To: [INSERT]

Date: [INSERT DATE]

Re: COVID-19 Vaccination in the Workplace

Dear xxxx,

With regard to the request that I disclose my COVID-19 vaccination status, I wish to make you aware of the following.

On 22 June 2021, the office of the Data Protection Commission published guidance titled: - “*Processing Covid-19 Vaccination Data in the content of Employment*” (the “**Guidance**”). Please be advised that the Guidance states the following: -

*“As the economy and society continue to open up with the lessening of COVID-19 restrictions, many employers are seeking to understand what information they can process in relation to their employees return to the workplace. In particular, as the rollout of the National Vaccination Programme progresses, the question has been raised as to whether employers can lawfully collect and process information about the COVID-19 vaccination status of their employees.*

*As a general position, the DPC considers that, in the absence of clear advice from public health authorities in Ireland that it is necessary for all employers and managers of workplaces to establish vaccination status of employees and workers, the processing of vaccine data is likely to represent unnecessary and excessive data collection for which no clear legal basis exists. This is particularly the case when there is no public health advice pertaining to what the purpose of such data collection would be. For example, advice as to what employers would be expected to do with knowledge of vaccination status of workers i.e. to send non-vaccinated workers home or segregate vaccinated and non-vaccinated workers in workplaces?*

***Data Minimisation***

*The Work Safely Protocol: COVID-19 National Protocol for Employers and Workers also states that, “Irrespective of the vaccination roll-out, Public Health infection prevention and control measures (such as physical distancing, hand hygiene, face coverings, adequate ventilation), and working from home unless an employee’s physical presence in the workplace is necessary, will all need to remain in place”. This makes it clear that there remains a full suite of measures that employers should employ to maintain workplace safety before considering whether knowledge of vaccination status is a necessary measure. In accordance with the principle of data minimisation, employers should implement all such measures that avoid processing the personal data of employees in the first place.*

***Voluntary Nature of Vaccination***

*Information about a person’s vaccination status is special category personal data for the purposes of the GDPR. It represents part of their personal health record, and is afforded additional protections under data protection law. The Work Safely Protocol: COVID-19 National Protocol for Employers and Workers states that the decision to get a vaccine is voluntary and that individuals will make their own decisions in this regard. This further suggests that COVID-19 vaccination should not in general be considered a necessary workplace safety measure and consequently, the processing of vaccine data is unlikely to be necessary or proportionate in the employment context.”*

For the sake of clarity, I set out below the reasons the processing of my vaccination status is not considered lawful at this time.

**General Data Protection Regulations**

The General Data Protection Regulations which came into force on the 25th of May 2018 lay down rules relating to the protection of persons with regard to the processing of their personal data.

The recitals to the regulations state that “*The protection of natural persons in relation to the processing of personal data is a fundamental right*”. Article 8 of the EU Charter of Fundamental Rights states that everyone has the right to the protection of their personal data and such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned, or some other legitimate basis laid down by law.

Information regarding whether or not an employee has been vaccinated constitutes health data which is a type of special category data under the General Data Protection Regulations.

**Article 6 (Lawfulness of Processing) of the General Data Protection Regulations**

In order to lawfully process health data, an employer must first determine a legal basis for the processing of such data under Article 6 of the Regulations, such as on the basis of consent or to comply with a legal obligation. In this regard it is important to note that consent (under Article 6(1)(a)) is generally not regarded as a valid basis for processing an employee’s personal data because of the inequality in bargaining power between an employer and an employee.

In fact, in the guidance note prepared by the Data Commissioner it specially states: - “*The processing of personal data in the context of employment takes place in a situation where there is an imbalance between the data subject (employee) and data controller (employer). Therefore, employees should not be asked to consent to the processing of vaccine data as this consent is not likely to be freely given.”*

From this I conclude that, where an employer inquiries into the vaccination status of an employee, and in circumstances where an employee confirms their vaccination status - it is highly likely that the collection and processing of such personal data would be considered unlawful – in which case an employee could raise a complaint with the Data Protection Commission.

**Article 9 (Processing of Special Categories of Personal Data) of the General Data Protection Regulations**

In circumstances where an employer can determine a legal basis for the processing of health data under Article 6 (which appears unlikely in circumstances where the Department of Health has not provided any guidelines stipulating the necessity of doing so), then an employer should be aware that the processing of special categories of personal data (which includes health data) is generally prohibited unless an employer can avail itself of one of the exemptions under Article 9.

**Data Protection Impact Assessment**

Article 35 (Data Protection Impact Assessment) of the General Data Protection Regulations states: -

*“1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks…..*

*3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of: …. (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10;…”*

**In light of the above, I would be grateful for your response to the following questions:**

1. Please provide the legal basis upon which the collection and processing of my special category data is considered lawful under Article 6 of the General Data Protection Regulations.
2. Please provide the legal basis upon which the collection and processing of my special category data is considered lawful under Article 9 of the General Data Protection Regulations.
3. In circumstance where you consider that there is a lawful basis to process my special category data under 6 and 9 of the General Data Protection Regulations, please advise what the purpose of such data collection would be – for example, is such data being collected and processed for the purposes of segregating vaccinated and non-vaccinated employees etc?
4. Please provide a copy of the Data Protection Impact Assessment required under Article 35 of the General Data Protection Regulations.

In circumstances where a decision is made by the company to cease the collection and processing of vaccination status data at this time, I would be grateful if you would confirm same.

Yours sincerely,

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