

GDPR Compliance and Employer Data on Employee Vaccination – Key considerations

While the most recent guidance from the Government is to return to remote working, there are some employees who can continue to work in their workplace, including many in the non-profit sector who provide services and support to the community.

This step, together with other measures announced earlier this week, is to help stem the increasing infection rates that we are currently experiencing. And with ongoing plans to roll-out a booster programme, it is worth updating employers across the non-profit sector of their responsibilities and limitations in relation to the vaccination status of their employees.

Public Health Advice

The advice from public health authorities in Ireland should indicate what data processing is necessary and legitimate in the context of managing COVID-19 in the workplace. The primary source of information in this context is the Work Safely Protocol: COVID-19 National Protocol for Employers and Workers. The Protocol sets out a number of requirements that will require employers to process personal data. For example, employers should keep a log of contacts to facilitate contact tracing. Employees should also complete a pre-Return-to-Work form, which contains their personal data. The Protocol does not currently require employers to collect any information regarding vaccination status and this is not required for pre-Return-to-Work forms.

Voluntary Nature of Vaccination

Information regarding whether or not an employee has been vaccinated constitutes health data which is a type of special category data for purposes of GDPR Compliance. It represents part of their personal health record and is afforded additional protections under data protection law. Such data can only be processed where there is a legal basis for the processing of the data under Article 6 of the *General Data Protection Regulation* (the “GDPR”) and where there is an applicable exemption to the general prohibition on processing special category data under Article 9.

The Protocol states that the decision to get a vaccine is voluntary and that individuals will make their own decisions in this regard. This suggests that COVID-19 vaccination should not in general be considered a necessary workplace safety measure and consequently, the processing of vaccine data is unlikely to be necessary or proportionate in the most employment contexts.

Specific Employment Contexts

There are some specific employment contexts within which the processing of data revealing vaccination status may be deemed necessary, subject to a risk assessment and with reference to sector-specific public health guidance. The current version of the Protocol suggests that there are a limited set of circumstances in which vaccination should be offered as a workplace health and safety measure (as provided for under the Safety, Health and Welfare at Work (Biological Agents) Regulations 2013 and 2020). There may be further situations, such as in the provision of healthcare services, where vaccination can be considered a necessary safety measure, based on relevant sector specific guidance. For example, the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners states that practitioners “should be vaccinated against common communicable diseases”. In these various situations, it is possible that an employer will be able to

identify a legitimate reason to know whether their employees have been vaccinated or not, for the purposes of managing the health of safety of workers and visitors. Employers should conduct a risk assessment through a competent health and safety advisor, with reference to any sector-specific public health advice to determine whether the measures that they consider necessary require knowledge of employees' vaccination status.

Accordingly, other than in the employment contexts referenced above, *employees should not be asked to consent to the processing of vaccine data, as this consent is not likely to be freely given* because of the inequality in bargaining power between an employer and an employee.

The processing of vaccine data by employers continues to require a specific set of circumstances underpinned by a legitimate reason other than consent.

If you have any questions relating to GDPR and vaccinations, please contact one of our team at Adare Human Resource Management.

Adare Human Resource Management is a team of expert-led Employment Law, Industrial Relations and best practice Human Resource Management consultants. For more information go to www.adarehrm.ie or call (01) 561 3594.