

Joint NCF/ACS Webinar on VCOD in wider social care and health settings 13.12.21

NCF and Anthony Collins Solicitors held a webinar on 13.12.21 to talk through what we know about vaccination as a condition of deployment in health and wider social care settings. This session was based on our understanding the [draft regulations](#) and [government response](#) to the wider consultation. When the operational guidance is published, the position outlined below might change. Read these notes alongside the presentation Anthony Collins gave. We will send an updated briefing once the operational guidance is published in early January.

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The Draft Regulations

Health and social care providers in England will be required to ensure all staff who have face to face contact with people for the purposes of CQC regulated care are fully vaccinated against COVID-19. This is due to come into force on the 1 April 2022 subject to parliamentary timetable. Once the regulations have been made (passed by parliament and signed by secretary of state), there will be a 12-week grace period. This means the regulations will need to be made by 6 January (although they are likely to be passed by parliament before Christmas).

Once the regulations are made, there will also be some changes to the Care Home regulations immediately without the grace period.

Who is in scope?

A provider of an activity regulated by the CQC (including domiciliary care/home care and in extra care housing & supported living) **will need evidence** that any **individual employed or engaged ‘for the purposes of the provision of that regulated activity’ who has direct face to face contact** with

the people you support has had **both doses of a COVID vaccination or evidence that for clinical reasons they should not be vaccinated.**

The most confusing aspect of the government's response to the consultation is the reference to the ancillary workers potentially being covered – NCF and Anthony Collins are looking for more clarity on this but we suspect that this has been written with hospital settings in mind rather than social care settings.

There is a two-stage test to work out who is in scope:

- Is the person employed or engaged for the purposes of the provision of a regulated activity?
And
- Do they have direct face to face contact with the people you support?

These regulations focus on **people carrying out regulated activities** rather than the setting being regulated (as it is for care homes).

Who is not in scope?

The current interpretation of the regulations suggests examples of staff who do not need to be vaccinated according to the draft regulations might include (not an exhaustive list):

- Staff involved in back-office support relating to regulated activities but who do not have face to face contact with the people being supported
- Staff providing entertainment for the people you support
- Other staff who provide non-clinical services
- Staff who only have day to day contact in day/ community services where the service is not regulated by CQC

Currently, our reading of the regulations is that people providing, for example, entertainment or maintenance services would not be covered by the scope when looking at wider social care settings / social care delivered in people's homes. Do note that this is different to the regulations that apply to care homes because those regulations cover everyone 'crossing of the threshold' of the care home.

Staff where the position is unclear

The current interpretation of the regulations also highlights a number of examples of staff where the position is currently unclear (not an exhaustive list):

- Staff involved in back-office support relating to the regulated activities, who do not normally visit the setting location as part of their role but who may from time to time need to have face to face contact with the people you support
- Someone in a quality assurance role
- Cleaners who work when they may have face to face contact with people who draw on care and support

We need clear operational guidance on these sorts of scenarios. It gets more tricky in these scenarios where an individual member of staff refuses to be vaccinated – are they covered by the regs or aren't they? Possible scenarios include HR staff who support people to be involved in interviews or who need contact with people as part of an investigation – the regulations do not provide clarity here, so the interpretation of the regulations in these scenarios could be argued

either way. Generally, where individual staff members have only a very irregular amount of contact with the people you support, then, as employers, you may want specific advice if those staff do not want the jobs & are arguing that they should not have to comply with the regulations as they do not feel that their role should be in scope. .

Clinical Exemptions

As with the regulations for care homes, the government has not produced one complete list of clinical exemptions. Instead, they refer to [Chapter 14a of the Green Book](#). For VCOD in wider social care settings and health settings, there is only the [formal medical exemption process](#). There is currently no self-exemption process for the wider policy but it is always possible this might be introduced if the delays we are seeing to the formal system for VCOD in care homes persists beyond April 2022.

Overseas Vaccines

Individuals who have been vaccinated abroad can provide evidence of their vaccination status.

They need to provide evidence of having had the number of doses set out in Schedule 4 of the [Draft Regulations](#) for the relevant vaccine.

Precise requirements around this are unclear at the moment. Some people may require an additional dose of an authorised vaccine within 10 weeks of an initial dose to make up the number of doses required.

It is also worth noting the update to guidance around MHRA-approved vaccines received abroad. There is now [a mechanism](#) for staff to have those vaccinations registered on the NHS COVID Pass system.

Pregnancy

The stance of DHSC and JCVI is that women who are pregnant should be offered vaccination and encouraged to take it. However, there are time-limited medical exemptions available for those that want to take one. These expire 16 weeks post birth.

New Starters with 1 dose

The regulations will allow providers to recruit staff who, more than 21 days before they start work, have received 1 dose of an authorised vaccine. Note though that they will need to have their second vaccine within 10 weeks of the first and provide evidence to that effect.

If, after the expiry of the 10-week period, the staff member has not had the second vaccine – they must be redeployed away from regulated activities or dismissed.

Dismissal

There is an obligation, via these regulations when they are made, on employees working in health and social care sector to be vaccinated. The legal requirement in the regulations means that if employees fail to be vaccinated or provide proof of medical exemption, this is a fair and non-discriminatory reason for dismissal.

During the 12-week grace period, you can still hire and deploy unvaccinated staff. Note though that these staff will be unable to work once the grace period comes to an end (expected to be end of 31 March 2022) if they have no medical exemption or proof of vaccination.

There are 5 broad stages:

1. Identifying and notifying all affected employees of the new requirements and setting a deadline for the evidence to be provided
2. Checking the evidence received
3. Meeting with those who don't provide the evidence or who tell you they will not be providing it to explore their concerns
4. Giving notice to those employees who have not provided the evidence offering a right of appeal
5. Considering any appeals

Note: It is very critical we have a clear understanding of the scope of the regulations in order to identify the correct staff who are in scope.

Lessons learned from VCOD implementation in care homes

Members raised a number of things to learn from the implementation of compulsory vaccination for care homes:

- The need to have operational guidance as early as possible
- Clarity in the nature of scope – particularly what ‘ancillary workers’ means.
- Clarity over who is likely to be medical exempt and the process by which exemptions are accessed
- Funding for providing notice due to their short deadline
- The need for a longer grace period than 12 weeks to allow for consultation with staff. VCOD in care homes has led to some lengthy and complicated conversations with staff and they had 16 weeks.
- Redeployment is unlikely to happen this time round – more staff are going to lose their jobs from this policy than the policy for care homes
- The issue with visiting professionals has not been robustly emphasised for care homes, no reason to expect it will be for the wider VCOD
- The need for robust, detailed and free legal advice to combat legal misinformation and facilitate constructive conversations with hesitant staff.
- On the legal point, Anthony Collins’ position in relation to the Workers of England Union letters and similar communications is to simply communicate that the provider has a legal duty to follow the regulations.

Q&A

Members raised a number of questions during the call.

Q: If you support people in a CQC reg setting and also support them in day service / training units, would the staff in the day service / training teams be in scope? Q: We have a day centre that is not CQC registered but its in the same building as our offices, they share space and facilities. Some of the people from supported living also go to the day centre. Does vaccination apply to all the day centre staff?

Anthony Collins: The wording in regs is that they are ‘employed or engaged’ for the regulated activities so staff that do not provide regulated activities are not caught by the regulations. However, if staff are working across settings between regulated and non-regulated services, then they will be in scope & they are going to need to be vaccinated/ provide medical exemption. Do note that if a staff member needed to enter a care home they would need to be vaccinated regardless of the regulated activity.

Q: To clarify, are the regs slightly different in Supported Living / Extra Care to care homes in terms of contractors etc. I.e. – it's only those delivering face to face or engaged for the regulated activity:

Anthony Collins: Yes, the new rules are about activity, not the setting.

Q: If you are not the registered provider but the landlord where regulated activity is carried out in the setting?

Anthony Collins: It is not the setting here, it is the activity that matters for wider social care settings. It is the employer of those staff who are employed or engaged to provide the regulated activity who is responsible for ensuring they are compliant with the regulations.

Q: Kickstart employees who are recruited as Wellbeing support workers - so they have direct interactions with service users to assist with day to day activities but not the provision of care - would the regs apply?

Anthony Collins: We would need to know more about the nature of the activities to be able to judge the answer to this question.

Q: Do the regulations include drivers who deliver and install medical equipment to customers and in their homes?

Anthony Collins: No, unlike the care home regulations.

Q: We have introduced a policy stating that all new staff joining must be fully vaccinated. If we wished, could we apply this to existing staff, regardless of role? i.e. go beyond the legislation with our own policy and potentially dismiss for SOSR on this basis?

Anthony Collins: Some providers are looking at this and saying that as an organisation, their purpose is the regulated activity but the challenge to this will come when looking at what the basis of a fair dismissal would be. If you have someone who does not have to have direct face to face contact then the policy goes further than the law and may end up with unfair dismissal proceedings.

Q: Does anyone on the call have any insight to whether the exemption process is working or not for care homes? We have four care home staff who believe they are exempt and have applied to the NHS for this but have still not received their NHS letter.

Nathan: The self-exemption for care homes has been extended to 31 March 2022 due to delays in the formal system if the staff members has submitted a self-certification form before 24.12.21. There is no self-exemption system for the wider policy, only the formal route.

Q: For those staff with medical exemption, if we continue to deploy them into frontline roles, are we putting ourselves at increased liability as they cannot be vaccinated?

Anthony Collins: The guidance for care homes says that you should carry out a risk assessment – the operating guidance for the wider policy is likely to say the same.

Q: The requirement for visiting professionals to show their proof of vaccination/exemption is not relevant in the 2nd VCOD regs as it's to do with the delivery of the regulated activity and not the setting to this is outside employers control? So, there will be no need to check status of visiting professionals in VCOD2?

Anthony Collins: It will be employer providing the regulated activity who has responsibility to ensure their staff are compliant with the regulations.

Q: Are children's services (ofsted reg) in scope?

Anthony Collins: No.

Q: There is also a lot of concern about absent employees (pregnant or long-term sick) – what do providers do?

Anthony Collins: The short answer, wait until you have to make a decision. Prioritise the workforce you have in work. You do not have to make sure absent staff are medically exempt or vaccinated until they are ready to come back to work.

Q: Are CQC inspectors in scope?

Anthony Collins + NCF: We do not think so but will check.

Q: If we were to seek to introduce a contractual requirement for all existing staff would we need to go through a contractual change process and get individual acceptances - could we rely on negative affirmation?

Anthony Collins: Yes, you could rely on negative affirmation.