

**Insights**

## **BACK TO LIFE: ISSUES FOR UK EMPLOYERS AS EMPLOYEES RETURN TO THE WORKPLACE**

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### **SUMMARY**

At the time of writing, the Government has published its provisional roadmap out of lockdown and employers are beginning to consider when and how employees may return to the workplace. This article considers some potential options and possible risks relating to a return to work.

### **CAN EMPLOYERS FORCE EMPLOYEES TO RETURN TO WORK AFTER LOCKDOWN?**

It is a general principle of English employment law that employees must comply with reasonable management instructions from their employer. This would include an instruction to attend work.

Whilst health and safety considerations have obviously called this into question during the pandemic, a requirement to return to work may still amount to a reasonable management instruction, depending on the type of workplace, the employee concerned and how easily the employee's work can be carried out from home. To avoid potential disputes it would be sensible for employers to consult with staff as early as possible to discuss matters and try to seek agreement. This is particularly important if a return to work requires a change to any terms and conditions of employment, as that will require consultation. Employers should take care to consider each individual circumstance on its own merits and be as flexible as possible, being mindful of any risks of discrimination or health and safety concerns.

Employers should also bear in mind their duty to protect the health and safety of their employees, if and when they return to work. This includes carrying out a risk assessment of the workplace and implementing measures to mitigate any risks. Employers should also be mindful of employees or workers who raise concerns, as English employment law offers considerable protection in relation to health and safety. Under section 44 of the Employment Rights Act 1996 for example, employees/workers must not be subject to any detriment because of raising concerns or refusing to attend work for health and safety reasons. Section 100 similarly provides that any dismissal will be

automatically unfair if the reason for dismissal is that the employee/worker has raised health and safety concerns or refused to attend work on health and safety grounds. Separately, employees/workers who raise health and safety concerns could gain whistleblower protection if their concerns are genuine.

It is likely that some employees will be anxious or concerned about returning to work, even once restrictions are eased. Employers should take steps to discuss concerns with these employees and try to resolve them where possible. One option is to consider unpaid leave or extended furlough if employees are particularly concerned.

However, if employers have taken every step to make the workplace safe, have discussed all options with their employees and employees still refuse to attend, it may be that a return to work can be enforced and disciplinary action can be taken if employees refuse to return.

## **CAN EMPLOYERS FORCE EMPLOYEES TO HAVE A COVID VACCINE OR PREVENT UNVACCINATED EMPLOYEES RETURNING TO WORK?**

Employers should certainly encourage employees to have a Covid vaccine, but there is currently no general legal requirement to be vaccinated. However, this does not prevent employers from making vaccination a condition of returning to work. Employers may be considering policies to require vaccination or prevent unvaccinated employees returning to the workplace.

Again, a requirement to have a Covid vaccine or remain at home may amount to a reasonable management instruction. For those working in care homes or hospitals, a requirement to be vaccinated may be considered reasonable, but such a strict requirement may seem less reasonable if employees have limited contact with others in the workplace. This may be difficult to argue on the part of the employee as most offices, other indoor premises, and generally most workplaces are known to be higher risk environments for transmission.

A blanket requirement for vaccination and/or preventing unvaccinated employees returning to work does risk being indirectly discriminatory, but such a policy may be objectively justifiable depending on the circumstances. Objective justification is when those implementing the policy can show that they have a good reason for doing so, and that the policy is proportionate. If successful, there would be no unlawful discrimination. For example, if an employer could demonstrate that they were implementing the policy to protect the health and safety of other workers, and there was nothing less discriminatory that could be done to protect them, such a policy could potentially be objectively justified.

It is worth noting that there are those who simply cannot have a Covid vaccine at present, such as pregnant women and those with specific allergies and, at the time of writing, approximately half the adult population has still to be offered the vaccine, although the position may be different in July,

when the government is hoping to have facilitated the rollout of a first dose of the vaccine to every adult in the UK.

In addition, people refusing the vaccine may argue that they are protected under the Equality Act 2010 on the basis of their religion or, in particular, philosophical belief. To qualify for protection they would need to show that the belief was genuinely held, cogent, serious and applied to an important aspect of human life or behaviour, that it was worthy of respect in a democratic society and did not affect other people's fundamental rights. This is not fanciful speculation – organisations with strong anti-vaccination/anti-lockdown principles and beliefs have thousands of member in the UK. The Covid vaccine is not universally approved of. In Poland for example, 47% of the population consider the Covid vaccine to be more dangerous than Covid itself. A further issue is that vaccine hesitancy in the UK is substantially higher amongst BAME communities, and in certain circumstances excluding the unvaccinated may be indirectly discriminatory on grounds of race/ethnic origin.

It is by no means unarguable that a genuinely held belief that vaccines are harmful would amount to a protected philosophical belief.

A possible further issue is that there may be employees who refuse to work with employees who have not been vaccinated, and have concerns about their health and safety. Employers may face pressure from vaccinated employees not to allow unvaccinated employees to return to work. Employers may ultimately feel they have a real business need to enforce vaccination or prevent unvaccinated employees returning to work.

In any event, it is best practice to discuss policies with employees. Recently published ACAS guidance suggests that any concerns around vaccination should be discussed with employees and issues resolved informally where possible.

If employers can demonstrate that requiring vaccination/preventing employees from attending work is a reasonable management instruction, it may be possible to take disciplinary action against employees who refuse to be vaccinated. Employers should ensure they consider all possible alternatives first, such as extended homeworking or a role with less contact with others. Employers should also bear in mind that any data regarding vaccination would constitute sensitive personal data and employers must comply with UK GDPR.

If it is not a reasonable management instruction, there may be limited recourse for employers for employees refusing to take a vaccine, and it may well be unlawful to ask employees to provide any information about vaccinations at all.

## **CAN EMPLOYERS FORCE EMPLOYEES TO TAKE A COVID TEST?**

It is likely to be reasonable to require employees to be tested if they are exhibiting symptoms of Covid in order to protect the health and safety of the workforce.

However, if employees are not exhibiting symptoms, then the question becomes whether such a requirement is a reasonable management instruction. If the risk can be managed through other means, such as home working or social distancing, then requiring testing may not be seen as reasonable. However, if people are working in close indoor proximity, as in almost all office environments, then it is more likely to be reasonable. Employers should bear in mind that any data regarding testing is sensitive personal data and should be processed in line with UK GDPR. This means, amongst other things, carrying out a data protection impact assessment and only processing data that is necessary and proportionate. Employers should also consider any indirect discrimination risks of a testing policy.

If employees refuse to be tested, they cannot be forced as this would amount to assault and battery (unless the employee is compelled to self-administer the test), but employers may be able to take disciplinary action for a refusal to test depending on the circumstances.

## TIPS FOR EMPLOYERS

- Ensure that you have implemented all the relevant health and safety measures and carried out risk assessments. Be mindful of any employees that raise concerns.
- Discuss returning to work and consult with employees as early as you can, and seek agreement wherever possible. Consider any refusal to attend work based on each employee's individual circumstances rather than implementing a blanket policy.
- If considering policies relating to mandatory vaccination, be wary of the risk of indirect discrimination with blanket policies. Best practice is to speak to employees and discuss the approach, ensuring that those who (medically) cannot be vaccinated are fully considered as well as any reasons individuals have for refusing vaccination.
- If considering mandatory testing, ensure you have a strong foundation for why such testing is necessary and that you have fulfilled the relevant requirements under UK GDPR. Again, best practice is to discuss the approach with employees and seek agreement where possible.

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BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: [COVID-19HRLabour&EmploymentIssues@bclplaw.com](mailto:COVID-19HRLabour&EmploymentIssues@bclplaw.com)

## RELATED PRACTICE AREAS

- Employment & Labor

## MEET THE TEAM



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