



No jab, no job?

Covid vaccination and employment rights:
What is the position for employees and businesses?

Meet our team



Toby Stroh

Partner

T: +44 (0)20 7216 5564

E: t.stroh@druces.com

Toby is Head of Druces' Corporate & Commercial team, acting for a wide range of business clients. For a number of years he has specialised in employment-related matters including High Court and tribunal work. He has built up a considerable expertise in this highly confidential and complex area.



Charles Avens

Senior Associate

T: +44 (0)20 7216 5568

E: c.avens@druces.com

Charles is a Senior Associate in Druces' Employment and Business Immigration team. The majority of his employment work is focused on acting for companies and institutions, through the provision of corporate advisory employment advice. This includes assisting with TUPE transfers, redundancies, staff re-organisations, disciplinarys/grievances, protected disclosures, advising on restrictive covenants and employee entry and exit.



Sophie Allen

Trainee Solicitor

T: +44 (0)20 7216 5535

E: s.allen@druces.com

Sophie recently joined the firm as a trainee solicitor and is currently in the Corporate & Commercial department. Sophie read Law at the University of Sussex before completing the LPC at the University of Law in London. Prior to joining Druces, Sophie was a Head Legal Assistant at a London law firm.



The Government has set out a [roadmap](#) to remove all legal limits on social contact by no earlier than 21 June 2021. The end of July 2021 is the target for every adult to have been offered a first dose of the vaccine, with the hope of increased protection helping to ease the current restrictions.

This roadmap will hopefully offer a path forward for businesses, providing dates by which they can re-open. Many industries have been disrupted over the past year with employees furloughed or working from home, as a result of which there will undoubtedly be questions about what a return to work will look like.

Existing Employees

Can employees be forced to have the vaccine?

No one can be forced to have the vaccine against their will. However, the requirement to be vaccinated may be a reasonable request by the employer, if it is to protect those with whom the employee might come into contact (for example, frontline NHS staff). There is a balance to be struck between one's right to private life and the protection of others. Article 8 of the Human Rights Act 1998 states that we all have the right to respect for our private and family life. There should be no interference with this right except, for example, where this is necessary for the protection of health of others. As the vaccine is not currently mandatory in the UK, it would be hard for an employer to argue that the protection of the health of others outweighs the right to the individual's choice in their private life unless, perhaps, they work on the NHS frontline.

There is, though, a fine balance to be struck here. As employers have a duty of care under the Health and Safety at Work Act 1974 to provide a safe working environment, as well as to protect the health, safety and welfare of all employees at work. A refusal to have the job without reasonable justification might, therefore, be considered a refusal to comply with a reasonable management instruction and justify disciplinary action. It is important to remember that a breach by an employer of the Health & Safety at Work Act 1974 is a criminal offence. Employers must do their utmost to protect the health and safety of their employees, whilst, at the same time, giving due consideration to the rights afforded to individuals under the Equality and Human Rights Acts.

What if employees refuse to be vaccinated? Can I dismiss them?

In some scenarios, dismissing employees for not being vaccinated or failing to disclose if they have been vaccinated may be lawful.

If the requirement to have the vaccine (or disclose if they have had the vaccine) was a reasonable management instruction and an employee refused, then the employer may be able to take action. Employees can be lawfully dismissed for failing to comply with reasonable management instructions.



An employer must, however, consider the reason why an employee has refused to have the vaccine. For those who cannot or do not want to have the vaccine because of disability, pregnancy, religion, philosophical belief or any of the other protected characteristics¹ then that employee's dismissal for failure to comply may result in a claim of unfair dismissal or for discrimination under the [Equality Act 2010](#).

Can I require employees to be tested?

It is a good idea to discuss testing with employees in advance, including why it is required, how the test will work and what the company will do with the test results.

On 6 March 2021, the Department of Health and Social Care [announced](#) that businesses of all sizes could register to order lateral-flow tests for their workers from 13 March 2021. Businesses are encouraged to register interest by 31 March 2021 to access free workplace testing.

The Government has provided [guidance on private-sector workplace testing](#) and recommend a minimum of two lateral-flow tests a week.

What measures can I put in place to have a safe workforce?

Some employees may be willing to have the vaccine but do not feel safe to work alongside those who are not vaccinated. The [Health and Safety at Work Act 1974](#) states that employers are responsible for making sure that all their employees are safe at work.

Employers should ensure a COVID Risk Assessment is carried out to manage risk and protect employees. The [Health and Safety Executive Guidance](#) states that employers must:

- Identify what work activity or situations might cause transmission of the virus
- Think about who could be at risk
- Decide how likely it is that someone could be exposed
- Act to remove the activity or situation, or if this isn't possible, control the risk

¹Part 2, Chapter 1, S4 of the Equality Act 2010 – the protected characteristics include: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.



Other measures an employer could take to ensure the safety of their staff include:

- Testing,
- Use of personal protective equipment (PPE),
- Flexible or remote working,
- Following government guidelines, and
- Encouraging existing staff to have the vaccine.

Recruiting Employees

Can I ask candidates if they have had the vaccine?

Asking candidates in an interview if they have had the vaccine may breach [Section 60](#) of the Equality Act 2010, which says that an employer must not ask applicants about their health before offering them employment. However, this section can only be enforced through a disability discrimination claim.

Can I add a clause to the offer of employment that states the vaccination is a requirement of the job?

It may be lawful to add a clause to the offer of employment, stating that the vaccine is a requirement of employment for prospective employees. However, the same reasons as to why someone might not have had the vaccine (as above) will need to be considered. Therefore, it could potentially be discriminatory to candidates who fall within the protected characteristics in the Equality Act 2010.

Can I refuse to employ people if they have not been vaccinated?

Where an employer is able to justify the requirement for the vaccination, it may be lawful to refuse to offer a job to candidates who have not had the vaccine purely through their own choice. If, however, candidates have not had the vaccine due to a protected characteristic, then it could lead to a claim of discrimination if they are refused the job as a result.

Health and Safety vs Discrimination

How do I enforce health and safety without being discriminatory?

Under paragraph 1 of Schedule 22 to the Equality Act 2010, if a person is imposing a condition by virtue of some other law, then that person is unlikely to be contravening the Equality Act. What this may mean for employers is that, if they comply with Health and Safety laws (which is a legal requirement for employers) and in doing so they interfere with a protected characteristic, they might not be breaching the Equality Act. However, Health and Safety should not be used as an excuse to justify discrimination.



Considerations for Employers

Vaccinated Employees

- Does the requirement for a vaccination reduce the risk to other employees?
- What is the reduction of risk?
- Is the requirement for a vaccination proportionate in the circumstances?
- Can the risks be managed by other means? E.g. working remotely, daily testing

COVID Risk Assessment

- Who oversees the risk assessment?
- Is this kept up to date regularly?
- Where is the risk assessment stored?
- Have you considered different types of employees? For example, home workers.

Data Protection

- Is it appropriate to hold information about employees' vaccinations?
- How will the data be stored?
- What will happen with the data from employees' test results?
- Are you compliant with GDPR?



About Druces LLP

Founded in 1767, Druces LLP is a highly regarded City of London law firm which is both proud of its long heritage, yet also keenly focused on delivering innovative and forward-thinking advice to its clients. Our core client base includes businesses, charities, investors, entrepreneurs, banks and (U)HNW families and individuals.

The firm operates on a four-practice group model: private client, corporate and commercial, real estate and dispute resolution. This structure allows us to support clients in key areas such as private wealth and estate planning, employment and immigration, UK and international property and banking and finance; as well as specialisms such as Sharia'a finance, Art law and healthcare.

Through recent mergers and growth, we have been able to expand our expertise and strength across the practice groups. This includes wealth planning services for clients in French speaking jurisdictions, and in the capital markets group where we have become leaders in the natural resources sector.

A large part of Druces' work is international. We were the founder members of the Alliance of Business Lawyers, a worldwide network of law firms enabling us to provide a compelling cross-border service for clients in the UK and overseas.

Essentially, Druces is a one-stop shop for clients looking for cutting edge legal advice allied to traditional private client and employment legal services. Our aim is to create a bespoke experience for clients; one which continues to challenge the offering of our larger competitors.

"Always accessible, immediate response. Attentive to specific requirements and always willing to go the extra mile. Personal and highly professional service."

Legal 500, 2021

About this guide

This guide is provided for general interest and information only. It does not constitute legal advice. Whilst every effort is made to ensure that the content accurately reflects the law in England as at the date of its transmission, no liability is accepted for any loss or damage arising from any act or omission resulting from any information contained herein.

29 March 2021

Further information

If you would like to learn more about our employment related services, please speak to:

Charles Avens (Senior Associate)

T: +44 (0)20 7216 5568

E: c.avens@druces.com

SNAPSHOT: DRUCES LLP

Established in 1767

Office in the City of London

International networks

Partner-led services

Employment & business immigration

Leading Private wealth, trusts and tax team

Corporate & commercial law specialists

Strong banking practice including trade finance & Sharia'a

Heavyweight property team

Experienced commercial litigation practice