

Covid-19 vaccinations

Essential considerations for employers

This article has been created exclusively for members of IoD Ireland.

As the rollout of the Covid-19 vaccination is now underway, the hopes of a return to normal life and a return to work in the office may be on the horizon.

The HSE is currently in the first phase of the vaccine rollout. People who are most at risk from Covid-19 will be the first to get the vaccine. It is thought that vaccines will become commercially available in the coming months.

In light of these developments, employers should be aware of the implications of the vaccine rollout in the workplace and the challenges that may arise as a result. In this briefing, we will highlight the key considerations for employers and the possible legal issues surrounding the vaccine, from an employment perspective.

1) Can employers require employees to be vaccinated?

At present, employers cannot require employees to be vaccinated. Unless the Irish Government legislates for compulsory vaccinations, employers should be very cautious about making the vaccine a requirement for employees.

The Irish Constitution provides for a person's fundamental personal right to bodily integrity (ie the right not to have your body or person unjustifiably interfered with) as well as the right to autonomy and privacy. Therefore, making a vaccine mandatory does not sit well with these core rights.

However, once vaccinations are commenced for a larger number of the public, it is likely that the Government will guide employers to encourage employees to receive the vaccine on the basis that doing so will reduce health and safety risks at work.

The Safety, Health and Welfare at Work Act 2005 obliges employers to carry out a risk assessment to identify health and safety risks to people in their place of work, and take steps to remove or minimise any risks identified. Employers will therefore need to update their risk assessments as the vaccine becomes more widely available and have a contingency plan in place for a scenario where some but not all of their workforce are vaccinated.

In situations where the employer assesses that a vaccine for all employees is necessary, it is highly unlikely that this will in itself be an adequate justification for mandating that employees receive the vaccine. However, the results of the risk assessment should be communicated to employees and employers should at the very least be encouraging their employees to be vaccinated to reduce health and safety risks in the workplace. Employees should also be provided with information on how to obtain the vaccine once it becomes commercially available.

2) What should an employer do if an employee refuses to be vaccinated?

There are a number of reasons why employees might legitimately be unable to have a vaccine or may refuse it.

Employers should be careful not to judge or stereotype an employee who refuses the vaccine. Pregnant employees and anyone with significant allergies are advised against having the vaccine. Employees may also have medical conditions that could prevent them from being vaccinated. The Employment Equality Acts 1998-2015 provide for protection from discrimination on nine protected grounds, including on the grounds of disability, religion and age. If an employee refuses to take the vaccine, on grounds which are protected by the Employment Equality Acts, and they are penalised as a result, they could take a discrimination claim against their employer. This could

technically arise in circumstances where employees who have not received the vaccine are not permitted to return to the workplace but their colleagues who have received it are. Such employees could argue that they are being treated differently to their work colleagues because of their religious beliefs or gender, etc.

It is important that employers continue to be flexible and monitor developments. In circumstances where an employee refuses to receive the vaccine, employers may consider alternative working arrangements, such as temporarily continuing to work from home or redeployment. Risks in relation to treating employees differently in this way should be assessed at the time in light of the then prevailing public health advice.

3) Can employers ask whether employees have received the vaccine?

In order to control Covid-19 within the workplace, many employers will be eager to record employee participation in the vaccination process. This will create challenges for employers from a data protection perspective. As information regarding the vaccination process involves the processing of health data (which is "special category" data), particular considerations arise under the GDPR.

It is likely that most employers will seek to rely on the processing of health data being necessary to comply with their legal obligation to ensure the health and safety of employees. Employers will therefore need to ensure that any records are kept in accordance with GDPR and privacy laws. Employee privacy policies should also be reviewed and updated accordingly.

The Data Protection Commission (the "DPC") has recently published a guidance note on temperature testing in the workplace. The guidance noted that there was currently no public health advice recommending the implementation of mandatory temperature testing in the workplace (other than in healthcare settings). The guidance made it clear that 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. The DPC may adopt a similar approach where an employer is seeking information on whether or not an employee has received the vaccine so employers should keep an eye out for such developments.

Next steps for employers

At present, we are still some time away from a vaccine becoming commercially available. The vaccination process within the workplace will need to be considered in the light of the circumstances and guidance existing at that time. It would be premature for employers to make any definitive decisions on their policies at this time.

However, employers would be well advised to keep informed of any public health updates and Government guidance in this area. Employers should be aware of the various issues that may arise in the workplace as a result of the vaccine rollout and continue to be flexible in order to maintain a safe workplace.

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