



LEGAL IMPLICATIONS OF COVID-19 ON THE FEE-PAYING EDUCATION SECTOR Q & A



As we begin to see the light at the end of the tunnel of the COVID-19 crisis, planning for a return to a “new normal” is key to ensuring a fluid transition for your staff and students.

Below we have highlighted some common questions which have arisen for our clients in the private school sector:

IF WE HAVE
FURLOUGHED STAFF,
HOW DO WE GO ABOUT
BRINGING THEM BACK
TO THE WORKPLACE?

With nearly half of UK businesses participating in the Coronavirus Job Retention Scheme (CJRS), you may have furloughed both teaching and non-teaching staff. The indication from the government is that we will see a phased return of pupils to schools from this month.

When you are clear on a re-opening date, it is best practice to give your furloughed employees as much notice as possible that they are required to return to work. Some may be volunteering or have found other temporary employment. In preparation, it is critical to ensure that your contact details for staff are up to date, and you have accurate records of any staff who are ill or self-isolating. This will give you the best basis upon which to conduct your staff planning. It may also be useful to use this time to update your Employee Handbooks to reflect any recent or planned changes to your policies and procedures following the COVID-19 crisis.

When your staff return, ensure that payroll is amended to reflect the change back to 100% salary. Also be mindful of employee relations issues: there is likely to be a period of adjustment as furloughed and non-furloughed staff reunite and good HR practices and clear communication will best ensure a smooth transition. Any grievances or issues raised should be dealt with in line with ACAS Guidance and dealt with as swiftly as possible with the appropriate professional guidance. You may find that some parents are reluctant for their children to return to full-time education until we see a further reduction in the infection rate. This may mean that you have a reduced need for teaching staff at present. You may consider reducing hours for some staff. This would be a change to the terms of employment and you should seek legal advice on the best way of implementing this.

WILL FURLOUGH IMPACT ON OUR EMPLOYEES' ANNUAL LEAVE ENTITLEMENTS?

The relationship between furlough and annual leave is one of the areas where the CJRS guidance requires more clarity, and has been a contentious issue amongst legal commentators of late. It is still unclear whether it is possible for furloughed employees to be compelled to take annual leave during a period of furlough; however, our view is that the most risk averse position is not to direct employees to take annual leave during furlough as there is a risk you may be liable to pay the additional 20% outside of the furlough rate. We appreciate that such an approach may be problematic when your staff return from furlough with a full holiday allowance, which may cause issues with resourcing later in the year. This may be particularly problematic in the education sector, where teachers are often contractually required to take their annual leave outside of term time. The government has pre-empted this by introducing legislation allowing employees to roll-over holiday into next year, which provides protection to employers against any Working Time Regulation claims from employees who are not able to take their full annual leave entitlement in the current year as a result of the crisis.

CAN WE MAKE FURLOUGHED STAFF REDUNDANT?

The economic impact of COVID-19 is already substantial. You may have found enrolments for the coming academic year are reduced, as parents feel the financial strain. You may find after careful consideration that you will require redundancies to keep your school running. There is no bar to furloughed employees being made redundant; however, the normal employment law principles and redundancy framework applies, and the process should be carried out carefully and in accordance with all relevant law.

While many fee-paying schools have been swift to respond to the lockdown, holding online tutoring and interactive classes, you may find some parents unwilling to pay their contracted fees. Whether parents are legally allowed to withhold fees will depend on the terms of the agreement with them. Many schools include provisions relating to closure or temporary suspensions. The position may be further complicated if your school provides boarding facilities. It will be important to have your contracts reviewed thoroughly so you fully understand your position and any potential liabilities which may arise.

If you do find that parents are contractually obligated to meet some or all of the fees due, it is worth considering whether payment plans or structured fee reductions for those affected by COVID-19 may be an appropriate way to approach the issue. It is worth considering whether an agreed fee reduction would be a preferred option to maintain goodwill with parents whose children have not been able to attend school because of the lockdown. If so, you should ensure that any agreements reached are documented in case enforcement action is required at a later date. If these discussions do not lead to a resolution or effective payment plan, it may be that the school will eventually need to resort to formal legal action against those who have not paid. Legal proceedings can be costly in terms of time and money, and will likely result in a loss of goodwill with the parents in question, so we suggest that you maintain an open dialogue with struggling parents to prompt payment, as court action should be a last resort.

WHAT SHOULD WE DO
IF PARENTS ARE
DISPUTING
FEES?

WHAT ARE OUR OBLIGATIONS TO OUR THIRD PARTY SUPPLIERS?

Like many other businesses, you may have already found that COVID-19 has resulted in cashflow issues making your payment obligations to your own third party suppliers difficult. If this is the case, it is important to consider which contracts are key to supporting your revenue, and which contracts (if any) you are able to lawfully terminate to limit the school's exposure and liability.

A full analysis of your contracts is key to enable you to make these decisions. When assessing whether you have grounds to be released from your contractual obligations under the contract, you should check whether there is a force majeure clause. A valid force majeure clause covering COVID-19 excuses you from having to perform their obligations under a contract if certain events occur. However, this will only assist you if (a) the specific contract contains a force majeure clause, (b) the COVID-19 pandemic falls within the scope of your contract's force majeure clause, and (c) the COVID-19 pandemic makes performance impossible (i.e. not just more difficult or uneconomic).

Alternatively, you may be able to rely on the doctrine of frustration. If there is a change in circumstances during a contract period which is not the fault of either party or which means the contract is impossible to perform or deprives the contract of its commercial purpose, a contract may be deemed "frustrated". This is construed very narrowly. It will not help parties if the change in circumstances were foreseeable when the contract was entered into, or if the contract simply becomes less lucrative as a result of the pandemic.

You should also consider whether you have any relevant insurances in place which may minimise your exposure to ongoing liabilities under the contract. Otherwise, it is worth keeping the channels of communication open with your third party suppliers to try and come to an arrangement which will keep the business relationship harmonious. The doctrine of frustration and any force majeure clause should only be considered as a last resort, as a dispute could result in lengthy and expensive proceedings. It is also worth considering how important that supplier is to your school. If there were to go insolvent because your school didn't pay, they may not be around to supply you in the future. An approach that maintains the commercial relationship and goodwill between the parties is preferred if possible.

WHAT OTHER THINGS
DO WE NEED TO
CONSIDER WHEN
PREPARING TO
REOPEN?

There will be an inevitable adjustment period as you transition back into your typical pattern of operation. Comprehensive planning will help facilitate this. Some areas that you may want to consider in advance of reopening are:

- Reviewing your contracts of employment for teaching and non-teaching staff
- Updating your Employee Handbook to reflect any new policies and procedures
- Updating and reviewing contracts with parents and third party suppliers
- Planning for employee relations issues and putting frameworks in place to enhance staff engagement
- Updating Health and Safety Policies and Procedures
- Consider further staff training in mental health for both staff and pupils

IF YOU HAVE ANY QUESTIONS OR WOULD LIKE SOME ADVICE - PLEASE CONTACT OUR
HIGHLY EXPERIENCED TEAM OF SOLICITORS ON
01582 514000 OR ENQUIRIES@MACHINS.CO.UK

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