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Summary Employment Law advice on Vaccination as a Condition of Deployment in relation to people employed or engaged in an activity regulated by CQC

When will the new legislation take effect?

The House of Lords has now given a green light for ministers to bring the new regulations into force so we expect they will be made on 6 January 2022 and come into force on 1 April 2022. They will also change the rules relating to care homes in relation to employing new staff and staff vaccinated abroad from the date they are made.

Who is caught by the new regulations?

The key question many providers are wrestling with is who is caught by the regulations. Further comments on that question are set out in the blog here. Providers need to work through and consider in relation to each role within the organisation:

1. Is the person employed or engaged for the purposes of a regulated activity? If so,
2. Do they have face to face contact with the people you support?

If the answer to both of those questions is yes you will need to obtain evidence that the person has been double vaccinated with a UK approved vaccine or is clinically exempt. (There are some complex rules relating to those who have been vaccinated abroad and also some new rules relating to those who have had only one dose of a vaccine which are beyond the scope of this note.)

Will it be fair and non-discriminatory to dismiss people who refuse to be vaccinated?

If it is a necessary part of an individual's role that they have direct face to face contact with the people you support and they are employed or engaged in respect of a regulated activity you will have a potentially fair reason for dismissal.

In order to carry out any dismissal fairly you would still need to follow a fair process and we have set out a suggestion below as to what a fair process might look like.

A dismissal will not amount to unlawful discrimination provided that anyone who is medically exempt for a reason related to a protected characteristic is not dismissed. For example, it would be unlawful discrimination to dismiss a pregnant employee who refuses to be vaccinated.

When would dismissals need to be carried out?

The new regulations will be enacted and become law in early January 2022 at the latest and will come into force on 1 April 2022. Providers, therefore, need to work to an implementation date of 1 April 2022.

In order to be in a position to obtain all of the necessary evidence from employees and also to affect any dismissals that may be necessary providers are going to need to implement a clear communication strategy. The strategy will need to be implemented quickly if providers wish to avoid having to pay any long serving staff in lieu of notice. An employee with 12 years' service or more is entitled to 12 weeks' notice of dismissal. As a result, notice of dismissal for anyone who is not appropriately vaccinated and is not exempt would need to be served on or before 6 January 2022 to avoid having to pay in lieu of at least some part of their notice period.

What process would be considered fair?

We consider the process that providers will need to implement breaks into five broad stages:

1. Notifying all affected employees of the new requirements and setting a deadline for the evidence to be provided;

- We suggest a letter is sent to all existing staff who have face to face contact with the people you support. If that hasn't already been done, explain the new regulations and the evidence of vaccination or exemption that is required. Ideally this should build on earlier communications relating to vaccination.
- We suggest the letter comes from your Chief Executive or equivalent role or a senior Director.
- You will want to identify a central place where evidence is sent.
- The deadline set needs to be realistic and providers who haven't already taken this step will need to take a view as to whether it is realistic to now request this by 6 January 2022.

2. Checking the evidence received;

- You will need an individual or team who will consider the evidence on receipt and check that it is satisfactory and meets the requirements and who can then follow up with all individuals who have not provided satisfactory evidence.
- You will want to thank all employees who have provided satisfactory evidence promptly to give them peace of mind that they will be able to continue in their roles.

3. **Meeting with those who don't provide the evidence or who tell you they will not be providing it to explore their concerns;**

- You should initially prioritise meetings with the most long serving members of staff who haven't provided the evidence.
- The meeting would need to discuss their reasons and any reasons given would need to be explored in detail.
- The biggest challenge in implementing the regulations in a Care Home setting has been where an employee has provided an exemption certificate from their trade union. Our view is that any such certificate should not be accepted in respect of the new regulations and the individual should be required to confirm that they will apply for a clinical exemption using the NHS Covid Pass system.
- The meeting would need to consider what alternative roles you might have where alternative employment can be offered.

4. **Giving notice to those employees who have not provided the evidence offering a right of appeal; and**

- For an employee with a 12 week notice period you will need to communicate notice of dismissal on or before 6th January 2022 to avoid paying in lieu for some of the notice period.

5. **Considering any appeals.**

- The appeal meeting should be with a more senior manager than who conducted the original decision and will need to be conducted to explore the particular grounds for appeal. We consider grievances about the decision to implement the regulations are best dealt with through the appeal process rather than starting a separate grievance process (unless the grievance goes beyond a complaint about the decision to implement the regulations).

Can we apply the new rules to our recruitment before 1 April?

Requiring the Covid-19 vaccination can, going forward, be a condition attached to any offer of employment for someone expected to have direct face to face contact with the people you support and applying the requirement is unlikely to lead to a successful discrimination claim provided you make exemptions for those who are clinically exempt.

You would need to review recruitment processes and wording of any job adverts, person specification and contractual documentation to ensure that they appropriately document the requirement to be vaccinated and to receive any future boosters.

We have prepared a toolkit which provides further detail in relation to all of these issues and which also includes template wording for recruitment, communications about the new regulations and templates for affecting the dismissal process. For further detail please contact Regena Hodgson at regena.hodgson@anthonycollins.com