



DMH Stallard

Employment law webinar

The new working world Part 1

Contents

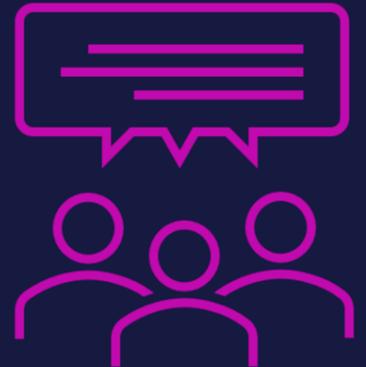
- Vaccinations – [Adam Williams](#)
- Home working:
 - Changes to the contract of employment, planning and insurance, employee monitoring, data security/protection – [Greg Burgess](#)
 - Overseas employment and tax - [Adam Williams](#)
- Questions

Vaccinations

Adam Williams

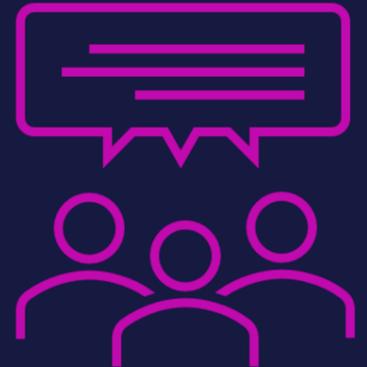
Have you introduced a
Covid vaccination policy in
your workplace?

Poll



Have you asked (or will you be asking) your staff to tell you whether they have been vaccinated?

Poll



Vaccines and the workplace: some key issues?

- Can employers impose mandatory vaccination?
- Can employers dismiss fairly an employee who refuses to be vaccinated?
- Might vaccination policies/requirements amount to unlawful discrimination?
- Human rights
- Data Protection

Key variables

- Roll out and uptake of vaccines
- Legislative developments
- New variants
- Covid 'status certification, and testing
- Link between vaccination and reduction in transmission

Mandatory vaccinations?

- Current ACAS guidance says *“It's best to support staff to get the vaccine without forcing them to.”*
- The PM gave evidence on 24 March to House of Commons Liaison Committee, saying it would be *“wholly responsible for care home companies to think of requiring vaccinations”*
- In absence of new laws, forcing an employee to be vaccinated would be an offence
- Consultation launched 14 April on making vaccinations compulsory for those working in older adult care home settings
- The particular workplace setting and associated health and safety risks to workers or customers/service users is likely to be influential in the extent to which vaccination can lawfully be made a condition of employment

Issues with requiring vaccinations?

- Untested in Great Britain (even by the Government)
- Vaccination is not suitable for everyone
- Could be indirectly discriminatory – objective justification
- Human Rights
- Negative press
- Resignations for employer's repudiatory breach?

Health & Safety

- Duty for employer to provide safe working environment
- Statutory duties (HSE) to assess risks in the workplace and take steps to address them (*Health and Safety at Work etc. Act 1974*)
- An employer wishing to impose a mandatory vaccination requirement should first:
 - Undertake a detailed risk assessment to evidence why Covid-19 vaccination is required, in addition to the stringent Covid-secure guidelines which should already be in place; and
 - Consult with workplace representatives or trade unions

Alternatives

- Measures to increase voluntary uptake of the vaccine?
 - Think of approach to winter flu vaccination
 - Policy on vaccination (following staff consultation)
 - Communications strategy
- Focus in on Covid-19 secure measures
- Regular testing and health and safety reviews
- Segmented approach?

Disciplinary and dismissal

- Service
- Reasonable management instruction
- Risk assessment
- Reasons behind refusal: legitimate? protected?
- Other reasonable means?

Data Protection

- ICO has created online materials providing guidance
- Immunisation status is special category data, requiring: lawful basis for processing (Article 6(1)) and a condition for processing (Article 9)
- Article 6: Employee consent, or employer's legitimate business interest?
- Article 9: Performance of rights and obligations in connection with employment, or health purposes?
- ICO says need clear and compelling reason for recording the information
- How long can data retention be justified in a fast moving/developing situation?
- Privacy notices?

Implementing a vaccination policy

- Consider:
 - Consulting with staff associations or unions before implementing any policy
 - How you intend to communicate with staff about the vaccination policy, including how you will use personal data
 - Your data protection obligations in processing data and the compatibility of the vaccination policy with your legal responsibilities
 - How you can use the policy to reduce the risk of potential workplace conflict between vaccinated and unvaccinated staff
 - In what circumstances you need to review the policy, for example, when private vaccination becomes readily available
- Address:
 - Purpose/benefits; employer's position on key issues; the benefits of vaccination and cases where it is not appropriate; and the continuing importance of other measures

Changing and updating employment contracts for the New Working World

Greg Burgess

Contractual considerations

- Place of work
 - Build in maximum flexibility for employer
 - Requirement to attend office on specific occasions – weekly meetings, client events, appraisals, disciplinary or consultation meetings

Contractual considerations (2)

- Benefits
 - If a particular benefit is conditional on them being in the office, then should they be compensated if they lost that benefit?
- Expenses
 - Clarity is key
 - Can they claim travel expenses for attending office?
 - What if visiting customers, suppliers etc?
 - Telephone and broadband
 - Heating and lighting
 - Costs of providing equipment

Contractual considerations (3)

- Illness
 - Does reporting procedure need adjusting?
 - Do you want to explicitly state that IT access may be removed when sick at home?
- Right to enter
 - Retain the right to enter their home in order to:
 - Install, maintain and service equipment
 - Risk assess working environment
 - Recover property on termination
- Trial period
 - Allows both parties to genuinely test the effectiveness of the home working arrangement
 - Retain the right to revert
 - No permanent change during trial period

Contractual considerations (4)

- Hours of work
 - What will be the “normal working hours”? Do you need to have any?
 - Minimum hours/core hours
 - Do you need to stipulate the working days?
 - Make sure contract makes clear their obligation to take appropriate rest breaks (minimum of 20 minutes every six hours under WTR)

Planning and insurance

- Planning
 - No permission needed provided that:
 - No structural alterations to home are needed to facilitate home working
 - Business use remains ancillary to the property remaining their main residence
 - This is question of degree – if, for example, business visitors may attend property then this could mean consent may be required
- Insurance
 - Does your employer's liability insurance also cover your equipment in their home?
 - If not, you should be requiring them to ensure that equipment is covered under their own home insurance
 - Employer to cover additional premium?

Employee monitoring

- Pre-pandemic line of cases looking at tension between fundamental human right to private and family life, and employer's right to covertly monitor staff
- UK legislation and guidance:
 - DPA and RIPA limit employer's power to monitor private communications
 - Employment Practices Code – carry out impact assessment

Employee monitoring (3)

- *“Shirking from home? Staff feel the heat as bosses ramp up remote surveillance”*
The Guardian – 27 September 2020
- PwC - reported to be developing a facial recognition tool that logs when employee is away from their computer. They said it was for compliance reasons so financial institutions can monitor trader’s activities as they would if they were on the trading floor
- Various tracking tools can be used for real-time activity tracking, taking screenshots at regular intervals, keystroke logging, webcam surveillance
- Tools such as Slack and Teams report when an employee is active
- Monitoring can be used to collect data to keep oversight of employee’s wellbeing
- Be clear with staff what monitoring will take place and why
- Less is best

Data security/protection

- Home/remote working presents particular challenges in respect of data security and data protection legislation
- How will data stored at and moving in and out of the home be secured?
- Control of software usage
- Document creation, retention and destruction

Data security/protection

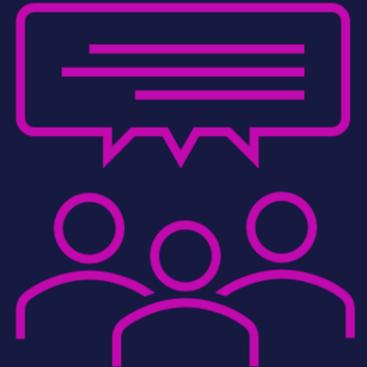
- Given the significance of a data breach, employers will need to consider:
 - the data that will be accessed/processed by the individual at home
 - does the employee need to have access to all this data (i.e. privacy by default)
- The employer will still be a controller/processor of personal data in respect of any such data that is accessed by the employee at home, so consider:
 - What technical and organisational measures are in place, and whether additional measures need to be implemented, to protect this personal data?
 - Whether the data protection policy/code of practice remains fit for purpose
 - Are privacy notices up to date?
- If the employee is abroad, consider cross-border data transfer issues and local data protection requirements

Overseas Employment

Adam Williams

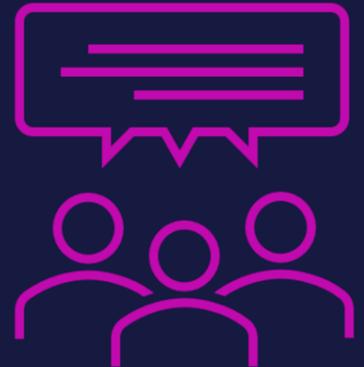
Have you had UK based employees working abroad during the pandemic?

Poll



Do you envisage some of these employees continuing to work abroad in the longer term?

Poll



Context

- Large numbers of migrant employees returned to country of origin during the pandemic, or became stuck there
- Resulted in large number of employees working outside of the UK/remotely
- In some instances, employers did not know that this was the case, in others it was a conscious decision to agree to the arrangement
- Many of these arrangements may last beyond the current pandemic
- Employees may request that the arrangements to be made longer-term or permanent

Example scenario

- David was recruited and employed by a UK bank to work full time in the UK. He has family in France, and was in France visiting them when lockdown happened. Travel restrictions prevented him from returning to the UK. David has therefore remained in France, working remotely for the bank. His contract remains unchanged and he has continued to be paid from UK payroll

Immigration

- If David is a French national then the position in France should be straightforward
- If he is not, then local advice needs to be taken with regard to his immigration status/options, and whether he can lawfully work for the bank there
- If David is a British national and he returned to France before 31 December 2020, can he benefit from the French equivalent of the UK's EUSS?
- If David is not British or Irish, what impact has his absence had on his right to return to the UK to live and work? He might benefit from the EUSS, or he might require new/updated visa sponsorship under the 2021 PBS
- If the bank already sponsors a work visa for David under the UK's PBS, it needs to ensure that his contact details are up to date on the SMS, and that any change of circumstances have been reported as required
- Is David's ability to subsequently settle in the UK impacted by his absence?

Tax

- Unlikely to be no tax implications, as David has spent several months working abroad
- Local tax advice needs to be taken with regard to whether/how David has or might become tax resident in France, which may mean income tax withholding obligations there
- If it does not already have one, local advice should be taken as to whether the situation might inadvertently create a permanent tax presence/reporting obligation for the bank, with potential significant tax implications for the company?
- If there is a double taxation scenario here, the availability of relief from this will need to be explored

Payroll/social security

- It seems that the bank is unlikely to have any existing payroll arrangements in France, or to have made social security contributions for David there
- Default position in this sort of scenario (i.e. originating employment in UK) is that the bank would start by continuing to pay NIC contributions through UK payroll
- Advice needs to be taken on how and when an obligation to make social security contributions in France might arise/have arisen
- If a withholding obligation has arisen in France then the bank will need to identify what payroll arrangements need to be made, and whether action needs to be taken to make good on any existing shortfall in contributions to the French authorities

Corporate/regulatory

- The bank will need to check whether it requires/had any registrations necessary for it to carry out the activities David is undertaking, in France
- If David's role forms part of a regulated activity, are all necessary approvals and regulatory permissions present and correct?
- If David is a director, do the UK company's Articles of Association prevent him from attending at board meetings remotely?

Employment Rights

- Even if he worked there for a relatively short period, it is possible that David might benefit from employment rights under French law. The bank will need local advice on the position for David and any risks or obligations arising
- David may continue to benefit from employment rights in the UK (notwithstanding absence)
- The tests in the UK and France are distinct, such that he could benefit from employment rights in both locations
- If David went to the location on or before 31.12.20, the bank will need to consider the relevance of the Posted Worker Directive

Questions

Speakers



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