

Dear Sir/Madam:

Re: Vaccination of Care Home Staff

I write to you in connection with the proposal to require [insert name] to show proof of his/her vaccination status as a condition of continued employment. This condition is met by a self declared exemption for reasons set out below.

I understand as an employer you are relying on the [Health and Social Care Act 2008 \(Regulated Activities\) \(Amendment\) \(Coronavirus\) Regulations 2021](#) [the Regulations].

The particular regulation on which you are relying is 5 (2):

*B has provided A with **evidence that satisfies A** that either—*

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

*(ii) that **for clinical reasons B should not be vaccinated** with any authorised vaccine;*

Leaving aside any argument about the legal validity of the Regulations, regulation 5 (2) must be interpreted in a way that is consistent with the language used.

The word “satisfies” means satisfies in a legally compliant way.

The words “for **clinical** reasons **should** not be vaccinated” must be interpreted in accordance with the existing law and in a legally compliant way.

A clinician **cannot and should not** vaccinate any care home worker either:

1. where the care home worker does not want a vaccine. Declining treatment amounts to a clinical reason under Montgomery, and the earlier case of *Heart of England NHS Foundation Trust v JB* [2014].
or
2. who is being vaccinated through third party pressure. Coercion or pressure invalidates any consent leaving the clinician potentially liable for the tort of battery.

The right to decline treatment is a human right of bodily autonomy which no person including the government can trespass on without there being exceptional circumstances relating to a lack of capacity. No such circumstances exist. There are many different reasons why a care home worker may not want a vaccine.

The right to decline treatment is recognised as a long established common law right. A clinician has to accept that any patient with mental capacity has the right to decline any treatment. A clinician should not vaccinate where an individual declines treatment.

Declining vaccination amounts to a clinical reason why a care home worker should not be vaccinated.

Under Regulation 5 (2) (b) all the care worker needs to do is provide satisfactory evidence of clinical reasons that the care worker should not be vaccinated.

My client requires you to accept a self-exemption as satisfactory evidence under regulation 5 (2) (b).

The NHS supports this interpretation of the Regulations, albeit in relation to their own application [the covid pass](#).

The covid pass describes itself as:

*The NHS COVID Pass lets individuals share their **coronavirus (COVID-19) vaccination** and test results in a secure way.*

The website states as follows under exemptions:

*There will also be a small number of exemptions for individuals who have a **medical reason** which means they cannot vaccinate or test. **These individuals will need to self-declare their medical exemption directly with you...***

*Please ask your customer if they can demonstrate their COVID-19 status using the NHS COVID Pass.. **This allows your customer to respond with information about a self declared medical exemption.***

If your customer confirms that they have a self declared exemption, but is unable to show any evidence, you should allow them access to your venue or event. You must not ask for proof of their medical exemption and it is not essential they show any form of exemption card at any point.

The Regulations specifically state at regulation 5 (5) that:

(5) Nothing in this regulation authorises the processing of personal data in a manner inconsistent with any provision of data protection legislation.

The data protection legislation requires consent for medical information to be given to a third party such as an employer. A care home worker is entitled to withhold consent.

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The issue therefore is consent.

A care home worker is entitled to withhold consent to vaccination. A care home worker is entitled not to share his or her medical records with their employer.

A self-declared exemption is satisfactory evidence of the clinical reasons why a care home worker should not be vaccinated.

This interpretation is in line with [section 45 E of the Public Health \(Control of Disease\) Act 1984](#) [the 1984 Act] which states as follows:

“Medical treatment

*(1) Regulations under section 45B or 45C may not include provision **requiring a person to undergo medical treatment.***

*(2) **“Medical treatment” includes vaccination and other prophylactic***

treatment.” The Regulations must be interpreted to be consistent with the 1984 Act.

Should you not agree with that analysis, you will need to set out in full why this interpretation is incorrect. Please do not quote the care worker’s guidance as the law should be followed not the guidance, where there is a conflict.

If you proceed to require more than a self-declared exemption you will find your organisation and potentially individuals within the organisation facing the following risks.

How the regulations breach common law rights if interpreted to not allow self declared exemptions:

Vaccination is a medical intervention. It requires the consent of the individual before its administration.

[Vaccination without consent is assault and battery](#). Putting someone in fear of violence can itself be a criminal offence of assault.

An individual who has been threatened with the loss of their job if they are not vaccinated, or show proof of vaccination cannot give valid consent if that is the reason for vaccination.

The NHS defines valid consent as follows:

“For consent to be valid, it must be voluntary and informed, and the person consenting must have the capacity to make the decision.

The meaning of these terms are:

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- 1. voluntary – the decision to either consent or not to consent to treatment must be made by the person, and must not be influenced by pressure from medical staff, friends or family*
- 2. informed – the person must be given all of the information about what the treatment involves, including the benefits and risks, whether there are reasonable alternative treatments, and what will happen if treatment does not go ahead*
- 3. capacity – the person must be capable of giving consent, which means they understand the information given to them and can use it to make an informed decision.”*

Here, the relevant factor is ‘voluntary’.

An individual undergoing medical treatment for the sole reason that if they do not, they will lose their job, has not given the degree of consent required to describe the procedure as “voluntary”. No valid consent can be given in these circumstances.

As per the above definition, the *“decision to either consent or not to consent to treatment must be made by the person and not influenced by pressure”*. Decisions made to receive medical interventions under pressure are therefore invalid. Such ostensible consent is not real.

It follows that any consent given on pain of losing one’s job is vitiated. The individual who has administered the medical intervention, their employer, and the employer who has required their staff to be vaccinated, may be liable in tort under the following heads of claim:

Assault and Battery:

The definition of assault is an act which causes another person to apprehend the infliction of immediate unlawful force on his person. A vaccination administered without proper consent is unlawful personal force and therefore the apprehension of such is the apprehension of immediate unlawful force.

The definition of battery is the actual infliction of that unlawful force on another person. The administration of a vaccine without proper consent is the infliction of unlawful force. Both

torts are actionable per se, so no loss must be shown. It is enough that the tort occurred.

Inducement as to Assault and Battery. The individual or organisation that has induced the Assault and Battery may be liable under this head of claim. It is also actionable per se. Organisations may argue they are acting under statutory authority (the abovementioned regulations), but it is well established law that acting under statutory authority is no defence to an assault or battery for example the case of [Wilkinson](#).

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Intimidation. The organisation who has induced the battery (the employer) could also be liable for the tort of intimidation or coercive behaviour to induce a battery.

The potential criminal offences are as follows:

"Technically, the offences of assault and battery are separate summary offences. An assault is committed when the defendant intentionally or recklessly causes another to apprehend immediate and unlawful violence and battery is committed when a defendant intentionally or recklessly inflicts unlawful force. Although battery may follow an assault that is not always the case."

You will need to take independent legal advice as to whether the approach adopted by your organisation meets the threshold of assault if any care home worker apprehends that his or her job depends on immediate and unlawful violence of a forced vaccination. The question is whether the misinterpretation of the law is reckless or not.

Statutory liability

The requirement that an individual be vaccinated, on pain of their job, is contrary to several statutory provisions.

The Equality Act 2010 outlaws various forms of discrimination.

The requirement for staff to be vaccinated, on pain of their jobs, is discriminatory in several respects:

1. Requiring care home workers to disclose their disability and any exemption discriminates directly and indirectly against disabled care workers and puts such care workers at a [substantial disadvantage](#). [The Assessment acknowledged 22% of care workers](#) are disabled. Care workers have the right not to disclose their disability to their employer.
2. [Indirectly discriminating against care workers](#) who as an occupational group are [mainly women](#). [Women have greater vaccine hesitancy than men](#).
3. [Directly or indirectly discriminating against pregnant women](#) in that [the requirement to](#)

[vaccinate also puts pregnant care workers at a substantial disadvantage as none of the clinical trials for the vaccines included any pregnant women see 10.4.2 of Pfizer trial.](#) Women who were breastfeeding were also excluded.

4. [Indirectly discriminating against care workers](#) who do not have [English as a first language](#).

5. Discriminating against those care workers who hold [philosophical beliefs](#) that government should not determine what medical treatment a care worker has. 6. Discriminating against those care workers who have [philosophical beliefs](#) based on natural remedies and or the non-use of animals in clinical trials. It is to be noted that

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the Equality Impact Assessment did not include the risk of discrimination against care workers holding particular philosophical beliefs.

7. Discriminating against those care workers who have a [religious belief](#) relating to the [constituent materials from which some vaccines are made](#).
8. Indirectly discriminating against members of [BAME](#) communities who have vaccine hesitancy based on [past injustice relating to medical treatment](#). [The Equality Impact Assessment acknowledges the BAME community's loss of trust in authority](#). It is alleged that the covid response has not rebuilt that loss of trust.
9. Directly or indirectly discriminating against younger care workers who face less risk from covid infection but risk a serious adverse event from the vaccination which is disproportionate to the risk being mitigated. It is to be noted that care home residents have their right to decline vaccines respected. [It is also to be noted that only 10% of residents have not been vaccinated](#). The Equality Impact Assessment acknowledges that younger female care workers have concerns over whether the vaccine may impact fertility. Those concerns are cogent as there is no long term evidence of fertility impact yet reports of adverse events from vaccination include heavier menstruation. [It is also to be noted that the bio-distribution study Pfizer supplied to Japan may have found a build up of the spike protein in the ovaries together with concerns over breast feeding mothers. The relevant extract is here. Canadians have raised concerns on this issue](#). In particular where uncertainties exist on toxicity that the precautionary principle should be applied. In 2021 every person should have their right to bodily autonomy respected and those who wish to adopt a wait and see policy with regards to vaccination should not be penalised for that choice. That's their right and a right that should be respected. The generations that came before fought for that right.

Any provision, criterion or practice [PCP] which cannot be objectively justified is unlawful discrimination if it can be shown to have an adverse impact on those with a particular

characteristic.

If regulation 5 (2) (b) is interpreted to require care home workers to show their vaccination status then that interpretation breaches the workers' right to keep their medical data private and confidential. That right is enshrined in the Data Protection Act 2018.

The Regulations recognise that at regulation 5 (5):

Nothing in this regulation authorises the processing of personal data in a manner inconsistent with any provision of data protection legislation.

Any requirement for a care home worker to produce either their medical records or the NHS covid pass application may also be discriminatory against those who hold the philosophical

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beliefs that the state has encroached too far into individual liberty when handling the declared pandemic.

An individual has the right to privacy and liberty and requiring employers to see a health pass discriminates against those who view that provision as a heavy handed and disproportionate response to the pandemic.

Any PCP that is discriminatory has to be removed.

In the circumstances can you confirm within five working days in writing that satisfactory evidence to comply with regulation 5 (2) (b) is met by a self- declared exemption without any further evidence being required.

I look forward to hearing from you as soon as possible.

Yours sincerely

[insert name]

