

## **Employers needed by vaccine refusals, Part 3 – injecting some reality (UK)**

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In the earlier parts of this blog series ([part 1](#) & [part 2](#)) we saw that for the most part, asking your employees to take the covid-19 vaccination will be a reasonable management request and that their refusal to do so will usually be deemed unreasonable at law. Against that background, how should the employer treat persistent refuseniks?

### **Can you refuse entry to your workplace to an employee who will not take the vaccine?**

Realistically, yes. If you say that it is a reasonable management instruction to take the vaccine to protect others in the work place, allowing in employees who won't do so obviously undermines that position, and the reason for which they won't do it is relatively unimportant. It may also be argued by unions or other employees that it creates an unnecessary risk to them (as it is basically only one step short of your allowing in someone you know has active Covid symptoms) and so that it puts the employer in breach of its statutory and contractual duties to them.

They may say that taking the vaccine gives others no safeguard against the virus being brought in on their clothes or other belongings, so its protective value is limited relative to the level of personal intrusion implicit in having an injection. That may well be true, but for so long as government and medical experts consider the vaccine to offer a material level of protection in the workplace above and beyond social distancing, one-way corridors and sanitiser, employers will probably not be just entitled but obliged to treat the issue of physical access to the premises as part of their reasonable precautions.

Remember that it may not be just employers which take this view. Australian flag-carrier Qantas has indicated that it will require anyone taking a flight with it to have been vaccinated and it is not hard to see many other service providers taking a similar view in time, especially where providing the service requires the customer to be in close contact/proximity with the employer's staff or property for any period of time, e.g. hospitality, gyms, salons, clothes shops, etc. If that becomes common practice, the employer's case for barring entry to non-vaccinated staff will be stronger still.

### **If I do refuse entry to an employee on that basis, do I have to pay them?**

If the refusal to take the vaccine is unreasonable, probably not. It would be the equivalent of turning

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up to work on a building site without your hard hat and toe-capped boots. You are just not sufficiently safe to work, it's your fault and so no pay is due. If the refusal is reasonable, then potentially so, but that may very quickly lead the employer down a path towards a termination of employment irrespective of the lack of overt culpability on the part of the employee (see paragraph 9 below).

### **If the employee suffers serious side effects from the vaccination you insisted upon, who is liable?**

If the vaccine is government-recommended and administered by professionals in line with medical best practice, it is not you. Instead it would be the government or the drug manufacturer. However, if you as employer don't keep the vaccine in approved conditions, don't properly vet the administering medical organisation, don't provide appropriate facilities for it if done on site, etc., then (to the extent causation is established) it will be you, since that would be a basic failure in your health and safety duties to the employee. There is nothing which you could ask the employee to sign which would alter this or which would be a valid waiver of any such claims.

If it becomes a requirement for employers to provide vaccinations, we would always recommend an appropriate prior check with your insurers to understand their conditions in those respects.

### **Are there data protection/privacy considerations in this?**

Inevitably, yes. Information about who has been vaccinated and when will constitute sensitive personal health data. The same will be true of information about who has not been vaccinated and why. That data will need to be kept subject to all the appropriate protections against loss or unnecessary disclosure, etc. Those records will also need to be retained long enough to be used in any possible proceedings arising out of the vaccination. That might be by the government for enforcement purposes if the vaccine becomes mandatory, by other employees if a failure to take adequate precautions is alleged, by the employee himself if there are adverse side effects, or by the employer if it comes to action against the employee. For practical purposes these will constitute valid grounds for processing under the legal obligation and/or legitimate business interest reasons in the GDPR, especially if the employee is provided before the vaccination with written notice as to the employer's intentions in this respect.

### **Can you dismiss an employee who refuses to take the vaccine?**

If taking the vaccine is a reasonable management request, then realistically, yes. You would need to be seen to consider alternatives (permanent homeworking, perhaps) but in any case where contact with other employees or customers is likely, you must ultimately have the right to take those steps reasonably necessary to protect them.

The question then would be how the employee was dismissed and for what. The "what" will come down to whether the employee's refusal is reasonable or not. In simple terms, if it is reasonable then the dismissal will be by reason of capability or some other substantial reason, whereas if it is not (and you really want to take the point), dismissal could be for misconduct in failing to comply with that reasonable management instruction. The "how" would be similar in both cases apart from the labelling in any formal pleadings – do what you can first by way of persuasion and exploration of alternatives, then offer a final opportunity to comply before making your dismissal decision, which should then be subject to a right of appeal. Alternatives? Maybe permanent WFH or unpaid suspension until the risk recedes, but clearly the employer's options are very limited.

Technically a misconduct dismissal could be without notice, but as the line between reasonable and unreasonable refusal may be a thin one, it might be thought that this is not a point worth taking for employees with relatively short notice entitlements.

If having the vaccine becomes just another possible arrow in the quiver of the employer's pandemic counter-measures, and is not pushed as hard by government as currently appears, then the position is less clear at law. In practical terms, however, we think that the balance of convenience will still favour dismissal. It is a sufficiently onerous requirement at a personal level that if some employees are seen to get away with not having it, order among the remainder will prove very hard to keep, much as with the introduction of pay cuts or furlough earlier in the pandemic. Individual rights may have to be subordinated to the best interest of the majority to some extent where the health of your wider workforce is concerned.

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