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# COVID-19 VACCINES, REMOTE WORKING AND LEAVE ISSUES

Latest Developments and Legal  
Considerations for UK Employers

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# Presenters



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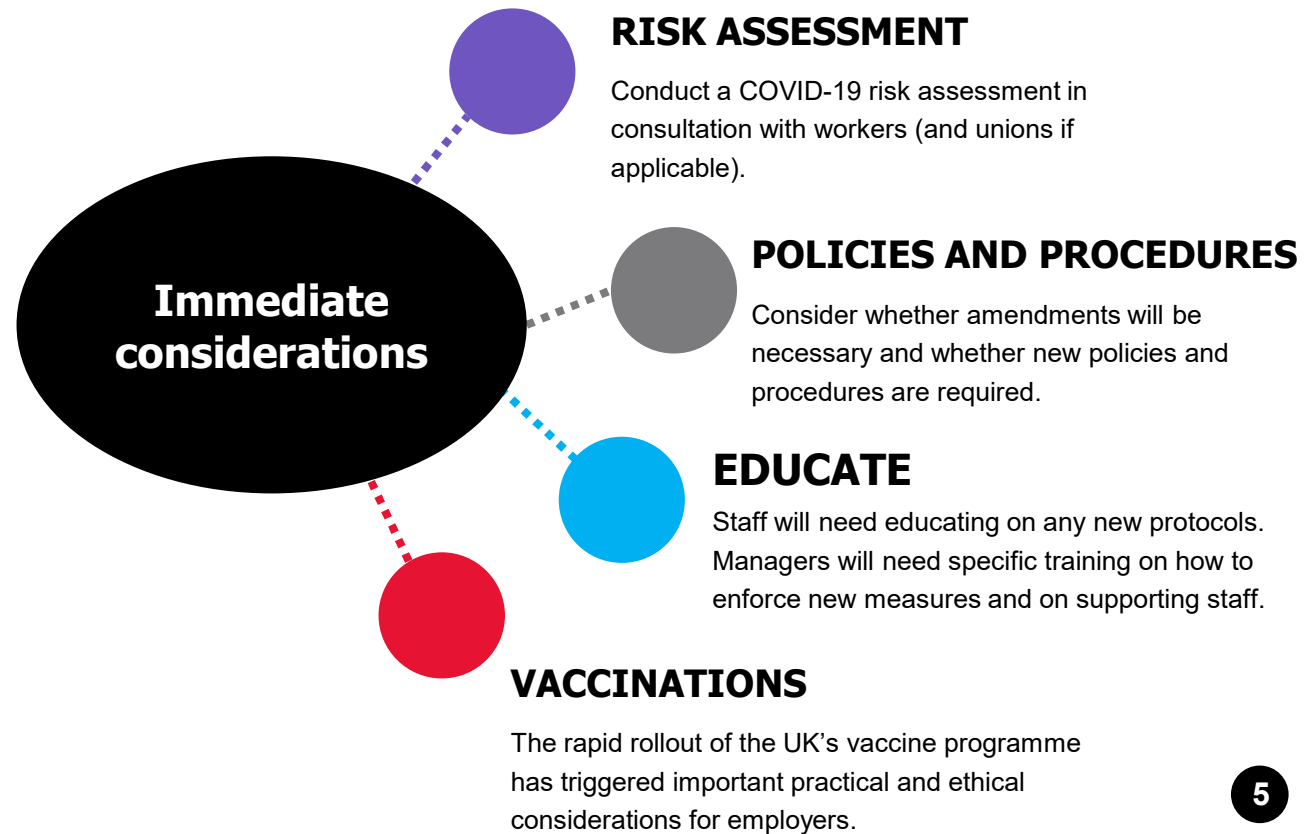
# Today's agenda

- 1. The current vaccines and regulatory approval**
- 2. Employer mandates and incentives: legal issues and workforce considerations**
- 3. Furlough developments and childcare leave**
- 4. Privacy considerations of processing vaccine status data**
- 5. Remote working models**

# What is the current picture for employers?

## Third UK national lockdown.

Government guidance once again states that workers should only leave home for work where it is unreasonable for them to do their job from home.



# **The current vaccines and regulatory approval**

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# How are vaccines being approved and distributed?



## Vaccine Approval

The MHRA gave regulatory approval for the Pfizer vaccine on 2 December 2020, followed by the AstraZeneca vaccine on 30 December 2020 and the Moderna vaccine on 8 January 2021.



## Vaccine Delivery Plan

It is hoped that the top 9 groups, representing 99% of COVID-19 deaths, will be vaccinated by the end of April 2021 – this *should* lead to a significant easing of restrictions.



## Selected Groups

The UK population has been split into priority groups. These groups are based on age but include those working as “frontline health and social care workers”.



## No Private Option

Vaccines are being administered in accordance with the UK Government’s national vaccination programme only. Workplaces are not included as potential vaccine sites and there is no indication of that changing.



## What is happening in the United States?

The Biden administration has promised 100 million vaccine doses in the first 100 days in office. As in the UK, the vaccine is being offered free to US citizens but vaccine providers may be able to charge administration fees. The Centers for Disease Control and Prevention has recommended that healthcare workers and those in long-term care should be offered doses first, followed by frontline essential workers (including manufacturing workers and food and agricultural workers).

# **Employer mandates and incentives: legal issues and workforce considerations**

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# Can an employer *require* its employees to be vaccinated? (1)

In short: this is highly unlikely without risk of claims.

*Mandatory medical treatment, including vaccination, is in theory prohibited!*



Employers must consider some key questions:

1. Can receiving a vaccine be considered a **reasonable management request**?
2. Is there a **medical examinations clause** in their employment contracts, and if so, could they compel a vaccination at common law?
3. Could employees have **valid reasons for refusal**, such as due to disability and religious beliefs? **Human rights** considerations are also important.
4. What sort of **publicity** may arise from an employer-mandated vaccination programme?
5. Could employers implement a “**no jab, no job**” approach?

# Can an employer *require* its employees to be vaccinated? (2)

A "no jabs, no jobs" stance raises several issues e.g. discrimination and data privacy



## "No jabs, no jobs"?

- The UK Government recently stated that it is "**up to businesses**" to decide whether they want to require employees to be vaccinated.
- Some employers are considering making it a **contractual requirement** that new and existing employees are vaccinated.
- Each employer needs to consider its justification for introducing the requirement based on its own risk profile, having regard to the safety of its workforce, customers, visitors etc.
- This is likely to amount to an employer-mandated "vaccine passport" and could leave employers open to **risks of legal challenges** on discrimination grounds and presents additional data privacy issues.

# Can an employer *require* its employees to be vaccinated? (3)



- The Health and Safety at Work Act 1974 obliges employers to take reasonable steps to reduce any workplace risks.
- ACAS advice:
  - If an employer deems it necessary for staff to be vaccinated, it must be agreed with staff/unions and put in writing (i.e. in a policy).
  - A refusal to be vaccinated could result in a disciplinary procedure (dependant on whether vaccination was necessary for the employee to carry out their duties, e.g. a care home worker).
- Article 8 Rights:
  - Maximizing the number of employees who can attend work safely *could* be a legitimate aim.
  - Allowing employees to return to offices only if they have been vaccinated and leaving other workers working remotely *could* be justifiable.

Context is  
key!

# Can an employer *encourage* its employees to be vaccinated?

Employers have broad discretion as to whether to encourage their employees to get vaccinated. ACAS guidance advises that employers should support staff in getting the vaccine.



## Marketing

Employers could promote the importance and benefits of being vaccinated in internal communications, such as via health and wellbeing campaigns.



## Financial Incentives

Employers could introduce financial incentives to encourage vaccination, such as paying for the costs associated with taking the vaccine, including travel to a vaccination centre, and paying employees for the time off to get vaccinated.



## Negative Incentives

In theory, employers could elect to not allow employees to return to the office, or to take part in certain events, if they have not had the vaccine. However, this could be interpreted as compelling employees to have a vaccination, giving rise to risk.






*Employers will need to consider the extent to which they encourage employees to be vaccinated, balancing all relevant stakeholder rights and interests, given that it is ultimately a personal choice for each employee.*

# **Mandatory employer COVID-19 testing**

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# Mandatory employer testing

**Many employers are introducing lateral flow testing for employees who cannot reasonably do their job from home. This new dynamic presents further employer considerations:**

-  Responding to an employee's refusal to be tested – business interests vs right to bodily integrity
-  Ensuring that other infection control measures remain in place
-  Privacy considerations: handle personal data lawfully, fairly and transparently
-  Accuracy of lateral flow tests is in question
-  Be transparent with employees about why tests are being conducted and how data will be used

# **Furlough developments and childcare leave**

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# Furlough scheme developments



The Coronavirus Job Retention Scheme continues to be expanded and extended, and details of employers receiving grants are now being made public.

Key elements	Scope	Extension	Publicity	Recipients
80% of salary for hours not worked, up to £2,500  "Flexible furlough" possible  No furlough grants for notice periods	Employers may now furlough employees in circumstances where they are unable to work as a result of caring responsibilities or where their health has been adversely affected by COVID-19.	<b>30 April 2021</b>  There are calls by unions and Labour to extend this even further.	HMRC will be publishing details of:  (i) the value of each employer's claim within a banded range; and  (ii) company numbers.	<b>4.1 million people</b>  The number of furloughed workers peaked in November 2020 but a spike in unemployment is expected in the spring.

*Exercise caution when considering whether to furlough employees.*



# Leave issues

**The reasons an employer may place employees on furlough leave have been expanded but employers should be mindful of the reputational impact of relying on public funds.**

## Expansion of the CJRS

- Employers may now furlough employees where:
  - an employee's health has been adversely affected by COVID-19; or
  - the employee is prevented from working / required to work reduced hours due to caring responsibilities as a result of lockdown / COVID-19.
- Includes employees who are caring for children at home due to the closure of schools and childcare facilities, or caring for vulnerable individuals within their household.

## Employer considerations

- Can you support employees who are struggling or unable to work due to caring responsibilities in other ways than using the CJRS?
- Allow flexibility in the way that employees' roles are carried out wherever possible.
- Examples:
  - Extending paid leave provisions for parenting emergencies.
  - Introducing another form of paid leave (e.g. reduced pay throughout a specific period of absence).
  - Offering the option of unpaid parental leave.
  - Enhancing "time off for dependents" policies by offering paid emergency leave of up to five days.

# Privacy considerations

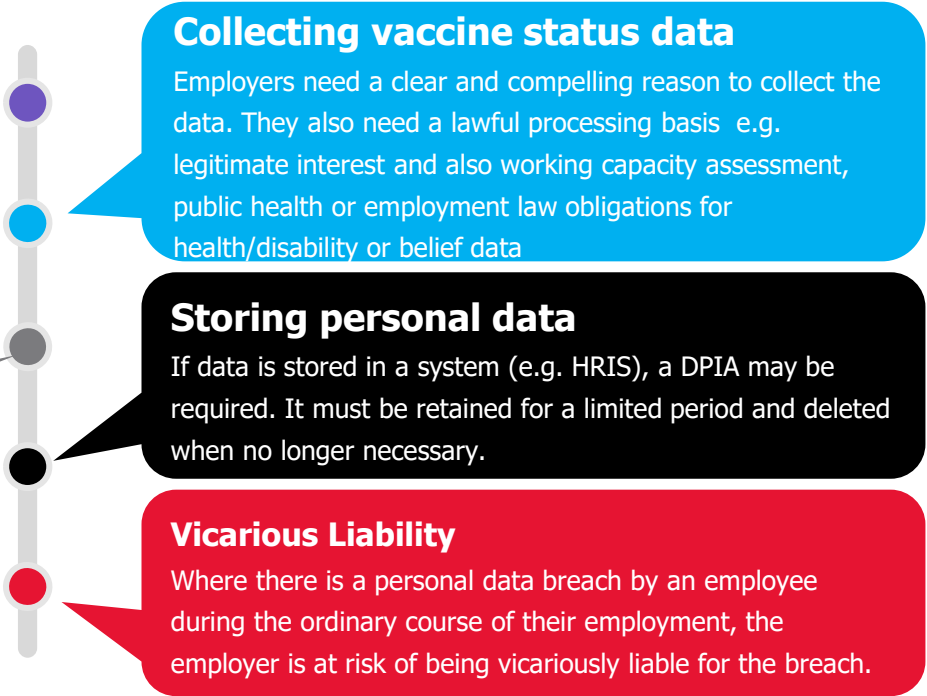
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# Privacy considerations

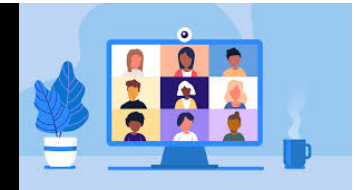
Privacy obligations are stringent under the UK GDPR and the DPA 2018.

**GDPR Obligations**  
The UK GDPR places general obligations on data controllers and processors to ensure lawful processing, transparency of data processing, restricted access to data and the security of data stored by employers. Data cannot be excessive to the lawful purposes.

**Transparency**  
Employers must be clear how the data will be used, protected and restricted.



# Monitoring employees



**Employers must be careful when considering using technology, such as surveillance software, to monitor staff working remotely.**

## Employer Duties

- Ensure that the Working Time Regulations are followed (e.g. rest breaks).
- Be mindful that employers do not have unrestricted monitoring rights and must conduct a DPIA when using technology to conduct monitoring to show that it is necessary and justified.
- Ensure that transparency is implemented by having policies on monitoring and they are communicated to employees.

## Use of Technology

- Some employers have adopted technology such as 'lone worker apps' or other software that employees can use to check-in and check-out.
- Employers may monitor employees' work activities, but the monitoring level needs to be proportionate and reasonable.
- Where employee personal data is involved, employers must ensure they have identified a legitimate and specific purpose for processing that data.

## Risks

- Inappropriate and disproportionate monitoring could lead to claims involving employees' right to respect for private life under Article 8 of the European Convention on Human Rights.
- Employees have data protection rights and can claim that excessive monitoring amounts to a breach of mutual trust and confidence (implied in employment contracts) leading to constructive dismissal claims.

# Remote working models

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# Managing Continued Home Working in the Medium- and Long-Term (1)

**Employers should consider changes to flexible working methods are effective from a business perspective and and meet employees' needs where possible.**

## New employee expectations

Start thinking about how to respond to employee expectations of new working patterns when UK Government guidance no longer requires people to work remotely.

Consider carefully how best to remain an employer of choice and stay competitive in the market – greater flexibility will be an important recruitment and retention tool. Engage employees wherever possible.

## Contractual place of work

Employers implementing full-time remote working should check whether contracts may need to be varied to change the employees' main place of work and include obligations to attend the office on reasonable request.

Be mindful of tax complications and employment rights for employees who are permitted to work in different jurisdictions long-term.

## Responding to flexible working requests

All employees with 26 weeks' service are eligible to request flexible working. Employers may refuse the application but must handle the request in a reasonable manner.

As well as agreeing to reasonable flexible working requests, many employers have shown their intention to be proactive by altering their flexible working policies more generally.

## Have a strategy

Weigh up the extent to which remote working will work for you as a business, and for which roles, over the long-term.

# Managing Continued Home Working in the Medium and Long Term (2)

**There are other legal and practical considerations...**

## Government guidance

The UK Government's latest guidance states that employees can only leave home for work purposes where it is unreasonable for them to do their job from home. Employers are therefore required to facilitate remote working wherever possible.

It is vital that employers closely review current and applicable government guidance.

## Mental health and workplace assessments

Put procedures in place to keep in direct contact with home workers to recognise signs of stress as early as possible. Be approachable, available and encourage team members to talk if they are having problems.

Employers have the same health and safety responsibilities for home workers as for any other workers. Provide workers with advice on completing their own basic assessment at home.

## Insurance

Employees will need to check there are no issues with them working from home with their mortgage provider/landlord, and their home insurer. Employers should check their employers' liability insurance to make sure they are covered for remote workers using business equipment.

## Equipment

Employers should continue to check that employees have the right equipment to work safely. Discuss equipment and technology with employees, agree what is needed and support employees in setting up new equipment or technology.

# Key Take-Aways

1

## Vaccines and Covid testing

- Employers may seek to compel employees to be vaccinated, but this will give rise to legal risk and clear justification is needed.
- Testing is likely to be a more common part of working life, but care should be taken with respect to data privacy and ensuring further appropriate precautions are taken.

2

## Furlough and other leave

- Exercise caution when considering whether to furlough employees.
- Take note that HMRC is now publishing the names of employers receiving furlough grants.
- Consider means of flexibility and support available to employees balancing caring responsibilities with work.

3

## Data protection

- Increased use of new technology and remote working means employers must be even more vigilant about their data protection obligations.
- Exercise caution when considering whether to monitor employees.

4

## Remote working models

- Act now to embrace flexible working to the extent you can and remain an employer of choice.
- Consider the vast legal and practical considerations of employees working remotely for the long-term.



# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/  
topics/coronavirus-  
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



## Biography



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As practice group leader for Morgan Lewis’s labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and non-contentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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Pulina Whitaker's practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK's Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.

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## Biography



Louise Skinner provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Described as “truly exceptional and insightful” by clients in The Legal 500 UK guide, Louise advises on issues including investigations, contractual disputes, whistleblowing, discrimination and restraint of trade. Louise has particular experience in the financial services, life sciences, and sports, media and entertainment sectors.

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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

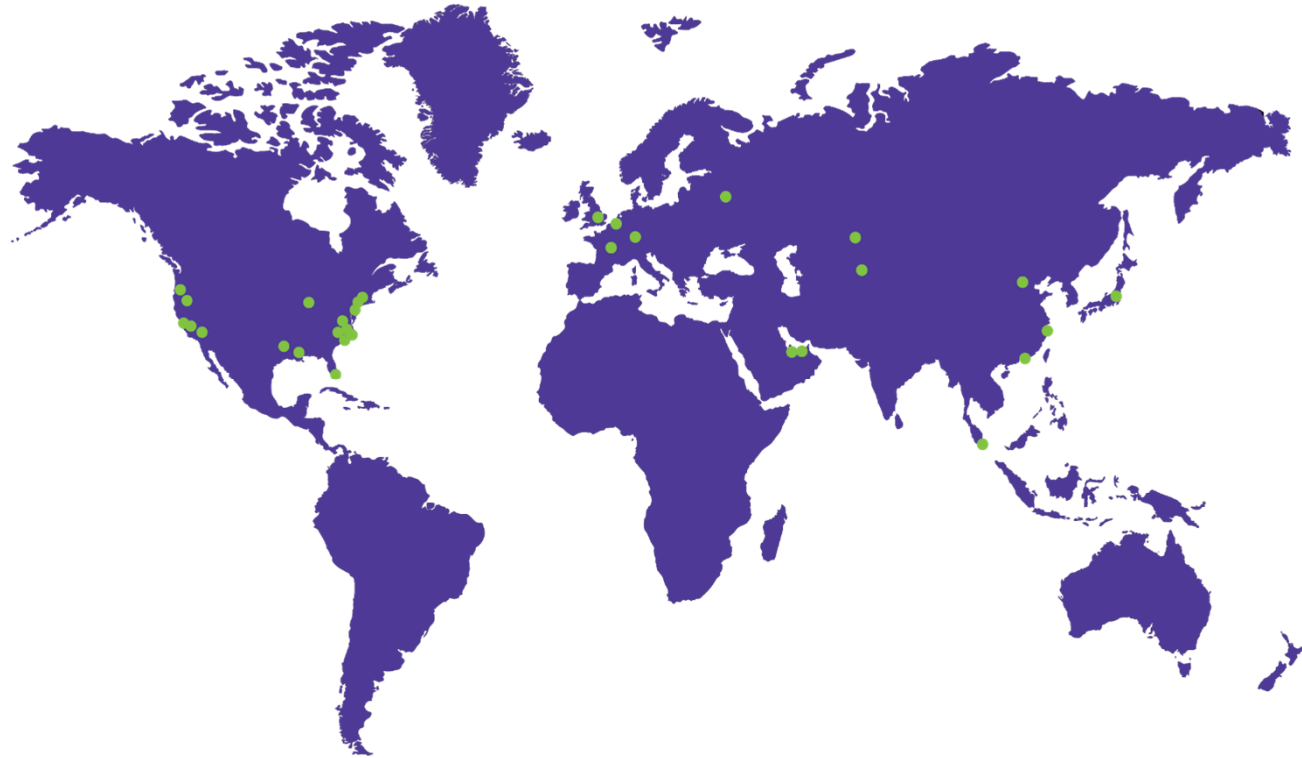
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