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**ELA L&P Committee: Making vaccination a condition of deployment
in the health and wider social care sector**

Response from the Employment Lawyers Association

22 October 2021

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INTRODUCTION

1. The Employment Lawyers Association (“ELA”) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA’s role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint.
2. ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
3. A Working Party, co-chaired by Emma Burrows and Catrina Smith was set up by the Legislative and Policy Committee of ELA to respond to the open consultation on making vaccination a condition of deployment in the health and wider social care sector. Members of the Working Party are listed at the end of this paper.
4. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

5. Some of our clients work in health and social care sectors, but the ELA is not part of those sectors. We welcome the DHSC's desire to consult on employment law effects of this proposal and respond on that basis.
6. The impact of rolling out mandatory vaccinations to wider groups of employees in the healthcare and social care sectors has employment law implications. Groups of employees sharing protected characteristics would be negatively impacted by COVID 19 and flu vaccinations being a condition of deployment in healthcare and social care. This could give rise to employment litigation against their employers and a reduction in number of staff available to carry out work in those sectors.
7. In requiring vaccinations to be a condition of deployment in the healthcare and social care sector there are potential conflicts with other legislation, and give rise to situations

where employers may face employment litigation, and must take steps to reduce the risk of any successful claims. This creates a burden on employers in the healthcare and social care sector.

QUESTION

DO YOU AGREE OR DISAGREE THAT EXEMPTION FROM COVID-19 VACCINATION AND FLU VACCINATION SHOULD ONLY BE BASED ON MEDICAL GROUNDS?

PLEASE PROVIDE A SEPARATE RESPONSE FOR COVID-19 VACCINATION AND FLU VACCINATION.

- strongly agree
- somewhat agree
- neither agree nor disagree
- somewhat disagree
- strongly disagree
- I don't know

QUESTION

ON WHAT OTHER BASIS, IF ANY, SHOULD A PERSON BE EXEMPT FROM THIS REQUIREMENT?

We have not answered the multiple choice question but please see our response to the second part of the question below. Some workers with protected characteristics may wish to be exempt from a requirement to be vaccinated on grounds other than medical grounds.

ARE THERE PARTICULAR GROUPS OF PEOPLE, SUCH AS THOSE WITH PROTECTED CHARACTERISTICS, WHO WOULD BE PARTICULARLY NEGATIVELY AFFECTED BY COVID-19 AND FLU VACCINATION BEING A CONDITION OF DEPLOYMENT IN HEALTHCARE AND SOCIAL CARE?

- **yes**
- no
- not sure

QUESTION

WHICH PARTICULAR GROUPS MIGHT BE NEGATIVELY IMPACTED AND WHY?

8. There are four groups with various protected characteristics which might be negatively affected by this policy. Where a protected characteristic is engaged, there is no requirement for a period of service before a worker has legal protection from discrimination under the Equality Act 2010 and any compensation which might be awarded in the event of a successful legal challenge is unlimited.
9. The following are the two principal underlying reasons for that negative impact:

- 9.1 individuals opting out of vaccination for a reason that does not fall within the medical exemptions list, ie choosing not to have a vaccine; or
- 9.2 individuals encountering difficulties in accessing the vaccine – though given the success of the COVID19 vaccine roll-out, this is less of an issue than it was earlier in the year for that vaccination.
10. There will be various reasons as to why workers choose not to be vaccinated, all of which engage protected characteristics. These workers fall into the following groups:
- a) Those working in/providing services to the health and social care sector who are of an ethnic minority background, as there have been reports of lower COVID19 vaccination rates amongst people of colour. The causes of this are generally related to access to vaccines and accurate information about the protection offered by vaccines, and hesitancy in relation to possible side effects. We refer to paragraphs 56, 57 and 58 of ELA’s response (dated 29 March 2021) to the call for evidence by the COVID-Status Notification Review.
 - b) Those workers and employees who are pregnant, might be seeking to become pregnant or who are breast feeding. Some individuals within this group might feel concerned about any as yet unknown effects of the COVID19 vaccine upon fertility, upon early pregnancy or breast feeding.
 - c) Those who work in/provide services to care homes who have a disability within the meaning of the Equality Act 2010, but who do not fall into the exemptions list. They may believe that either vaccination will make their particular condition worse but are unable to establish this.
 - d) Those who contend that it is contrary to their religion or belief to be vaccinated. This could include ethical vegans who object to the vaccine on the grounds that it has been tested on animals.
11. Where employers decide, based on guidelines and legal frameworks, that there will be a requirement (or a Practice, Criteria or Policy – known as a “PCP”) for their staff to have the vaccination, then they should ensure that they carry out an equality impact assessment as to which groups may be disadvantaged by the requirement. As any PCP regarding vaccination status involves processing special category data, this could be done at the same time as any data protection impact assessment required under Article 35 UK GDPR. Employers should also take appropriate steps to mitigate the impact of the requirement on any specific groups
12. Employers may also have consider whether testing for COVID-19 would be an alternative and more proportionate means of satisfying its health and safety obligations. Public sector employers will also need to be mindful of the public sector equality duty as a blanket requirement for vaccinated staff may well breach this duty without due regard.

13. We suggest that any equality assessment undertaken by DHSC incorporates an assessment of the risks of claims by such groups in relation to both COVID19 and flu vaccinations.
14. Negative impacts could be avoided by allowing staff to either be vaccinated or to demonstrate that they have had a negative COVID-19 test result. This needs to be coupled with appropriate financial support and employment protection available for those who test positive.

QUESTION

THINKING ABOUT CIRCUMSTANCES IN WHICH STAFF FALL WITHIN A REQUIREMENT TO BE VACCINATED BUT REMAIN UNVACCINATED, HOW DO YOU ANTICIPATE YOU WOULD RESPOND?

- redeploy unvaccinated staff
 - cease employment for unvaccinated staff
 - other (please specify)
 - not applicable
15. ELA is not an employer in this sector and is not therefore in a position to respond to this question.
 16. We note however that in addition to the Equality Act 2010 considerations outlined above, existing employees with two or more years of service have the right not to be unfairly dismissed. There are five potentially fair reasons for dismissal – one of which is contravention of an enactment. A statutory requirement to be vaccinated would be a potentially fair reason for dismissal in the event that an employee refused to be vaccinated when requested to do so. The employer may be able to demonstrate a fair reason for dismissal in these circumstances, i.e. that “the employee could not continue to work in the position which [they] held without contravention (either on [their] part or that of [the] employer) of a duty imposed by or under an enactment” (section 98(2)(d) ERA 1996). However, the employer would also need to show that it acted reasonably in treating this as sufficient reason for dismissing the employee (section 98(4) ERA 1996). This will depend on all the circumstances, including the size and administrative resources of the employer. A key consideration is likely to be whether alternative roles exist which could be undertaken by the employee. Therefore, any dismissal process which did not consider re-deployment would be likely to be unfair. The number of roles covered by the requirement to be vaccinated will inevitably impact on the ability to re-deploy.
 17. Where health and safety concerns have been raised, considerations of detriment under s.44 ERA 1996 and automatically unfair dismissal under s.100 ERA 1996; and/or 18.3 are also likely to be engaged. Where a qualifying protected disclosure has been made, detriment under s.47B ERA 1996 and automatically unfair dismissal under s.103A ERA 1996.

18. An employer has duties to inform and consult about measures being taken in respect of health and safety matters which depend on whether it recognises any trade union. This is explained in more detail below. It also must consider requirements under health and safety law to conduct and update risk assessments to reflect steps being taken in response to any requirement to be vaccinated
19. Where health and safety concerns have been raised, considerations of detriment under s.44 ERA 1996 and automatically unfair dismissal under s.100 ERA 1996; and/or 18.3 are also likely to be engaged. Where a qualifying protected disclosure has been made, detriment under s.47B ERA 1996 and automatically unfair dismissal under s.103A ERA 1996 may also need to be considered.

QUESTION

DO YOU THINK A VACCINATION REQUIREMENT POLICY COULD CAUSE ANY CONFLICT WITH OTHER STATUTORY REQUIREMENTS THAT HEALTHCARE OR SOCIAL CARE PROVIDERS MUST MEET?

- **yes**
- no
- I don't know
- not applicable

Please give further detail on other statutory requirements that a vaccination requirement policy could conflict with.

20. The requirement for vaccination is likely to result in the need to amend the contracts of employment of relevant employees in order to avoid the employer acting in breach of contract. The contract would need to impose the requirement and make it a condition of continuing in employment that the employee has the vaccination, and for example, any subsequent boosters or updated vaccinations. In practice, however, given that this is unlikely to be a current contractual requirement, introducing this change would need to be accompanied from an employee relations perspective, with some practical arrangements, potentially allowing for redeployment into other areas/roles if necessary, as well as dealing with some of the other points listed below, not least in relation to staff who may object or not be able to have a vaccine for a variety of reasons.
21. A consultation process with employees will likely be required before the requirement can be imposed. The requirement is likely to engage legislation requiring consultation with employees on matters relating to health and safety.
22. Where the employer recognises a trade union and health and safety representatives or Safety Committees are appointed by the union (as is often the case in NHS trusts), information and consultation requirements that must be observed are set out under the Safety Representatives and Safety Committees Regulations 1977.

23. Where the employer does not recognise a trade union, different requirements are provided for under the Health and Safety (Consultation with Employees) Regulations 1996. The employer must then inform and consult either the elected spokesperson(s) or the employees themselves where no election has taken place.
24. Consultation may also be required under collective redundancies legislation (section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992)) if the employer 'proposes' to dismiss and re-engage 20 or more employees in order to introduce new contractual term(s) relating to the vaccination requirement. Due to jurisprudence on this part of collective redundancy law, 'proposing to dismiss' has been interpreted to mean the point in time where the employer intends to give notice of dismissal.
25. In both situations, consultation must be carried out 'in good time' before the changes take effect, and under TULR(C)A 1992 minimum consultation periods must also be observed. There will therefore be timing considerations in terms of how quickly the scheme can be implemented.
26. Notwithstanding, even with relatively small workforces, a period of consultation is likely to be required before an issue of this sensitivity is introduced into contracts.
27. For the introduction of this condition for existing staff, the process takes time. Any regulations need to take into account the need for consultation, time for decision-making and up to 12 weeks' notice for each employee. The implementation of Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 ('the Regulations') did not give sufficient time for care providers to do this. This has meant that some providers will incur costs to pay in lieu of notice on the date of implementation (11 November), as providers have had to terminate the employment of employees due to the lack of redeployment opportunities in the social care sector.
28. Where an employer makes having a vaccination a condition of being offered employment, the contractual position could be made clear at the outset. In these circumstances, the unfair dismissal points set out above are not engaged as the employee will not have started work. However, discrimination laws protect applicants for employment as well as employees. Consequently, the considerations set out above would apply
29. Even where staff have been vaccinated, employers will need to consider their overall duty under common law and the Health and Safety at Work Act 1974 to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees. An employer must consult with Health and Safety representatives appointed by any recognised trade union (and permit inspection of documents for those representatives to discharge their duties) under the Safety Representative & Safety Committee Regulations 1977. Separate duties apply under the Health and Safety (Consultation with Employees) Regulations 1996 where there is no recognised trade union. Guidance on the extent to which vaccination does – or possibly more importantly, does not help an employer satisfy their health and safety obligations

would be useful. Vaccinations alone are unlikely to prove sufficient for employers to comply with those obligations and are not a “short cut” to health and safety compliance.

30. Employers will need guidance on how to manage the interaction between staff and the people they support who have been vaccinated, and those who have not. Employers will need to risk assess each job and workspace for the impact of their staff having different statuses. This will require updated information about (for example) the transmission risk for those who are vaccinated (and those who are not), the efficacy of the vaccine against new variants, and on the accuracy of testing. There may otherwise be a risk of litigation against them by both the people they support and employees, for providers that have a high proportion of vaccinated staff but who fail to take other ‘COVID-secure’ steps.
31. We understand that employees will have to complete a course of approved vaccination programmes. Staff may need to be temporarily redeployed whilst awaiting vaccinations. Consideration should be given to what would happen if there is no suitable alternative role available and dismissal is the only other current option; could some kind of temporary lay-off be imposed, and what rights to pay and other conditions would apply during this period?. There are measures which could be introduced alongside the vaccine requirement to help mitigate the impact on individuals and encourage vaccine take up. For example, staff within scope of the requirement could be entitled to paid time off to undertake vaccination, and to sick pay entitlements for any time off needed to recover from the side-effects of vaccination.
32. Even with a vaccination requirement, there is a risk that some workers may not feel safe working in a hospital or care setting. Much will depend on how other staff and visitors are managed, what other COVID-secure measures are implemented, and that individual’s own circumstances. There may be some workers who have not yet returned to work and those workers who are concerned on reasonable grounds over a return to the workplace will potentially have protections against detrimental treatment or dismissal under sections 44 and 100 of the Employment Rights Act 1996 (ERA 1996).
33. We note that the government is considering which categories of people who work in health and social care settings should be required to have a vaccine. The wider the vaccination requirements are, the less likely it is that a non-vaccinated employee could be re-deployed to a role which did not require vaccination. The case for this extension of the application of the Regulations from older people's homes to the proposed wider CQC registered settings is the crossover in both employees and those that they support, in the provision of care. However, we note that there is similar crossover in people being supported in both CQC and non CQC settings such as sheltered housing and extra care facilities.
34. As noted above, even with a vaccine regime, employers still need to consider their health and safety obligations to all of their workers. This may include re-deploying staff who cannot be vaccinated to alternative, less risky roles (where they exist) as part of a reasonable adjustment for disabled employees or as part of a specific pregnancy-

related health and safety assessment (although please note our comments on temporary self-exemption below). Similar considerations apply to any situation that involves disputed employment status of ‘staff’. Additionally, the risk assessment conducted by the employer will need to address and implement measures that cover the working practices (see *Uber BV and others v Aslam and others* [2021] UKSC 5 4 and for example, Regulation 4A of the Safety Representatives and Safety Committee Regulations 1977). Where the NHS trust or other organisation does not employ the staff member in question, it may be more difficult to impose the requirement and monitor compliance e.g. in the case of agency staff.

35. We consider that it would be good practice for the Government to undertake a regular review so that the policy, if implemented, is only continued for as long as necessary. Any regular review should also be accompanied by an Equality Impact Assessment exploring the negative impact of the policy.
36. Any vaccination requirement would also engage data protection considerations as employers will be required to process sensitive personal data about their staff. Vaccination data is health data under applicable data protection laws, which has the protected status of “special category data”. Managers will be obliged to consider what extra protections need to be afforded to such data before implementing such a policy. Managers cannot simply rely on the consent of their employees in this context.
37. The process of exemption on the basis of medical exemptions from the Regulations is not as yet resolved and a temporary process of self-exemption is currently in place, which includes pregnancy. This is causing some confusion with care providers. They are being challenged by employees who have medical conditions which are not clearly excluded or included in the Green Book list of medical exemptions. In the future, the reasons for exemption need to be clear if the system works without medical support, as it does now.

Members of this Working Group:

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