

Ward Hadaway FAQs

On the Vaccination as a Condition of Deployment (VCOD) for Healthcare

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 were amended on 9 November 2021 to provide that the registered person can only employ or otherwise engage a person in respect of a CQC regulated activity, if the person provides evidence that they have been vaccinated with a complete course of an authorised vaccine against COVID-19, or if otherwise vaccinated against coronavirus is also within a specified time period, vaccinated with a single dose of an authorised vaccine, subject to specific exemptions.

Two guidance notes have been provided. Phase 1: Planning and Preparation [C1470-vcod-for-healthcare-workers-planning-and-preparation-guidance.pdf \(england.nhs.uk\)](#). Phase 2: VCOD Implementation [C1545-update-vcod-for-healthcare-workers-phase-2-implementation.pdf \(england.nhs.uk\)](#)

Caroline Shafar specialist in Healthcare Employment, answers some FAQs.

1. What are the key dates?

- 6 January 2022 – 12 week grace period
 - This is the start date following which staff are required to get their first vaccine.
- 3 February 2022 – this is the last date to get the first dose of the vaccine
 - All staff should have managed to obtain their first dose of the vaccine by this date.
- 4 February 2022 – this is the first date you can give notice of termination of someone's employment
- 31 March 2022 – the earliest that notice of termination can expire
 - If you have got somebody who, as at the 4 February, has a longer notice period than that, their employment of course will terminate after 31 March but anyone else with a shorter period of notice, the earliest that their employment can terminate is 31 March
- 1 April 2022 – these Regulations come into force.

2. Which organisations have to comply?

Any organisation where the "registered person" is responsible for the delivery and quality of service providing CQC regulated activity in England.

- What is a registered person? A registered person is an individual, partnership or organisation registered with the CQC for regulated activity. The registered person is the healthcare provider.

This covers the following:

- NHS Trusts/Foundation Trusts
- ITSs
- CICs
- GP Practices
- Dentists
- Community services providing care in a person's home
- Private healthcare
- Any other organisation registered with the CQC to provide healthcare facilities.

The Registered Person needs to have systems in place to record whether staff are fully vaccinated.

The Registered person will need to be able to evidence and monitor that all independent contractors, agency or bank staff who have face to face contact with patients/service users are also fully vaccinated.

3. What are regulated activities?

This is important when determining who is and is not in the scope i.e. who has to be vaccinated? You will need to refer back to whether or not they are working with regulated activities. You can find out what regulated activities is through the CQC. For many of you, this is a relatively straightforward answer. You will know if you are providing regulated activity.

This covers things such as:

- Personal care
- Accommodation for persons who require nursing or personal care
- Treatment of diseases or injury, surgery, diagnostic proceedings,
- Accommodation for persons who require treatment for substance misuse
- It also involves maternity and midwifery services, transport services, triage, supply and management of blood, services for swimming clinics, nursing care, family planning, also apply to children and adult services around mental health, learning disabilities, substance misuse, hospices, and health industry secure settings – those are all regulated services by the CPC.

4. Who is/is not in Scope?

This is one of the areas that the most number of disputes will arise. We will have organisations saying you are in scope and individuals saying we are not in scope.

On the face of it, very simply:

In Scope

- Anyone over the age of 18 (unless exempt – see below)
- Who has face to face contact with patients and service users
- Is deployed as part of CQC regulated activity
- It will cover both clinical as well as non clinical e.g. porters, cleaners, receptionists if they have face to face contact with patients and service users.
- It also includes bank and agency workers, contractors, volunteers, locums, honorary contract-holders, students and trainees
- All of those who are going to be working in patient based service user role and over the age of 18.

Not in Scope

- Under 18
- Medically exempt
- Participated in a clinical trial for the COVID-19 vaccine
- Pregnant and have a temporary exemption which is valid until they are 16 weeks post birth

5. Scenarios

- VCOD will not apply if the individual provides care remotely e.g. triage or telephone consultations
- Managerial roles off site
- If you are on long term absence e.g. sick leave or maternity leave. Only apply if they are coming back or KIT days

The guidance provided a number of scenarios to assist with our understanding as to who may or may not be in scope.

- One example is an electrician, a tradesperson, who is going to visit a hospital ward to fix some loose cabling. The answer to this scenario is that this individual would not be in scope. They are not providing regulated activities in a face to face user situation so they are not in scope of the policy.
- The guidance goes on to state that maintenance workers who are employed in the hospital estates and facilities team would be in scope because they were part of the provision of the CQC regulated activities and are likely to have social contact with

patients in clinical areas. So you can see the logic in that the electrician in this scenario who is visiting the hospital is not employed by the Trust, he does not work for the hospital Trust, and is therefore not themselves in a role which is going to be undertaking regulated activity. But question whether the Trust would have to assure themselves that this individual has in fact got the appropriate vaccinations through the contractor that they are using because, remember, that whilst the regulations apply to the individuals you directly employ it also applies to any workers that you have on site through the agency, and independent contractors, by way of example. So in that scenario where you have individuals on site from independent contractors there is requirement for you to ensure that they are complying with the regulations i.e. being double vaccinated. The question in that scenario is whether you need to ensure that that tradesperson was himself double vaccinated.

- Another example where you have a volunteer who is working in a hospital shop within an antenatal clinic. In that scenario, you would say no, that person is not in scope because they are not deployed by the registered person i.e. the Trust to provide provision of regulated activities. That is relatively straightforward.
- A further example is where there is an outpatient pharmacy. Now in that scenario again the answer is no, they are not in scope. Then you might hesitate there and think, hold on, if you are working in pharmacy aren't the rules that you have to be double vaccinated. That is the question for the company that owns the pharmacy but as it is an outpatient pharmacy i.e. a pharmacy that is tagged on to a hospital building, not an inpatient pharmacy, it is not for you the organisation, the hospital, the Trust to require that the individuals in the outpatient pharmacy are double vaccinated. That is entirely a different question for the people who run and own that pharmacy.

So whilst there is still going to be some uncertainty in the more complicated and less clear roles around who is and is not in scope, the examples are quite helpful.

What if you're not sure whether a role is in scope?

When you are deciding about whether a role is or is not in scope, just make sure that you are documenting your decision making and thought process. Then if the CQC do knock on your door and ask you to produce the evidence of who has been vaccinated and the assessments you have made about whether or not the roles are in scope, you have got the evidence there and your thought process and you can justify that.

As the CPC are going to check organisations records as to who is and is not vaccinated and whether they should be to do their role, you must keep written documentation as follows:

- Record your assessment of the role and reasoning why you determined that it was out of scope.
- A key point is the impact on quality of care and people's welfare safety

7. How to obtain information on vaccination status

- ask staff
 - some may provide information merrily whilst others may be hesitate to divulge what they see as their personal and private information
- use information from your own vaccination delivery programme

- if your organisation has provided a vaccination delivery programme, you can use those records to determine whether staff members have been vaccinated. Obviously this doesn't cover everybody in your organisation.
- use NIMS – NHS England National Immunisation System database.
 - use if an NHS Organisation or a Local Authority.

8. How does this comply with Data Protection law?

There is an exception to processing sensitive personal information and that is where there is a legal basis for doing so.

The Guidance says that there is a legal basis through COPI. The Control of Patient Information (COPI) notices provides a legal basis for NHS England to disclose information on vaccination status to support the pandemic response. Various COPI notices have gone to NHS organisations and local authorities and NHS Digital separately to give those permissions to use the information in that way.

You should ensure that you have put in your usual data protection processes about how to access that information and process that information

Limit number of staff who will have access to that information. You may have a dedicated team within HR to deal with that question of whether or not staff are vaccinated. Question if it needs to go beyond that group and if so, why?

You can only obtain from NIMS, information on COVID-19 vaccination.

You should complete a data protection impact assessment.

Have an appropriate policy document in place to deal with this very issue

Inform staff how their data is being used. It is all about consulting with staff, ensuring staff feel comfortable and trust how their data is being used and how they are going to be treated. Make sure staff are fully engaged and understand how their information is being utilised.

9. If after consultation, employees remain unvaccinated and refusing to be vaccinated what can you do?

- Consider any adjustments to their existing role to remove the face to face activity but without causing issues in terms of patient safety and delivery of care. You need to balance your duty to employees but also your duty to patients.
- Follow process to dismiss
 - If there can't be any adjustments then the next step is the dismissal process. Post 4 February, you can give notice but not until that date.
 - If you do go down dismissal process, what would you be dismissing for? You need to have good reason.

10. What would be the reason for dismissal?

- Breach of a statutory restriction
 - regulations say you have to be vaccinated and you are not; or



- SOSR – some other substantial reason
 - If staff refuse to provide information of their vaccination status and you cannot find out through other means i.e. NIMS or your own records.
- The second guidance sets out clearly the expectations of what that process is going to look like. If you do not follow that process then in an Employment Tribunal, reference will be made to this guidance to say this is what the guidance states and you should have followed it. But to be fair it is nothing unusual outside normal dismissal process.

11. What would a fair process look like?

- Step 1. Engagement with the unions
 - making sure your staff side are on board with the steps that you are proposing to take and the processes you are proposing to take. You have already been going through the process of encouraging staff to be vaccinated during this period and since November or even before in reality.
- Step 2. Formal review
 - Meet with staff members to ensure that they understand the consequences of not being fully vaccinated.
 - They have a right to be accompanied at this meeting. Ask why they will not get vaccinated. If it is around fear, try and allay those fears, and provide clinical/scientific information around the vaccine etc and get a full understanding of why they do not want to be vaccinated.
 - Explore alternative options around their role, restrictions on duties, redeployment etc. Within that make it clear that if there are no alternatives then dismissal is a real possibility and 31 March 2022 (or end of notice period if notice period is longer than 31 March 2022) will be their last date
 - Staff need to know the consequences but equally they are being heard and listened to.
 - Document it.
- Step 3. From 4 Feb- Formal meeting.
 - Give notice to dismiss within that meeting. Dismissal cannot take place earlier than 31 March 2022 (you must have considered all points the staff have given)
 - Redeployment search runs concurrently with the notice period.
- Right of appeal
- If absent from work – consult in good time.
 - Guidance that you will still consult when they are going to come back to a patient facing role and do it in good time. You would probably use same timeframe set out in this guidance if you can. Equally ask early doors about vaccination status.

12. What do we need to do around redeployment?

- Not the same as looking for suitable alternative employment in a redundancy process.
 - There is no requirement to look for suitable alternative employment – not bound by the definition.
- No slotting in expectation
- No requirement for pay protection
- Proactively identify roles
 - make sure it is clear where individuals can find those alternative roles, where there are going to be advertised;
 - provide any training they would require for redeployment; and
 - make sure agreement is documented, in writing, as you may change their terms of conditions such as change in pay and/or hours etc.
- Pause external recruitment
 - ideally need to retain individuals within the organisation if possible
- People who have not had the vaccine are not to be given preferential treatment over other staff in organisational redeployment pools and who have legal entitlement to redeployment e.g. redundancy, disability, ill health and on maternity. People with VCODs are not to be given priority over individuals requiring redeployment due to a legal requirement.
- Provide training if possible
- Agree a clear process for how jobs are to be advertised.
- If no jobs are available – they will leave employment and be dismissed.
- There is no expectation of redundancy payment, no consultation period etc, it is about always keep a dialogue going with those individuals

Documentation/transparency/consistency

- Objective criteria – make it objective as possible, document reasoning. Say 2 people are going for the same role – make sure everything transparent and documented in case of challenge, you have got your evidence in place to be able to answer that challenge.
- Also important from an equality and diversity point of view. Recommend that Managers who are managing that recruitment process are very much reminded of their role around equality and diversity.
- Perhaps make sure training is up to date on equality and diversity.
- Also challenge if a person is in scope

14. Agencies and Independent Contractors who supply staff to the NHS to do regulated activities

- If you supply staff into the NH e.g. nursing, catering, locum Doctors etc - what are your responsibilities? You, as the organisation, are not covered by regulations in the sense that you are not regulated through the CQC so your organisation as a whole - the regulations don't apply. You are likely to find that the NHS healthcare organisation that you supply contractors to are going to be seeking some assurance from you if the staff you are supplying are going to be in face to face patient roles. They will want you to ensure that the staff need to be double vaccinated, that's the likelihood.
- The guidance says that you could use this guide to frame how you approach your staff – probably not go as far as saying that you will be in a position to dismiss those staff unless there is literally nothing else they could do. There will be other areas they could work in so there will be a reluctance to say you have to terminate the contact. In this scenario you would think there is a greater expectation to try and find alternative roles for these individuals to do.
- Approach with some degree of caution. In a particular skillset there may absolutely nothing you can do and you may have no choice but there will be an expectation from a Tribunal that you take action to find alternative roles.

If you do have any questions, please contact Caroline Shafar, Stuart Craig or one of the other Healthcare Employment team.

