

## **Introduction**

At the time of writing, the only sectors of the economy where mandatory vaccination has been implemented are for workers and employees deployed in the social care and workers and the regulations are about to come into force for employees deployed in the health and the NHS. This guidance will focus on workers and employees in the NHS and is written for Unite the Union members working in the health sector, though some of this guidance may apply to workers and employees working elsewhere.

In addition, there is not a four country approach in the UK to mandatory COVID-19 vaccinations in health and social care, though other employers in other sectors of the economy may consider mandatory vaccination as a condition of employment policies or what is more commonly known as “No job, No jab”.

## **England**

Mandatory vaccinations for social care employees and employees visiting care homes has been in place since 11 November 2021. Mandatory vaccinations health and NHS employees which conduct CQC registered activities and are in patient facing roles with take effect from 1 April 2022. Legislation has been put in place to make mandatory COVID-19 vaccination a condition of deployment in care homes, health and NHS for roles that are in scope.

## **Scotland**

There are no plans for mandatory vaccinations for NHS and social care home staff in Scotland.

## **Wales**

There are no plans for mandatory vaccinations for NHS and social care home staff in Wales.

## **Northern Ireland**

The Government plans to hold a consultation on mandatory vaccination for new health and social care employees.<sup>1</sup>

As a health trade union representing over 100,000 workers in the NHS and in social care, Unite has strongly encouraged our members to be vaccinated through our [‘Stay safe - get a jab’ campaign](https://www.unite-theunion.org/campaigns/stay-safe-get-a-jab/)<sup>2</sup> Despite this encouragement, Unite believes the vaccination programme should not be a mandatory condition of employment in order to be deployed in the NHS for patient-facing employees and in social care.<sup>3</sup>

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<sup>1</sup> <https://www.health-ni.gov.uk/news/public-consultation-planned-vaccination-new-recruits> “Public Consultation on vaccination planned for new recruits”

<sup>2</sup> <https://www.unite-theunion.org/campaigns/stay-safe-get-a-jab/>

<sup>3</sup> <https://unitelive.org/unite-covid-jabs-should-not-be-mandatory/> “Unite: Covid jobs should not be Mandatory”

The purpose of this guidance is to address some of the common questions which members may ask and to point Unite workplace representatives and officers in the direction of additional information.

## **Unite in Health’s position on COVID-19 vaccinations and mandatory COVID-19 vaccinations**

Unite in Health strongly encourages our members to take the COVID-19 vaccination. The vaccines being used are an essential part of the programme to minimise the impact of the coronavirus disease<sup>4</sup> alongside other measures. This is supplemented by the Unite “[Stay safe - get a jab campaign](#).”<sup>5</sup> Unite members are also involved in the production, distribution and administration of the life-saving vaccines.

Your union, Unite, encourages you to have the vaccine when it is offered to you – and we do this because we believe in the vaccines and we believe in protecting you<sup>6</sup>. We also believe in voluntary uptake of the COVID-19 vaccination, that is why our message has also been clear in consistently opposing mandatory vaccinations for social care staff<sup>7</sup> and NHS staff<sup>8</sup>. One of the reasons for our opposition to mandatory vaccination is according to the Government’s own estimates, 73,000 NHS staff could leave their posts in England rather than take the vaccination. There are already nearly 100,000 vacant posts in the NHS<sup>9</sup>. With such gaps in the workforce, constant pressure on the NHS and social care services caused by the pandemic and the waiting list back logs that have escalated throughout the pandemic, this a policy choice that will exacerbate the workforce shortage and put patients at increased risk.

The World Health Organisation (WHO) produced a briefing entitled “*COVID-19 and mandatory vaccination: Ethical considerations and caveats*”<sup>10</sup> raises a number of ethical issues in relation to mandatory vaccination and goes on to conclude that decision makers should encourage voluntary vaccination against COVID-19 before contemplating mandatory vaccination. Finally, mandatory COVID-19 vaccination cannot be seen as a replacement for other infection control measures, such as social distancing, good ventilation, hand hygiene and the widespread availability of Personal Protective Equipment (PPE).

## **Mandatory COVID-19 vaccinations in England**

### **Why?**

The Government’s rational and policy objective for mandatory COVID-19 vaccinations are:

1. Drive up vaccination levels in health and care workers.

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<sup>4</sup> [https://www.unitetheunion.org/media/3597/jn9318-a4-COVID-19-vaccination-position-statement\\_jan21\\_v4final.pdf](https://www.unitetheunion.org/media/3597/jn9318-a4-COVID-19-vaccination-position-statement_jan21_v4final.pdf) - Unite in Health position statement on COVID-19 vaccinations – January 2021

<sup>5</sup> <https://www.unitetheunion.org/campaigns/stay-safe-get-a-jab/> Unite Stay Safe, Get a Jab

<sup>6</sup> [https://www.unitetheunion.org/media/3688/9367\\_getajab\\_booklet\\_a4\\_8x-2.pdf](https://www.unitetheunion.org/media/3688/9367_getajab_booklet_a4_8x-2.pdf) - Unite the Union Stay safe, get a jab

<sup>7</sup> <https://www.unitetheunion.org/news-events/news/2021/june/proposals-for-compulsory-vaccination-of-care-home-staff-condemned-by-unite/> Proposals for mandatory vaccination condemned by Unite, June 2021

<sup>8</sup> <https://www.unitetheunion.org/news-events/news/2021/september/unite-repeats-its-opposition-to-the-mandatory-covid-vaccinations-for-nhs-and-social-care-staff/> - Unite repeats its opposition to the mandatory Covid vaccinations for NHS and social care staff

<sup>9</sup> <https://digital.nhs.uk/data-and-information/publications/statistical/nhs-vacancies-survey/april-2015---september-2021-experimental-statistics> (September 2021)

<sup>10</sup> <https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1>

2. As a means of protecting all those who use health and care services, a large number of whom are vulnerable, as well as the wider community.
3. Protect staff themselves by increasing vaccination rates.
4. This will also help reduce COVID-19 related sickness absences for these workers.<sup>11</sup>

Mandatory vaccination is recommended by the independent and Government appointed Scientific Advisory Group for Emergencies (SAGE) Social Care Working Group.<sup>12</sup> SAGE's recommendation indicate that the underpinning science has validity. Whilst there may be counter arguments and criticisms of the approach, it is not flawed or discredited and SAGE has come to their conclusion through their own rational conduct, let alone that SAGE which comprises of some of the leading scientists in the country, has come to their conclusion independently.

## How and when?

On 22 July 2021, the UK Government produced Regulations (The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2021)<sup>13</sup> which came into effect on 11 November 2021. Those regulations placed a duty on a registered person who runs a Care Quality Commission (CQC)<sup>14</sup> registered care home in England to prevent anyone<sup>15</sup> from entering a care home who hasn't been fully vaccinated or has shown that they are exempt for "clinical reasons".

On 9 November 2021, following a public consultation the UK Government laid down further regulations in the House of Commons. The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2022<sup>16</sup> were made on 6 January 2022 and come into effect on 1 April 2022 which will make the COVID-19 vaccination a condition of deployment for workers and employees in health and NHS settings for patient facing CQC regulated activities.

## What workers are in scope for mandatory vaccinations?

On 6 December 2021, the Government published guidance regarding which health and NHS workers were in scope for mandatory COVID-19 vaccinations.

- The regulations will apply to CQC-regulated activities whether they are publicly or privately funded. The regulations apply to health and social care workers who are deployed in respect of a CQC regulated activity, who have direct, face-to-face contact with service users.
- This includes individuals working in non-clinical ancillary roles who enter areas which are utilised for the provision of a CQC-regulated activity as part of their role and who may have social contact with patients, but not directly involved in patient care (e.g.

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<sup>11</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032255/making-vaccination-a-condition-of-deployment-in-the-health-and-wider-social-care-sector-impact\\_statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032255/making-vaccination-a-condition-of-deployment-in-the-health-and-wider-social-care-sector-impact_statement.pdf) - Making vaccination a condition of deployment in the health and wider social care sector impact statement – Department of Health & Social Care – December 2021

<sup>12</sup> <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/outcome/making-vaccination-a-condition-of-deployment-in-care-homes-government-response>

<sup>13</sup> <https://www.legislation.gov.uk/uksi/2021/891/made>

<sup>14</sup> i.e. Care Quality Commission

<sup>15</sup> Note: there are certain excluded groups, including residents, their friends and family, members of the emergency services, and those carrying out urgent maintenance

<sup>16</sup> <https://www.legislation.gov.uk/uksi/2022/15/contents/made>

receptionists, ward clerks, porters, and cleaners), regardless of contracted hours or working arrangements.

- The requirements would not apply to those employed, or otherwise engaged, in the provision of a CQC regulated activity if they do not have direct face to face contact with patients and/or services users/patients. e.g. those providing care remotely, such as through triage or telephone consultations or those in managerial roles working on sites separate from patient areas that do not have direct face to face contact and so registered persons could continue to deploy them in those roles as usual.
- This also applies to students and trainees whom fit this criteria.
- Students and trainees who opt not to have the vaccination but are not exempt from the regulations, should be directed to their educational provider to discuss the impact this will have on their progression through their programme.
- Contractors (which include outsourced and non-NHS employers in the commercial and not for profit sector), suppliers and bank and agency workers are required to demonstrate that they have systems and processes in place to evidence and monitor that all independent contractors, agency or bank staff who have face-to-face contact with patients and/or service users and who are deployed, as part of CQC regulated activity, are fully vaccinated against COVID-19.
- Mandatory vaccination also applies to those working in specific primary care settings (general practice and dentistry) and the independent sector.

Currently, the regulations do not require evidence of boosters, but employers are strongly advised to provide supportive advice to workers to encourage uptake of the booster vaccine if eligible.

### **What does this mean to health and NHS workers?**

- Now the regulations have been approved, unvaccinated individuals will need to have had their first dose of an approved COVID-19 vaccine by 3 February 2022, in order to have received their second dose by the 31 March 2022 deadline.
- NHS and non-NHS employers have already begun the process of verifying and checking the COVID-19 vaccination status of their employees and have sent letters to their employees on this issue.
- In addition, employers should have been working in partnership with staff side health trade union.
- If employees do not meet these deadlines and are not exempt from mandatory COVID-19 vaccination and cannot be redeployed into roles that are not in scope, they face the prospect of dismissal from their post.
- NHS England issued fresh guidance on redeployment concerning mandatory COVID-19 on 14 January 2022<sup>17</sup>. This gave more information on what redeployment processes should be put in place. The key points of this guidance are:
  - Principles of redundancy do not apply to redeployment related to mandatory COVID-19 for health and NHS staff.
  - There will be no pay protection for redeployed staff
  - The CQC will take a 'proportionate approach' when enforcing guidance
  - If vaccination status is unknown, staff must show NHS COVID-19 vaccination pass to verify they have taken the vaccination or if the individual has had their vaccination in a foreign country this also has to be verified.

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<sup>17</sup> <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2022/01/C1545-update-vcod-for-healthcare-workers-phase-2-implementation.pdf>

- Dismissal notices may be issued to employees that do not intent to take the COVID-19 vaccination from 4 February 2022.
- NHS Trusts must inform the NHS system and NHS England if they are unable to deliver care because of loss of staff.

### **Exemptions**

These are the exemptions for COVID-19 mandatory vaccinations:

- Those under the age of 18,
- Those clinically exempt from taking the vaccination
- Those that may have a short-term medical condition (such as pregnancy) may be deployed in a CQC regulated activity. Please note, for pregnant women, the exemption expires 16 weeks after giving birth
- Those who may be involved in a clinical trial.

### **Advice for Unite workplace representatives and regional officers**

**Do engage with management through the usual employer level negotiation, consultation and information processes and procedures that are established and in place.**

Employers have been advised to proactively plan their approach to comply with the regulations in partnership with trade unions and staff side representatives, commencing with the identification of the staff groups in scope and a review of staff vaccination data. Workplace representatives and regional officers should advice members what the possible outcomes are if they do not wish to be fully vaccinated by 1 April 2022 and are do not meet any of the stated exemptions.

Employers have been advised if it is unlikely that the worker will be fully vaccinated by 1 April 2022 (and no exemption applies), they should undertake a formal process with the individual in line with internal policy if applicable ensuring that the individual is aware of the possible implications of their failure to be vaccinated by 1 April 2022. From guidance issued by NHS England on 14<sup>th</sup> January 2022, if an employee has not confirmed they have not received at least one COVID-19 vaccination and they do not intend to do, notice of dismissal can be issued. Though that notice should not end before 31 March 2022.<sup>18</sup>

**Promote the fact that Unite the union believes in COVID-19 voluntary vaccination through our ‘Stay safe, Get a job’ campaign and arrange for materials to be sent to members, workplace representative and activists.**

The materials can be download from the Unite website or ordered via the union’s publication library. Employers have been advised that engagement with unions is best practice in order to collaboratively agree a supportive approach to encourage workers to be vaccinated, agree processes to inform staff, discuss concerns and to consider practical and operational issues.

**Urge management to undertake a local Equality Impact Assessment (EIA) on the potential impact of the policy on people with protected characteristics and publish their results if they have not already done so. This is something any workplace or branch rep or official can ask for or indeed a workplace or branch equality reps may pursue.**

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<sup>18</sup> <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2022/01/C1545-update-vcod-for-healthcare-workers-phase-2-implementation.pdf>

Employers have been encouraged to make their own Equality Impact Assessment. The Department of Health and Social Care (DHSC) has completed an Equality Impact Assessment (EIA) on the potential impact of the policy on people with protected characteristics.<sup>19</sup>

**Ensure management involve their occupational health workforce in the efforts to encourage workers or employees that have not taken the vaccine or may be vaccine hesitant, to have supportive conversations.**

Employers have been advised to engage occupational health and have one-to-one conversations with members of staff who have yet to have the vaccine in order to encourage more employees to take the vaccine. DHSC and NHS England have made a number resources that can assist with this that are available.

**In the context of mandatory COVID-19 vaccinations, review current organisational change and redeployment policies.**

Employers have been advised to plan redeployment processes and parameters and put in place a proposed timetable with consistent processes for staff engagement on redeployment and next steps. The approach to redeployment, agreed in partnership with staff side, should be guided by a set of best practice principles to ensure a fair and transparent process in addition to local policies, including consideration of the following:

- Vaccination period extended
- Temporarily redeployed staff may be eligible for pay protection under the employer's pay protection policy.
- Whether potential suitable alternative roles should be ring-fenced with consideration given to other staff who may be subject to redeployment for a reason unrelated to the regulations.

There will be more conversations locally between trade unions and employers regarding redeployment now the further detailed guidance has been issued. Please note the redeployment guidance not a joint NHS employers, DHSC, NHS England and trade union document; it has been issued from NHS England.

## **Frequently asked questions (FAQs)**

### ***Your rights***

- 1. Can I be dismissed if I do not get vaccinated and would I be able to claim unfair dismissal?**

Before dismissal is considered, the employer should go through a number of steps.

- Have a supportive one-to-one conversation to establish reasons for vaccine hesitancy or refusal.
- Carry out a risk assessment for staff and services impacted.

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<sup>19</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032170/making-vaccination-a-condition-of-deployment-in-health-and-wider-social-care-settings-equality-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032170/making-vaccination-a-condition-of-deployment-in-health-and-wider-social-care-settings-equality-impact-assessment.pdf)

- Consider temporary redeployment or offer a suitable alternative role within the organisation or wider health service.
- Undertake a local equality impact assessment to consider the likely impact on staff with protected characteristics.
- Follow the organisation's employment related policies and procedures. These should be in line with the guidance that has already been published on who is in scope for mandatory COVID-19 vaccination and the guidance on redeployment.<sup>20</sup>

If the employer were to decide to dismiss an employee who refused to get vaccinated, there would be nothing that the employee could do to prevent the dismissal taking effect. This means an employee can be dismissed if they refuse to comply with the statutory requirement to be vaccinated. Whether that dismissal was 'fair' or 'unfair' would depend upon the facts of the case.

The right to make a complaint of unfair dismissal requires two years continuous employment, except in a small number of special circumstances, which probably wouldn't apply to a dismissal in these circumstances. Therefore, any employee who has worked for their employer for less than two years will not be able to make a complaint in the Employment Tribunal that they have been unfairly dismissed.

At present there is an approximate wait of 12 months between the lodging of an unfair dismissal claim and the outcome of their complaint of unfair dismissal.<sup>21</sup>

The circumstances surrounding a dismissal of someone refusing to get vaccinated would have to be looked at carefully, but a lot is likely to depend upon the steps taken by the employer leading up to the decision to dismiss. If the employer has engaged with the employee, attempted to persuade them, explained the importance of vaccination (in their opinion) and given the employee time to consider their position, it is perhaps more likely that the Tribunal would be sympathetic than it would be if the employer simply imposed a rule without any discussions.

Case law is not especially helpful in this area<sup>22</sup>, but Tribunals have upheld dismissals where safety of others has been put at risk by the 'misconduct' of their colleagues.<sup>23</sup> Whether a Tribunal would uphold a dismissal for refusing a COVID-19 vaccination would obviously depend upon the circumstances, though this is much clearer now that the regulations have come into force for those in social care settings and are about to come into force for those in health and NHS settings, as it is now law for those in scope to be vaccinated.

There may be a number of arguments which would be available to a claimant who has been dismissed for refusing to be vaccinated. Whether those arguments would apply in any individual case would need careful consideration and further advice should be sought.

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<sup>20</sup> <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2021/12/C1470-vcod-for-healthcare-workers-planning-and-preparation-guidance.pdf>

<sup>21</sup> As at May 2021, employment tribunal cases of 3-5 day duration were routinely being listed in the first half of 2022, suggesting about a 12 month wait for an unfair dismissal claim (<https://www.gov.uk/government/publications/national-employment-tribunal-user-group-minutes-may-2021/national-employment-tribunal-user-group-minutes-may-2021#employment-tribunals--presidents-report> - see para 4.5 of the ET President's report)

<sup>22</sup> We know of no authority on dismissal for refusing vaccination

<sup>23</sup> See for example, *Maalouf v Teletech UK Ltd* – Case ref: 1673/14 in which M was dismissed for eating peanuts in the vicinity of a colleague with a severe nut allergy

## 2. Does mandatory COVID-19 vaccination conflict with my human rights?

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law.

There has been a legal challenge to the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 through a judicial review<sup>24</sup> that was made partly on the grounds that these regulations infringe Article 8 (The right to respect private and family life) ECHR<sup>25</sup>. This case, *Peters and Findlay v Secretary of State for Health and Social Care and the Joint Committee for Vaccination and immunisation*<sup>26</sup>, was brought in relation to Care Homes.

One of the grounds was on human rights and mirrored some of Unite's opposition to mandatory Covid-19 vaccination cited earlier in this guidance. The judge in the case, Mrs Justice Whipple, refused permission to bring judicial review, i.e. she found there was no arguable case meriting a judicial review.<sup>27</sup> rejecting the arguments on human rights relying on the judgement in an earlier case, *Vavricka v Czech Republic*, from the European Court of Human Rights where the Court ruled the government could prevent an unvaccinated child attending school and could fine the parents; on that basis preventing an unvaccinated worker from working in a care home did not breach article 8; since there is a balance to be made between individual human rights and achieving the greater public health objective of minimising harm from coronavirus. In addition, the choice to take the vaccination is still the individuals' who must bear the consequences of not taking the vaccine, even if the individual may lose their job.

## 3. If I choose to not take the vaccination and suffer dismissal, am I being discriminated against?

Vaccine hesitancy<sup>28</sup> in itself is not a protected characteristic<sup>29</sup> for the purposes of the Equality Act 2010. Therefore, members who are vaccine hesitant would not be able to say that they are being subjected to discrimination simply because the employer requires employees to be vaccinated.

If a member is to argue their refusal to take the vaccine was because of a particular protected characteristic from the Equality Act 2010 such as a disability, religion or belief, the facts should be examined.

A challenge to the 2021 regulations in relation to care homes was brought in *Peters and Findlay v Secretary of State for Health and Social Care and the Joint Committee for Vaccination and immunisation*. One of the grounds was on discrimination. Mrs Justice Whipple refused

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<sup>24</sup> Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/>

<sup>25</sup> <https://www.carehomeprofessional.com/care-home-workers-seek-judicial-review-of-mandatory-covid-vaccinations/> (published 17 September 2021)

<sup>26</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2021/3182.html>

<sup>27</sup> <https://ukhumanrightsblog.com/2021/11/26/mandatory-vaccination-for-care-home-workers-not-unlawful-nor-in-breach-of-echr/>

<sup>28</sup> Refers to delay in acceptance or refusal of vaccines despite availability of vaccine services

([https://www.who.int/immunization/research/forums\\_and\\_initiatives/1\\_RButler\\_VH\\_Threat\\_Child\\_Health\\_gvirf16.pdf](https://www.who.int/immunization/research/forums_and_initiatives/1_RButler_VH_Threat_Child_Health_gvirf16.pdf))

<sup>29</sup> See Equality Act 2010, section 4 - age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

permission to bring judicial review, i.e. **she found there was no arguable case meriting a judicial review**, rejecting the arguments on discrimination on the following grounds: She found that if any discrimination argument could be established it could be easily justified. The Equality Act 2010 allows for objective justification. This means that discrimination is permissible because the public health benefits of the COVID-19 vaccination is a good enough reason to justify discrimination, so any discrimination doesn't count as unlawful discrimination under the Equality Act 2010.

Public Health England publishes guidance on "Immunisation against infectious disease" (known as "the Green Book") which now includes a chapter on COVID-19 vaccines<sup>30</sup>. That guidance makes it clear that there are certain health conditions that would prevent someone from being vaccinated and thus a medical exemption may be granted on these grounds. If members are raising concerns relating to health conditions, then the member should approach their General Practitioner first to seek a medical exemption or temporary medical exemption and further advice might be required. This has been taken account in the regulations where there are certain conditions where employees are not required to take the vaccine.

- Those under the age of 18,
- Those clinically exempt from taking the vaccination
- Those that may have a short term medical condition (such a pregnancy)
- Those who may be involved in a clinical trial.

#### **4. May I argue that my refusal to take the COVID-19 vaccine is a philosophical belief under the Equality Act?**

Whenever a Tribunal is asked to consider whether a certain belief would qualify for protection under the Equality Act 2010, they apply a test which is set out in the case of *Grainger v Nicholson*<sup>31</sup>.

That test includes a requirement that a belief:

- Attains a certain level of cogency, seriousness, cohesion and importance;
- Is worthy of respect in a democratic society;
- Is not incompatible with human dignity; and
- Does not conflict with the fundamental rights of others

Vaccine refusal is unlikely to be treated as a philosophical belief under the Equality Act.

#### **Support from your Union**

#### **5. If I choose not to take the COVID-19 vaccine and I'm not exempt from mandatory vaccination in the NHS and social care as a condition of deployment from 1 April 2022 how can Unite support me?**

Unite strongly encourages all our members to take the COVID-19 vaccination. We have had our 'Stay safe - get a jab' campaign to promote vaccination in place for a number of months. Despite this Unite has been vocal in opposition to mandatory vaccination for NHS and social care staff on many occasions.<sup>32</sup>

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<sup>30</sup> <https://www.gov.uk/government/publications/COVID-19-the-green-book-chapter-14a>

<sup>31</sup> [https://www.bailii.org/uk/cases/UKAT/2009/0219\\_09\\_0311.html](https://www.bailii.org/uk/cases/UKAT/2009/0219_09_0311.html) UKAT/0219/09

<sup>32</sup> <https://unitelive.org/unite-covid-jabs-should-not-be-mandatory/>

All Unite members have access to a variety of legal services through our legal services.<sup>33</sup>

The union provides representation to members in internal matters with their employer, for example in grievances and disciplinary matters.

Therefore, if someone is threatened with disciplinary action up to and including dismissal for failing to take the mandatory vaccine they will be provided with that representation in the region of their workplace (in most cases) by either workplace representatives, accredited workplace companions or regional officers. This will be decided by your Unite Region.

Where legal assistance and support is required for an employment matter in the first instance contact your workplace representative or Unite district or regional office<sup>34</sup>.

Should an individual be dismissed for refusing the mandatory vaccine each case will be considered on its merits. The test in unfair dismissal cases is the following:

S 98(4) of the Employment Rights Act 1996<sup>35</sup> explains whether a dismissal is fair or unfair Depends on whether in the circumstances.... the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee Shall be determined in accordance with the equity and substantial merits of the case.

Each case will depend entirely on the facts and circumstances and importantly the actions of the employer when faced with situation where someone has refused the vaccine and why they have done so.

In summary, each case has to be assessed on its merits. The union's legal assistance to members does not extend to supporting every case brought to us legally to conclusion. The union will always endeavour to represent our members in the workplace.

### ***Professional codes and standards***

#### **6. If I am a member of a regulated profession could, I be breaking my Code or standards of practice if I refuse the vaccination?**

Different regulated professionals will have Codes and standards that apply to their practice so you should make sure you are familiar with yours. For example, the Nursing & Midwifery Council (NMC) says "The Code and our standards make clear that professionals have a responsibility to maintain their own level of health. And that they should take all reasonable personal precautions to avoid potential health risks to colleagues and people receiving care. All nurses, midwives and nursing associates, whether they decide to be vaccinated or not, need to be confident that measures are in place where they work to manage any risk of transmission, and they need to take appropriate steps themselves to reduce risks and prioritise the safety of people in their care".<sup>36</sup>

The Health Care Professions Council (HCPC) say "We would strongly encourage registrants to be vaccinated, where a vaccine has been approved and is available, unless there are good reasons why vaccination is not appropriate in a registrant's individual circumstances. If you have good reason not to be vaccinated, you need to be confident that

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<sup>33</sup> <https://www.unitelegalservices.org/>

<sup>34</sup> <https://www.unitelegalservices.org/services/employment-law-solicitors>.

<sup>35</sup> <https://www.legislation.gov.uk/ukpga/1996/18/section/98>

<sup>36</sup> <https://www.nmc.org.uk/news/coronavirus/vaccines/>

measures are in place where you work to manage any risk of transmission that your health may pose to service users, and you need to take appropriate steps yourself to reduce risks and prioritise safety”.<sup>37</sup>

The General Pharmaceutical Council (GPhC) say “We strongly urge pharmacists and pharmacy technicians to get COVID-19 and flu vaccinations at the earliest opportunity, unless they are medically exempt, and ask them to encourage other members of their team to get vaccinated as well. For healthcare workers, getting vaccinated protects the individual, their family, and colleagues, as well as patients and the public.”<sup>38</sup>

The General Medical Council (GMC) say “Doctors should be immunised against common serious communicable diseases unless medically contraindicated”<sup>39</sup>

Though an individual may remain registered to perform their chosen profession, the individual may not be able to be employed due to these new regulations.

## ***Pensions***

### **7. Can my NHS pension be withheld if I am dismissed for not taking the COVID-19 vaccination?**

Our understanding is that currently this is unlikely. NHS pensions will only attempt to withhold retirement benefits of pension scheme members for members that are dismissed for disciplinary reasons and are convicted of fraud or theft involving public funds. A dismissal involving not taking the COVID-19 vaccination would not be regarded as a disciplinary reason and likely to be deemed dismissal for ‘some other substantial reason’.

Once leaving the NHS, your pension would usually be frozen on the date of dismissal and there would be several options to choose from in what to do next. Please contact NHS pensions for further information on this matter.

## **Mandatory COVID-19 vaccinations and which staff members are in scope**

### **8. My employer is interpreting the mandatory COVID-19 guidance to apply to all staff under "incidental contact" rather than the emphasis being those in CQC regulated roles that are patient facing. Is this correct?**

This is not correct, the guidance makes it clear that health and NHS staff in scope for mandatory COVID-19 vaccinations are as follows:

The regulations will apply to CQC-regulated activities whether they are publicly or privately funded, who have direct, face-to-face contact with service users.

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<sup>37</sup> <https://www.hcpc-uk.org/globalassets/resources/external-consultations/2021/hcpc-response-to-dhsc-consultation-on-mandatory-vaccination-for-frontline-health-care-staff.pdf?v=637709297650000000>

<sup>38</sup> <https://www.pharmacyregulation.org/news/gphc-responds-government-announcement-mandatory-covid-19-vaccinations-nhs-frontline-staff> GPhc responds to Government announcement of mandatory COVID-19 vaccination for frontline NHS Staff, November 2021

<sup>39</sup> <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice/domain-2----safety-and-quality>

This include individuals working in non-clinical ancillary roles who enter areas which are utilised for the provision of a CQC-regulated activity as part of their role and who may have social contact with patients, but not directly involved in patient care.

The regulations do not apply to those employed, or otherwise engaged, in the provision of a CQC regulated activity if they do not have direct face to face contact with patients and/or services users/patients.

This also applies to students and trainees whom fit this criteria.

The regulations also apply to contractors (which include outsourced and non-NHS employers in the commercial and not for profit sector) suppliers and bank and agency workers that meet the criteria above.

Mandatory vaccination also applies to those working in specific primary care settings (general practice and dentistry) and the independent sector.

#### **9. Do regulations apply to contractors and agency staff?**

Yes the regulations apply to contractors, outsourced employers and non-NHS employers. Anyone in scope and meeting the definitions above will fall under the regulations regardless of who they are employed by.

#### **10. Do the regulations include bank staff and volunteers?**

Yes, bank staff and volunteers are included. Any individual who has face-to-face patient contact regardless of whether the work is paid or unpaid are in scope of the regulations.

#### **11. Do the regulations include students?**

Yes, students are included. Any individual who has face-to-face patient contact regardless of whether the work is paid or unpaid, or whether an individual is studying via a Higher Education Institution or directly with an employer. Students should make contact with their course leaders as soon as possible if they are not fully vaccinated. Further advice and support will be made available by Health Education England.

Students should also be aware that they may not be able to register with their professional body (please refer to question?) if they do not vaccinate and are required to do so by the regulations. If an individual is unable to register, they may not be able to get a job in their chosen profession.

#### **12. Do the regulations include employees who are currently on maternity/adoption leave or on long term sick?**

Yes, employees currently on long term sick or on maternity/adoption leave are included. Employees in these circumstances will be unable to return to work where there is direct face to face contact with service users/patients unless they are vaccinated (including as part of a return to work or Keeping in Touch days for example). Employers must not leave the conversations with individual employees just before they return to work even if that is after the 1 April 2022.

**13. I am considering working in health, NHS or social care or waiting to start my new role shortly do the regulations affect me?**

Yes, you are affected. The regulations cover any individual who has face-to-face patient contact from 1 April 2022. It therefore applies to all new starters, and we suspect employers will make it a requirement for applicants as part of their pre-employment checks.

**My vaccinated status**

**14. How will the Trust know my vaccination status?**

Each NHS employer Trust has different mechanisms for collating this information in line with General Data Protection Regulations (GDPR). Employers could use the National Immunisation and Vaccinations System (NIVS/NIMS), a local Trust system, or through evidence from individuals using the NHS App or COVID-19 pass. All information must be treated confidentially and only utilised for the purpose of engaging with staff and ensuring the Trust complies with the legislation from 1 April 2022.

**15. Is my employer able to access the national vaccination databases to obtain my vaccination status?**

NHS England have stated that Trusts have a statutory right of access regarding COVID-19 vaccine status, which would be taken from NIVS / NIMS, due to the COPI notice (Control of Patient Information Regulations 2002).

***Questions for members who have yet to take the vaccination.***

**16. If I do not take the first dose of the vaccine by 3 February 2022, could my employer issue notice on my employment, even if I am going through the redeployment process?**

It will be possible to issue notice from 4 February 2022 and go through the redeployment process concurrently, if you choose not to take the COVID-19 vaccination. Unite does not expect anyone's employment to be terminated before 31<sup>st</sup> March 2022 and the guidance does support this. Some employees with notice periods that take them beyond 1 April 2022, maybe be able to be paid in lieu of notice with the agreement of their employer or could be temporarily redeployed to a non-CQC regulated patient facing role.

**17. What happens if I can't have the vaccine? I.e. I have a medical/clinical exemption.**

Where a member of staff believes they have a clinical/medical exemption, this must be evidenced and recorded appropriately to continue working in a patient-facing role. A Trust risk-assessment to identify the level of risk of exposure to the individual, other workers, patients and visitors will be required with the involvement of occupational health. As a result of this assessment, managers may be required to put in place other measures and reasonable adjustments to help reduce the risk, which may include reviewing current personal protective equipment (PPE) use, regular lateral flow testing, remote working, sufficiently ventilated workplaces, cleaning regimes and hand hygiene etc.

**18. I haven't had the vaccine as yet as I am pregnant, what do I do?**

The Joint Committee on Vaccination and Immunisation (JCVI) has advised that pregnant women should be offered COVID-19 vaccines and that pregnant women should discuss the risks and benefits of vaccination with their healthcare professional, including the latest evidence on safety and which vaccines they should receive. While the Royal College of Obstetricians and Gynaecologists (RCOG), the Royal College of Midwives (RCM) and the UK Tetralogy Service recommend the COVID-19 vaccination for pregnant and breastfeeding women, pregnant women are eligible to request short-term medical exemptions from vaccination. For pregnant women, the exemption expires 16 weeks post-partum. This will allow you to become fully vaccinated after birth. A MATB1 certificate can be used to provide evidence of exemption status.

**19. What happens if I had my first vaccine but my second is delayed until after 1 April 2022?**

The regulations say you must take both dose before 1 April 2022 and you should make every reasonable attempt to have both vaccines by this date. However if there is a delay or unforeseen circumstances out of your control, this should be considered by your employer on a case by case basis as part of the meetings on this matter. It may be possible, but not guaranteed, that termination of employment may be possible, but it could also be delayed, unpaid leave may be granted, you may take annual leave or temporary redeployment arrangements may be put in place.

**20. What happens if I have recently had coronavirus meaning that I cannot have my first vaccine dose until after 3 February 2022?**

Vaccination should be deferred in those with confirmed infection to avoid onward transmission. People currently unwell and experiencing COVID-19 symptoms should not receive the COVID-19 vaccine until they have recovered. The NHS England guidance says this should be around four weeks after the onset of symptoms or from the date of a positive COVID-19 test.<sup>40</sup> You may have to show evidence to your employer that you have had coronavirus and you will have to speak with your employer to make necessary arrangements to comply with the regulations which could include temporary redeployment.

**21. Do people who have had COVID-19 need to be vaccinated?**

Yes, they should get vaccinated and suffering from COVID-19 doesn't count as a medical exemption. There is currently no evidence of any safety concerns from vaccinating individuals with a past history of COVID-19 infection, or with detectable COVID-19 antibody, so people who have had COVID-19 disease (whether confirmed or suspected) can still receive the COVID-19 vaccine when it is their time to do so.

The Joint Committee on Vaccines and Immunisation (JCVI) are constantly reviewing this and have decided getting vaccinated is just as important for those who have already had COVID-19 as it is for those who haven't.

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<sup>40</sup> <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2022/01/C1547-vcod-faqs.pdf>. Vaccination as a condition of deployment (VCOD) for healthcare workers, January 2022

**22. Will I get time off work to go and get my vaccinations?**

This is not guaranteed and depends on your employer, although Unite and other staff side unions are encouraging employers to give paid time off for employees to take COVID-19 vaccinations.

***Redeployment***

**23. What is redeployment and what is this process?**

If you are in scope for the regulations, not exempt from taking the vaccine and do not want to take the vaccine, being redeployed to an alternative role that is not CQC regulated and doesn't have face to face contact with patients is an option.

Redeployment means you will be required to consider alternative roles, and your employer will support you to find an alternative role that meets your skills and experience. Your employer may be able to consider roles requiring short periods of training/reskilling. NHS England guidance has been published on redeployment but employers should follow their established local policies for redeployment agreed in partnership with trade unions.

**24. If I go through redeployment and I accept a lower graded role, or a role that does not attract unsocial hours or other allowances, will my pay be protected?**

Recently published guidance has declared that the principles of redundancy does not apply to redeployment for not taking the COVID-19 vaccination, so pay protection does not need to be applied. Despite this, employers should follow their local redeployment policies. Unite is asking for employers to provide 1 month's pay protection to cover any trial period for redeployment to a new alternative role to maintain employment levels in the health, NHS and social care.

## **Useful information**

### ***Department of Health and Social Care and NHS England***

The Department of Health and Social Care has produced an operational guidance on mandatory vaccination for people working or deployed in health and the NHS in England.

(<https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2021/12/C1470-vcod-for-healthcare-workers-planning-and-preparation-guidance.pdf>).

NHS England and NHS Improvement has also published resources which are available for engaging and communicating with staff to increase vaccination uptake

(<https://www.england.nhs.uk/coronavirus/publication/vaccination-as-a-condition-of-deployment-for-healthcare-workers-phase-1-planning-and-preparation/>)

DHSC has completed an Equality Impact Assessment (EIA) on the potential impact of the policy on people with protected characteristics. Please find it here

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032170/making-vaccination-a-condition-of-deployment-in-health-and-wider-social-care-settings-equality-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032170/making-vaccination-a-condition-of-deployment-in-health-and-wider-social-care-settings-equality-impact-assessment.pdf))

Vaccination as a condition of deployment (VCOD) for healthcare workers, January 2022

<https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2022/01/C1547-vcod-faqs.pdf>.

The Department of Health and Social Care has produced an operational guidance on mandatory vaccination for people working or deployed in care homes in England.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1010601/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010601/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance.pdf)

NHS England has published frequently asked questions for NHS staff that enter care homes

<https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2021/08/C1372-faqs-vaccinations-for-nhs-staff-entering-care-homes-v2.pdf>

### ***Unite the Union***

Unite stay safe and get a job campaign

<https://www.unitetheunion.org/campaigns/stay-safe-get-a-job/>

Unite position statement on COVID-19 vaccinations – January 2021

[https://www.unitetheunion.org/media/3597/jn9318-a4-covid-19-vaccination-position-statement\\_jan21\\_v4final.pdf](https://www.unitetheunion.org/media/3597/jn9318-a4-covid-19-vaccination-position-statement_jan21_v4final.pdf)

*Unite the Union stance on mandatory Covid-19 vaccinations*

April 2021

<https://www.unitetheunion.org/news-events/news/2021/april/compulsory-vaccinations-for-care-home-staff-must-be-thought-through-carefully-and-handled-sensitively-urges-unite/>

June 2021

<https://www.unitetheunion.org/news-events/news/2021/june/proposals-for-compulsory-vaccination-of-care-home-staff-condemned-by-unite/>

September 2021

<https://www.unitetheunion.org/news-events/news/2021/september/unite-repeats-its-opposition-to-the-mandatory-covid-vaccinations-for-nhs-and-social-care-staff/>

November 2021

<https://www.unitetheunion.org/news-events/news/2021/november/persuasion-not-coercion-says-unite-as-javid-gears-up-to-announce-mandatory-covid-vaccinations-for-nhs-staff/>

December 2021

<https://www.unitetheunion.org/news-events/news/2021/december/unite-opposes-mandatory-covid-19-vaccination-as-a-condition-of-deployment-in-the-nhs-in-england/>

If you require more information regarding the union's response to coronavirus please do check out the Unite coronavirus hub on

<https://www.unitetheunion.org/campaigns/coronavirus-covid-19-advice/>

You may also contact your local Unite the Union workplace representative, or your local Unite regional or district office for further information.

Contact your local Unite regional or district office.

<https://www.unitetheunion.org/contact-us/>

**Unite in Health**  
**January 2022**