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Workplace Lawyers

Education Bulletin

Spring 2022

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Welcome to the Spring Term 2022 edition of our Education Bulletin! In this edition, we're looking at some legal updates that might impact your school or college, as well as looking ahead to what to expect this year.

In this bulletin we cover:

- Sickness absence and pay in the wake of the Omicron variant
- Changes to KCSIE
- The option of “phased withdrawal” from the Teachers’ Pension Scheme
- The DfE’s new consultation on teacher misconduct
- What HR changes to expect in 2022

Sickness absence and pay in the wake of Omicron

The huge increase in Covid cases and sickness absence since the appearance of the Omicron variant has impacted many employers, including schools and colleges. In response, the Government has made a couple of key changes which schools and colleges need to be aware of:

- **Statutory sick pay rebate scheme** - the Government has reintroduced the [Statutory Sick Pay Rebate Scheme](#). This allows small and medium-sized employers in all sectors to reclaim statutory sick pay paid for Covid-related absences of up to two weeks per employee. Employers with fewer than 250 employees (as at 30 November 2021) are able to claim for days of absence from 21 December onwards (including where the absence began before that date). The scheme will end on 24 March 2022, which is the last date for claims to be submitted to HMRC.
- **Changes to rules on self-certifying** - the Government also introduced a temporary change to the statutory sick pay rules which allows employees to self-certify for up to 28 days’ absence. Employees are normally able to self-certify for sickness absences of up to 7 days. However, employees whose period of sickness absence began at any point between 10 December 2021 and 26 January 2022 only need a fit note from a doctor if they are off sick for more than 28 days. For absences beginning after 26 January employees will need a fit note after 7 days of absence.

No enhanced sick pay for unvaccinated employees?

A rather contentious issue making headlines recently has been what employers should pay to unvaccinated employees who are unable to come to work because they have been in contact with someone who has Covid-19. Under current rules, anyone who has been double jabbed who comes into contact with a person with Covid is not required to self-isolate, unless they test positive as well. However, anyone who is unvaccinated who comes into contact with a positive case is required to self-isolate for 10 days, meaning that some unvaccinated employees are having to self-isolate on numerous occasions, despite testing negative for Covid.



This can cause significant issues where the employee cannot work from home. As a result, some employers are choosing to only pay statutory sick pay to unvaccinated employees who do not have Covid but have to self-isolate and cannot work from home.

The potential risks of following this approach will depend on what your school's employment contracts and policies say, as well as the circumstances of each employee. But a disgruntled employee could potentially claim unlawful deduction from wages, breach of contract and possibly discrimination. Therefore it is sensible to take legal advice before changing your approach to sick pay.

Changes to Keeping Children Safe in Education (KCSIE)

Since our last bulletin, a new version of **Keeping Children Safe In Education** has been released. A key change is the introduction of a new duty on schools and colleges to deal with "low-level" safeguarding concerns. See our [article](#) to read our tips for implementing the updated guidance.

If you have any questions about safeguarding issues, please get in touch with any member of the **Education Team**.

The Department for Education (DfE) has now launched its consultation on the changes it is proposing to make to KCSIE from the start of the 2022-23 academic year. A key proposal is to merge the separate non-statutory guidance on sexual violence and sexual harassment into KCSIE. This would, in turn, mean that governors and trustees would be required to receive safeguarding and child protection training (including online safety) at induction and this training would have to be regularly updated. As part of this change, the phrase 'peer-on-peer' abuse would be altered to 'child-on-child' abuse.

The DfE also proposes that the new version of KCSIE would say that schools should consider online searches as part of their due diligence checks on shortlisted candidates. This would explore anything that is publicly available online which may be worth testing at interview.

Schools are not expected to make any changes to policies or current practice until KCSIE 2022 has been published. In the meantime, though, you can have your say on the proposed changes. The proposed revisions, consultation document and online consultation form can all be accessed [here](#). The consultation closes on Tuesday 8th March 2022.

Teachers' Pension Scheme – option for "Phased Withdrawal" for Independent Schools

Faced with the ongoing costs and risk exposure associated with defined benefit pension provision – pressures which have been exacerbated by the impact of Covid-19 – many independent schools have been forced to review whether they can continue to provide their teaching staff with membership of the TPS as part of their terms and conditions of employment. However, although a school's leadership team may be able to set out a clear financial rationale for proposing a TPS withdrawal, this needs to be balanced against a number of competing pressures within the school and its sector – in particular the need to retain and reward talent, to ensure that the school's pension benefits remain competitive and the potential disparity in pension benefits between older staff with long TPS service, and younger staff who have only been in the scheme for a relatively short period of time. Faced with a possible TPS



withdrawal, many independent schools have found themselves going through tricky and bruising employment and pension consultations with staff and unions, which even if resulting in a “successful” eventual TPS exit inevitably have a negative effect on staff morale and the teaching staff’s relationship with management.

Acknowledging the difficulties associated with a TPS withdrawal, and with a view to balancing some of these different factors, the Government changed the rules around TPS participation from 1 August 2021 to allow independent schools to exit the TPS in a different way – through the “phased withdrawal” model.

Under phased withdrawal, rather than ceasing future accrual of benefits for staff in the TPS entirely, membership in the TPS can be “frozen” for an independent school at a particular point in time. This means that existing TPS members remain in the scheme and accrue future years of service, but no other new staff can join the scheme in the future, other than any staff who are subject to a bulk TUPE transfer from another participating school.

Of course, legally, there are still loopholes to jump through regarding consultation and potentially changes to employment terms and conditions as well, and phased withdrawal is also not without its potential downsides – not least the risk of a school developing a future “two-tier” workforce between TPS and non-TPS staff at a later date. That said, on the face of it, the phased withdrawal model in theory does offer a neat “halfway house” which avoids the fallout from the school proposing a full TPS exit while allowing the school to still balance and hedge some of its future risk on pensions.

If you are interested in knowing more about options around TPS exit, and whether the phased withdrawal model could be a sensible fit for your school, please contact our Head of Pensions [Andrew Campbell](#) in the first instance.

DfE publishes consultation on teacher misconduct: regulating the teaching profession

The DfE has recently published a [consultation](#) seeking views on proposed changes to the teacher misconduct arrangements operated by the Teaching Regulation Agency (TRA) on behalf of the Secretary of State for Education. The TRA considers the most serious cases of misconduct and decides whether a prohibition order should be imposed, preventing a teacher from being employed or engaged to undertake teaching work in a particular setting.

The consultation proposals include:

- Widening the scope of the current teacher misconduct rules to include those who previously carried out teaching work who commit misconduct (for example, teachers on a career break or acting as supply teachers between jobs).
- Broadening the scope of the current rules to include a wider range of education settings, such as further education colleges and online education providers.
- Enabling the Secretary of State to consider referrals of serious teacher misconduct regardless of how the matter comes to their attention, including referrals from DfE officials who come across evidence during the course of their normal duties that a teacher may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute, or have been convicted of a relevant offence.



The consultation closes on 14 March 2022 and responses should be submitted using the [online form](#).

What HR changes to expect in 2022

- **A new Employment Bill** – the Government could introduce the Employment Bill which will introduce a number of new rights for employees, including:
 - The right to take [one week's unpaid carer's leave](#) each year, to care for a spouse, civil partner, child, parent or someone living in the same household or who reasonably relies on them for care and who has a long-term care need.
 - Increased redundancy protection for pregnant women and new parents. The obligation to offer a suitable available vacancy to a woman on maternity leave whose position is redundant will instead apply from the point at which she informs her employer that she is pregnant until six months after the end of her maternity leave. Redundancy protection for those returning from adoption and shared parental leave will be extended until six months after they return.
 - A new right to neonatal leave and pay for parents whose babies require neonatal care.

The Government has said that the Bill will be introduced when Parliamentary time allows, so it is unclear whether these rights will come into force in 2022. No action is needed for now, but once these changes come into force, schools and colleges will need to update their policies and procedures accordingly.

- **Increased protection from sexual harassment** - the Government will introduce a new duty requiring employers to take “all reasonable steps” to prevent sexual harassment occurring and there will be a statutory code of practice for employers to follow. Employees will also be protected against harassment by third parties and may have six months to bring a claim under the Equality Act 2010 instead of three months. The changes will come in as soon as parliamentary time allows, so possibly in 2022. In the meantime, schools and colleges can reduce the risk of harassment by checking that their policies and procedures are up to date and that staff have adequate training.
- **Key holiday pay case** - we expect to see the decision of the Supreme Court in *Harpur Trust v Brazel* on calculating holiday entitlement for part year workers. The decision could impact how you calculate holiday pay for staff on permanent contracts who work part of the year. Click [here](#) for information on the issues in the case and the decision being reviewed by the Supreme Court.
- We may also see the responses to a number of Government consultations this year –
 - **Menopause in the workplace** - the Women and Equalities Committee's [inquiry into menopause in the workplace](#) is examining the extent of discrimination faced by menopausal women at work and investigating how Government policy and workplace practices can better support them. The Committee's recommendations are expected to be published in 2022 and could lead to changes to the Equality Act 2010 to better protect menopausal women suffering discrimination at work.



- **Flexible working** - the [consultation on changes to flexible working laws](#) has closed and the response should follow in 2022 although it is unclear when any changes will be implemented. Changes being considered include: giving employees the right to request flexible working from day one of their employment; changing the eight business reasons an employer can rely on for refusing a request and allowing employees to make more than one request in any 12 month period.
- **Family leave** – we are still awaiting the response to the Government’s 2019 consultation on how it might reform the whole range of family leave and pay currently available to parents, including shared parental, maternity and paternity leave and pay and unpaid parental leave. This may be published in 2022.

If you have any queries regarding any matters raised in this Education Bulletin, please contact Doyle Clayton’s Head of Education, [Simon Henthorn](#) on 0203 696 7172 or shenthorn@doyleclayton.co.uk.

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