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Disqualification from providing Childcare



Top Tips for Schools

Impact of the recent Childcare (Disqualification) Regulations 2009

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There has been a certain amount of uncertainty about the impact of the recent Childcare (Disqualification) Regulations 2009 ("the Regulations"). The Regulations are made under the Childcare Act 2006 and provide that a person who is disqualified under the Regulations may not provide relevant childcare or be directly concerned in the management of such provision. Further, the Regulations provide that schools are prohibited from employing a disqualified person in connection with relevant childcare provision. Broadly speaking, the Regulations mean that schools should not employ anyone in early years and relevant later years' provision who are disqualified from working with children. However, how schools go about complying with this requirement has not always been clear.

It is clear now however that it is an offence to knowingly employ someone who is disqualified.

The Department for Education ("DfE") has now released further guidance about what the Regulations mean for schools. This guidance has statutory force and so schools are required to comply with it. Our advice would be to read the guidance (it's not as bad as it looks with pages 13 to 47 being a list of the relevant offences).

[The document can be accessed by clicking this link.](#)

We set out the key points and practical implications below.

1. What are the grounds for disqualification?

Disqualification means disqualification from providing childcare. The list of criteria for disqualification is long (the full version can be seen in the DfE guidance) but the highlights are as follows:

- a inclusion on the Disclosure and Barring Service (DBS) Children's Barred List
- b being found to have committed certain violent and sexual criminal offences against children and adults which are referred to in regulation 4 and Schedules 2 and 3 of the 2009 Regulations (note that regulation 4 also refers to offences that are listed in other pieces of legislation)
- c certain orders made in relation to the care of children which are referred to in regulation 4 and listed at Schedule 1 of the 2009 Regulations
- d refusal or cancellation of registration relating to childcare, or children's homes, or being prohibited from private fostering, as specified in Schedule 1 of the 2009 Regulations
- e living in the same household where another person who is disqualified lives or is employed (disqualification 'by association') as specified in regulation 9 of the 2009 Regulations
- f being found to have committed an offence overseas which would constitute an offence regarding disqualification under the 2009 Regulations if it had been committed in any part of the United Kingdom

2. Who do the Regulations apply to?

The key theme with the Guidance is that the disqualification requirements apply to those who provide childcare within a certain age range and who are responsible for managing that setting. As always, there may well be situations that are not clear cut and judgement and consideration of individual circumstances would come into play. We suggest that if schools are not sure, that they obtain advice and clearly document any decision made. We deal with the common categories of worker below:

Staff

The disqualification requirements apply to the following staff:

- Early years provision - any member of staff who provides any care for a child up to and including reception age. This includes breakfast clubs, lunchtime supervision and after school care provided by the school both during and outside of school hours for this early years age range.
- Later years provision, for children under 8 – please note however that the new DfE guidance states that the Regulations do not apply to education or supervised activity for children above reception age during school hours or in after school or co-curricular educational clubs. However, the Regulations do apply to before school settings, such as breakfast clubs and after school provision that would constitute childcare
- The Regulations also apply to staff who are responsible for managing either the early or later years provision in that setting. The Guidance is clear that schools will need to use their judgement to determine who is covered but this will include the Head, and may also include members of the senior management or leadership team responsible for the day-to-day management of the provision

Volunteers and Governors

The initial guidance was that the Regulations do not apply to Governors and volunteers; however, the DfE Guidance states that the Regulations will apply if the volunteer or Governor works in relevant childcare on a regular basis, or they are directly concerned with the day-to-day management of such provision.

Staff who occasionally provide childcare

Most staff who are only occasionally deployed and are not regularly required to work in relevant childcare will not automatically come within the scope of the legislation. Schools should exercise their judgement about whether such staff are within scope by evaluating and recording any risks and control measures put in place and taking advice from the LADO, safeguarding lead or advisor when appropriate. A record of the assessment should be retained on the employee's personnel file.

Agencies and supply staff

Where schools use staff from any agency, or third-party organisation, to work in relevant childcare in schools, or contract out such childcare, they must obtain confirmation that the agency or organisation providing the staff has informed staff that they will be committing an offence if they are deployed to work in relevant childcare, or are directly concerned in the management of such provision, if they are disqualified under the Regulations. This should include the provider requesting that their staff inform them if they consider that they could be disqualified under the legislation.

for example on employment based teacher training programmes, and work in a relevant setting, the school must obtain confirmation from the provider that they comply with the legislation.

Self-employed contractors

Where the school deploys a contractor who is self-employed to work in relevant childcare provision, the school must obtain assurance that the contractor is aware of their responsibilities under the guidance and has complied with them.

The Guidance states however that the disqualification requirements do not apply to the following:

Staff not directly employed to provide childcare

Staff such as caretakers, cleaners, drivers, transport escorts, catering and office staff who are not employed to directly provide childcare are not covered by this legislation.

Healthcare provision

Anybody involved in any form of healthcare provision for a child, including school nurses and local authority staff such as speech and language therapists and education psychologists, are specifically excluded from the statutory definition of childcare, and are therefore excluded from the legislation.

3. What do schools need to do to demonstrate that they have complied?

The key point is that schools must ensure that they are not knowingly employing a person who is disqualified under the Regulations in connection with relevant childcare. Schools' obligations are as follows:

- Schools must make sure that anyone who falls within the relevant categories of staff set out above are aware of the legislation, including that they may be disqualified by association if they live in the same household as a disqualified person or in a household where a disqualified person is employed.
- Schools need to take steps to gather sufficient and accurate information about whether any member of staff in a relevant childcare setting is disqualified by association.
- Schools need to keep records including the date disqualification checks were completed, whether on the Single Central Register (optional) or elsewhere.

4. Practical Steps

These obligations can be achieved in a variety of ways.

- **Ensuring staff are aware of the legislation**

To ensure staff are aware of the legislation, schools may wish to review and update their recruitment and safeguarding policies to inform staff of their obligations to notify the school of any changes. Schools will need to publicise this whether by way of a staff bulletin or other staff communications to ensure that staff are aware of their obligations in this regard. Schools may also wish to consider amending and/or including in the contract of employment an obligation for staff to inform the school if they fall into the disqualification criteria.

Schools may (although it is not necessary) also comply with this part of their obligation by asking relevant staff to complete a self-declaration form (as provided below).

- **Gather sufficient and accurate information about whether any member of staff is disqualified by association**

There has been debate as to whether it would be appropriate to ask staff to complete a declaration form (possibly on an annual basis) stating that they are not disqualified from providing childcare. The DfE Guidance states that it is not necessary for schools to take this step. However, the Guidance also states that schools are required to evidence that they have gathered this information. There appears to be a dichotomy here. There are perhaps three approaches to suggest in respect of **existing** staff:

1. Option one is to make staff aware of the legislation (as set out above) and then keep a clear documented audit trail (emails, letters, other communications) to demonstrate that the school has gathered sufficient and accurate information to demonstrate that staff are aware of their obligation to inform the school if they may be disqualified (including by association). They should also be advised of the need to inform the school if their position changes.
2. Option two is to ask staff working in a relevant setting to complete a self-declaration form; this is likely to include sufficient detail making staff aware of the legislation and the need to inform the school of any changes.
3. If schools wish to adopt a belt and braces approach, option three would be to ask relevant staff to complete the self-declaration form set out above on an annual basis. Whether schools decide to do this may well depend on their resources.
4. For **new** staff, we would suggest that the easiest way to comply is to require new starters to complete a self-declaration form on recruitment. Additionally, on recruitment it is important that staff are informed (either through the school's policies or in their contract of employment) that it is their obligation to inform the school if their position regarding disqualification changes.

Record Keeping

Schools must do the following:

- keep a record of those staff who are employed to work in or manage relevant childcare
- record the date on which disqualification checks were completed.

Schools may choose to keep this as part of the Single Central Record or maintain a record separately. Schools should also keep records regarding action taken when employees declare that they are disqualified (see below).

5. What about data protection?

The DfE Guidance states that in gathering evidence to show that the school has complied with its obligations, schools should minimise the intrusion into the private lives of their staff and members of their household.

Schools should therefore ensure that in maintaining records they should not store personal data or sensitive personal data about household members without their consent, and they should ensure that any information is kept to a minimum, is accurate and is only stored for the minimum period of time necessary.

6. What if there are staff working in the school who declare that they could be disqualified by association?

If this is the case, the school must inform Ofsted. You should tell the individual that Ofsted has been informed and explain the implications to the individual including whether it would be possible for the individual to apply to Ofsted for a waiver. The statutory guidance states that schools should explain to the individual that details about how to make an application for a waiver and a copy of the form can be found on the Ofsted fact sheet. Current indications are that Ofsted could take up to 2 months to provide a waiver. During this period the school should consider whether it would be appropriate to redeploy the member of staff elsewhere. Schools should consider taking advice from their HR provider, LADO, or safeguarding lead officer on these matters.

7. What should you do if an employee declares that they are living with someone who has been disqualified and it is not possible to obtain a waiver from Ofsted?

If the employee is currently working at the school and cannot be redeployed elsewhere in a school in a different setting, the school may consider steps to legitimately terminate their employment.

Conclusion

Both schools and education sector organisations have expressed concern about the impact of these Regulations. It is at least clear for the time being that it is an offence to knowingly employ someone that is disqualified. It is also clear that a self-declaration form is just one option in ensuring that staff are aware of the legislation and for a school to gather information.

If you have any queries regarding the Regulations including a template self-declaration form please contact Kristine Scott or Esther Maxwell on kscott@hcrlaw.com; emaxwell@hcrlaw.com or by calling 01242 246405.



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