Ruth Seddon HR

Employment Law Update from Ruth Seddon HR

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All things Covid

REQUIRING WORKERS TO BE VACCINATED

This guidance applies to employers not in the Care Home industry.

For an employer, requiring workers to be vaccinated to come to work may seem attractive and logical. There are, however, a number of pitfalls. Any such requirement would be a new contract term and so the normal rules of changes to contracts apply, eg consultation and documentation. It could be applied to new workers more easily than existing workers.

In addition, there are some potential ways an employee could make an employment tribunal claim if they cannot or will not be vaccinated: indirect discrimination is most possible on the grounds of disability (some may not be able to have the vaccine), race (some ethnicities have lower uptake), religion or belief and sex.

If you do make it a rule, you would have to go through a fair process before deciding to dismiss for their not being vaccinated. This carries with it the possibility of unreasonable pressure/bullying which could lead to a constructive (unfair) dismissal claim.

However, the biggest hurdle to get over is the question of whether requiring vaccination is reasonable in the circumstances and is the **only** or **best** method for controlling an existing risk under the Health and Safety Act. Other less invasive measures such as testing, social distancing, etc., could manage the risk adequately. Requiring vaccination is unlikely to be justifiable for most employers, particularly as the most recent medical evidence suggests that vaccinations do not reduce transmission of the virus significantly and that even the existing effect may wane over time.

If you do want to introduce this then we would need to do detailed work to identify if it is justifiable and how to introduce it.

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SICK PAY AND COVID

A certain supermarket has got themselves in the news over removing sick pay for unvaccinated workers suffering from Covid. This proposal suffers from all the potential discriminatory issues identified above, but with the additional risk that it disincentivises people from telling their employer they have Covid if they are unvaccinated. So they may not stay off work and thus spread it to other workers, including the vaccinated. In my view this policy is very likely to backfire. It should also be noted that the most recent data (last week) indicates that the infection rate in the over 40s is higher among vaccinated people than unvaccinated. this could change but the volatility of medical data can undermine policies quickly.

GDPR AND VACCINATION STATUS

A reminder - any data on an employee's health is sensitive personal data and you need an employee's consent to record it. Here's a link to the full Information Commissioner Guidance on asking employees for their vaccination status, I will summarise it below. https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccination-and-covid-status-checks/

To record this data you need to consider the following:

- your contractual right to have this information (as above, I believe consultation would be needed)
- health and safety requirements (does the risk assessment indicate this is necessary)
- equalities and human rights including privacy (you wouldn't think of asking anyone if they are vaccinated against flu or measles so why this virus?)

You also need to be clear on why you want this data - what is the purpose? What are you trying to achieve?

In regards to job applicants, where you are considering asking this question of someone once you have offered a job (remember - you cannot ask any health questions before offering a post), you may also need to complete a data protection impact assessment.

I do recommend you read through the full ICO guidance if you are considering taking the step of recording vaccine status. Recent indications are that the ICO is becoming a little uncomfortable with the way regulations are drifting in regards to privacy so this is one to watch.