

Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

January 2021



HOT TOPIC

COVID Vaccination and Testing – can you make employees do it?

With the COVID vaccination programme underway and the government encouraging those who are symptom free to get tested every 2 weeks, employers are considering how far they can go in requiring employees to get vaccinated and tested.

Can employees be forced to be tested?

Clearly you can't physically force anyone to submit to a COVID test. You can certainly ask and encourage employees to be voluntarily tested. Direct employees to relevant local government information on symptom free testing and only ask to be notified of a positive test result (and arguably even then only if the employee is not already working from home).

But what many employers want to know is, can they make testing mandatory and discipline or even dismiss employees who refuse to comply? The answer, unsurprisingly, isn't simple.

[Read the full feature here p2>](#)

Welcome

Happy New Year.

We hope that you all had a good Christmas and managed to start the New Year feeling rested.

We're only a few weeks in but it's already been busy with the latest COVID employment challenges keeping us on our toes – like whether employers can require testing and vaccinating. We take a look at these issues in this first of our newsletters of 2021.

As always, please follow us on [LinkedIn](#) for our latest updates.



outset.

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Testing can be an uncomfortable process, involving a nose and back of the throat swab. It can be a legitimate concern for employees that being forced by their employer to regularly undergo such testing is an invasion of privacy.

Acas has issued guidance which states that employer cannot force employees to be tested, but, depending on the circumstances, an employee could potentially be disciplined for refusing to do so. This is likely to only be fair in certain circumstances, and employers who don't want to face claims should tread carefully.

Employers who want to consider introducing a mandatory testing policy, and disciplining employees who do not comply, should:

- **Carefully consider why testing is necessary** – who it should apply to and in what circumstances
- **Consult and agree a testing policy with employees** (or recognised Trade Union)
- **Put the agreement in writing**
- **If an employee refuses to be tested, consider their reasons**, whether there is scope for flexibility and try to resolve the issue before moving to disciplinary action
- **Comply with data protection rules** around handling sensitive personal data

If an employer pays for testing is that a taxable benefit?

The government updated tax regulations in November 2020 to ensure that where employers do provide (or pay for) testing, this will not be classed as a taxable benefit. Providing free testing is therefore exempt from income tax.

Can employees be forced to vaccinate?

Requiring employees to be vaccinated is even more of a thorny issue than testing. Requiring individuals to undergo an invasive procedure is something that even the government isn't willing to mandate.

There can be many reasons why someone may refuse to be vaccinated, including:

- **Concerns/anxiety** - around the safety of the vaccine, largely prompted by its swift development and release
- **Religious objections** - although the majority of major religious organisations have approved the vaccine as suitable for its followers to have, an individual's faith/belief must be factored in
- **Health reasons** – someone may be allergic, pregnant or have some other health related reason for not being able to safely have the vaccine
- **Anti-vaxxers** – the anti-vaccination movement largely arose from parents in Western countries refusing to vaccinate their children due to various reasons and perceived fears.

Whilst such objections aren't new, there was a surge in the opposition to vaccines in general, specifically against the MMR (measles, mumps, and rubella) vaccine. This led to multiple measles outbreaks in countries where the measles virus was previously considered eliminated. Despite this, the movement is experiencing a resurgence, undoubtedly fuelled by social media and media outlets and by the speed at which the COVID vaccines have become available. On the face of it, being an anti-vaxxer is not a protected characteristic. Might an individual attempt to argue that being an anti-vaxxer should be a protected belief under the Equality Act (in the same way veganism has)? Almost certainly, but it's unlikely a Tribunal would agree.

Acas guidance on vaccination is similar to testing – employers can't force employees to be vaccinated and if they want to introduce such a policy, the same sort of steps as with testing should be followed.

With testing however the risks around discipline and dismissal are likely to be higher so employers should approach such situations with extreme caution.

Not only could you face unfair dismissal claims for those with at least 2 years' service but, regardless of longevity, employees could bring discrimination claims depending on their circumstances.



Why employee engagement is important

The importance of employee engagement can't be overstated – employee engagement strategies have been proven to reduce staff turnover, improve productivity and efficiency, retain customers at a higher rate, and make more profit. Most importantly, both at work and in your personal life - when you're engaged it infuses everything you do with purpose, energy, and enthusiasm.

Contrary to popular belief, employee engagement is not a single concept; instead it consists of different levels, ranging from the job to the organisation. Each level of engagement motivates different beneficial organisational outcomes and is predicted by a unique set of drivers.

Employee engagement can be created organically through well-established management constructs such as commitment, organisational citizenship behaviour, job involvement and job satisfaction. Some suggest that employee engagement is just a re-badging of these constructs. At a very basic level there are correlations between engagement and measurements of concepts such as commitment.

Employee engagement starts with high level decision-making. Leaders and managers must adopt policies that will encourage engagement. This means not only implementing the right tools and processes, but actively participating in a company-wide cultural change.

The Psychological contract

CIPD (2020) defines the term 'psychological contract' as referring to individuals' expectations, beliefs, ambitions and obligations, as perceived by the employer and the worker. The psychological contract is based on an employees' sense of trust and fairness and their belief that their employer is honouring the agreement between the organisation and its employees. Where an organisation applies the fundamentals of a psychological contract, the employee receives a sense of fairness and inclusion.

Even if the organisation applies strategies that may affect the psychological contract, the method used along with involvement of employees may still impact the sense of trust and fairness. This trust and feeling of fair treatment is essential to being engaged as an employee.

Breaches of the psychological contract without trust and fairness is the quickest way to take an employee from being engaged to being disengaged. Compared to the ease in which that is done, there's a huge amount of work involved to reverse it.

What can you do?

Organisations must decide what engagement means to them, in order to effectively measure and improve it. There are multiple drivers of job and organisational engagement which organisations can incorporate into a holistic strategy and embed into people management practices and systems.

Using diagnostic measures to get to know your employees and an evidence-based approach to improve engagement will put organisations in a far better position to achieve their desired outcomes. However, there is no one 'magic solution' - the combination of drivers that will be effective will differ over time and context, therefore HR must consider the whole package within the specific context of the organisation.

Fostering employee engagement is an organic and socially responsible way to boost productivity. A win-win solution, it benefits everyone, for all types of organisation hierarchies.



Final thoughts

Ultimately, you can implement any mandatory requirement you like, and dismiss any employee who refuses to comply. It all comes down to what risk your business is willing to take. Not only is there the time and expense of dealing with tribunal claims, but the publicity that is likely to be attracted is something most employers will want to avoid. Who wants to be the Tribunal test case (no pun intended)?

We have all been subject to strict government lockdown rules, and if we do go anywhere - requirements to wear face coverings and constant diligence in washing/sanitising hands. We can't do what we want, when we want or see most of our friends and family.

We've cancelled everything from weddings to gym sessions, decorated the entire house, completed Netflix and we're half way through YouTube. Both little and large pleasures we took for granted have been denied us, and we still don't really know when things will get back to "normal".

We know it's for everyone's safety, but that doesn't stop the feelings of frustration that most of us have felt, at least from time to time.

Being instructed by your employer that it insists you submit to invasive procedures or risk losing your job may be an invasion on peoples' sense of freedom and privacy that goes a step too far.

The majority of individuals will welcome the job when it gets to their turn. Is it even necessary to introduce a policy? Communication is key – start a genuine, two-way dialogue with staff, perhaps even conduct an anonymous opinion survey to find out what your workforce truly thinks about testing and vaccination.

You will probably find that those who say they don't want the vaccine are in the tiny minority, and having one to one conversations with those to understand their reasons is likely to be much more successful in fostering good employee relations, than going straight in with proposals for mandatory requirements across the board.



Guest article by our HR Consultant David Westell.

David has over 12 years experience as an HR consultant and has extensive experience in employee relations, HR policy & procedures and HR strategy and implementation.

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What do I do about... right to work checks for EU nationals?



Now that the Brexit transition period has ended, many employers have been asking what they should do about right to work checks for EU nationals.

What evidence can I ask for when conducting a right to work check?

The Home Office provides a checklist online which helpfully explains each step involved, what evidence you can accept, and whether, based on the type of evidence, you need to conduct a follow up check (which depends on whether the document provided falls into List A or B). The checklist can be found [here](#).

Can I ask for right to work evidence during a recruitment process when I know the candidates are based abroad?

Requesting right to work evidence during a recruitment process and basing your decision as to whether to progress the individual based on the evidence provided could lead to claims of discrimination. Particularly if you only ask this of the candidates you believe to be non-British nationals. Instead, employers should conduct the recruitment process without factoring right to work issues into the decision-making process. At offer stage, making the offer subject to the individual having the right to work in the UK will ensure you won't need to proceed any further should the individual not have permission.

Should I be asking for additional evidence from new EU employees, beyond their passport?

No. EU nationals can continue to provide their EU passport as evidence of their right to work in the UK until 30 June 2021, and employers cannot insist on any additional evidence. It's only from 1 July 2021 that EU nationals applying for jobs will need to provide their prospective employer with evidence of Settled Status (or other right to remain in the UK).

Can I ask to see evidence of settled status?

Until 30 June 2021 you can't insist on evidence of settled status. Even come 1 July, you won't be able to insist on additional right to work evidence from existing employees unless when you first conducted their check, the evidence they provided fell within List B of the Home Office right to work checklist. You could ask employees to voluntarily

provide evidence of settled status, but it's a question which should be handled carefully to minimise the risk of an allegation of discrimination.

What if I insist a new starter provides evidence of Settled Status?

Home Office guidance is very clear that employers cannot insist on EU nationals providing anything beyond their EU passport until 1 July 2021. It warns that employers must be careful when conducting right to work checks not to discriminate. If you insist on evidence which the immigration rules don't require, you could be exposed to a discrimination claim. For this same reason you should always conduct right to work checks consistently to all new starters (in other words, don't only ask for right to work evidence from "foreign" employees).

What if a new starter has an EU passport, but I suspect they haven't applied for Settled Status and/or might not qualify so will be an illegal worker come 1 July?

Terminating employment or retracting an offer where an EU national has provided their passport prior to 1 July runs a high risk of a discrimination claim. If when you conduct the check their evidence falls within List A in the checklist, you won't be able to insist on a follow up check later down the line. However, all employers must help the Home Office prevent illegal working. If you have reason to believe that an employee doesn't have the right to work in the UK, but you aren't able to insist on further evidence from them, it could be worth considering a discussion with the Home Office.

These situations should always be approached sensitively and carefully in order to minimise risk to the business.

Recent Case Decisions

Tribunal powers can stretch across the ocean

Sarnoff v YZ

The Claimant lodged an Equality Act claim against a number of companies and individuals connected to Harvey Weinstein. She alleged being subjected to sexual harassment by Harvey Weinstein, that she was employed by a subsidiary company of The Weinstein Company Holdings LLC, either in the UK or US, and that by failing to prevent his conduct the Respondents "knowingly helped" him.

One of the individual Respondents is on the board of the parent company and is a resident in the US. The Employment Tribunal made an order for disclosure of relevant documents against all parties. This particular Respondent argued that the Tribunal's power could not extend to him in the US.

Both the EAT and Court of Appeal agreed that the Employment Tribunal does have the power to order all parties to proceedings to disclose documents, regardless of their location.

The Court of Appeal drew a distinction from the limitation of that power in the Rules of Procedure which state that the Tribunal may "order any person in Great Britain to disclose documents or information". There is no such geographical limitation when it comes to the power for making orders applicable to the parties to the claim.

This case serves as a word of warning to businesses with group companies based abroad. Claimants can name individuals as respondents to claims of discrimination. This combination of rights of employees and powers of the Employment Tribunal mean that employees based abroad could be subject to proceedings in the UK and have to supply documents and information.

Believe it or not?

With working from home looking more and more like a long-term way of life for many of us, you might want to take a look at the Uswitch Remote Working Index 2020.

Uswitch considered a number of factors, including property prices, internet speeds, green spaces and top rated schools to provide the best and worst places to work from home in the UK:

The UK's top 5 places to work from home



1. Harrogate
2. Bath & North East Somerset
3. Mendip
4. Derry City and Strabane
5. Wigan

The worst 5 places to work from home

1. Ipswich
2. Sandwell
3. Leicester
4. Manchester
5. Blackpool

