

EDUCATION BULLETIN

AUTUMN 2019

Welcome to our Autumn education bulletin.

As we now have a general election confirmed for the 12th December, whilst we await their manifestos we take a quick look at the position of the main parties and include a recently published joint response from Wrigleys Solicitors and SSAT to the Government's education policies.

We review safer working practices for those working with children and young people in education after recent changes to non-statutory guidance produced by the Safer Recruitment Consortium, including the new criminal offence of "upskirting".

We also take a look at the key messages from the recent ESFA letter to accounting officers of academy trusts and provide a reminder of the key changes included in the Academies Financial Handbook 2019 and what this means for the education sector.

We include some relevant employment related updates for schools, covering the calculation of holiday pay for part-time music teachers and potential whistleblowing extensions to trustees, governors and other volunteers connected to your school. Further employment updates are available from our monthly Employment Update Bulletin to which readers can subscribe [here](#).

Our final article welcomes Fiona Wharton to our charities team as part of our new Newcastle office. Fiona will be an important part of our education team, supporting our expanding governance and charities work for academies in the North East.

First, a reminder of some of our forthcoming events:

Click any event title for further details.

- **Northern Education Conference**
27th November 2019, Principal, York
[For more information or to book](#) ▶
- **Employment Breakfast Briefing: What's new in employment law?**
3rd December 2019, Radisson Blu, Leeds
[For more information or to book](#) ▶
- **Save the Date: Employment Breakfast Briefing**
4th February 2019, Radisson Blu, Leeds
[For more information or to book](#) ▶
- **We are exhibiting at SSAT National Conference 2019 on stand G4**
4-5th December 2019, ICC, Birmingham
[For more information or to book](#) ▶

We are always interested in feedback or suggestions for topics that may be of interest to you, so please get in touch.

Chris Billington,
Head of Education
e: chris.billington@wrigleys.co.uk
t: 0113 244 6100

Contents

1. Election 2019 Manifestos – What Can Schools Expect?
2. Safer working practices for those working with children and young people in education
3. Wrigleys Solicitors and SSAT jointly respond to the Government’s education policies
4. New criminal offence of “upskirting” added to schools safeguarding guidance from September 2019
5. ESFA’s Latest Accounting Officer Letter – What You Need To Know
6. The Academies Financial Handbook 2019 – What’s New?
7. Question of the month: Could volunteers and trustees be protected as whistleblowers?
8. Question of the month: how should holiday pay be calculated for term-time only workers?
9. Charities expert joins successful team to grow Wrigleys’ presence in the sector



Wherever you see the BAILII logo simply click on it to view more detail about a case

Election 2019 Manifestos – What Can Schools Expect?

We look here at the manifesto pledges schools can expect to see ahead of the General Election on 12th December.

Funding

In recent days, the Resolution Foundation has suggested that Government spending is likely to return to 1970s levels over the next parliament, whichever party wins the General Election. Given recent spending pledges by the Conservatives, it is therefore clear that schools funding will be a key battle ground during the General Election campaign. The Conservatives have already promised an extra £7.1bn by 2022 (an extra £4.3bn in real terms) while the Liberal Democrats have demanded an emergency £2.2bn cash injection and pledged an extra £10bn a year. Labour has today announced a £150bn social transformation fund for schools, hospitals, care homes and council houses but has yet to provide the detail on schools funding. As always, the devil will be in the detail for each party with the real-terms benefit and impact on the national funding formula and areas of highest disadvantage receiving scrutiny. Schools should therefore look for the further detail in each manifesto and the inevitable analysis that will follow.

SEND

While the Conservatives have earmarked an additional £780m in 2020/21 to fund SEND provision, this will be wholly inadequate to address the funding crisis. It is also unclear whether the Conservatives will undertake to reform SEND provision. Meanwhile, the Liberal Democrats want to “end the crisis” in SEND and “mend the hole” in SEND funding. They say they will provide “thousands of pounds” for every child with an education, health and care plan, to free up school budgets for children with moderate additional needs, and create a new SEND strategy “so that schools, councils, healthcare providers and social services work together in the best interests of the child”. Given the strength of Liberal Democrat feeling on the issue, schools should expect to see further detail in their manifesto. It remains unclear, however, whether Labour and the Greens will do likewise though one would expect to see some detail given the role of the local authority in SEND provision.

Starting teachers' salaries

The recent announcement to raise starting teachers' salaries to £30,000 is widely expected to feature in the Conservative manifesto. However, this must be funded beyond the extra £7.1bn, otherwise the burden will fall on schools. Labour, the Liberal Democrats and Greens are not expected to make a corresponding pledge on starting salaries.

Ofsted and inspection

However, they do want to scrap Ofsted with Labour pledging to introduce a new inspection system combining local authority "health checks" and "more in-depth" inspections where concerns are raised. We should look for further detail in the Liberal Democrat and Green manifestos. Meanwhile, the Conservatives will retain Ofsted and confirm their policy to remove the inspection exemption for 'outstanding schools'.

SATs and assessments

Labour has committed to abolishing SATs and reception baseline assessments while the Greens intend to scrap SATs and the Liberal Democrats want to scrap primary testing.

National Education Service

The proposed National Education Service will also feature in the Labour manifesto, founded on the principle of free education for everyone throughout life. This is expected to span free childcare, a new Sure Start programme, free vocational and technical education and national guidelines to ensure consistency. That much we know. What we need is further detail in the manifesto.

Academies

While academies will continue under the Conservatives, their manifesto needs to confirm the priority to be given to the programme, given the slow down in academy conversions under Theresa May. Labour has said it will not abolish academies but would like to see them operated by multi academy trusts constituted along co-operative lines, with greater local accountability. However, their manifesto needs to confirm if this is still policy. The Liberal Democrats and Greens also need to confirm their policies on academies.

Free schools

Free schools will also continue under the Conservatives, perhaps with a greater focus on alternative provision. However, Labour has said it will abolish the programme. Meanwhile, the Liberal Democrats have said they will abolish the presumption that any new school will be a free school while the Greens need to confirm how they see free schools operating within a local authority framework.

Grammar schools

As at present, the Conservatives are expected to continue with the expansion of grammar school places under the selective school expansion scheme.

Assisted places

The Sunday Times has also indicated that the Conservatives may re-introduce funding for disadvantaged pupils to attend private boarding schools which, if confirmed, would be reminiscent of the programme spearheaded by Lord Adonis under the Labour government.

Private schools

Meanwhile, Labour has said it will remove charitable status and its tax benefits from private schools though has yet to confirm the conference motion to integrate private schools into the state sector by redistributing their assets.

In summary

While we await the election manifestos, we're obviously unable to confirm the final policies of each party. However, we can anticipate the battle lines between the parties which are drawn along fairly conventional lines. That said, the one peculiar feature is the competing promises on school funding which, this time, is not on the question of whether funding should increase but by how much, which does turn the tables on conventional party politics.

Safer working practices for those working with children and young people in education

Recent changes to non-statutory guidance produced by the Safer Recruitment Consortium

In May 2019 the Safer Recruitment Consortium (SRC) published an update to their [*guidance on safe working practices for those who work with children and young people in an education setting*](#).

In line with the statutory guidance in Keeping Children Safe in Education (KCSiE), all schools must have a staff code of conduct in place. The new revised non-statutory guidance is a useful starting point when considering guidelines for professional conduct towards children and young people. Although the guidance is non-statutory, it includes a foreword by Nadhim Zahawi MP, who was at that time Parliamentary Under-Secretary of State for Children and Families in the Department for Education. He welcomes the revised guidance and encourages those working in education to read it alongside KCSiE.

We outline below the key revisions to the SRC guidance.

Confidentiality

The guidance has been updated to reflect the new data protection rules found in the Data Protection Act 2018 and the General Data Protection Regulation. Schools should ensure that staff understand their responsibilities under new data protection law and should only share records with those who have a legitimate professional need to see them.

Staff who need to share 'special category personal data' about children or young people (including information about their health, sex life and sexuality, racial or ethnic origin, or religious and philosophical beliefs) should be made aware that they can do so without consent when it is necessary for the purpose of safeguarding children and individuals at risk in cases where it is not possible or reasonable to gain consent, or if seeking consent would place a child at risk.

Standards of behaviour – changes to disqualification by association rules

This section has been updated in response to the Childcare (Disqualification) Regulations 2018. Under the former "disqualification by association" rules, someone working with children in the early years age range or in childcare for children under 8 provided by a school outside of school hours, and who lived in a household where a disqualified person lived or was employed, had a statutory duty to disclose this to their employer. This statutory duty to disclose was removed in August 2018. However, schools are expected to make it clear to all staff that they should disclose any relationship or association which may have implications for the safeguarding of children in school.

The guidance also states that schools should create an open culture where staff are able to raise these issues and have their own welfare safeguarded through arrangements to mitigate risk. However, schools are advised not to ask intrusive questions relating to an employee's relationships and associations.

Communications with children

The guidance states that staff should only use computer equipment and internet access provided by the school when on site and now makes clear that this means staff should turn off their personal internet and on-line data access while on school premises.

Photographs

The revised guidance makes clear that staff should not take photographs of a child's injury even if requested to do so by children's social care. Nor should staff make audio recordings of a child's disclosure.

Curriculum

The guidance has also been amended to note that when discussions occur as part of the curriculum involving sexually explicit, political or other sensitive material, care should be taken to comply consistently with the school's policy on spiritual, moral, social, and cultural education and, where relevant, with the school's policy for relationships and sex education.

Wrigleys' Comment

Chris Billington, head of Wrigleys' Education Team comments: "As a school governor myself, I have found the SRC guidance useful in summarising best practice for ensuring safe working practices and professional boundaries between staff and pupils. I recommend that schools and academies use the revised guidance to inform their own code of conduct, policies and staff induction / training materials.

"It is interesting to note the expectation on staff to disclose any relationships which might create a safeguarding risk even though the statutory duty to disclose has been removed. Readers might be interested in our [article from April 2018](#) concerning a case in which a head teacher's failure to disclose her relationship with a convicted sex offender was a fundamental breach of her employment contract even though she had no statutory duty to disclose.

Wrigleys Solicitors and SSAT jointly respond to the Government's education policies

Why schools might be cautiously optimistic going into the new year.

Against the backdrop of a looming general election and uncertainty about a deal / no-deal Brexit, the current government have formally announced a swathe of education policies, including increased funding, which suggests that education may be a key decision-maker in any imminent campaigns. So what should we make of the announcements that have already been made, and of the leaked policy document reported by the Guardian which suggests further education reforms?

At SSAT and Wrigleys Solicitors, we are pleased that the government are finally acknowledging that, since 2010, school budgets have been stretched to breaking point. If delivered intelligently, the £2.6bn promised for 2020/21 should bring school funding back to 2015 levels with the £4.8 billion for 2021/22 and £7.1 billion for 2022/23 returning school funding to pre-austerity levels. The efforts of grassroots movements such as WorthLess? should be applauded for raising school funding as a national concern. It is not a coincidence that the government chose to focus on schools for the first of its non-Brexit-related policy announcements. However, much remains to be seen as to the impact this will have on the ground. We should continue to scrutinise the emerging details as they are released. School leaders we've spoken to continue to be concerned by several key uncertainties:

- How this will be rolled out? Will schools who are currently above the national funding formula see further real-term cuts in 2020-2021?
- The need to properly implement a national funding formula that addresses historic inequalities, without taking money away from schools in areas of the highest disadvantage.
- Whether the various promised pots of money will be new money from the Treasury or be redirected from elsewhere?

We also need to see further detail of what the government will expect from schools in return for the additional funding. The Spending Review, in its own words, marked 'a new focus on the outcomes the government will deliver' with outcomes and metrics underpinning implementation plans for the promised funding. The government is therefore expecting more 'bang' for its 'buck' with the Department's School Resource Managers tasked with ensuring schools make the most of every pound given to them.

Above all, while any increased funding is very welcome, it will not have an immediate effect on the issues that almost a decade of austerity has created. The huge gaps in mental health support, counselling and other frontline services will continue; and schools will continue to act as the 'fourth emergency service'. Families will continue to rely on foodbanks and many parents will continue to worry about the cost of providing three meals a day during the summer break. Until the government acts quickly to resolve these issues, the increased funding for schools will, sadly, only have a limited impact – and will certainly not close the current disadvantaged gap.

Other announcements are also welcome, such as the Department's decision to remove 'outstanding' schools from

inspection, something that Ofsted has long been arguing for. But again, this must come with more money for the inspectorate, who have seen over 50% budget cuts since 2010.

Likewise, the proposal to raise starting teachers' salaries to £30,000, making them some of the highest graduate salaries, is much needed; at a time when many schools are facing significant recruitment issues. However, this must be funded beyond the funding uplifts for 2020/21, 2021/22 and 2022/23, otherwise the impact of the extra money in returning school funding to pre-austerity levels will be limited. The whole mainscale pay grade, pension contributions and national insurance must also be considered when working out the funding arrangements.

We are less sanguine, though, regarding the policy announcements leaked to and reported by *The Guardian*; which include a renewed effort to academise all schools, funds to incentivise MATs to take over schools-no-one-wants, new guidelines around behaviour including greater powers to exclude and encouraging school leaders to confiscate or ban mobile phone.

All of these issues should ultimately be resolved in the best interests of students and at a local level; with schools empowered and supported to work in partnership with local partners and communities. It would be wrong for central government to make changes where arrangements already work well, to dictate how headteachers should ensure good behaviour, or to take decisions about good and outstanding schools structures away from local governance. Both SSAT and Wrigleys Solicitors support school leaders making the best decisions for the young people they serve. This belief in the autonomy of schools to do what is right for their students is shared by both organisations; but can only be achieved when schools are given the necessary resources.

The increased funds promised by the current government will go so far; but we need all political parties to take a longer-term approach to school funding. Education must be seen as an investment, not as a cost, and governments of any colour must work with and trust the leaders and teachers in our schools.

Above all, the needs of the children must be at the centre of education policy-making; which is why both SSAT and Wrigleys Solicitors are proud to be fighting for deep social justice every day through our work with schools.

This article has been written in conjunction with SSAT, The Schools, Student and Teachers Network: <https://www.ssatuk.co.uk/>

New criminal offence of “upskirting” added to schools safeguarding guidance from September 2019

Keeping Children Safe in Education: revised statutory guidance is expected to be in place from 2 September 2019.

“Upskirting” became a specific criminal offence under the Voyeurism (Offences) Act 2019 on 12 April this year. It typically involves taking a photograph under a person’s clothing without them knowing, with the intention of viewing their genitals or buttocks for sexual gratification or causing humiliation, distress or alarm. The revised version of Keeping Children Safe in Education lists upskirting as one example of peer on peer abuse of which school staff should be aware.

A copy of the new, and current, guidance is available [here](#). All schools and academies are required to have regard to this advice. The guidance continues to be refined and added to in the face of new and evolving threats. These include threats which have been much in the media of late, such as the risks to children and young people involved in and exploited by gangs and criminal networks.

Key changes within the new guidance are listed below:

Part 1 – Safeguarding information for all staff

- “Upskirting” has been added to the list of examples of peer on peer abuse.
- New information is included concerning the risks to children involved with serious violence. Staff should be vigilant for signs that children are involved with serious violent crime, criminal networks and gangs. Links to Government advice for schools on [gangs and youth violence](#) and [county lines](#) have also been added.

Part 2 – Management of safeguarding

- References to the [guidance on multi-agency working](#) have been updated to reflect new safeguarding partner and child death review arrangements which will be in place from 29 September 2019. The three safeguarding partners (the local authority, a local clinical commissioning group and a local chief of police) will work together to safeguard and promote the welfare of local children. Governing bodies, proprietors, management committees and senior leadership teams (including the designated safeguarding lead) should make themselves aware of and follow the new arrangements.
- The guidance on the opportunity to teach safeguarding through Relationships Education and [Relationships and Sex Education](#) has been updated. Readers will be aware of the current debate concerning teaching primary school children about LGBT relationships. This debate arises from the use of the “No Outsiders” programme by some schools. From September 2020, the subjects of Relationships Education (for all primary pupils), Relationships and Sex Education (for all secondary pupils), and Health Education (for all pupils in state-funded schools) will be mandatory. All pupils will be expected to be taught LGBT content in an age appropriate way. Parents can withdraw their children from sex education, but not from relationships education classes.
- The guidance on Ofsted inspections has been updated to include [the relevant inspection framework](#), and continues to include safeguarding within the scope of the inspector’s report.

Part 3 – Safer recruitment

- The Government guidance for overseas qualified teachers that can apply to the Teaching Regulation Agency for qualified teacher status in England is currently being revised. The direct link to the guidance has therefore been removed.
- The guidance has also been amended to make clear that maintained schools should carry out section 128 checks on school governors. A person who is subject to a section 128 direction is disqualified from taking part in the management of academy trusts, free schools and independent schools and is disqualified from holding office as a governor of a maintained school. For information, “management” positions include:
 1. Employees in a management position in an independent school, academy or free school;
 2. Trustees of an academy or free school trust;
 3. Governor or members of a proprietor body for an independent school;
 4. Governors on any governing body in an independent school, academy or free school that retains or has been delegated any management responsibilities, including members of a local governing body.
- A new section is included regarding checks on associate members who are appointed by the governing body of a maintained school to serve on a governing body committee. While enhanced DBS checks on governors are mandatory, the guidance clarifies that they are not mandatory for associate members.

Annex C – Online safety

- There is a link to [Government guidance](#) on teaching online safety in schools. This focuses on how schools can ensure that pupils know how to behave and stay safe online as part of the existing curriculum requirements.

The current guidance, which has been in place since September 2018 continues to apply and should be referred to before the new guidance supersedes it this September.

ESFA’s Latest Accounting Officer Letter – What You Need To Know

We look here at the key messages from the latest ESFA letter to accounting officers of academy trusts to help you plan and prepare for what’s coming.

Just as schools and academies broke up for the summer the Chief Executive at the ESFA, Eileen Miler, issued her annual letter to accounting officers of academy trusts, highlighting those areas of particular concern for the ESFA.

Internal scrutiny

As highlighted in my recent [article](#) on the key changes included in the Academies Financial Handbook 2019, not only must academy trusts have a programme of internal scrutiny to provide independent assurance to the board

that financial and other controls and risk management procedures are operating effectively but they must also submit the annual summary report of areas reviewed, key findings and recommendations and conclusions (as presented to the audit committee) to the ESFA by 31st December. The letter clarifies that this rule will first apply in December 2020 but that accounting officers will be asked to send their academy trusts most recent internal scrutiny findings by 31 December 2019, alongside their annual accounts. This could be a report for the last term, quarter, month or other period (depending on the approach adopted by your academy trust), including for the full year. The ESFA will explain how to submit your most recent internal scrutiny findings when they publish updated guidance in October on submitting your annual accounts.

Contact details

Meanwhile, the letter confirms that accounting officers will need to provide and maintain contact details for all your members and trustees, via the [Get information about schools \(GIAS\)](#) system, from 1 September 2019. You're already required to do this for your chair, chief financial officer and yourself.

Big Brother is watching you!

The letter further confirms that, from September 2019, the Academies Financial Handbook 2019 will also be available in HTML format, apparently to make it easier to search for particular content (as if this isn't possible already) but also to help the ESFA identify those parts that are most read and help improve future editions. So, be warned, if you don't make regular use of the HTML copy, you're giving the ESFA ammunition to tighten the screw even further in future editions of the Handbook.

School resource management self-assessment tool

Speaking of tightening the screw, the letter also confirms that, from autumn 2019, completion of the school resource management self-assessment tool (SRMSAT), currently voluntary, will become mandatory for academy trusts on an annual basis. Accounting officers will need to submit the completed SRMSAT to the ESFA by 14 November 2019. From 1 September 2019, growing academy trusts will no longer need to complete a financial management and governance self-assessment (FMGS) alternative return.

In summary

So there you have it, the key things to note from the latest account officer letter, as you head off on your holiday. Enjoy!

The Academies Financial Handbook 2019 – What's New?

We look here at the key changes included in the Academies Financial Handbook 2019 and what this means for the sector.

The Academies Financial Handbook 2019, which is effective from 1st September 2019, continues as before with an unrelenting focus on high standards of governance, financial control and accountability. This time, though, it adds weight to internal scrutiny, risk registers, whistleblowing, executive pay and financial notices to improve – to name a few - while referencing guidance and resources to promote good practice. It therefore reinforces a 'stick' and 'nudge' approach to compliance and use of central support, meaning the ESFA will be less forgiving of academy trusts where it identifies concerns.

Internal scrutiny

While the current Handbook already includes requirements and minimum expectations for internal scrutiny, the new Handbook extends this by requiring all academy trusts to have a programme of internal scrutiny to provide independent assurance to the board that financial and other controls and risk management procedures are operating effectively. In particular, internal scrutiny must: evaluate the suitability and compliance with financial and other controls; offer advice and insight to the board on addressing weaknesses; ensure all categories of risk are identified, reported and managed; and be independent and objective, with direct reporting to a committee of the board. Further, internal scrutiny must be: conducted by someone suitably qualified and experienced; covered by a scheme of work; and timely, with high risk areas reviewed in good time. An academy trust must also identify

the areas it will review each year.

The audit committee has a clear role to play in securing these outcomes and must: have written terms of reference; agree a programme of work and who will perform it; review the risk register; consider reports and progress against recommendations; and have access to those undertaking internal scrutiny, as well as external audit.

Where the rubber hits the road, though, is in transparency and external reporting. Here, the annual summary report of areas reviewed, key findings and recommendations and conclusions (as presented to the audit committee) must be submitted to the ESFA by 31st December. The annual governance statement, which accompanies the annual accounts, must also confirm who has undertaken the internal scrutiny and why. Meanwhile, the outcome of the internal scrutiny must inform the accounting officer's statement of regularity in the annual accounts.

These changes place internal scrutiny well and truly in the spotlight, meaning academy trusts must ensure their governance, reporting and contracting arrangements are fit-for-purpose for 1st September. If these are areas where you need advice and support, do get in touch.

Risk Register

To reinforce internal scrutiny, the new Handbook requires academy trusts to maintain a risk register.

Internal control

Internal scrutiny is also bolstered by a new requirement on academy trusts to have sound internal control, risk management and assurance processes.

Accounts

Meanwhile, the new Handbook stipulates that management accounts must include an income and expenditure account, variation to budget report, cash flows and balance sheet and that audited accounts must be provided to the members of the academy trust.

Financial transactions

The Handbook also confirms that academy trusts must obtain ESFA approval before they borrow or approve staff severance, compensation or ex gratia payments, write off debts or acquire or dispose of freehold or leasehold property beyond the limits already set out in the Handbook.

Financial performance

Where the board has concerns about financial performance, it should (i.e. as minimum good practice) act quickly, ensuring the academy trust has adequate financial skills in place.

Financial Notices to Improve

The new Handbook also turns the spotlight on Financial Notices to Improve ("FNtI") by requiring academy trusts that are subject to an FNtI to publish this on their website within 14 days of issue and retain it there until it is lifted by the ESFA. While FNtIs are already published by the ESFA, it is fair to say that most parents/carers will not know how to access this level of information on their child's academy. The new requirement for academy trusts to publish an FNtI on their website will therefore make the FNtI more readily available with the risk that parents/carers will move their children elsewhere, compounding the situation for the academy trust and meaning only the strongest academy trusts will survive. Academy trusts will therefore need to ensure that their financial management and governance arrangements are in order. Governance reviews and spot checks are a good way of testing the strength of governance arrangements and are areas where we provide expertise to academy trusts.

A knowledgeable clerk

In terms of governance, the Handbook confirms that a knowledgeable clerk is fundamental to the effective functioning of the board by providing: administrative support; guidance to ensure compliance with the legal and regulatory framework; and advice on procedural matters. We already provide support to a number of national clerks networks and so provide clerks with advice to ensure effective governance in keeping with the [Clerking Competency Framework](#) and the [Governance Handbook](#).

Whistleblowing

Alongside effective governance, the new Handbook now requires academy trusts to have a whistleblowing procedure.

Executive pay

The board of an academy trust must also ensure that its decisions about executive pay extend to pay and benefits and are reasonable, defensible and good value-for-money and are sighted on broader business interests held by senior executives, such as private companies in which they have an interest which provide services to the education sector.

In summary

It's fair to say that the new Handbook turns the screw again on academy trusts, at a time when resources are stretched. Academy trusts are already struggling to make ends meet and will find the new requirements a challenge, particularly when it comes to internal scrutiny. When combined with the references to guidance and resources to promote good practice, meaning the ESFA will be less forgiving of academy trusts where there are concerns, this will only push more academy trusts towards re-brokerage, if not insolvency.

Question of the month: Could volunteers and trustees be protected as whistleblowers?

A number of recent developments may extend whistleblowing protection beyond employees and workers.

New EU protections for whistleblowers

While the UK has been focused on the technicalities of leaving the European Union, the European Parliament continues business as usual. In April this year, the European Parliament formally adopted a directive which aims to strengthen whistleblowing protections across the EU, acknowledging that such protection is currently patchy. This move comes after scandals triggered by whistleblower disclosures such as the diesel car emissions revelations and "Panama Papers".

UK whistleblowing protection is some of the most comprehensive of all the EU member states. However, the UK legislation expressly protects only workers and employees. The new EU directive will protect from retaliation anyone who discloses information on violations of EU law that they observe in their work-related activities. In addition to workers and employees, the new directive is designed to protect self-employed people such as freelancers, consultants and contractors, suppliers, non-executive directors, trustees, volunteers, unpaid interns and trainees and job applicants. It will also protect those who assist whistleblowers such as colleagues and relatives.

EU directives must be implemented in member state national laws before they have effect. If and when the UK leaves the EU, it will not be required to pass such national legislation to implement the directive (unless a lengthy delay to Brexit means the UK is required to do so in the interim period). However, it is likely that the UK will still have to match these new protections as part of the corporate governance and accountability standards required within a future trade deal with the EU.

Charity Commission now treats volunteers as whistleblowers

A recent [Charity Commission report](#) on whistleblowing disclosures confirms that the Commission has begun to treat charity volunteers as whistleblowers where appropriate. The Commission comments that this is a significant change which extends its ability to identify and act on serious concerns. It notes that volunteers do not have the same statutory protection as workers and employees but it recognises that they need the same engagement

from the Commission as a worker given that volunteers face many of the same challenges and risks when raising concerns.

Supreme Court: office holders may have whistleblowing protection

A recent case decided in the Supreme Court suggests that UK whistleblowing protection will already extend in some cases to those acting as office holders such as directors, judges and ministers of religion.



Case details: [*Gilham v Ministry of Justice*](#)

District Judge Gilham was appointed as a salaried district judge in October 2005. In 2010 she raised a number of concerns about the impact of cuts to the justice system, increased workload and the lack of secure court room accommodation. She expressed her fears that these could lead to miscarriages of justice and endanger people's health and safety. She later alleged that she had been undermined and bullied by other judges and by court staff as a consequence of her complaints.

She brought a whistleblowing detriment claim in an employment tribunal. The tribunal determined that she was not a worker and so could not benefit from whistleblower protection. On appeal, the EAT and Court of Appeal agreed.

However, on a further appeal, the Supreme Court remitted the case back to the tribunal. It held that denying DJ Gilham protection as a whistleblower was in breach of Article 14 of the European Convention on Human Rights (ECHR) as it impinged on her right to freedom of expression on the ground of her status (in particular her status as a judge). It decided that the definition of a worker within the Employment Rights Act 1996 should be read and given effect so as to extend whistleblowing protection to the holders of judicial office.

Following this case, it is possible that claimants who are not classed as workers or employees could bring legal appeals on the basis that their human rights have been interfered with on the ground of their status as office-holder. It is also possible that this will have as yet unseen consequences beyond whistleblowing protection, extending rights currently limited to employees and workers to volunteers, trustees and the self-employed.

Wrigleys' comment

Third sector employers should be alert to the possibility that volunteers and trustees could ultimately be found to have legal protection from detriment if they raise concerns which could be in the public interest. To encourage people to come forward with concerns, it is advisable that whistleblowing policies and procedures apply to employees, workers, self-employed contractors and volunteers. Such policies should make clear that concerns will be taken seriously and that retaliation will not occur following disclosure.

It will be interesting to track the development of whistleblowing protections in the next few years. It seems that the direction of travel will very much be towards extending protection from retaliation to a wider group of individuals working with an organisation.

Question of the month: how should holiday pay be calculated for term-time only workers?

Court of Appeal confirms school was wrong to pay holiday pay at the rate of 12.07% of earnings.

Where does the 12.07% calculation for holiday pay come from?

Part-time workers are commonly paid holiday pay at the rate of 12.07% of earnings. But how do employers come to this figure?

First, it is important to be clear that holiday *leave* and holiday *pay* are calculated in different ways.

Holiday leave

The minimum holiday leave entitlement under the Working Time Regulations is 5.6 weeks per year. It can be tricky to calculate holiday leave entitlement at any particular stage of the year for workers who do not work full-time. Often, employers use a calculation of 12.07% of hours actually worked so that they can work out holiday leave entitlement as it accrues hour by hour. This calculation is based on a standard working year of 52 weeks minus 5.6 weeks (46.4 weeks): 5.6 is 12.07% of 46.4 weeks.

Holiday pay

It is also common for employers to use the same percentage for holiday pay calculations and so simply to pay 12.07% additional pay as holiday pay. However, as the case below highlights, this calculation will not always be compliant with the statutory rules for holiday pay set out in the Employment Rights Act 1996. Under these rules, a week's pay should be paid for a week's leave. Where a worker has variable hours, a week's pay is the average weekly pay over the last 12 working weeks before the holiday was taken. This calculation ignores any weeks during which the worker received no pay.

Because "part-year" workers, such as those who work only during school terms, work fewer than 46.4 weeks in a year but are still entitled to the 5.6 weeks' paid holiday, they will not be paid the correct holiday pay if the 12.07% calculation is applied.



Case details: [*The Harpur Trust v Brazel*](#)

Mrs Brazel worked under a term-time only zero hours contract as a visiting music teacher at Bedford Girls' School. She worked between 32 and 35 weeks per year. Her contractual and statutory paid holiday leave entitlement was 5.6 weeks. She was required to take all her leave during school holidays. Her holiday pay was calculated as 12.07% of her pay and was paid three times a year at the end of April, August and December.

The employment tribunal decision

Mrs Brazel brought a claim for unlawful deductions from wages, arguing that her holiday pay should be calculated under the week's pay provisions set out in the Employment Rights Act (applying the 12 week average) and not by paying her an additional 12.07% of pay. If Mrs Brazel worked 32 weeks in a year, the tribunal calculated that she would, by the 12 week average calculation, have been paid holiday pay at a rate of 17.5% of annual earnings. The tribunal dismissed the claim, determining that words should be read into the Working Time Regulations to ensure that the statutory entitlement to holiday pay is pro-rated, in effect capping paid holiday leave entitlement at 12.07% per cent of annualised hours and not so not favouring part-time workers.

The EAT decision

The EAT disagreed. It stated that Mrs Brazel was entitled to 5.6 weeks' paid leave under her contract and under legislation, and that the Employment Rights Act contains a clear mechanism for calculating a week's pay where there are variable hours. There was no basis on which to read words into the Working Time Regulations to pro-rate the 5.6 weeks' paid leave entitlement so that part-time workers were not treated more favourably than full-time workers. It pointed out that legislative protection works the other way around to protect part time workers from being less favourably treated than full-time workers.

Court of Appeal decision

The Court of Appeal agreed with the EAT. It considered the possible anomalies which could arise, such as a cricket coach who is employed on a permanent contract from year to year but works only 12 weeks a year. It confirmed that such a worker would be entitled to the statutory minimum of 5.6 weeks' paid leave at the rate of a week's pay (in other words, the coach would be paid 17.6 weeks' pay for only 12 weeks' work). The judgment makes clear that this would only apply where there is an on-going contract and so the worker accrues the full statutory minimum leave for the year. It would not apply for workers who are engaged on short-term contracts from time to time. The Court was clear that such extreme cases are not sufficient to require the application of the pro rata principle to all workers.

Wrigleys' comment

The school in this case was following non-statutory guidance from Acas on calculating holiday pay for workers with irregular hours. It is likely that this guidance will now be updated. Schools are advised to check whether their term-time only workers are receiving the statutory minimum paid holiday leave based on average pay over the last 12 paid weeks. It is possible that this decision may encourage term-time only staff or other "part-year" workers to bring unlawful deduction from wages claims for underpaid holiday pay (which would be limited to any arrears for the last two years) or breach of contract claims in the civil courts (for which 6 years of arrears might be claimed).

Chris Billington, Head of Wrigleys' Education team, commented: "The Court of Appeal judgment highlights some

interesting anomalies in the paid holiday leave entitlement for permanent but seasonal workers (such as those who work only in Summer holiday clubs). It is unusual for employers to have in place permanent contracts for staff who only work for a few weeks a year. However, as was acknowledged by the Court, schools may do so in some cases in order to cut the administrative burden of obtaining new DBS checks for each seasonal engagement. School employers will now need to weigh up the risks and benefits of such contracts and may consider moving to more short-term engagements.”

Charities expert joins successful team to grow Wrigleys’ presence in the sector

Fiona Wharton joins the top tier Charities and Social Economy team.

Fiona has worked in the charity sector since qualification in 2000, including previously as Comic Relief’s first in house lawyer, and in private practice in London, Leeds and more recently in Newcastle.

Fiona advises charities and social enterprises on all aspects of charity and company law and governance, commercial arrangements, mergers and collaborative working, trading and fundraising. She also has considerable experience of advising public sector organisations, corporate bodies and individuals on their relationships with or involvement in charities. Fiona has also advised social housing clients and other exempt charities such as universities and academies on charity and governance issues.

Fiona is a trustee of Changing Lives and VONNE (Voluntary Organisations Network North East) and is recognised as an expert in charity law by legal directories Chambers & Partners and Legal 500.

Wrigleys as a firm have decided to expand their regional offices to service the north east clients that have been loyal to the firm for many years. Charity and private clients will be the focus on the new office. On the charity side, Fiona and Claris D’cruz will be based in Newcastle full time. Private clients will continue to be served from the Leeds office, but various partners and solicitors will have the Newcastle office as a base when seeing clients and others in the north east.

Wrigleys have been working with a number of academies to review governance and company compliance. If you would like any further information, please contact **Chris Billington or Elizabeth Wilson on 0113 244 6100**

www.wrigleys.co.uk/education



Follow us on Twitter

