

The Slaughter and May Podcast

COVID testing and vaccines – What comes next for employers?

Clare Fletcher	Hello and welcome to our latest COVID-19 implement podcast. I am Clare Fletcher, PSL Counsel in the Employment team here at Slaughter and May
Philippa O'Malley	And I'm Philippa O'Malley, an Associate in the Employment team.
Clare Fletcher	<p>Today's podcast is about the employment implications of COVID testing and vaccination.</p> <p>Philippa and I recorded a podcast on COVID testing back in July so we'll briefly revisit some of those themes.</p> <p>We'll then discuss how things have moved on in the past five months and how work placed testing for COVID is likely to develop further in the next few months, as we move into a new stage of this pandemic. We will then consider the employment implications of a COVID vaccine now being available before concluding with some key takeaways for employers.</p> <p>I should say that this podcast is being recorded on 10th December 2020 and reflects the law and guidance as it stands today.</p> <p>So Philippa shall we start with a brief overview of the position on employee testing for COVID-19?</p>
Philippa O'Malley	Yes, so the NHS testing programme is now pretty well established and most employers and employees will be quite comfortable now with how that process works. However, the main limitation of that system is that tests are still only available for individuals who have COVID symptoms, and that means that some employers have developed their own testing regimes for all or selected employees, including those without symptoms.
Clare Fletcher	So I think it is fair to say that at that stage those sort of private workplace testing regimes were broadly limited to sectors like healthcare and hospitality where the risk of exposure to COVID is greatest, and I think that's likely because as we discussed in our last podcast requiring employees to submit to COVID testing is problematic in most circumstances from an employment law perspective.
Philippa O'Malley	Agreed, and just by way of reminder, when developing a testing strategy, employers need to consider their health and safety obligations as well as employees' rights to object to testing.

	Employers should also ensure they comply with data protection rules when handling test results and when sharing health information in an employment context.
Clare Fletcher	<p>Absolutely. So what's changed then since we recorded our podcast in July?</p> <p>Well one of the biggest changes is the increased testing capacity within the NHS system and the latest stats for the end of November showed over 1.5 million people per week were tested for COVID across all settings, and that's about three times the figure we saw at the time of our last podcast. Since that time we've also seen a period of increased attendance at workplaces, at least over the summer period before the second lockdown and this has led to a gradual increase in workplace testing programmes and we certainly expect that trend to continue and accelerate into the New Year.</p>
Philippa O'Malley	<p>Helpfully for employers the guidance on workplace testing is starting to catch up with the increase in testing. In September the government published its COVID-19 testing guidance for employers. This sets out the legal obligations and best practice where employers are running their own testing or contact tracing schemes outside of NHS Test and Trace. Reassuringly, it largely repeats the points we made in our previous podcast, ensure you comply with your legal obligations, consider the correct parameters and consult with employees. We also now know that where the employer provides COVID-19 tests to employees, this will be treated as a tax free benefit, at least until the end of the current tax year. There was some certainty around that point Clare when we recorded our last podcast.</p>
Clare Fletcher	<p>Yes that's right.</p> <p>Contact tracing has also developed significantly. We now of course have the NHS App which we didn't back in July. There's also more guidance on workplace forms of contact tracing. The government guidance you just mentioned Philippa, highlights the fact that where employees are traced through these private workplace contact tracing systems, there is no legal requirement on that employee to self-isolate and no entitlement to statutory sick pay for that self-isolation, unless of course a parallel notification also comes through NHS Test and Trace. So both of those implications would need to be managed through the employer's own policies.</p>
Philippa O'Malley	<p>Picking up on the point about the employer's policies, employee monitoring has certainly become a hot topic during the pandemic, partly because of the number of employees now working remotely which often necessitates a different approach to monitoring, but also because it's a big issue for workplace contact tracing.</p>

	<p>The ICO is very aware of this and has also updated its guidance. It now acknowledges, for example, that employers may wish to use CCTV to monitor whether employees are observing health and safety measures in the workplace or where an employee has developed systems or tested positive to identify what close contact that employee had during a period where they may have been contagious. The ICO's position is that both these uses of CCTV may be legitimate, provided of course that this kind of monitoring is necessarily justified and proportionate and that employers are informed that it is taking place.</p>
Clare Fletcher	<p>So that's brought us up to date, I think, from the last podcast. Let's look forward now to the next few months. It certainly feels like we're entering a new stage and hopefully nearing the end of the pandemic. We'll say a few words first about how workplace testing may develop before we move on to look at vaccination and the big change we foresee on testing is how it may be used to reduce the period of self-isolation for individuals who have symptoms or have been identified through contact tracing.</p>
Philippa O'Malley	<p>When we spoke about this in July, Clare, I remember that the government, I think at that time, was firmly against using testing in this way.</p>
Clare Fletcher	<p>That's right, but the tide is certainly turning on this and a key part of the government's COVID-19 winter plan is the introduction of frequent testing as an alternative to self-isolation and this was of course trialled in Liverpool recently and further trials should be taking place, including in some work places before the end of this year, ahead of rollout across the country from early next year.</p> <p>We don't as yet have any details on what this new mass frequent workplace testing regime may look like, so employers really need to watch this space, look out for the guidance when it becomes available and start preparing to implement workplace testing if they don't already.</p>
Philippa O'Malley	<p>Moving on from testing to COVID vaccination and what this might mean for employers, clearly the fact that the vaccination programme has already started is great news for our prospects of returning to something more like normal social interaction. However, at the risk of dampening the mood, we would sound a note of caution from an employment perspective.</p> <p>There are several reasons where vaccination is just not going to be a get out of jail free card for employers. The first is that employers will not have control of the process, at least for some time. Vaccinations are not currently available for purchase by private businesses so the process will, at least initially, be given by governments and government policy.</p>

<p>Clare Fletcher</p>	<p>And the UK government has been clear that vaccination won't be a legal requirement when it becomes widely available, which I think would prevent most employers from insisting that employees are vaccinated. The analysis on that is going to be similar to what we looked at last time in relation to testing for COVID-19. At this stage it's hard to be conclusive that instructing an employee to have a COVID vaccine would be a reasonable management instruction, and that's not withstanding the health and safety duties on both employers and employees.</p> <p>In the majority of workplaces I think the prudent approach would be to encourage and advise employees to be vaccinated, and that would probably extend to giving employees paid time off to take the vaccine for example, but not to make vaccination a strict requirement.</p> <p>Having said that though, I think one area to keep an eye on is whether a vaccination will be required for certain activities and I'm thinking particularly about international travel. If that sort of requirement is introduced, it might mean that vaccination is necessary for certain roles and could be mandated by the employer and we have already seen some airlines indicating that they will require anybody travelling with them to have been vaccinated so that's certainly an area for employers to watch.</p>
<p>Philippa O'Malley</p>	<p>Another issue that employer's will need to be aware of when developing their COVID vaccine strategy, is the risk of discrimination claims. Employees who hold anti-vac views may well be able to claim that this is a protected religious or philosophical belief and they must not be discriminated against on the basis of such views. From a religious perspective, some Christian faith healing denominations have a theological objection to vaccination. Other religions have voiced objections, not based on the concept of the vaccine itself but on the contents of the vaccine, for example gelatine derived from pigs is often used in mass produced vaccines and this might be a concern for Muslim or Jewish employees, and it may also be a concern for vegan employees who may also hold protected philosophical beliefs.</p> <p>Equally, some employees will not be eligible for a vaccine, whether initially because of age or because of health conditions such as a weakened immune system or severe allergies, both of which could amount to a disability for discrimination purposes.</p> <p>Similarly, employees who suffer from a fear of needles may feel they are unable to have the vaccine and it's possible that could be considered a disability.</p> <p>Essentially what this means is that employers can't have a one size fits all approach.</p>

<p>Clare Fletcher</p>	<p>And another angle for employers to be aware of is the need to take care when handling information about whether their employees have been vaccinated.</p> <p>Vaccine passports aren't current government policy for COVID-19 but I think that may change, and in either case it's likely that businesses will want to ask for proof of vaccination from their employees as well as others who enter their premises. It is not year clear if employers would be able to insist that this information is provided by employees.</p> <p>As we have seen with COVID test results, employers will likely have legitimate grounds for processing this sort of information about vaccination, but would need to make sure it's handled appropriately in line with data protection principles and of course be transparent with employees about how they process this information.</p>
<p>Philippa O'Malley</p>	<p>There's clearly a huge appetite for information about COVID vaccination at the moment, and a growing concern about misleading information discouraging people from getting vaccinated.</p> <p>One of the issues we've been considering is how much employers need to do to inform employees about the pros and cons of vaccinations and how to counter misinformation. Employers clearly have a responsibility to protect the health and wellbeing of their staff but I don't think this would necessarily require them to do much more than point employees towards credible sources of vaccination information. Although if there is any instance of misinformation in a work context, for example, an employee spreading misinformation or trying to encourage others not to get vaccinated, employers would be well advised to address it.</p>
<p>Clare Fletcher</p>	<p>Misinformation can of course grow, because at this stage there is still some important things we don't know about the vaccine. We don't yet know if any of the vaccines offer lasting or life-long immunity and it might well be that we need annual COVID vaccines like we have for flu, and at that point employers will need to consider a long-term vaccination strategy, perhaps offering to provide and pay for an annual COVID vaccine as some already do for seasonal flu.</p> <p>Another thing that health experts don't yet know is if the vaccine prevents transmission of the virus. The vaccine is meant to prevent people from developing the disease COVID-19, not necessarily from becoming infected with the Coronavirus. That means it's possible that a vaccinated person could carry the Coronavirus and pass it on to somebody without the vaccine who could then fall ill with COVID-19. So the upshot is that vaccination is not a silver bullet and other measures will be needed to supplement it, for example to protect those employees who can't or won't be vaccinated.</p> <p>So workplace COVID secure measures will need to remain in place for some time yet.</p>

<p>Philippa O'Malley</p>	<p>So what are the key points that employers should be taking from today's podcast? The first one is to be prepared for some significant changes in the coming months. Look out for new measures on workplace testing, we do expect this to become more frequent and widespread. Second, think about what approach you will take to COVID vaccines as and when they become more widely available. Third, update your COVID risk assessment in light of these changes and get your policies ready. Fourth, and very importantly, engage and consult with employees on your strategy. This kind of consultation on health and safety measures is of course a legal requirement and is also very useful in demonstrating that your approach is proportionate. Overall, it helps achieve buy into the policy which will be key to getting employees back to work safely and comfortable returning to work safely. In the meantime, employers will need to continue following government guidance around remote working and making their workplaces COVID secure. These rules are likely to remain important as we move into a world where all employers will face a mixed employee population; those vaccinated and those not vaccinated.</p>
<p>Clare Fletcher</p>	<p>Thanks Philippa. That brings us to the end of today's podcast, thank you all for listening. You can find all of our podcasts via the Slaughter and May website. Thank you and goodbye for now.</p>

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