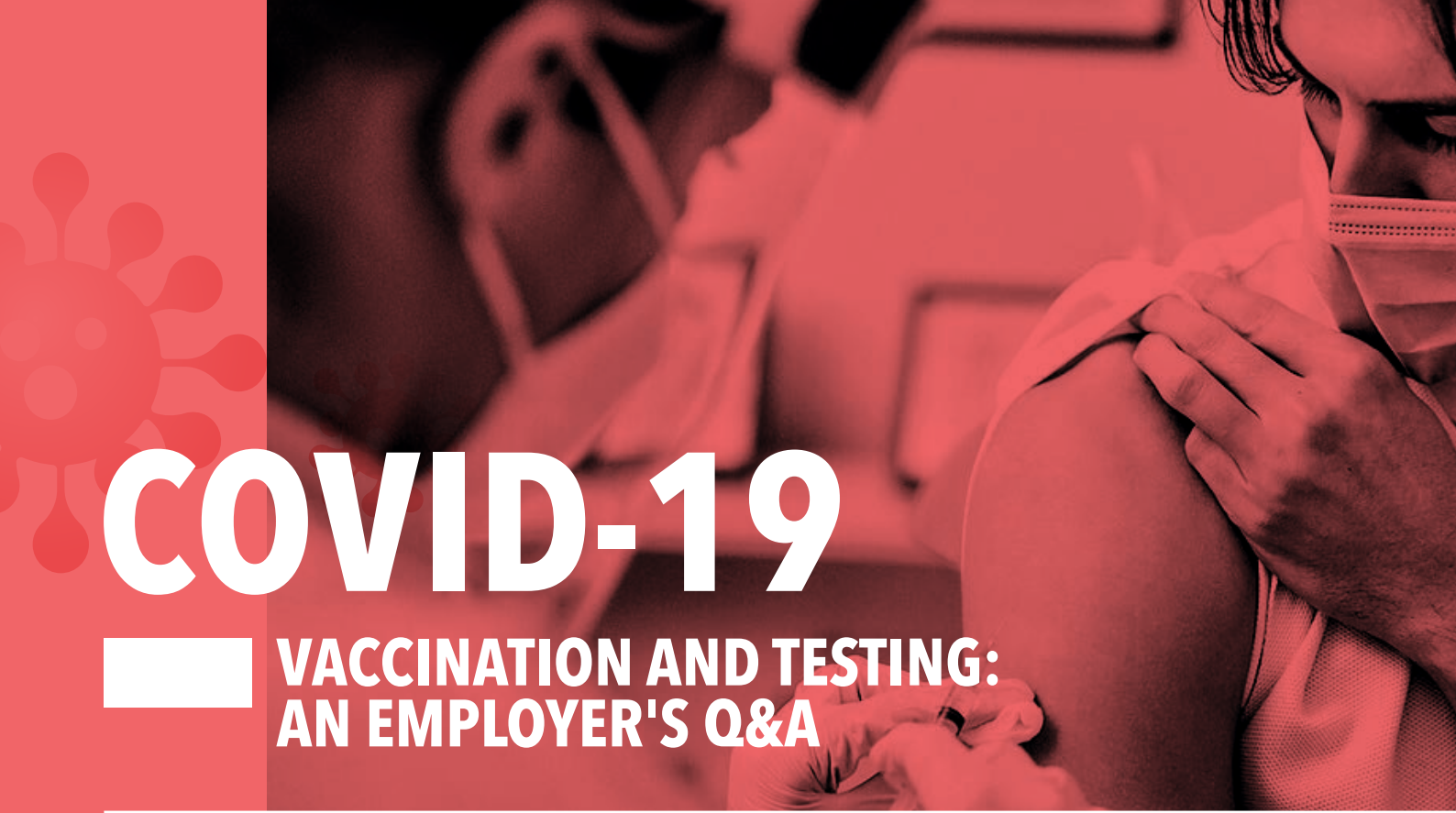




# COVID-19

## VACCINATION AND TESTING: AN EMPLOYER'S Q&A

**The phased rollout of the COVID-19 vaccine has been dominating headlines, as the UK continues to battle high rates of transmission and new variants of the virus. With the Government aiming to offer vaccinations to millions of people by the Spring, there's finally a light at the end of the tunnel for employers, following a gruelling year of lockdowns and uncertainty.**

Naturally, your priority is to get back to business as safely as possible. However, you've probably got some questions about testing and the vaccine – particularly around whether you can impose either mandatory testing or mandatory vaccinations on your employees.

The HR and employment law experts of NAFD supplier member, Citation, break down the most common questions from business owners around the topic, to make sure you stay on the right side of your legal obligations.

At first glance, it's tempting to take a very simplistic view on this topic, but it's a very complex area of law involving fundamental principles of privacy. Plus, there's no legislation, guidance or comparable case law to draw upon to answer these questions.

If you're considering your options when it comes to testing and vaccination for your employees, it's always best to seek advice before introducing any policies.

### CAN I MAKE COVID TESTING MANDATORY?

The short answer is no, an employer cannot force an employee to take a COVID test. However, there may be situations where it can be justifiable to have a mandatory testing policy and take disciplinary action if an employee fails to comply with the policy. How reasonable a mandatory testing policy is considered depends entirely on the circumstances.

The fundamental question is why such a policy is needed by the business, and then weighing this up with the impact it would have on the individual.

### ARE THERE DATA PROTECTION IMPLICATIONS FOR EMPLOYERS?

Yes, there are very significant data protection issues at hand if an employer is considering introducing a COVID testing policy.

If obtaining testing information from an employee, it would be considered processing 'special category data' under the Data Protection Act 2018.

It's vital that an employer carries out an impact assessment, formulates a robust policy and communicates clearly with employees exactly how their data will be used, stored and shared if introducing a testing policy.

### CAN I MAKE AN EMPLOYEE REVEAL THEIR COVID TEST RESULT?

An employer can require an employee to notify them if they have received a positive test result. Employers can also ask whether an employee has had a COVID test. However, there's no guidance currently available to support the mandatory disclosure of whether a test has been taken or its result - unless it's positive!

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This may change given the increase in asymptomatic testing. If an employer does decide to implement a mandatory disclosure policy (over and above the requirement to reveal the outcome of a positive test, which is already a legal obligation) they would need to make a clear case as to why this is necessary for all employees to reveal whether they've had a test, and its result, in consultation with their employees.

It's always best practice to take professional advice on how such a policy is written and subsequently communicated to employees – as well as understanding how to handle employees who refuse to comply with a testing policy.

### **CAN I REQUIRE AN EMPLOYEE TO HAVE THE COVID VACCINATION?**

Again, as with testing, the short answer is no, an employer can't force someone to have the vaccination. Importantly, any attempt by an employer to make vaccination mandatory is very likely to be viewed as unreasonable.

Given this, can an employer introduce a policy requiring all employees be vaccinated, including disciplining any employee that refuses? In this case, it's essential to weigh up all the circumstances including why the policy is necessary, the potential risks to the business if it does not introduce the policy and balance this with the impact on an employee of enforcing the policy.

It could be that an employee has a protected reason for not getting the vaccine – for example they're pregnant, or have reasons linked to specific religious beliefs or clinical conditions. Taking disciplinary action against an employee who refuses to

have the vaccine on these grounds could be viewed as discriminatory, as it relates to characteristics protected under the Equality Act.

A compulsory vaccination policy could be applied reasonably in certain circumstances. Care settings are the most obvious one – with care staff and residents in the top priority group for access to the vaccination programme.

Another example could be if an employee had to travel internationally as a fundamental part of their role, and entry to countries they need to visit becomes conditional upon having had the vaccine.

As always, it's best to seek advice on how best to create and communicate any policy that makes the business's stance on the vaccine clear.

### **CAN I REQUIRE AN EMPLOYEE TO REVEAL WHETHER THEY'VE HAD THE VACCINATION?**

While this may seem like a reasonable question for an employer to ask, there has been no formal guidance from the

Government on balancing business needs with employee privacy rights. So it's not easy to say for certain how a tribunal would view a request to disclose whether an employee has had the vaccine.

In a situation where an employer believes they're justified in requiring employees to disclose this information, as always approaching the issue with transparency, communicating why it's necessary for the business and making sure the policy is clear and comprehensive is essential – as is following proper data protection requirements.

If an employee refuses to comply with a demand to disclose this information, it's always best to seek advice on how best to handle this.

### **YOUR NAFD MEMBER BENEFIT**

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