

NO JAB – NO JOB. Can an employee be dismissed for refusing to be vaccinated?

Yes - in certain circumstances an employer may fairly dismiss an employee who refuses to be vaccinated.

Duty to provide a safe and healthy workplace

Employers have a general duty to provide a safe and healthy working environment for all their employees. Existing occupational health and safety regulations already require them to assess the health and safety risks in their workplaces. And they must formulate Health & Safety Plans to mitigate or minimize the risks.

Assessment of Covid risks

Covid adds an additional risk to the existing risks in most workplaces. Employers first need to assess the risks of employees infecting each other in their physical workplaces. Can the employees comply with the Covid protocols on physical distancing and regular sanitizing? Can they pass on the infection by touch contact with tools, surfaces, or products? Are some parts of the workplace riskier than others?

Mandatory vaccination rule

The Health & Safety Plan should be adapted to include the Covid risks and the measures to mitigate against them. The measure may include a new rule – mandatory vaccinations. The rule could apply to all employees in the workplace – or it could apply only to those employees who are exposed to more risk of infection than others.

The rule must pass muster against the existing guidelines for substantive fairness –

- Is the rule reasonable or legitimate?
- Are employees aware of the rule?
- Is the rule consistently applied?
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The considerations to assess whether a mandatory vaccination rule is reasonable will include –

- Are the risks of infection from employee contact in the workplace moderate to high?
- Do collective rights to safety against the risks of Covid take priority over the rights of individuals to refuse vaccines for religious, medical, or other constitutional reasons?
- Have reasonable measures been implemented to accommodate employees who refuse to vaccinate – such as allowing them to work remotely if practical?

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Dismissal for refusing vaccination

The employer may decide to introduce a mandatory vaccination rule after proper consideration of all these factors - and after proper consultation with employees and their representatives. The employer could then proceed to dismiss employees who refuse to be vaccinated.

The termination would be for operational reasons. This would be on the basis that the employee poses an unacceptable risk to the health and wellbeing of other employees in the workplace.

TIP: *Employers can introduce a rule which requires all or some employees in the workplace to be vaccinated. The rule must be reasonable after a proper assessment of the risks of Covid infection. It must be a reasonable measure to mitigate against the risks of spreading infections amongst employees while they are at work. An employee who refuses vaccination may be fairly dismissed for operational reasons.*

PATRICK DEALE