Act (HIPAA)).

Employers also should consider how they plan to receive such information, and what they will do with it once they have it. Questions to consider include:

- How secure is your company's email system?
- Can employees access their work email on their phones? If so, are there password and other security measures in place to prevent unauthorized access to that information?
- What does HR plan to do with the information once it receives it? Will it be printed out and stored in a paper file?

### Authors:



**Sarah Bruno**  
Partner, San Francisco



**Mark Goldstein**  
Partner, New York



**Amanda Brown**  
Senior Associate, Dallas



**Michael Lombardino**  
Senior Associate, Houston

- Does the company plan to insert that information into the employee's personnel file or HR database?
- Who would have access to that information?
- If the company plans on storing the data electronically, does the company have sole possession, custody, and control of the servers where the data will be stored? If so, the company may want to confirm where those servers are physically located, and whether any state or local laws of that jurisdiction impose additional data-privacy, data-security, and breach-notification requirements. If an employer plans to contract with a third party to maintain that information, it presents a whole other host of issues that must be navigated.

### What about employees who refuse to return to the workplace?

This is one of the most frequently asked questions about reopening workplaces. Employers should approach each situation individually. Factors employers should consider include: the employee's duties, work location, industry, vaccination status, current COVID-19 transmission levels, and workplace safety efforts. Generalized concern about the virus – without more – is not legally protected under federal law. Nevertheless, employers should consider – subject to any individualized considerations warranted by the particular situation – educating the employee about, among other things, the company's health and safety protocols before considering an adverse action like termination.

Additionally, if an adverse action is taken against the employee, the employer may want to consider an action short of termination (for example, a leave of absence, short-term transfer to a different role that allows remote working, etc.). Overall, employers should tread carefully and exercise a measure of flexibility when considering adverse action to an employee's refusal to come to work due to generalized concerns about the virus.

Click [here](#) to read more frequently asked questions on US employee privacy issues related to the COVID-19 vaccine.

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Phone: +44 (0)20 3116 3000

Fax: +44 (0)20 3116 3999

DX 1066 City/DX18 London

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