Disqualification under the Childcare Act (DUCA) 2006 - commentary

There is no doubt that the publication of DfE guidance in Autumn 2014 on disqualification from childcare (and disqualification by association) caused all sorts of problems so it was pleasing to see in the new version (DfE 31st August 2018) that schools and many childcare settings have been disapplied from the ‘by association’ section. When deciding which staff are affected by the guidance, you only need to ask yourselves a few questions:

1. Do we provide early years care for children aged 0 - 4?
2. Do we have a reception class?
3. Do we offer wrap-around care, breakfast club or after-school childcare for children up to the age of 8?

If the answer to any of these questions is 'yes' then the regulations will apply to some of your staff in which case you need to do the following:

1. Identify which staff, students and volunteers the regulations apply to (the attached briefing will help you)
2. Write individually to those staff advising them of the Regs and their duty to advise you if they have any relevant cautions, convictions or orders.
3. Display the list of offences and orders somewhere accessible (or place it on the staff platform) - you could copy annex A & B from the DfE guidance**.**
4. Set up a list of all the staff that you believe the Regs apply to, add a note of the date you wrote to them and then ask them all to sign & date saying that they have read and understood the explanatory letter. You could if you prefer add a column to the SCR but personally, I think that over-complicates things as the new column will only apply to some staff.
5. If any member of staff or volunteer informs you of a relevant offence or order, check first that the issue they are disclosing is on the list - if it is, contact your HR service, safeguarding adviser or email me for advice before taking any action

Important points:

* There are unlikely to be any major shocks as most of these offences would have been disclosed on the person's DBS certificate. If so, you or your organisation would have presumably already risk assessed the criminal information and decided the person was suitable for appointment.
* The vast majority (1999 out of 2000) of those who have applied for a waiver from Ofsted have been cleared to continue working in childcare.
* It isn't generally going to be that new information comes to your attention - more that up till now it was your decision whether to appoint and take the risk but now Ofsted will want a say if the post falls into early- or later-years childcare
* If new information does come to light during this process, then the member of staff has possibly failed in their duty to inform you of a significant change in circumstances which (apart from the matter of disqualification) may be a disciplinary issue
* Try to avoid the temptation to develop a questionnaire - it isn't helpful in the long term as anyone answering 'yes' is disqualified immediately and must be removed from providing childcare
* Understand that even in that circumstance it may not be necessary to suspend the person if they can be redeployed to another role
* The updated DfE guidance [August 2018] makes it clear that employers **must not** ask staff / volunteers about people they are related to or live with

Other jobs to do after the initial response:

1. If you answered 'yes' to any of the first three questions, you will need to think about your recruitment process. How are you going to ensure that new applicants for roles which fall into the Regs are advised of disqualification and the need to disclose? And how are you going to ensure that applicants for roles that do not fall into the Regs are NOT asked to disclose?
2. When re-deploying existing staff from one part of the organisation - where the Regs did not apply - to another, where they will (for example, moving the Year 5 teacher to Reception class next year) how are you going to ensure that the person is advised of the Regs and their need to disclose?
3. If you haven't done so already, make it a contractual duty for all staff that they must inform you of *any* cautions, convictions or orders made against them during their employment with you
4. For individuals in relevant childcare posts (regardless of whether they are paid or unpaid) you should remind them annually of their duty to disclose anything that would disqualify them from that role
5. The DfE guidance states that employers should have clear expectations that ALL staff (not just those in childcare) will notify the employer of any relationship / association (in the real world or online) that may affect the safeguarding of children in the organisation – you may choose to include this in your staff code of conduct and / or safer recruitment policy but should also include a statement in your Child Protection policy to this effect

Lastly:

1. If you answered 'no' to the first three questions above, then the Regs do not apply to your organisation
2. If you have answered 'yes' to any of the first group of questions, then the Regs will also apply to your Head Teacher and possibly other members of SLT such as the EYFS coordinator. In the case of question 1 or 3, it will also apply to whoever is registered with Ofsted as the responsible person for that provision (which could be the Head but is often also the room manager or EY manager or similar)
3. It does not apply to school governors but may apply to some trustees in certain circumstances
4. If another organisation runs early years provision or wrap-around care for under 8s on your site, then you must seek assurance from them that they are taking the correct steps to ensure they are not employing disqualified persons

Example: A year 2 teacher is asked to move to Reception class in the new school year. She discloses that she has an old conviction which is included in the list – this was known to the school when she was first appointed. Under the new Regs (2018) she is disqualified from childcare and cannot take up the post as Reception teacher until she applies for and receives a waiver from Ofsted. Her role in year 2 is unaffected as the Childcare Regs do not apply to over 5s during the normal school day.

NB the DfE has confirmed that the Regs apply to care staff in boarding schools / residential special schools if any boarding pupil is under the age of 8. However, children’s homes are exempt as they have a similar duty under the *Disqualification from Caring for Children Regulations* 2002.

You do not have to issue questionnaires for staff to complete – the duty is purely to inform staff of their duty to notify you if any of the criteria apply

If you do use a questionnaire, ensure that the questions are correctly worded and you are not asking for additional information to which you have no right

A person is disqualified immediately the information is known – they must be removed from relevant childcare without delay

*Children’s homes*

*Residential care staff*

*Health professionals (school nurse, speech & language therapist*

*Contractors that are not providing childcare*

*Casual after-school clubs (that are not registered with Ofsted)*

*School governors & proprietors*

What schools must not do:

* Apply it to all staff just in case
* Do nothing
* Ask intrusive questions about or require staff to ask intrusive questions of people in their household
* Breach the Data Protection Act 2018, Rehabilitation of Offenders Act 1974 (amended 2013) or guidance from the Information Commissioner
* Suspend or redeploy someone to whom the Regs do not apply

Disqualification criteria

Being on the DBS Children’s Barred list

Convicted/cautioned/reprimanded for certain serious offences (listed in the guidance)

Certain orders relating to the care of own children (listed in the guidance)

Convicted overseas for an offence that would have resulted in disqualification if it had occurred in the UK

Having had childcare registration cancelled or refused in the past\*

What schools must do:

* Include information about the Regs in recruitment materials for relevant posts
* Identify which staff the Regs apply to
* Inform these staff of their duty to disclose and make the list of relevant offences / orders available to them
* Inform them that they have a duty to tell you if they believe any of the disqualification criteria apply to them
* Record the date on which each staff member is informed of the Regs and their duty to disclose anything relevant
* Go through the process annually with relevant staff / volunteers

The Childcare Regs do not apply to:

Children’s homes (but do apply to boarding schools / residential special schools)

Health professionals (school nurse, speech & language therapist)

Contractors that are not providing childcare

Casual / hobby after-school clubs (that are not registered with Ofsted)

School governors & proprietors

\*Those whose childcare registration was cancelled due to unpaid fees