



# Leaving lockdown: Considerations for employers

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## Part 2: FAQs on Covid-19 Testing and Vaccinations

**In Part 2 of our “Leaving Lockdown” series we look at a topic many employers are grappling with: Covid-19 testing and vaccines.**

### Can an employer make it mandatory for existing employees to receive the Covid-19 vaccination?

An employer *can* make vaccination a mandatory requirement but doing so exposes the employer to several risks.

The key risks include:

- For those who cannot or will not take the vaccine due to characteristics which are protected under the Equality Act 2010, such as pregnancy, religion, disability or potentially philosophical belief on the grounds of an anti-vax belief (that is yet to be tested in the courts), the employer will be exposed to discrimination claims. In addition, if an employer makes vaccination compulsory before all adults have been offered the opportunity to be vaccinated this would discriminate against younger employees. Employers would need to be able to justify their policy of mandatory vaccination by demonstrating they have a legitimate aim (such as health and safety of their workforce) and that a mandatory vaccination programme was a proportionate means of achieving this.
- For those with the requisite 2 years’ service -
  - If an employee refuses to be vaccinated and is dismissed as a result this may result in an unfair dismissal claim.
  - If an employee is disciplined as a result of refusing a vaccine and resigns in response, or feels there is undue pressure placed on them to be vaccinated and that the employer is breaching the implied duty of trust and confidence – this could result in constructive dismissal claims.
- If employees were physically forced to take the vaccine this could amount to the criminal offences of assault and battery, and if there

was an adverse reaction then a possible personal injury claim.

- For public authorities or organisations carrying out public duties there would also be the risk of a claim that mandatory vaccination interferes with Article 8 of the European Convention on Human Rights, which protects the right to a private life.

There are likely to be limited circumstances where a mandatory vaccine policy will be justified - for example where employees need to travel to regions where a vaccine is required or where an employee is required to have extensive contact with third parties and social distancing or other COVID-secure measures are not possible. However, employers would be advised to reasonably consider alternatives before pressing on with a mandatory vaccination policy (e.g. is international travel necessary or could meetings be conducted remotely?).

The question of what is reasonable will be fact sensitive and is likely to depend on the risk and implications of COVID-19 in the particular setting.

### If an employer doesn’t make it mandatory for staff to be vaccinated, can it actively encourage vaccination?

Yes. ACAS advises employers to encourage and support their staff to be vaccinated without making it mandatory. Employers may want to encourage employees by:

- offering employees paid time off to attend vaccination appointments;
- paying employees their full salary if they are off sick with vaccine side effects; or
- not counting absence caused by vaccine side effects as part of sickness records.

We recommend a policy of *encouraging* voluntary vaccinations rather than a *compulsory* vaccination policy. Active encouragement may elicit a more

welcome response from employees and ultimately may result in the same number of employees being vaccinated whilst avoiding discrimination claims, the other litigation risks set out above or generally employee relations issues.

If an employer decides to develop a vaccine policy, it is important to consult with employees, employee forums or trade unions (if relevant) in the development of any policy and to think about how it is rolled-out and communicated to employees.

It will also be crucial to consider the data protection issues if an employer is considering collating information about employee vaccination status. Requesting health information from employees, such as whether they have been vaccinated, is classed as special category data under the UK GDPR and employers will need to ensure that they comply with the relevant legislation. We recommend seeking specialist advice from our data protection colleagues on these issues.

### **Can employers ease workplace restrictions as more employees are vaccinated?**

No. Employers should continue to follow the government guidance on working safely during coronavirus and employ COVID-19 secure measures as appropriate e.g. wear well-fitting masks, making sure employees keep 2 metres apart, avoid poorly ventilated spaces and encourage frequent hand-washing.

In making their workplaces COVID-19 secure employers should remember their obligations under the Health and Safety at Work Act 1974. Under this legislation employers have a duty to ensure the health and safety of their employees as far as reasonably practicable and not to expose their workforce to health and safety risks. A failure to comply with these duties is a criminal offence.

### **Can an employer make workplace testing mandatory?**

By way of background, workplace testing generally relies on using lateral flow tests in which a swab is taken, and results are provided rapidly, usually within 30 minutes. This differs from PCR testing which is usually sent to a laboratory to be analysed.

Employers who want to make testing mandatory should be able to show that testing is an appropriate and proportionate action to take, having carried out the required risk assessments

which takes account of the specific workplace circumstances and risk of transmission. Also employers need to consider if they can safely carry out such testing on site or if they can introduce home testing to avoid unnecessary travel in the event that someone tests positive.

A mandatory policy of testing can expose the employer to employment law risks. The main risk would be unfair dismissal claims if an employer dismissed those who refused to undertake mandatory testing (and if those employees had the requisite 2 years' continuous service to bring such claims). It's much less likely there would be the risk of a successful discrimination claim (as it is difficult to see how testing would discriminate on religious, pregnancy, disability, age or philosophical belief grounds). Discrimination claims are much more likely to arise with a mandatory vaccination policy (as outlined above) rather than a mandatory testing policy.

There are also important data privacy considerations concerning testing and the ICO has issued specific [guidance](#) for employers who are planning to introduce testing. Given data concerning health is classed as special category data under the UK GDPR employers are recommended to carefully consider the data protection implications of any testing policy. Our data protection experts will be happy to discuss any queries with you.

### **What steps should an employer take if it is proposing implementing a workplace testing scheme?**

Employers have a legal duty to consult with employees concerning health and safety at work, and ACAS recommends consulting with employees either directly or with a recognised trade union before implementing workplace testing. Topics to cover in such a consultation include:

- how testing would be carried out;
- how staff would get their test results;
- the process to follow if someone tests positive;
- the policy for pay if someone needs to self-isolate, but cannot work from home;
- how someone's absence would be recorded if they need to take time off work; and
- how testing data will be used, stored and deleted, in line with data protection law.

Employers will also need to take into account the government guidance on [NHS Test and Trace in the workplace](#). Government guidance provides that employers should call the “Self-Isolation Service Hub” as soon as they are made aware that any of their workers have tested positive. Employers will need to provide the 8-digit NHS Test and Trace Account ID of the person who tested positive, alongside the names of co-workers identified as close contacts. This will ensure that all workplace contacts are registered with NHS Test and Trace and can receive the necessary public health advice, including the support available to help people to self-isolate.

### Should I have a COVID-19 workplace testing policy?

If an employer is planning on implementing a workplace testing scheme it is advisable to have a testing policy in place. It will be important to explain why the employer is asking employees to be tested along with the benefits of testing. This should cover why the business has decided testing is appropriate and what expectations it has of staff both in testing and compliance with other safety measures. Risk assessments should also be updated accordingly.

**If you have any questions on the issues in this alert please contact Paul Reeves, Leanne Raven or your usual Stephenson Harwood contact.**

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