Birketts

WELCOME TO THE WINTER 2019 ISSUE OF

Education Matters

IN THIS ISSUE

Welcome to our winter 2019 edition of Education Matters, our newsletter for our clients and contacts in the education sector.

Sonya O'Reilly
Legal Director
01473 406357
sonya-oreilly@birketts.co.uk

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Whatever is happening in the world of Brexit at the time you are reading this, one thing is certain, no one is sure of the impact it will have on the education sector during the months ahead. The key challenges for the education sector are likely to depend on what the 'colour' of our Government is in the event of a general election.

Mr Boris Johnson's announcement in August that the budget for primary and secondary schools would be increased by a total of over £14bn over three years, rising to £52.2bn by 2022-23 clearly seeks to begin addressing the budgetary constraints that have constrained the sector during the recent years of austerity. We watch with interest to see what the impact of additional funding could achieve.

Politics aside, there are, as ever, a number of developments within the education sector that the Birketts' Education Team are poised and ready to help you with.

Erika Clarke highlights the new legislation that came in to force in the summer which will result in a greater number of higher education institutions being registered charities regulated by the Office for Students in the future.

Against the backdrop of the inescapable issue of Brexit, Janice Leggett will take you through the Government's announcement of plans for changes to immigration rules post-Brexit and in particular, the impact of the plans on students looking to study (and stay on to work) in the UK.

If your institution provides student accommodation to students during their period of study, make sure you read Dwight Patten's review of the changes to the fees and charges that can be levied on students following the new Tenant Fees Act 2019.

The seemingly endless flow of cases looking at the questions of how to calculate holiday entitlement for workers carries on. Tom Sharpe analyses the Court of Appeal's decision in the *Harper Trust v Brazel* case. This article is a 'must read' if you have part-time, term time only employees, such as sports coaches and music teachers.

Finally, Liz Brownsell will draw your attention to the importance of robust and careful governance in the Academy Trusts' sector following a series of headline grabbing mismanagement scandals. Birketts has recently launched a new fixed-fee Academies retainer package which will be of interest to Academy Trusts. Please get in touch with a member of the Academies Team to find out more.

More higher education providers to be regulated by the Office for Students as exempt charities

Erika Clarke
Legal Director
01603 756525
erika-clarke@birketts.co.uk

New legislation came into force in August 2019 which means that many higher education providers that are both registered with the Charity Commission and also registered with the Office for Students (OfS) may apply to become an exempt charity.

What is an exempt charity and who regulates them?

"An exempt charity has charitable status but cannot register with the Charity Commission and is not directly regulated by the Commission.

An exempt charity has charitable status but cannot register with the Charity Commission and is not directly regulated by the Commission. Instead, exempt charities have a principal regulator, which checks the charity's compliance with charity law and ensures exempt charities are accountable to the public. The principal regulator also has the power to ask the Commission to open a statutory inquiry into an exempt charity where it believes there is an issue for serious concern.

For higher education institutions, the OfS is the principal regulator, having taken over this role from the Higher Education Funding Council for England from 1 April 2018.

What does this change mean?

This change in legislation means that a greater number of higher education providers that are currently registered charities may be regulated directly by the OfS in the future.

"...'relevant higher education providers' may now apply for exempt status and this can be granted following an order issued by the Privy Council...

Higher education providers that are currently registered charities and 'relevant higher education providers' may now apply for exempt status and this can be granted following an order issued by the Privy Council (known as an Order in Council). 'Relevant higher education providers' are those registered with the OfS and receiving (or be entitled to receive) funding from the OfS under section 39 or 40 of the Higher Education and Research Act 2017 or those providing higher education courses that are designated for the purposes of section 22 of the Teaching and Higher Education Act 1988. There are, however, a limited number of charities which cannot be exempt, namely colleges in the university of Oxford, colleges or halls in the university of Cambridge or Durham, any students' union or HE Institutions in Wales.

Exempt charities do not have registered charity numbers, so higher education providers that become exempt charities will lose their registered charity number and will be removed from the Register of Charities. This means that providers that are looking to prove their charitable status will need to refer third parties to the list of exempt charities on the gov.uk website, provide their HMRC charity reference number or ask the OfS to confirm that they are a charity.

"After moving to exempt status, higher education providers will be regulated by the OfS as principal regulator and will be obliged to report matters of significance to the OfS...

After moving to exempt status, higher education providers will be regulated by the OfS as principal regulator and will be obliged to report matters of significance to the OfS, such as potential mergers, relocations and audit concerns. The OfS has published guidance for higher education providers that are exempt charities which sets out the legal obligations of a charity, its trustees and the role of the OfS as regulator. The guidance includes details of the reporting requirements placed on exempt charities by the OfS and the provisions of the Charities Act 2011 to which they are subject and those that do not apply to exempt charities. For example, the restrictions within sections 117 to 126 of the Charities Act 2011 relating to the disposal of land or the grant of a mortgage by a charity do not apply to exempt charities, but an exempt charity will still need to include certain statements within the relevant transaction documents.

Continuing role of the Charity Commission

"...the OfS does not have the power to investigate charities itself. Therefore, where the OfS has cause for concern, it will refer providers to the Charity Commission, which has the power to launch a statutory inquiry.

Despite this move to direct regulation by the OfS, the OfS does not have the power to investigate charities itself. Therefore, where the OfS has cause for concern, it will refer providers to the Charity Commission, which has the power to launch a statutory inquiry. The OfS and Charity Commission published a memorandum of understanding in February 2019 which sets out both organisations' commitment to cooperating together to prevent, detect and remedy the misconduct or mismanagement of charities.

Higher education providers will continue to have an obligation to report serious incidents to the Charity Commission, in addition to making regulatory reports to the OfS as set out in its regulatory framework. The memorandum of understanding provides for the Charity Commission and OfS to share information and work together when responding to such reports.

Further information

For further information and advice about exempt charities and the regulation of higher education providers, please contact Erika Clarke.

How will the changes to Immigration rules affect students?

Janice Leggett
Immigration Consultant
01245 211280
janice-leggett@birketts.co.uk

With Brexit continuing to loom heavy on the horizon, the Government have been keen to announce changes to the Immigration rules which will specifically look to benefit students with the intention to retain 'the brightest and the best' graduates to remain in the UK after their studies.

> *"The announcement was greeted with enthusiasm by Universities UK, which represents 130 institutions, many of whom had been concerned that the numbers of students from the EU would fall significantly in the event of Brexit.*

A significant pillar in this is the announcement of plans for a new immigration route to enable international students to work in the UK for two years after graduation. Students who have successfully completed a degree from a trusted UK university or higher education provider in any subject will be able to stay in the UK for two years to find work. If they meet the requirements they will then be able to switch onto a skilled work visa route. Full details are yet to be released but it will be interesting to see how this new route compares to the Tier 1 Post Study Work route that was scrapped over seven years ago. The announcements claim "unlike the route which closed in 2012, this new route will also include safeguards to ensure only genuine, credible students are eligible." The announcement was greeted with enthusiasm by Universities UK, which represents 130 institutions, many of whom had been concerned that the numbers of students from the EU would fall significantly in the event of Brexit. A post study work route is seen as a major attraction to International students.

It is unclear when graduates will start benefiting from the new visa. So far we only have announcements and no legislation has been passed, so it will not assist those graduating in 2019. It appears the route will form part of our new immigration system from January 2021. The Government has said students enrolling in the 2020/21 academic year will benefit. However, there is uncertainty for those who enrolled earlier but will graduate in 2021.

Until the new rules are introduced, most international students will be limited to four months after the end of their visas. However, from October 2019, Tier 4 Students studying at degree level or above will be able to switch into Tier 2 within three months of the expected end date of their course. We welcome these changes in Tier 2 which we believe will have a positive impact on employers across a variety of sectors and will allow students greater flexibility to look for work before the end of their course.

Further welcome news is that from 6 October 2019, PhD level occupations will be

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exempt from the annual limit on skilled workers from outside the EU. This will help speed up applications, as they will no longer need to go through the monthly Restricted Certificate of Sponsorship application process. Tier 2 migrants in PhD level occupations will also be allowed greater flexibility on absences from the UK for research that is directly related to their Tier 2 employment. This will not be counted as an absence for the purpose of an application for Indefinite Leave to Remain. The same applies to their partners and dependants who accompany them in these circumstances. This is good news for international research professionals and the institutions which can move staff as appropriate without excessive concern to the effect on the individual's long term immigration status.

Any immigration update would not be complete without mention of Brexit, so as we move towards 31st October deadline, it is worth emphasising that in the event of a no-deal Brexit, both staff and students who are EU nationals, already in the UK before Brexit day, will have until 31 December 2020 to apply under the EU Settlement Scheme.

Further information on the EU Settlement Scheme is available online. For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team.

Dwight Patten
Legal Director
01223 326646
dwight-patten@birketts.co.uk

Check your student accommodation fees

Any institutions who provide student accommodation to students during their course of study will want to carry out a careful review of their standard tenancy or licence documents and related policies in order to make sure they are compliant with the new requirements in the Tenants Fees Act 2019.

The Act, which came into force on 1 June 2019, places significant limits on the types of charges that may be levied on students under their accommodation agreements. In summary, unless a payment is specifically permitted under the Act it will be treated as a prohibited payment, and landlords or agents can face civil or even criminal sanctions for the charging prohibited payments.

So which charges are still permitted and what do you need to watch out for? The following are the most relevant points for education establishments.

The Act, which came into force on 1 June 2019, places significant limits on the types of charges that may be levied on students under their accommodation agreements.

Rent

Perhaps obvious, the rent is a permitted payment under the Act, but there are new requirements specifying that rent is payable at regular, specified intervals and in particular you must not charge a larger instalment at the start of the accommodation agreement than you charge for a later rental period unless by agreement with the tenant or pursuant to a rent review clause in accommodation agreement which allows upwards or downwards review.

Tenancy deposit

For the purposes of the vast majority student accommodation agreements there is a new specified limit on amount of tenancy deposit of 5 weeks' rent. Other rules as to repayment of the deposit are specified in the Act. You may of course also have to comply with existing requirements applying to Assured Shorthold Tenancies relating to the registration of deposits with a tenancy deposit scheme, unless (as with many of HE institutions) you are a specified educational institution under Schedule 1 of the Housing Act 1988 in which case your student accommodation agreements will mostly fall outside of the Tenancy Deposit Scheme Requirements.

Holding deposits

Holding deposits will be permitted, but capped at one week's rent and subject to a number of specific rules, which you should review carefully if you have a policy taking holding deposits.

Default fees and damages

We suspect that this is the area in which the most changes will need to be made. Fees charged for the late payment of rent are permitted, but only if the right to charge is written into the agreement, the rental payment is more than 14 days overdue and, most importantly, that the fee does not exceed interest on the overdue sum at 3% above the Bank of England Base rate.

Default fees for the loss and replacement of a key or security device are also permitted if the agreement provides for it, but must be based on the reasonable costs to the landlord or agent of replacement of the key/device. It may also be possible to recover associated call out time or taxi costs for example, and there is useful Government guidance on this on point.

"It is still possible to recover damages for breach of contract, but be careful how these are framed if mention is made in your agreement.

It is still possible to recover damages for breach of contract, but be careful how these are framed if mention is made in your agreement. For example 'a fixed fee of "x" for breach of obligation "y"' is likely to be prohibited. You need to ensure you have clearly identified tenant obligations, e.g. not to cause damage, so that a clear justification for charging for the breach can be made; damages for breach will then be based on the recovery of costs to the landlord for putting the landlord back in the same position before the breach; costs will have to be supported by evidence. Similarly, termination fees where a tenant/licensee requests an early termination of the tenancy agreement are specifically permitted under the Act, but must be based on and not exceed the financial loss to the landlord and/or reasonable costs to the landlord or agent in arranging for the tenant to leave early.

"You need to ensure you have clearly identified tenant obligations ...so that a clear justification for charging for the breach can be made...

Utilities and communications services etc.

Charges for utilities and communications services or Council Tax where applicable are permitted if the accommodation agreement provides for such payments to be made, but there must not be any over-charging.

Variation, assignment or novation

A charge is permitted if the change is being made at the request of the tenant, although it is capped at £50, or (if higher) the reasonable costs of the person to whom it is made.

Which charges to steer clear of?

Importantly, other types of fees which may commonly be specified in accommodation agreements, e.g. fixed fees for sending reminder letters, viewing fees, set up fee, check out fees, legal fees for enforcement of contract (unless under a court order) are all prohibited under the Act.

If you would like to discuss the Tenants Fees Act further, please get in touch with Dwight Patten or Ian Rattenbury. If you want to know more about Birketts' Education Team please visit our web pages.

The Harper Trust v Brazel [UNISON intervening] [2019] EWCA Civ 1402

Tom Sharpe
Legal Director
01603 756494
tom-sharpe@birketts.co.uk

The Court of Appeal has recently considered the question whether or not 'part-year' (i.e. term-time) workers should receive a pro-rated holiday entitlement in order to reflect the fact that they do not work throughout the whole year.

Facts

The claimant is employed by the Trust on a permanent employment contract as a 'visiting music teacher'. She works variable hours during term time dependent on the number of pupils requiring tuition, and she delivers thirty minute sessions to each pupil per week. She is paid for the hours worked.

The Trust had been calculating her holiday pay in line with the approach recommended by ACAS in their guidance for calculating the pay for casual workers (12.07% of the hours worked over the holiday year). However, the claimant argued that she was being underpaid and should have received a higher amount calculated using the normal 12 week calculation set out in the Working Time Regulations 1998 (WTR).

The Trust argued that the principle of pro-rating should apply to part-year workers in respect of the amount of leave accrued, in a similar way as is well established for part time

workers and that the claimant should not be entitled to both holiday and holiday pay as if she had worked throughout the year.

The Trust argued that... the claimant should not be entitled to both holiday and holiday pay as if she had worked throughout the year.

Decision

The Court held that the existing calculation method under the WTR is straight forward and should be followed where there is a permanent contract in place. It held the existence of a permanent contract is enough to fix a worker's entitlement to 5.6 weeks' holiday, to be calculated with reference to the preceding 12 weeks' pay. That was the case even though it could result in part-year workers receiving disproportionately higher holiday entitlement and pay compared to those working throughout the whole year. The Court concluded that any other finding would essentially involve substituting the existing scheme under the WTR for a completely different one in respect of part-year workers.

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Impact

The formula in the ACAS guidance will not apply to part-year workers and, instead, if a permanent contract is in place, then regardless of the hours actually worked, workers are entitled to a full 5.6 weeks' pay calculated in the normal way.

Practical implications

The decision has potential implications only for workers on permanent employment contracts, ranging from teachers or lecturers working term time only and those employed with varying hours such as music teachers or sports coaches.

Although the judgment did not mention workers not engaged on permanent contracts, such as workers on zero hours contracts, there is a possibility that, in light of the finding of this case, such workers may attempt to bring claims to obtain the same right to the calculation of their holiday entitlement and pay.

We recommend reviewing the way in which your institution engages and pays part year workers... and consider whether you should be calculating holiday entitlement and pay differently in light of this case.

Steps you should take now

We recommend reviewing the way in which your institution engages and pays part year workers (including music teachers and sports coaches) and consider whether you should be calculating holiday entitlement and pay differently in light of this case. Depending on the outcome of your review you may also need to consider implementing a new calculation system and a strategy for dealing with any back pay claims. Please contact a member of our Employment Team for advice on your individual circumstances, to identify the best solution for your institution.

NB: From April 2020 the review period for calculating weekly pay will increase from 12 to 52 weeks.

Academy Trusts and the importance of robust governance

Liz Brownsell
Senior Associate | Co-Head of Charities and Social Enterprise
01473 406383
liz-brownsell@birketts.co.uk

Headlines surrounding mismanagement of Academy Trusts seem to have dominated sector news over the past year, in the wake of the Bright Tribe Trust scandal. The ripple effect of this and other high profile governance scandals is still being felt throughout the sector, with an ever-increasing regulatory burden for Multi-Academy Trusts.

A Panorama investigation into the Bright Tribe Trust aired in September 2018 revealed significant conflict of interest issues, school closures following asbestos disturbance and misuse of £255,000 of government funding for fire-safety works. Government-appointed trustees now managing the Trust have ring-fenced £1.5mn in preparation for a finding of 'improper use of grants'.

The Trust was also criticised for a 'lack of rigour' when handling conflicts of interest, which included an agreement to allow the Trust founder Michael Dwan's brother to run a nursery on-site rent free until 2027.

Outwood Academy Trust has also seen negative press over the past year, in relation to its controversial use of 'consequence rooms', reports by whistle-blowers relating to disturbing 'flattening the grass' assemblies where teachers would scream at students in order to provoke a response with the aim of then expelling them in front of an audience to make an example of them, and allegations of executive intimidation of school staff.

Kevin Courtney, joint General Secretary of the National Education Union comments that "the academies programme has drastically reduced transparency and accountability of schools with parents having little say or access to information about how academies are run."

However, there is no sign of the academy conversion initiative slowing down; in fact, quite the contrary. Additionally, the press has analysed Department for Education data and reported that the number of primary schools being moved between Multi-Academy Trusts has trebled during the same period. This figure may in part be explained by concerns over so called 'untouchable schools', which, due to deep rooted governance issues and financial instability, are pushed from Trust to Trust, or are simply without any sponsorship.

Understandably, in the wake of high profile scandals within the sector, the Public Accounts Committee has called for more rigorous oversight from the Department for Education.

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Lord Agnew, Parliamentary Under Secretary of State for Schools, attributes the majority of bad headlines concerning academies to poor governance, and this opinion is reflected in the most recent updates to the Academies Financial Handbook, which introduces some key governance-related changes, such as:

- an increased emphasis on the importance of robust governance, with an emphasis on the role of Trustees of Multi-Academy Trusts in applying the highest standards of conduct in line with the Academies Governance Handbook
- the strong suggestion that Academy Trusts should appoint a non-trustee Clerk to aid with the efficient functioning of the Board. Particular emphasis is placed on the Clerk's role in ensuring that the Board is compliant with relevant frameworks
- the requirement that Trusts must notify the ESFA about any governance changes in the Trust within 14 calendar days. Failure to notify the ESFA, or if the information submitted is not of acceptable quality, may trigger an investigation
- numerous changes to the Internal Scrutiny section, with a particular expansion into the principles of 'internal scrutiny' and the insistence that the principles are covered by a scheme of work, which is driven by the audit committee and is informed by risk.

"The high profile failings ... demonstrates the importance of robust governance... However, for some Boards, it might seem like an insurmountable task to stay abreast of the ever-increasing governance requirements without compromising on education strategy.

The latest Academies Financial Handbook also clarifies the process for establishing executive salaries and reinforces the fact that no individual may be involved in the decision-making process for setting their own salary, in an attempt to abate continued negative press around excessive salaries for Academy CEOs.

The high profile failings and increased regulatory emphasis on governance demonstrates the importance of robust governance and policy within Multi-Academy Trusts. This is important for the effective running of Trusts, and should also be high on the agenda of Trustee Boards both from a regulatory and reputational perspective. However, for some Boards, it might seem like an insurmountable task to stay abreast of the ever-increasing governance requirements without compromising on education strategy.

The Birketts multi-disciplinary Education Team comprises lawyers with specialist expertise in this sector and is well placed to provide pragmatic advice to Multi-Academy Trusts in relation to: Academy Conversions, governance, employment, commercial contracts, safeguarding, student issues and more.

We have also just launched a new fixed-fee Academies Retainer Package exclusively for our Academy Trust clients, allowing us to offer you a highly cost-effective solution for your day-to-day legal advice needs. Please get in touch with Liz Brownsell or another member of the Academies Team to find out more.