

## No Jab, No Job!

### May employers lawfully introduce such policies?

Whether discretionary ‘no jab, no job’ 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.

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 Tribunal to decide in light of the specific facts of any case brought before it.

### Guidance Summary

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

“No jab, no job” policies may also have the *potential* to be indirectly discriminatory on grounds such as sex, age, race, religious belief or philosophical belief. It would, of course, be for an employment tribunal to consider if unlawful discrimination had occurred based on all of the particular circumstances of any case, with such matters as the nature of employment being considered, as well as other precautionary measures which employers may take. Considerations with regard to the nature of employment is likely to take account of whether close contact with other people is required and the conclusions of health and safety risks assessments regarding the spread of Covid 19.

### What should employers do?

All employers should:

- set workplace rules that are fair and reasonable – be flexible where practicable – look to adopt a range of solutions that might help to accommodate various staff needs
- outline the policy in writing so that all associated contingencies are covered - a good guide on those matters and a good source of practical advice is the [Labour Relations Agency's Practical Guide to the Covid-19 Vaccination and the Workplace](#) (html) – it includes a model policy
- base decisions on thorough and up-to-date health and safety risk assessments
- follow Department of Health and similar official guidance
- always consider and then make reasonable adjustments for disabled people and pregnant women

- if disciplinary action is called for, follow the [LRA's Code of Practice on Disciplinary and Grievance Procedures](#) (html)
- keep such policies under regular, frequent review and cancel them when it is 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 employers may presently be asking themselves i.e. may they, at their own discretion, impose non-statutory “no job, no job” policies on their workforces, either as a condition for continued employment, or as a job selection criterion for new staff?

One effect of such policies is that it may leave some employees or job-seekers feeling that they have little real choice i.e. they must either take the vaccine or risk losing their job or a job opportunity. If they suffer such detriments, they may then seek to challenge such policies in employment tribunals as being unlawful.

### **Statutory “no job, no job” rules**

At present employers in Northern Ireland are not obliged by law to introduce “no job, no job” policies but the possibility that public policy on this issue could change is illustrated in England where the Government [recently made regulations](#), 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. The regulations effectively impose a “no job, no job” rule in those particular workplaces. The narrow scope of those regulations might also have some bearing on the question of whether it is lawful for employers in other business fields to introduce their own discretionary “no job, no job” policies. It should be noted too that, at the time of writing, it seems that the legality of these regulations may be challenged by way of judicial review. It may also be noted that on 9 September the Government in England commenced a [consultation](#) on its proposals to apply similar rules to frontline staff in other health and social care environments.

## Are such discretionary employment policies lawful?

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

A good guide on the employment law perspective and a source of practical advice is the [Labour Relations Agency's Practical Guide to the Covid-19 Vaccination and the Workplace](#).

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

Furthermore, the [Government in England has published guidance](#) on the new regulations relating to the statutory "no jab, no job" 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 an employment tribunal 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 employers from discriminating unlawfully when making employment decisions and policies. 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 an employment tribunal, but the answer is quite likely to be “yes”, especially if the consequence of not being vaccinated is that the person’s employment opportunities are restricted by “no jab, no job” policies.

If people who are clinically barred from taking the vaccine are deemed to be disabled, it means that their employers or prospective employers who operate “no jab, no job” policies will be obliged to make reasonable adjustments to those policies, or to the consequences of applying them.

That could, for example, mean ensuring that there are reasonable exceptions to those policies for a disabled person (applicant or employee) put in place. This may include re-arranging his/her working arrangements so that he/she may continue working without the need to be vaccinated.

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 consideration would have to be built into recruitment procedures. Employers would need to ensure, if they specify in job advertisements that they are operating a “no jab, no job” policy, that it is clearly noted in the advertisement that exceptions will be made in appropriate cases, such as for disabled job applicants.

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, it is possible that “no jab, no job” policies could discriminate unlawfully against employees or job-seekers 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 an employment tribunal to determine whether a claim on this ground can be made but given the possibility that it might, what should an employer 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. re-arranging a woman’s working arrangements, such as allowing her to work from home without the need to be vaccinated, or allowing her to take paid or unpaid leave until such time as her statutory maternity leave begins.

Again, if such exceptions can be made for pregnant women, that should be reflected in any job advertisements that declare that the employer is operating a “no jab, no job” policy.

Finally, if such exceptions and adjustments cannot reasonably be made, employers should consider whether it would be appropriate to [suspend \(on full pay\)](#) an unvaccinated pregnant employee on grounds of health and safety.

## **Indirect discrimination – which protected grounds may be relevant?**

Anti-discrimination law may be relevant where it can be shown that “no jab, no job” 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. **Age:** We are at a stage where the vaccine, or the first dose, is now available to [everyone over the age of 16](#) i.e. the entire working age population. Nevertheless, there is [evidence](#) of greater vaccine hesitancy amongst people in the under-30 age group. Thus, indirect age discrimination against people in that age group is a possibility.
3. **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 job, no job” policy could cause these forms of indirect discrimination may exist here too.

4. **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. 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*”.

For claims to be based on philosophical belief discrimination, a person would first have to prove that their objection to, or hesitancy about, the vaccine is based on a philosophical belief i.e. that their objection is based on a genuinely held viewpoint about a “*weighty and substantial*” aspect of human life and behaviour and is not merely an opinion based on some real or perceived logic, or based on the information or lack of information that is available. Ultimately, it would be for an employment tribunal to determine whether any person’s professed viewpoint about vaccination satisfies that test. It is an open question and much will depend on the facts of individual cases.

## **Indirect discrimination – the justification defence**

Where it can be shown that a “no job, no job” policy has a potentially indirectly discriminatory effect, that does not necessarily mean that it is unlawful, for an employer may still make the case, and an employment tribunal may accept, that the policy is lawful because it is objectively justified as **a proportionate means of achieving a legitimate aim**.

### **Legitimate aims**

Firstly, an employer 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 employers are likely to make the case that a “no job, no job” policy is needed to protect people’s health and safety, such as staff or service-users. Some employers 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 employer 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 job” policy, employers must also show that adopting the policy is an appropriate and balanced means of achieving those aims.

In assessing whether this is so, an employment tribunal'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.

An employment tribunal is also likely to be influenced by other factors associated with the type of employment in question: for example-

- the proportion of employees who are already vaccinated
- the number of employees and visitors in the premises
- the nature of employees' contact with each other and with visitors
- the size/layout of the workplace – 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.

Employment tribunals may also accept that certain working environments have particular features and risks that justify higher precautions, including possibly “no jab, no job” policies. That was, for example, a view taken by the Government in England when it made its [regulations \(noted above\)](#) in respect adult care homes, but which do not apply more widely to other kinds of businesses; although as noted above the Government in England has commenced a [consultation](#) on its proposals to apply similar rules to frontline staff in other health and social care environments.

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

Some scenarios may illustrate this:

Employer A may find it fairly easy to continue its activities safely and efficiently by ensuring that staff and customers continue to observe social distancing and other precautions, such as by allowing staff to work from home or by making staff and customers wear face coverings, or by separating staff and customers with Perspex screens, but employer B may not be able to do any of this and may need staff to work on the premises and in close physical contact with customers. If the declared aim of the “no jab, no job” policy is to protect people's health, then employer B is likely to be in a much better position to justify the policy than employer A. Indeed, employer A may find that such a policy is not justifiable in their case at all.

Employer C may be in a hybrid situation. They can readily allow some staff (their office-based ones) to work from home. They also have a second group of staff who need to work on the premises but not in close physical contact with other people and for whom social distancing protocols and precautions are in place and can easily be maintained. However, they also have a third category of staff who must work on the premises and in close physical contact with customers. If the declared aim is to protect people's health, then employer C is likely to be in a much better position to justify a "no jab, no job" policy for the third group of employees than for the other two groups. Indeed, employer C may find that such a policy is not justifiable in the case of their (usually) office-based workers at all. If it is justifiable in the case of the third group (the close physical contact workers), that does not necessarily mean it will be so for the second group. The answer there may depend on how close and how frequent the second group of workers come into close contact with the third group and whether other precautions can be put in place to reduce the risk of infection between them.

### **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 health strategy, and based on employers' 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.

### **Implementing a "no jab, no job" policy – other consequences**

Even where a "no jab, no job" policy is deemed to be justified on its specific terms, additional caution will be needed when implementing it.

For example, if the policy is justified in relation to a particular group of employees (care workers, or other close personal contact staff) but not to others (office staff), it does not follow that dismissing an unvaccinated member of the first group would be a justified action – the employer would have to consider other matters, such as transferring that person to the other group, if possible.

Where disciplinary or dismissal action is contemplated, the Labour Relations Agency's [Code of Practice on Disciplinary and Grievance Procedures](#) should be followed.

Furthermore, if such policies are not applied across the board (i.e. to all job groups), that too should be reflected in any job advertisements that declare that the employer is operating a "no jab, no job" policy. The advertisements should clearly indicate which particular jobs it applies to.



## **Further advice and information**

For telephone advice on employers' obligations under equality and discrimination law, contact our helpline on 028 90 500 600. Alternatively, you can email [edenquiries@equalityni.org](mailto:edenquiries@equalityni.org) and we will answer as soon as possible.

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