

# ANOTHER WINTER, ANOTHER COVID-19 VARIANT RELATED CHALLENGE FOR UK EMPLOYERS

20 JANUARY 2022 • ARTICLE



As the Omicron variant of Covid-19 spread rapidly across the UK, Plan B measures were introduced and are now being eased again. We consider the challenges for employers and examine a recent employment tribunal decision on an employee's refusal to go to work for fear of catching Covid-19.

## CHALLENGES FOR EMPLOYERS

### Business continuity arising from Omicron related staff shortages

An estimated 4.3m people in private households across the UK had Covid-19 in the seven days leading up to 6 January 2022.

Such high case numbers have caused testing shortages and considerable staff shortages across all business sectors. Staff shortages are likely to continue for some time, with ministers recently asked by Boris Johnson to prepare contingency plans for public sector workforce absences of up to 25%. Staff shortages are likely to be equally problematic for the private sector.

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The government has tried to help by amending the mandatory ten-day quarantine period. It is now possible for employees to stop self-isolating after five days provided they received two negative lateral flow results on days five and six of that period.

### Issues with pay

The government also introduced a scheme to support those on low incomes whilst self-isolating by providing one-off payments of £500 (known as the Test and Trace Support Payment). This must be claimed by employees where they are eligible, but it does not apply to all.

### Withholding company sick pay entitlements for unvaccinated employees

Recent news reports suggest that employers are beginning to introduce measures that cut company sick pay entitlements for unvaccinated staff who do not have mitigating circumstances for being unvaccinated and need to self-isolate because of exposure to Covid-19. This is not without risk. Unless exceptions are made, employees who, for example, are pregnant or who cannot be vaccinated due to medical reasons may be able to bring discrimination claims if they find they are not entitled to the same company sick pay as vaccinated colleagues.

## Health and safety

For those who cannot work from home, employers still need to be mindful of the health and safety implications.

Employers have a duty to manage risks in the workplace by taking reasonably practical steps which include completing assessments of the risks of Covid-19 in the workplace, keeping workspaces well ventilated and regular cleaning.

Equally, where employees are working from home, employers should maintain regular contact to make sure employees have the equipment and support that they need to carry out their jobs.

## Can employees refuse to attend the workplace for fear of catching Covid-19?

No, said an employment tribunal in a recent decision.

Under the Equality Act 2010, it is against the law for employers to discriminate against employees because of a protected characteristic, which include religion or belief, age, sex, disability and race. This is separate from the “serious and imminent danger” argument raised by other employees which is health and safety related. The claimant in this case complained of unlawful discrimination under the protected characteristic of religion or belief, stating her belief was “*a fear of catching Covid 19 and a need to protect myself and others*” and that it was a philosophical belief.

The tribunal considered the case of *Granger plc v Nicholson [2010]* and the criteria it set out to satisfy the definitions of a philosophical belief, which are:

1. the belief must be genuinely held;
2. it must be a belief and not, as in *McClintock v Department of Constitutional Affairs [2008]*, an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance; and
5. it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

The tribunal decided that the claim failed on both the second and third criteria.

The fear of catching Covid-19 was not deemed to be a philosophical belief, instead a “*reaction to a threat of physical harm and the need to take steps to avoid or reduce that threat*”. Further, the tribunal considered that the claimant’s fear could be described as a widely held opinion based on the present state of information. Discussing the second failed criteria, the tribunal stated that while the claimant’s fears were weighty and substantial and about aspects of human life and behaviour, they do not amount to a belief and therefore the criteria could not be met.

Due to Covid-19 related reasons, the respondent applied for the hearing to be conducted virtually. Notably, given the reasons for bringing a claim (namely the fear of catching Covid-19), the claimant objected and requested the hearing be held in person. She cited security issues with conducting the hearing virtually. Her objections were upheld, and the hearing took place in person.

## KEY STEPS FOR EMPLOYERS

- Try to plan for possible staff shortages and consider how these can be managed appropriately;
- Complete the necessary Covid-19 risk assessments and provide an adequate working environment for all employees; and
- If your business plans to withhold company sick pay from unvaccinated employees consider how you will avoid giving rise to discrimination arguments and make exceptions for those with mitigating circumstances.

Trainee Amy Tully also contributed to this article.

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