

No Jab, No Entry!

May service-providers lawfully introduce such policies?

Whether discretionary ‘no jab, no entry’ policies are lawful is a question that should be considered from several legal perspectives, such as data protection law, human rights law and anti-discrimination law.

Given the Equality Commission’s remit, this article examines the anti-discrimination law perspective.

Summary of Guidance

Service providers implementing a “no jab, no entry” policy should ensure that exemptions are in place for disabled people and pregnant women.

“No jab, no entry” policies may also have the *potential* to be indirectly discriminatory on grounds such as sex, race or religious belief. It would, of course, be for a county court to consider if unlawful discrimination had occurred based on all of the particular circumstances of any case.

A county court’s judgment is likely to be influenced by factors associated with the type of service and premises in question, for example: the number of employees and visitors, the size/layout of the premises and the availability of other health precautions, such as face-coverings, social distancing and whether unvaccinated service-users can satisfy other conditions (such as by having a recent negative NHS lateral flow test, or they have natural Covid antibodies as demonstrated by a recent PCR test).

County courts may also accept that certain environments have particular features and risks that justify higher precautions, including possibly “no jab, no entry” policies. That was, for example, a view taken by the government in England when it made its [regulations \(noted below\)](#) (html) in respect of adult care homes, but which do not apply more widely to other kinds of businesses.

Finding this balance is the hardest question to answer and, ultimately, a county court would have to make its findings based on all the facts and circumstances of any cases brought before it.

Finding the right balance also means reviewing such policies regularly. Given the dynamic situation, it would be prudent for service providers implementing such policies, to review their policies frequently, perhaps in line with the NI Executive’s own reviews of its own health strategy, and based on service-providers’ up-to-date health and safety risk assessments.

Where they are adopted, such policies should not be maintained and continued indefinitely and should be cancelled as soon as it is deemed prudent to do so.

Public sector employers should additionally:

- Screen their policies in line with the arrangements of their [section 75 equality schemes](#) (html) and conduct equality impact assessments, where appropriate.

Context for this Guidance

[The Government's official report](#) (html) indicates that, at the time of writing, just over 80% of the population in Northern Ireland aged 16 years and over have received both doses of the Covid-19 vaccine.

In Northern Ireland, accepting the vaccine is voluntary, meaning that, at the moment, no one is compelled by law to take it, and although the uptake figure is steadily increasing day-by-day, it is unlikely that there will be a full 100% uptake because many people cannot or will not receive it.

That context will have some bearing on a question that service-providers may presently be asking themselves i.e. may they, at their own discretion, impose non-statutory “no jab, no entry” policies on customers, clients or other visitors to their premises?

One effect of such policies is that it may leave some people feeling that they have little real choice i.e. they must either take the vaccine or risk being barred from entering and enjoying a wide range of premises and facilities that are otherwise open to the public, like shops, bars and restaurants. If they are so barred, they may then seek to challenge such policies in the courts as being unlawful.

Statutory “no jab, no entry” rules

At present service-providers in Northern Ireland are not obliged by law to introduce “no jab, no entry” policies but the possibility that public policy on this issue could change is illustrated in England where the government there [recently made regulations](#) (html), which come into force on 11 November 2021, introducing a bar on people entering [adult care homes](#) unless they can prove that they have been fully vaccinated, subject to some exceptions. More recently, the government [Scotland](#) announced that they intend to introduce similar rules in relation to nightclubs and adult entertainment venues and other live events attended by large numbers of people. The government in [England](#), however, has abandoned plans to introduce similar rules. The narrow scope of those regulations and proposed regulations might also have some bearing on the question of whether it is lawful for service-providers in other business fields to introduce their own discretionary “no jab, no entry” policies. It should be noted too that, at the time of writing, it seems that the legality of the English care homes regulations may be challenged by way of judicial review.

Are such discretionary policies lawful?

Whether such policies are lawful is a question that should be considered from several legal perspectives, such as data protection law, human rights law and anti-discrimination law. If nothing else, it's a complex question.

The Information Commissioner's Office has published guidance on the data protection law perspective: [ICO - guide on vaccination and COVID status checks](#).

The [government in England has published guidance](#) on the new regulations relating to the statutory rules that will be applied in adult care homes.

Given the Equality Commission's remit, this article examines the anti-discrimination law perspective although we must be clear that, ultimately, questions as to whether unlawful discrimination has occurred or not in any situation, would be for a county court to decide in light of the specific facts of any case brought before it.

Anti-discrimination law

There are [several anti-discrimination laws in Northern Ireland](#) that prohibit service-providers from discriminating unlawfully when making decisions and policies about how they deliver their services. They prohibit discrimination on a wide range of grounds, not all of which may be relevant to the question posed here.

We will focus, therefore, on those anti-discrimination laws that may be the most relevant.

Disability discrimination and the reasonable adjustment duty

Guidance from the [Public Health Agency \(see sections 11 and 12\)](#) indicates that there are some people who, for medical reasons, should not be vaccinated. The [Green Book on immunisation against infectious diseases](#) (at Chapter 14a, page 20), states that:

'The vaccine should not be given to those who have had a previous systemic allergic reaction (including immediate-onset anaphylaxis) to:

- a previous dose of the same COVID-19 vaccine
- any component (excipient) of the COVID-19 vaccine.'

Is any person who is so allergic, or otherwise clinically barred from receiving the vaccine on medical grounds, a "disabled person" for the purposes of our disability discrimination law, the *Disability Discrimination Act 1995*? The answer would ultimately have to be given by a county court, but the answer is quite likely to be "yes", especially if the consequence of not being vaccinated is that the person's ability to engage in normal day-to-day activities, such as shopping, using public transport or entering public buildings is substantially reduced by "no jab, no entry" policies.

If people who are clinically barred from taking the vaccine are deemed to be disabled, it means that service-providers who operate “no jab, no entry” policies will be obliged to make reasonable adjustments to those policies.

That could, for example, mean ensuring that there are reasonable exceptions to those policies for a disabled person put in place. This may include waiving the rule for them, or providing the service in other ways without their need to enter the premises. The latter is likely to be a less satisfactory approach and, unless unavoidable and justified by strong health-and-safety based reasons, might be unlawful too. Caution is needed. Waiving the rule is likely to be the best solution in most situations.

The same duty would also apply in respect of people whose hesitancy about receiving the vaccine stems from their having a mental health disability, such as severe anxiety.

Given the possibility, if not probability, that such adjustments would often be reasonable, it means too that this point should be added to advertisements and notices placed around the premises. Service-providers should ensure that if they specify in such notices that they are operating a “no jab, no entry” policy, that it is clearly noted that exceptions will be made in appropriate cases, such as for disabled people.

Failure to put in place reasonable adjustments would be an act of unlawful disability discrimination.

Further information on employers’ obligations in relation to reasonable adjustments is available on the [Commission website](#).

Discrimination against pregnant women

The latest [medical guidance from the Government](#) promotes vaccination for pregnant women.

Nevertheless, there is [evidence](#) of high levels of vaccine hesitancy amongst pregnant women with many going unvaccinated.

Given that evidence, then it is possible that “no jab, no entry” policies could discriminate unlawfully against service-users who are unvaccinated because they are pregnant.

Such discrimination could arguably take two forms. One is *indirect sex discrimination* – this is discussed in the next section.

The other is a form of direct discrimination called “*discrimination on the grounds of pregnancy*”. It will ultimately be for a county court to determine whether a claim on this ground can be made but given the possibility that it might, what should a service-provider do to address the risk?

It may require making adjustments of the kind that would be made for disabled people; such as making exceptions to the policy: e.g. waiving the rule.

Again, if such exceptions can be made for pregnant women, that should be reflected in any advertisements or notices that declare that the service-provider is operating a “no jab, no entry” policy.

Age discrimination against younger people

We are at a stage where the vaccine, or the first dose, is now available to [everyone over the age of 16](#), but only to [some children below that age](#). Thus, allegations of age discrimination against people in that younger age group are a possibility.

However, there would be no legal remedy available to young people who are denied entry to services and premises on the basis that they are unvaccinated. This is because the law in Northern Ireland does not prohibit age discrimination in relation to the provision of goods and services.

Indirect discrimination – which protected grounds may be relevant?

Anti-discrimination law may be relevant where it can be shown that “no jab, no entry” policies are potentially [indirectly discriminatory](#) on one of the protected equality grounds i.e. where they have a disproportionate adverse impact on one group compared to another.

Given that the rollout of the vaccine programme is ongoing and that official data on vaccine uptake is still being gathered and that the picture may change with time, it is not entirely clear which groups may be so affected but some potential issues are outlined below.

1. **Sex:** Given the [evidence](#) that pregnant women are hesitant about being vaccinated, then indirect sex discrimination against women is a possibility.
2. **Race and/or religious belief:** There is [survey data from the Office for National Statistics](#) which found that Black or Black British people were more likely to be vaccine hesitant than White people, raising the possibility of indirect race discrimination against people of the Black or Black British ethnic group. Similarly, people of the Islamic faith appear more hesitant to be vaccinated than people of the Christian faith, raising the possibility of indirect religious discrimination against Muslims. We do not know if that data reflects the situation in Northern Ireland as the survey relates to Great Britain only. Nevertheless, the potential that a “no jab, no entry” policy could cause these forms of indirect discrimination may exist here too.
3. **Political opinion and/or philosophical belief:** Some commentators have discussed the possibility of indirect discrimination occurring on the protected equality grounds of political opinion or philosophical belief. But, it is unlikely that such claims can be made in Northern Ireland at this time.

Given that Northern Ireland health law and public policy promotes a voluntary Covid-19 vaccination programme, it seems unlikely that claims of indirect discrimination on grounds of political opinion could feasibly be argued for such claims must be concerned with opinions *“relating to the conduct of the government of the state or matters of public policy”*.

Claims that are based on allegations of philosophical belief discrimination may be open to job applicants and employees in relation to “no job, no job” employment policies, but the law in Northern Ireland does not prohibit discrimination on that ground in relation to the provision of goods and services.

Indirect discrimination – the justification defence

Where it can be shown that a ‘no job, no entry’ policy has a potentially indirectly discriminatory effect, that does not necessarily mean that it is unlawful, for a service-provider may still make the case, and a county court may accept, that the policy is lawful because it is objectively justified as **a proportionate means of achieving a legitimate aim**.

Legitimate aims

Firstly, a service-provider must have some lawful aim that they wish to achieve, i.e. the underlying reason for introducing the policy, or the business need or objective that the policy seeks to meet.

Many service-providers are likely to make the case that a “no job, no entry” policy is needed to protect people’s health and safety, such as staff or service-users. Some service-providers may, of course have other aims, perhaps, for example, a desire to *“get back to pre-Covid normality as quickly as possible”*, or to ensure continuity of service without interruptions caused by staff having to self-isolate.

It will be for each service-provider to develop their own particular aims, ensuring that any declared aims are ones that they are genuinely trying to achieve. It would also be better if declared aims are complementary and consistent with each other.

Proportionate means of achieving those aims

It is not enough to declare that one has certain aims in mind for adopting a “no job, no entry” policy, service-providers must also show that adopting the policy is an appropriate and balanced means of achieving those aims.

In assessing whether this is so, a county court’s opinion may be influenced by a range of factors, including what the latest medical evidence shows about the vaccines’ effectiveness in halting or impeding infections and in protecting the health of people who are infected, as well as the external legal and public policy context, such as the fact that Northern Ireland’s vaccination programme is voluntary.

A county court is also likely to be influenced by other factors associated with the type of service and premises in question: for example-

- the number of employees and visitors in the premises
- the nature of visitors' contact with staff and other visitors
- the size/layout of the premises – is it congested or is there plenty of space?
- the availability of other health precautions and the ease with which they can be installed and maintained; e.g. face-coverings and social distancing

It would also be important to consider whether one's health and safety concerns might be adequately addressed if unvaccinated service-users can prove that they satisfy other conditions such as by having a recent negative NHS lateral flow test, or that they have natural Covid antibodies as demonstrated by a recent PCR test. This wider approach was [adopted by the organisers of two recent concerts](#) that were held in Belfast.

County courts may also accept that certain environments have particular features and risks that justify higher precautions, including possibly “no jab, no entry” policies. That was, for example, a view taken by the government in England when it made its [regulations \(noted above\)](#) in respect of adult care homes, but which do not apply more widely to other kinds of businesses. Even then, those regulations contain exceptions for a wide range of visitors, including residents and visiting family members. The more recent proposals for statutory “no jab, no entry” rules in [Scotland](#) (html) are also narrow in their application to specific venues and circumstances.

Finding this balance is the hardest question to answer and, ultimately, a county court would have to make its findings based on all the facts and circumstances of any cases brought before it.

Sunset clauses

Finding the right balance also means reviewing such policies regularly. Given the dynamic situation that we are in, it would be prudent to do this quite frequently, perhaps in line with the NI Executive's own reviews of its own health strategy, and based on service-providers' up-to-date health and safety risk assessments.

Where they are adopted, such policies should not be maintained and continued indefinitely and should be cancelled as soon as it is deemed prudent to do so.

Section 75 - public sector service-providers

Public sector service-providers should additionally screen their policies in line with the arrangements of their [section 75 equality schemes](#) and conduct equality impact assessments, where appropriate.

Further advice and information

For telephone advice on service-providers' obligations under equality and discrimination law, contact our helpline on **028 90 500 600**. Alternatively, you can email edenquiries@equalityni.org and we will answer as soon as possible.

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