

Keeping Children Safe – 1 October amendment

The Department for Education (DfE) have (sensibly) amended paragraphs 164 and 165 of the Keeping Children Safe in Education 2019 guidance. As you know, these paragraphs set out when you need to refer an individual to the Disclosure and Barring Service (DBS).

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The old version stated:

“The legal duty to refer applies equally in circumstances when an individual is deployed to another area of work that is not regulated activity, or they are suspended”.

It was the last four words of this sentence that resulted in a lack of clarity – a subject our safeguarding expert, Dai Durbridge, regularly had to advise on the best approach to adopt.

The amendment adds a little clarity. It now states:

“Referrals should be made as soon as possible and ordinarily on conclusion of an investigation, when an individual is removed from regulated activity. This could include when an individual is suspended, redeployed to work that is not regulated activity, dismissed or when they have resigned”

When an allegation is made, an investigation should be carried out to gather enough evidence to establish if it has foundation, and employers should ensure they have sufficient information to meet the referral duty criteria explained in the DBS referral guidance, which can be found on GOV.UK.

So whilst it still makes reference to suspension, it also makes it clear that:

1. You ordinarily refer on conclusion of an investigation;
2. When that investigation has allowed you to gather enough evidence to establish that the allegation has foundation; and
3. You should ensure you have sufficient information to meet the referral duty criteria.

In the vast majority of cases, this means that the duty will be met once the disciplinary hearing is concluded and an outcome reached.

If an appeal is raised by the employee you should not await the outcome of the appeal hearing before you refer, unless the appeal hearing can be convened within a short window of time (e.g. three to four days).

The duty to refer will have been triggered at the disciplinary hearing stage and waiting longer than three to four days for an appeal outcome will be considered an unreasonable delay. If an appeal panel overturns the hearing panel's decision and you have already made the referral to the DBS you will be able to write to the DBS to retract the referral with an explanation.

There may be some exceptional cases where you need to refer sooner. If they happen, we're here to guide you every step of the way.

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