

# EMPLOYMENT LAW BULLETIN

OCTOBER 2021

## Welcome to the Wrigleys Employment Law Bulletin, October 2021.

This month we focus on the top ten frequently asked questions from our employer clients in relation to Covid-19 and the workplace.

Employers are currently navigating a route between returning to business as usual and taking account of the most recent sector guidance and risk assessments. We consider in our FAQs some of the tricky issues arising from having a mixture of vaccinated and unvaccinated staff in relation to isolation leave and pay, collecting personal data about vaccination status and requiring evidence of vaccination or exemption for some roles.

We also consider the broader issues of dealing with employees who refuse to attend their workplace as working practices return to something more like normal, and those whose health continues to be impacted by “Long Covid”.

Our October Employment Brunch Briefing focused on whether employers can make decisions about staff based on whether they are vaccinated or not. If you missed this session, you can access this and other recorded webinars through the links below.

On 7 December, our next free Employment Brunch Briefing will be a round up of the important employment law cases of the year, along with recent and upcoming changes to legislation. You can sign up through the link below. It would be great to see you there.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

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## **Forthcoming webinars:**

### **Students' unions webinar**

#### ***Students' unions contracts: tips and tricks***

4 November 2021 | 11:00 - 12:00

**Speakers:** *Daniel Lewis and Mike Ford, solicitors at Wrigleys Solicitors*

[Click here for more information or to book](#)

### **Students' unions webinar**

#### ***Governance reviews for students' unions***

11 November 2021 | 11:00 - 12:00

**Speakers:** *Laura Moss, partner at Wrigleys Solicitors & Nick Smith, consultant at Nick Smith Consulting*

[Click here for more information or to book](#)

### **Students' unions webinar**

#### ***Students' unions and trading subsidiaries***

18 November 2021 | 11:00 - 12:00

**Speaker:** *Joanna Blackman, solicitor at Wrigleys Solicitors*

[Click here for more information or to book](#)

### **Employment Brunch Briefing**

#### ***What's new in employment law?***

7 December 2021 | 10:00 - 11:15

**Speakers:** *Alacoque Marvin and Michael Crowther, solicitors at Wrigleys Solicitors*

[Click here for more information or to book](#)

**If you would like to catch up on previous webinars, please follow this [link](#).**

# Top 10 FAQs on Covid-19 and Employment law

*Article published on 15 October 2021*

*Employers are currently dealing with a number of issues in relation to the Covid-19 pandemic.*

On the one hand, many organisations will be rolling out return to the workplace policies or already back to business as usual. On the other, employers may be facing staffing issues due to sickness and self-isolation which are hampering normal operations. Employers may also be faced with difficult decisions as to whether to collect and act on information about the vaccination status of their staff. And those in the health and social care sector will be considering the impact of actual or potential requirements for staff to be vaccinated.

In this article, we answer some of the most frequently asked questions we have received relating to Covid-19, employment law and Covid vaccination policy.

## **Can an employer refuse to pay a staff member who is not double vaccinated and who is required to self-isolate?**

New government guidelines introduced on 16th August 2021 state that individuals who are double vaccinated and have been in close contact with a Covid-positive individual are not required to self-isolate unless the individual has symptoms or has tested positive themselves. Those who are not double vaccinated must continue to self-isolate.

For government guidance on self-isolation, see: [Stay at home: guidance for households with possible or confirmed coronavirus \(COVID-19\) infection](#).

From 16th August, those who have had a full course of an MHRA approved Covid vaccination, and at least 14 days have passed after the second dose, no longer need to self-isolate if they are a close contact of someone with Covid-19. This policy also covers:

- under-18s;
- participants of UK clinical vaccine trials; and
- those who cannot be vaccinated due to medical reasons.

Even though vaccinated employees will not have to self-isolate, the guidance still advises those who come into contact with a Covid-positive individual to take a PCR test, to limit contact with people outside their home, particularly clinically extremely vulnerable people, and to wear a face covering where social distancing cannot be maintained.

Where possible, non-vaccinated employees should continue to work from home and be paid in the normal way. If they cannot, a non-vaccinated employee is entitled to receive Statutory Sick Pay (SSP), subject to eligibility, during the isolation period. Entitlements to contractual sick pay during self-isolation will depend on the wording of contractual documents and the employer's sick pay policy.

Where there are different sick pay rules for vaccinated and unvaccinated staff, it is possible that employers could face claims from employees on the basis of a protected characteristic. For example, if the reason for not being vaccinated could be connected to pregnancy, disability or belief.

## **What is the current advice from the government on returning to the workplace?**

Government guidance suggests the following:

- employers should carry out a risk assessment of the workplace

- adequate ventilation should be provided
- workplaces should be cleaned on a regular basis
- a policy should be put in place for employees who display Covid symptoms to isolate
- ensure employees, contractors and visitors are aware of all safety measures in place
- additional consideration should be given to those who are vulnerable or live with somebody who is vulnerable to Covid, and reasonable adjustments should be made for disabled employees.

Employers should consider a phased return to the workplace or extend hybrid working where appropriate.

To see further government guidance across different sectors, please see: [Working safely during coronavirus \(COVID-19\)](#).

### **What if an employee refuses to attend their workplace?**

If an employer wants employees to return to the workplace, it is up to the employer to provide a safe environment by implementing health and safety measures to mitigate identified risks. Employers should also be aware that they have a duty to consult with staff or their representatives on health and safety matters.

If an employee refuses to return to work, an employer should first consider any reasonable adjustments they can make in the workplace to allow for that employee to return. Employers have a statutory duty to make reasonable adjustments for disabled employees where a policy or way of working (such as normal workplace routines) put them at a substantial disadvantage compared with someone without their disability.

Reasonable adjustments could include:

- a temporary or permanent redeployment elsewhere within the business;
- a flexible working agreement which might include home-working, hybrid working or adjusted start times; or
- a gradual return to the workplace.

The employer should also consider whether it is necessary to increase the use of Covid control measures, such as social distancing and PPE to protect vulnerable colleagues.

If after having taken reasonable measures to ensure the workplace is safe an employee still refuses to attend the workplace, then the employer may consider a disciplinary procedure. However, there is a risk of claims in this scenario and so it is advisable to resolve issues as far as possible through discussion and to document the steps the employer has taken before taking this approach.

Employers should note that employees and workers can bring claims arguing they have been subjected to a detriment or dismissed because they refused to attend work because of fears about serious and imminent danger in the workplace. Further guidance on this can be found in our previous article (available on our website): [Refusing to work because of fears about Covid-19 - section 44 of the Employment Rights Act](#).

There are further protection for employees against automatic unfair dismissal on health and safety grounds under s.100 of the Employment Rights Act. These were considered in the case of *Rodgers v Leeds Laser Cutting Limited*, where Mr Rodgers was dismissed after he did not return to work citing that he had a young child who may have had underlying health issues. For more detail see our previous article (available on our website): [Was an employee automatically unfairly dismissed for refusing to attend work due to the Covid-19 pandemic?](#)

## **Can an employer treat vaccinated staff who isolate but are not required to as being on unpaid leave?**

Current government guidance suggests that there is no need for those who are fully vaccinated to isolate when they have been identified as a close contact of someone with Covid-19 unless they have symptoms or test positive for Covid-19. An employer would therefore be entitled to treat an employee who chooses to self-isolate when they are not required to as being on unpaid leave for that period.

Current government guidance on the self-isolation rules can be found here: [Stay at home: guidance for households with possible or confirmed coronavirus \(COVID-19\) infection](#).

This would not apply to those who are not yet “fully” vaccinated, for example, they have only had one vaccination dose or have not reached the required 14 days after their second dose.

Employers should note the Government’s guidance that vaccinated people who are identified as close contacts should consider taking extra precautions in the 10 days after that contact.

There may be some circumstances in which an employer decides to ask vaccinated employees not to come in to work where they have been identified as a close contact, for example because they are working with vulnerable people or where it is possible to work from home and this will help to reduce the risk of transmission. In this case, the employer should continue to pay the employee as normal during the isolation period.

## **Can employers introduce a mandatory Covid-19 vaccination requirement for staff and what are the risks of doing so?**

Employers may wish their employees to be vaccinated for health and safety purposes in the workplace. Employers should consider whether they have good reason to require staff to be vaccinated to carry out certain roles. The consequences of requiring staff to be vaccinated will include risks to staff relations and morale, recruitment and retention, and a risk of claims in the employment tribunal where staff lose their jobs/benefits or allege unfavourable treatment connected to a protected characteristic.

The current government position is that vaccinations are not mandatory. At present, only those working in CQC-regulated care homes must be able to show evidence of a full course of a Covid-19 vaccine or a valid clinical exemption in order to continue in their roles. This requirement for care home staff comes into force on 11 November 2021. The operational guidance for care home employers is available [here](#). It is possible that similar requirements will be introduced to other health and care settings in future. The Government is currently consulting on extending the vaccination requirement to all frontline health and care workers in CQC regulated services. The proposals and consultation can be viewed [here](#).

Government guidance suggests that employers should help their staff to make an informed decision about whether to be vaccinated by providing them with authoritative information about the vaccine.

Deciding not to have the vaccine is unlikely to be grounds for a disciplinary process. The government guidance stresses that, even in regulated care homes, not accepting a vaccine is not a ground for misconduct. Where employees are dismissed because they are unvaccinated, the reason may be statutory restriction (where the CQC requires staff to be vaccinated or exempt) or “some other substantial reason”.

Unless the organisation is working in a high-risk or regulated sector, mandatory vaccinations are a risky policy and should be carefully considered in relation to your organisation’s service users and employees’ circumstances.

A mandatory vaccination policy among staff risks employment claims being brought against you. Such claims could involve discrimination claims on the grounds of disability, sex/pregnancy and maternity, age, race, religion or belief. For more information, see our previous article (available on our website): [Can employers insist that employees are vaccinated against Covid-19?](#)

In addition, you could face unfair dismissal claims if you were to dismiss a staff member for not getting a vaccine. Although an employee cannot bring an ordinary unfair dismissal claim before they have two years' service, if they can prove that the reason for the dismissal was automatically unfair (for example it was health and safety related or because of whistleblowing), then the two-year qualifying service requirement does not apply. Discrimination and breach of contract claims can also be brought without two years' service.

**An employee has just returned from a holiday abroad: can they come back to work?**

From 4 October 2021, [new rules for international travel have taken effect](#).

The system will change from the red, amber and green list countries, to be replaced by a single red list of countries with simplified travel measures.

For government guidance on a list of red list countries refer to: [Travel to England from another country during coronavirus \(COVID-19\)](#).

The new measures are set out in the following table:

<b>Red list countries</b>		<b>Rest of the world</b>	
<b>Fully vaccinated individuals</b>	<b>Unvaccinated/not wholly vaccinated individuals</b>	<b>Fully vaccinated individuals</b>	<b>Unvaccinated/not wholly vaccinated individuals</b>
Pre-departure test and a PCR test on days two and eight after they return, and must self-isolate for 10 days at a managed quarantine hotel		Will not have to take a pre-departure test before travelling to England	Pre-departure test and a PCR test on days two and eight after they return and must self-isolate for 10 days at home.
		For now, individuals must book a PCR test on day two and complete a passenger locator form  The government have proposed that this will change. Individuals can instead take a lateral flow test instead of two-day tests. The government has not yet published a date for this change.	Individuals have the option to test to release after five days

Employers might insist employees stay working from home upon returning from holiday whatever the relevant travel rules. However, where isolation is not required by law, this should be considered on a case-by-case basis, for example if an employee would lose out on certain payments by working from home, then this might be a breach of contract and an employer could risk a claim being made against them.

Where possible, holiday policies should assist employers to come to an agreement with an employee before they go on holiday in preparation for their return to work.

### **Can an employer collect personal data about Covid vaccination status from their employees?**

This is possible; however, health data is special category personal data under the Data Protection Act 2018. An employer's use of this data must be in line with data protection law.

The Information Commissioner's Office (ICO) guidance on the data protection implications of processing data about vaccination and Covid status can be found here: [Vaccination and COVID status checks](#).

If an employer cannot explain the reasons for collecting data about an employee's vaccination status and there is evidence that an employer can achieve their objective without collecting this data, they are unlikely to be able to justify collecting it.

Whether this data can lawfully be collected will depend on the type of work involved and whether there is a reason to check employee's Covid status.

If the reason for collecting the Covid data will have a negative impact on an employee, for example, it will put an employee at risk by denying them employment opportunities; then an employer needs to complete a data protection impact assessment.

Where an employer scans Covid passes digitally, even if no record is kept, an employer will be deemed to collect personal data. However, if Covid passes are just visually checked and no record is kept, then no personal data is processed, and data protection law will not be relevant.

An employer may have a lawful basis to collect vaccination data. In order to process special category data, the employer will need one of the lawful bases to process personal data (see [ICO guidance on lawful bases for processing personal data](#)). It will also need one of the conditions for processing special category data. For example, an employer which requires information about vaccine status in order to carry out its risk assessment or to develop risk mitigation measures may rely on the lawful basis of legitimate interests (taking into account the interests of the data subject) and the so-called "employment condition" (processing is necessary to carry out obligations and exercise rights in the field of employment).

If an employer decides to collect the vaccination data of their employees, they should update their privacy notice. The ICO recommend a privacy notice should include certain information. Guidance on this can be found here: [What privacy information should we provide?](#) The ICO guidance for creating/updating a privacy notice may be helpful and can be found here: [Make your own privacy notice](#).

### **What is long Covid and will it be a disability under the Equality Act 2010? What should an employer do if an employee is absent due to having symptoms of long Covid?**

Long Covid is the condition that individuals are said to have when they display symptoms for a period of time following the end of the initial Covid infection.

S6 of the Equality Act defines a disability as:

- a physical or mental impairment; and
- the impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities.

At present, there is no case law on specifically this question of whether Long Covid is a disability under the Equality Act 2010.

Employees may be able to establish a physical or mental impairment that has affected their day-to-day activities and is related to so-called Long Covid. For example, shortness of breath could hinder an employee's ability to work/exercise.

What will perhaps be difficult to prove is that the condition has a 'long term' and 'substantial' impact on the individual. The Equality Act 2010 states that long term means the condition has lasted or is likely to last for a period of 12 months.

Whether the impact is substantial will depend on the severity of symptoms and their effect on the individual's ability to carry out day to day activities. With medical experts currently unsure as to the duration of Long Covid symptoms and the varying degrees of symptoms, it is possible that some individuals may find it difficult to show they are disabled due to Long Covid under the Equality Act. However, it is best practice for employers who are unsure as to whether an employee is disabled for these purposes to err on the side of caution and do what they reasonably can to facilitate the individual's return to work.

In the situation of a Long-Covid related employee absence, an employee should be treated as they would be with any other absence. This is in line with the [Acas guidelines](#).

Your sickness absence policy should be followed to manage the employee's absence. This may include review meetings and occupational health referrals. It is recommended that you should always keep in touch with employees during their period of absence and discuss with them the support they will need to return to work.

For more information, please refer to our previous article (available from our website): [Is "long Covid" protected as a disability under the Equality Act?](#)

### **How will the government's vaccination policy affect care home staff?**

Commencing 11th November 2021, staff working in a Care Quality Commission registered adult care home in England, require two doses of a Covid-19 vaccine to enter their work premises unless they are medically exempt. Mandatory vaccinations do not apply to residents or their visitors.

More information can be seen in our previous article (available from our website): [Regulations to make Coronavirus vaccination compulsory for most care home staff are signed into law.](#)

This policy has a broad reach. It covers anyone who needs to enter the care home. This will include a trade person working for a contractor or a self-employed person such as a hairdresser. It also includes volunteers in most circumstances.

Not following this policy could constitute a breach of duty to provide safe care and treatment and risks significant financial penalty for CQC registered providers.



## **If a dismissal is considered for refusal of a vaccine in a care home, will it be fair where there is a mandatory requirement for vaccination or exemption?**

If dismissal becomes necessary, a care home must:

- follow a fair procedure; and
- act reasonably in treating the potentially fair reason as a sufficient reason for dismissal.

To achieve this, a care home should follow these steps which are set out in the [operational guidance](#) for registered care home employers:

- employee consultation
- warning employees they risk dismissal if they do not prove they are either vaccinated or exempt in a certain time frame
- providing a meeting to allow an employee to explain their circumstances to prevent a dismissal
- permitting an employee to be accompanied by trade union representative or a colleague
- making a record of all formal meetings to prevent disputes
- considering alternatives to dismissal, such as redeployment to a role that does not require a vaccination
- considering each matter on a case-by-case basis
- always communicating the outcome to the employee
- giving contractual/statutory notice
- the provision of a right to appeal to allow an employee to appeal their dismissal.

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