

COVID-19: Employer Guidance on Vaccines

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Introduction

The roll out of COVID-19 vaccinations is well underway in many countries. While a vaccination program has been viewed by many as the long-awaited route out of the pandemic, it continues to present challenges for employers—including whether they can require employees to be vaccinated.

In this publication, we provide at-a-glance guidance to the key issues for employers to consider in Brazil, France, Germany, Hong Kong, the UK and the United States, followed by more detailed Q&As for each of these jurisdictions.

At-A-Glance

	Brazil	France	Germany	Hong Kong	UK	United States
Employer access to COVID-19 vaccines	Not permitted	Permitted, subject to conditions	Permitted, subject to conditions	Not permitted	Not permitted	Not permitted
Requiring employees to be vaccinated	Permitted, subject to conditions	Not permitted	Not permitted	Permitted, subject to conditions	Permitted, subject to conditions	Permitted, subject to conditions
Requiring employees to disclose/produce proof of vaccination	Permitted, subject to conditions	Not permitted	Not permitted	Permitted, subject to conditions	Permitted, subject to conditions	Permitted, subject to conditions
Taking action if employees do not want to be vaccinated	Permitted, subject to conditions	Not permitted	Not permitted	Permitted, subject to conditions	Permitted, subject to conditions	Permitted, subject to conditions

Not permitted	
Permitted, subject to conditions	
Permitted	



BRAZIL

1. Are COVID-19 vaccines available?

Yes. According to the COVID-19 National Immunization Operation Plan, the following vaccines are approved for use in Brazil by the Health Surveillance Agency (ANVISA):

- CoronaVac developed by Sinovac in partnership with Instituto Butantan
- AstraZeneca, developed by Oxford University in partnership with Fiocruz
- Pfizer, developed by BioNTech and registered in Brazil by Wyeth Pharmaceuticals
- Janssen, developed by Johnson & Johnson

In Brazil vaccination plans were divided into groups to receive vaccines (for example, the first phase included frontline health professionals, indigenous populations and traditional communities living near rivers, individuals over 75 years old and individuals aged over 60 in nursing homes; then, several phases covering individuals by age group, according to the participatory planning of each state).

Currently, the vaccination against COVID-19 is in a very advanced phase. More than 80 percent of the population in Brazil has been vaccinated with the first dose, and approximately 72 percent with the second dose or single dose. In addition, more than 20 percent of the Brazilian population has received a booster dose.

2. Do employers have direct access to the vaccines?

Pursuant to the guidelines established by Brazil's Ministry of Health, COVID-19 vaccines will be primarily distributed to the population through the National Public Health System (SUS).

As of the enactment of Law No. 14,125 from March 10, 2021, companies are allowed to directly purchase COVID-19 vaccines that have been temporarily authorized for urgent use by ANVISA. However, these vaccines must be entirely donated to SUS, in order to make them available for the National Immunization Program (PNI).

Companies will only be allowed to acquire, distribute and administrate vaccines after the end of the immunization of the priority groups stipulated by the National Plan of Operationalization of Vaccines against COVID-19. Nevertheless, 50% of the vaccines must be donated to SUS and the other half must be utilized without any costs.

All information regarding vaccines acquisition by companies, including purchase or donation contracts and the application of vaccines, shall be furnished to Brazil's Ministry of Health.

3. Do employers have a legal right to require employees to be vaccinated?

Yes. Pursuant to Brazil's Labor Code (CLT), the employer is responsible for the health and safety of the workplace and, therefore, is entitled to adopt all reasonable measures to secure that employees are healthy and safe during their activities.

Additionally, Brazil's Federal Supreme Court (STF) has recently issued a decision through which the government can require mandatory vaccination of the population and impose penalties for those who refuse to get vaccinated, prioritizing the collective interest over the private interest of each citizen.

However, it is important to note that the Court has also protected the individual's subjective right to freedom of conscience by not authorizing the use of coercive force by the government to make an individual receive the vaccine.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

Yes. Employers that require vaccination may also require proof of vaccination. However, it is essential to remember that personal data relating to the health of an individual constitutes sensitive data (pursuant to the “General Data Protection Law” or “LGPD”). Thereby, its collection, treatment and storage must obey the parameters set forth by LGPD.

Employers should be aware that certain employees may have a reasonable justification to not take the vaccine (e.g., employees with disabilities or sincerely held religious beliefs). These employees should be allowed to provide their justifications to the employer, who should collect, treat and store the corresponding data as confidential information.

In addition to the aforementioned, it is important to mention that the STF rendered a decision that deemed the Ministerial Ordinance No. 620, issued by the Ministry of Labor and Social Security on November 1, 2021, as unconstitutional. The Ministerial Ordinance No. 620 forbade employers from requiring employees to present proof of vaccination, classifying this conduct as discriminatory but as of the STF’s decision its effect was suspended.

5. Can employers take action if employees do not want to be vaccinated?

Although it is not legal to physically force people to take the vaccine, employers have a right to require employees to be vaccinated or impose reasonable disciplinary measures to those who refuse.

Employees who refuse to be vaccinated without a reasonable justification (e.g., any proven allergy to the vaccine’s components or preexisting condition that endangers the employee if vaccinated) will be subject to the application of gradual disciplinary measures by the employer (written admonition, suspension and termination for cause).

Any disability that prevents the employee from receiving the vaccine is considered a reasonable justification, which is why the employer does not have carte blanche to take adverse action against employees who are in this situation, including by excluding the employee from the workplace or using disciplinary measures against the employee.

As with disability-related reasons for not being vaccinated, the fact that an employee cannot be vaccinated because of a sincerely held religious belief does not necessarily mean that an employer can terminate the employee or use any disciplinary measure against them. In such scenarios, employers should consider potential strategies, such as moving the employee to a remote work regime, instead of being subject to risks related to a discrimination-related dispute.



FRANCE

1. Are COVID-19 vaccines available?

Yes, vaccination is open to all adults without conditions, as well as to all children aged 5 to 17 years on a voluntary basis.

The booster shot is open to everyone over 18 years and one month old, as early as three months after their last injection or COVID-19 infection.

As of February 15, 2022, health pass rules change for people over 18 years old. After that date, these people must have had a booster shot, as soon as they are eligible and, at the latest, four months after their last injection. Failure to do so will deactivate their health pass.

A bill, in force since January 24, 2022, provides that a vaccination pass is compulsory to access certain public areas where the health pass was previously required. For people over the age of 16 years, proof of a complete vaccination status will be demanded; a negative COVID-19 test will no longer suffice to access those areas.

As of February 22, 2022, 53.15 million people, and 79.2 percent of people over age of five, are fully vaccinated.

2. Do employers have direct access to the vaccines?

The government controls the supply of vaccines to the population.

Initially limited to vaccination centers, now general practitioners, midwives, nurses and pharmacists are allowed to vaccinate to the extent that the person belongs to the above defined categories.

Employers may only organize vaccination of their employees through the company occupational medicine doctor. Employers must inform their employees about how to access the vaccination through the occupational doctors. Absences by employees to be vaccinated are considered as a working time and must not lead to any loss of pay.

However, given the relatively small number of occupational doctors, this option is quite limited.

3. Do employers have a legal right to require employees to be vaccinated?

Under French law, vaccination policy falls within the scope of Public Health and is determined by the Minister of Health. Only the legislator can make vaccinations mandatory.

Generally, employers do not have a legal right to require employees to be vaccinated. However, vaccination against COVID-19 has been made compulsory by law n° 2021-1040 of August 5, 2021, unless there is a medical contra-indication, for people working in the health and medico-social sectors. In particular, the following are concerned:

- Medical and paramedical professionals working in private practice or in hospitals, clinics, nursing homes (EHPAD) and retirement homes, as well as professionals, students or pupils working on these premises;
- Professionals in contact with vulnerable people, such as firefighters, ambulance drivers, employees in the homes of certain beneficiaries of the personalized autonomy allowance (APA) or the disability compensation benefit (PCH).

Since October 16, 2021, people subject to the compulsory vaccination are required to show one of the following documents:

- A certificate of complete vaccination status;

- A certificate of valid recovery;
- A medical contra-indication.

A bill, in force since January 24, 2022, transformed the health pass into a vaccination pass for all people over the age 16 years in almost all the business activities listed below where such health pass was required.

Therefore, employees working in those businesses have to show proof of a complete vaccination status or a medical contra-indication; a negative COVID-19 test is no longer sufficient to access the workplace.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

No, employers cannot require employees to disclose or to produce proof of whether they have been vaccinated, except under specific circumstances determined by law.

Several laws require a “health pass,” now transformed into a “vaccination pass,” for listed business activities, notably:

- Leisure and cultural venues (theaters, amusement parks, concert halls, festivals, sports venues, cinemas, etc.)
- Bars and restaurants (with the exception of company restaurants), including on terraces
- Department stores and shopping malls, by decision of the prefect of the department, in case of risk of contamination (new window), under conditions guaranteeing access to essential shops, as well as to transportation
- Seminars
- Public transport (trains, buses, planes) for long journeys
- Hospitals, homes for the elderly (EHPAD) and retirement homes for companions, visitors and patients receiving scheduled care. The pass will not be requested in case of medical emergency.

It should be noted that as of February 28, 2022, masks are no longer be required in enclosed spaces where the vaccination pass is required.

Whenever an employee is legally required to show a vaccination pass, the employer must check that the employee has complied with their obligation.

5. Can employers take action if employees do not want to be vaccinated?

In the health sector, failure to be vaccinated in time may lead to suspension of employees and public servants without pay. The possibility of dismissal in case of failure to be vaccinated, initially planned by the government, has been removed by Parliament.

For staff working in the sectors concerned by the vaccination pass, if employees fail to present the pass, their employment contract may be suspended, without pay. At the end of the third day following the beginning of the suspension, the employer must organize a meeting with the employee to consider ways to regularize the situation. They may be offered an assignment to another position, without contact with the public. Dismissal is not allowed. Employers may terminate fixed-term employment contracts (CDD).

Also, as a matter of principle, an employer cannot impose remote work to its employees. However, during the health emergency period, the employer may require an employee to work remotely a certain number of days per week if the employee’s activities are eligible for this work organization.

It should be noted that the health emergency period has been extended to July 31, 2022 by law.

Current governmental recommendation is to extend work from home up to three days per week, whenever it is possible.



GERMANY

1. Are COVID-19 vaccines available?

So far, the vaccines from Biontech/Pfizer, Moderna, Astrazeneca, Johnson & Johnson, and Novavax are available in Germany. Vaccines from other manufacturers continue to be in the development or approval process and should also be available in the next few months. Approximately 63.4 million people have been vaccinated in Germany at least once so far (as of February 25, 2022), including approximately 62.7 million people who are already fully vaccinated. Approximately 47.2 million people have received their booster shot. Currently, approximately 19.7 million people (i.e., 23.7 percent of the population) are unvaccinated. The access to vaccination in Germany used to be staggered according to prioritization, starting with high-risk groups such as elderly citizens and medical personnel. However, since June 7, 2021, there is no longer a prioritization and everyone can make an appointment to get vaccinated. The vaccination is carried out in vaccination centers as well as by mobile vaccination teams, general practitioners, and company doctors. In August 2021, Germany started to offer booster shots primarily to older citizens and members of other high risk groups. The current recommendation is that all people 12 years or older should receive a booster shot approximately three months after their last vaccination.

2. Do employers have direct access to the vaccines?

As of February 25, 2022, employers in Germany do not have any direct access to the vaccines. However, company doctors have been able to secure a certain number of vaccine units per company for which they provide medical services. While employers are not obliged to facilitate a vaccination campaign at their premises, many use this opportunity to engage with their company doctor and offer vaccination appointments for employees and their family members on a voluntary basis. Apart from that, the government procures and finances all vaccines used in Germany and organizes distribution to each federal state. The federal states then ensure safe storage and distribution on site. They also organize and operate the vaccination centers and the mobile vaccination teams that vaccinate residents of nursing homes and their staff.

3. Do employers have a legal right to require employees to be vaccinated?

At present, a COVID-19 vaccination is not mandatory for employees. However, effective March 16, 2022, vaccination will become mandatory for employees working in hospitals, nursing homes, doctors' and dentists' offices, emergency and nursing services, birthing centers and other medical and nursing facilities.

Although various politicians and other stakeholders keep demanding a general legal obligation to vaccinate, this is not currently being discussed and is unlikely to come up in the near future. It is more likely that vaccination against COVID-19 will remain voluntary, as is the case with other infectious diseases.

Likewise, there is no contractual obligation for employees to get vaccinated. The employer's right of direction is not sufficient for a vaccination order. A vaccination obligation agreed in the employment agreement is highly unlikely to be effective and thus not enforceable.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

Technically, there is no general right of employers to specifically require employees to disclose or to produce proof of whether they have been vaccinated. However, since new legislation came into force on November 24, 2021, employees may be granted access to company premises only if they are able to prove that they are either vaccinated, recently recovered or tested negative (so-called "3G"). In this context, employers can require employees to produce proof of either of the three statuses but cannot specifically ask for the vaccination status. When it comes to processing and storing information obtained during the

access control process, for data privacy reasons such information must be limited to the fact that employees are permitted to access the premises (in light of proven status), and for how long such access right exists. Under the existing legislation, the status “vaccinated” does not lapse so the access to company premises can be granted permanently. On the other hand, people are considered “recently recovered” only for three months; after that they need to produce other evidence that they fulfill one of the 3Gs. A negative test is valid for either 24 or 48 hours depending on which type of test is used.

Only very few employers (e.g., hospitals and medical practices) can require their employees to disclose or to produce proof of whether they have been vaccinated. The vaccination status constitutes a special category of personal data (health data) in the sense of Art. 9 para. 1 GDPR, and thus, the disclosure of the vaccination status would require the explicit and free consent of the respective employee.

In the context of the COVID-19 pandemic, the opening clause of Art. 9 para. 2(i) GDPR, according to which processing is permitted if it is necessary for reasons of public interest in the area of public health, was used as the legal basis for data processing under the German Infection Protection Act. Pursuant to section 23a of the German Infection Protection Act, employers of certain sectors (e.g., hospitals and medical practices) are permitted to process the vaccination status of their employees. Other employers are not permitted to request employees to disclose their vaccination status. However, if employees voluntarily disclose their vaccination status, employers are permitted to use that information when planning and implementing infection protection measures.

5. Can employers take action if employees do not want to be vaccinated?

There is currently no obligation for employees to be vaccinated against COVID-19. Employers can only recommend the vaccination and incentivize it by offering vaccination premiums. However, if an employee refuses the (voluntary) vaccination, this refusal cannot be used as a basis for any disciplinary measures (such as formal warning or dismissal). Likewise, in general, the respective employee must not be treated differently than their vaccinated colleagues. Whether the employer can deny access to the office premises if an employee refuses to be vaccinated will depend on the circumstances of the individual case. In particular, it must be assessed whether the employer’s duty to protect its staff can be achieved through less restrictive means (obligation to wear masks, distancing, proof of other 3G status, etc.).



HONG KONG

1. Are COVID-19 vaccines available?

Yes. Two COVID-19 vaccines are currently available in Hong Kong, the Sinovac vaccine (CoronaVac) and the BioNTech vaccine (Comirnaty).

Hong Kong residents aged three or above are eligible to receive free vaccination, CoronaVac or Comirnaty. Those between the age of 3 to 5 are eligible to receive free CoronaVac vaccination.

Holders of Exit-entry Permits for traveling to and from Hong Kong and Macao that are allowed to stay in Hong Kong as visitors, and can complete two doses of vaccination within their limit of stay without extension, are also eligible to receive the free vaccination. Other lawful visitors can make appointments for vaccination if their stays are long enough for them to complete two doses.

Non-refoulement claimants and refugees recognized by the United Nations High Commissioner for Refugees (UNHCR) can indicate their intention of receiving a vaccination through the International Social Service Hong Kong Branch. They can receive the vaccine at designated community vaccination centers where interpretation service is available.

The following individuals can receive a third dose of COVID-19 vaccine free of charge:

- Certain groups of immunocompromised people age 12 or older (e.g., cancer patients, organ transplant recipients, patients with severe primary immunodeficiency or on chronic dialysis, advanced or untreated HIV patients and patients taking active immunosuppressive medication);
- People age 18 or older who had received two doses of Comirnaty vaccine or two doses of CoronaVac vaccine.

Recipients of the third dose must present the prescribed documentary proof of eligibility.

Hong Kong residents who are eligible for the third dose and have received a previous dose abroad may bring their vaccination records to the vaccination venue without advance appointments to receive the third dose.

Non-Hong Kong residents falling within the above groups must have received at least one previous dose in Hong Kong, and they must be holders of Exit-entry Permits for Travelling to and from Hong Kong and Macao, holders of non-local passports, or non-refoulement claimants or refugees recognized by the UNHCR.

Comirnaty is recommended as the third dose, but CoronaVac is available too.

Vaccination is available to eligible people in 18 community vaccination centers, designated general out-patient clinics of the Hospital Authority (CoronaVac only), designated clinics of the Department of Health, designated private clinics, Hospital COVID-19 Vaccination Stations (Comirnaty only) and the Mobile Vaccination Station. Outreach vaccination service is provided to residential care homes and nursing homes by visiting medical officers under the Residential Care Home Vaccination Programme. Such service is also available to enterprises and organizations if enough employees want to be vaccinated and there is a suitable venue with enough space.

Details of the vaccination programme can be found here: <https://www.covidvaccine.gov.hk/en/programme>

2. Do employers have direct access to the vaccines?

Not at this time. The Hong Kong Government is controlling the sourcing and administering of the vaccines to the general public. Employers can apply for outreach vaccination service if enough employees want to be vaccinated and a suitable venue is available.

3. Do employers have a legal right to require employees to be vaccinated?

Vaccines are not currently mandatory and employers do not have a statutory right to require employees to have the vaccine.

Employers have an obligation under the Occupational Safety and Health Ordinance (OSHO) and common law to take all reasonably practicable steps to ensure the safety and health at work of all of their employees. The vaccine should be considered as part of COVID-19 risk assessments, as a potential additional measure to control the risks associated with contracting the virus at work. Employers may decide, following such a risk assessment, that having a vaccinated workforce would be necessary and reasonable in reducing the risk.

An instruction to have the vaccine must also be a lawful and reasonable direction on the part of the employer. While it is not unlawful to require employees to be vaccinated for COVID-19, the question becomes whether a direction to be vaccinated is reasonable, which will depend on the circumstances.

The Government implemented a “vaccine pass” arrangement effective February 24 2022, under which, generally, all visitors including employees (except for exempted group) entering a “Specified Premise” from the dates below will be required to be vaccinated as follows:

Phase	Relevant Date	Age Group	Minimum COVID-19 Vaccination Requirements
1	From February 24 to April 29, 2022	18 or older	1 dose
		12-17	1 dose
		Recovered Patients (applicable to those age 12 or older)	0 dose, if within 6 months from date of discharge or recovery (whichever is later); or 1 dose, if after 6 months from date of discharge or recovery (whichever is later)
2	From April 30 to June 29, 2022	18 or older	2 doses
		12-17	1 dose
		Recovered Patients (applicable to those age 12 or older)	0 dose, if within 6 months from date of discharge or recovery (whichever is later); 1 dose, if after 6 months from date of discharge or recovery (whichever is later) and within 9 months subsequently; or 2 doses, if after 9 months from first dose
3	From June 30, 2022	18 or older	3 doses (or 2 doses for those who have had their second dose within the last 9 months)
		12-17	2 doses (or 1 dose for those who have had their first dose within the last 6 months)
		Recovered Patients (applicable to those age 12 or older)	0 dose, if within 6 months from date of discharge or recovery (whichever is later); 1 dose, if after 6 months from date of discharge or recovery (whichever is later) and within 9 months subsequently; or 2 doses, if after 9 months from first dose

Individuals who are exempted from the vaccine pass arrangement (i.e., they are not required to be inoculated in order to enter a Specified Premise) are:

- Individuals under the age of 12;
- Individuals unsuitable for vaccination due to health reasons, holding a specified medical exemption certificate (see [link](#) for the sample medical exemption certificate);
- Individuals who enter the Specified Premises only for the purpose of ordering takeaway of food or drink or taking away such food or drink, delivering or picking up an article from the premises, or performing necessary repairs on the premises;
- Individuals who enter or pass through the Specified Premises solely for receiving vaccination, medical treatment or undergoing a specified test in a place other than the Specified Premises; or
- Individuals who enter or pass through the Specified Premises only for receiving essential government services (including any government service that enables compliance with any legal requirement) provided on the Specified Premises, or any premises in the same building as the Specified Premises;
- Individuals who enter or pass through Specified Premises only for appearing as a party, or a representative of a party, to any proceedings in any court, statutory tribunal or statutory board held on the Specified Premises, or any premises in the same building as the Specified Premises;
- If it is reasonably necessary for a person to enter the Specified Premises to avoid physical harm to themselves or anyone else inside the premises; or
- Individuals required by a public officer (who is performing a function of the officer) to enter the Specified Premises;
- Individuals with lawful authority or reasonable excuse to enter or remain on the Specified Premises.

The Secretary for Food and Health will issue vaccine pass direction from time to time, including information on “Specified Premises.” Starting February 24, 2022, the list of “Specified Premises” includes catering business premises and the 23 scheduled premises in Schedule 2 of Cap 599F (which include some most frequently visited public premises like shopping malls and supermarkets).

The vaccine pass requirements are also applicable at schools, universities, government and public sector offices, indoor venues managed by the Leisure and Cultural Services Department, public hospitals, residential care homes for the elderly, residential care homes for individuals with disabilities through administrative instructions. However, the vaccine pass requirements for the applicable categories of people may differ in these premises. For example, the vaccine pass is not applicable to patients seeking consultation at public hospitals.

The Government proposed to amend the Employment Ordinance to address the employment-related issues arising from the COVID-19 measures it is implementing. See [link](#) for a summary of the proposed amendments. The proposed amendments are not in force yet.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

Depending on the circumstances, the requirement for employees to disclose or to submit proof that they have been vaccinated may be considered a lawful and reasonable direction of the employer (e.g., where an employee is required to access a premise where a vaccine pass is required).

If an employer requires its employees to make such a disclosure, then they will need to comply with the Personal Data (Privacy) Ordinance (PDPO) as the requirement will inevitably involve the collection and processing of employees' personal data.

The PDPO requires, among other things, that the collection of the data is necessary for the purpose for which it is collected and is adequate but not excessive. The PDPO requires data users to take all practicable steps to ensure the personal data collected is accurate and not retained for a period longer than is necessary for the fulfilment of the purpose for which the data is used. There is also certain information that should be provided to an employee before seeking vaccination data from the employee. Under the PDPO, an employer will need to inform the employee on or before collecting the data whether it is obligatory or voluntary for them to supply the data and when it is obligatory, the consequences for the employee if they fail to supply the data.

5. Can employers take action if employees do not want to be vaccinated?

The actions that an employer may take will depend on, among other things, whether the employer has a lawful right to require the employee to be vaccinated. This will depend on, among other things, whether the requirement to be vaccinated is reasonably necessary and practicable to ensure the safety and health at work of its employees and protect public health as well as whether the employer has a right under the contract of employment to require the employee to be vaccinated. If these things are not established, then the employer may not be able to do much. If they are, then the employer may be able to take certain actions in respect of the employee. What steps may be taken will of course depend on the circumstances, but may include disciplinary action.

Employers should also have regard to any conditions of its employees which may explain why they may refuse to get vaccinated and be careful about treating employees who refuse to get vaccinated less favorably, as there is a risk that this may fall foul of anti-discrimination laws. For instance, there may be individuals with medical conditions or who are pregnant or breastfeeding where medical advice is that they should not take the vaccine (e.g., CoronaVac is not recommended for pregnant or breastfeeding women). Employers should be careful of potential disability, pregnancy or breastfeeding discrimination where there is less favorable treatment of employees who have not been vaccinated, for example, by not allowing them to go into the office.

The obligations that the employer must comply with include the contract of employment, the OSHO, Disability Discrimination Ordinance and Sex Discrimination Ordinance. They may also have to consider employee relations issues as well, for example, if the employee disagrees with or is opposed to vaccination as a matter of principle.



UNITED KINGDOM

Each of the UK nations has plans to scale up vaccine delivery, however, the information in this section of the guide relates to COVID-19 vaccinations provided by the National Health Service (NHS) in England only.

1. Are COVID-19 vaccines available?

Yes. The UK government's strategy has been to develop a diverse portfolio of vaccines and figures released in mid-February 2022 showed that approximately 91 percent of the population had received the first dose of the vaccine, approximately 85 percent had received the second dose, and approximately 66 percent had received the booster dose.

2. Do employers have direct access to the vaccines?

No. Currently, vaccines are not commercially available and are distributed through the NHS.

3. Do employers have a legal right to require employees to be vaccinated?

Vaccines are not currently mandatory and employers do not have a legal right to require employees to have the vaccine. Regulations making vaccines a condition of deployment for health and social care staff are set to be revoked, subject to Parliamentary approval. According to government guidance, employers should support staff in having the COVID-19 vaccine, but they cannot force staff to be vaccinated.

Employers may find it useful to talk with their staff about the vaccine and share the benefits of being vaccinated. If an employee does not want to be vaccinated, the employer should listen to their concerns. Employers should be sensitive towards individual situations and must keep any concerns confidential, in particular as some people may be resistant to taking the vaccine on health grounds or on grounds that are protected from discrimination under the Equality Act 2010.

UK employers have obligations under health and safety law to reduce health risks to employees and others to a level which is as low as reasonably practicable. The vaccine should be considered as part of COVID-19 risk assessments, as a potential additional measure to control the risks associated with contracting the virus at work. Employers may decide, following such a risk assessment, that having a vaccinated workforce would be necessary and reasonable in reducing the risk. Therefore, an instruction to have the vaccine could be regarded as a "reasonable instruction" on the part of the employer, but that will depend on the circumstances.

Recent press coverage has suggested we may see such decisions implemented across the UK in the near future. For example, a report published in September 2021 commissioned by Indeed Flex, a recruitment company, revealed that of 400 company HR directors surveyed, 70 percent were planning to implement vaccine mandates.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

Requiring evidence of vaccination gives rise to significant data protection issues. Details about an employee's vaccination status is likely to be considered special category health data, which means employers will have to identify a particular GDPR exemption for processing it. Potential grounds may include where it is necessary for performance of rights and obligations in connection with employment, such as maintaining a safe place of work. A policy would also be required, covering the collection of such data and its retention (i.e., only retaining the information for as long as it is needed).

Even if permitted by privacy law, an employer cannot require an employee to disclose such information against their will. Whether any adverse action could be taken against an employee who refuses is likely to depend on the grounds of their objection (see question 5 below), but it would seem reasonable for an employer to be permitted to ask the question as part of a wider policy of encouraging staff to be vaccinated.

5. Can employers take action if employees do not want to be vaccinated?

Whether an employer can take action will depend on a number of factors, including whether there is a vaccination policy in place and whether being vaccinated is necessary for the employee to do their job. It is arguable that a requirement for vaccination is a reasonable management instruction in order for an employer to provide a safe place of work. This argument now has some precedent following the recent Employment Tribunal decision to dismiss a care home employee's claim for unfair and wrongful dismissal for refusing to get vaccinated, albeit it remains to be seen whether this case will have wider implications beyond the care home sector. In any case, any such policy, is likely to have to make room for exceptions based on employees' reasons for refusal.

For example, the reason for refusal to have the vaccine could be protected from discrimination by the Equality Act 2010. Indeed, the COVID-19 Secure Guidelines suggest that employers should be mindful of the particular needs of those with protected characteristics.

Employers could be at risk of indirectly discriminating against individuals with certain protected characteristics if they plan to treat vaccinated staff differently from unvaccinated staff. Examples of different treatment could include requiring vaccinated staff to return to work whilst preventing unvaccinated staff from entering the workplace or not allowing them to travel abroad for work.

Individuals with the following protected characteristics could potentially be indirectly discriminated against in these circumstances:

DISABILITY

Individuals with certain medical conditions are being advised not to have the vaccine. These employees may be disabled for the purposes of the Equality Act 2010 and their decision not to get vaccinated could be "something arising from" that disability. Differential treatment could, therefore, lead to successful indirect disability discrimination claims unless the employer could show an objective justification for the treatment. If employers press employees for reasons why they will not have the vaccine, employers could be put on notice of a disability they did not know about and must then be prepared to make necessary reasonable adjustments for the employee.

PREGNANCY AND MATERNITY

Expectant mothers were initially advised not to have the vaccine, however that guidance has now been reversed. Pregnant women may nonetheless be reluctant to be vaccinated due to the earlier advice.

RELIGION OR BELIEF

Employees may claim that vaccination is against their religious beliefs. Equally, although not yet tested, an anti-vaccination stance could amount to a protected philosophical belief and therefore attract protection under the Equality Act 2010.

A successful claim using this protected characteristic would need to establish that the belief was genuinely held, cogent, serious and worthy of respect in a democratic society.

If an employee refuses to be vaccinated because of a protected characteristic, and this results in detrimental or disciplinary action from their employer, they may be able to issue a direct or indirect discrimination claim and claim constructive unfair dismissal if they resign in protest. It is important to remember that discrimination claims have no financial cap, so a successful claim could potentially come with severe costs consequences in damages for the employer.

A recent publication by ACAS encourages employers to consider hybrid working arrangements to increase productivity and job satisfaction, attract and retain a more diverse workforce and improve trust and working relationships. The publication covers considering hybrid working, consulting and preparing, creating a policy, treating staff fairly and supporting and managing staff.



UNITED STATES

1. Are COVID-19 vaccines available?

As of this writing, three COVID-19 vaccines have been approved by the FDA for use in the United States: (1) the two-dose Moderna vaccine, (2) the two-dose Pfizer-BioNTech vaccine, and (3) the single-dose Johnson & Johnson COVID-19 vaccine.

- **Pfizer:** The Pfizer vaccine is currently approved for use for individuals 16 years of age and older as a two-dose primary series and as a booster dose at least five months after completing the primary series. The FDA has also granted Emergency Use Authorization (EUA) for use of the primary series of the Pfizer vaccine for children ages 5 to 16, for a single booster dose for individuals 12 years of age or older at least five months after completing a primary series, and for a third primary series dose for individuals five years of age and older who have been determined to have certain kinds of immunocompromise.
- **Moderna:** The Moderna vaccine is currently available for use under EUA by the FDA as a two-dose primary series for individuals 18 years of age and older, as a third dose primary series dose for individuals 18 years of age and older who have been determined to have certain kinds of immunocompromise, and as a booster for individuals 18 years of age or older at least five months after completing their primary series.
- **Johnson & Johnson:** The Johnson & Johnson vaccine is currently available for use under EUA by the FDA as a single-dose primary series for individuals 18 years of age and older and as a booster for individuals 18 years of age or older at least two months after completing their primary dose.

Vaccination distribution is being handled on the state level and each state is implementing the distribution process differently. Most states are allowing any individuals who are interested in receiving a booster to obtain one.

2. Do employers have direct access to the vaccines?

No. Not at this stage.

3. Do employers have a legal right to require employees to be vaccinated?

We will deal with legal obligations and legal right in turn.

LEGAL OBLIGATION

Employers currently are not subject to any legal obligations under federal law to require their employees to be vaccinated. In November 2021, the federal Occupational Safety and Health Administration (OSHA) published an emergency rule that requires employers with 100 or more employees either to have a mandatory COVID-19 vaccination policy or, alternatively, to give employees the option of vaccinating or undergoing weekly COVID-19 testing. The US Supreme Court recently blocked OSHA from enforcing the vaccination rule and OSHA subsequently withdrew the vaccination and testing emergency standards, effective as of January 26, 2022.

State and local COVID-19 rules that impose similar requirements as the OSHA rule are unaffected by the Supreme Court's decision and OSHA's withdrawal of its standards.

LEGAL RIGHT

On October 13, 2021, the Equal Employment Opportunity Commission (EEOC) updated the vaccination sections of its technical assistance document titled [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”](#) (the “Guidance”) to provide guidance to employers regarding COVID-19 vaccinations in the workplace.

The EEOC's Guidance notes that federal equal employment opportunity laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the Americans with Disabilities Act (ADA).

The EEOC's Guidance further notes that in some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability or for religion. See further discussion below.

To ensure a safe workplace, an employer should consider whether to implement different vaccination policies with respect to employees in different roles and/or work locations. For example, an employer may wish to mandate vaccinations for employees who have more direct interaction with other workers or with the public as compared to employees who do not.

Prior to instituting a mandatory vaccination policy, an employer should consider whether there are any state laws or regulations that may be implicated. For example, certain states may require an employer to provide paid time off to an employee in order to obtain a COVID-19 vaccination. Similarly, an employer should assess whether other statutes, such as the Occupational Safety and Health Act or the National Labor Relations Act, are implicated. For example, collective bargaining agreements may limit an employer's ability to implement or enforce a mandatory vaccination program as to certain unionized employees.

An employer adopting a mandatory vaccination policy should also notify all employees that it will consider requests for accommodation based on disability or religion on an individualized basis. An employer should also have in place a process to allow employees to request an accommodation, and for management to assess such requests.

An employer that implements a mandatory vaccination policy should also consider how it will handle situations where an employee subject to the mandatory vaccination policy suffers side effects from the vaccine. For example, an employer may wish to consider providing such an employee with a paid leave of absence during the period in which they are recovering from the side effects. An employer should also discuss any mandatory vaccination policy with applicable insurance carriers, including the employer's workers' compensation insurer, to address coverage in the event an employee becomes ill from side effects.

In all events, employers should be mindful that guidance regarding COVID-19 in the workplace continues to evolve at the federal, state and local levels. Employers should carefully monitor applicable updates and consult with their counsel to ensure that their policies comply with the most current guidelines and requirements.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

The EEOC has stated that simply requiring an employee to provide proof that they have received a COVID-19 vaccination is not a disability-related inquiry because it is not likely to elicit information about a disability. There are many reasons—not all of which are disability-related—why an employee may not be vaccinated. However, to the extent an employer asks an unvaccinated employee questions about why the employee did not receive a vaccination, such questions may elicit information about a disability and would therefore be subject to the disability-related inquiry standard. If an employer requires its employees to provide proof of vaccination from their own health care provider or a pharmacy, an employer should warn employees, in order to avoid implicating the ADA, not to provide any medical information as part of the proof. In addition, because proof of vaccination constitutes personal data relating to an employee, the information should be collected, treated and stored as confidential medical information.

Under Title II of the Genetic Information Nondiscrimination Act (“GINA”), employers are generally not permitted to use, acquire or disclose an employee’s genetic information. Accordingly, while administering the COVID-19 vaccine generally does not implicate GINA, employers who engage (or hire a third party to engage) in pre-vaccine medical screenings or who require proof that employees have received the vaccine should specifically advise employees not to provide any genetic information, either in responding to screening questions or providing proof of receipt of the vaccine.

5. Can employers take action if employees do not want to be vaccinated?

Yes. Subject to the exceptions described below relating to disabilities and sincerely-held religious beliefs, employers may take action if they implement a mandatory vaccination policy and employees refuse to be vaccinated.

In the event an employee is unable to receive the vaccination due to a disability, the employer does not have carte blanche to take adverse action against the employee, including by excluding the employee from the workplace. Rather, the EEOC instructs that employers must determine whether the individual’s presence “would pose a direct threat [to the workplace] due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’” In doing so, the employer must conduct “an individualized assessment of four factors”: (1) the duration of the risk posed by the employee; (2) the nature and severity of the potential harm caused by an employee’s physical presence at the worksite; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

If the employer concludes that the employee poses a direct threat—which the EEOC has stated “would include a determination that an unvaccinated individual will expose others to the virus at the worksite”—the employer must assess whether it can implement any “reasonable accommodation” to mitigate the risk while still allowing the employee to come to the worksite. If no such accommodation is possible or practical because it would impose an undue hardship on the employer, the employer can exclude the individual from the worksite. However, the employer is not automatically permitted to terminate the employee’s employment under such circumstances. Rather, the employer must assess whether other reasonable accommodations are available that would enable the employee to keep their job — such as, for example, permitting the employee to work remotely or to take legally mandated leave. Employers should keep in mind that the reasonable accommodation analysis is quite fact-specific. For example, the EEOC advises that “[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.”

RELIGIOUS BELIEF, PRACTICE, OR OBSERVANCE

Pursuant to Title VII of the federal Civil Rights Act, if an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving a COVID-19 vaccination, the employer must provide the employee with a reasonable accommodation unless the accommodation poses an undue hardship. “Undue hardship” under Title VII is defined as an accommodation that has “more than a *de minimis* cost or burden on the employer.” The EEOC’s Guidance further provides that “because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” If the employer has an objective basis for questioning the employee’s religious nature or the sincerity of a religious belief, the employer “would be justified in requesting additional supporting information.” As with disability-related reasons for not being vaccinated, the mere fact that an employee cannot be vaccinated because of a sincerely held religious belief does not necessarily mean that an employer can terminate the employee. Other options, such as remote work, may need to be considered as potential accommodations if they do not impose undue hardship on the employer.

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