

COVID-19 vaccinations: *Key considerations for employers*



Focus on
COVID-19
Coronavirus

On 15 December 2020, the Minister for Health announced Ireland's National COVID-19 Vaccination Strategy.

The first vaccine was approved for use on 21 December 2020, with the first dose administered in Ireland on 29 December 2020. A second vaccine was approved for use on 6 January 2021 and the approval of additional vaccines is anticipated in the coming months.

In light of the rapidly deteriorating public health situation and the widespread prevalence of COVID-19 in the community, it is clear that the prompt implementation of Ireland's vaccination strategy is the only viable way out of this pandemic. With this in mind, employers need to get to grips with some novel and complex issues that will arise this year as some, but perhaps not all, of their workforce is vaccinated.

In this briefing, we consider some of the key issues that employers are likely to encounter as the vaccination strategy is ramped up and more of the working population become eligible for vaccination:

1 Will an employer be able to require an employee to be vaccinated?

This is a very common question at the moment but one to which there is no stock answer. While widespread vaccination of the workforce might be desirable, it is highly unlikely that employers will be able to insist that all of their employees are vaccinated. An employer who issues a mandatory instruction to an employee to be vaccinated is in uncharted waters and could be exposed to legal claims and employee relations issues as a consequence.

Under the Irish Constitution, there is a fundamental personal right to bodily integrity.

While fundamental rights are not absolute and may be balanced against the common good, there is currently no indication that the government plan to legislate for mandatory vaccination. In the absence of legislative air cover, employers who insist their employees are vaccinated are potentially exposed if some of those employees refuse to comply with their employer's instruction and suffer adverse consequences as a result.

The Employment Equality Acts 1998 - 2015 provide for protection from discrimination on nine protected grounds, including on the grounds of disability, religion and age. A disability (which is very widely defined) may preclude an employee from receiving the vaccine or inform their reasons for refusing it. Any requirement by an employer that an employee receive the vaccine could amount to discrimination on the grounds of disability. Likewise, a requirement that an employee is vaccinated could also constitute discrimination on religious grounds, where an unwillingness to have the vaccine stems from an employee's religious belief. Finally, as the vast majority of younger employees will only become eligible for vaccination at the latter stages of the national vaccination strategy, the imposition of a mandatory requirement to be vaccinated could constitute age discrimination.

It can be expected that employers will seek to rely on health and safety grounds as justification for

strongly advocating their employees should be vaccinated. Under the Safety, Health and Welfare at Work Act 2005 an employer is obliged to identify and reduce workplace health and safety risks and employees have a duty to cooperate in this regard with their employer. Employers will therefore need to update their risk assessments as the COVID-19 vaccines become more widely available and have a contingency plan in place for a scenario where some but not all of their workforce are vaccinated. That said, we see no issue with employers actively encouraging employees to be vaccinated on the basis that doing so reduces health and safety risks at work. It is anticipated that in due course the Health & Safety Authority will publish guidance for employers on COVID-19 vaccinations and this guidance will likely inform the approach employers take when it comes to communicating their corporate position on vaccinations in the workplace.

2 What should employers do if an employee does not want to be vaccinated?

Operating on the assumption that employees will not be required by law to be vaccinated, employers will not be able to compel employees to be vaccinated. Leaving aside employees who may have good reason for not wishing to be vaccinated at this time (e.g. those with a disability or who are pregnant), employers need to be cognisant of the fact there is a degree of vaccine hesitancy amongst the population at present. It is perfectly understandable that some employees are nervous about being vaccinated at this time and would not necessarily be considered unreasonable for an employee to refuse vaccination if made available to them. Where vaccine eligible employees decline to be vaccinated, an employer would be well advised to engage with the employee, obtain a better understanding of their reluctance to be vaccinated and explore with them whether their concerns can be overcome. If they cannot, the employer might wish to consider alternative working arrangements, such as remote working in the short term. Redeployment might also be considered where vaccination is considered a practical prerequisite to working in a high risk environment (such as in healthcare). In exceptional cases, an employer may wish to take disciplinary action or potentially even dismiss an

employee who refuses to be vaccinated, however, there would be considerable legal risks associated with this course of action and it would be prudent for employers to take specific legal advice before taking any more draconian action along these lines.

3 What should employers communicate to employees?

As vaccinations become more widely available it will be important that employers prepare a communication strategy for employees to update them on the workplace risk assessment and the measures being taken to minimise risks. As part of this, many employers will likely seek to encourage staff to be vaccinated. Information should be provided in accordance with the workplace risk assessment and official public health advice. Employers should engage with their workforce on measures via their usual channels, which in some workplaces will include engaging with trade unions or employee representatives. Employers may wish to utilise a similar communications approach to any annual flu vaccination programme they currently operate.

4 What data protection considerations apply?

One of the biggest challenges employers are likely to face is the data protection considerations that arise when it comes to vaccinations. Many employers will be understandably keen to know which of their employees have obtained the vaccine and when, and perhaps more importantly who has not and why not.

Can employers ask employees whether they have been vaccinated?

Information in relation to participation in the national vaccination strategy will constitute special category data and would need to be processed by an employer strictly in accordance with the GDPR. In this regard, an employer must have a legal basis for processing such data by reference to Articles 6 and 9 GDPR. Employee consent is unlikely to constitute a valid legal basis for collecting information relating to vaccination participation, as in practice employees may not have any real choice in the matter.

In practice, most employers will likely seek to rely on such processing being necessary to comply with their legal obligation to ensure the health and safety of employees under the Safety, Health and Welfare at Work Act 2005.

Employers may also ask employees for such data, if acting under the direction of public health authorities. The GDPR and the Data Protection Act 2018 permit the processing of special category data where necessary for public health reasons, and once suitable safeguards have been implemented. However, it remains to be seen whether this will pass muster with the Data Protection Commission. Last year, the Data Protection Commission published a guidance note on mandatory temperature testing by employers in the workplace. The guidance specifically noted that there was no public health advice at the time recommending the implementation of temperature testing in the workplace (other than in healthcare and residential care settings). The guidance made it clear that temperature testing should be the exception rather than the norm, and an employer would need to be in a position to justify why the processing of this special category data is necessary for the purpose of mitigating against the risk identified in the employer's risk assessment. It is quite likely that the Data Protection Commission will adopt a similarly cautious approach to a scenario where an employer is insisting an employee disclose whether or not they have been vaccinated (and perhaps even provide proof of vaccination) before being permitted to return to the workplace. It is however quite possible that bespoke guidance will be published for specific higher risk work environments (e.g. healthcare).

Do privacy notices need to be updated?

Employee privacy notices would need to be reviewed and amended. Employers should clearly inform employees about why data around vaccination is being collected, who it will be disclosed to, and how long the data will be retained. Employers should ensure they have a legal basis to retain records of who has been vaccinated, that it is kept up-to-date and accurate, and deleted when it is no longer needed. It should be stored securely and only accessed on a need-to-know basis by authorised personnel. A Data Protection Impact Assessment (DPIA) should also be carried out before a policy

on vaccination disclosure is introduced, to assess the necessity of disclosure, the risks to data subjects, and to ensure such a policy does not disproportionately infringe on employees' right to protection of their personal data. DPIAs are mandatory in certain circumstances, including where large-scale processing of special category data is carried out.

Can an employer disclose who has been vaccinated and who has not? – for example, by only permitting employees to return to the office who have been vaccinated?

Employers should avoid disclosing information as to whether a particular employee has been vaccinated, unless there is a lawful basis for doing so. In cases where it is necessary to reveal whether an employee has been vaccinated, that employee should be informed in advance of the communication. Employers should also be aware that failing to permit employees who have not been vaccinated to return to the office, may indirectly reveal further special category data about them. For example, employees may have medical conditions that prevent them being vaccinated. In addition, pregnant employees feature last on the published priority list, and may be advised against having the vaccine.

5 What steps should employers be taking to prepare?

Many organisations have already updated their workplace risk assessments in line with the Work Safely Protocol. As the vaccine is rolled out risk assessments will need to be updated and kept under review. Consideration will need to be given to alternatives to the vaccine, bearing in mind that some employees may not receive the vaccine for some time and others may simply refuse to be vaccinated. It will also need to be borne in mind that current medical evidence indicates the vaccination does not necessarily mean an employee is no longer capable of being infected or transmitting the virus and therefore, it is likely adherence to the Work Safely Protocol will be required for some time yet.

Employers should consider their communication strategy and plan their approach to encouraging and facilitating employees to obtain the vaccine.

As the vaccine rollout will be a very gradual process, many employers will need to consider the manner in which they will implement a gradual return to the workplace. The staggered return of employees who are currently working remotely is likely to be recommended by public health so should be planned for.

If employers plan on processing any vaccine related data relating to their employees, it will be essential they are aware of their responsibilities in processing this data under the GDPR and take the necessary steps to ensure compliance as this is an area likely to be closely policed by the Data Protection Commission.

Conclusion

While the roll-out of the vaccine throughout the working population will take some time, every employer is at some point in time this year going to have to consider the impact of the vaccination programme on their employees and the knock on implications for the safety of their workplace. For that reason, employers would be well advised to start planning now and, at a minimum, prepare a checklist list of issues that need to be considered and decisions that need to be taken. In doing so, it should also be borne in mind that the vaccination programme is unlikely to be a one off event and booster doses will likely be needed to be received at periodic intervals in the future. Employers should therefore plan for vaccination programmes becoming a regular feature of the working year.

As progress is made on the roll out of the vaccination programme it is expected that the government will be in a position to ease the Level 5 restrictions currently in place, enabling workplaces to reopen and employees to return. Continued adherence to the [Work Safely Protocol](#) will therefore still be required. As has been the case throughout the pandemic, continued flexibility and adaptability on the part of employers and employees alike will be required in order to maintain a safe workplace.

In the absence of public health advice or advice from the Health & Safety Authority on the implications of the national vaccination programme for employers, it is probably premature for most employers to implement vaccination policies at this time. However, it is certainly time for employers to put this issue on their HR agenda for 2021 and to keep a close eye on public health updates and government guidance with a view to rolling out guidance for their own workforce in the coming months.

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