



ActifHR

Where people matter...

October 2017 Update

Welcome to this month's update - where we discuss the latest guidance and legislation.

In this Edition we report on:

- Suspend or not suspend? That is the question.
 - The new General Data Protection Regulations (GDPR)
 - Migraines – Are they classed as a disability?
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Suspend or not suspend? That is the question.

If an employee is facing a serious misconduct allegation, It is difficult for employers to know whether or not to suspend them as part of a disciplinary process.

Employers should not pre-judge the situation but there are several valid reasons why an employer may wish to suspend, such as risk to the business, or challenges in carrying out a reasonable investigation. The recent case of *Agoreyo v London Borough of Lambeth*, provides some useful guidance.

An employer needs to have a reasonable and proper cause before suspending an employee, or it will be a breach of the implied terms of trust and confidence, allowing the employee to resign and claim constructive dismissal.

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Suspension should not be a 'knee-jerk' reaction. It should not be a routine decision because you need to investigate something serious. In the above case, Ms Agoreyo was a teacher in a primary school. Allegations were made that she had used unreasonable force towards one of the children on three occasions.

With regards to two of the three allegations, the Headteacher found that Ms Agoreyo had used reasonable force. However, shortly afterwards she was suspended because of all the allegations.

She then resigned. In this case, no alternatives to suspension had been contemplated. The decision was a 'knee-jerk' reaction, as the suspension letter did not explain why an investigation could not be conducted fairly without suspension.

Employers: this case is a good reminder that, even if the allegations are serious, employers should not jump straight into suspending an employee without reasonable cause.

Contact us: make sure you have a comprehensive suspension letter, and a contractual right to suspend an employee. We can assist investigations and disciplinary issues.

The new General Data Protection Regulations (GDPR)

Employers, a reminder that the new GDPR are set to kick off on 25 May 2018. It escalates the obligations on all businesses to ensure the safety of personal information of individuals stored on their systems, whether customers, suppliers or employees.

The GDPR will apply to data 'controllers' (employers) and now data 'processors' (employees) Previously the Data Protection Act only applied to controllers. Processing involves storing, retrieving and erasing data. Controlling involves manipulation in terms of interpretation or decision based data.

The GDPR applies to personal data, but the definition is wider than under the DPA. The regulations place greater intensity on the documentation that data controllers must keep, to indicate their accountability and consents they hold.

If your business is complying properly with the current law, then most of your current compliance will remain valid and can be the starting point to build from as many of the GDPR's main principles are similar to this in the current Data Protection Act (DPA)

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However, there are new elements and important enhancements. Your business will have to do various things for the first time, and some things differently. It is essential to start planning your approach to GDPR compliance now with the rules coming into effect in 7 months time.

To start with, you will need to gain 'buy in' from crucial people in your organisation. You may need, for example, to put new processes and procedures in place to deal with the GDPR's new transparency and individuals' rights provisions, the cost of which depends on the complexity of your business.

One key new aspect is having to show how you adhere to the rules. Evidencing compliance is known as the 'accountability' principle.

Employers: we recommend as a start that you carry out a review of your current processes against the GDPR requirements.

Contact us: we can assist with GDPR compliance.

Migraines – Are they classed as a disability?

A person who suffers from migraines could be disabled, so the short answer to this is yes! Migraines are not an excluded condition under the Equality Act, so there is scope for them to be treated as a disability.

To determine whether migraines by themselves amount to a disability on their own, rather than being part of another disability, you need to determine whether they are a physical or mental impairment. This impairment may have a substantial and long-term adverse effect on the employee's ability, to carry out normal day-to-day activities.

An employer would need to take each stage at a time. To establish, 'substantial', in this context is one that is more than trivial. For example, what do the migraines prevent an employee from doing? Even if they can carry out tasks, these may be painful and take longer to do, which would then potentially be 'substantial'.

Looking at 'long-term' this is mostly seen as a condition that has lasted at least 12 months. Although migraines themselves do not last for such a long-time, it is the recurrence of such symptoms over that time that is important. When reviewing 'normal day-to-day activities', these are the activities the employee does on regular basis, shopping, reading, writing, getting dressed, travelling and work-related activities.

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It is recognised that an employee takes time off work when suffering a serious migraine, however, an employer needs to look at what happens if an employee gets a migraine at work and how they cope.

Employers: this allows an employer to build a complete picture of the impairment to make an appropriate decision.

Contact us: if you have an employee with an ongoing or underlying illness.

Caroline Robertson, CEO

Caroline has a wealth of experience supporting business clients with practical hands on HR advice.

Caroline's pragmatic approach helps businesses of all sizes deal with complex HR situations.

She qualified as a Solicitor in 1999 and is able to assist Businesses on all aspects of employment law and HR.





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