

Community Union response to call for evidence.

Question 1: Which of the following best describes the capacity in which you are responding to this call for evidence?

- i) Trade Union or staff association

Community is a general union representing workers in sectors across the economy, including steel, education, justice, finance, the third sector and the self-employed.

Question 2: In your view, what are the key considerations, including opportunities and risks, associated with a potential COVID-status certification scheme?

e) *Considerations relating to the responsibilities or actions of employers under a potential COVID-status certification scheme.*

Exclusion from work

Employers are entitled to exclude workers from work. Workers may have a right to be paid whilst excluded if they are fit and able to work.

However, the argument as to whether workers should be paid has not been tested in court in relation to exclusions in relation to Covid-certification. Guidance on this matter would be welcomed to give employers and workers clarity.

If both test and vaccine-based statuses were in place would employers be permitted to exclude workers from work if they were tested (regularly), but had not been vaccinated? And in such a case would those workers be entitled to pay?

Changes to duties

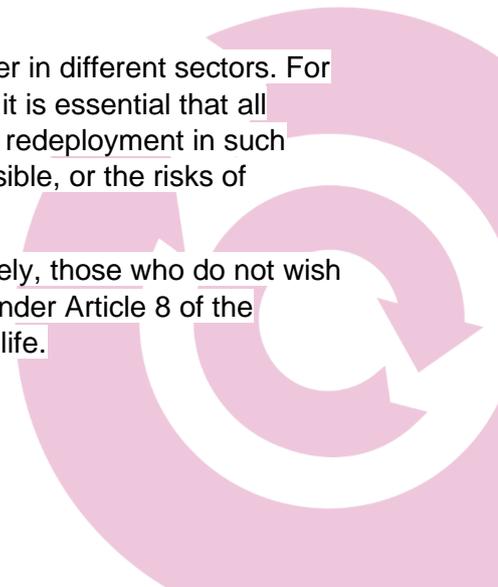
Some employers are already implementing a system of changing workers' duties based on covid-status, by assigning those who have already been vaccinated to certain tasks or clients whilst the rollout takes place. Some employers might ask those who are not vaccinated to work from home, and this is within their rights. Covid-certification would likely make this process simpler.

Dismissal

Employment tribunals have not yet heard any cases relating to unfair dismissal and Covid-certification. Would declining covid-certification be reasonable grounds for unfair dismissal? Would employers be required to accept either form of COVID certification or could they dismiss a worker for refusing to be vaccinated, even if they accepted being tested?

We recognise that the form an unfair dismissal case might take could differ in different sectors. For example, in the health and social care sectors employers may argue that it is essential that all workers are vaccinated in order to prevent the spread of the virus, or that redeployment in such contexts is impossible. In other sectors, redeployment may be more plausible, or the risks of transmission lower.

However, those who do not wish to be vaccinated (and, although less likely, those who do not wish to be tested), may argue that dismissal is an infringement of their rights under Article 8 of the convention on Human Rights to the right to respect for private and family life.



Other arguments that we anticipate could be made are those with reasonable fears about being vaccinated. A worker could argue they have a reasonable fear of the side effects of the vaccine or a reasonable fear of an adverse reaction to it. Guidance in anticipation of such cases would be welcomed.

Given that those with less than 2 years' service do not have the right to claim unfair dismissal, workers in these circumstances would not have access to legal recourse if they were dismissed unfairly as a result of COVID-certification.

Should employers be given carte blanche to dismiss workers who do not have the qualifying years of service to bring an unfair dismissal claim? Or should the two-year limit be relaxed in cases related to COVID-certification status?

“No Job No Job”

We are hearing about companies looking to introduce “no job no job” clauses into contracts. It's unlikely any existing contracts will include such terms. However, for new contracts, employers may try to include being vaccinated as a condition of employment.

Our current understanding is that this is legal. Clarity on this point would be welcomed.

In particular, if an employee were willing to be tested, but not to get vaccinated, would it be lawful for an employer to refuse to employ them?

There should be exceptions for people who have medical reasons why they cannot have the vaccine. It is critical that any system of certification has appropriate exceptions, and a mechanism for recording such exceptions.

g) Equalities considerations

We note that if a worker cannot get the vaccine for medical reasons and an employer does not take this into account, it is likely to be classed as disability discrimination.

Notably, pregnant women are currently being advised not to get the vaccine, and that therefore it is important that this group of workers who are already vulnerable to discrimination are protected.

Any system of covid-certification put in place will require a number of safeguards to ensure that it does not result in breaches of the Equality Act. Guidance must be clear and emphasise what the valid exceptions are likely to be. It is essential that in its implementation the scheme does not discriminate against workers who may be affected by medical exemptions.

h) privacy considerations

We recognise that a covid-certification scheme may require giving employers access to workers' data. Consent for this should be sought where possible and ideally any data sharing scheme would be based on consent, where a worker is granted their own COVID-status and then consents to share it with their employer.

Strict penalties will already be in place for breaches of COVID-status data, as it is likely to be highly sensitive personal data. Enhancing the enforcement powers of the ICO in this situation and reiterating the importance of maintaining privacy will be important.

Question 3: Are there any other comments you would like to make to inform the COVID-status certification review?

It is worth considering that employers are likely to be cautious about participating in covid-certification regimes if the employment consequences are not clearly set out and clarified.

It is important that communications around such a scheme are clear and accessible. It must be clearly explained to those who may be hesitant about being vaccinated (or tested) what the consequences of such a decision might be.

We are also hearing reports that vaccination may be made mandatory in certain sectors such as care homes. We would argue against this and would promote a voluntary approach. Forcing workers to be vaccinated may harm trust and employee relations and could also be discriminatory. Instead, focus should be on making it as easy as possible for people to get vaccinated, by offering paid time off for appointments, decent sick pay for those recovering, and bringing on-site vaccination clinics to key locations such as care homes. Mistrust can also be combatted by bringing healthcare professionals onsite to manage workers' concerns.

The consultation document suggests that both vaccination and testing certification will be available. We would hope that this means that it would not be compulsory for workers to be vaccine-certified but rather that a range of options and information would be offered to workers.

Please direct any questions to research@community-tu.org