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## October 2017 Update

Welcome to this month's update - where we discuss the latest legislation and guidance. In this Edition, we report on:

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- Suspend or not suspend?
- The new General Data Protection Regulations (GDPR)
- Migraines – Are they a disability?

### Suspend or not suspend?

It is difficult for employers to know whether to suspend an employee facing serious misconduct allegations 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 conducting a reasonable investigation. The recent case of *Agoreyo v London Borough of Lambeth*, provides some useful guidance.

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

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 in light of all the allegations.

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

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

**Contact us:** make sure you have a contractual right to suspend and have a detailed suspension letter. We can assist investigations and disciplinary issues.

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## The new General Data Protection Regulations (GDPR)

Employers, don't forget the GDPR are set to kick off on 25 May 2018. It increases 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 emphasis on the documentation that data controllers must keep, to demonstrate their accountability and consents they hold.

Many of the GDPR's main principles are similar to those in the current Data Protection Act (DPA) so 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.

However, there are new elements and significant enhancements. Your business will have to do some 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.

As a starter you will need to gain 'buy in' from key people in your organisation. You may need, for example, to put new 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 feature is having to show how you comply with the rules. Evidencing compliance is known as the 'accountability' principle.

**Employers:** we suggest as a start that you undertake a review of your current processes against the GDPR requirements.

**Contact us:** we can assist with GDPR compliance.

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## **Migraines – Are they a disability?**

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

To assess whether migraines by themselves amount to a disability on their own, rather than being part of another disability, you need to establish whether they are a physical or mental impairment that has 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 generally seen as a condition that has lasted at least 12 months. Although migraines do not last for such a long-time, it is the recurrence of such symptoms over 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.

It is accepted that an employee takes time off when there is 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 informed decision.

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

**For more information or assistance Email:** [enquiries@employmentlawsupport.co.uk](mailto:enquiries@employmentlawsupport.co.uk)

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Employment Law Support    Principal: Caroline Robertson  
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