



The new working world: part one

Webinar Q&A

We have listed the questions received prior to and during our webinar hosted on 22 April 2021. Please see our responses below.

- **Can you request an employee to undertake regular Covid tests if they refuse to have the vaccine?**

Any requirement to have an employee test themselves or to report on their own health/medical status could be met with resistance, but yes you could request it. Whilst there is a risk of challenge, we think it would be harder (by comparison to requiring an employee to get vaccinated and report on that) for an employee to legitimately push back and refuse this requirement. However, you do need to think about whether there are any specific underlying reasons for refusal (like a mental health issue, philosophical belief etc.), which would potentially require you to objectively justify the requirement for the purposes of the Equality Act 2010.

- **What about staff (support staff/contractors) who work within hospitals - can these individuals be forced to take the vaccine?**

There is still a risk of challenge, and a risk of the organisation becoming a losing test case, but it may be possible to legitimately require this. It would be important to focus very carefully on the health and safety risk assessment and the strength of argument in favour of vaccination being necessary to manage a risk (either to them – or to service users with whom they may come in to contact). The hospital context should be one where there is more scope for success in this than, say, a clothing retail store staffed and frequented by young people.

- **If international travel is a requirement of a role and vaccines are required for travel would that be a justification to require employees to have a vaccine?**

It's a potential justification for requiring it, but there are some very key factual issues to consider. For example, how necessary and fundamental to the role is the ability to actually travel internationally? Are there other means of achieving your objective here that don't require the travel? Is it a legal requirement for the employee to be vaccinated in order to visit countries they would be expected to visit as a material part of their role? If the employee can show that there are acceptable means of conducting business (i.e. Zoom) and is suggesting this is permitted to continue for a short period (i.e. until the international approach to vaccination and travel becomes clearer), then that might be a difficult basis on which to refuse and terminate. So there is scope here, but it would need to be carefully managed in light of the developing/unsettled context.

- **Could you require vaccinations for new employees even if you just encourage all existing employees? Would it make a difference if all the other employees in the premises had voluntarily been vaccinated?**

This carries legal risk at present, but less so than mandating vaccination for existing employees because there will be no risk of ordinary unfair dismissal claims from potential new recruits. They would still, however, have the right to challenge what they perceive to be unlawful discrimination, so it's important to consider any risks associated with introducing this new "provision, criterion or practice". With regard to all other existing employees having been voluntarily vaccinated, that might give rise to concern from existing staff that new recruits should be as well. You would need to keep in mind that vaccination is not appropriate for everybody though, so a blanket ban of unvaccinated new recruits would be unwise in our view.

- **Are there any issues with requesting staff to not discourage others from getting the vaccine?**

We don't think so, and in fact it could be good ER practice. This is a sensitive subject, and vaccination is not appropriate for everyone, and so employees need to be sensitive in the dialogue they have with colleagues on the subject. You might also consider having a policy that individual employees should not actively encourage staff to get vaccinated, for the same reason.

- **If we move to a Hybrid working model do we need to issue a new contract of employment to reflect the change?**

Not necessarily, although if your contracts are due to be reviewed in any event, then you should include any new wording in the updated contracts you are issuing to new staff.

We do not think it necessary to issue a new contract of employment just to reflect a change to a new hybrid working model. That change can be recorded through a letter to staff, ideally signed and returned by them. However, if chasing a large workforce to return signed letters is unrealistic, you can consider saying to staff that the change will take effect unless they object. This is a slightly more risky approach. As with any proposed change to terms and conditions, the challenge is always is how you deal with any objectors. That is where specific advice should be sought.

- **We were thinking of moving to a hybrid model but first trialling it. We propose keeping their contracts the same for now, in case we decide to go back to the position that their normal place of work is the office. Is this something we can do?**

It is a good idea to trial these new working arrangements, as it gives both employer and workforce the chance to see whether the new arrangements do genuinely work. They may work for some, and not for others. The key for the employer is to only confirm the changes as taking permanent effect when they have been properly tested.

- **If you compress hours to allow a full-time employee to work their full-time hours over four days rather than five does that mean that their annual leave entitlement should reduce?**

In such a situation, because the employee would still be working full-time, their holiday entitlement should remain the same.

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- **If we receive a high number of flexible working requests what's the quickest way to process these?**

Ideally you can avoid having to deal with a number of formal flexible working requests by being proactive and talking to your staff about the models you are considering, and giving them the chance to comment and input on these. Inevitably, whatever model you adopt, there will be some that it does not suit. If you cannot resolve their specific requests for flexibility on an informal basis, then you will need to follow the statutory framework for considering flexible working requests.

If you have a number of similar requests you could seek agreement of the staff involved to consider their requests collectively.

- **Last year the senior leadership team championed the value of working from home. We are seeing a change in direction from them now and they are actively encouraging people returning to work. One team member has 14 years service and is 62 years old and is understandably nervous at returning to the office full time. Assume we need to offer a flexible solution as possible in this case?**

Yes, try and be flexible with this employee, but if the senior leadership team are adamant that all staff must return to the office then they are entitled to do that, provided they are satisfied the office is safe.

- **We have had TWO requests to permanently work abroad, but we don't want to allow this. Can we recall them?**

Potentially yes. If you require it, and they refuse then you're heading towards dismissal territory, so think about whether they have service and the likelihood of them looking to run an unfair dismissal claim in UK, or indeed trying to do so in country they are currently in, and how confident you can be of being able to defend any such challenge. In the UK context that will centre on the extent to which the employee can justify its refusal, and on your side the extent to which you can demonstrate that dismissal was within the range of reasonable responses.

- **What about those staff who are just not working and are stuck abroad? Using our disciplinary process on the basis of unauthorised absence, would this be seen as fair reason to dismiss?**

Impossible to say at this point, as the test for unfair dismissal is so fact sensitive. However, wilful unauthorised absence would likely amount to a potentially fair reason to dismiss within the Employment Rights Act 1996 (e.g. conduct) and so the key question will be whether, in all the circumstances of the particular case, it was within the range of reasonable responses for the employer to dismiss. The answer to that question touches on issues like mitigating circumstances, how serious or repeated the misconduct is/was, and whether a sanction short of dismissal (e.g. a final written warning) was the furthest an employer could reasonably go in the circumstances.

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- **If an employee has moved permanently to the EU, is on a UK payroll and wants to change to a consultant basis, will the company have to take the new IR35 Rules into account if he is based in the EU?**

If the employee is simply doing the same work but labelling themselves as a consultant then the reality of the situation will be that they remain an employee based abroad. If they have genuinely reconfigured how the work will be done and terminated the employee relationship and are now providing services as a consultant the consideration of the April 2021 Off Payroll Working Rules (OPWR) will only apply if there is an intermediary, likely to be the personal service company, involved between the consultant and end user client. If there is an intermediary then the OPWR may still not apply depending on the UK tax liability of the consultant for which specialist tax advice would need to be obtained.



Greg Burgess

Partner, Employment

01293 558547

Greg.Burgess@dmhstallard.com



Adam Williams

Partner, Employment

01483 467413

Adam.Williams@dmhstallard.com

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