



GENERAL
ADVICE IN THE
HEALTHCARE
SETTING –
UNVACCINATED
EMPLOYEES



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INTRODUCTION

MARCH 2021

Whilst the staff of many Healthcare Providers, including GP Practices, have now received a Covid-19 vaccination, some healthcare employers have raised queries around managing the Practice in circumstances where some staff have declined to avail of vaccination or are unvaccinated for any reason.

The following information may be of interest by way of general advices/comment.

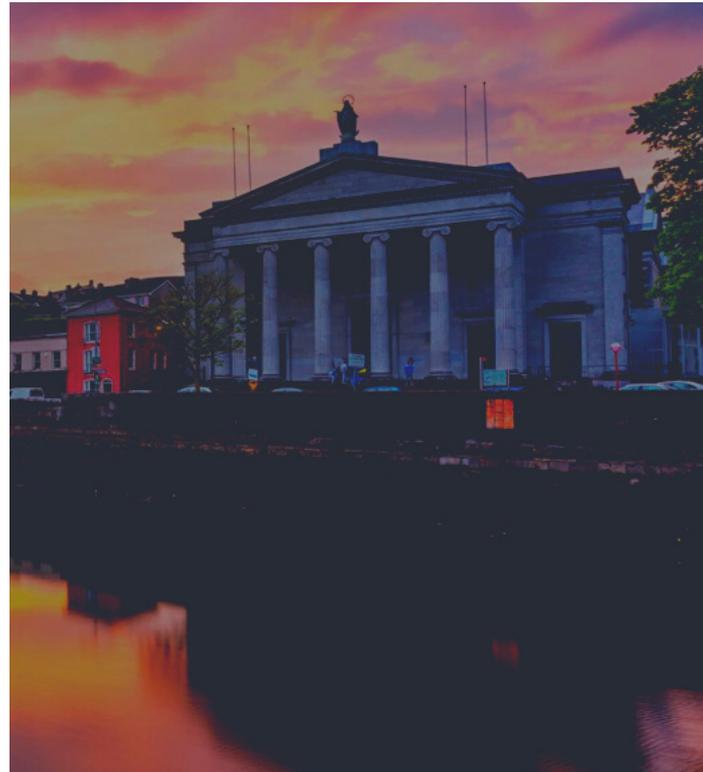
Please note that this article is by way of general advice and comment only. Circumstances surrounding individual cases will vary. Medisec Members must consult with their own Practice Solicitors on a case by case basis if they have a specific query or require specific advice.

COVID-19 - WORK SAFELY PROTOCOL

All workplaces are required to develop a Covid-19 Response Plan. There are helpful templates, guidance and associated checklists available at www.hsa.ie/covid19.

The Practice's Covid-19 Response Plan should be updated as required. It should take account of the Government's "Work Safely Protocol" (updated November 2020) available [here](#).

The Government's "Work Safely Protocol" includes a requirement on Employer to review and update the Employer's occupational health and safety risk assessments and safety statement.



The Safety, Health and Welfare at Work Act 2005

Employers have a duty of care towards employees in relation to safety, health and welfare under the Safety, Health and Welfare at Work Act 2005.

Equally, employees have a responsibility for their own safety, health and welfare and that of others in the workplace. This is unlikely however to extend to requiring an employee to avail of vaccination.

In relation to Covid-19, Employers should undertake a risk assessment to assess the risk of any employee potentially contracting the virus and/or potentially passing on the virus to other employees or to patients. These Risk Assessments should be updated regularly and as required, to take account of any updated circumstances or developments (which may include assessing the position where there are unvaccinated staff employed in the Practice).

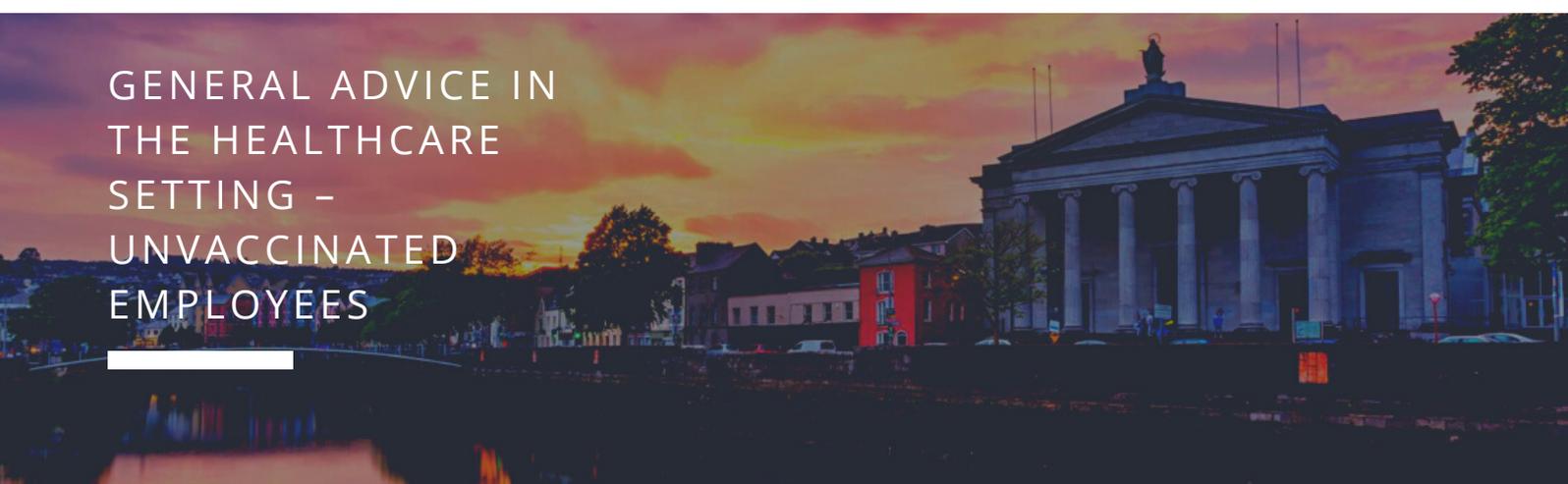
If a risk is identified, the employer must consider whether it needs to take measures to ameliorate that risk.

In addition to its duty of care to employees, a healthcare provider/GP practice undoubtedly has a duty of care in respect of patients/service users. If additional measures need to be taken to minimise any additional risk to other staff or patients in so far as unvaccinated employees are concerned, those measures should be reasonable and proportionate and should not be discriminatory.

At present, as limited evidence is available, there may remain a possibility that a vaccinated person could be a carrier of the Covid-19 virus and still transmit the virus to another person.

This raises two questions for a GP Practice to consider as part of a Risk Assessment:

1. The vulnerability of, or risk to, unvaccinated workers attending at the workplace.
2. Whether an unvaccinated employee poses more of a risk to patients or other employees than a vaccinated employee.



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Risk Assessment Outcome

There may be instances, based on the outcome of the Risk Assessment, that if an employee is not vaccinated that they would not be regarded as safe to perform certain tasks which would normally form part of their role, however, clearly there will need to be an adequate objective basis to justify such a conclusion.

If a Risk Assessment determines that a particular employee is not regarded as safe to perform certain tasks and the risk posed by the employee cannot be ameliorated satisfactorily, then the options for an Employer may be:

- a) Re-deploy the employee to alternative duties.
- b) Request the employee to work from home.

If these are not viable options for a Practice for operational reasons:-

- c) If relevant, an Employer may consider endeavouring to agree with an employee that they will take annual leave for a particular day or days when a risk cannot be satisfactorily ameliorated.
- d) Direct the employee to remain at home and not attend the workplace due to an unacceptable risk.

There remains some uncertainty in a situation where an Employer considers an employee is not regarded as safe to perform any of their tasks (and cannot work from home or do alternative duties, for example) on a long-term basis. That situation raises the following questions:

1. Whether an employer should be expected to pay an employee where an employee is deemed unsafe to work due to an unacceptable risk as a result of non-vaccination and is therefore unavailable for work.
2. The question of an employee's continued employment with the employer.

The position has not been tested or determined by the Courts or employment adjudicatory bodies to date.

Where an employee has declined vaccination, there is a risk of an employee discrimination claim if an employee considers they are being penalised due to their decision to decline vaccination related to any of the protected grounds under employment equality legislation. Whether an employee may have a possible discrimination claim will of course depend on the particular circumstances of the situation complained of.

DATA PROTECTION

- As an aside, an employer should avoid disclosing to employees the position as to whether other employees have been vaccinated for data protection reasons.

PROCEED WITH CAUTION

- The above is provided by way of general advice and comment only. Circumstances surrounding individual cases will vary. All GP practices need to carry out their own clinical risk assessment and consult with their own Solicitors if they have a specific query or require specific employment advice.

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