

CHANGES TO THE RULES ON SELF-ISOLATION IMPLICATIONS FOR EMPLOYERS

On Monday 16 August, the rules on self-isolation are changing. Employers will once again need to get to grips with more new rules and consider how to communicate them to staff and implement them fairly and safely in the workplace. Office based employers have not yet had to grapple with self-isolation much to date as many employees have been working from home. This issue will come much more to the fore for them in September, when many employers are planning a return to the office in some form.

As at Friday 13 August, some government guidance has been amended to take into account the change in rules.

From Monday, those individuals who are double jabbed and who had their last vaccination at least 14 days prior to contact with a positive case will not legally have to isolate. Those under the age of 18 years 6 months, those participating in an approved COVID-19 clinical vaccination trial and those who can evidence that they cannot be vaccinated for medical reasons will also be exempt from the legal requirement to self-isolate.

As at **Friday 13 August**, some government guidance has been amended to take into account these changes. The article below is based on the information in the government [press release](#) dated 11 August 2021 (the press release) and on the [NHS Test and Trace in the workplace guidance](#) (amended today 13 August) (Workplace Guidance), [Guidance for contacts of people with confirmed coronavirus \(COVID-19\) infection who do not live with the person](#) and the [Stay at home: guidance for households with possible or confirmed coronavirus \(COVID-19\) infection](#) (the Guidance) both amended on 12 August. Further guidance is likely to follow.

HOW WILL WE KNOW WHICH EMPLOYEES SHOULD BE SELF-ISOLATING?

It will remain a criminal offence for an employer to knowingly allow a worker to attend the workplace when they are required to be self-isolating. It is therefore important that employers understand the new rules.

According to the press release, if someone is called by NHS Test and Trace and told they are a contact of a positive case, they will be asked for their age and their vaccination status. Test and Trace will then inform them if they are required to self-isolate. The Guidance says that “if you are not legally required to self-isolate you will be provided with advice on testing and given guidance on preventing the spread of COVID-19”.

The press release confirms that, if using the NHS COVID-19 app, people will be asked to self-declare if they are under 18 or double vaccinated. The Employer Guidance says that “if you receive a contact alert via the app and you are under 18 and 6 months, fully vaccinated or otherwise exempt, you will be advised to take a PCR test, but not to self-isolate.”

Employees continue to be under a legal duty to notify their employer of the requirement to self-isolate. However, the employee is under no statutory duty to notify their employer if they are a close contact, but exempt from the duty to self-isolate. Therefore, unless an employer has a policy to request more detailed information about when someone has been in close contact with a positive case, in theory, employers should only hear about the requirement to self-isolate from employees who do not fall within the list of exemptions. They should ensure that when they receive such a notification that they do not allow the self-isolating employee to attend the workplace. The changes also mean that employers will not be aware if an employee has come into recent close contact with a positive case, unless the employer has a policy requiring the employee to notify them of this.

Different rules apply in a limited number of sites where daily contact testing is in place, where close contacts do not have to isolate because they are having daily lateral flow tests. This only applies to the workplaces that have been approved to take part in the workplace daily contact testing scheme. See the [Workplace Guidance](#) for more details of this scheme.

SHOULD WE ASK FOR CONFIRMATION OF CLOSE CONTACT NOTIFICATION ANYWAY?

Employers are subject to statutory health and safety obligations and a legal duty to take reasonable care to provide a safe place of work. Employers will also be considering business continuity in this context and seeking to avoid an outbreak of COVID-19 in the workplace. In some workplaces, additional precautions may be required, for example in the health and social care sectors.

The Guidance says “Even if you are vaccinated, you can still be infected with COVID-19 and pass it on to others.” The Guidance recommends that, as well as getting a PCR test, fully vaccinated close contacts may also consider:

- Limiting close contact with other people outside their household, especially in enclosed spaces
- Wearing a face covering in enclosed spaces and where they are unable to maintain social distancing
- Limiting contact with anyone who is clinically extremely vulnerable; and
- Taking part in regular lateral flow testing

The Guidance confirms that individuals should follow this advice until 10 full days after their most recent contact with the person who has tested positive for COVID-19.

Employers may therefore wish to ask all employees to notify them if they are identified as a close contact, whether they have to legally self-isolate or not. This could be not only close contact notification from NHS Test and Trace, but also from the NHS COVID-19 app, or where the employee knows they have been in contact with a positive case via another way. Employers should take appropriate action to protect their workforce, especially more vulnerable members of staff. In some cases, particularly where employees can work from home, this may mean requiring those who are not legally required to self-isolate to remain away from the workplace for the 10 day period.

Alternatively employers may want to encourage (or require) employees who have been in close contact to take a PCR test and receive a negative result before they come back into the workplace and to remain at home whilst they await their test result. Requiring employees to take a test result can give rise to additional issues, particularly if employees have a disability or medical condition, which means they are unable to take a PCR test. This also is not a foolproof solution as the employee may go on to develop COVID-19 a few days later.

Another option would be to give employees the choice of staying at home for 10 days, or taking a PCR test to return earlier if they get a negative result. This would avoid the controversy of requiring employees to take a test. A further modification could be to suggest that all employees remain at home for 5 days after a close contact and then have the option to take a PCR test at that point if they wish to return to the workplace before the full 10 days - test to release. This would reduce the chance of employees returning post a negative test, only to develop COVID-19 shortly after.

Where employees cannot work from home, employers may wish to consider whether they can make other modifications to work location/ duties to reduce the risk of transmission. This would particularly be the case where someone who has been in close contact with a positive case will be in proximity in the workplace to a clinically extremely vulnerable employee.

Again, the tricky question of what to pay employees for staying away from the workplace arises if they are unable to work from home. Those who have to self-isolate legally are entitled to statutory sick pay at a minimum. They may also be entitled to a payment of £500 from their local authority through the Test and Trace Support Payment Scheme. Those who are simply asked by their employer to isolate will not be entitled to statutory sick pay or a support payment. Asking employees to take unpaid leave when they have no symptoms and they are not legally required to self-isolate is unpalatable and may result in employees not notifying their employer of their close contact. Employers should seek legal advice before requiring employees to stay away from the workplace in circumstances where they are not under a legal obligation to self-isolate and they are unable to work from home.

WHAT SHOULD WE DO IF A HOUSEHOLD MEMBER OF AN EMPLOYEE TESTS POSITIVE?

The Guidance makes it clear that the same rules apply whether the close contact is external to the household or within it. This is despite the fact that people who live in the same household as someone with COVID-19 are likely to be at a higher risk of being infected than most other close contacts. We expect to see many employers asking employees whose household members are exhibiting COVID-19 symptoms to avoid attending the workplace.

WHAT CHECKS CAN WE DO?

We know that some employers have been collecting vaccination information about employees for planning a safe return to the office. But do employers need this information in order to comply with their duties regarding self-isolation? The Employer Guidance says that “Employers are not expected to check whether an individual is exempt from self-isolation.”

If an employer is taking the conservative view that all close contacts should work from home for 10 days, irrespective of age or vaccination status, there may be no need to check vaccination status.

If an employer is simply relying on its employees notifying them only when they are legally required to self-isolate, the employer should not need to check vaccination status in these circumstances either.

In some circumstances, where there has been an outbreak of COVID-19 in the workplace, an employer may wish to check which employees can legally continue to work, by checking vaccination statuses before NHS Test and Trace has become involved.

CAN WE LEGITIMATELY GATHER VACCINE INFORMATION IN COMPLIANCE WITH THE GDPR?

The ICO has an [advice note](#) for organisations about vaccination and COVID-19 status checks. It is clear that vaccine status is special category data and so special rules apply to processing such data under the GDPR and the Data Protection Act 2018. The ICO says “If you are only conducting a visual check of COVID Passes (either a hard-copy document or a pass held on a digital device) and do not retain any personal data from it, this would not constitute ‘processing’. The activity would therefore fall outside of the UK GDPR’s scope.”

By analogy, anything beyond a purely visual check, such as recording the consequences of the visual check are likely to fall within the GDPR.

We recommend that legal advice should be sought before processing any data on vaccinations.

WHAT SHOULD WE COMMUNICATE TO STAFF?

Much of the success of employer plans with regard to self-isolation issues will come down to the way it communicates with its employees beforehand. Some issues that employers may wish to cover include:

- The legal obligation to self-isolate still applies to those employees who have only had a single vaccination
- An individual is not exempt from self-isolation if identified as a close contact until two weeks have passed since their final vaccination dose
- Even double vaccinated individuals still need to self-isolate if they receive a positive COVID-19 test result
- If a double vaccinated employee's self-isolation period due to close contact with a positive case began before 16 August and was due to end after 16 August, they will be able to leave self-isolation on 16 August
- Encouraging staff to take a PCR test if they are a close contact and the employee is double vaccinated and consider asking them to remain at home until they receive a negative test result
- Any additional notification requirements regarding being a close contact
- The employer policy regarding all close contacts and whether this goes beyond the legislation

WHAT ACTION CAN WE TAKE FOR EMPLOYEES WHO ARE UNVACCINATED WHO KEEP SELF-ISOLATING?

In the coming months, there are likely to be issues arising in the workplace where employees who have not had the vaccine are required to self-isolate, possibly on a frequent basis.

There may be many reasons why employees are not vaccinated. For example, some younger people are not yet vaccinated – this number will reduce in the next 3 months. It could be because of a reasonable decision based on the risk of side effects. It could be for a religious or philosophical reason or perhaps because of pregnancy/ breastfeeding. It could also be linked to race. If employees cannot work from home, employers will have to grapple with the issue of pay. Withholding pay in these circumstances is a minefield. It raises the risk of indirect age discrimination, disability discrimination and possibly religious belief/ philosophical belief or race discrimination claims.

Helpfully though, where an employee is not able to receive the vaccination for medical reasons, they will not need to self-isolate when they are a close contact of a positive COVID-19 case.

CAN WE GIVE PRIORITY TO FULLY VACCINATED STAFF GOING FORWARDS?

It is possible in some sectors, especially where working from home is impossible, that employers may wish to limit recruitment to those who are fully vaccinated. Employers would be well advised to tread very cautiously before implementing such a policy. It is rife with the possibility of discrimination claims.

WHAT DO WE DO IF ONE OF OUR WORKERS TESTS POSITIVE?

The Workplace Guidance states that employers should call the **Self-Isolation Service Hub** on 020 3743 6715 as soon as they are made aware that any of their workers have tested positive. In these circumstances, you would need to provide the 8-digit NHS Test and Trace Account ID of the person who tested positive, alongside the names of co-workers identified as close contacts.

In the event of an outbreak in the workplace, the Workplace Guidance says that “employers should follow their established outbreak processes and seek advice from their local health protection team as appropriate.”

KEY CONTACTS

For further information about any of the issues raised in this guide, please contact:



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