

NO JAB, NO JOB! Gillian Crew, 42 Bedford Row

1. As of the 11th November 2021, it is now compulsory for care home staff in England to be fully vaccinated against Covid-19, unless medically exempt. The Health and Social Act 2008 (Regulated activities)(Amendment)(Coronavirus)Regulations 2021 amend the safe care and treatment provisions in regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (*SI 2014/2936*) by inserting a new provision requiring staff employed in registered care homes to be fully vaccinated unless they are exempt for clinical reason¹.

¹ “(3) For the purposes of paragraph (2)(h), a registered person (“A”) in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person (“B”) does not enter the premises used by A unless—

(a) B is a service user residing in the premises used by A;

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;

(c) it is reasonably necessary for B to provide emergency assistance in the premises used by A;

(d) it is reasonably necessary for B to provide urgent maintenance assistance with respect to the premises used by A;

(e) B is attending the premises used by A in the execution of B’s duties as a member of the emergency services;

(f) B is a friend or relative of a service user and that service user is or has been residing in the premises used by A;

(g) B is visiting a service user who is dying;

(h) it is reasonably necessary for B to provide comfort or support to a service user in relation to a service user’s bereavement following the death of a friend or relative; or

(i) B is under the age of 18.

2. Further, the government announced on the 9th November 2021 that it is extending these provisions to all frontline healthcare workers in the NHS requiring them to be fully vaccinated by 1st April 2022.
3. Private employers may also follow suit by introducing “no job, no job” provisions into new contracts of employment, with Charlie Mullins of Pimlico Plumbers leading the way². Google, and other US Companies including JP Morgan, Netflix, Bloomsbury and Goldman Sachs, have also expressed an intention to introduce covid vaccination policies for those returning to its offices³. Anecdotally, I have been told of self-employed contractors who are now being asked to provide proof of vaccination to return to contracts post-pandemic. For the reasons set out in this paper, they are brave to do so. Although it may be easier to introduce provisions within new contracts, “firing and re-hiring” or relying upon clauses to vary contracts is unlikely to do much for morale amongst staff already feeling under pressure during the pandemic.
4. It is unlikely that many people, and certainly those of us with loved ones within the care home system or elderly relatives accessing health care on a regular basis, would disagree with the purpose behind the provisions, namely, to protect the most vulnerable in our society from Covid.
5. However, making vaccinations compulsory is something wholly new to UK law: although some Government ministers have claimed that UK Doctors are required to be vaccinated against Hepatitis B, this appears to be a matter of guidance and policy⁴ rather than a statutory requirement.
6. This is against the current backdrop where the Government is reluctant to mandate mask wearing or vaccination passports to access entertainment venues such as clubs or theatres as it appears not to want to tell private citizens what to do.
7. Further, there are concerns about a staffing crisis in the care industry. According to figures released by NHS England, 89.4% of care home staff in older age care homes were fully vaccinated by the end of October 2021, with a remaining 49,040 staff not having received two doses, equivalent to 1 in 10 staff.⁵

² [HR Magazine - Pimlico Plumbers advert risks discrimination claims](#)

³ [Netflix US cast and crew must be vaccinated to work - BBC News](#)

⁴ Chapter 12: [Public Health Green Book](#) recommends

⁵ NHS England Covid 19 Weekly Vaccinations Data week ending 4th November 2021.

8. The purpose of this short seminar is to consider the employment law ramifications of making vaccinations mandatory as a matter of law. rather than the moral or societal reasons for doing.
9. Perhaps a good place to start is to consider the situation that employers of care home staff (and in the not too distant future frontline health care staff) are now in by reference to the potential legal claims which could be brought.

Vaccine Hesitancy

10. What are some of the reasons behind vaccine hesitancy? It was interesting to see that a care worker who was facing dismissal this week said the concerns for her were about the long term safety of the vaccine, that she would take it at some point in the future but not yet.
11. An Australian study has found the following drivers of vaccine hesitancy based on a small study of 4300 respondents from Australia, New Zealand, US, Canada and the UK ⁶
 - i. Trust in government approval of safe & effective COVID-19 vaccine
 - ii. Perceived effectiveness of COVID-19 vaccination for others.
 - iii. Perceived ability to free-ride (benefitting from others taking up the vaccine)
 - iv. Conspiracy beliefs about vaccination
 - v. Perceived side-effects of COVID-19 vaccine.
 - vi. Perceived effectiveness of COVID-19 vaccination for the individual.
 - vii. Perceived COVID-19 vaccine availability.
 - viii. Perceived disease severity for others
 - ix. Perceived susceptibility to COVID-19 for others
 - x. Perceived disease severity for the individual
 - xi. Perceived susceptibility to COVID-19 for the individual.

⁶ Centre for Business Intelligence & Data Analytics at the University of Technology Sydney (UTS), Reference: "Enablers and barriers to COVID-19 vaccine uptake: An international study of perceptions and intentions" by Paul F.Burke, Daniel Masters and Graham Massey, 23 July 2021, *Vaccine*.

12. In an article in May 2021⁷, the British Medical Journal defined vaccine hesitancy as “*a delay in acceptance or refusal of safe vaccines despite vaccine availability.*” The authors identified the following drivers of vaccine hesitancy:
- i. Socioeconomic and healthcare inequalities and inequities
 - ii. Structural racism and previously unethical research involving some ethnic minority groups
 - iii. Social disadvantages including lower levels of education and poor access to accurate information
 - iv. Misinformation, disinformation, rumours, and conspiracy theories, in particular through social media
 - v. Lack of effective public health messages or targeted campaigns
 - vi. Barriers to access, including vaccine delivery time, location, and cost related to socioeconomic inequalities and marginalisation

Unfair Dismissal

13. This is the good news story part for respondent employers.
14. Firstly, it is not illegal for the employer to continue to employ an unvaccinated member of staff in that the regulations do not make a criminal offence to employ an unvaccinated employee. This contrasts with other policy driven employment exclusions, such as it is unlawful to employ illegal workers under the Immigration, Asylum and Nationality Act 2006 and any employer found to be doing so risks a civil penalty and/or criminal prosecution.
15. However, it remains a breach of statutory duty contained in the 2021 Regulations. Therefore the employer who continues to employ the employee in such circumstances is “*contravening a duty or restriction imposed by or under an enactment*” within the meaning of section 98(2)(d) of the Employment Rights Act 1996.
16. So although it may not be illegal to employ an unvaccinated care home member of staff, it is likely to a potentially fair reason for the employee to be dismissed, subject to a fair procedure being carried out in accordance with s 98(4), and consider of other alternatives, such as redeployment. A fair procedure needs to include time for consultation with the employee, to

⁷ [Covid-19 vaccination hesitancy | The BMJ](#)

explore the reasons behind their vaccination status, and to consider any other redeployment options as well as for an appeal.

17. Further, “Some other substantial reason” (“SOSR”) pursuant to section 98(1)(b) of the ERA is also likely to be in play, as the failure to be fully vaccinated in light of the 2021 regulations is likely to a substantial reason of kind justifying dismissal because the employer would be in breach of the regulations to continue to employ the member of staff.
18. It is not a redundancy situation. The employer’s need for the work of a particular kind or in a particular place has not ceased or diminished within the meaning of section 139 of the ERA. As highlighted above if any thing these provisions are likely to increase the need for workers rather than reduce for such work.
19. However, just because it is not a redundancy situation, and technically speaking the requirement to collectively consult would not arise under section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 despite the wider definition of redundancy in s 195 (dismissal not for a reason related to the individual concerned), it might be there could be 20 dismissals taking place at one establishment, so employers would be sensible to collectively consult as well as to individually consult.

Discrimination

20. If like me, your first reaction to the talk of “no jab, no job” was that it would be potentially discriminatory, we find ourselves in good company. The Equalities and Human Rights Commission in their response to the consultation about making vaccination compulsory for care home workers⁸ raised concerns when it said:

“In legislating for mandatory vaccination the Government is right to prioritise protection of the right to life for residents and staff. In our view it is therefore reasonable to require care home staff to be vaccinated in order to work directly with older and disabled people, subject to some important safeguards to ensure the requirement remains proportionate and to minimise the risk of unlawful discrimination or breaches of care workers’ human rights.”

⁸ EHRC Response to Consultation on making Vaccination a condition of deployment in older adult care homes.

21. The safeguards referred to included medical exemptions for those who cannot receive the vaccine for medical reasons, easy access to vaccination (including covering travel expenses) and financial security for those suffer from side effects from the vaccine.

Direct Discrimination

22. Claims are unlikely to succeed of direct discrimination under section 13 because the reason for the treatment is not the person's protected characteristic but their vaccination status.

Indirect Discrimination

23. In terms of discrimination claims, it is likely that such the mandatory vaccinations provisions will attract claims of indirect discrimination under section 19 of the Equality Act 2010:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

24. A provision or criteria which requires full vaccination is likely to be indirectly discriminatory against certain groups within the meaning of section 19 of the Equality Act 2010 and will require justification where the statutory disadvantage is shown in relation to a protected characteristic. Two obvious characteristics spring to mind.

25. Firstly, disability, there are certain groups who cannot have the vaccine or for whom the vaccine is not suitable as it will be not as effective i.e those who suffer from severe allergies or who are immunosuppressed and those who are being monitored for long Covid. The

- inability to have the vaccine could also be the “something arising” under section 15 and would again require justification.
26. However, in relation to disability cases, the current provisions expressly provide for an exemption due to clinical reasons, and it is likely the above cases would fall into that provision.
 27. Secondly of course where the individual meets the statutory definition of disability, the duty to make reasonable adjustments applies under section 20 and 21 of the Equality Act 2010. It is a wide duty that requires the consideration of redeployment and can extend where necessary, to the creation of an entirely new role in certain circumstances (see Southampton City College v Randall [2006] IRLR 18 - reasonable to create an entirely new role in a job reorganization; versus no obligation on an employer to create a post specifically which is not otherwise necessary in Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664 and Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 664 reasonable in a disciplined service to consider a job swap by creating a vacancy by forcing another employee to transfer).
 28. Further, women who are pregnant or breastfeeding have been the subject of inconsistent government advice when it comes to the Covid vaccination. Firstly, they were advised not to be vaccinated as the vaccine had not been tested on pregnant women and then this advice as subsequently changed to pregnant women should be offered the vaccine, but not the Astra Zeneca jab. Although pregnancy and maternity is not a relevant protected characteristic for indirect claims, a claim could be brought under s 18 of the EqA itself or Regulation 19 of the Maternity and Parental Leave Etc Regulations 1999.
 29. Sex is a relevant characteristic for claims of indirect discrimination. Women may wish to delay vaccination because they are trying to conceive if of child bearing age. A December 2020 survey of 55,000 people found that the group most likely to refuse vaccination were 18 to 34-year-old women, with many citing worries about fertility. However, this is unlikely to make a strong indirect discrimination case.
 30. Less obvious but equally arguable would be cases of age discrimination, younger workers may be more cautious of being vaccinated due to the lower risk of hospitalisation, intensive care admission and death from COVID-19 and the slightly higher risk of blood clots from the vaccination. Further, this argument does not appear to be made out on the vaccine data where the younger ages are taking up the vaccine.
 31. Likewise, there may be arguable indirect race discrimination claims available. Research by SAGE published in December 2020 refers to the UK Household Longitudinal study, which

showed marked differences between different ethnic groups in willingness to receive the COVID-19 vaccine. The research found that Black ethnic groups were most likely to be hesitant, followed by those of Pakistani or Bangladeshi ethnic origin. "Other white" ethnic groups were more hesitant than those of "white UK" and "white Irish" ethnicity. The greater hesitancy in minority ethnic groups was due to low confidence in the vaccine, distrust, access barriers, inconvenience, socio-demographics and lack of communication from trusted providers.

32. In January 2021, just a month or so after the commencement of the Covid vaccination programme, the UK Household Longitudinal Study showed higher vaccine hesitancy in most minority ethnic groups, with the highest being those from Black ethnic groups, where 71.8% said they were unlikely to have the COVID-19 vaccine, followed by those of Pakistani or Bangladeshi ethnic origin (42.3%). The main reasons given were a lack of trust in the vaccines and concerns about unknown future effects⁹. Another study showed that black people were less likely than any other ethnic group to have been vaccinated, with statistics showing that by April 2021 only 64% of black over-50s had been vaccinated compared with 93% of white people of the same age¹⁰.
33. How about cases of indirect Religion or belief discrimination? It is possible that the protected characteristic of religious or philosophical belief could protect certain religious or moral objections to the vaccine. Concerns have been raised about gelatine derived from pigs is often used in mass-produced vaccines. This may be a concern for Muslim, Hindu, vegan or vegetarian employees. Although there is no gelatine in the COVID-19 vaccines currently available, shark liver oil is being considered as an adjuvant for one of the new vaccines. Other employees may reject the vaccine because embryonic tissue was used to test or develop the vaccine or concerns about the vaccine being tested on animals
34. Ethical veganism has been successfully argued as protected belief under section 10 of the Equality Act 2010: see *Casamitjana v League Against Cruel Sports* ET/3331129/2018. *The Vegan Society in light of compulsory vaccination has this to say*¹¹:

⁹ see Covid vaccine: 72% of black people unlikely to have jab, UK survey finds, [theguardian.com](https://www.theguardian.com), 16 January 2021

¹⁰ see Legal update, Practical Law Employment, 6th May 2021: COVID-19: vaccine uptake in black over-50s only 64% compared with 93% of white peers

¹¹ Statement September 2021 - [Vegan Society response to Covid-19 vaccine | The Vegan Society](https://www.vegansociety.com/news/news/2021/09/21/covid-19-vaccine)

“Since all medications currently go through animal testing and animal products are commonly used in their manufacture, decisions around taking medication can be complex for vegans. Many vegans find compromising their beliefs to be stressful and upsetting. You can explore this subject further in [veganism and medicine](#) and [animal products in medications](#).

However, it has never been more important for us to talk about the definition of veganism in the context of medications, including vaccines. The [definition of veganism](#) recognises that it is not always possible or practicable for vegans to avoid participating in animal use, which is particularly relevant to medical situations. In the case of Covid-19, vaccination is playing a fundamental role in tackling the pandemic and saving lives. As there is currently a legal requirement that all vaccines are tested on animals, at this point in time it is impossible to have a vaccine that has been created without animal use.”

35. And what about the anti-vaxxers? Other employees may have a strongly held belief that vaccines are harmful to public health. It is unlikely that this will amount to a protected belief under the test set out in [Grainger v Nicholson \[2010\] IRLR 4](#) which includes requirements that a belief: (i) attains a certain level of cogency, seriousness, cohesion and importance; (ii) is worthy of respect in a democratic society; (iii) is not incompatible with human dignity; and (iv) does not conflict with the fundamental rights of others.
36. Even if the group disadvantage and particular disadvantage is established under section 19, the Respondent employer can still rely upon the justification defence. As acknowledged by the EHRC, in terms of care homes (and indeed NHS healthcare settings) the legitimate aim part of the justification defence is likely to be pretty strong, namely, to protect the health of the most vulnerable. However, the same argument is likely to be less compelling the further away the workplace is from the vulnerable, so will the same argument succeed in relation to an office in the City in comparison to a care home or a hospital setting?
37. Further, justification is not a “one size fits all” approach and it is not a question of simply whether there is a legitimate aim. What needs to be justified is the application of the PCP to the individual and whether that is a proportionate means of achieving a legitimate aim. So in the current scenario where the PCP would require to be fully vaccinated to remain employed, whether the sanction of being dismissed for not being fully vaccinated is a proportionate means of achieving a legitimate aim.

38. As set out by the Supreme Court in the Bank Mellat v HM Treasury (No 2) [2014] AC 700 when applying the proportionality test in addition to assessing whether the measure is sufficiently important to justify the limitation of a protected right, the tribunal must consider whether a less intrusive measure could have been used without compromising the achievement of the objective, and whether balancing the effect on the rights of the person against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.
39. Other less intrusive measures which could achieve the same legitimate aim could include daily lateral flow tests and/or mandating the wearing of PPE inside including face masks and gloves.

Conclusion

40. It will be interesting to see what litigation emerges from the provisions relating to mandatory Covid vaccination. Permission for judicial review by two care workers has been sought but the current status of the application is unclear. What is clear is that the provisions have significant employment law ramifications, which will be closely monitored by both employees and employers and will be showing in an employment tribunal near you in the not too distant future depending on waiting lists.

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