

## **COVID-19 VACCINE EXEMPTIONS – LEGAL SUMMARY**

### **Purpose**

**This information sheet outlines the current legalities of obtaining a clinical/medical exemption for anyone unable or unwilling to receive any COVID-19 vaccine.**

### **Disclaimer**

*This leaflet reflects the opinions of the authors only and is not, and should not be taken as being, comprehensive or authoritative in any manner to any particular case or situation or set of facts.*

*Each case will depend upon its own facts, and the law must be interpreted and applied to the facts of each individual case. We make no representation and offer no assurances about the contents of the information sheet or the applicability to any one case. This leaflet does not give, nor is it intended to give, any legal or medical advice.*

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### **Audience**

- Doctors (or their delegated Health Care Professionals)
- Workers who cannot have or choose to forgo the COVID-19 vaccine
- Care Home (or other) Employers

### **Background**

This document is based on:

- The Health and Social Care Act 2008 (s.20)
  - The parent Act which provides the powers to make the regulations of the health care professions;
- The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (s.5)
  - which amends The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 to include (s.12(3)).

### **Summary of Changes to the Law**

The amended 2014 Regulation s.12(3)(b)(i) imposes the requirement for registered persons (ie care home or other employers) to be satisfied with evidence that a person entering a care home or being employed by them has been vaccinated **OR** s.12(3)(b)(ii) has a clinical reason for not being vaccinated.

Exceptions include residents and their visitors; persons entering for emergency assistance or urgent maintenance; people visiting a resident who is dying; people providing "comfort or support to a service user in relation to a service user's bereavement following the death of a friend or relative" and those under 18.

There is no definition of 'satisfied' or 'evidence' or 'clinical reason' and there is no requirement to log that evidence. Imposing mandates over and above these legislated requirements is overstepping the law, may be unlawful or unreasonable and could be actionable.

### **Clinical (Medical) Exemptions**

When the government explained its plans to vaccinate care (or other) workers, they did not clarify that there would be valid clinical reasons not to be vaccinated, nor what those might be, or how this would be stated, including self-certifying.

Further the government did not define 'clinical reasons' for exemption in the legislation; likely because they understand that it is not possible to legislate away the right to informed consent.

**It is a well-established legal principal that a failure to give informed consent is a clinical reason not to be vaccinated.**

The right to informed consent is firmly enshrined in UK and International Law as documented clearly in Article 6 of the Universal Declaration on Bioethics and Human Rights 2005, which the UK signed up to adhere to, where it states that "*any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information.*" [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html)

The government has issued 'guidance' for people to 'prove' they are unable to get vaccinated. They are led to believe that this guidance is law and must be followed. **Guidance does not override the legislation.** This paper will set out and explain what clinical/medical exemptions are available.

### **What legal clinical/medical exemptions are available to a care home (or other) worker (Person B)?**

There is a real and present threat from the requirement for vaccine passports, which means mandatory vaccination within the setting or establishment that requires the vaccine passport. This understanding of the law will help declare legal exemptions in any 'mandatory vaccination' or 'vaccine passport' situation that is imposed, whether by government or any other organisation.

The recent **UK government legislation (as above) does not override the legal right to informed consent** and it is possible to simply decline to be vaccinated (non-consent) and/or self-declare vaccine exemption.

**The 'Right to Decline Treatment' is a legally protected human right of bodily autonomy**, which no person including the government can trespass on without there being exceptional circumstances relating to lack of mental capacity. **Declining vaccination amounts to a clinical reason why someone should not be vaccinated.**

- **Anyone can self-declare an exemption or get a health professional to declare an exemption.**
- The legislation does not stipulate that the clinical/medical exemption must come from a doctor.
- A valid reason for exemption need not be listed on the government web site. The list of clinical/medical exemptions is NOT EXHAUSTIVE. Person B could potentially list ANY exemption that applies to themselves.



- A care home manager has absolute discretion as to what evidence satisfies that Person B is either vaccinated or should not be vaccinated for clinical reasons.
- There is nothing in the legislation to prevent Person B from declaring an exemption verbally and nothing to prevent the care home from accepting that.
- The NHS app and any government exemption document is NOT a necessary exemption evidence by law.
- The Government guidance sent to care homes, dated Sept 15 2021, stipulated specific forms for the workers to apply for a formal medical exemption through the NHS COVID Pass system. **Guidance is NOT LAW. There is no legal foundation for this guidance that workers need to apply for a formal medical exemption.** Further, the UK government has no legal authority to insist a worker use a particular form to declare their exemption.
- There is nothing temporary about self-certified exemptions as they do not expire; therefore, there is no legal requirement to re-certify when the government's clinical review process goes live. If the government's 'temporary exemption forms' with an express expiration term was previously used, it is possible to simply self-certify again in another alternative form.
- [Here are some forms](#) that may be useful to declare a COVID-19 vaccine exemption.
- Information in the video from [CACUK Legal Surgery – Assert your vaccine exemption](#) may also be helpful
- Anybody who felt harassed, coerced, or stood to lose income because they did not get vaccinated would have been legally exempt, under the law pertaining to informed consent being necessarily free of coercion or penalty.
- If an employer is threatening to terminate employment for declining vaccination, the recommended route is to first try verbal conversations and informal written correspondence outlining your legal rights. If this is not well received, a formal letter may follow.

Examples are: - [Exemption letter to care home manager](#)  
- [Open letter re vaccination mandates](#) - to be adapted as required.  
- [PJH Law Pre-action Letter Employee Vaccine Mandate](#)

The Workers of England Union also has a [fact sheet on this process](#).

### **Can a care home manager / employer (Person A) accept a self-declared exemption?**

The Regulations give the care home (or other) employer (Person A) discretion over what 'evidence' they accept and whether or not to process it. **Government letters and guidance CANNOT override legislation.** The legislation requires a person only to provide evidence which satisfies an employer that for clinical reasons this person should not be vaccinated.

- **There is nothing in the legislation to prevent Person A from accepting a verbal or written selfdeclared (or other) exemption.**
- Person A has complete discretion on what evidence they will accept as a clinical reason for exemption. Clinical reasons can include anything that affects Person B personally.



- Written exemption forms are not required by the legislation. Person B only needs to satisfy Person A that they have an exemption.
- Person A is under no legal obligation to only accept government forms; therefore, alternative forms may be accepted with no consequence.
- **Person A would be making a negligent mistake in law in not recognising the absence of valid informed consent as a self-certified clinical reason why a person should not, and indeed cannot be, lawfully vaccinated.**
- The obligations under the amended 2014 Regulation are complied with by Person B's verbal or written statement regarding their medical reason for exemption, or that they have not given informed consent to vaccination, as the failure to give informed consent is a clinical reason not to be vaccinated. **The verbal or written statement amounts to satisfactory evidence which discharges Person A's obligations under the regulations.**
- Any Person A who is concerned that they may be prosecuted for failure to comply with the requirement of Regulation 12 s.3(b), or failing their general duty with regards to persons other than employees, should be aware the s.22(4) of the 2014 Regulations provides a defence for a registered person if they can prove that they took all reasonable steps and exercised all due diligence to prevent the breach of any of those regulations that has occurred. S.4 of the Health and Safety at Work Act also only requires steps to be taken insofar as they are reasonable for a person in that position to take and, where they are reasonably practicable.
- The amended 2014 Regulations s.12(3)(b) must be interpreted in a way that is consistent with the language used. The word "satisfies" means satisfies in a lawful way. The words "for clinical reasons should not be vaccinated" must therefore be interpreted in accordance with the rule of law and established and recognised case law.

## APPENDIX

### Case law showing that a lack of informed consent, i.e. simply saying no to medical treatment, is a valid reason to not get vaccinated

- In *Montgomery v Lanarkshire [2015] UKSC 11*, there is an exemption on evidence of medical reasons, and the Supreme Court recognises at common law that **denial of free and informed consent is a selfcertified medical reason**. <https://www.supremecourt.uk/cases/docs/uksc-2013-0136-judgment.pdf>
- In *R Wilkinson v Broadmoor: [2001] EWCA Civ 1545*, Lady Justice Hale, Supreme Court President, confirmed that **forced medical procedure without informed consent "may be sued in the ordinary way for the (common law) tort of battery"**. <https://www.bailii.org/ew/cases/EWCA/Civ/2001/1545.html>

In the judgement it was held that acting under statutory authority provides no defence, therefore the employer will be guilty of coercion on the threat of battery with regards to unlawful dismissal, if express evidence of denial of informed consent are unlawfully rejected.

This will result in a breach of contract and also a Tort that can be sued. The above is why mask "mandate" exemptions were self-certified. It is unlawful for doctors to interfere with the process of free and informed consent. **If consent is given but the patient subsequently proves that information provided at the time breached the above common law test of informed consent, the Tort of battery is committed, and the medication is unlawful.**

- In *Bell v Tavistock [2020] EWHC 3274*, The High Court has found children incapable of providing Gillick Competency for experimental medicines with unknown long-term effects. Schools therefore risk being sued for battery if ignoring parental preferences. <https://www.judiciary.uk/wpcontent/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>
- These principles are also discussed without reference to case law on this important NHS page on Free and Informed Consent and Gillick Competency. [Consent to treatment - NHS \(www.nhs.uk\)](https://www.nhs.uk/consult/condemned/consent-to-treatment)
- *Burton Hospitals NHS Foundation Trust [2017] EWCA Civ 62*, provides information on the Doctor's obligation to provide information to inform consent. <https://www.bailii.org/ew/cases/EWCA/Civ/2017/62.html>
- In *SS v Richmond [2021] EWCOP 31*, forced Covid vaccination of a patient with dementia, lacking capacity but previously objecting to vaccination, was found unlawful. <https://www.bailii.org/ew/cases/EWCOP/2021/31.html>
- In *Chester v Afshar [2004] UKHL 41*, The House of Lords decided that a doctor's failure to fully inform a patient of all surgery risks vitiates the need to show that harm would have been caused by the failure to inform. <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041014/cheeste-1.htm>
- In *Sidaway vs Bethlem [1985] AC 871*, a mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death. <https://www.bailii.org/uk/cases/UKHL/1985/1.html>