

Can Bermuda employers make the COVID-19 vaccination mandatory?

Service area / [Employment, Pensions and Incentives](#)

Legal jurisdiction / [Bermuda](#)

Date / [January 2021](#)

It goes without saying that an employer cannot vaccinate its unwilling employees, but can an employer dismiss or otherwise discipline an employee that refuses vaccination?

The short answer is: perhaps, in limited circumstances, and with significant risk.

The Government's position

In the absence of definitive legislation or case law on this point, employers may find the Government's position instructive.

Currently, vaccines are only available in Bermuda via the Government's coronavirus immunisation program. The Government has made it clear that participation in this program is entirely voluntary, stating on its [COVID-19 vaccine webpage](#): 'While not mandatory, the Ministry of Health strongly urges all individuals to get the coronavirus vaccination', and 'The COVID-19 vaccination is not mandatory and will be given only to those who request it'.

While the Government has given priority to key workers (healthcare workers, police, firefighters, teachers, corrections officers, workers at ports of entry, etc.), there has been no indication at all that the vaccination of these workers will become anything other than voluntary.

We would recommend that employers follow this example by encouraging workers to participate in the immunisation program and providing them with the key information they

need in order to enrol or otherwise make an informed decision.

An employer may, however, seek to indirectly enforce participation in the immunisation program, for example, by requiring employees to provide proof of inoculation before returning to work on the company premises or meeting with clients.

To what extent would this be legal?

What is the employer's duty?

Employers have a duty under the Occupational Safety and Health Act 1982 to take reasonable actions to ensure the health, safety and welfare of their workers, and the people that interact with their workers. Employees equally have a duty to support their employers in these efforts.

Although these duties are drafted broadly in the legislation, the employer's duties extend specifically to the provision of a working environment devoid of risks to health, and to the provision of information necessary to ensure safety and health in the workplace, as far as is reasonably practicable.

While the duty to inform could likely be satisfied by the employer distributing a document that details the importance of inoculation and instructions on how to receive it, the duty to keep the workplace safe may be more difficult to achieve in the context of a threat as formidable as COVID-19.

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The Government's guidance would be the best starting point for determining what employer actions are reasonably practicable to ensure safety and health. Therefore, if the Government recommends that current measures (voluntary immunisation, masks, social distancing, etc.) are sufficient, it can be presumed the employer will not have a duty to go any further.

Can employers choose to enforce vaccinations?

If an employer does consider enforcing a vaccination requirement, it will need to weigh the potential benefits of this demand against the potential risks.

If an employee has a disability that prevents vaccination, or a religion, belief or political opinion that is contrary to vaccination, that employee could raise a claim of discrimination against their employer under the Human Rights Act 1981. If such an employee is fired due to their not being vaccinated, they could raise a claim of unfair dismissal.

Further, if an employee believes that a vaccination requirement would make the continuation of their employment unreasonable, that employee could terminate their contract without notice and pursue a claim of constructive dismissal.

Potential remedies for unfair and constructive dismissal include the employer being made to reinstate the worker, re-engage the worker on new terms, or pay the worker an amount equalling up to 26 weeks wages (plus their notice pay and benefits which would have accrued during the notice period).

Other points that employers should consider:

- **Coronavirus legislation:** Even if an employer's workforce is fully vaccinated, the employer will still need to ensure compliance with Government's coronavirus related regulations, such as those requiring social distancing.
- **Making vaccination a contractual requirement:** As it is unlikely that employees' current contracts will permit an employer to require vaccination, employers could seek to introduce a contractual requirement. In the circumstances, this may prove difficult as any proposed change will need the express agreement of its employees, either through individual negotiation or collective agreement. If the employees resist this change, the employer will be faced with the prospect of either unilaterally imposing the change or terminating employment and offering to re-hire on the revised terms. Both options would carry significant risks, including those set out above.
- While introducing such a term for new employees would be more straightforward, there may be little immediate practical benefit for employers that do not anticipate high staff turnover in the near future.
- **Data protection:** An employer attempting to enforce a vaccination regime would need to maintain records of

employee inoculations. The individual's record will be 'sensitive personal information' under the Personal Information Protection Act 2016 (PIPA), and the use of this information by the employer would need to be justified by the nature of the worker's role. While the relevant provisions of PIPA are not currently in force, we anticipate they will come into force soon.

- **Travel restrictions:** Major airlines are currently considering implementing restrictions that would prevent travel for persons that have not received a COVID-19 vaccine. It is probable that countries that currently require travellers to provide coronavirus test results before flying may also be considering equal restrictions. This is not unprecedented, as travellers are already expected to be vaccinated against other diseases before travelling to certain countries.
- Employers will need to be aware of such restrictions, in particular where they recruit employees from overseas or require their employees to travel for work purposes.
- **Public image:** While it is possible that a company that ensures its employees are vaccinated could receive praise, it is also possible that such a company could receive significant criticism from individuals or groups that find fault with the administration of the vaccine.

Continued



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