

Brachers Bitesize

Masks, vaccines and testing – where are we now?

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Presented by:

Sarah Wimsett - Associate
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Employment law and HR

A woman with blonde hair tied back, wearing a dark blue business suit over a light blue collared shirt, is speaking in a meeting. She is gesturing with her right hand. The scene is overlaid with a semi-transparent blue shape that covers most of the image. The background is a bright, out-of-focus office environment with windows and curtains.

Welcome

Presenters



Sarah Wimsett | Associate, Employment

SarahWimsett@brachers.co.uk

Sarah provides employment law advice to a wide variety of clients including specialist sectors such as manufacturing, education and healthcare.

Sarah also has experience dealing with contentious matters in an employment tribunal, including acting for claimants and respondents in unfair dismissal and discrimination cases.

Sarah is named in the Chambers UK 2022 legal directory as an 'associate to watch'.

[Connect with Sarah on LinkedIn](#)



Colin Smith | Partner, Employment

ColinSmith@brachers.co.uk

Colin is a specialist employment lawyer with over 20 years' experience. He acts mainly for employers across a range of industries.

Colin was recently named as a 'Recommended Lawyer' in leading legal directory, Legal 500 2022.

[Connect with Colin on LinkedIn](#)

Today's webinar

- 01** Face coverings
- 02** Covid testing
- 03** Vaccinations
- 04** Vaccinated vs unvaccinated
- 05** Self Isolation



Poll

Are you going to continue to require face coverings and/or testing in the workplace?



Poll

Are you intending to have different sick pay policies for the vaccinated versus the unvaccinated?

Face coverings

A woman with dark hair tied back, wearing glasses and a light blue surgical face mask, is looking down at a smartphone in her hands. She is wearing a white long-sleeved shirt. The background is a blurred city street with buildings and a traffic light. A large blue semi-transparent shape is overlaid on the right side of the image, containing the text.

Requirement to wear a face covering

- Legal position: Wearing face coverings ceased to be legally mandated from 27 January 2022
- Should staff be required to wear a face covering although not legally mandated?
- Guidance: how to stay safe and help prevent the spread

'Continue to wear a face covering in crowded and enclosed spaces, especially where you come into contact with people you do not usually meet.'

Requirement to wear a face covering

- **Guidance:** Face coverings - when to wear one, exemptions and what makes a good one.
 - *'Customers, visitors or staff may choose to wear face coverings in any setting.'*
 - *'Employers can also choose to ask their staff or customers to wear a face covering, even though they are not legally required.'*

Requirement to wear a face covering

- **Guidance:** Working safely during coronavirus (COVID-19). Employers should consider the guidance on face coverings for a particular type of workplace involved.
 - *'When deciding your approach to face coverings, you need to consider the reasonable adjustments for staff and clients with disabilities. You also need to consider carefully how this fits with other obligations to workers and customers arising from the law on employment rights, health and safety and equality legislation.'*
 - *'If your workers choose to wear a face covering, you should support them in using face coverings safely.'*

Key considerations

- Reasonable adjustments
- Health and safety obligations to workers and customers
- The carrying out of risk assessments
- Requirement vs encouragement
- Guidance, policies and training

Legal risk

- Can you insist employees wear masks at work?
- Disciplinary action for those not complying with the requirement?
 - Consider case by case basis and consider the reasons for any objections.
- Risks of claims from other staff who do not feel safe
- Discrimination risks with a blanket policy

A healthcare worker in a blue protective suit and mask is shown in a clinical setting. The worker is holding a clear test tube labeled 'COVID-19 coronavirus' and a white swab with a red cap. The background is a blurred clinical environment. The text 'COVID testing' is overlaid in white on a blue semi-transparent background.

COVID testing

Testing – Workplace testing

- Voluntary decision for employers to run testing programmes for their staff
- **Guidance:** Coronavirus (COVID-19) workplace testing: guidance for private-sector employers and third party health providers
 - *'We want as many employers as possible to sign up to regularly test their employees'*
- **Government schemes:** Precautionary testing for critical workers and Workplace daily contact testing

Testing – Data protection

Data protection implications

- Health information is ‘Special Category Data’
- ICO’s coronavirus recovery – data protection advice for organisations
- Grounds for processing the data
- Data protection impact assessment
- Information given to employees

Testing – Key considerations

- Reasonable adjustments
- Health and safety obligations to workers and customers
- The carrying out of risk assessments
- Mandatory vs voluntary
- Guidance, policies and training – consider practical issues such as frequency of testing, who will be tested, whether it will be limited to employees etc
- Consultation? See Acas guide on workplace testing for COVID-19

Testing – Legal risk

- Is the requirement to undertake a test a reasonable management instruction?
 - Testing can feel invasive and uncomfortable
- Disciplinary action for those not complying with the requirement?
 - Consider case by case basis and consider the reasons for any objections

Testing – Legal risk

- Discrimination risks
- Issues with testing particular groups
- Issues with pay – what happens if they test positive?
- Risks of claims from other staff who do not feel safe



Vaccinations

Compulsory vaccinations

- Mandatory vaccination for care homes, health and social care sectors.
 - Current position
 - Possible revoking of the above
 - Consultation published on 9 February 2022 and open until 16 February 2022

Requesting mandatory vaccinations

- Currently only regulated care homes in England are able to legally require workers to be vaccinated
- Acas guidance – Getting the vaccine: Getting the COVID-19 vaccine for work
 - *Advises employers to encourage and support their staff without making vaccination a requirement*
- EHRC in April 2021 warned that blanket mandatory vaccination policies, applied inflexibly, are likely to be unlawful

Requesting mandatory vaccinations

Key considerations

- Survey by HRLocker in January 2021 revealed that 23% of employers planned to make vaccination mandatory
- Important considerations:
 - Negative publicity
 - Employee satisfactions levels/ issues with staff retention
 - Consultation

Requesting mandatory vaccinations

Key considerations

- Health and safety obligations
- Data protection considerations
- Risk assessments

Requesting mandatory vaccinations

Legal risks

- Unclear if a requirement to be vaccinated would be a lawful and reasonable order or would be justified on health and safety grounds
- Risk of constructive dismissal claims where you require an employee to be vaccinated as a condition of providing work
- Potential discrimination claims - vaccinations not suitable for all
- Potential personal injury claim

Encouraging vaccinations

- Practical steps on encouraging vaccines:
 - Sharing information on the facts about vaccination
 - Offering time off to attend vaccination appointments
 - Encouraging senior staff to share their vaccination experiences
 - Policies and training

Different treatment for those not vaccinated

– Self isolation as a close contact

- Since 16 August 2021, fully vaccinated employees do not have to self-isolate if they are identified as a close contact of someone with COVID-19
- Employers should pay employees who can undertake their role remotely as normal. However, where an employee is unable to carry out their role remotely, the issue of pay is problematic
- Self-isolating unvaccinated employees without symptoms are entitled to SSP in most cases but may not be covered by an occupational sick pay scheme

Different treatment for those not vaccinated

– Self isolation as a close contact

- Employers may therefore have a certain amount of freedom to withhold occupational sick pay from those who are self-isolating but have declined the opportunity to be vaccinated
- Consider reason for not being vaccinated
- May be controversial for employee relations and public relations

Different treatment for those not vaccinated

– Contracting COVID-19

- The reason an employee has become ill does not affect their entitlement to SSP
- Most occupational sick pay schemes do not distinguish between different types of illness or the circumstances in which the illness was contracted
- Many be a breach of contract claim if scheme contractual
- Risks of discrimination and human rights arguments



Self isolation

Removal of self isolation

- Government currently promising to remove self isolation requirement
- Would mean no-one legally required to self isolate even when they have COVID
- If brought in, what will employers do?
- Raises highly complex issues

Removal of self isolation

- Can you insist an employee stays at home (when they can work from home)?
- Can you insist an employee stays at home (when they cannot work from home)?
- Do you have to pay them?
 - SSP?
 - CSP?

Removal of self isolation

- Paying to stay at home?
- Conditions?
- Testing availability/proof?
- Why COVID and not other contagious illness?
- Will place employers in a very difficult position in striking an affordable (not abused) and safety proportionate position
- Unlikely to be lawfully able to insist without pay

A diverse group of people, including men and women of various ethnicities, are seated in an audience. In the foreground, a woman with dark curly hair is smiling and raising her right hand. The background shows other audience members looking towards the front. A large blue arrow-shaped graphic points from the left towards the center of the image.

Any questions?

About Brachers' Employment team

Our [Employment and HR team](#) take pride in delivering employment law and HR services that are tailored to your needs. We are dedicated to listening and learning about your business to understanding the challenges you face, your ambitions, and how to retain, your key asset, your people.

We are one of the largest employment and HR teams in the South East, working alongside businesses with 60,000 employees in the region.

Free online consultation

If you have any questions arising from the session, please take advantage of our [free 30-minute consultation](#) with Colin Smith, Sarah Wimsett, or another of the Brachers' Employment team for an initial discussion on your needs and to find out how we can help.

Other webinars you may be interested in:

- [Brachers Bitesize: Employment law update 2022](#)
- [Answering the recruitment challenge: Talent acquisition](#)
- [Answering the recruitment challenge: Staffing through an agency](#)