

A.R.H.T

Advocacy Rights Hospitality Toolkit

DOMESTIC COVID VACCINATION CERTIFICATION - WHAT DO THEY MEAN FOR YOU?

ARN seeks to empower people to advocate on behalf of themselves, their business, and their customers.

We believe it is everybody's right to know the correct interpretation, meaning of regulations and guidance but more essentially how they exist and operate in the real world and in your business.

We believe that if businesses and customers alike properly know their rights and obligations, they both can apply the law fairly, without discrimination to equally ensure customers and staff safety, enjoyment and being free of liability.

We understand that many people, without a legal background, really struggle at times to know what they should or should not, can and cannot do to keep their businesses operating within the bounds of the law whilst providing an enjoyable experience for their customers and keeping everybody safe.

We know that when comparisons are drawn between what regulations actually state and information provided on the NI Direct Website Domestic Vaccination Certificates, managed by the Executive Information Service, working within the Department of Finance, there is seemingly contradictions and inaccuracies in what appears to be lawful commands on the surface through guidance with what the law properly and actually requires people to do.

An example is the implication relating to the evidencing of a person's covid status, e.g., you will be asked for your certificate. We know the regulations do not empower a responsible person to so demand nor oblige a customer to so comply.

We believe this language, by potentially misrepresenting the intention and operation of the regulations, may lead to people being unwittingly coerced into disclosing personal private medical health data and others unlawfully processing that data.

We believe that when the state intervenes, especially on matters such as disclosing private medical data and health status, requiring medical procedures and basic human rights relating to being able to run a business and enjoying life unhindered by interpreting laws for the public through guidance or other compliance measures, the state bears a duty to be accurate in a manner than empowers people to be communicatively adept knowing their rights and obligations particularly when they are subject on pain of punishment for getting it wrong.

We remain concerned that these current state interventions are creating vulnerability across society especially when these regulations seek the voluntary cooperation of people as stated in the explanatory memorandum (Pt.4.) of the regulations.

We have, in the following toolkit, tried to correct any erroneous assumptions by setting out what the regulations state and how the law can and should operate for everyone's benefit to protect and keep safe everybody but still enjoy our social life together as a community.

We hope this toolkit will provide a framework for you to achieve that, but it will be for you to decide if and how apply this toolkit.

A.R.H.T.

Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021. Statutory Rule No.93.

WHEN AMENDMENTS START.

1. Commencement – 1. (2) 5pm on 29th November 2021 as further amended on 9th December 2021.

APPLIES TO WHAT BUSINESS SITUATION

Regulation 1(3)(a) —

“(a) a “person responsible”—(i) for carrying on a business or providing a service or operating any premises includes the owner, proprietor and manager of that business or service or those premises; and

(ii) in relation to a relevant event, means the person responsible for organising that event, or the person responsible for the management of the premises at which the event is held or to be held if no other person is responsible for organising the event

WHO ARE THEY FIRSTLY TRYING TO REGULATE?

Qualifying individual. [a person (P)/customer]

16B.— (1) A “qualifying individual” may attend a relevant event or enter and remain on relevant premises.

(2) A qualifying individual is an individual who can evidence their Covid status in accordance with regulation 16C.

16C - Supporting evidence

16C.— (1) A person (P) may provide evidence of their Covid status through—

HOW DOES THE LAW INTERPRET REGULATIONS 16B & 16C?

ACCORDANCE – To comply with.

CAN - Be able to.

COVID STATUS – It is a status category which conveys a set of privileges, obligations, powers or restrictions on a person.

EFFECTIVE – successful in achieving a result.

ENSURE – make certain.

EVIDENCE – The available body of facts or information indicating whether a belief or proposition is true or valid.

MAY – expressing possibility or to give permission.

PROVIDE – make available for use, supply.

THROUGH – allowed / permitted by the law.

Simply put (our interpretation) – A qualifying individual, (P), is a customer ‘who is able to have an available body of facts or information complying with 1 of the 5 examples in Reg 16 C, which can indicate whether the proposition that they are a qualifying individual is valid or true’

WHAT DOES COVID STATUS MEAN?

Covid Status is not legally defined in Public Health Act (NI) 1967 at S.33 Interpretation section or subsequent regulations.

It operates as a permissible status category which conveys a set of privileges, obligations, powers or restrictions on a person.

There are 5 examples given within R.16C of how to achieve that status, evidently, they relate to many and varied different conditions of your health relative to coronavirus, e.g., the differences between 16C (1) (a) & (c).

Therefore, we believe, this begs the question whether it would be plausible to conclude that where covid status is not defined, operates as a permissible status category and does not proscribe what cannot be evidence of covid status, is it open to interpretation that when (P), e.g. is asymptomatic, in the absence of testing could this equate with having a covid status as a qualifying individual also fulfilling the policy intention of these regulations alongside other health and safety legislative measures designed to keep people safe?

WHAT DOES ‘MAY PROVIDE (SUPPORTING) EVIDENCE’ MEAN?

16C.— (1) A (P) ***may*** provide evidence of their Covid status through;

Q: What does ***may*** mean legally? A: It is discretionary, people have a choice.

How do we know this?

1. Look at 16. B. (1) A - A “qualifying individual” may attend, so the health minister, who laid this regulation, is saying a qualifying individual **MAY**, in normal language you have a choice whether you attend, clearly it is a choice.

2. CIVIL CONTINGENCIES ACT 2004. Section 22 (1) ‘emergency regulation **may** make any provision’. (2) In particular, ‘emergency regulations **may** make any provision’; (a) – (i)

Reading this in normal everyday interpretation and legal interpretation clearly shows this **MAY** is a choice, e.g. in S.22 about making provisions and lists 12 examples BUT it is not a comprehensive or exhaustive list.

What is the legal consequence of this?

A customer / (P) by consent, **may** provide, i.e., make available for use or supply, evidence of their private health data equating to Covid status, in accordance examples in Reg 16 (1) (c) (a) – (e), which impose an obligation to undergo a medical procedure in 4, in order to be granted permission to enter premises.

The requirement, now, to evidence your health status relative to covid means that an asymptomatic person, whom for whatever reason chooses not to undergo a medical procedure and cannot obtain a medical exemption, can no longer rely on laws that help us in everyday scenarios keep people safe e.g. Health and Safety at Work Law and contracts on employment were people, employers and employees, contract with each other to make sure people are safe and protected incorporating acceptable instructions guiding behaviour, i.e. not to come into work if they are showing signs of infection, which is commonly agreed and known to be showing signs of illness.

We know these laws still exist to protect us all in these scenarios through general duties on employer, licensee, consumer protection laws and employee protections, e.g., Health and Safety at work Northern Ireland order 1978, though not limited to, though now they are subjugated to emergency regulations.

However, other laws exist and operate upholding the rule of law, providing due process in law protecting our rights and keeping us all safe.

WHAT DOES EVIDENCE MEAN?

‘Available body of facts or information’ – If you look at Reg 16 C there are differing types of supporting evidence or examples of facts and that they differ in type and meaning; see (a) compared to (c). The NI Direct website affords the following evidence;

(a) relates to a vaccination and an available fact to indicate it to be true is the Domestic Covid Vaccination Certificate downloaded through an APP onto an qualifying individuals phone or by vaccination cards given when vaccinated.

Or

(c) relates to a positive PCR test and an available fact to indicate it to be true is a text confirmation, which is a valid notification, from NHS, downloaded and stored on a qualifying individual's phone or by recovery certificate through the Domestic Covid Vaccination Certificate process.

It is obvious both are facts.

It is obvious both relate to different personal medical health data.

It is obvious that both are in accordance with Reg 16 C and can therefore be used to evidence the covid status for a qualifying individual.

BUT

if evidence is facts OR 'information' what can information mean in relation to indicating whether a belief or proposition is true or valid, that a person is a qualifying individual?

'Information' is facts provided or learned about something or someone.

Could it be other than that contained and derived from the domestic covid vaccination certificate?

What could alternative declaration or verification information look like and how could it be provided to evidence covid status?

If we suppose a system is operated -

- at the entry point to premises or at a table or at a bar requiring self-declaration or verification;
- that allows a customer to provide, e.g. 16C (1) (C) a text on their phone from NHS result PCR test,
- or provide a declaration, verbally or non-verbally, they are a qualifying individual and that they are able provide that text evidence,
- and provides their details and phone number,

it seems plausible, therefore, from the wording of REG 16B + 16C that either of these methods of declaration or verification fulfils the requirements to evidence covid status because there is nothing we can find within Reg 16C that prescribes or commands the manner by which a customer **MUST** provide evidence of their covid status.

To explain this, we can examine 16C evidence of covid status may be provided through or by way of;

'a valid notification of a positive result of a COVID-19 polymerase chain reaction test taken no earlier than 30 days, and no later than 180 days, before the relevant time'

What this means is that this is the evidence a customer needs to have possession of to have a covid status and thus become a qualifying individual.

We know this evidence can be supplied from the NHS by text message to a person's mobile phone and once received, provided it remains within time frame, that person has evidence of covid status and they are automatically a qualifying individual.

That person may apply for a recovery certificate through the domestic covid vaccination certificate scheme.

But the regulations are silent on how that evidence must be provided to the responsible person because the responsibility is on the responsible person to have effective system to ensure a customer is a qualifying individual and thus permitted to enter.

It therefore seems plausible that (P), a customer, declaring or verifying to you verbally (speaks) or non-verbally (writes by hand, filling in a questionnaire or form, on computer or other means in a document electronically or otherwise through a self-declaration covid status protocol process, text message from NHS, signing an employment contract as to their health status) i.e., other than with the domestic certificates, that they are a qualifying individual and able to provide supporting evidence accords with Reg 16C.

These would seem plausible alternative means to evidence covid status because we can find no command in Reg 16C prescribing, i.e., state authoritatively or as a rule that (an action or procedure) should be carried out, the manner by which that supporting MUST be provided and only a prescription on the category of supporting evidence that may be made available.

Furthermore, there exists no proscription within Reg 16C, i.e., forbidding, the provision of this covid status evidence by these alternative means.

Could such alternative declarations or verifications be legally effective?

A person's verbal utterances and or written statements (verbal and non-verbal), ie. declarations, can in law amount to 'effective' evidence.

This is confirmed in legal textbooks - Barry Valentine – Criminal Procedure in Northern Ireland. Chapter 12. Witnesses & Evidence. Section 12.00.

In criminal cases virtually all testimony of witnesses is adduced orally and can be given in written form by a written statement called a FORM 38/36 or an affidavit.

If given verbally (in court or otherwise) the law applies a standard for the truth of what is spoken or written by an Oath.

Barry Valentine Book Section - 12.07 – All witnesses give evidence orally, on oath (Oaths Act 1978), that is a commitment to tell the truth, the whole truth and nothing but he truth.

In essence this is the process the legal system adopts to ensure a witness's evidence is truthful on pain of punishment if found not to be so.

These regulations similarly require a person not to lie about being a qualifying individual on pain of punishment if found not to be so, according to Reg.16B (3).

We believe a direct comparison can be drawn because it seems apparent how these regulations have similar processes, standards and punishments for not telling the truth about fact as do the courts.

We believe that because courts adopt such processes as an effective system for the truth it would seem reasonable and proportionate, therefore by comparison to adopt similar declaration and verification means to ensure only a qualifying individual is permitted entry.

We find supporting evidence for this proposition from the fact that governmental departments and the law currently recognises and accepts multiple forms of self-verification that incorporate penalties for false entries.

There are many and varied established effective systems ensuring the truth of the facts stated as can be evidenced by e.g., electoral registers, driving licence and passport forms, census forms, tax and vat returns, giving evidence in court, writing and signing an affidavit and most pertinent to this scenario is signing employment contracts as to health status.

We appreciate this is outside a court room and there is no oath, but the concept of trust exists in everyday life situations, e.g., customers will have their food prepared in accordance with health and safety guidelines and customers enter a financial agreement / arrangement, for which they are lawfully liable when ordering food and will not leave without paying, nevertheless both carry criminal sanctions for breaking.

What would allow such alternative declarations or verifications to be legally effective?

In seeking to ensure truth the law applies what is termed “presumptions” [See B.Valentine – Criminal procedure in NI; Pg 293; Section 11.07 -11.09.

What the law takes this to mean is that courts / lawyers can presume or draw an inference of law and fact in a particular case.

A presumption of law is, e.g., sanity or a person is innocent until proved beyond a reasonable doubt guilty.

A presumption of fact can be relied upon, such as a person intends the natural and probable consequences of his act [Criminal Justice Act (NI) 1966.S.4] as those presumptions assist in finding a prima facie case, i.e., some evidence, and in the absence of any contrary evidence can be used to find a fact proved.

We know, therefore, that in real-life scenarios, e.g., a person verifying, verbally or non-verbal, to you something to be true, on pain of punishment if found to be untrue can be relied being legally effective to assist in finding some evidence that the person is truthful and what they are verifying is a true fact.

If alternative declarations or verifications could be legally effective to evidence covid status at what level does that evidence need to achieve from the customer?

When a customer declares or verifies in a manner other than with a domestic certificate, e.g., being a qualifying individual, some evidence has been raised, but the difficulty is, at what level of proof is needed to ensure the verification measures accord with a legally effective system?

We consider that the customer bears what is called the legal burden because they are saying they have a particular status, e.g., insanity [Criminal Justice Act (NI) 1966]. When a defendant claims, e.g., an insanity status, they must discharge this persuasive burden at a level 'on a balance of probabilities' that fact which is essential to the determination of their guilt or innocence. In ordinary everyday language it is more likely than not, probable, more than 50% which is commonly termed the civil standard of proof.

If the standard was the criminal standard 'beyond all reasonable doubt' a too high a level of burden would be placed on customer and would not be in keeping with the 'golden rule' on burdens of proof that, the prosecution ONLY bear the burden to prove beyond a reasonable doubt.

It would also be in keeping with the 'golden rule' on burdens of proof, if a customer (or the responsible person) was challenged on the basis of that evidence and the means it was provided was insufficient the government would bear the burden to prove, beyond a reasonable doubt, how and why other measures are considered reasonable and proportionate, e.g. NI Govt domestic verification process, and required from (P) ensuring an effective system as written by enforcement officer 18 (3) (b) issuing an improvement notice to a responsible person if either disagreed by way of an appeal in court (see reg 21).

However, we conclude by saying that none of the above best practice guidance will be effective unless the responsible person develops in written form a well-reasoned, logical and best practice protocol system, perhaps similar to a health and safety risk assessment, to enable the customer to declare and verify they are a qualifying individual and able to provide both medical and identification evidence.

It would seem plausible that if such a system with effective protocols was deployed those measures could be viewed as reasonable and proportionate ensuring compliance with the regulations.

WHO ARE THEY SECONDLY TRYING TO REGULATE?

The Responsible Person.

WHAT MUST THE RESPONSIBLE PERSON DO?

FULFILING REQUIREMENTS; ENTRY TO PREMISES AND ATTENDANCE AT EVENTS. 16F –

(2) Responsible person (P) must not permit a person other than a person referred to in paragraph (4) and

(3) (P) must ensure there is in operation an effective system for –

(a) ensuring that only a person (qualifying person) may enter.

For our purposes (4) (a) qualifying person – this can be any customer.

(6) Recording only a customer over 16 yrs name and telephone number, date and time of entry, event start time and if a ticket purchase again name and number.

HOW WILL A RESPONSIBLE PERSON'S SYSTEM BE ASSESSED AS EFFECTIVE?

We find that Reg 15F a written statement, must be kept, describing the system along with retention and disclosure obligations.

We find that Reg 16F (3) describes that the system is to be 'effective'.

We find that as 'effective' is not defined it will have an ordinary everyday meaning, i.e. to make certain, to be convinced or sure and firmly rely upon.

We find that 'effectiveness' is to be assessed against the only other standard existing in Reg 18 - Officers and Premises Improvement Notices; specifically, Reg 18 (3) (a) the measures specified in the notice are reasonably necessary and proportionate in order to ensure that (P) does so comply with measures to ensure only a permitted person enters and remains.

It is evident, therefore, that discretionary authority is given to enforcement officers to assess the system currently operating against the standard of 'what is reasonably necessary and proportionate to ensure compliance.'

The reasonableness and proportionate test as applied to an effective system

We find this assessment test is already recognised by the courts and in the law as 'reasonableness', e.g., in defending oneself.

See case Beckford. V. The Queen [1988] Appeal Court 130. Lord Griffiths (at p.45) 'the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.'

Also see the legal textbook Blackstone's Criminal Practice; Defences involving excuses and justifications – duress of circumstances.

We believe that the reasoned and logical conclusion is that for a system to be effective the responsible person is required to 'honestly believe' the system in operation can make certain, that they can be convinced or be sure and firmly rely upon it will ensure only a qualifying person will be permitted entry and allowed to remain.

At what level or standard will it need to be proved effective?

We find that the regulations are silent as to the actual level or standard of proof. We find it plausible that any assessment must rely upon reasonableness and proportionality due to Reg 18 (3) (a).

We know that in the law of reasonable self-defence the defendant bears the 'evidential burden'. Therefore, the defendant must have raised some evidence of this, e.g., in a statement to the police and if that evidential burden has been discharged then the prosecution must rebut the defence beyond reasonable doubt and the operation of these burdens in this manner would be in keeping with the 'golden rule' on burdens of proof.

We believe that these burdens will operate in the following manner;

Provided the responsible person has completed a written assessment of their premises and honestly concludes their operating system is a reasonable and proportionate of their effective system, e.g., akin to a health and safety risk assessment and if challenged based on their system being inadequate and needed improving, the golden rule of burdens would seemingly operate on enforcements officers' improvement notices.

It would operate, not only, on the provision of a written statement in an improvement notice on how and why it is considered other measures are reasonably necessary and proportionate, e.g. NI Govt domestic covid verification certificate, and required from (P) to ensure an effective system in accordance with 18 (3) (b), but also to substantiate that consideration and assessment in court if that improvement notice was appealed by the responsible person (see reg 21).

We believe that supporting evidence on the standard or level of an effective system can be relied upon from governmental departments where the law currently recognises and accepts multiple forms of self-verification that incorporate penalties for false entries.

There are many and varied established effective systems ensuring the truth of the facts stated as can be evidenced by e.g., electoral registers, driving licence and passport forms, census forms, tax and vat returns, giving evidence in court, writing and signing an affidavit and most pertinent to this scenario is signing employment contracts as to health status.

EFFECTIVE SYSTEMS AND WHEN SHOULD IT OPERATE?

Suppose a system operated on thus -

- at the entry point to premises or at a table or at a bar requiring self-declarations or verification;
- That allows a customer to provide, e.g. 16C (1) (C) a text on their phone from NHS result PCR test,
- or provide a declaration, verbally or non-verbally, they are a qualifying individual and that they are able provide that text evidence,
- and provides their details and phone number,

it seems plausible, therefore, from the wording of REG 16B + 16C that either of these methods of declaration or verification fulfils the requirements to evidence covid status because there is nothing we can find within Reg 16C that prescribes or commands the manner by which a customer MUST provide evidence of their covid status or the manner of the operation of the effective system.

Suppose a system operated on thus –

Website booking with protocols and questions as part of the navigation menu and thereafter a declaration that by completing booking they are a qualifying person.

It seems plausible, therefore, from the wording of REG 16B + 16C that either of these methods of declaration or verification fulfils the requirements to evidence covid status because there is nothing, we can find within Reg 16C that prescribes or commands the manner by which a customer MUST provide evidence of their covid status or the manner of the operation of the effective system.

However, the protocols and measures developed by a responsible person ensuring an effective system would require to be assessed against the above legal doctrines and requirements in order to comply with the regulations.

Removal and refusing access according with Reg 16F.

We find it plausible to incorporate already existing legal protections and measures relative to customers in these circumstances into the newly developed effective system required under these regulations.

REQUIREMENTS ETC 'VISITOR AND ATTENDEE INFORMATION'.

REG 15 (2)

- (a) If info not given in advance at time of attendance obtain that info and in accordance with R.15(4) name, or who bought ticket, telephone number, date and time arrival [normal booking requirements].
- (b) Record in filing system
- (c) Retain 21 days
- (d) Destroy after 21 days.

WHAT IS YOUR OBLIGATION IN RELATION TO PERSONAL DATA UNDER 16F (6)?

It is strictly limited to having a system in place to 'process any personal data necessary', e.g., name, or who bought ticket, telephone number, date and time arrival, and whether they wish to and or can verify qualifying person criteria.

RETAINING YOUR SYSTEMS DATA

It must be retained for 21 days and if asked for this information by a relevant officer it must be supplied within 24 hours Reg 15A (3).

There must be a reasonable system to retain that information for 21 days and thereafter destroy same.

DEPARTMENT ISSUING FURTHER GUIDANCE

If the Dept issue updating guidance the no must "having regard" to it under 16F (5) means that there is an obligation to read it and carefully consider same.

Guidance is advisory and discretionary offering a choice to apply though not enforceable, nevertheless it can be subject to scrutiny by the courts particularly, e.g., if it mis-states the law.

Though to keep on the right side of the law a system to record when and how a responsible person 'had regard' to that guidance could be adopted as a best practice measure.