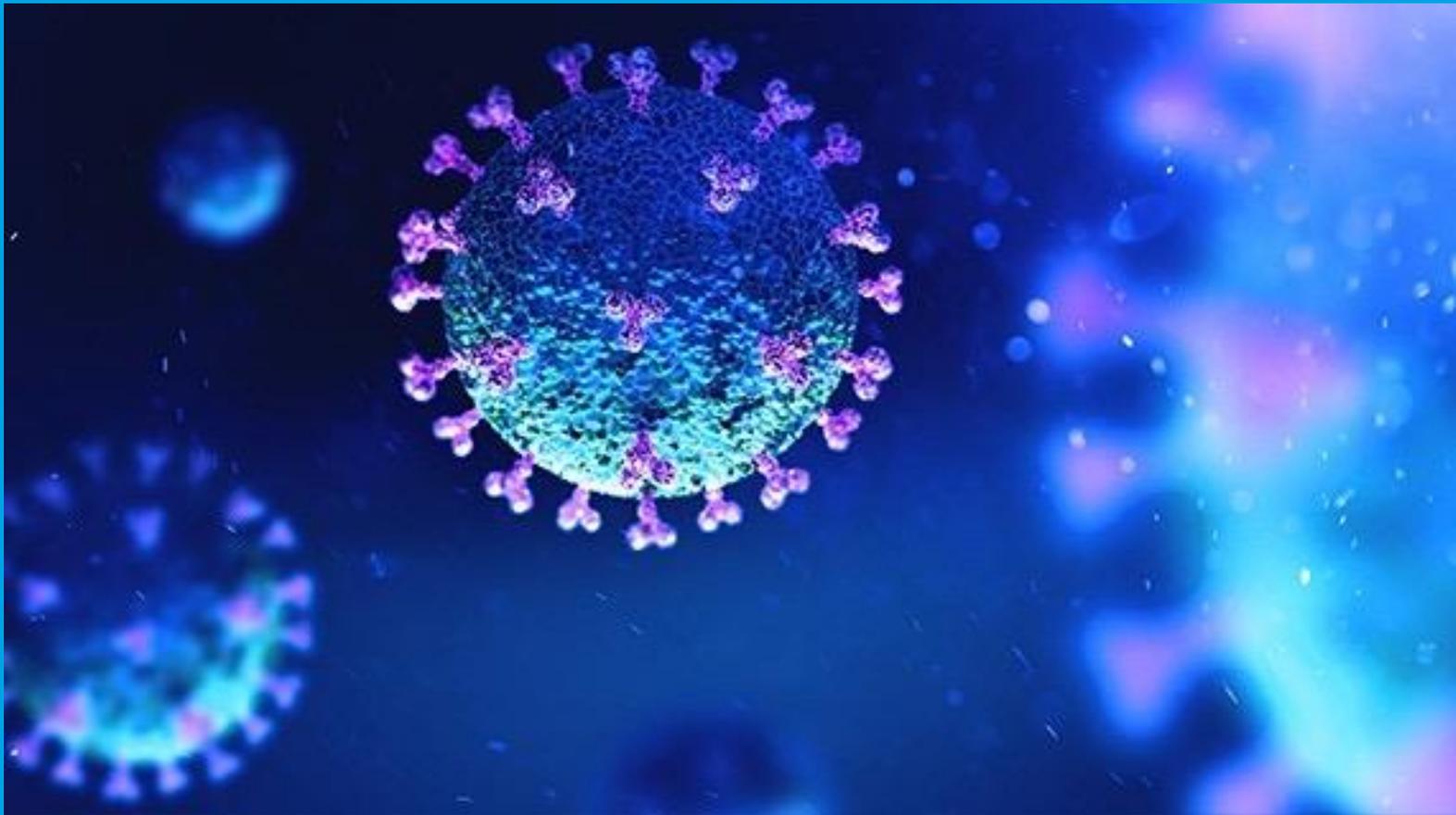


WP3-D2A ‘No jab, no job’? Employment law and mandatory vaccination requirements in the UK

Lilian Edwards, Keri Grieman



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**British Institute of
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The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

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This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust.

In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations.

This project examines two critical enablers of that trust: good governance and the rule of law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

- (1) International governance frameworks for public health emergencies.
- (2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, courts and police.
- (3) UK case studies and a literature review of data governance (national and international) in relation to the use of data driven technologies in the pandemic emergency
- (4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

This report forms part of Work Package 3. This work package examines how good governance and rule of law principles can help to build public trust in data-driven technologies introduced in response to public health emergencies. The work package outputs address a range of technological responses to Covid-19 by discussing the legal frameworks that govern them and identifying the issues and challenges that they give rise to from a public trust perspective. The outputs comprise:

- Rapid Evidence Response Review of Data-Driven Responses to Public Health Emergencies (WP3-D1)
- 'No jab, no job'? Employment Law and Mandatory Vaccination Requirements in the UK (WP3-D2A)
- 'Venue Check-In' or 'Presence' Apps (WP3-D2B)
- Judicial Scrutiny of COVID-19 Regulations in the UK: Addressing Deference to Data-Driven Decision-Making in Human Rights Cases (WP3-D2C)
- Policy Brief: Good Governance and Rule of Law Principles for Data-Driven Technologies in Public Health Emergencies (WP3-D3)

The law is stated as of September 22 2021. However it has been possible to take account of some later events. We acknowledge very helpful comments from Prospect Union and from Nyasha Weinberg, although all views expressed are those of the WP3 team.

'No jab, no job'? Employment law and mandatory vaccination requirements in the UK

WP3-D2A

Main Findings

1) *Legality, scrutiny and transparency*

- The UK government can pass specific laws if it wishes to introduce vaccine mandates in particular sectors, but has to date chosen only to do so in the limited arena of care homes with future action planned for all NHS workers; however, this leaves it open to other employers to use them as they wish subject to general law. This voluntary use by employers, in the absence of clear government advice, will lead to uncertainty, division and a lack of public scrutiny.
- The technical infrastructure for proof of Covid-19 status has largely been put in place without legislative scrutiny. Full chamber parliamentary scrutiny has been non-existent in Westminster to date (although one short notice debate was held in Holyrood) and Select Committee opposition rejected out of hand.
- Scrutiny of the actual *technologies* used to certify and read vaccination status is particularly worrying in its absence. These apps impinge upon rights but detailed scrutiny is usually only possible by looking at source code or impact assessment documents (data protection, public sector equality duty, etc.) and requires specialist know how; in some cases, publication of these documents has been delayed, or public access denied. The internal development of apps is essentially not a public process and civil society only has access, given also opposition to FOI on policy grounds, by fiat of the government.

2) *Human rights: Equality and Non-Discrimination*

- Discrimination is the major area of concern in requiring employees be vaccinated. Vaccine passports are said to create a 'two tier society', and this may be particularly apparent in workplaces with a high number of the vaccine-hesitant individuals, often drawn from the socio-economically impacted and/or BAME workers.
- For employers, worry may arise from fact that indirect discrimination may occur if, even in good faith, a vaccination mandate reduces the number of workers or applicants from certain racial, ethnic or belief backgrounds. The legal test for the employer in such cases is to show whether it is 'a proportionate means of achieving a legitimate aim'.
- In the public sector the care home legislation in force in November 2021 claims, on unclear basis, to be exempt from discrimination challenge on grounds of age, disability, religion or belief. This claim is made in guidance, not primary or delegated legislation, and seems hard to substantiate. Rule of law issues also arise where, as here, guidance is mixed up with hard law.
- Particular issues for private sector employers may arise concerning privacy rights and collection of health data; under data protection law this is sensitive personal data with special safeguards.

3) *Conclusion*

- A full-scale vaccination requirement by a non-governmental employer is unlikely to be imposed outside of specific statutory exceptions or in a small number of workplaces where eg health or travel needs make it vital. The issues of unfair dismissal and possible discrimination claims, combined with the organisational issues of practical implementation and employee resistance, in a context of existing mitigations which are less problem-raising, will probably mitigate against widespread adoption by employers in the UK; but widespread uncertainty for both employers and employees and fears of discrimination are still likely. The situation may also change unpredictably as COVID rates change.

The Vaccine Passport Debate; background and chronology

The question of whether employees can be forced to get vaccinated, or more accurately, to show proof of vaccination to go to work, has become a heated one in the UK (and elsewhere¹) in the second year of the pandemic. As lockdowns have eased, and workplaces (including public facing areas such as shops and hostelrys) have opened up, it has become an increasingly crucial issue to know how best to keep these free of infection, prevent transmission to the vulnerable public, and simultaneously kickstart the economy, without the need for constant isolation by potentially infected workers.

The debate has morphed unpredictably as vaccination has moved from a distant hope to a present normality, at least in the developed West; as vaccinations have become more widely available to increasingly young age groups, and as guidance has been rolled out to encourage some groups excluded at the start, notably pregnant women, to 'get the jab'. Questions of individual liberty versus public safety have been hotly debated. Public opinion has ebbed and flowed, as have government pronouncements. A key worry has been that of sunseting and scope creep; once vaccine passports are introduced as a public health measure, how easy will it be to stop them becoming a permanent ID card?²

The employment debate is a subset of the general debate about the ethics, legality and practicality of vaccination passports, or as the UK government prefers to call them, 'COVID-status certification', and this paper will not attempt to cover the whole debate.³ As general background, though, the UK government's position on 'vaccine passports' as a policy tool has shifted considerably over time. The Prime Minister reassured Parliament in December 2020 that 'it is no part of our culture or our ambition in this country to make vaccines mandatory. That is not how we do things'⁴. However, as of February 2021, the UK Foreign Office, the Department for Transportation and Department for Health and Social Care announced they were planning for a certification system for travellers whose destination demanded a vaccine passport as a condition of entry.⁵

¹ For discussions on the debates in different countries, see <<https://lexatlas-c19.org/tag/theme-vaccination/>> accessed 14 September 2021

² These discussions are mainly beyond the scope of this paper but see discussion in Katie Lines and Richard Mackenzie-Gray Scott, 'Written evidence from the Bingham Centre for the Rule of Law (CVC 881), Public Administration and Constitutional Affairs Committee, Covid 19 Vaccine Certification inquiry' (15 June 2021) <https://binghamcentre.biicl.org/documents/2118_written_evidence_submission_-_covid_19_vaccine_certification_inquiry_pacac.pdf> accessed 14 September 2021

³ For more information see Rapid Evidence Review of Data-driven Responses to Public Health Emergencies

⁴ Cited in Jeff King, 'United Kingdom: mandatory vaccination and vaccine conditionality' (*Lex-Atlas: Covid-19*, 14 May 2021) <<https://lexatlas-c19.org/united-kingdom-mandatory-vaccination-and-vaccine-conditionality/>>

⁵ Francis Elliott et al., 'Government Plans Covid Vaccine Passports to Allow Foreign Holidays', *sec. news*, accessed 14 July 2021, <https://www.thetimes.co.uk/article/government-plans-covid-vaccine-passports-to-allow-foreign-holidays-3mc9vd0xk>,> accessed 14 September 2021

On 10 June 2021, the Public Administration and Constitutional Affairs Committee, who had consulted publicly to consider 'potential ethical, legal and operational issues and the efficacy and appropriateness of a certificate system'⁶ reported that they did not see that a scientific case, nor a good public interest case, had been made out by the government for COVID-status certification scheme, and that there were serious ethical concerns relating to discrimination, individual civil liberties and data protection. In particular they noted:

A Covid-status certification system would, by its very nature, be discriminatory. The evidence of vaccine uptake is a clear indication that such a system would likely disproportionately discriminate against people on the basis of race, religion and socioeconomic background, as well as on the basis of age due to the sequencing of the vaccine rollout. While the Committee accepts that in emergency situations the prospect of temporary infringement of rights may need to be weighed against public health or other emergency considerations, these occasions should only ever be when there is an overwhelming case of necessity and should, in all situations, be proportionate to that necessity.⁷

However, during the course of that inquiry, the government announced their intention to move forward swiftly with a scheme to facilitate international travel by UK citizens.⁸ This was subsequently implemented for England and Wales via adapting the existing 'NHS App' used hitherto by a minority of the population (c 3 million) for GP bookings and access to medical records.

Scotland, by contrast, initially only provided a paper document to prove vaccinated status, which had no QR code for easy scrutiny, caused difficulties for international travel, and raised issues of possible fraud. Scotland however announced in early September 2021 intent to issue an app-based vaccine passport along the English lines, which would be useable not just for international travel but to be mandated for certain domestic purposes, with the scheme to launch on 1 October 2021 (see below). England had previously also announced an intention to use its vaccine passports for domestic purposes, including entry to nightclubs, although less detail was available (again, see below).

Thus, the *technical* infrastructure for use of vaccine passports, both domestically and internationally, was rather quietly put in place,⁹ in England at least, without statutory measures, parliamentary vote or indeed, the publication of a new data protection impact assessment (DPIA).¹⁰ The speed of production of an app was popularised by the desire to enable international travel during the peak holiday season of 2021. Scotland moved more slowly and held a Parliamentary debate on 9 September 2021 prior to introducing its scheme, but with no draft law to scrutinise (and a likelihood of no further debate as the law will be delegated legislation), only partial details of principles, and only a few hours' notice of these prior to the debate. It has, however, announced the intent to publish various impact assessments including an Equality Impact Assessment and a Business and Regulatory Impact Assessment at the

⁶ Public Administration and Constitutional Affairs Committee, 'Covid 19 Vaccine Certification', <<https://committees.parliament.uk/work/1104/covid-19-vaccine-certification/publications/>> accessed 14 September 2021

⁷ Public Administration and Constitutional Affairs Committee, *Covid-Status Certification: Second Report* (HC 2021-22 42) [64]. The government claimed to rebut the conclusions of the Committee in a full reply on 9 September 2021 – see Public Administration and Constitutional Affairs Committee, *Covid-Status Certification: Government Response to the Committee's Second Report*, (HC 2021-22 670). No extra evidence was supplied by the government, reference was merely made back to existing SAGE documents etc and their 'belief' that this was a valid public health measure.

⁸ Ibid [75]. The Committee were unimpressed, noting that the launch of the NHS App without notification to Parliament 'could be construed as contempt for Parliament and this Committee' [78]

⁹ C Stokel-Walker, 'The NHS App has quietly become a vaccine passport' (*Wired*, 21 July 2021) <<https://www.wired.co.uk/article/nhs-app-covid-vaccine-passport>> accessed 14 September 2021

¹⁰ See Twitter thread from 21 August 2021 with Phil Booth of MedConfidential and Pat Walshe, independent privacy consultant, at <<https://twitter.com/EinsteinsAttic/status/1429032223966121987?s=20>> accessed 14 September 2021. Note that the Public Administration Committee (above n6) recommended publication of such DPIA.

same time as the app itself. This will be helpful to civil society who have been involved in the development phases,¹¹ but does not equal prior scrutiny of the technologies. It is not known if civil society were engaged at all in the development of the English app.

Domestic uses, such as for entry to venues and hospitality, or employment matters, have been throughout more controversial than use for international travel.¹² The Cabinet Office held a consultation that attracted a remarkable number of 52,450 responses, almost all opposed to widespread use of vaccine passports, after which it was announced in July 2021 that the government in general would 'not mandate the use of COVID-status certification as a condition of entry for visitors to any setting at the present time'.¹³ However, nothing was said about any control being exerted over the use of Covid-19 certification by employers, either to require it or to restrain it, except that:

'Essential settings should not use certification, but others can decide to use it at their own discretion in compliance with legal obligations'.¹⁴

One sector was treated differently, however, as , the government also announced an intention to legislate for mandatory vaccination for workers in care homes, one of the main sites of Covid-19 infection and death in the first wave, with possible extension to all NHS workers - see discussion below.

However immediately before 'Freedom Day' on 19 July 2021, when most COVID-related restrictions were dropped in England and Wales, the government suddenly announced plans to mandate a requirement for vaccine passports in facilities or events where people are likely to be in close proximity to a large number of people from other households for a sustained period of time (e.g. nightclubs and music venues). This was expected to involve a vote in Parliament around September 2021.¹⁵

Then in yet another policy U-turn however, described as an 'extraordinary volte-face',¹⁶ Sajid Javid, the Health Secretary, announced on 11 September that this scheme would not in fact go ahead.¹⁷ The main motivation for this appears to have been dissension within Tory ranks, plus industry opposition, although data may also have played a part, as one of the clear reasons for such a scheme was to incentivise young people to get vaccinated, following the French model, The government has reserved the right still to introduce such a scheme if it becomes necessary. A consultation paper was issued on 27 September 2021 about this so-called "plan B"¹⁸.

¹¹ In Scotland civil society such as the Open Rights Group (ORG) and the regulator the Scottish Human Rights Commission have been consulted throughout the development of the digital vaccination passport (private email from Heather Burns, formerly ORG Scotland).

¹² See eg Guy Davies, 'Vaccine passports are being trialed in the UK: Why are they so controversial?', abcNews (12 April 2021) <<https://abcnews.go.com/International/vaccine-passports-trialed-uk-controversial/story?id=76976981>> accessed 14 September 2021

¹³ HM Government, 'COVID-Status Certification Review Report' (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999408/COVID-Status-Certification-Review-Report.pdf> accessed 14 September 2021, 3

¹⁴ Ibid [7]

¹⁵ Information from Big Brother Watch, see <<https://www.crowdfunder.co.uk/join-the-challenge-against-covid-passes>> accessed 14 September 2021

¹⁶ Aubrey Allegretti, 'Tory MPs fear return of Covid vaccine passports plan in England', The Guardian, (12 September 2021) <<https://www.theguardian.com/world/2021/sep/12/plans-for-vaccine-passports-in-england-ditched-javid-confirms>> accessed 15 September 2021

¹⁷ Marie Jackson, 'England vaccine passport plans ditched, Sajid Javid says', BBC News (13 September 2021) <<https://www.bbc.co.uk/news/uk-58535258>> accessed 15 September 2021

¹⁸ DHSC "Proposal for mandatory COVID certification in a Plan B scenario: call for evidence" (27 September 2021) at <https://www.gov.uk/government/consultations/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario-call-for-evidence>, accessed 11 October 2021. As of 22 November 2021 Plan B has not been activated.

Scotland meanwhile moved ahead with introducing a similar scheme, which has since 18 October 2021 required vaccine passports for entry to nightclubs, and other large indoor and outdoor events including festivals and football matches.¹⁹ Regulations were made under delegated powers from the Coronavirus (Scotland) Act 2020 and the scheme came into force on 1 October 2020 although enforcement was delayed by two weeks to allow industry time to transition.²⁰ The regulations will be reviewed every three weeks and revoked when no longer necessary. A comprehensive paper justifying the vaccine passport roll out and referring to scientific evidence and public attitude work was released on 29 September 2021.²¹ Notwithstanding the nightclub industry launched an unsuccessful challenge to the proportionality of the scheme.²²

Our focus is on the question:

Can *employees* be excluded from the workplace if they do not show proof of vaccination? (or, in some cases, an equivalent, such as proof of natural immunity from recent infection, or proof of recent negative PCR or antigen test)?

This breaks down into two related sub-questions:

1. Can rules be made by the *state* mandating vaccination passports in the workplace?
2. Assuming, as in the UK to date, the state chooses not to intervene in how private sector employers deal with vaccination status, is it legal for non-state *employers* to demand proof of vaccination as a condition of work?

All of these questions raise ethical as well as legal issues. Although these were not the main focus of this work package, we have had the benefit of the citizen's jury and other work carried out by the Ada Lovelace Institute as part of the project and this gives an opportunity to integrate some evidence as to public attitudes and ethical quandaries raised. We note however that the responses of the juries are opinions of members of the public not authoritative legal or factual opinions.

Vaccine passports and employment: key issues

The question of whether employer-mandated vaccination is legal is not a simple one. There are multiple considerations and laws at play, some contradictory.

- *Public safety.* Workplaces are a microcosm of society and an increasingly important locus post lockdown for transmission of the disease, both to other workers and to the public, especially in shops and hostelrys. Arguably public safety might demand the rollout of vaccination passports to workplaces just as, with much less opposition, has been suggested for international travel.
- *Health and safety obligation of employer.* The Health and Safety at Work Act 1974 requires employers to take reasonable steps to reduce workplace risks to the lowest possible level.

¹⁹ 'Scots to need vaccine passports for large events', BBC News (1 September 2021) <<https://www.bbc.co.uk/news/uk-scotland-58412832>> accessed 15 September 2021

²⁰ Scottish Government, 'Coronavirus (COVID-19): mandatory vaccine certification, Proposals for a mandatory COVID-19 vaccination certification scheme in Scotland' (9 September 2021) <<https://www.gov.scot/publications/coronavirus-covid-19-mandatory-vaccine-certification/>> accessed 15 September 2021. The scheme was implemented by the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 amending the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 which came into force on 1 October 2021.

²¹ Scottish government, Coronavirus (COVID-19) vaccine certification: evidence paper (29 September 2021), <<https://www.gov.scot/publications/covid-vaccine-certification-evidence-paper/>> (accessed 11 November 2021).

²² 'Judge refuses to delay Scots vaccine passport scheme', BBC News (30 September 2021) <<https://www.bbc.co.uk/news/uk-scotland-58747315>> (accessed 11 November 2021).

These obligations are owed not only to workers but also to customers. In one interpretation, this might oblige an employer to ensure that employees and customers are protected from catching or transmitting the virus by requiring employees to be vaccinated.

- *Individual liberties.* However, mandatory vaccination is an intrusion on an individual's bodily autonomy - enforcing vaccination, it is said 'would be a criminal offence against the person and an unlawful injury leading to claims such as assault and battery'.²³ Medical ethics have also long instructed against involuntary medical treatment except in the most extreme and exceptional circumstances. The Public Health (Control of Disease) Act 1984 accordingly provides that while the government has the power to intervene to prevent and control infection, the public cannot be compelled to receive treatment such as vaccinations.²⁴
- *Discrimination* is perhaps the biggest issue here. The Equality and Human Rights Commission (EHRC) claimed in April 2021 (not just in relation to, but including, labour issues) that vaccine passports could create a 'two-tier society' and that any blanket requirement for such passports was likely to be unlawful.²⁵ Serious opposition on grounds of inequality has also come from Big Brother Watch²⁶ and the Ada Lovelace Institute²⁷ as well as the Public Administration and Constitutional Affairs Committee cited above.²⁸
- *Employment law and existing contracts.* Employees may claim their existing contracts do not require proof of vaccination and so any attempt to impose it would require their consent. Attempts to impose it without consent might constitute a fundamental breach of contract which could lead to an unfair dismissal claim, although such remedy would only be available to workers after two years employment.
- *Data protection.* Collecting data about an employee's health, including vaccination status, raises awkward issues for data protection law, as such data is sensitive personal data (General Data Protection Regulation (GDPR), art 9) normally requiring the explicit consent of the data subject. Fears about breaching data protection law might put employers off going down a Covid-19 passport route.

We examine some of these in more detail below.

It is worth noting, perhaps unsurprisingly given the above, that employer intent to make use of vaccine passports in the UK has been variable. In a survey in January 2021 of 750 executives carried out by a recruitment consultancy, 23% of employers announced they intended to make vaccination mandatory and 48% of recruiters that they would prioritise vaccinated persons.²⁹ However, in May 2021 the British Chamber of Commerce found only 5% of employers saying they had rules in place to require vaccine

²³ Section 45E; Chartered Institute of Personnel and Development, 'COVID-19 vaccination: guide for employers' (CIPD, 14 September 2021) <<https://www.cipd.co.uk/knowledge/fundamentals/emp-law/health-safety/preparing-for-covid-19-vaccination#gref>> accessed 15 September 2021

²⁴ Ibid

²⁵ See report at 'Covid-19: Vaccine passports could create "two-tier society", equality watchdog warns', BBC News (15 April 2021) <<https://www.bbc.co.uk/news/uk-56755161>> accessed 15 September 2021

²⁶ See Big Brother Watch, 'Access Denied: The Case Against a Two-Tier Britain Under Covid Certification' (2 April 2021) <<https://bigbrotherwatch.org.uk/wp-content/uploads/2021/04/Access-Denied-Big-Brother-Watch.pdf>> accessed 15 September 2021

²⁷ Ada Lovelace Institute, 'What place should COVID-19 vaccine passports have in society? Findings from a rapid expert deliberation to consider the risks and benefits of the potential roll-out of digital vaccine passports' (17 February 2021) <<https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>> accessed 15 September 2021

²⁸ Covid-Status Certification: Second Report (*supra* n7), 3-4

²⁹ 'Covid-19: 23% of employers to mandate vaccinations for staff' (*Thomson Reuters Practical Law*, 28 January 2021) <<https://uk.practicallaw.thomsonreuters.com/w-029-4169>> accessed 15 September 2021

proof with 6% saying they might move to that in future.³⁰ Issues cited included that ‘administrative processes involved would be laborious’ and that legal uncertainty and lack of government guidance³¹ was an issue: “We would have no legal sanction to ensure compliance and we’d expect a test case to drag on in the courts”.³²

It is clear that gains in public trust and reduction of infection also have costs in terms of bureaucracy, alienation of workforce, and possible resignations from certain groups not vaccinated by choice. Employers may simply feel it is easier to keep using other precautions such as social distancing, ventilation and reduction of in-office hours than resort to potentially illegal or irritating certification. Public Health England advice is broadly for employers to encourage vaccination and provides a toolkit to help with vaccine hesitancy.³³ A large number of commercial and third sector employers have indicated intent to require vaccine certification in the US, including Google and Facebook,³⁴ but relatively few in the UK, probably because of stronger employment rights, lack of government guidance and opposition from bodies such as the Chartered Institute of Personnel and Development (CIPD).³⁵ One significant factor which has not been much investigated is the influence of insurance demands on employer vaccination mandates.

UK citizen opinion seems, interestingly, less negative than most UK civil society, and perhaps also more positive than most UK employers. A February 2021 survey of over 1000 people found that 58% supported the use of vaccine passports to enable a return to office life.³⁶ Perhaps predictably, support increased with age, from 50% for 18–34 year-olds to 63% for those over 65.³⁷ In August 2021, support still held up at around 60% of Britons, although only 38% of 18-24 year olds. Research into public attitudes carried out by YouGov for the Scottish Government, on 24-25 August 2021 and cited as supporting their passport scheme³⁸, found over half of respondents (55%) would download and use a mobile app to prove either vaccination or a negative test result, with just over one in five (23%) saying they would not use such an app.

Interestingly, a recent paper (looking at vaccine passports generally, not just in relation to employment) found what they termed a ‘vaccine passport paradox’, whereby the overall positivity of the population towards the introduction of passports may mask processes that alienate critical minorities and may possibly lead to an overall decrease in inclination to vaccinate. In other words, while most the population

³⁰ ‘BBC survey finds four in five firms have no plans for vaccine certification’ (British Chambers of Commerce, 13 May 2021) <<https://www.britishchambers.org.uk/news/2021/05/bcc-survey-finds-four-in-five-firms-have-no-plans-for-vaccine-certification-2>> accessed 15 September 2021

³¹ Guidance on working during the COVID crisis was updated by the government in August 2021 but did not include advice about use of vaccine certification: see Department for Business, Energy & Industrial Strategy, ‘Working safely during coronavirus’ (14 July 2021) <<https://www.gov.uk/guidance/working-safely-during-covid-19>> accessed 15 September 2021

³² British Chambers of Commerce (*supra* n30)

³³ Public Health England, ‘COVID-19 vaccination: guide for employers’ (12 July 2021) <<https://www.gov.uk/government/publications/covid-19-vaccination-guide-for-employers/covid-19-vaccination-guide-for-employers>> accessed 15 September 2021

³⁴ Bobby Allyn, ‘Google and Facebook Mandate Vaccines for Employees at U.S. Offices’, NPR (28 July 2021) <<https://text.npr.org/1021798222>> accessed 15 September 2021

³⁵ Chartered Institute of Personnel and Development, *supra* n23

³⁶ Serco Institute, ‘Public Opinion & Vaccine Passports in the UK: Discussion paper’ (February 2021) <<https://www.sercoinstitute.com/media/102/serco-institute-public-opinion-vaccine-passports-in-the-uk-final.pdf?1613398142>> accessed 15 September 2021, 13

³⁷ Connor Ibbetson, ‘Britons still broadly support COVID-19 vaccine passports’ (*YouGov*, August 9 2021) <<https://yougov.co.uk/topics/politics/articles-reports/2021/08/09/britons-still-broadly-support-covid-19-vaccine-pas>> accessed 15 September 2021

³⁸ See Scottish Government “Coronavirus (COVID-19) vaccine certification: evidence paper”, 29 September 2021, <https://www.gov.scot/publications/covid-vaccine-certification-evidence-paper/pages/6/>, accessed 10 October 2021.

are quite positive towards vaccination and even vaccination passports, a small hard core, associated with poverty, and minority ethnic communities, will remain very opposed, creating pockets of resistance to general public health goals.³⁹

The Ada Lovelace Citizens Jury,⁴⁰ which held discussions in July 2021, had many misgivings about vaccination passports, though not all related to employment. Particular points worth drilling into might be the question of why there should be a need for digital proof rather than paper; why there needed to be mandatory schemes at all, and if they could become an ID scheme by the back door; who had access to the data; whether such schemes were not 'discriminatory by design' and reinforcing digital inequalities; and how well they actually worked, given vaccination was not clearly correlated either to total immunity or complete reduction in transmission.

As we move into a phase where most new Covid-19 infections may actually affect the fully vaccinated - given the high level of vaccination in the population - (though hopefully with far less severe effects) public opinion on the usefulness of certification may again waver. The UK is already suffering as of autumn 2021 a rise in cases in the fully (double) vaccinated, due to waning immunity. The booster programme will alter the picture again. Accordingly, proof of 'no current infection' - as supplied by PCR and lateral flow tests, though they suffer from unreliability - might become more useful than proof of vaccination – supporting the idea that vaccine passports may be more theatre than a real guard against infection and introduced for other purposes such as surveillance and border control. On the other hand, as the numbers fully vaccinated rise, public opinion, at least perhaps among the white majority, may well be shifting from seeing COVID passes as threatening to empowering.⁴¹

Key Laws and Regulations

The **Health and Safety at Work Act 1974** requires employers to take reasonable steps to reduce workplace risks to the lowest practicable level. The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations also provides that Covid-19 is a reportable disease, whereunder employers must report under the following circumstances:

- an accident or incident at work has, or could have, led to the release or escape of coronavirus (SARS-CoV-2). This must be reported as a dangerous occurrence
- a person at work (a worker) has been diagnosed as having Covid-19 attributed to an occupational exposure to coronavirus. This must be reported as a case of disease
- a worker dies as a result of occupational exposure to coronavirus. This must be reported as a work-related death due to exposure to a biological agent⁴²

³⁹ Alexandre de Figueiredo, Heidi J. Larson, and Stephen Reicher, 'The potential impact of vaccine passports on inclination to accept COVID-19 vaccinations in the United Kingdom: evidence from a large cross-sectional survey and modelling study' (medRxiv, 1 June 2021) <<https://www.medrxiv.org/content/10.1101/2021.05.31.21258122v1.full>> accessed 15 September 2021

⁴⁰ As part of 'The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies' project (of which this publication is part), the Ada Lovelace Institute was commissioned to convene citizen juries to assess the public's perception of the issues addressed in the project.

⁴¹ See Milan et al "Promises Made to Be Broken: Performance and Performativity in Digital Vaccine and Immunity Certification" 2021 European Journal of Risk Regulation 12(2):382-392

DOI:10.1017/err.2021.26. cf evidence from Scottish YouGov survey discussed supra n 38 that numbers saying vaccine passports "would make them feel more comfortable if they were to go to a venue or an event" were rising between June and September 2021 while numbers worried that systems "may not be fool-proof" declined in same period.

⁴² Health and Safety Executive, 'RIDDOR reporting of COVID-19' <<https://www.hse.gov.uk/coronavirus/riddor/index.htm>> accessed 15 September 2021

The **Equality Act 2010** provides nine protected characteristics, and it is against the law to discriminate on any of the nine: age, gender, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Employers must take care to neither treat less favourably on any of these grounds, such as by targeting employees with one or several characteristics with vaccine information, nor to ignore the disparate needs and requirements of employees.

The **Public Health (Control of Disease) Act 1984** provides government authority to prevent spread of disease, though specifically notes that regulations 'may not include provisions requiring a person to undergo medical treatment... includ[ing] vaccination.'⁴³

An exception was legislated for care home staff and visitors offering services in the **Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021** (England and Wales only).

The **General Data Protection Regulation** or GDPR regards vaccination status as health data which is defined as sensitive personal data in art 9.

The **Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021** amend the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 to add requirements to ensure persons are fully vaccinated in certain late night venues (eg nightclubs) or large group events.⁴⁴

Employment law and mandatory proof of vaccination

1) Mandatory vaccinations for public sector

The law explicitly forbids the government from imposing compulsory vaccinations. Regulations 'may not include provision requiring a person to undergo medical treatment', and 'medical treatment' includes 'vaccination and other prophylactic treatment'.⁴⁵ Many authorities agreed that new primary legislation was therefore needed to implement a general policy of mandatory vaccination, including on employees.⁴⁶

The government nonetheless decided to consult on whether vaccination should be required for workers in care homes for older people.⁴⁷ These homes had been a major and tragic site for infection and death

⁴³ Public Health (Control of Disease) Act 1984, Section 45E

⁴⁴ <https://www.parliament.scot/-/media/media-folder/the-health-protection-coronavirus-requirements-scotland-amendment-no-2-regulations-2021.pdf>

⁴⁵ Public Health (Control of Diseases) Act 1984, Section 45C and E. See discussion by Jeff King (*supra* n4) and Denis Campbell, 'Covid jabs to become mandatory for care home staff in England', The Guardian (15 June 2021) <https://www.theguardian.com/world/2021/jun/15/covid-jabs-to-become-mandatory-for-care-home-staff-in-england?CMP=Share_iOSApp_Other> accessed 15 September 2021

⁴⁶ See Jeff King (*supra* n4), Katie Lines and Richard Mackenzie-Gray Scott (*supra* n2), and Public Administration and Constitutional Affairs Committee (*supra* n28)

⁴⁷ Department of Health and Social Care, 'Consultation Outcome: Making vaccination a condition of deployment in older adult care homes' (19 July 2021) <<https://www.gov.uk/government/consultations/making-vaccination-a->

in the first wave of Covid-19 and also have a relatively high proportion of workers who came from religious or ethnic communities with significant rates of vaccine hesitancy. As at April 2021, 89 local authorities had a staff vaccination rate under 80%, including all 32 London Boroughs. 27 local authorities had a staff vaccination rate under 70%. Following this consultation, the government decided vaccination would be made compulsory for the 1.5 million social care staff in England, albeit with exceptions.⁴⁸ Regulations rather than primary legislation were in fact issued: The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.⁴⁹ Guidance on how to implement these Regulations was issued in August 2021.⁵⁰

From 11 November 2021, in order to enter a care home, individuals need to demonstrate that they have received a complete course of their Covid-19 vaccination. Notably, the alternatives available via the NHS App of proof of recent negative test or of recent natural immunity are not acceptable. This date was chosen to allow all staff time to get both vaccination doses (if applicable) along with the four-week period for immunity to develop. Medical exemptions are available, as already noted for employers in the "COVID Green Book", chapter 14a.⁵¹ The legislation thus creates a distinct legal category which supersedes claims of unfair dismissal (though not, arguably, of discrimination). Those coming into care homes to do other work, for example healthcare workers, tradespeople, hairdressers and beauticians, and CQC inspectors will also have to follow the new regulations, unless they have a medical exemption.

Under new measures announced by the Health and Social Care Secretary on 9 November 2021, health and social care workers in England will also need to provide evidence they have been fully vaccinated against Covid in order to be deployed.⁵² The government is expected to set a deadline for the beginning of April 2022 to give 103,000 still unvaccinated health workers time to get two jabs.⁵³

A key issue, given that vaccine hesitancy has been shown to be high in some BAME communities, is whether exclusion of workers who refuse to be vaccinated could be discriminatory. We discuss this in more detail below, but in relation to care homes, the guidance states that the legal mandate protects against such claims on basis of '*age, disability, religion, or belief*' on the grounds that the action taken is justified and proportionate. No such claim is made relating to '*race, sex, sexual orientation, pregnancy and maternity, gender reassignment, marriage and civil partnership*'.⁵⁴ These claims do not seem to be based on the primary text of the Regulations themselves and are puzzling; guidance, and indeed, delegated legislation cannot overrule primary legislation. Another issue is whether the requirements will

[condition-of-deployment-in-older-adult-care-homes/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes](#)> accessed 15 September 2021

⁴⁸ Denis Campbell (*supra* n45)

⁴⁹ Applies to England only, in force from 11 November 2021

⁵⁰ Department of Health & Social Care, 'Coronavirus (COVID-19) vaccination of people working or deployed in care homes: operational guidance' (4 August 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010601/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance.pdf> accessed 15 September 2021

⁵¹ Public Health England, 'COVID-19: the green book, chapter 14a' (27 November 2020, updated 3 September 2021) <<https://www.gov.uk/government/publications/covid-19-the-green-book-chapter-14a>> accessed 15 September 2021

⁵² UK Government, 'Government to introduce COVID-19 vaccination as a condition of deployment of all frontline health and social care workers', 9 November 2021 <<https://www.gov.uk/government/news/government-to-introduce-covid-19-vaccination-as-a-condition-of-deployment-for-all-frontline-health-and-social-care-workers>> (accessed 12 November 2021).

⁵³ Joseph Lee and Marie Jackson, 'Covid-19 vaccines to be compulsory for frontline NHS staff in England', BBC News, 10 November 2021 <<https://www.bbc.co.uk/news/health-59215282>> (accessed 12 November 2021).

⁵⁴ Operational Guidance (*supra* n50), 47

trigger resignations from those preferring not to be vaccinated, or cases for unfair dismissal - an issue the government themselves raised in the preceding consultation.⁵⁵

The government stated that following this decision they would launch another consultation in due course whether or not to make Covid-19 and flu vaccination a condition of deployment in all health and care settings, and this was published on 9 September 2021.⁵⁶

2) Mandatory vaccinations for private sector

As noted above, the UK government has so far chosen to leave it up to the private sector to decide whether and how to apply any conditions of mandatory vaccination. This avoids the question of whether it is legal for the government to make such a requirement and merely passes the onus of legality on to private employers.

Employees may claim that vaccine mandates they do not wish to, or cannot, comply with, constitute a fundamental breach of contract which could lead to unfair dismissal. There are three sub-categories of employees that make a difference to the legal analysis here:

- those employed for more than two years,
- those employed for less than two years,
- and prospective employees.

It is also crucial to note that unfair dismissal provisions only apply to 'employees' and there are an ever growing number of workers in atypical forms of employment (such as casual, zero hour contracts, freelancers, etc) who do not have unfair dismissal protection, although they may well have rights under the Equality Act.

Employees with greater than two years of continual employment have rights regarding unfair dismissal. Dismissing an employee for their unwillingness to be vaccinated may provide grounds for unfair dismissal.⁵⁷ Employees on a contract who have been employed for less than two years do not have rights of unfair dismissal, though they may make discrimination claims (see below)⁵⁸. For both categories the question arises as to whether a term of the contract requiring vaccination can be imposed *after* employment commenced. Inserting a clause into an existing contract would mean a change to terms and conditions, which generally cannot be done unilaterally by the employer without agreement from the employee or a trade union.⁵⁹ Imposing the clause without such agreement could again amount to constructive dismissal.

⁵⁵ Consultation Outcome (*supra* n47) [40]

⁵⁶ Marie Jackson and Doug Faulkner, 'Covid: Mandatory jobs for health staff being considered in consultation', BBC News (9 September 2021) <<https://www.bbc.co.uk/news/uk-58496967>> accessed 15 September 2021. Closes 22 October 2021.

⁵⁷ Sarah Hayes, 'Can employers force employees to have the COVID-19 vaccine?' (*The HR Director*, 10 May 2021) <<https://www.thehrdirector.com/features/health-and-wellbeing/can-employers-force-employees-covid-19-vaccine/>> accessed 15 September 2021

⁵⁸ There are a number of exceptions to the two year rule (whistleblowing, health and safety concerns, asserting a statutory right etc).

⁵⁹ 'Coronavirus vaccine and your employees – HR considerations' (*Croner-i*, 28 July 2021) <<https://app.croneri.co.uk/feature-articles/coronavirus-vaccine-and-your-employees-hr-considerations>> accessed 15 September 2021

For new employees, employment experts suggest that it may be legitimate to insert a term requiring new employees to be vaccinated from the start.⁶⁰ The employer must still have regard for considerations of discrimination. Questions of reasonableness may be invoked from general labour law. However generally as long as the contract does not fall below minimum statutory rights it will be for the parties to agree the terms.⁶¹

For some jobs, travel may be essential and by extension, vaccination, given current restrictions both in the UK and other countries. Thus, where travel is required for a job, 'the vaccine is likely to be a fair reason for dismissing any such employee who refuses the vaccine'.⁶² An employer could arguably mandate a vaccination as a health and safety requirement if they could show the vaccine to be 'the most reasonably practicable way of mitigating the risk of Covid-19, having carried out a risk assessment.'⁶³ Such a situation is most likely to arise in a healthcare-specific setting, though in areas where the government has not, as an employer, mandated their own employees be vaccinated, such a case would need to be particularly strong.⁶⁴

Where risks could be substantially reduced or completely mitigated by other means, such as working from home, mandatory vaccination is unlikely to be reasonable. Employers must still, *pace* vaccinations and 'freedom days', take steps as per the Health and Safety at Work Act 1974 to reduce workplace risks, which could including steps such as improving airflow, increased sanitation measures, provision of materials such as masks and hand sanitizer, and implementing measures aimed at decreasing risk such as one-way entry, social distancing, and rotational in-office days. Employers can encourage staff to be vaccinated, discuss benefits of vaccination, and offer other means of support such as paid leave during vaccine appointments or recovery.⁶⁵ Full consultation with the trade union will not only be good practice but may help to address workers' concerns.

There is little specifically relevant case law in the UK: one recent Covid-19 unfair dismissal case on masks⁶⁶ suggested it was reasonable to dismiss an employee for refusing to wear a mask where he had been specifically instructed to do so by company guidance, albeit at a time when the general law and guidance of England and Wales did not demand masks. Vaccination mandates however, with their bodily intrusion, privacy and autonomy consequences and lasting effects seems a much harder case to establish, especially given the possibility of the alternate mitigations (masks, social distancing, etc.) mentioned above. Case law is developing on other countries as well. For example, on 8 November 2021, the High Court of New Zealand dismissed a challenge to an order requiring aviation security service employees to be vaccinated.⁶⁷

⁶⁰ 'The COVID-19 vaccine: What does it mean for employers?' (*Burges Salmon*, 2 June 2021) <<https://www.burges-salmon.com/news-and-insight/legal-updates/employment/the-covid-19-vaccine-what-does-it-mean-for-employers>> accessed 15 September 2021

⁶¹ See for an alternate interpretation, Jane Mann and Ed Livingstone, 'Is "no jab, no job" lawful? Can employers compel staff to be vaccinated at work? Your questions answered' (*Fox Williams*, 11 March 2021) <<https://www.foxwilliams.com/2021/03/11/is-no-jab-no-job-lawful-can-employers-compel-staff-to-be-vaccinated-at-work-your-questions-answered/>> accessed 15 September 2021

⁶² Lucy Lewis, Colin Leckey, and Helen Coombes, 'COVID-19 vaccination – updated FAQs for employers' (*Lexology*, 12 May 2021) <<https://www.internationallawoffice.com/Newsletters/Employment-Immigration/United-Kingdom/Lewis-Silkin/COVID-19-vaccination-updated-FAQs-for-employers>> accessed 15 September 2021

⁶³ Lucy Lewis, 'Coronavirus vaccination – FAQs for employers' (*Lewis Silkin*, 17 August 2021) <<https://www.lewissilkin.com/en/insights/coronavirus-vaccination-fags-for-employers>> accessed 15 September 2021

⁶⁴ *Ibid*

⁶⁵ Sarah Hayes (*supra* n57)

⁶⁶ *Kubilius v Kent Foods Ltd* [2020] (Employment Tribunals) 3201960/2020 V

⁶⁷ Courts of New Zealand, *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012, 8 November 2021 <<https://www.courtsofnz.govt.nz/cases/four-aviation-security-service-employees-v-minister-of-covid-19-response>> (accessed 12 November 2021).

Key Good Governance and Rule of Law Concerns

1) Discrimination

This is perhaps the key issue in the debates around employment and vaccine mandates. There are nine characteristics protected by the Equality Act 2010. The most broadly applicable and pertinent here include age, disability, pregnancy and maternity, race, and religion or belief. Discrimination can occur either directly or indirectly. Indirect discrimination involves applying a provision, criterion, or practice to a group of workers, that puts, or would put, people sharing a protected characteristic at a particular disadvantage compared to others and which is not a proportionate means of achieving a legitimate aim. The reason why the requirement was put in place is irrelevant - the statistics alone may show a pattern of discrimination.

The EHRC has suggested that '[a]ny mandatory requirement for vaccination or the implementation of Covid-status certification may amount to indirect discrimination, unless the requirement can be objectively justified.'⁶⁸ This would involve showing that the requirement was a proportionate means of achieving a legitimate aim. So, for example, suppose an employer decides not to hire people who cannot show evidence of vaccination – the argument might then be that this practice would disproportionately affect Muslim or BAME workers who are statistically less likely to be vaccinated (see below), and therefore is potentially indirect discrimination unless the employer can objectively justify the decision.

Civil society organisations such as Big Brother Watch (BBW), Liberty and the Nuffield Council on Bioethics have argued alongside the EHRC that indirect discrimination is likely to operate in any vaccine passport scheme, and the Public Administration and Constitutional Affairs Committee inquiry (above) was sympathetic to this view, quoting Silkie Carlo of BBW at length:

[COVID passes carry] a high risk of indirect discrimination and certainly it raises a profound ethical issue and a practical one as well. The onerous requirement to have a certificate will, in practice, socially and economically exclude some of the most marginalised groups and punish them as a result and further deteriorate trust.⁶⁹

As noted above, the inherent inequalities involved in COVID passes were one of the main reasons the Committee rejected them outright.

Looking at discrete aspects of discrimination, indirect age discrimination was clearly a relevant concern in the period where not all working-age individuals had had the chance to receive the vaccine. However, at time of writing everyone of working age has had the chance to receive at least the first vaccine dose and as the care home legislation shows, it can be reasonably expected all workers will have had the opportunity to be double dosed by at latest November 2021. Age is also related to precarity in the employment market though, and it might be suggested that a vaccine mandate might be an easy way to try to get rid of temporary or short term workers. Notably when France's vaccine pass legislation was

⁶⁸ Sorcha Bradley, 'Are Covid vaccine passports legal?', The Week (15 April 2021) <<https://www.theweek.co.uk/vaccine/952531/are-covid-vaccine-passports-legal>> accessed 15 September 2021

⁶⁹ Public Administration and Constitutional Affairs Committee (*supra* n28) [58]. See at greater length, both the report *Access Denied* and counsels opinion commissioned by Big Brother Watch as an appendix to their report (*supra* n26)

passed by the Conseil d'Etat, the only concern they had was that it should not be used by employers in this way.⁷⁰

Direct disability discrimination can occur if an individual is unable to receive the vaccine due to an existing disability.⁷¹ Given now well established categories of exemption, this is unlikely to occur. In terms of pregnancy and maternity, while health guidelines currently state that pregnant and breastfeeding women can safely receive the vaccine,⁷² there was a time period in which this was not the case, and it is still not recommended to receive certain vaccines.⁷³

Race, religion and belief are the central worries. Office for National Statistics (ONS) figures for 9 August 2021 still show that Black British adults had the highest rates of vaccine hesitancy (21%) compared with White adults (4%). Vaccine hesitancy was also higher for adults identifying Muslim (14%) or Other (14%) as their religion, compared with adults who identify as Christian (4%).⁷⁴ Legal commentators note that while 'some ethnic minorities are statistically much less likely to be vaccinated',⁷⁵ employers must take care to avoid 'identify[ing] employees based on ethnicity and stereotype them based on their ethnicity as this would potentially be discriminatory treatment'.⁷⁶

Anti-vaxxers might conceivably claim their objections are a matter of legally protected religion or belief. If an employee can demonstrate a fundamental, strongly-held belief, that is 'worthy of respect in a democratic society'⁷⁷ given 'its compatibility (or otherwise) with the dignity and rights of others',⁷⁸ then it is a belief that will qualify under the Equality Act as protected. Employment experts are however dubious that this is likely to generate a general exemption for anti-vax beliefs⁷⁹. Much depends on the reason for the anti vax view and the proof that can be produced to back it. If someone said that they could not be vaccinated because their specific religion would not condone it, or if they were unable to take the vaccine because they were vegan, that might be covered by religion or belief discrimination, subject to justification (but there are few or no examples of this actually applying – the Vegan Society,

⁷⁰ Leïla de Comarmond, 'Covid: feu vert du Conseil constitutionnel au pass sanitaire', Les Echos (5 August 2021) <<https://www.lesechos.fr/economie-france/social/covid-feu-vert-du-conseil-constitutionnel-au-pass-sanitaire-1337162>> accessed 15 September 2021. It is also worth noting the intersection between race and gig work (e.g. a high percent of Uber workers are BAME).

⁷¹ Katten Muchin Rosenman, Christopher Hitchens, Emma Phillpot, Brigitte Weaver, 'COVID-19 Vaccinations: Key Considerations for UK Employers' (*JDSupra*, 9 February 2021) <<https://www.idsupra.com/legalnews/covid-19-vaccinations-key-2528376/>> accessed 15 September 2021

⁷² Public Health England, 'Guidance: COVID-19 vaccination: a guide for all women of childbearing age, pregnant or breastfeeding' (29 July 2021) <<https://www.gov.uk/government/publications/covid-19-vaccination-women-of-childbearing-age-currently-pregnant-planning-a-pregnancy-or-breastfeeding/covid-19-vaccination-a-guide-for-women-of-childbearing-age-pregnant-planning-a-pregnancy-or-breastfeeding>> accessed 15 September 2021

⁷³ Pregnant women are however advised to receive only certain vaccines (Pfizer and Moderna at present). Note pregnancy and maternity are not relevant for indirect discrimination.

⁷⁴ Office for National Statistics, 'Coronavirus and vaccine hesitancy, Great Britain: 9 August 2021' (9 August 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandwellbeing/bulletins/coronavirusandvaccinehesitancygreatbritain/9august2021>> accessed 15 September 2021

⁷⁵ Francis Churchill, 'What could Covid passports mean for employers?' (*People Management*, 8 April 2021) <<https://www.peoplemanagement.co.uk/news/articles/what-could-covid-passports-mean-for-employers#qref>> accessed 15 September 2021

⁷⁶ Chartered Institute of Personnel and Development (*supra* n23)

⁷⁷ *Forstater v CGD Europe & Anor* [2019] (Employment Tribunals) 2200909/2019 [50]

⁷⁸ Hambler A, 'Beliefs Unworthy of Respect in a Democratic Society: A View from the Employment Tribunal' (2020) 22 Ecclesiastical Law Journal 234

⁷⁹ Jane Mann and Ed Livingstone (*supra* n59);

for example, has provided evidence that COVID vaccines in use in the UK do not contain animal products⁸⁰).

Finally, additional discrimination concerns may also apply depending on how vaccines are confirmed, such as requirements for facial recognition as proof of identity.⁸¹

The question of discrimination against the socio-economically deprived is particularly thorny, given poverty itself is not a protected characteristic under the Equality Act. Big Brother Watch found evidence that the poor and least well educated were not only the most likely to be reluctant to get vaccines but also those likely to have the most problems re access and time.⁸² Recent ONS data also shows that only 87% of people over 50 in the most deprived areas have been vaccinated, compared with 95% in the least deprived. Adults who were unemployed (12%) were more likely to report vaccine hesitancy than those who were in employment (4%) or retired (1%).⁸³ Refugees and migrants, again falling uneasily between categories of inequality, were also likely to be indirectly discriminated against for poor vaccine uptake.

Further, many of the estimated 1 million undocumented migrants in the UK are fearful of accessing health services due to punitive data sharing as part of hostile environment policies and may be more apprehensive still if COVID-status certificates, akin to internal passports, become an everyday requirement. We cannot simply erase histories and experiences of discrimination and hostility that have created distrust. The best way to ensure marginalised groups are included in public health measures is to create an enabling, not a punitive, environment. Health certificate segregation would only deepen discrimination and alienate people even more. This would be disastrous for trust in public health authorities when trust is critical for successful pandemic management.⁸⁴

In countries like France, vaccine mandates in a wide variety of venues have been imposed with some apparent success to encourage the vaccine-hesitant to get jabbed.⁸⁵ In UK workplaces, employers putting vaccine requirements in place might be seen as not just protecting themselves, their workforce and their immediate customers, but society at large by pushing up flatlining vaccination rates. Such feelings are understandable, but should be checked against the evidence. Some studies show that pressure only entrenches the resistance of the small group who are vaccine-hesitant, especially when vaccine mandates are applied for domestic use as well as international travel⁸⁶. Coercing vaccination even indirectly is also ethically suspect, as seen in the Council of Europe resolution on Covid-19 vaccines.⁸⁷ Finally, the latest (August 2021) ONS figures actually show an extremely low rate - 4%, down from 8% in March - of people saying they are reluctant to get vaccinated. Flatlining rates might thus be better attributed to lack of time or geographical access, factors which vaccine mandates at work will not help and might indeed make worse. It is noticeable however that the Scottish vaccine pass scheme explicitly foregrounds incentivising take up as one of its key aims⁸⁸.

⁸⁰ See <https://vegsoc.org/lifestyle/covid-19-vaccines/> although there is some incidence of animal testing in development and testing. The Society note: "As with all medicines and vaccines, we advise that everyone should take the medicines and vaccines they need".

⁸¹ See *Access Denied* (*supra* n26) at 23.

⁸² *Access Denied* (*supra* n26), 22

⁸³ Office for National Statistics (*supra* n74) cited in Grace Browne, 'The UK is about to hit its Covid vaccine ceiling' (*Wired*, 12 August 2021) <<https://www.wired.co.uk/article/covid-vaccine-ceiling-uk>> accessed 15 September 2021

⁸⁴ *Access Denied* (*supra* n26), 22

⁸⁵ Ido Vock, 'Why Emmanuel Macron's vaccine passport scheme worked', *New Statesman* (26 August 2021) <<https://www.newstatesman.com/world/europe/2021/08/why-emmanuel-macrons-vaccine-passport-scheme-worked>> accessed 15 September 2021

⁸⁶ See Alexandre de Figueiredo, Heidi J. Larson, and Stephen Reicher (*supra* n39)

⁸⁷ Council of Europe, 'Covid-19 vaccines: ethical, legal and practical considerations' (Resolution 2361 (2021)) 27 January 2021

⁸⁸ See n 38 above.

2) Privacy and data protection

The EHRC suggest that vaccine passport schemes in and of themselves may contravene article 2 of the ECHR (right to life), and article 8 (right to respect for private and family life).⁸⁹ We cannot go into this in detail in this paper, although an 8 April 2021 decision by the European Court of Human Rights may be influential in having ruled that mandated vaccination for pre-school students did not breach Article 8.⁹⁰

Employers asking staff for details about vaccination history will come under strict obligations concerning the processing of that information since it is, as with other types of health data, sensitive data subject to special rules under the GDPR.⁹¹ This raises difficulties for employers as the lawful grounds for processing special category data are limited and consent of the employee alone will probably not suffice, since it is not seen as freely given within the employment relationship. However, other grounds in art 9 GDPR may fill the gap, e.g. the public health ground in art 9(2)(i)⁹² (although note this means a requirement of confidentiality is imposed as well). Doubt about the proper ground for processing, plus fears of data breaches, may add to the factors putting employers off vaccine mandates. Falsified documentation is also a concern that employers must contend with.⁹³

In general, Covid-19 certification passes represent a potential massive transfer of data to service providers and, in our context, employers. Unlike with contact tracing apps, identification of the person offering credentials is (so far at least) intrinsic to their design. As noted above, there was no public scrutiny or Parliamentary sign-off of how the English NHS App was transformed into a vaccination passport, and as of end September 2021, the government still seems resistant to giving access to the public for scrutiny of any Data Protection Impact Assessment. Yet the technical details of implementation are vital in knowing how this sensitive health data is stored, shared and held as secure, all requirements of the UK GDPR. While private employers need not use the state-supplied means of vaccine certification, it is likely they will. There might also be issues concerning how much personal data is read and collected at the employer end if they use the NHS COVID Pass Verifier app (<https://www.nhs.uk/covid-19-response/nhs-covid-pass-verifier-app/>).

The lack of transparency about these technologies is deeply worrying. The Information Commissioner's Office has issued guidance which offers some help: they note, perhaps a tad hopefully, that 'use of this data must be fair, relevant and necessary for a specific purpose'.⁹⁴ If the use of this data is likely to result in a high risk to individuals (e.g. denial of employment opportunities or services) then a DPIA is recommended.

⁸⁹ Ada Lovelace Institute, 'Checkpoints for vaccine passports' (10 May 2021) <https://www.adalovelaceinstitute.org/wp-content/uploads/2021/05/Checkpoints-for-vaccine-passports_requirements-for-governments-and-developers_Ada.pdf> accessed 15 September 2021, 47

⁹⁰ Case of *Vavříčka and Others v. The Czech Republic*, App no [47621/13](#) and 5 others (ECHR, 8 April 2021)

⁹¹ Burges Salmon (*supra* n60)

⁹² See discussion in Christiane Wendehorst, 'COVID-19 Apps and Data Protection' in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst, and Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Intersentia, 2021) (freely available at <<https://www.intersentiaonline.com/library/coronavirus-and-the-law-in-europe>> accessed 15 September 2021). See also advice by the ICO recommending against using consent as lawful ground: Information Commissioner's Office, 'Vaccination and COVID status checks' < <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccination-and-covid-status-checks/#canIcheck>> accessed 15 September 2021

⁹³ Burges Salmon (*supra* n60)

⁹⁴ ICO (*supra* n92)

The Scottish app was launched on 1 October 2021⁹⁵ and was coded from scratch rather than adapted from an existing app; a lengthy DPIA intended to be made public is in preparation, but has not been issued at time of writing. An Equality Impact Assessment (EQIA) and Public Sector Equality Duty (PSED) document were also produced and mitigations identified. A paper certificate or downloadable PDF is also available from NHS Inform which should reduce privacy fears about data collection as well as digital inclusion issues. Businesses affected must download a separate app, CovidCheck⁹⁶ to “read” and check QR codes generated by the app on user’s phones.

Both these processes again raise worries about transfer of very sensitive personal data to persons other than medical staff. The Scottish regulations however place a legal requirement on businesses to keep information about certification status confidential and not use it for other purposes⁹⁷. This obligation only seems to apply if the vaccination passport is demanded as part of the mandatory events and venues scheme; it might be worthwhile extending it to voluntary use by employers even though arguably DP and common law may already impose such duties.

Conclusions

The debate around whether to require workers to prove vaccination is in the UK a subset of the debate around ‘vaccination passports’ generally. While to date the general state approach has been to steer away from placing hard mandates on the private sector, and only a very limited incursion into the public sector, this could easily change at any time depending on a wide variety of health, commercial and political factors.

There are significant *employment and equality* law risks for employers in mandating vaccination, especially for private employers not in the healthcare area and not backed by a statutory mandate. While it is important for employers to protect the health and safety of their employees, customers and others affected, there is a significant concern for the privacy, equality and bodily autonomy of staff as well as the possibility of backlash from the workplace. There is evidence that using employment vaccine mandates as a stick to overcome vaccine hesitancy at a point when it is already a very low percent, may well backfire.

While it may be reasonable and proportionate to require vaccination where refusal would put either the employee or others at significant risk, such as in care homes, elsewhere employers run the risk of *discriminating* against employees who cannot or will not receive the vaccine, especially when other mitigations are possible. Given workplaces have already put great effort into installing alternative mitigations, and the divisive, risky and bureaucratic impacts of a passport scheme, plus shortage of labour post-lockdown in many low paid industries due to Covid-19 combined with Brexit,⁹⁸ many or most may decide it is not worth the effort. The care home sector especially is already fearing the November 2021 deadline may lead to shortages of staff.⁹⁹ At the moment, rigorous statistical evidence of employer choices is minimal and should be clearly assessed to provide policymakers with input going forward.

⁹⁵ <https://www.gov.scot/news/vaccine-certification-scheme-introduced/> .

⁹⁶ <https://www.covidcheck.scot/> .

⁹⁷ See new s 7B of the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021.

⁹⁸ Richard Partington, ‘UK employers struggle with worst labour shortage since 1997’, The Guardian (8 July 2021) <<https://www.theguardian.com/business/2021/jul/08/uk-employers-struggle-with-worst-labour-shortage-since-1997>> accessed 15 September 2021

⁹⁹ See Thomas Smith, ‘Care homes face losing 40,000 staff from compulsory vaccinations policy’ (*Community Care*, 27 July 2021) <<https://www.communitycare.co.uk/2021/07/27/care-homes-face-losing-40000-staff-compulsory-vaccinations-policy/>> accessed 15 September 2021

The lack of willingness on the government's part to take responsibility for a statutory scheme or even issuing clear guidance on vaccine mandates, leaves employers and employees alike uncertain about the legality of any schemes.

As with other uses of technology during Covid-19, although the broad functionality involved has been widely discussed, there has been a lack of clear communication, public scrutiny and Parliamentary control over the precise *technologies* designed to be used as COVID passes, and what issues they might raise related to rule of law, human rights, privacy and equality (see other WP3 work on contact tracing apps and venue check-in apps).

In an emergency situation like the pandemic, lines have blurred between executive action and parliamentary democracy and it is unclear how far a legislative basis should have been sought or at least clarified for technologies like vaccination passports and before them, contact tracing apps.¹⁰⁰ Parliamentary scrutiny has been restricted and select committee conclusions rebuffed. Civil society scrutiny has mainly been achieved through looking at documents like DPIAs, and these have not always been made available. As we note in another paper within this work package¹⁰¹, the courts also seem reluctant to engage with what may be unconstitutional exercise of power during COVID-19 by the executive. As with other types of Covid-19 technology studied, serious questions thus arise as to whether apps, as a new, opaque and technocratic type of 'law by code'¹⁰² are being adequately scrutinised by conventional democratic processes – and if not, what other means are needed.

¹⁰⁰ It is clear the government does have some general powers to keep administration going, without need for legislation or recourse to royal prerogative : see eg Adam Perry, 'The Source of the Crown's General Administrative Powers' (*UK Constitutional Law Blog*, 25 October 2014) <<https://ukconstitutionallaw.org/2014/10/25/adam-perry-the-source-of-the-crowns-general-administrative-powers/>> accessed 15 September 2021; Max Harris, 'Showcase–New Directions in Administrative Law Theory: The Prerogative, The Third Source, and Administrative Law Theory' (*iconnect*, 13 September 2019) <<http://www.iconnectblog.com/2019/09/showcase-new-directions-in-administrative-law-theory-the-prerogative-the-third-source-and-administrative-law-theory/>> accessed 15 September 2015. The matter seems under theorised in an era of 'law by app', however. Notably even in Scotland, the regulations introduced (see box above) to put in place effectively a vaccine passport scheme refer to "a reasonable system" for checking entrants to clubs etc are fully vaccinated and do not provide any kind of legislative foundation for the app itself.

¹⁰¹ See WP3 D2-C *Judicial Scrutiny of COVID-19 Regulations in the UK: Addressing Deference to Data-Driven Decision-Making in Human Rights Cases*.

¹⁰² See Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999)

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