

NO JAB, NO JOB?

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Welcome
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Scope



1

Is it lawful for an Employer to introduce a No jab, no job policy?

2

Position re new staff v existing employees

3

Can an employer discipline an employee for failure to take the vaccine?

4

Current position – Has anyone implemented a policy?

Is It Lawful For An Employer To Introduce A No Jab, No Job Policy?

Much debated issue

Founder of Pimlico Plumbers, Charlie Mullins recently announced they would not give a job to anyone who had not been vaccinated.

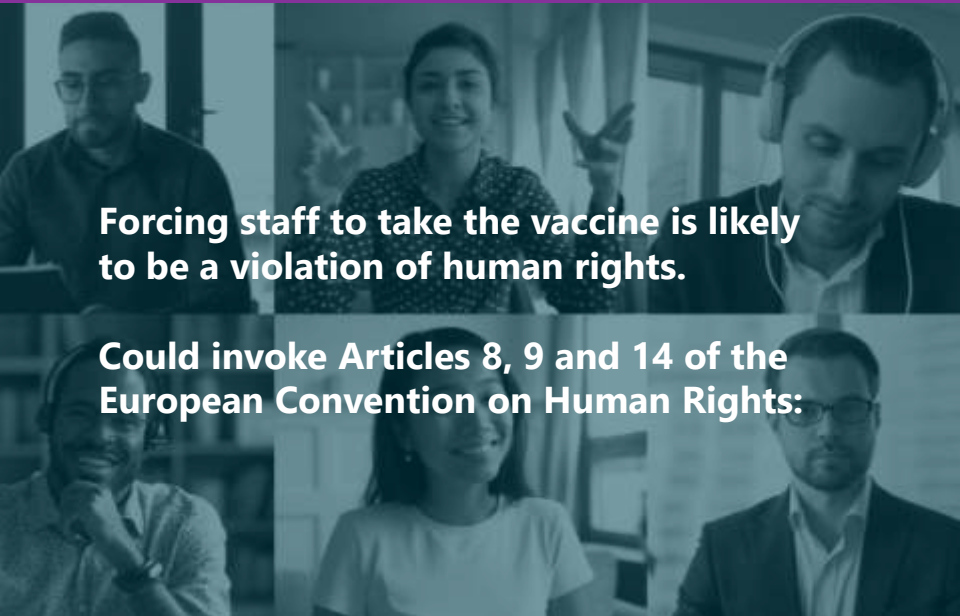
- Lawyers have drafted new employment contracts for its workforce to include the vaccine requirement
- Workers will be contractually required to prove they have received the COVID-19 vaccine, without which they would not be offered any work by Pimlico

This raises various legal issues which would need to be considered before introducing a policy/contractual requirement.

Human Rights Considerations

Article 8 gives the right to respect for private life, family life, home and correspondence. – There is potential to argue a vaccination requirement is an unnecessary invasion of the right to privacy, as there are other, less invasive ways to minimise the risk of transmission in the workplace.

Article 9 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. - Employees who reject vaccination because of their religion or belief may be able to rely on Article 9.



Forcing staff to take the vaccine is likely to be a violation of human rights.

Could invoke Articles 8, 9 and 14 of the European Convention on Human Rights:

Article 14 states that the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Discrimination?

Such A Policy Would Also Raise Issues Of Discrimination:

Indirect Discrimination

- 1 Might be possible to justify if it is a proportionate means of achieving a legitimate aim.
- 2 Consideration would need to be given as to what the Employer is trying to achieve.
- 3 Sections 2 and 3 of the Health and Safety at Work Act 1974.

Discrimination: Protected Characteristics



Equality Act 2010

1 Age Discrimination - Likely to affect young people who will have to wait longer to be offered the vaccine and would not be able to comply.

2 Disability - Pre existing medical condition?

3 Religious or Philosophical Belief:

- Fact specific.
- Refusal on grounds of not eating animal products - many vaccines use pig gelatine
- Anti-vaxxers

4 Sex discrimination – e.g. a pregnant woman

Other protected characteristics could be raised.

Consent

1 Consent must be given by the patient for a vaccine to be administered.

2 Under The Public Health (Control of Disease Act) 1984, the government has the power to make regulations to prevent, protect against, control or provide public health response to, the incidence or spread of infection or contamination in England and Wales.

3 However, the Act such regulations cannot require a person to undergo mandatory medical treatment, which specifically includes vaccination (Section 45E).

4 See <https://www.legislation.gov.uk/ukpga/1984/22/section/45E>

5 Employees have the absolute right to refuse the vaccination. Forced vaccination could amount to the criminal offences of assault and battery.



Proposals Re Compulsory Vaccinations For Health & Social Care Staff



- 1 The government has not yet passed any legislation making COVID-19 vaccinations compulsory for the general public.
- 2 However, the health secretary has now said that care workers in England could be required by law to have the vaccine under plans being considered by the Government.
- 3 There are concerns of a low uptake of staff in care homes.
- 4 Aim is to protect the most vulnerable to the virus.
- 5 Precedent for the proposition – existing requirement for NHS clinical staff to have a Hepatitis B vaccine?
- 6 Potential issues re discrimination.

Considerations For Introducing A Policy Or Requirement



1

ACAS guidance advises it is best for employers to support staff without making it a requirement. Better to encourage staff to take the vaccine when offered and offering paid time off to attend vaccination appointments. See: <https://www.acas.org.uk/working-safely-coronavirus/getting-the-coronavirus-vaccine-for-work>

2

Consider general duties of an employer

Must demonstrate a clear business rationale which constitutes a reasonable instruction:

3

- Will depend on setting and particular context against other effective measures to protect the H&S of staff/clients/service users
- Particularly important in the care sector


4

Consider the conflicts between duty of care to protect Health and Safety of employees vs protecting employees rights – The extent to which vaccination reduces transmission is still under review.

5

S2 HSA 1974 does not include insisting staff have vaccine .

New Staff V Existing Employees



It is possible for an employer to impose a contractual requirement or policy on new recruits (though discrimination risks still remain).

The position is different for existing employees.

For an existing employee:

- 1** Look at the contract to see whether there is an existing express term. A contract in the Social care sector may already contain a clause.
- 2** Consideration will need to be given as to whether it is lawful/reasonable instruction from the employer:
 - Fact dependent looking at all the circumstances
 - May be reasonable in certain sectors, such as care homes
- 3** Bear in mind that introducing a contractual requirement requiring employees would amount to a change in terms and conditions of employment.

Can An Employer Discipline An Employee For Failure To Take The Vaccine?

- 1** Should be done with caution, and after exploration of the facts.
- 2** Where employees do raise concerns, it is important to consult with them to find out their reasons.
- 3** If the objection is related to a protected characteristic, could be discrimination to discipline or dismiss the employee.
- 4** Consider if there are there alternatives e.g. permanent homeworking or moving to a role where they don't come into contact with many people.
- 5** If Employer does discipline, they would need to show the instruction given was reasonable, the employees refusal unreasonable and that dismissal was justified in all the circumstances and that a fair process took place.
- 6** If the requirement to have the vaccine is a term of the employment contract or a professional requirement, the employer would have a firmer legal ground for taking disciplinary action.





Potential Claims

Unfair dismissal
(if have 2 years' service)

Constructive unfair
dismissal

Discrimination
claims

Breach of contract

Current Position: Has Anyone Implemented A Policy?



1 On 17 February 2021, the UK government's minister in charge of the COVID-19 vaccine rollout, Nadhim Zahawi MP, stated in an interview with the BBC that it is "up to businesses to decide" whether to require staff to have been vaccinated against the virus.

2 Some organisations have already introduced a policy:

Pimlico Plumbers

Care UK:

- Largest organisation to adopt a no job no job policy for new starters.
- Now ask at application and interview stage, whether the applicant has had or would be willing to have the vaccination.

3 BUPA and MHA (Charity care provider) are also considering their policies.

4 Barchester Healthcare have announced that they will insist that current staff are vaccinated, warning that if they "refuse ... on non-medical grounds [they] will, by reason of their own decision, make themselves unavailable for work".

Any Questions?



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