



# Education Matters

Autumn 2019

Brachers is a leading provider of legal and HR advice to schools, academies and higher educational establishments. The Education team brings a fresh approach to the sector, comprising a team of lawyers and HR consultants (via KentHR) that advise on the issues faced by the sector in a straightforward, jargon free, approachable manner.

We strive to provide a service that recognises the specific needs, aims, challenges and culture of your organisation, whilst bringing a wealth of knowledge and solutions from our past experience. We hope we can share our passion and enthusiasm with you, working in partnership in pursuit of delivering educational excellence.

In our termly education newsletter we bring you the latest in legal updates, guidance, news and insight from the education sector. In this issue you can find out more about GDPR, the RSE curriculum requirements, health and safety in schools, teachers' workloads, holiday pay claims, gender identity issues and key considerations when entering into a contract.

It is important to us that we offer you real value and relevant, useful information. Please help us by providing feedback and comments as well as any suggestions of what you would like to be covered in future newsletters. Also, if you would like to contribute an article and/or share some valuable know-how please do contact us.





## GDPR update for schools

Schools handle a large amount of personal data on students, staff, governors and other third parties. This includes information such as grades, medical records, images and much more. With such an abundance of data it is important that schools comply with data protection laws and that policies and procedures are regularly reviewed to ensure this.

The General Data Protection Regulation (GDPR) has been in force for over a year and during this time there have been a significant number of data breaches and reports to the Information Commissioner's Office (ICO), which makes understanding and complying with the regulation even more important.

### Reports to the ICO

In response to a recent Freedom of Information request by Schools Week, the ICO revealed that it handled over 1,385 school cases in the first year of the GDPR, and that just 208 (15 per cent) resulted in orders to take action.

The number of reports made to the ICO which required no action suggests that schools are being cautious and struggling to interpret their obligations under the GDPR and the Data Protection Act 2018.

### ICO audits

Since 21 November 2018 the ICO have carried out data protection audits on eight separate academy trusts. In completing each audit, they identified areas for improvement – many of which were in relation to risk management, training and data sharing.



## What steps can you take to ensure compliance with data protection laws?

1. Undertake an audit of data collected and processed and repeat this annually.
2. Ensure that risks for all information assets are assessed, documented and supervised.
3. Keep and regularly review a record of the school's data processing activities.
4. Complete a data protection impact assessment and repeat this annually.
5. Provide regular refresher training to all staff so that they continue to understand their obligations. Ensure that such training includes details of the challenges your school has faced so far and where improvements need to be made.
6. Ensure that the necessary data sharing agreements are in place and care centrally logged and accessible.
7. Seek external legal advice where needed.

### How can we help

Brachers and our HR consultancy service, [Kent HR](#) can support you in ensuring that your school complies with data protection law.

**For further information please contact a member of the team.**



## Is your school ready for the new RSE curriculum requirements?

### Background

At the end of June 2019, the DfE published new statutory guidance on Relationships Education, Relationships and Sex Educations (RSE) and Health Education. This was in response to identified risks that children and young people may face through increased online activities and the need to support them to be safe and healthy, and manage their academic, personal and social lives in a positive way. The guidance was the result of consultation with a variety of sources and can be found at [here](#).

The guidance is aimed at governing bodies, trustees or directors, proprietors, management committees, teachers, other school staff and school nurses, head teachers, principals and senior leadership teams, diocese and other faith representatives and relevant local authority staff.

### What does this mean for your school?

From September 2020, relationships education will be compulsory in all primary schools and RSE compulsory in all secondary schools, as well as making Health Education compulsory in all state-funded schools (specific elements are phase dependant).

The new guidance replaces the *Sex and Relationship Education Guidance 2000*. It will be reviewed three years from the first required teaching, then every three years after that point. It contains information about what schools should do and sets out the legal duties which schools must comply with when teaching RSE and Health Education.

Schools must have regard to the guidance, and where they depart from those parts of the guidance which state they should (or should not) do something will need to have good reasons for doing so.



Unless otherwise specified, 'school'\* means all schools, whether maintained, non-maintained or independent schools, including academies and free schools, non-maintained special schools, maintained special schools and alternative provision, including pupil referral units.

Schools are being encouraged to adopt the new curriculum from as early as September 2019. If you do decide to do this be aware that you will need to meet both the old statutory guidance (2000) and the new guidance.

Whilst this guidance has been produced, a recent poll of teachers found that many are not confident in teaching the new curriculum and many feel their schools are not ready to handle topics such as female genital mutilation, which can be complex and hard to deliver in a classroom.

The DfE have produced guides to help schools communicate with parents of primary and secondary age pupil, available [here](#).



\* Guidance on Health Education does not apply to independent schools, which must meet the Independent School Standards as set out in the Education (Independent School Standards) Regulations 2014. However, they may find the sections on Health Education helpful. It does, however, apply to academies and free schools.



### Comment

The new law has attracted wide ranging commentary, particularly around sex education. It leaves in place the right of parents to withdraw their child from sex education, save for biological aspects of human growth and reproduction that form part of the National Science Curriculum. The new position is that parents can withdraw pupils until three terms before their child's sixteenth birthday; however, headteachers can refuse the withdrawal in 'exceptional circumstances'.

Concerns have been raised that schools could overuse their ability to refuse and the DfE have indicated that they will issue further guidance on handling such requests.

What is clear is that this area will need to be given careful thought and planning to ensure that schools can deliver teaching in this area by the right people, at the right level and with appropriate training and understanding of the curriculum.

If you have not already done so, you would be well advised to start considering your policies and procedures to ensure a fully embedded approach and that any new policy compliments and/or integrates appropriately with current

policies covering matters such as behaviour, inclusion, respect for equality and diversity, bullying and safeguarding.

Based on the guidance, your RSE policy should also take account of pupils' needs and the community they serve, and schools should work closely with parents when planning and delivering these subjects.

It may therefore be helpful to hold staff, pupil and parent forums on the subject and/or use Student Voice to gain full buy in from everyone involved and ensure that parents, pupils and heads can make informed choices.

It should also be remembered that at the heart of Relationships Education, Relationships and Sex Education and Health Education, there is a focus on keeping children safe and the role that schools can play in preventative education should never be underestimated.

A helpful 10 step guide has been produced by the PSHE Association and Sex Education Forum with support from five education unions to support school leaders in preparing to provide high quality RSE, which can be found [here](#).



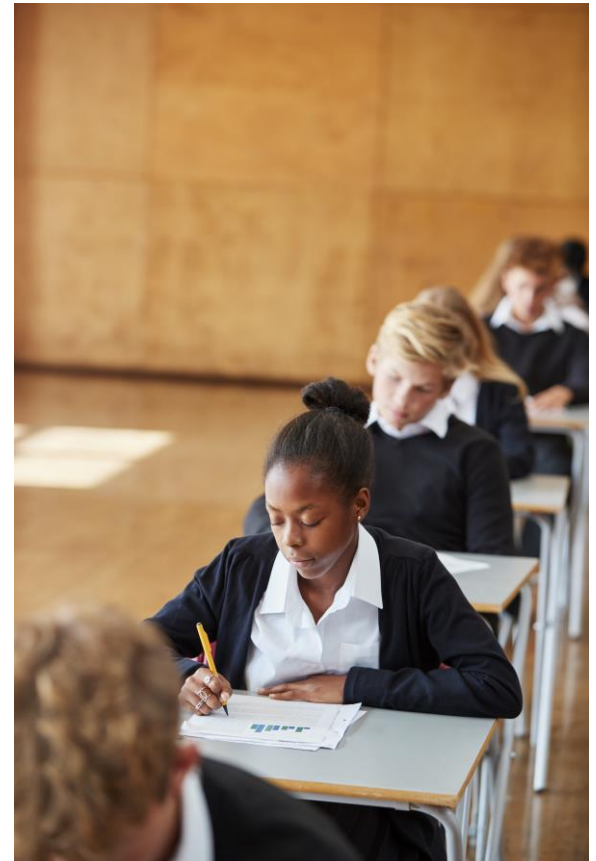
### **How can we help?**

Brachers can provide schools with assistance and/or advice in developing and/or maintaining appropriate policies and procedures.

We can also advise upon and/or assist with deciding upon and responding to parent requests for withdrawal and, ensuring that the statutory guidance is followed.

If you are considering training for staff covering possible discrimination and the Equality Act 2010 this is also an area that we can assist with.

**For further information please contact Louise Brenlund on 01622 776405.**







## Who has responsibility for health and safety in schools?

Under UK legislation the primary responsibility for health and safety lies with the employer. In most situations it is easy to identify who this is. However, with the fragmented structure of education provision in England, this may not be so straight forward. The answer will generally depend upon the type of school and how it is established.

For a community school or a voluntary controlled school, the employer will usually be the local authority. For foundation schools or voluntary aided schools it will be the governing body. The employer for an academy or a free school will be the academy trust and for independent schools it will be the governing body or proprietor.

The employer is responsible for ensuring that risks to staff and pupils is managed so far as is reasonably practicable. Each case may be slightly different, so it is essential that those involved with the management and operation of

schools are clear as to their responsibilities for health and safety.

In all workplaces, employees, teaching and other staff also have responsibilities under health and safety legislation. For example, head teachers should ensure that the school is following the employer's policies and that staff are appropriately trained and understand their own responsibilities.

One of the key risks which arises in the education setting is how to deal with the legacy of asbestos used in the construction of school buildings. There are specific regulations which address this issue – The Control of Asbestos Regulations 2012. These impose a duty to manage asbestos in non-domestic buildings, such as schools. The Health and Safety Executive (HSE) can carry out inspections to ensure that these obligations are being complied with and can prosecute where a breach is identified.



Another area which often raises concerns is school trips. Contrary to public perception, the HSE actively encourages school trips and has published a policy statement aimed at tackling health and safety myths in this area. They advocate a proportionate and sensible approach for planning and organising off-site activities.

Where there is a death or a serious injury it may need to be reported to the HSE under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) regime. The majority of injuries in schools, as with other places of work, are slips, trips and falls. Not all injuries and dangerous occurrences are reportable but staff should be trained to identify when a report is required. Not all incidents will lead to an investigation by the HSE.

At the other end of the spectrum there may still be a breach of health and safety legislation even where no injury occurs. For example if no appropriate risk assessment was made for an activity or if the correct training was not provided to staff on how to manage asbestos.

It is essential that employers in the education sector comply with their obligations under health and safety legislation, both to ensure the safety of their pupils and staff and to avoid enforcement action by HSE.

The HSE advises that education providers must strike the right balance to ensure that real risks are properly managed in way which maximises learning opportunities for pupils.



## Teachers' workload – the story so far

Excessive workload is one of the main reasons why teachers have considered leaving the professions which contributes to the ongoing teacher recruitment and retention crisis. In a 2017 Health survey(i) carried out by charity, Education Support Partnership it was found that 75% of all education staff have faced physical or mental health issues in the last two years because of their work and 53% have considered leaving as a result. Mental health of teachers has been in focus for some time with workload being considered as the top work-related reason. With pupil numbers rising and the need for new teachers this is an area of great concern.

### What is being done about it?

The DfE has designed a **Workload Reduction Toolkit** (i), published in July 2018 with an update in March 2019, to support schools to tackle workload. An advice document is also available on ways to reduce workload in your school (iii) which supplements the Workload Reduction Toolkit.

The toolkit is split in three stages:

### Stage 1 – Identifying the workload issues in your school(s)

This can be done via a workload survey, holding a workshop to discuss the survey findings which will then help you prioritise at what needs to be done.

### Stage 2 – Addressing the issues in your school

Once you have identified the issues you can now look at addressing them. Resources are available in the form of guidance to running workshops, template policies such as wellbeing, communication.

### Stage 3 – Evaluating the impact of the changes of you have made

New research carried out by the DfE highlights that 46% of school leaders are making use of the toolkit.



### **Recruitment and Retention Strategy (iv)**

The long awaited Strategy document was published by DfE in January 2019 to tackle the ongoing recruitment and retention crisis. The main areas of focus include:

- Creating supportive school cultures to tackle teacher workload.
- For many NQTs, the quality of the support they have received throughout their first year has been variable and, for some, poor. The move to a two-year framework which includes quality mentoring, CPD, and funded non-contact time will hopefully ensure a better support framework.
- Looking at approaches to flexible working (v) – such as different working patterns and job share, which should promote a work-life balance. New specialist qualifications for experienced teachers will also be rolled out from the new academic year.
- Simplifying the ways into teaching by introducing new digital systems.

### **New Ofsted Inspection Framework**

The Framework will come into effect from September 2019. There is strong focus on ensuring learners are taught all subjects across the curriculum and that teachers, supported by school leaders, have the subject knowledge to teach and assess these effectively.

#### **Key changes include:**

- New ‘quality of education’ judgement
- Looking at outcomes in context
- Evidence such as internal performance data will no longer be scrutinised as evidence of progress during inspection
- Separate judgements – personal development and behaviour and attitudes
- Extending on-site time for short inspections of good schools



In relation to workload, with internal performance data no longer being used for inspection evidence, which will hopefully ensure inspection does not create unnecessary work for teachers. Conversations will not be focused just around data, but around what is taught, and how.

### **What can your school do about it?**

- Get your SLT on board and think about your school culture. Is it supportive? Do you promote work-life balance or is there an expectation to work late every day?
- Utilise the Workload Reduction Toolkit if you are not doing so already. This resource provides structured support to identify the issues and create an action plan.
- Consider if some teachers may benefit from flexible working. Can some roles be job shared? Or can some teachers work compressed hours?

- Have ongoing and open communication with staff, parents and carers. If you are thinking of making any changes then ensure that they are consulted with and informed.

**For further advice on how you can reduce workload in your School or managing change within your school.**

**For help with running workshops and delivering training then contact the KentHR team on 01622 776445.**

- (i) [https://www.educationsupportpartnership.org.uk/sites/default/files/education\\_staff\\_health\\_survey\\_2017.pdf](https://www.educationsupportpartnership.org.uk/sites/default/files/education_staff_health_survey_2017.pdf)
- (ii) <https://www.gov.uk/government/collections/workload-reduction-toolkit>
- (iii) <https://www.gov.uk/guidance/reducing-workload-in-your-school>
- (iv) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786856/DFE\\_Teacher\\_Retention\\_Strategy\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786856/DFE_Teacher_Retention_Strategy_Report.pdf)
- (v) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/593990/DFE\\_Flex\\_Working\\_Guidance\\_2017\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593990/DFE_Flex_Working_Guidance_2017_FINAL.pdf)



## No summer break for holiday pay cases

**The Harpur Trust v Lesley Brazel and Unison [2019]**

Cases involving holiday pay are often in the courts, and this summer has been no exception.

In August the Court of Appeal released its judgment on the issue of holiday pay for those with irregular working hours, in this instance a part-time music teacher at a school who worked term-time only.

Calculating holiday pay for individuals with irregular hours (be it part-time, zero hours or otherwise) has always been a tricky process. Many employers adopt an approach of paying 12.07% of annualised hours as holiday or rolling up hourly rates by 12.07% to include an element for holiday pay. Not all approaches adopted in practice are seen to be compliant with the Regulations.

Before looking at the facts of the case, it is worth noting how the 12.07% figure is arrived at.

It comes from taking 5.6 weeks statutory holiday entitlement, divided by the standard working year of 46.4 weeks (for example, 52 weeks in the year, less 5.6 weeks statutory holiday).

This case indicates that adopting the approach of paying holiday pay at 12.07% of hours worked may leave you vulnerable to claims for unlawful deductions from wages.

### Background

The case involved Mrs Brazel, a visiting music teacher employed by the Harpur Trust on a part-time basis under a permanent zero-hours contract. She worked mainly during term time with no set hours per week. Typically she worked 10-15 hours per week. As the Court of Appeal noted, she was a “part-year” worker as opposed to a “full-year” worker, as she did no work for the Trust during the holidays.



Mrs Brazel's contract of employment entitled her to her statutory entitlement of 5.6 weeks' annual leave and required her to take her holiday outside of term time.

The Harpur Trust paid Mrs Brazel 12.07% of her annualised hours for periods of annual leave and holiday pay was paid in three instalments at the end of each term. The Trust followed guidance from an ACAS booklet for calculating the pay of casual workers. It calculated Mrs Brazel's earnings at the end of each term and paid her one-third of 12.07% of that figure.

### **The claim**

Mrs Brazel brought a claim of unlawful deductions from wages in the Employment Tribunal. She complained that this method of payment was not correct and that she was being underpaid during her holiday periods. Mrs Brazel argued that her holiday pay should be calculated with reference to the Working Time Regulations 1998 (WTR) by firstly working out a week's pay by taking her average weekly remuneration for the 12 weeks' prior to the calculation date, and then multiplying it by 5.6. She argued that nothing in the legislation required a different approach to be taken where workers do not work a full year.

### **The decisions**

In the first instance, the Employment Tribunal dismissed her claim. It held that applying any other approach than 12.07% of her earnings would give Mrs Brazel an unfair windfall, because she did not work the standard 46.4 week working year. Her holiday pay would be a higher proportion of her actual earnings than that of a full-year worker – approximately 17.5%.

The EAT and, on further appeal, the Court of Appeal, disagreed. The appeal courts recognised that the holiday pay of part-year workers represents a higher proportion of their annual earnings than full-year workers but did not consider that it was obviously unfair. The Court of Appeal dismissed the Trust's argument that European and English law allows for pro-rating of entitlements for part-time workers. It held that the WTR require a straightforward calculation to be applied – identify a week's pay and multiply that figure by 5.6. It saw no reason to deviate from this and imply a pro-rata principle into the WTR for 'part-year' workers.



### Why is this important?

Whilst the overall outcome is not surprising, it serves as a useful reminder to schools and others who engage part-time employees and those on zero hours contracts. The correct approach to calculating holiday pay is to work out the average pay in the 12-week period prior to the holiday being taken (sometimes this period is longer in practice as the rules require some weeks, where there is no pay, to be ignored for the purposes of the calculation).

In cases where using the 12.07% figure does not produce the same result as the average pay calculation, there is a risk of claims for unlawful deductions from wages covering the previous two years, with the employer liable for the balance.

### What should you do?

- Revisit your current practices and check your calculations, particularly for teaching or other staff who work term time only, or on similar patterns.
- If you currently calculate part-time holiday for those working fluctuating hours on the basis of a 12.07% multiplier, this will need to be checked.
- Review the contracts of existing workers and employees who work fluctuating hours and update these where appropriate.

**To further discuss this case and its implications for any of your staff, please do not hesitate to get in touch.**





## Legal issues when dealing with gender identity issues in schools

NHS England's gender identity development service revealed it is receiving three times the referrals it did in 2014-2015.

Schools should be mindful that issues of gender identity may arise in relation to pupils (including applicants) and also teachers, non-teaching staff and governors.

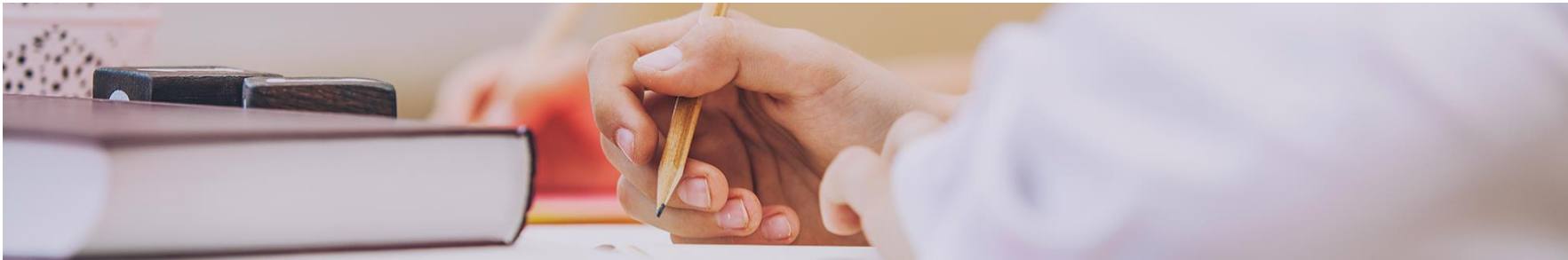
This can be a complicated area for schools and one which may also link to mental health issues for the individual concerned. Many people found questioning their gender identity may be feeling distressed, anxious and suffer with low self-esteem.

In order to best support these individuals and their wellbeing, schools should encourage a culture of openness and inclusiveness and should ensure that they have clear procedures for responding to any disclosures made regarding gender identity.

### **Being aware of possible discrimination**

Schools need to be aware of the risks of unlawful discrimination if the wrong action is taken (this may include inaction). Schools should not discriminate against an individual because of any of the protected characteristics listed in the Equality Act 2010. These include sex, gender reassignment and sexual orientation.

The Equality Act states that a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiology or other attributes of sex.



The GEO guide makes it clear that a person can change gender without any medical intervention and medical processes are not essential to transitioning. It may not always be apparently obvious if someone has this protected characteristic.

Training in this area is recommended. Schools can be held vicariously liable for the actions of their employees, and even other third parties, if they fail to take adequate steps to prevent unlawful discrimination.

### **Data protection**

As part of considering its procedures in supporting those who may be questioning their gender identity, schools should consider how personal data will be processed in light of the General Data Protection Regulation and Data Protection Act 2018.

Personal data held about an individual which relates to their health, sex life or sexual orientation will be special category

personal data and should be treated with particular care. Schools should be clear on how to process special category data and how such information is kept secure.

We are now a year on from the implementation of the GDPR and now is a good time to revisit your policies and consider whether they remain fit for purpose.





## 10 key points to think about when entering into a contract

Schools enter into contracts on a regular basis. Whenever goods or services are purchased, a contract is created and it is important that you agree to and understand the terms and conditions of that contract before signing up.

### Schools should consider in particular:

**1. The procurement process.** Before entering into any contract, you should ensure that the DfE's procurement guidance (available [here](#)) has been followed. Bear in mind that for very high value contracts (with a value in excess of £181,302 for goods and services and a value in excess of £4,551,413 for works), you may also have to comply with EU procurement rules. These are often complex and you should always seek legal advice if you think they might apply.

**2. The term of the agreement.** Many types of contracts commit customers to a minimum term and that term will often automatically renew unless notice is given in advance.

The term of the contract should always be checked and, where appropriate, negotiated. If the term of a contract cannot be negotiated, you should ensure that you diarise any key dates (such as when notice to terminate needs to be served) to avoid any unwanted automatic renewals.

**3. Service standards.** When procuring services (for example catering services or the services of a consultant), it is important to consider what standard of service you are expecting and whether this is reflected in the contract. As a minimum, all service providers should agree that in the performance of their services they will exercise reasonable care and skill appropriate for someone in their industry, but sometimes more detailed service levels and key performance indicators (KPIs) should be included. Consider whether you should have the right to terminate or receive a refund or discount if certain KPIs are not met.



**4. Warranties.** When purchasing new equipment, check what warranties the supplier is giving in relation to the equipment and the duration of those warranties. If purchasing equipment that you expect to last long-term, you may need to negotiate an increased warranty duration.

**5. Price and payment.** Depending on the nature of the agreement, the price you are paying could be subject to change. Always check if the price you are paying is fixed for the term of the agreement and, if not, check when it may increase and by how much. Also check whether a price quoted is inclusive or exclusive of VAT the payment due date.

**6. Termination rights.** Termination rights are particularly important in relation to long-term or high value contracts and any contracts for essential services. You should have a right to terminate if the provider repeatedly breaches the agreement or breaches a material term. If appropriate termination rights are not included, it could be very difficult to terminate the contract early if you are not happy with the standard of service being provided. The contract should also clearly state what happens at the end of the term (e.g. return of the supplier's equipment or the removal of items by the supplier).

**7. Confidentiality.** If you will be sharing confidential information with a third party (for example, a consultant), you must ensure that the contract deals with confidentiality and that the third party is under an obligation not to disclose the school's confidential information to anyone.

**8. Data protection.** If you will be sharing any personal data under a contract, it is essential that the contract includes GDPR compliant provisions.

**9. Insurance.** Check what the contract says about insurance and consider whether there needs to be an obligation on the contractor to take out and maintain insurance. Request evidence of insurance, where applicable.

**10. Liability.** Check what the limitation on the contractor's liability is in the event that something goes wrong. Depending on the nature of the contract, you may need to negotiate an increase to any cap on the contractor's liability. You may also need to consider including a cap on your liability.



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## Meet our team

### 60 Seconds with Louise Brenlund, Associate

Louise has worked in law for over 20 years, starting out as an Outdoor Clerk, qualifying as an Associate of the Institute of Legal Executives and then going on to qualify as a solicitor in 2005.

Since joining Brachers in 2010 Louise has been a key member of the Education team, working closely with a range of schools, academies and MATs providing legal advice on employment law. Advice has included a wide range of matters from advising on policies and procedures, staff grievance and disciplinary issues, pupil safeguarding matters, TUPE, representing schools in Tribunal proceedings and matters relating to data protection. Louise also runs our Education Matters Forum in conjunction with Kreston Reeves which is aimed at Heads, Principals, Business Managers, Directors, Trustees and Senior Leaders, enabling assisted discussion of issues topical to the sector.

Owing to her keen interest in the education sector Louise has been involved outside of work in a Business Steering Group of a UTC and currently volunteers as a School Governor. Louise feels that this gives her valuable insight into the operations and workings of a school as well as the decisions that need to be taken at a senior level taking account of both staff and pupils.

Please feel free to contact Louise on 01622 776405 if you have any employment law related queries.

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