

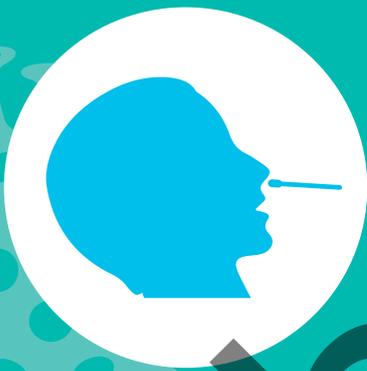


International
Chamber of Shipping

Shaping the Future of Shipping

Coronavirus (COVID-19)

Legal, Liability and Insurance Issues arising from Vaccination of Seafarers



In collaboration with

IGP&I International
Group of
P&I Clubs



International
Transport Workers'
Federation



INTERTANKO

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Legal, Liability and Insurance Issues arising from Vaccination of Seafarers

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The International Chamber of Shipping (ICS) is the global trade association representing national shipowners' associations from Asia, the Americas and Europe and more than 80% of the world merchant fleet.

Established in 1921, ICS is concerned with all aspects of maritime affairs particularly maritime safety, environmental protection, maritime law and employment affairs.

ICS enjoys consultative status with the UN International Maritime Organization (IMO) and International Labour Organization (ILO).

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1 Introduction

This Guidance addresses legal, liability and insurance issues that could potentially arise for shipowners from or in connection with vaccinations of crew for coronavirus (COVID-19). It considers questions that have been raised by members such as: whether and under what conditions a shipowner can require crew to have vaccination, what vaccines may be safely given and what might be the potential liabilities for shipowners in requiring crew to be vaccinated. It provides guidance on best employment practice to protect against such liabilities and information on insurance cover for such liabilities under the shipowner's standard Protection and Indemnity (P&I) insurance.

This Guidance will form part of the Industry Guidance: *Coronavirus (COVID-19): Guidance for Ship Operators for the Protection of the Health of Seafarers*.

Withdrawn



2 Maritime Labour Convention, 2006, as amended (MLC, 2006)

The starting point for analysis is the Maritime Labour Convention, 2006, as amended (MLC, 2006), which provides the minimum standards and rights of seafarers and which has been ratified by almost 100 countries.

Article 4 of the MLC, 2006 includes minimum requirements on shipowners to provide access to medical care on board ship and ashore. MLC, 2006 does *not* include provisions for vaccinations/immunisations.

As there are no express provisions in the MLC, 2006 regarding vaccinations, it is necessary to turn to national law, either of the flag State which may regulate this (and which may also govern the seafarer's contract of employment) or the law of the seafarer's country. It is not feasible to conduct a review of the laws of all states but some general principles can be drawn (based on English law as a focus).

2.1 General Principles

2.1.1. Employers' Duty of Care and Obligation to Reduce Risks in the Workplace

Under established law, employers have a duty of care to protect their employees. Supplementing this general legal obligation, UK statutory law places an obligation on employers to take reasonable steps to reduce any workplace risks (the Health and Safety at Work Act 1974); in the context of COVID-19, this obligation would justify employers encouraging employees to be vaccinated to protect themselves and everyone else at the workplace. This encouragement can be given by providing employees with reliable information and guidance.

The UK government has issued such guidance for healthcare workers and which could form a template for other workplaces: [COVID-19 vaccination: guide for healthcare workers - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/covid-19-vaccination-guide-for-healthcare-workers)

2.1.2. Informed and Voluntary Consent to the Vaccination

Vaccination requires an individual's informed and voluntary consent. If an employee refuses vaccination, employers should consider the reasons given carefully. Each case will need to be considered on its own facts and an individual response made accordingly. Depending on the particular circumstances, this response could entail implementing alternative solutions to protect the refusing employee and others in the workplace. This could include the use of personal protective equipment (PPE), additional social distancing measures and changing the employee's work duties to reduce contact with other employees. Ultimately, however if the employee's presence in the workplace is deemed to pose a threat to the health and safety of the wider workforce, employers may consider not allowing unvaccinated employees to work. This decision should always be made carefully and preferably, with legal advice as to what actions might legitimately be taken to protect the safety of the workplace and to also protect the unvaccinated employee's rights of employment.



2.1.3. Data protection and privacy

All information about an employee's health, including whether an employee has received a vaccine will constitute special category data under data protection laws such as the General Data Protection Regulation (EU) 2016/679 (EU GDPR) and the UK General Data Protection Regulation (UK GDPR) tailored by the Data Protection Act 2018 (DPA 2018).

Employers who choose to collect and keep (process) records of vaccinations should therefore do so in accordance with all such applicable laws. The UK data protection legislation and the EU GDPR, for example, prohibit processing of special category data unless it is necessary and proportionate. Such processing could be justified on the basis that it is necessary to comply with the employment contract, or other employment law requirements including, the employer's health and safety or occupational health duties and for reasons of public interest in health.

All data relating to an employee's health must be kept securely and should not be retained any longer than is necessary to perform duties as an employer. Such data should not be disclosed to third parties unless the employer is legally obliged to do so.

Employers should have a privacy policy for employee information and should carry out a data risk assessment covering the processing of special category data to ensure compliance with key data protection principles. Important data protection principles include: ensuring data processing is transparent, that it is secure and that it is kept to the minimum necessary. Employers should consider and document the risk to employees and any alternatives to obtaining and processing the data. Employee Privacy Policies should be regularly reviewed and updated.



3 Frequently Asked Questions

3.1 Safety and Liability Issues

3.1.1 Can a shipowner require/mandate seafarers to get a COVID-19 vaccine?

For the reasons already noted in section 2.1.2 above, under UK law, an employer cannot compel an employee to be vaccinated (or indeed to take any form of medication) if they do not wish to be so (as this raises issues of intrusion on an employee's body and breach of their human rights on medical intervention under UK law and the European Convention on Human Rights). The same would apply for the COVID-19 vaccine.

The UK government has indicated that the government does not plan to make the vaccine mandatory. Other countries may take a different approach and mandate certain vaccines to be compulsory (or demand proof of vaccination as a border or visa requirement). Overall, though in view of the international nature of the typical crew list, it would be prudent to proceed on the basis that a seafarer cannot be compelled to get the vaccine but instead employers should encourage seafarers to do so for the reasons stated above.

Notwithstanding the above, shipowners have addressed issues of vaccinations for crew members for certain specified types of illness even before COVID-19 outbreak. This has been done through the contractual route, by making it a condition of the employment contract with the seafarer to have certain vaccines which are required in countries to which the ship might sail. This has been regarded as legitimate and leaves the seafarer the right to decide whether they wish to accept the employment on these terms – see more below.

3.1.2. Can a shipowner amend/vary existing contracts of employment to require the seafarer to get a vaccine as a condition of employment?

It is unlikely that an employer could reasonably amend an ongoing employment contract to make it a requirement that an employee be vaccinated if this is against the employee's wishes. However, there are some sectors and job roles where employers might be able to argue that the person in that post needs to be vaccinated for health and safety reasons e.g. because social distancing is not possible (with or without PPE). Such a requirement would be in compliance with the employer's duty of care to the workforce to provide a safe work environment. For example, this would particularly apply to those working in healthcare settings. In some limited circumstances, employees could in fact be dismissed for refusing the vaccination if it means they will present a threat to themselves, patients or service users.

However, this position is not universal and it is questionable whether working on board ships would be regarded the same as a healthcare setting. Therefore we would advise shipowners to be circumspect about requiring seafarers to be vaccinated while under a current contract if they do not wish to be. Instead, shipowners could encourage their seafarers to get vaccinated by ensuring they are provided with reliable information about the vaccine to enable them to make an informed choice. If they nevertheless refuse, and especially if that refusal is on religious or medical grounds, the shipowner needs to take care not to proceed in a way which is discriminatory or unfair to the seafarer.



It may be reasonable for the shipowner to implement working procedures to accommodate the unvaccinated and protect other crew members. Such measures might include providing for alternative duties, separate accommodation (where it is reasonably possible) and providing appropriate protective equipment. If such accommodations are not possible, or the vessel is unable to operate safely, it may be open to the shipowner to remove an unvaccinated individual from the vessel, provided all contractual and other legal obligations to the individual are met.

In making these decisions, the shipowner must have regard to the circumstances of the particular ship and the primary obligation to ensure the health and safety of all on board and the safe operation of the ship.

3.1.3 Can a COVID-19 vaccination be made mandatory for seafarers as a contractual condition in a new contract of employment?

As stated above, contractual conditions of employment commonly and legitimately include clauses in the employment contract with the seafarer that make acceptance of 'necessary' vaccines for the countries their ship might enter as a condition of employment for seafarers.

Below is an extract of a sample contract of employment:

Health Declaration

- a) You are required to complete a Health Declaration, normally on board, prior to commencing a new tour of duty.
- b) You must declare in the Health Declaration all medication you are taking, whether it is prescribed by your doctor or not (e.g. over the counter medication).

Vaccinations

- a) It is a condition of employment that you have any known necessary vaccinations for the countries which your ship might enter.
- b) Vaccination requirements of the countries which the Shipowner's fleet enters are constantly being monitored. The Company/Shipowner will aim to advise you of vaccination requirements prior to joining a ship, but this is not always possible. You may be required to have further vaccinations during a tour of duty.
- c) It is your responsibility to bring all original International Certificates of Vaccination with you to the ship and have these available for inspection as required.
- d) The Company will cover the cost of any vaccinations or medical precautions specifically required by the Company/Shipowner. Any other costs, for example for additional investigations, are your responsibility; also any travel, accommodation or subsistence which might be incurred.

Medical Care

- a) Emergency and routine medical care will be provided to you at no cost to you when you have left your country of residence and are in transit to the ship and during a tour of duty.
- b) If you become ill before you leave your home country, the Company is not responsible for the cost of medical care.

Medical Care Onboard

- a) The cost of medical treatment recommended by the ship's doctor and related costs incurred during a tour of duty will be met by the Company. This does not include dental or optical treatment of a non-essential nature unless caused by an accident or injury in the course of employment.

Part B1 (UK CBA), D&T Officers, Annual Salary/Contract Option Agreement (Ref B1, current v5, 2 May 2017)



In practice, companies seem to be quite careful about when a vaccine is deemed 'necessary' and immunisation requirements depend on where the seafarer is serving and their duties on board. The main vaccines required seem to be based on whether the port States to be visited have an active requirement for presentation of an International Certificate of Vaccination, for example for yellow fever; or for cholera or polio where there is an active outbreak. In other cases vaccination seems to be strongly advised or recommended rather than required, even where active illness could lead to a seafarer being determined unfit for duty (for example hepatitis A/B).

See also: <https://www.ukpandi.com/news-and-resources/bulletins/2017/the-best-defence-is-a-good-offence-why-vaccinations-matter/>

In the present circumstances of a global pandemic of a highly contagious virus and where a COVID-19 vaccination will protect both the seafarer and people coming into contact with them, it is likely that it will be required by most if not all States and therefore it would reasonably be considered to be a 'necessary' vaccination (we are already receiving reports of States beginning to require proof of COVID-19 vaccination for transport workers or for travellers).

So, for an existing contract that has a similar requirement on the seafarer to have 'any known necessary vaccinations' a seafarer could reasonably be required to get the COVID-19 vaccination when it is offered or made available. For new contracts, again, the COVID-19 vaccine would fall within the same (or similar) provision or the employer could reasonably include it specifically as a term of the new employment contract although it would be prudent to discuss this with any new applicants.

In all cases, vaccination requires an individual's informed and voluntary consent and cannot be forced. Accordingly, even in cases where there is a contractual requirement to have the vaccine, an employee may refuse vaccination.

Employees may refuse vaccines for many reasons, for example; concerns about health and safety for them personally, or on religious grounds or concerns about the safety of the vaccine itself, or from a more general anti-vaccination belief. Whatever reason an employee has for refusing to be vaccinated, employers must consider each case individually. It should be noted that some reasons given for refusing a vaccine could attract protection under the UK Equality Laws Act and any employer considering potential proceedings for breach of contract should seek specific legal advice to make sure that any action is legitimate.

3.1.4 Which vaccine?

There are more than 50 vaccines each at a different stage of testing and approval, as approval requirements vary by country. As yet there are no universally approved COVID-19 vaccines.

The safest option for shipowners, if they have contractual provisions requiring vaccination, is to include a provision in the contract of employment requiring all new onboarding seafarers to be vaccinated in accordance with the vaccine approved in their home country.

If the time comes when shipowners are able to supply vaccines directly to seafarers, they should ensure that any vaccine to be used has been approved by a relevant international or relevant national regulatory authority, the home state of the seafarer or the flag State.



It is understood that the World Health Organization (WHO) does not have a list of 'approved' vaccines, but has a list of vaccines which are under review for Emergency Use Listing (EUL) and which contains information as to their current status with regard to evaluation for use: [Status_COVID_VAX_01March2021.pdf \(who.int\)](#)

Use of vaccines that are still in a testing phase is not recommended. In addition, the shipowner should complete due diligence in ensuring that the vaccination batch to be used has been acquired from a reputable company and has undergone safety checks etc. before being administered. Recent reports of fake vaccinations supplied through private markets should place shipowners on alert to ensure that the vaccinations they plan to supply are verifiably sourced.

The age and medical history of the seafarer may also be relevant as to choice of vaccine: for example, in the EU the Moderna vaccination has been authorised only for those aged 18 or over.

3.15 Should vaccination take place on board?

Currently COVID-19 vaccines can only be accessed through national, government-run vaccination programmes. The industry is reviewing ways for seafarers to obtain authorised vaccines in the near term and this may include vaccinations to take place on board under approved conditions. (See: *Coronavirus (COVID-19): Guidance for Ship Operators for the Protection of the Health of Seafarers*, Version Four, section 5.3, question 4 - 'Can I get a Vaccine?').

3.16 Is the shipowner liable for the costs of vaccinating seafarers?

If a shipowner requires a seafarer to be vaccinated against COVID-19 or vaccination effectively becomes an occupational requirement for work at sea, then the shipowner would be liable for ensuring that a vaccine has been offered and at no cost to the seafarer. It is anticipated in this regard that a number of governments will be providing free vaccinations for their citizens.

3.17 Is the shipowner liable for the consequences of vaccinating seafarers, including any side effects?

The Maritime Labour Convention, 2006, as amended (MLC, 2006) mandates that seafarers shall have access to medical treatment (Article IV) and that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment:

Regulation 4.2 – Shipowners' liability

Purpose: To ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment

1. Each Member shall ensure that measures, in accordance with the Code, are in place on ships that fly its flag to provide seafarers employed on the ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarers' employment agreement or arising from their employment under such agreement.

Accordingly, if a crew member is vaccinated during the course of their employment and subsequently falls ill due to a reaction to an approved vaccination, then the shipowner's liability for illness and/or death, under the terms of employment and any applicable Collective Bargaining Agreement (CBA), would apply as it would with any other illness.



3.1.8 What would the shipowner's liabilities be if the vaccine was imposed by the seafarer's home country?

Where the seafarer has voluntarily taken the COVID-19 vaccination because it has been offered, for example by their government, then the shipowner would not be liable for the cost and would not be liable for the consequences of any resulting adverse reaction or illness. If however the seafarer falls ill while travelling to/from or on board the ship, it would be treated as any other case of medical treatment being required by a serving seafarer regardless of the link to the COVID-19 vaccine.

If the vaccine is mandated by the authorities in the seafarer's home country the cost of vaccination is unlikely to rest with the shipowner. Assuming that the vaccine is authorised and approved, the shipowner would respond in accordance with the seafarer's employment contract in the event of an adverse reaction or resulting illness which materialises whilst travelling to/from or on board that vessel. If a seafarer were then to fall ill due to the quality of the vaccination or a reaction thereto, liability would still follow the contract (but with a potential recourse action by the shipowner/insurer against the appropriate third party).

3.1.9 What would the shipowner's liabilities be in the event that a seafarer refused vaccination and other crew members contracted COVID-19 as a result of contact with the unvaccinated seafarer?

Assuming that the shipowner has discharged their duties to inform the unvaccinated seafarer of the safety of the vaccine and subsequently implemented measures to protect the seafarer and other crew members (social distancing, PPE, separate accommodation, etc.) as far as reasonably and practicably possible, the shipowner would respond in accordance with the terms of the applicable contract of employment. This would generally include liability for medical and repatriation costs.

3.2. Insurance Considerations

3.2.1 What are the P&I Club Rules?

All of the International Group P&I Clubs provide insurance cover for specified risks which include cover for illness and death of seafarers. The following is an extract from the UK P&I Club Rules, 2020:

Section 3: Illness and death of seamen

Liability to pay damages or compensation for illness and death resulting from illness of any seaman, and hospital, medical, funeral or other expenses necessarily incurred in relation to such illness or such death including expenses of repatriating the seaman and sending abroad a substitute to replace him.

PROVIDED ALWAYS that:

Where the liability arises or the costs or expenses are incurred under the terms of a crew agreement or other contract of service or employment and would not have arisen but for those terms, that liability is not covered by the Association unless and to the extent that those terms shall have been previously approved by the Managers in writing.

When considering whether to cover a claim relating to vaccination against COVID-19, such as a resulting illness, the owner's P&I Club would consider whether the liability and the cost relating to it was incurred in direct connection with the operation of the entered vessel. This would depend on factors such as when the vaccine was taken and whether this was during the crew member's contract of employment.

A shipowner's liability would have to arise either under the terms of the seafarer's employment contract (as above) or as a result of applicable legislation, in which case the illness would be covered and treated as any other illness on board.



3.2.2. What are the insurance cover provisions for other liabilities in a case where many of the crew were ill as a result of vaccination? Would there be cover for delay/damage to cargo as well? 12

The liability for continued medical treatment and related costs would be based on the contractual terms of employment and be treated as any other illness on board.

Loss of time, freight or revenue are generally excluded under IG P&I Club Rules. As far as cargo damages are concerned, that has to be determined based on the facts of the particular case as well as the terms of carriage and the applicable charter party. Each case would have to be assessed on its individual merits. The cost of providing the vaccination itself, including any time spent in port to facilitate vaccination of a particular crew would be an operational expense and would not be covered.

INTERTANKO has published guidance on chartering issues relating to COVID-19: <https://www.intertanko.com/info-centre/intertanko-guidance/guidancenotearticle/guidance-on-chartering-issues-relating-to-covid-19>

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4 Other Considerations for Discussion

4.1 Protection against transmission

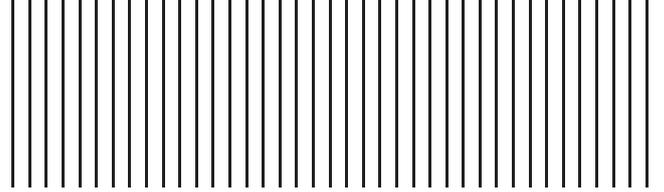
While it has been proven that the available and approved COVID-19 vaccines provide strong protection against developing symptoms, as yet there is no data on whether any of the vaccines prevent active infection or onward transmission of the virus or on how long immunity lasts once vaccinated. In addition, no vaccine is 100 percent effective. For this reason, States are unlikely to move quickly towards removal of other precautions they have put in place such as quarantine and testing. Although mass vaccination will be crucial for protecting the health of seafarers, it may therefore be of limited immediate use in alleviating the crew change crisis. This in turn may affect whether it is considered 'reasonable' to make vaccination a condition of employment.

4.2 Availability

Although in the longer-term supply is not expected to be an issue given the number of vaccines in development, at present, stocks of COVID-19 vaccinations are limited and are not available for private sale. Each State has its own priority list for rolling out the vaccine. For seafarers already on a tour of duty, there is no guarantee that a State other than their State of nationality/ residence will consider them for vaccination at all or for priority vaccination. There have been reports that the AstraZeneca/Oxford vaccine could be available for private purchase in India. While general availability remains restricted, any secondary private market could carry increased risks of a particular vaccine batch having been illegally acquired, fake or unsafe. This would make due diligence in vaccine sourcing even more important. It may also make requiring vaccination for seafarers more likely to be deemed discriminatory.

UK P&I Club has provided an FAQ on what kinds of costs it is covering in relation to COVID-19 expenses which may be of general interest: <https://www.ukpandi.com/news-and-resources/coronavirus/>





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