

VACCINATING YOUR STAFF: ENCOURAGE OR ENFORCE?



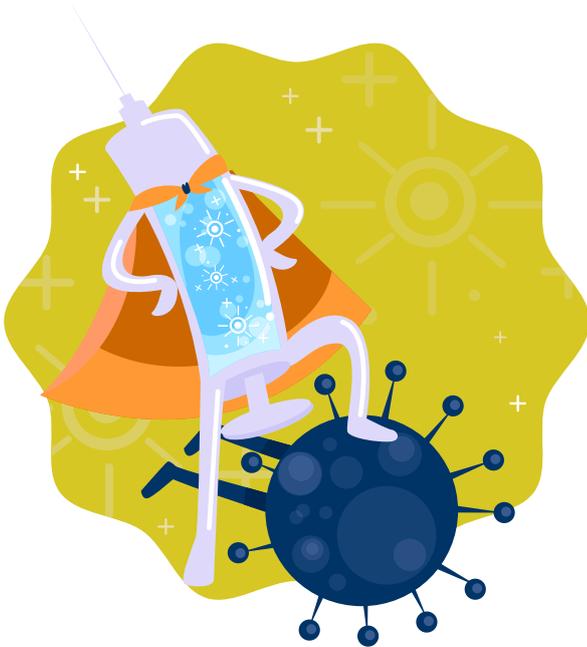
Whilst the roll out of the COVID-19 vaccine has started to gain some momentum there have been reports that some staff have refused to be vaccinated. This creates significant operational challenges for providers who find themselves in the unenviable position of having to balance the legal rights of those staff against the health and safety risks posed to their patients and other staff.

Can Primary Care providers force workers to vaccinate?

There is currently no legal basis in the UK to make vaccination for COVID-19 mandatory. In fact, the Public Health (Control of Disease) Act 1984 specifically precludes any government regulations from 'requiring a person to undergo medical treatment' which includes vaccinations. The Government has been clear that it has no intention of requiring anyone to have the vaccine.

Requiring staff to have the vaccine, which is invasive, is unlikely to be a reasonable management instruction. Dismissal for refusal to have the vaccine is unlikely to be fair. Making it a requirement for staff who refuse because of a disability, pregnancy or a protected religious/philosophical belief could lead to potential discrimination claims.

There is an argument that in the healthcare sector there's an increased need for staff to be vaccinated to protect the health and safety of particularly vulnerable patients. However, neither the Government nor the CQC are requiring staff to be vaccinated, nor is it clear that requiring healthcare workers to have the vaccine would be a justifiable interference with their human rights.



There is also a risk of personal injury claims in the event that you force an employee to have the vaccine and they have an adverse reaction.

Providers who try and insist on it are therefore opening themselves up to potential legal claims.

The current position seems to be similar to that with the flu jab: it is not a mandatory requirement, but it should be strongly encouraged.

What can employers do if workers refuse the vaccine?

The starting point should be implementing an effective information and consultation process with staff with a view to:

- Providing factual and reliable information about the vaccine
- Busting any myths or conspiracy theories
- Identifying any concerns staff have; and
- Discussing how their concerns might be overcome

A consultative approach could significantly reduce the number of staff who refuse to be vaccinated.

If, despite these attempts, staff continue to refuse to be vaccinated, consideration should be given to how best you can mitigate the risk. For example, by continuing to ensure robust infection control measures are in place and regular testing (ideally a test before each shift).

It is also hoped that as more people have the vaccine, concerns about its safety or reliability will dissipate and those who have previously been reluctant will take up the opportunity to be vaccinated.

Can you make it a condition of employment for new starters?

One way of increasing the percentage of staff who are vaccinated would be to make it a condition of employment for new starters. This would be lawful in most cases; however, care needs to be taken where an applicant for employment does not want to be vaccinated because of pregnancy, disability or a protected religious/philosophical belief. Refusal to offer a job in those circumstances could give rise to discrimination claims.

What liability would a provider face if an employee refused the vaccine and then infected a colleague?

A provider can be held liable for a worker’s wrongdoing when it affects a third party in certain circumstances. The law around ‘vicarious’ liability is complex, but a key element would be the requirement for the infected colleague to prove that they contracted COVID-19 due to a breach of duty for which their employer is liable. In practice this could be difficult, considering the many potential sources of infection. However, it is a matter that providers must carefully consider and take steps to prevent transmission as far as reasonably possible.

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