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Top tips for independent schools



Top tips for independent schools

Our extensive experience means that our employment solicitors, HR consultants and safety managers understand the wider social context within which independent schools operate. We're alive to the issues that can arise around employment status; term-time working patterns for staff; managing maternity leave taken by key staff; social media use by teaching and ancillary staff; teacher-pupil relationships; reputational risk from non-work related and extra-curricular activities; school roll shrinkage and redundancy; convictions; work-related stress; managing teacher performance; holidays; notice of termination; pay differentials; media relations and school image.

We've compiled this guide to help your school stay ahead of the game and focus on what you do best.

Donald MacKinnon
Group Legal Director



The 7 key employment/HR challenges for schools

1. Boarding staff and sleepovers
2. Employment status
3. Safeguarding v Duty of Care
4. Redundancy
5. Performance
6. Stress
7. Recruitment

Margaret Anne Clark
Head of Employment Law



1. Boarding staff and sleepovers

For independent schools providing boarding accommodation for students, a number of employment law issues can arise from the need to provide 24/7 care and supervision of the students. Arranging shift patterns for boarding staff so that an appropriate level of oversight is provided to students, while also ensuring that staff are able to enjoy their entitlements to rest breaks, daily rest and weekly rest, under the Working Time Regulations, can be a difficult balance to strike.

This is especially the case when considering developments in case law over recent years, particularly when examining whether someone should be deemed to be working when they are “on-call” during the night and need to be available to deal with any emergencies which arise, even during the time they spend sleeping.

If you require your boarding staff to remain on site throughout the night to deal with any situations which crop up, then case law suggests it is likely that they will be deemed to be working for the whole time that they are required to be on site and available. This has implications not just in terms of rest entitlements under the Working Time Regulations but potentially also under the National Minimum Wage Regulations. If every hour spent on-call is factored into the calculation of what their average hourly rate is for minimum wage purposes, there is a danger that the NMW is not being paid.

Providing accommodation to boarding staff only allows a nominal weekly sum to be offset against their pay for minimum wage purposes. In light of these issues, care does need to be taken to ensure the NMW is being paid to avoid the potential fines and reputational damage that can be imposed on employers.

Do teachers or other staff sleep over in the Boarding House during term time? If so, is the school complying with its obligations relating to daily and weekly rest breaks under the WTR and paying correctly under the NMW Regulations? LAW can help you review the hours of work and working patterns of these employees to check that you are complying with the law and where appropriate provide you with support and guidance to ensure employees are receiving appropriate breaks and the correct pay.

2. Employment status

With the Taylor review and recent cases involving other sectors hitting the headlines, it is a timely reminder of how important it is for schools to understand the correct status of the workers it engages with and the different rights and entitlements applicable depending on whether someone is an employee, a worker or a self-employed contractor. The right to claim unfair dismissal; be paid a redundancy payment; entitlement to paid holidays; and many other rights are determined by your employment status.

For independent schools, while the majority of staff you contract with will be employees of the school, there are some categories of worker where their employment status may be unclear. Visiting music teachers, sessional staff and specialist sports coaches are all roles with the potential for ambiguity when it comes to determining what their employment status is.

By working with a specialist partner like LAW, independent schools can avoid any dubiety over the employment status of its staff by ensuring that there is a clear and unequivocal contract in place which specifies the precise nature of the relationship. The written contract will often be the first port of call for a tribunal or court tasked with determining the correct employment status.

Care should still be taken to ensure the way the relationship works in practice reflects the terms of the written contract as tribunals will be alive to the possibility of an employer seeking to impose a particular status on an individual which doesn't reflect the practical reality of the relationship. LAW has considerable experience of advising independent schools on how to avoid disputes in this area and can help you to identify and resolve any issues that may be present in your school in what is a very topical area of employment law.

Daniel Gorry
Deputy Head
of Employment Law



Employment status – Case study

An independent school engaged a number of visiting music teachers to attend school each week to provide 1-1 tuition to students. The teachers would spend approximately two days a week on site and attend regularly during term time other than in exceptional circumstances where other commitments prevented their attendance. In such cases, the teacher could provide someone else to cover their lesson or reschedule the lesson for an alternative time.

There was very little written documentation in place to clarify the nature of the relationship between the parties. One visiting music teacher asserted that they were an employee of the school and that they therefore should be entitled to the same rights to paid holidays, pension contributions, sick pay and other employee benefits as the school's permanent teaching staff.

The school's view was that the teacher was self-employed but this was a case where there were a number of aspects of the relationship which were akin to an employment relationship and a number of aspects more consistent with a self-employed relationship.

LAW successfully supported this school by persuading the Employment Tribunal and Employment Appeal Tribunal that the teacher was a self-employed contractor and not entitled to the full range of contractual benefits they asserted they were due. LAW can help schools avoid getting into such situations by assisting with the drafting of clear, unambiguous contractual documentation for your employees, workers and self-employed contractors while also robustly defending your position in the event that disputes do arise.

Are your sessional teachers self-employed workers or employees?

If you don't try and correctly identify them you could leave the school exposed to employment claims in areas such as holiday pay, for example. HR At Work can help you identify the status of these teachers, put the correct contractual documentation in place and ensure you meet your legal obligations regarding holiday pay.

3. Safeguarding v Duty of Care

The safeguarding of pupils is of paramount importance and getting it wrong can have dire consequences. Part of this means ensuring that anyone covered by the SVGA 2006 or PVG 2007 remains able to work with vulnerable groups under these regulations. It is therefore important to consider how you would proceed in an instance where this is no longer the case, taking into account possible appeals, to make sure you are fair to your employees whilst continuing to protect your students and remaining legally compliant.

Balancing safeguarding with your duty of care to your employees can be tricky, as demonstrated by a recent case in the High Court. Allegations had been made against a teacher for using unnecessary force towards a pupil and she was immediately placed on suspension with no explanation provided as to why this was necessary. She raised a claim, arguing that the school had breached the implied contractual term of trust and confidence. The Court agreed with the teacher, stating that suspension should not be a knee-jerk reaction and should only be used in instances where there are no other alternatives.

When serious allegations are made, the duty to safeguard pupils can cloud your judgement in terms of how an employee should be treated. You should therefore always consider if there is an alternative to suspension such as removing them from work where they interact with pupils. This is especially important as Courts tend to scrutinise the decisions of employers governed by regulatory bodies much more closely due to the long-term impact they can have on the careers of their employees.

Anita Mulholland
Employment Solicitor



Sophie Macphail
Employment Solicitor



4. Redundancy

We live in a time of political and economic uncertainty. The effects of this have been felt across many areas of society and many business sectors with the education sector being no exception. Where student numbers start to decline and other pressures on costs start to take hold, difficult decisions need to be taken about how to achieve the necessary cost savings to react to these challenges. Sometimes, changes have to be made to the staffing structure or to overall employee numbers.

Undergoing a restructure or redundancy process gives rise to a number of potential employment law issues. There is a need to meaningfully consult with your affected employees and, where reductions to employee numbers are required, care should be taken to ensure that the right pool of employees is being considered and that you have a fair and objective means of deciding who should be selected for redundancy.

Getting this type of process wrong can result in unfair dismissal and discrimination claims from employees that are made redundant as well as damaging relationships with those who remain with the school.

LAW has advised a number of independent schools on how to tackle complex restructures and redundancy processes in a way which minimises the risk of unfair dismissal and discrimination claims while also being sensitive to the strain such a process places on managers and all employees affected by the uncertainty associated with changes of this nature.

5. Performance

Unfortunately, not all teachers perform to the required standard. However, do not assume that teachers cannot be performance managed – they can. Generally speaking, an employee is more likely to turn their performance around if concerns are highlighted at an early stage as opposed to letting issues fester. Offering training and support also results in positive outcomes and is much less time-consuming than having to go down a poor performance dismissal procedure. However, where a formal route is required, schools should also not be afraid to take such measures with their teachers.

In the unfortunate circumstances where poor performance has resulted in a capability dismissal, when deciding whether the dismissal was fair, the Employment Tribunal is careful not to impose their own view on what standards should be expected of teachers. The Employment Appeal Tribunal has previously ruled that an independent school was entitled to set its own standard of teaching, even if these were higher than those in a local state school. Generally speaking, these standards will still need to be realistic and reasonable and the tribunal will look for whether the proper supervision procedures were in place. Carefully considered and robust policies therefore form an integral part of performance management.

Are employees performances assessed against key performance indicators so that the school knows who is performing well and who may need further support? LAW can help you design KPIs and support you in putting in place an appraisal system that will allow the school to get the most from its employees.

Gerry O'Hare
Senior Employment
Solicitor



Performance – Case study

Teachers tend not to be performance managed. The reasoning for this varies but from our experience it either tends to be a case of 'they've always taught that way' or that it would be time-consuming to do so and might also upset the apple cart. LAW, however, believes that performance management is an important aspect of maintaining positive performance and morale, not least because it can be de-motivating for productive members of staff if the under performance of colleagues is ignored. We therefore frequently provide in-depth guidance to our School clients on the approach to take when managing the performance of a teacher. Recently we assisted an independent school on how to commence the performance management of a Head of Department whose performance had been questionable for a number of years.

The client's reluctance to deal with the issue stemmed from the teachers seniority and a lack of understanding of how to approach the situation. The client's dedicated employment solicitor provided advice on how to identify the problem to determine whether or not performance was really the issue or if there were any other issues, such as excessive workload or ill-health. Once it was identified that it was solely a performance issue, advice was provided on how to create and implement a performance management action plan. Our advice also included the steps the client should follow in the event that the process was unsuccessful to ensure any subsequent dismissal would be fair. Thankfully, however, once the HoD knew and understood the School was taking the under-performance seriously, they turned their performance around. The result was that no formal action had to be taken – saving the school the hassle of a lengthy process.

6. Stress

Teacher stress is at an all-time high. According to research conducted by the Liberal Democrats, one in 83 teachers in England was absent from work for one month or more during the 2016-17 academic year due to stress or mental health issues. Absences of this length have an impact on the school itself, both logistically and financially, as well as on pupils.

Stress in and of itself is not a medical condition but rather an adverse reaction to excess pressure. Removing the cause of the stress at work should, therefore, remove the barrier to the employee returning to work. Stress requires a non-medical solution and when this is work-based stress, the employer and the employee will need to work together to find it. This might involve carrying out a stress audit and ensuring that the results are put into action. Long-term stress can lead to a mental health condition if left unresolved so it is always better to nip it in the bud, where possible.

It is therefore important to be aware of the difference between stress and mental health conditions, and how these interact. An employer's obligation under the Equality Act 2010 to make reasonable adjustments does not come into play in cases of stress. On the other hand, if an employee's mental health condition is a disability, you could be guilty of disability discrimination if you fail to make such adjustments. Recognising this crucial difference, as well as understanding when stress is a symptom of something more serious, is vital both in terms of managing staff absenteeism and ensuring legal obligations are being fulfilled.

Stress – Case study

If stress is ignored, it can have a significant detrimental impact on both the teacher and the school. LAW are adept at helping clients recognise the 'stressors' which lead to stress and assisting clients with navigating these tricky situations. LAW recently assisted an independent school in relation to a teacher who began struggling with classroom management and who also noticeably became increasingly withdrawn. By contacting LAW at an early stage, we were able to help the client identify that the behaviours were attributable to stress rather than it being a performance issue. We assisted the client in engaging with occupational health in obtaining a specialist report on the steps the school could take in both the short and medium term to assist the teacher, as well as advising the school on what steps to take to ensure minimum disruption to the department. The school followed our practical advice which meant that the teacher was fully supported throughout and there was no disruption to service.

7. Recruitment

Aside from possible teacher regulation issues that can crop up, our experience is that, when it comes to recruitment, independent schools can also struggle with the same issues experienced by clients across a range of sectors. Getting the right person is key, especially for teachers who have such a high level of responsibility, but it is also important that you don't let your recruitment procedure fall foul of employment law.

One of the major legal issues that can crop up at any point during the recruitment process is discrimination. Did you know that somebody who has not even applied for a job with you can bring a discrimination claim in relation to your recruitment arrangements? It is therefore vital that you keep this consideration in the forefront of your mind at all stages; from advertising the vacancy to interviewing candidates to choosing the successful individual. This will likely involve thinking about how somebody could be disadvantaged by the requirements of the position or the way they are being assessed and making adjustments where possible.

Heather Maclean
Employment Solicitor



The costs of failing to manage health & safety in schools

Failing to adequately manage health and safety in schools results in accidents and incidents involving staff and pupils and can result in hefty costs where negligence is established.

Millions of pounds in compensation have been secured for teachers after falls and assaults.

- A teacher who lost her balance while using a table and chair to put up a display suffered a fracture which aggravated her foot fibromyalgia and depressive illness, preventing her from working and resulting in her contract being terminated. The case was brought against the employer for failing to provide proper work equipment and resulted in a pay-out of £250,000.
- Another teacher received £250,000 after being subjected to violence and bad pupil behaviour for four years. This led to the teacher's "steadily worsening health and eventual breakdown" while the employer failed to help manage the behaviour or carry out a formal risk assessment.
- Almost £85,000 was awarded to a teacher who slipped on untreated black ice at the door to her classroom while a 53-year-old teacher was awarded £60,000 after she slipped and fell on a food and liquid spillage as she made her way from a science lab.
- An academy worker in the North East was given nearly £50,000 after a "prolonged assault" by a teenage girl who had been told to stop chewing gum. This included blows to the stomach and hand, leaving the teacher with bruises, post-traumatic stress disorder and depression.
- A teacher who fell from a stepladder while conducting rigging and adjustments to spotlights and cabling in the school drama studio suffered multiple fractures to the skull, wrist and elbow as a result of the impact. The school had inadequately risk assessed work at height in its drama studio, and had failed to provide teachers with sufficient training for work at height. The school were fined £2,000 and ordered to pay full prosecution costs.

What does health & safety actually mean for schools?

The Association of Teachers and Lecturers Union General Secretary stated a few years ago that there needs to be a "balance between safety and silliness" when managing safety. Still, senior leadership teams in schools will often read that school children are required to wear goggles when playing conkers (or that such games should be banned completely). In recent years, school trips and excursions have reduced significantly – possibly due to safety fears and the perceived numerous hours of safety planning required. In addition, schools often worry about asbestos management; legionella; fire safety and security. The Safety At Work team are registered OSHCR practitioners approved by the Health and Safety Executive, and Chartered Members of IOSH (Institute of Occupational Safety and Health), meaning that our school and education clients are always dealing with experts who are at the top of their profession. Our team take a sensible and supportive approach towards our school clients.

Douglas Cameron
Head of
Safety Services



The 8 key health & safety challenges for Schools

1. School trips
2. Incident reporting
3. Asbestos management
4. Safe buildings and structures
5. Management of contractors
6. Traffic management
7. Fire
8. Security



Lee Craig
Health & Safety
Manager

1. School trips

School trips can be riddled with hazards. A recent school trip was the cause of a serious complaint from a child's parents to the school and the local council board. The pupil, on a trip abroad, wore shorts without sufficient sun protection such as SPF and was severely sunburnt. Staff members took advice from a local pharmacist and took the child to the local hospital who completely bandaged the pupil's legs which left him unable to move without a wheelchair.

The pupil then had to endure a 36 hour coach trip home.

The findings from the Scottish Public Services Ombudsman were that though the initial treatment was sufficient, allowing the child to wear shorts without adequate protection and the coach journey home were not reasonable actions. The pupil was severely burned and options for getting the child home in a quicker, more comfortable manner should have been explored.

The local council have since apologised to the parents for the poor handling of the complaint, along with an apology for not exploring other options for the child to return home.

Had the staff members ensured a sufficient SPF was applied, or a different outfit worn then there would have been no burn – how many of your staff would think to ensure this? The pupil in the example was in the sun “no longer than 30 minutes” but had complained of their legs feeling uncomfortable.

2. Incident reporting

Over reporting to a regulatory body is common. Many of the common incidents that cause injuries to pupils at school tend not to be reportable under RIDDOR, as they do not arise directly from the way the school undertakes a work activity.

Knowing what to report can cause confusion amongst staff and lead to this over reporting. LAW can offer you 24/7 advice should you need it and provide clear guidance on whether an incident needs to be reported.

3. Asbestos management

Any building built before 1980 could contain asbestos, the fibres of which are highly dangerous and cannot be seen, smelt or tasted. Exposure does not cause immediate symptoms, often taking 20 to 50 years to develop. Before renovating, or carrying out any construction or repair work it is vital to ensure that you and any contractors are aware of the presence of asbestos on the premises so measures can be put in place.

As a school, you have a legal duty to manage asbestos which could be present in ceiling or floor tiles, insulation, and certain cement products (amongst many others). The expectations are relatively straightforward. Surveys (Type 2), action recommendations for removal, encapsulation, potential warning signage and management control evidence for remaining protected asbestos.

Matt Ramsey
Health & Safety
Manager



Asbestos in schools – Case study

The management of asbestos in school remains a real challenge for the education sector, especially when it comes to the removal of asbestos containing materials. A recent Freedom of Information request by the Joint Union Asbestos Committee revealed that at least 335 primary and secondary school teachers died of mesothelioma in Britain between 1980 and 2015, along with eight school secretaries, eight nursery nurses, 18 school midday assistants and 24 teaching assistants between 2003 and 2015. Whilst these figures are derived from occupations, there are no clear figures on pupils affected.

In order to manage asbestos we at LAW can provide assistance with this process, including vetting the contractors and reviewing the plan of work before activity commences. Failure of contractors is all too common – a recent case involved a construction company being fined after removing asbestos during the refurbishment of a junior school in the Cotswolds. The company removed the asbestos in an unsafe manner and didn't have a license to touch asbestos anyway! The workers were exposed to high levels of the toxic fibres which they then carried out into the wider world on their clothing as no decontamination procedure was in place.

The lack of knowledge, and the lack of properly fitting face masks means that the exposed workers are likely to develop asbestos related diseases. With proper planning and an asbestos survey, the contractor would have been replaced with a fully licensed asbestos specialist who would have been able to put the appropriate safety measures in place.

Speaking after the hearing, HSE inspector James Lucas said "The company in this case should have ensured appropriate measures were identified during the planning process to include the engagement of a licensed asbestos contractor to carry out correct control measures and safe working practices for the removal of the asbestos." If you have any questions, would just like a chat to seek reassurance, or if we can be of any assistance with asbestos, please do not hesitate to call LAW.

4. Safe buildings and structures

In 2016, nine tonnes of masonry fell from an Edinburgh primary school during Storm Gertrude. The school, having lost a major part of a wall, had to close as a “precautionary measure”, later reopening after a safety inspection. After additional surveys, the school was closed again with no notice 6 weeks later. This move highly concerned parents as they worried about the safety of the building that their children had been attending for the previous 6 weeks.

An independent report published a year later found that it “was just a matter of timing and luck” that no one died or was injured. This incident prompted quick action from the local authorities; 17 schools were closed in Edinburgh alone over concerns about the buildings and with this the lack of proper scrutiny over school construction has been brought to light.

It doesn't end there though. In March 2018, the flashing on the school's roof was found to be loose and “flapping in the wind”. A few weeks earlier a ceiling tile fell on to a pupil dislodging others as well as part of the ceiling frame. Luckily, it was a light-weight tile and the girl was unharmed – though probably rather shocked.

Checks will be carried out in the other 17 schools in the area: a run of bad luck or shoddy work coming to light? Ensuring your building is properly risk assessed and maintained is key to reducing the risks faced by your pupils and staff. In addition, when work is carried out by contractors, make certain that they are qualified to carry out the work and that a supervisor is on site at all times.

Michael Moran
Health & Safety
Manager



Safe buildings focus point: swimming pools

Let's start this one with a bit of a game – what do HSG179, ASA and PWTAG mean to you? Of course, every school will recognise the ‘codes’ as the relevant guides we use: HSE's Managing Health and Safety in Swimming Pools, The Amateur Swimming Association Guidelines for School Swimming Pool Water Treatment Advisory Group Code of Practice for Swimming Pool Water (how are those for a mouthful?!)

It's one thing to know that these exist, but another to know how to apply all this jargon to your facilities! It's our job to keep up to date and on the ball with all the guidance, legal requirements and best practice. In short, along with the “obvious” things like supervision and lifeguards and emergency situations, you've also got to be prepared for checking the pool water quality, pool plant room safety, and being on guard for microorganisms such as Cryptosporidium and Giardia which spread fast and cause severe illness.

Whether the school maintains the pool facility or whether it is maintained by an external provider, the responsibility sits wholly with you as a school to ensure that your pupils, staff and visiting parents are safe.

Safe buildings focus point: classrooms

You would think that a classroom would be one of the least dangerous places in the school (unless it's a science lab, a technology lab or a cookery class) but unless the risks are controlled and monitored, it can be a very unsafe place.

A messy classroom is a dangerous classroom – overfilled shelves; unanchored bookcases; and unsecure cabinets are all hazards that are easily remedied. Overloaded electrical outlets, or those in disrepair and trailing, broken electric wire are often overlooked but are a prime cause of shock and fire.

Do your staff know that it's their responsibility to check and report any issues? It's up to them to keep the area free and safe from hazards. When was the last time they had any training on identifying hazards or risk management? We often find that there is a disjoint between those responsible for safety and the teaching and technical staff who are unaware and untrained.

5. Management of contractors

Introducing a third party to your school increases the potential risk, especially, if they are carrying out maintenance work during term time. Knowing the right questions to ask contractors can be challenging for schools.

LAW can carry out a due diligence check on your contractors to ensure they are competent, and carry out on-site inspections during the work to ensure risks are being controlled.

6. Traffic management

187 children aged 0-4 years old were killed or seriously injured whilst on foot in 2014. Of the child casualties in this age group, pedestrians accounted for 65%, followed by those seated in cars (28%) and cyclists (1%).

Schools should consider vehicle movements in their risk assessments which occur immediately outside the school premises, which may be associated with school activities, such as staff arriving and leaving work, school buses delivering pupils and delivery vehicles.

LAW can carry out that risk assessment for you or provide practical advice on what measures you can take to protect you pupils and staff.

“I’m very pleased with our relationship with Law At Work. We get a fast response from LAW underpinned by step-by-step support from start to finish. They deal in law, but mercifully they do it in plain English.”

Bursar, Dollar Academy

7. Fire

Schools are required to have adequate fire precautions, including a fire risk assessment, and we often find during a site inspection that these are neglected or out of date. Schools need to have a careful and in depth fire risk assessment completed examining (for example) the property structural defences, escape protection routes, detection and alarm systems, fire extinguishing systems, hazardous substances, evacuation procedures, training, pupil and staff awareness, statutory and maintenance inspection etc.

A good assessor will be totally committed to gain a clear overall understanding of where fire safety standards are and where the significant risks are, be able to explain both the concerns but more importantly business sensible solutions and timescales. The assessor must assist the school towards achieving improvements and do as much as they can to deliver that additional support, not just assess, produce a report and walk away.

Of course, LAW is capable of carrying out a fire risk assessment at your campus and providing you with a succinct report that gives you clear actions and recommendations to ensure that you meet your legal obligations.

8. Security

Hand in hand with emergency evacuation comes an increasing need to plan for evacuation or lock down. When external threats of whatever kind are present, it is vital that schools are able to move staff and students away from danger in a controlled way. Dynamic lockdown procedures enable a quick response to restrict access and egress to a building through physical measures and prevent staff and students moving into danger areas and can prevent and frustrate potential attackers.

- Plan how to achieve full and partial lockdown
- Ensure arrangements are in place to let staff and students know what’s happening
- Provide training for staff
- Apply the STAY SAFE principle



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Employment Law | Human Resources | Health & Safety

As trusted experts in employment law, HR and health & safety, LAW offer independent schools a range of flexible employee relations services under one roof. By delivering top quality, all-inclusive fixed-fee advice, we enable schools to take quick, confident and decisive action.

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