

Governors for Schools – Strategic HR

**Jenny Arrowsmith, Partner and specialist in
employment law and education sector**

Strategic HR

Reducing Cost – restructures, changing terms of employment for new and potentially existing staff, not replacing existing roles, proactive management of absence where additional cost is incurred (sickness related absence, suspensions etc), reducing spend on agency staff

Getting the most out of your arrangements – maximising efficiency (linked to the above)

Setting yourself up for growth – increased flexibility and being able to be responsive to change

Challenging the status quo - where the way things have always been done no longer meets continuing need

Legal update – are your contracts up to date and fit for purpose?



Changes to employment contracts/section 1 statements

All employees and **workers** who start work **on or after Monday 6 April 2020** must receive a statement setting out a list of prescribed information

Becomes a 'Day One' right

Consequences of non compliance:

- Employees/workers can ask tribunal to decide their terms of employment/ engagement
- If bring a successful claim, tribunal can award **two to four weeks pay (capped)**

Rights of existing employees/workers

Don't have to make any immediate changes to bring contracts in line with new requirements unless they ask for an updated statement

- Have a **month** to respond

Key point: consider rolling out amendments to contracts anyway

Bereavement leave

From **6 April 2020** parents will be able to take up to two weeks' leave if their child dies – 'day one' right

- Only available for children **under the age of 18** or a **stillbirth after 24 weeks** of pregnancy

May also be entitled to statutory pay, paid at same rate as SMP etc

Key point: Employees must have 26 weeks' service to be eligible for pay and have to give notice to employers

Notice of termination

Term implied into **all** contracts of employment

Time runs from date employee receives letter and has reasonable opportunity to read it – **Newcastle upon Tyne NHS Trust v Haywood, Supreme Court**

Contractual provision will overrule this

- **Recommend you set out how notice can be served and when the employee will be deemed to receive it (even if they haven't)**

Changes to reference period for holiday pay

Reference period for calculating holiday pay increasing to **52 weeks** from **Monday 6 April 2020**

Applies to all workers whose pay varies because they don't have normal working hours, or their days of work (or rates of pay) vary

If a worker hasn't got a year's service,- calculate on whole weeks of work

Key point: make sure your payroll can support the change

Difficult issues around when holiday is taken?

When is the employee deemed to have taken their paid holiday?

- Helpful to spell this out in policy/contract [but most don't]
- Probably can continue to argue that paid leave taken before unpaid leave – but this could be challenged as per NI CA decision in **Chief Constable of the Police Service of NI v Agnew**
- If start/leave part way through a year & where pay often equalised over 12 months – you will need to adjust this to reflect actual time worked and amount of holiday taken/accrued
- What rate applies? Is there a contractual provision?
- Can only recoup overpayment of holiday if contractual clause in contract

Term time (or part year) only staff

Can't pro-rate working time holiday for term time staff – entitled to at least 5.6 weeks' holiday - **Brazel v The Harpur Trust**

Can't use 'shorthand' formula of 12.07% to work out holiday entitlement

Key point: straightforward where FTE only receive 5.6 weeks.

No definitive guidance about how pro-rata principle applies where FTE receive **additional contractual holiday**. Unions argue pro-rate **all** leave and level up to 5.6 weeks or take the higher figure if exceeds this

May have to pro-rate **additional leave** if dependent on other factors such as length of service or seniority due to risk of claims treating part timers less favourably [take advice]

If underpaid – have to decide whether to change practices now or wait and see if appeal granted (and decision)? Risk of claims v's cost of compliance

Do your contracts work for you?



Flexibility & clarity of work arrangements

Place of work

TLRs – how long for

Secondments

Flexibility in duties

Sick pay

Fixed years of sick pay assessment and set points in year when additional entitlement gained – does this work for you? (rolling 12 month periods / link service to continuous employment service)

Green Book - incorporating service from other academies and LA service – increases cost to you

Teachers – do you include prior service in assessing entitlement to holiday, sickness etc? Not a requirement of Burgundy Book but common provision

Managing absence – need flexibility to do so with your chosen OH provider, to refer when you deem appropriate, to require reporting in line with expectation and to link sick pay to co-operation with this.

Sick pay

Teachers entitled to six months full pay (in addition to other contractual rights to sick pay) for *'accident, injury or assault attested by an approved medical practitioner ... arising out of and in the course of the teacher's employment'*

Psychological conditions such as stress – is it included if work related?

Employment tribunal in **Bashir v London Borough of Barking and Dagenham** said that the deputy head teacher was entitled to the additional payment because medical professionals had reported that she suffered from 'work related stress'

Crippling cost to existing sick pay provisions for an increasingly common reason for sickness.

Should consider moving from BB terms where possible

Sick pay and Coronavirus

Staff on Green Book and Burgundy Book terms may be entitled to be absent on full pay and for this not to count towards sick pay entitlements where they would be exposed to infectious disease

Burgundy Book – requires reasonable probability of infection through workplace and support of medical practitioner that shouldn't attend

Green Book – wider scope – no requirements as above and could include where they assert it is unsafe to return to work

Limits scope of other options which are more favourable to and available to other employers

Notice periods

Teaching staff – Burgundy Book sets down notice to terminate at the end of the school term. One exception – gross misconduct

What about in cases of dismissal for misconduct (after warnings) or SOSR?

Worth amending contractual notice provisions to reflect circumstances when just basic notice (two months) can apply regardless of when that expires

What about probationary periods – lesser notice?

PILON clauses – worth including also, as is a garden leave provision

Notice during sickness – Burgundy Book says that it must be on full pay even if full pay entitlement is exhausted

Safeguarding pay

Pay protection when removing TLRs or restructuring – 36 months in the Burgundy Book

Can be crippling cost and also prevent the impact of any restructures from taking financial effect when needed

Can be disadvantage to some to take redundancy or alternative, more suitable roles where they would lose out

Not required in law (other than if in contractual terms) and alternatives exist – **discretionary safeguarding, shorter period, offer of alternative roles and if not accepted or available, redundancy**

Important to set out how long additional payments would apply for and scope to remove with reasonable notice

Incorporation of STPCD, Green Book and Burgundy Book

TUPE staff – will likely have this as part of their terms

As academy trust – can set own terms. Do not need to incorporate. If you do, you are bound by them

Collective agreements and trade union recognition agreements transfer to the transferee on transfer so be careful. Although interpretation of collective agreements such as collectively agreed terms are **fixed at date of transfer** provided the transferee (academy) does not take part in subsequent collective bargaining.

New contracts – you do not need to be bound by STPCD, Green Book and Burgundy Book. You can take the bits you want to keep and not be bound by the rest but must set out those parts you wish to keep in the contract. Alternative, incorporate except for certain areas and make this very clear in the contract

Existing contracts – more difficult to change but it is possible. New roles created in a restructure can be on new terms even if existing employee

Changing terms and conditions

- What changes do you want to make?
- Do you have an express contractual right to make the change? Language must be **unambiguous** and **clear**
- In any changes to practice, must still act reasonably – trust and confidence is key
- If no contractual right to change – be careful. Specific process to follow to seek agreement and implement changes that way. In absence of agreement, imposing new contractual terms is high risk (strike, constructive dismissal, breach of contract claims)
- Understand scope of collective bargaining
- **Take advice** – plan ahead and understand who it affects, how and what the business case is for change

Employment implications of COVID-19

1. **Immediate issues** - bringing staff back to work, health & safety concerns, staff refusing to return, use of furlough
2. **Medium to long term issues** – changes to workforce, varying terms and conditions, redundancies
3. **Possible consequences** – increase in employment tribunal claims, in particular around health & safety

Consultation about returning to work

Must consult “in good time” before re-open

Aim to try and reach agreement (and reassure staff)

Encourage those who are unhappy about returning to work to talk to you – try and resolve

But you are responsible for the final decision

Publish assessment on website if you employ at least 50 people

Risk assessments - travel

Employers do not normally have to factor in travelling to work as part of risk assessment, but probably necessary now

HSE guidance limited – asks employers to *“identify where people can travel alone in their own transport ...[and] to maintain social distancing”*

Public transport problematic – employees are asked to *“consider all other forms of transport before using public transport”*

Risk assessments

Must consider if it is safe for different groups of people to return:

- Vulnerable people who are not required to shield (as per government's list)
- Pregnant women
- BAME members of staff

Anyone who is shielding **must** remain at home

Asking staff to return to work – the refusers

Consider **reasons** why they are reluctant to return

- **Red flags:** Are they vulnerable/living with someone who is vulnerable or shielding? Do they have a disability? Are they pregnant? Do they have childcare responsibilities?

...Or are they just worried about returning?

Can you **address** their concerns?

Health and safety rights: ERA 1996

Right for employees not to suffer detriment/dismissal if in **circumstances of danger** the employee reasonably considers to be **serious and imminent**, employee:

- Left place of work
- Refused to return to workplace
- Took appropriate steps to protect self and others

Danger wider than a feature of workplace – can come from other people

Subjective assessment based on knowledge

Take advice – changing dynamic as to when this is likely to be more risky relating to the return to work issue

To do list

1. Consider when you last updated your core staff contract templates?
2. Have a review so you understand risk and scope for improvement - required vs. recommended updates?
3. Understand how you calculate TTO holiday – make provision or adjust your calculations
4. Think about how you communicate and plan holiday to be taken by all staff where they can't take it during term time
5. When implementing restructures, consider if the new roles can be on new terms
6. Get advice if staff are refusing to return to work due to Covid-19 and you cannot agree alternatives

We can help – get in touch



Jenny Arrowsmith

Partner

 0113 218 6446

 07718 668646

 Jenny.arrowsmith@irwinmitchell.com

irwinmitchell.com – Coronavirus hub



About News & Insights Careers **Coronavirus Updates** Call - 0808 250 8889 Request A Call Back Search

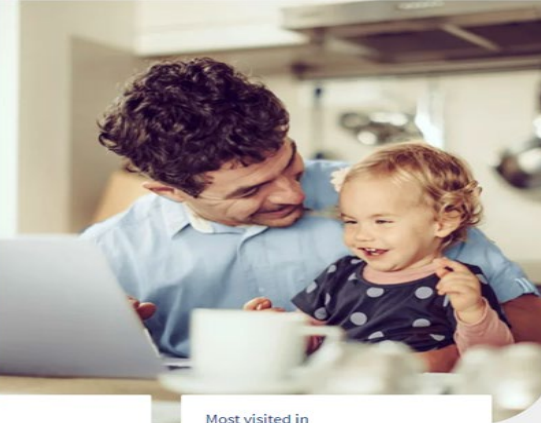
IM irwinmitchell Personal Wealth Management Business People Offices Contact

Expert Hand. Human Touch.

At Irwin Mitchell, we pride ourselves in understanding people. We understand that everybody's situation is different, be it business or personal.

Whatever happens, if you need legal advice or support with your financial planning, we're here. We'll listen, get to know you and your situation, and give you all the advice you need.

Excellent  4,277 reviews on  Trustpilot



- Most visited in **Personal Legal Services**
 - [Personal Injury Claims](#)
 - [Medical Negligence Claims](#)
 - [Divorce & Family Law](#)
 - [Conveyancing & Property](#)
 - [Will, Trust & Estate Disputes](#)
- Most visited in **Wealth Management Services**
 - [Asset Management For Personal Injury](#)
 - [Financial Planning](#)
 - [Investment Management](#)
- Most visited in **Business Legal Services**
 - [Commercial Litigation & Dispute Resolution](#)
 - [Employment](#)
 - [Real Estate](#)
 - [Corporate](#)

About News & Insights Careers **Coronavirus Updates** 0808 250 8889 Request A Call Back Search

IM irwinmitchell Personal Wealth Management Business People Offices Contact

Home > In Focus Coronavirus Updates



The coronavirus (COVID-19) outbreak in 2019 has created uncertainty for everyone around the world.

We've seen a lot of concern around the economic and financial effects coronavirus will have in the coming months. Our lawyers are providing ongoing commentary around how you can prepare as much as possible for what's ahead. You can also find out more about [how we're supporting our clients, colleagues and communities](#).

Join our webinar – supporting you at work and at home

COVID-19 has changed many aspects of our lives, and we're here to help. Join our **free webinar** where we'll be discussing the latest legal updates like pension schemes, statutory sick pay (SSP) and family law.

Contact us today

And let us know how we can help

Your name*

Your email*

Your phone number*

How can we help?*

irwinmitchell.com – Employment section

[About](#)

[News & Insights](#)

[Careers](#)

[Coronavirus Updates](#)

[Call us free on 0808 271 2602](#)

[Request A Call Back](#)

[Search](#)



[Personal](#)

[Wealth Management](#)

[Business](#)

[People](#)

[Offices](#)

[Contact](#)

[Home](#) > [Business](#)

Employment Law



Services in: [Employment Law](#)

Expert Hand. Human Touch.

 0370 1500 100  [irwinmitchell.com](https://www.irwinmitchell.com)  [@IrwinMitchell](https://twitter.com/IrwinMitchell)

Irwin Mitchell LLP is authorised and regulated by the Solicitors Regulation Authority.

 **irwinmitchell**