

Education Focus



Looking for clarity in uncertain times

As we approach the Summer break and the full impact of the outcome of the General Election is still to be felt, schools, colleges and universities continue to face uncertainty on a number of fronts. Education policy is clearly still evolving in the wake of the loss of the previous Government's majority in the Commons. Whilst uncertainty makes it ever harder for providers to plan ahead, it does at least bring opportunity for those who are able to be more nimble. As ever the education sector will demonstrate its resilience and deal with whatever comes its way, but let us hope that in what is undoubtedly going to be an unsettled period for the Country there is some recognition that stable education policy is in itself a good thing.

With that said, there are some legal issues where a clearer picture is emerging. The ESFA's procurement process for non-levy apprenticeships is in tatters, but the new apprenticeship

regime is now in force and we have some initial observations which are shared on page 4. The legislation behind the college insolvency regime was passed before the Parliament was dissolved and we now await implementing regulations which are currently expected to take effect in the second half of 2018. With a programme of training sessions already underway we will keep monitoring the detail and publishing further commentary as matters evolve.

With all of this change happening it would be easy to miss some of the wider changes in legislation coming

our way. A very significant change which affects all providers is the General Data Protection Regulation (known as the "GDPR"). It stems from legislative change in Europe and was given specific attention in the Queen's Speech. There is much to do for all providers before the new legislative framework comes into full force in May. We have a Q&A on this topic overleaf and we are putting in place a series of events to try to raise awareness for what is an important raising of the bar when it comes to the compliance standards expected of all providers.

Tom Morrison



Q&A

The new law on data protection



David White is a Senior Solicitor in Rollits' Commercial & IP Team and advises education providers on data protection and freedom of information issues. In this Q&A David sets out some of his early thoughts on the new data protection regime which comes into force in May, known as the General Data Protection Regulation – or GDPR for short.

How is the data protection law change being implemented and when will it take place?

The General Data Protection Regulation ("GDPR") takes the form of a Regulation which is already in force in all EU member states without implementation of national legislation. Full enforcement of the GDPR begins on 25 May 2018 and the UK's current legislation – the Data Protection Act 1998 ("DPA") – continues in force until that date.

Won't the proposed changes just fall away when Brexit is complete?

No. Although, post-Brexit, the GDPR will no longer automatically apply in the UK, the UK will need to ensure that its data protection laws provide an adequate level of protection for personal data by EU standards. This means that the UK will have to implement appropriate data protection

legislation, or transpose the GDPR into national legislation on the day Brexit occurs so that the GDPR effectively continues to apply. The recent Queen's Speech recognises the importance of the GDPR and both the Government and the ICO have been clear that one way or another the UK will need to be in a position to trade with the EU and that personal information will need to be able to flow freely and lawfully.

What are the key changes?

The overarching objective of the GDPR is the same as the DPA: to protect individuals' personal data. The GDPR does, however, strengthen the protection granted to EU citizens in respect of their personal data in a number of ways. For example:

- The conditions for obtaining consent to process personal data have been strengthened and the controller will need to be able to demonstrate that such consent was "freely given, specific, informed and unambiguous".
- Controllers and processors are required to demonstrate that they comply with the data protection principles. That means they must implement appropriate technical and organisational measures to demonstrate that data protection has been considered in respect of any processing activities (for example,

by implementing appropriate data protection policies, staff training, internal audits and reviews of HR policies). Some organisations will be under an obligation to appoint a data protection officer, and data protection impact assessments are compulsory in certain circumstances.

- The GDPR strengthens individuals' data rights and creates new rights which organisations will need to familiarise themselves with and act on, such as the right to data portability, the right to erasure and the right to object to processing. Organisations can no longer charge a fee for responding to a subject access request and must respond in a shorter timeframe (without delay and no later than one month after receipt).
- The GDPR introduces direct, statutory data protection obligations on processors. Under the DPA, processors are generally not subject to direct obligations, fines or other penalties and so this represents a significant change.

What are the risks arising from a breach of the GDPR?

Under the DPA the maximum fine that can be imposed for a data protection breach in the UK is £500,000. The GDPR significantly increases this. Under the GDPR the ICO can impose a fine of up

to 4% of annual worldwide turnover for the preceding financial year or €20 million (whichever is greater) for certain data protection breaches. Furthermore, organisations are required to report “notifiable breaches” to the relevant supervisory authority (the Information Commissioner’s Office in the UK) within 72 hours. In some cases the individual concerned must be notified as well. Beyond this there are clear non-legal risks such as damage to reputation.

Will the changes have any effect on personal data that we obtain prior to 25 May 2018?

Yes. The GDPR will apply to all personal data held by an organisation irrespective of when that data was obtained. Organisations should be looking now at what personal data they process and on what lawful basis that data is processed (and whether it will still be considered lawful on 25 May 2018). For example, if an organisation processes personal data based on the individual’s consent, but the consent obtained from the individual does not meet the higher standards imposed by the GDPR, the consent will not be valid once the GDPR comes into force. In such circumstances the organisation should obtain fresh consent from the individual which meets the requirements of the GDPR before 25 May 2018 to ensure that it can process that individual’s personal data lawfully once the GDPR comes into force.

Will there be any transitional ‘bedding in’ period within which to achieve compliance?

No – full compliance will be required from 25 May 2018. It is therefore imperative that data controllers (if they have not done so already) ensure that they review their existing policies and procedures to ensure they comply with the new laws and make any necessary updates – such as to methods of obtaining consent. Staff should be trained and educated in the new laws and any related changes to the data controller’s existing procedures.

What does all this mean for education providers?

The GDPR impacts most upon those organisations which hold information about lots of people – such as staff and customers. Education is a staff-intensive business and education providers nationwide serve a large number of customers (in the form of pupils and students). The sector needs to be ready for what is a significant change and we are in the process of conducting an awareness campaign to help support that. May 2018 will be here before we know it.

Publication schemes

The Freedom of Information Act 2000 (“FOIA”) imposes an obligation on public authorities – which includes local authority maintained schools, academies and further and higher education institutions – to adopt and maintain a publication scheme approved by the Information Commissioner and to routinely publish information to the public pursuant to that scheme.



Model publication schemes are available on the Information Commissioner’s Office’s (“ICO”) website. The Information Commissioner expects public authorities to adopt model publication schemes without modification.

As part of its publication scheme, a public authority is also expected to produce a “guide to information” which specifies what information the authority publishes and how it is available (for example, online or in hard copy). The Information Commissioner has published a “definition document” for each type of education provider which sets out the types of information the Information Commissioner expects the provider to publish. There is also a template ‘Guide to information available’ on the ICO’s website to assist smaller schools (and in particular primary and nursery schools). The model publication scheme recommends that information should be made available on a website wherever possible.

In addition to the above, all providers covered by FOIA should adopt a policy to review periodically what information they publish pursuant to their publication scheme to ensure that any newly created information that falls within the scope of the publication scheme is made available promptly.

Providers should take steps to adopt and implement a publication scheme if they have not done so already. Whilst publication can sometimes be a time consuming process, there are mandatory legal requirements under FOIA and publication schemes can be used as a tool for ultimately reducing the workload associated with responding to requests for information (because if the information requested is readily available through the publication scheme, for example, as a download, it is sufficient to direct the applicant to the relevant web page).

David White

Post-levy apprenticeship contracting

Our observations so far...

We have over recent months been advising a range of providers in relation to their contractual arrangements under the new apprenticeship levy regime. In many ways it is a brave new world for everybody, where new issues are still surfacing, but we have several observations already which we felt would be useful to share.

The contract for services is key

Under the Education & Skills Funding Agency's ("ESFA") apprenticeship funding rules, education providers are required to have a written 'contract for services' with employers for each apprenticeship which covers a variety of issues that the funding rules stipulate must be covered by those contracts. Those providers who have not done so already, should put in place a contract for services which makes for a reasonable allocation of risk between the provider and the employer. We have found some providers to have been required to sign up to the employer's standard contract for services, which is inevitably drafted so as to be more favourable to the employer. We have also seen some templates in circulation which in our view are less than optimal from a provider's perspective and can be cumbersome to use. The key is putting in place a contract that works well for both parties and is easy to use.

Can the same contract for services cover multiple learners?

As each learner's apprenticeship journey is different and each learner must enter into an individual commitment statement with the provider and the employer, we consider it to be sensible for each Contract for Services to work on a learner-by-learner basis too. Whilst there is nothing in the funding rules which prohibits the same Contract for Services being used to cover multiple learners, we consider that any potential savings in administration time at the beginning of the arrangement could be dwarfed by the resulting complications that could arise in documenting any variations to the arrangement.

For example, if there are three learners and one completes on time, another withdraws and another has a break in learning, this will require the Contract for Services to be varied in relation to one learner and terminated in respect of another. Documenting all of these changes would be convoluted and keeping track of the Contract for Services could become a difficult process. Having one Contract for Services per learner



would remove this layer of complexity. There are ways to achieve this that ensure there is minimal friction for the employer and learner and administrative burden is kept to a minimum.

Can we enter into a contract for services where the learner has not yet been identified?

In a word, no. In order for a Contract for Services to be legally binding and enforceable, the parties will need to have agreed upon the specific details of the contract – this includes the apprenticeship programme concerned, the price payable by the employer and a specification of the services to be delivered by the provider. As the specification of the services to be delivered by the provider are very much going to be determined by the characteristics of the individual learner, it will not be possible for the specification to be finalised until the learner has been identified.

We have found this position to be of concern to some providers, who wish to enter into at least some form of written commitment with the employer before the learner is identified – for example, if the provider is going to be assisting the employer in learner recruitment as part of the provider's value added service. In such circumstances, a good way forward

is for the provider and employer to enter into a written letter of intent or memorandum of understanding – which would not be legally binding but, if signed by both parties, can give each party comfort that the other party is serious about entering the arrangement without scaring either off. The document could also attach a copy of the form of Contract for Services that will apply if and when the parties do agree upon the identity of any learner(s).

Existing ESFA-funded subcontract templates may require amending for post-levy apprenticeship subcontractors

Whilst many of the key themes in providers' existing subcontracts will remain relevant to apprenticeship subcontractors under the new regime, the ESFA's funding rules refer to some additional requirements that providers will need to ensure are covered off in their subcontracts for apprenticeship delivery. In practice we have helped several providers to achieve this by adapting their existing subcontract templates into an 'apprenticeship-specific' subcontract template for use with apprenticeship subcontractors only. The changes are not extensive, but they are important to ensure funding rules compliance.

James Peel

Series on property and estate management

Part 2 Third party occupation

In this series of articles we are discussing some of the major property issues which come to light when advising education providers on property matters including academy conversions, mergers, the sale of land and the potential development of a property. We are also highlighting practical pre-emptive action which can be taken to deal with each of these issues in order to prevent the issue having any major implications.



When advising education providers on property matters one of the most common issues to arise is how to deal with third party occupiers on the site. Providers will often allow third parties, such as sports clubs and local community groups, to use buildings and facilities at a site on an informal basis with no agreement in writing in place. This places the provider at risk of a potential claim by the third party occupier, who could claim they have an interest in the site. This could have severe implications for the provider if, for example, the provider wanted to develop the land occupied by the third party or if it wanted to terminate the occupation due to the conduct of the occupier.

There are three main types of agreement which can be used to document the occupational arrangement: **lease**; **licence**; and **tenancy**. The label on the document itself does not determine what the agreement is, so the underlying arrangement needs to be assessed to establish the true nature of occupation.

Lease

A lease grants exclusive possession to an occupier of land and/or buildings (or rooms) for a specified term at a reserved rent and grants an interest in land during the term. Exclusive possession means that the third party has the sole right to use the demised property to the exclusion of all other persons, including the landlord. A lease also grants security of tenure to the tenant, unless such rights are specifically excluded through a set statutory procedure (which the property owner would usually want). Once a lease has been granted, the tenant has a right to occupy the property for the term and the lease can only be brought to an end in pre-agreed circumstances, such as in the event of a breach of the lease or upon the insolvency of the tenant.

A lease would therefore only be suitable for longer term arrangements where it is intended that the third party will be the only person entitled to use the land, for example in the case of a sub-station lease to a utility company or a youth centre.

Licence

A licence grants consent to the occupier to use property for particular purposes. The licence is personal to the occupier and the occupier does not have exclusive possession which means that other parties (including the owner of the property) can also use the property.

A licence would therefore be suitable for arrangements with sports clubs and community groups, who would like to use a building or sports facility during a specified period each week, as multiple licences could be granted to different clubs and groups in relation to the same building or facility. A licence does not create an interest in land and so it can be terminated on notice if the property owner wants to remove an occupier from the property.

Tenancy

A tenancy is an agreement whereby a property can be used solely by an occupier on a rolling basis, until either party determines the tenancy. There are different types of tenancy, including tenancies at will which can be terminated immediately at any time by either party, and periodic tenancies. Tenancies also grant an interest in land to the occupier.

A tenancy is suitable where a provider wants to grant an interest in land to an occupier, but does not want to specify a term. A tenancy is therefore suitable for shorter term arrangements such as with a community group.

If a school converts to an academy and there are third party occupiers at a site, then it will be a prerequisite of the Department for Education to the granting of consent to the conversion that any occupation is formally documented in writing. In any event, we would always advise that any arrangement is documented in writing so there is no uncertainty as to the agreed terms, the nature of the interest granted and the mechanism to bring the arrangement to an end.

Libby Clarkson

Ofsted logo update

We reported in the Autumn 2016 edition of Education Focus on a clampdown by Ofsted on education providers adapting Ofsted's 'Outstanding Provider' logo into a 'Good Provider' logo for use on stationery and signage. Ofsted's actions were criticised at the time by some commentators for being too heavy-handed, and it was hoped that Ofsted were going to review their logo policies internally.



Well, fast forward a few months and Ofsted has indeed updated its policies, which several of those same commentators consider to include a significant 'U-turn' on Ofsted's part. Not only has the 'Outstanding Provider' logo been revamped, but Ofsted has also introduced a new 'Good Provider' logo which may be used by those education providers who were awarded an overall judgement of 'Good' in their most recent Ofsted inspection.

This development will be welcomed by 'Good' providers who were officially – until now – unable to use the Ofsted logo to promote their achievements. However, they will also need to familiarise themselves and comply with Ofsted's related logo terms of use. 'Outstanding' providers will also need to be careful to ensure that they update their stationery and signage with Ofsted's new logo, as continued use of the old logo could (ironically) result in them falling foul with Ofsted.

James Peel

Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact Tom Morrison on 01482 337310.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

The law is stated as at 10 July 2017.

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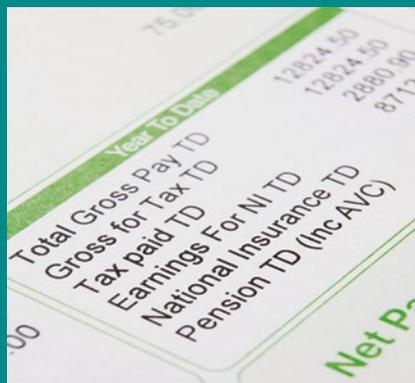
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IR35

Since April 2017 all education providers are affected by the IR35 rules which relate to tax and National Insurance contributions.

These rules relate to workers who are paid through an intermediary. These workers will need to be assessed by the provider to determine whether or not IR35 applies. An intermediary may be the worker's own limited company, a service or personal service company or a partnership. In IR35 applicable situations, the education provider (who will be deemed to be the client) must pay PAYE and NI. A worker placed by an employment agency does not attract IR35 although the provider is responsible for ensuring that the agency has put



IR35 in place. This is a hot topic in the sector at the moment and we have seen a marked increase in queries from education clients, especially in relation to tutors, assessors and interim executives. It is a technical area of law and taxation and, given the potential consequences, we would recommend that any provider in doubt as to a worker's status should seek specific advice.

Ed Jenneson