

JOHN MERRY

PARTNER
HEAD OF EMPLOYMENT TEAM



Firstly, I would like to take this opportunity to thank our clients for their instructions and testimonials that have resulted in the employment team maintaining its Tier 4 ranking in the Legal 500.

Unlike many other practice areas, which have rankings for teams “elsewhere in the West Midlands”, all employment practices in the region are measured against each other, and the rankings are therefore, not surprisingly, dominated by firms with a presence in Birmingham – of course, for the most part, very large national or, indeed, international concerns. We are proud to be one of the few teams outside Birmingham ranked as high as Tier 4, and indeed to be the only team with a presence in Shropshire or Herefordshire that is ranked that highly.

In this newsletter, with COVID-19 still very much with us and impacting on our professional and personal lives, we draw attention to the, in some respects, differing governmental workplace guidance relating to the virus that will be in place in England and Wales over autumn and winter; mark the passing of shielding and the ending of the SSP rebate scheme; and comment on the introduction of compulsory vaccination for those who work in care homes in England and considerations for employers outside that sector who might contemplate adopting a similar policy.

COVID-19 AUTUMN AND WINTER PLANS

In September 2021, the UK government published its COVID-19 Response: Autumn and Winter Plan in two parts, Plan A and Plan B, to set out how it intends to address the challenges that may be posed by COVID-19 through to the spring.

Plan A is currently being applied, and Plan B is only to be implemented if data should suggest further measures are necessary to protect the NHS. Beyond that, the UK government has stated that “*more harmful economic and social restrictions would only be considered as a last resort*”.

The Welsh Government published its own strategy, the Coronavirus control plan: autumn and winter 2021 update, in October 2021. It has stated that any surge in COVID-19 cases would initially be addressed by an enhanced local or regional response.

What the current plans mean, in particular, for employers

Employers are to continue to be required to observe workplace safety guidance. That applicable in England is [here](#) and that applicable in Wales is [here](#).

A material difference in the approach of the two jurisdictions is that the requirement remains in Wales that employees should work from home if possible, whereas that is not a feature of Plan A in England, and it is to be reconsidered as a control measure in the event of a shift to Plan B.

Also on 29 October 2021, strengthened measures were announced in Wales due to rising rates of COVID-19, and of particular relevance to employers is a change to the self-isolation requirements for fully-vaccinated household contacts of persons with symptoms or who have tested positive for COVID-19, who are now strongly advised to self-isolate until they have received a negative PCR test. In England, it remains that whilst such persons are advised to take a PCR test, they are not advised to self-isolate pending the result.

My settlement agreement with my company was dealt with really efficiently and with minimal fuss, even though we were in a pandemic.

Mr Stephen Setterfield

Information and queries were always conveyed clearly and in good time. To meet deadlines.

Porter & Woodman Gifts Limited

COVID-19 VACCINATIONS FOR CARE HOME STAFF

The government passed legislation on 22 July 2021 requiring CQC-regulated care homes in England to take steps from 11 November to ensure that those who enter their premises for work-related purposes are fully vaccinated against COVID-19, unless they cannot be vaccinated for clinical reasons or are exempt.

This will apply to most people who enter the care home for work, including:

- Staff
- Agency workers
- Service providers such as tradespeople, hairdressers, doctors, nurses and CQC inspectors
- Volunteers
- Work experience students
- Job applicants attending an interview.

Categories of worker who are exempt are restricted to emergency services personnel and otherwise those providing “emergency assistance”, and those undertaking urgent maintenance work.

The government has published *operational guidance* on the new rules; and Acas has published *advice* to help employers to prepare for them, which includes tips on how to support staff to be fully vaccinated, and so retain them.

We would remind employers that whilst a failure to be fully vaccinated without a valid clinical reason will be a potentially fair reason for dismissing an employee with over two years’ service, a dismissal must still be reasonable in all the circumstances, including that a fair procedure must be followed.

Acas make the point that, depending on the circumstances, employers might be able to consider other options than to dismiss staff who are not fully vaccinated as at 11 November.

They cite as examples that care homes might agree for such employees to:

- Do suitable alternative work outside the care home premises, for example in an office or another place where they do not need to be vaccinated; or
- Take short-term paid or unpaid leave or undertake training that can be done away from the workplace if they are waiting to complete their vaccinations or obtain proof of exemption.

A criticism of Acas’ advice is that they state that:

“If the employer has explored all available options and if a staff member continues to refuse to get the vaccine then the worker could be subject to a disciplinary procedure.”

However, failure to be vaccinated will not constitute misconduct, and so it will not be appropriate to apply a disciplinary procedure: the potentially fair reason to be relied on is statutory restriction. Acas is correct, though, to advise that a fair procedure will include offering the employee the right to appeal any decision; and that if an employer is considering action against an employee related to the issue of vaccination, including dismissal, it is a good idea for them to get legal advice.

Evidence of medical exemption

Until 24 December 2021, people working or volunteering in care homes who have a medical reason why they are unable to have a COVID-19 vaccine will be able to self-certify that they meet the medical exemption criteria. Details of how to self-certify are [here](#). From 25 December 2021, those who are medically exempt will need to verify their status using the NHS COVID Pass in the same way as those who are fully vaccinated.

On 19 October 2021, the Department of Health and Social Care confirmed the procedure that care home workers in England should use to apply for this. Full details of the application procedure are set out in *COVID-19 medical exemptions: proving you are unable to get vaccinated* (“the Exemptions guidance”).

This procedure applies, in fact, to any individual who is unable to be vaccinated for medical reasons, and is not limited to care home workers. For example, an employee can use it to evidence to their employer that they are exempt from self-isolating for 10 days if they are a close contact of somebody with a confirmed case of COVID-19.

To apply for an exemption, an individual must call the NHS COVID Pass service on 119 to ask for a medical exemption application form. It will not be possible to obtain this form from a GP. The possible reasons for medical exemption are limited. However, if eligible, the individual will receive an application form by post. The form must be returned to the GP or clinician specified for review. The individual is to receive the result of the application by post within two to three weeks.

The NHS COVID Pass will look and work the same for people with medical exemptions as it will for people who are fully vaccinated. It will not show that the user has a medical exemption. However, the individual will receive a confirmation letter which explains that they are unable to be vaccinated for medical reasons. The Exemptions guidance states that they must keep this letter and use it if they work or volunteer in a care home after 11 November 2021.

COMPULSORY VACCINATION IN WIDER EMPLOYMENT

Any employer outside of the regulated care home sector in England that is considering imposing a mandatory vaccination requirement, or treating employees or job applicants differently because of their vaccination status, should consider the following:

Unfair dismissal

Employees with over two years’ service have unfair dismissal protection.

Tribunals are likely to consider that it will be unfair to dismiss an employee for not being vaccinated, unless it is essential and necessary for the employee to carry out their role. A lot will depend on the type of workplace and the level of risk, and in particular whether there is contact with clinically vulnerable people.

One scenario which might make a dismissal of an employee who refuses to be vaccinated fair is where there is pressure from third parties, e.g. if a client or customer of the employer will only allow people on site who are vaccinated. If this were to arise, in the case of employees with more than two years’ service, the employer would still need to look at the possibility of alternative work for the employee and also make reasonable representations to the third party before proceeding to dismiss.

Discrimination

No minimum length of service is required for an employee to bring discrimination claims, and protection is also afforded to job applicants during the recruitment process.

Certainly, to apply a policy of mandatory vaccination to those who have a clinical reason for not being vaccinated will expose employers to claims of unlawful indirect discrimination on grounds of disability.

It is also possible that those with certain religious or moral objections to the vaccine might bring claims if they are dismissed, or overlooked for a position, for refusing to be vaccinated. For example, some religious groups may be concerned that animal products have been used in the vaccines. Although there is no gelatine in the COVID-19 vaccines currently available, shark liver oil is being considered as an adjuvant for one of the new vaccines. Some people may reject the vaccine because embryonic tissue was used to test or develop the

vaccine. Others may have a strongly held belief that vaccines are harmful to public health (anti-vaxxers), and although this is unlikely to amount to a protected belief, such claims can still be time consuming and costly to defend.

If there is found to be indirect discrimination on a protected ground, this will not be unlawful if it is justified as being a proportionate means of achieving a legitimate aim. The legitimate aim part of the defence should be straightforward, as the employer would be seeking to protect the health and safety of staff, clients/customers and other third parties. However, even employers in the health and social care sectors might struggle to persuade a tribunal that a mandatory vaccination policy would be a proportionate means of achieving that aim, as there are less discriminatory methods that could be applied, such as regular testing and implementation of precautions to minimise the risk of spreading the virus.



The team is adept at aiding senior executives with settlement agreements and has particular expertise in advising schools. It regularly assists colleges in relation to academy conversions.

The Legal 500 2022 Edition

SSP REBATE SCHEME

The COVID-19 SSP Rebate Scheme closed with effect from 30 September 2021.

The scheme has allowed employers with fewer than 250 employees (as of 28 February 2020) to apply to HMRC for reimbursement of up to two weeks' statutory sick pay (SSP) per eligible employee for absences taken due to COVID-19.



Employers will not be able to make a claim for any eligible SSP costs incurred up to and including 30 September after the earlier of (i) 31 December 2021 or (ii) one year after the last qualifying day in the period of incapacity for work to which the SSP costs relate.

The government's updated guidance to employers for claiming under the scheme is [here](#).

For the avoidance of doubt, the [COVID-19 statutory sick pay enhancement scheme](#), which provides financial support for social care workers who work in Wales, will continue to run until 31 March 2022.

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SHIELDING

The UK government announced in September 2021 that, in England, people previously considered to be clinically extremely vulnerable to COVID-19 will not be advised to shield again. This followed a pause to shielding guidance that had been in place since 1 April 2021.

Since 19 July 2021, the guidance for clinically extremely vulnerable people in England has been to follow the same advice as the rest of the population, with the suggestion of additional precautions people may wish to take. Research and evaluation for some individual clinical groups will continue.

The [webpage](#) which previously hosted the English guidance for people considered clinically extremely vulnerable has been updated to state that shielding has ended, but that those in this category should continue to follow the general COVID-19 [guidance](#) on how to stay safe and, in addition, may want to consider additional precautions, alongside any medical advice.

The position in Wales remains that shielding is unlikely to be reintroduced, but this has yet to be unequivocally ruled out. The Welsh government publishes its own [guidance](#) for clinically vulnerable people – although it does share similar themes to the guidance applicable in England.

Separate guidance is available for people living in [Scotland](#) and [Northern Ireland](#).

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