

This information sheet is intended to address issues at the workplace in relation to the COVID-19 mass vaccination programme which is currently being carried out and the data protection issues that may arise.

Employers are likely to be facing one of their biggest challenges yet during this pandemic which has significantly shaken the ground we were used to walking on. Employers who support vaccination and are confident in its recorded effects cannot be blamed for wanting to know which of their employees have been vaccinated. Whilst vaccinated employees may have no problem disclosing such facts to their employer, data privacy issues may arise in cases of persons who have refused to get vaccinated for some reason or other.

Like many other data privacy issues, the answers are not a one size fits all. The extent, if at all applicable, of what data you are permitted to access in such situations will vary and depend greatly on the industry you operate in, who your customers and employees are, and whether any specific health concerns may exist in your field. The most important consideration to keep in mind is that decisions should be taken based on the data privacy principles¹ and in some cases based on the findings of a Data Protection Impact Assessment.

The following are the questions being answered in this information sheet:

Can employees' personal data be shared with a public health authority and/or a relevant body wishing to invite employees to have the COVID-19 vaccine?.....	2
Can employers keep a record of which employees have been vaccinated?	3
What lawful basis should I use to record my employees' vaccination status?.....	4
How long should an employer retain employees' vaccination data?	4
Can vaccination data be used for recruitment purposes?	4
Do employees have the right to be notified if a colleague refuses to be vaccinated?.....	5

¹ Lawfulness, fairness and transparency.
Purpose limitation.
Data minimisation.
Accuracy.
Storage limitation.
Integrity and confidentiality (security)
Accountability.

Can employees' personal data be shared with a public health authority and/or a relevant body wishing to invite employees to have the COVID-19 vaccine?

Yes. Data privacy legislation does not prohibit the sharing of information where it is necessary and proportionate to do so. A distinction must however be drawn – this is not a case of forcing employees to take the vaccine. This is about providing their data to the health authorities to invite them to take it. As things stand, they will nonetheless be called up at any stage in the upcoming months.

There is no need to rely on consent if a public health authority and/or a relevant body wants to offer the COVID-19 vaccine to your employees. It is important to note that consent is only valid if it is freely given. This is often where issues arise in employment relationships, due to the imbalance of powers between the employer and the employee. However, in this case, consent is a non-issue.

There are other lawful bases an employer can rely on in order to share such information. Employers may consider any of the following:

- **Legitimate interests.** This is applicable where there is a compelling justification for the processing. This basis recognises that sharing the data is likely to be in the interests of the individual, the organisation and the public health efforts to tackle COVID-19, as long as you protect individuals' rights, and you follow data protection principles.

- **Public task.** This is likely to be applicable if you are a public authority and you can identify a task, function or power with a clear basis in law - such as your legal responsibilities around public health – which requires you to share this data.

- **Legal obligation.** You can rely on this lawful basis if you need to share personal information to comply with the law. At the time of writing this note there is no law which obliges you to do so.

Make sure that any data transfer is effected in an adequately secure manner and you must furthermore ensure that you have implemented the appropriate technical mechanisms to effect such a data transfer securely to the relevant bodies. In doing so, make sure that you are only sharing just what is necessary to fulfil this purpose.

You should always inform your employees about the personal data sharing and let them know which data was shared and for what reason. In the process, make sure that your employees can exercise their information rights. This will require reviewing and updating your data privacy notice to your employees. Another option is having in place a vaccination policy also covering the data protection implications.

Employees, like all data subjects, have the right to object to the sharing of their personal data in certain circumstances. Upon receipt of such a request from an employee, you should definitely take their views into consideration and the decision should be based on whether the need to share the data overrides the interests of the employee/s objecting to the transfer and any applicable duty of confidentiality, considering the context of the pandemic.

Can employers keep a record of which employees have been vaccinated?

This is a thorny issue which is still currently the subject of intense debate. Taking into account that vaccination is not yet mandatory but only recommended by the authorities, it therefore renders itself a strictly personal health issue, which classifies itself as a special category of personal data.

Whilst several parties have been arguing for the right for employers to be allowed to ask employees whether or not they have been vaccinated, the data privacy implications can be significant. The employer must ask oneself about the *reason why* such data is being requested – what does one intend to achieve by doing so? How shall such records be eventually retained?

When processing such data, an employer should identify both a lawful basis under Article 6(1)², and a condition for processing under Article 9³, of the General Data Protection Regulation. If this is not possible, any processing will be in breach of the data privacy legislation.

Thus, an employer's justification for processing their employees' vaccination status must be compelling and clear. Such data should never be processed on a "just in case" basis. Relevant factors would include the industry/sector the employer operates in, the type of work carried out by the employees, and the actual health and safety risks at the workplace.

Furthermore, vaccination status classifies as health data, which is a special category of data. In other words, it needs further protection. It also means that a specific justification for processing⁴ must be identified. In this case, the employment justification or the public health justification are likely to be considered as most appropriate. In cases, where the latter condition will be used, you must ensure that

² The lawful bases for processing personal data under Article 6(1) of the GDPR include:

- Employer's legitimate interests. To rely on this category, employers will need to identify a legitimate interest and show that processing is necessary to achieve it, taking into account the employees' interests, rights and freedoms.
- Consent. However, consent is rarely appropriate in an employment setting given the imbalance of power between the employer and employee. The difficulties with using consent as a grounds for processing data in the employment context mean that it is likely to be better to find an alternative basis for processing the data.

³ The grounds for processing special category data include:

- Performance of rights and obligations in connection with employment. This could include processing in order to ensure the health, safety and welfare of workers and ensure a safe working environment.
- Health purposes. The reasons for processing special category personal data for health purposes include where it is necessary for the assessment of the working capacity of the employee.

⁴ Explicit consent

Employment, social security and social protection law

Vital interests

Not-for-profit bodies

Made public by the data subject

Legal claims and judicial acts

Substantial public interest conditions

Health or social care

Public health

Archiving, research and statistics

the processing is carried out by a health professional, or that employees are informed that their vaccination status is being treated as confidential, and disclosure will only occur in defined circumstances.

If such data is processed, employees should be informed about:

- What personal data is required.
- Who it will be shared with.
- How long it will be kept for.
- What decisions will be made based on the data held.

What lawful basis should I use to record my employees' vaccination status?

A lawful basis for processing is strictly contingent on having a good reason to do so, as described above - one denotes the other. This will be wholly dependent on your specific situation. The answer to this can generally be denoted from the question “*why* do I need to process this data?”

For instance, should a public authority process this kind of data, its lawful basis would most likely be that of pursuing a public task. However, when it comes to a private employer, other options can be legitimate interests, and the reasons justifying this may vary. For example, a care home for the elderly may infer the necessity to protect the health and safety of its patients however may not be able to justify it until there has been a full vaccination roll out. Other companies may require vaccination for employees who travel often to countries where vaccines may eventually become mandatory. This necessitates the execution of a self-made assessment for the relevant organisation, in some cases including a Data Processing Impact Assessment.

How long should an employer retain employees' vaccination data?

This is a very fluid area. As information about both the virus as well as the vaccines develops, today's employer's reasons for keeping vaccination data for as long as originally intended may not be justifiable at a later stage.

In the first place, employers must always ensure they have a legal basis to retain information of which employees have received the vaccine. This information should be kept accurate and up to date. It should also be deleted when it is no longer needed.

It is advisable to carry out a review, on a regular basis, on whether there are grounds to collect and store vaccination data. This should be carried out during the progression of the vaccination roll-out. Such a review should also include the monitoring of the most recent scientific and government advice on the vaccine roll-out and coronavirus restrictions.

Can vaccination data be used for recruitment purposes?

The processing of vaccination data should never result in any unjustified or unfair treatment of either job candidates or employees. Such processing should only be carried out for the purposes candidates and employees would reasonably expect and have been informed about.

If the processing of such data is likely to result in a high risk to individuals, such as a denial of employment opportunities, it is advisable to carry out a Data Protection Impact Assessment (DPIA). This will help the employer understand whether such information gathering is actually needed and to demonstrate the grounds for processing this special category of data would be.

Do employees have the right to be notified if a colleague refuses to be vaccinated?

As mentioned earlier, data about an employee's health is a special category of personal data. It can only be processed in defined and restricted circumstances.

Employers should respect their duty of confidentiality owed to their employees and should not routinely disclose vaccine status among the employees unless they have a legitimate and compelling reason to do so. It may therefore be appropriate for an employer to advise employees that not all of their colleagues have been vaccinated, but it would be inappropriate to identify which employees are unvaccinated in most circumstances. However, the employers' interests at large must once again be balanced with the fundamental right of the data subjects. For example, in a case where all employees but one have disclosed the fact that they've been vaccinated, the employer's statement that one employee has not been vaccinated will constitute certainty as regards the identity of such employee.