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Academies annual update: education post COVID-19

Part one: A legal and governance update - Q&A responses

Question	Answer
What are your views on continuing with virtual meetings and the possibility of returning to in person meetings?	Looking to the longer term, we would anticipate that clients will look to adopt a hybrid model, mixing remote and face to face meetings. The experience of the last 12 months is that it can be very much easier to convene remote meetings, but that it can be helpful to meet in person, particularly to discuss matters of more significant importance where remote conversations can lose elements of the flow and nuances of the discussions.
Can I ask what follows in the wake of a forced closure? Where do the students go for example?	In the event of a forced closure typically the ESFA would work with the school being closed and, importantly the Local Authority (which retains its place planning role) to identify where children might be placed. Ideally, there is at least a full academic year of notice given to ensure that an orderly process can be undertaken (and to enable any, say, year 10 children to complete their GCSEs at their existing school).
Will the expectation be that existing academies will have to change their current Articles?	We wait to see. Past experience shows that the DfE has not necessarily insisted on a blanket update, but that they will use any times when consent may be required (for example, on a significant change or a new school joining the Trust) to require changes to be made to the Articles.
Over what period do you anticipate changes to articles will need to be implemented. In my school we don't comply with some of the provisions that are currently optional. Independent members being one. Notwithstanding any value in change for changes sake	We are at the moment dealing with a number of changes of Articles of Association for clients. It is taking quite some time to get these changes approved by the ESFA, and the ESFA is not placing significant pressure on our clients to make the changes. Accordingly, we would anticipate that any changes

we recognise we may need to become more compliant, but change will not be straightforward.	would be able to be introduced over a reasonable timeframe which would give enough time for new members etc. to be found.
We have CEV staff who refuse to return to work even though shielding has ended. Referred to occupational health who said that they have health conditions and vaccination does not guarantee they will not get covid. Staff saying, they are unable to return to school as we cannot guarantee 2m social distancing.	The Government's guidance on shielding for CEV ended on 1 April 2021 in response to falling infection rates. If it is possible for a CEV employee to work from home, they should continue to do so in line with current Government guidance. If the CEV employee cannot work from home, the employer should take steps to reduce the risk of exposure to COVID-19 in the workplace and explain the measures it has put in place to keep employees safe at work (including any protective measures which apply where social distancing may not be possible, e.g. the use of face coverings when moving around corridors). The employer should also carry out individual risk assessments for its employees and explore whether any additional measures may be appropriate to help its employees (including those who are CEV) feel safe, e.g. whether an alternative role with reduced face-to-face working may be appropriate or whether adjusted working patterns could be implemented. If, after consulting with employees and taking the above steps, there are employees who are still unwilling to come into work, and it is not possible for these employees to work from home, the employer could consider whether disciplinary action may be appropriate. This should be approached with caution as the employer may be at risk of the following claims being made against it in the Employment Tribunal: (i) automatic unfair dismissal or constructive dismissal, (ii) discrimination (e.g. on the grounds of disability), and (iii) health and safety detriment claims. We strongly recommend employers take legal advice before taking any action against employees who refuse to attend the workplace because of COVID-19.

Will the right to request a contract extend to Exam invigilators who are scheduled on an annual basis and paid on claims basis?	This shall depend on whether the exam invigilator is an employee, worker or self-employed. A lot of exam invigilators are treated as self-employed by schools/ academies and therefore, in theory, these exam invigilators are not entitled to a contract under employment law legislation. It should be noted that, if the parties label the exam invigilator as an independent contractor (i.e. self-employed), this will not prevent a tribunal from making a finding of worker status if the actual working relationship between the parties suggests worker status. The position regarding exam invigilators' employment status is complicated and, in most cases, it is likely that exam invigilators would be classed as workers if a tribunal were to consider their employment status. If an exam invigilator is deemed to be a worker from an employment law perspective they will be entitled to receive a section 1 statement no later than the beginning of their employment. A section 1 statement is a written statement of a worker's terms of employment that must be provided by law. It includes particulars such as, the name of the employer and worker, the worker's normal working hours and the length of notice required to terminate the contract. Sections 1 – 3 of the Employment Rights Act 1996 outline the full list of particulars that must be provided to a worker in a section 1 statement. The Queen's Speech 2019 mentioned the introduction of a new right for all workers to request a more predictable contract after 26 week's service. No legislation/ further guidance has been published on this new right and we are still awaiting the publication of the Employment Bill which should provide further information on this. If your exam invigilators are considered to be workers from an employment law

	perspective, this right shall likely extend to these exam invigilators. If you have any queries on the employment status of your exam invigilators we recommend taking legal advice on this and what contractual documentation should be put in place between the parties.
Our "Invigilators" would be on Zero hours contracts (or you could say casual). It won't be appropriate to offer a formal contract as only needed when we hold exams. Will these staff fall within the regulation and what can we do	Please see the answer to the question above on exam invigilators. If your exam invigilators are workers you must provide them with a section 1 statement (mentioned above) by law. It is advisable to always have a contract in place where you are engaging exam invigilators, particularly in an education setting, as you will want to ensure the engagement is conditional on certain requirements being met, e.g. a satisfactory DBS check. As stated above, if your exam invigilators are deemed to be workers from an employment law perspective, the new right to request a more predictable contract after 26 week's service which was mentioned in the Queen's Speech 2019 shall likely extend to these exam invigilators. As above, it should be noted that no legislation/ further guidance has been published on this new right to date. The Employment Bill, which is due to be published this year, should provide further information on this right. We recommend taking legal advice on the employment status of exam invigilators and what type of contract is appropriate in the circumstances.
What could the consequences be of an employee going to a red / amber country and not being available for work due to isolation? What penalties can we apply?	Employees should keep up-to-date with Government guidance on travelling abroad and should not travel to red/ amber list countries unless exceptional circumstances apply, such as the serious illness of a family member. Employers cannot prevent employees from travelling to a red/ amber list country. It may be reasonable for employers to ask their employees not to travel abroad to these countries given the

	requirement to self-isolate on return, particularly if these employees cannot work from home. We would recommend communicating the employer's position to its employees on travel to red/ amber list countries in advance and what will be expected of employees on their return from these countries. Employers could opt to take disciplinary action against employees who travel abroad to red/ amber list countries and then are not available for work due to isolation, e.g. by placing an employee on unpaid leave. However, this should be approached with caution as there is a risk that these employees may bring a claim for breach of contract and/ or discrimination against the employer. We recommend employers take legal advice before taking any disciplinary action against employees who have travelled to red/ amber list countries.
Please could you clarify for me the change re terms of office for trustees, and extending these	The DfE's draft model refers to the ability to have terms of office shorter than 4 years – at the moment, all terms of office must be 4 years. The new model has no limits on the total number of terms of office which can be served, so any number of extensions could be undertaken. Against this power needs to be balanced the ideal position of ensuring that the board is refreshed on a regular basis so trusts may want to consider having a policy of, say, no more than 3 terms of 4 years for trustees.