

APPRENTICESHIPS, SKILLS, CHILDREN AND LEARNING ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Apprenticeships, Study and Training

Chapter 2: Study and Training

Section 40: Employer support for employee study and training

75. This section inserts a new Part 6A (sections 63D to 63K) and two new sections (47F and 104E) into the Employment Rights Act 1996.
76. New section 63D introduces a right for qualifying employees to make a statutory application to their employer in relation to study or training – essentially a request to their employer to allow them to undertake study or training, whether in the form of “on the job” training provided by the employer, or separately. The application is called a “section 63D application” in the legislation, but is likely to be known as a “time to train” application or request in practice. Later provisions provide that the request has to be considered by the employer and accepted unless one of the reasons for refusal allowed by the legislation applies.
77. Under section 63D the request must meet certain conditions in order to qualify for the scheme. For example, it must be for study or training that is intended to improve an employee’s effectiveness at work and the performance of the employer’s business.
78. The type of training which may be requested is further defined in new section 63E. Subsections (1) and (2) of that section allow a request to be for training of any sort. This means that an employee may request study or training that is undertaken outside the place of work with an external training provider or in-house training provided by the employer. The study or training might also include unsupervised learning, for example e-learning. Subsection (1) also allows for more than one course of training or study to be included in one request. For example a person may have identified that they have a need for basic skills training in numeracy and, following the completion of that training, would wish to undertake a full level 2 course related to their job. An employee would be able to include both courses of training in their request.
79. Subsection (3) of section 63E provides that it is not essential that the training lead to the award of a qualification of any sort. It will therefore be possible for an employee to request to undertake any study or training that they think will make them more effective in their current or future role in the employer’s business and improve their employer’s business performance, for example training to become more effective in the use of commercial software packages.
80. Section 63D defines which employees are eligible to make a request. The Secretary of State may specify in regulations the period employees must have been employed in order to qualify. The intention is that only employees who have been continuously

employed by their current employer for 26 weeks or more will be eligible. However, the regulation making power will allow different employment durations to be set in the future after a period of operation of the policy if required.

81. Subsection (7) of section 63D lists employees who are not eligible to make a request for study or training under these provisions. The effect of this is to exclude employees whose learning needs are already catered for in other ways, for example employees who:
 - are of compulsory school age (subject to restrictions, it is possible for people of compulsory school age to undertake employment) (paragraph (a)); or
 - are young people who already have a statutory right to paid time off to undertake study or training (paragraph (d)); or
 - are 16 or 17 year olds who are already under a duty to participate in education or training as a result of Part 1 of the Education and Skills Act 2008 (paragraph (b)).
82. Agency workers are also excluded. In addition, the Secretary of State has the power to make regulations specifying other types of person to be excluded from the right. These regulations are subject to the affirmative resolution procedure. This will allow the Secretary of State flexibility to react to changes as needed and to exclude other employees from being qualifying employees if appropriate.
83. Subsection (8) of section 63D provides that an employee and employer can make other arrangements in relation to study or training if they so choose. Employees may choose to ask for training in ways other than those specified in the new Part 6A and may choose not to exercise their statutory right under this Part, for example if their employer is already undertaking annual performance reviews which result in their training needs being met.
84. To ensure the employee has considered and explained their study or training needs, how the proposed study or training would impact on the business and what the benefits to the employer are thought to be, section 63E(4) sets out precisely what an employee must include in their request. They must give details of the subject matter of the study or training, how long it would last, who would provide or supervise it and whether it would lead to a qualification, and state how they think it would make them more effective and improve the performance of the employer's business. *Subsection (5)* also includes a power for the Secretary of State to make regulations specifying the form of the application.
85. New section 63F specifies that employers must deal with requests under section 63D in line with regulations made by the Secretary of State. Subsection (1) of section 63F means that an employer has to deal with only one application from the employee in any 12 month period. However, in certain circumstances, an employer could be required to disregard an earlier application which has been submitted. These circumstances would be set out in regulations made under section 63F(3).
86. Subsection (4) of section 63F enables the Secretary of State to make regulations specifying how employers should deal with an application. The Government intends that regulations made in exercise of this power will set out the procedure for employers to follow. For example, they would include requirements concerning the holding of a meeting to discuss the application; for the employer to give the employee notice of the employer's decision on the application; about the procedure for exercising the right of appeal; for applications to be treated as withdrawn in certain circumstances; and in relation to companions which the employee may bring to meetings. The intention is to use the procedure set out in regulations made under the flexible working provisions (Part 8A of the Employment Rights Act 1996) as a model.
87. An employer may refuse a request for "time to train" only where they think that certain permissible business reasons apply. These are listed in subsection (7) of section 63F. An employer could refuse a request where they thought that the training would not improve

the employee's effectiveness in the employer's business or improve the performance of the business; or that the study or training would impose a burden of additional costs on the business; or that it would mean that the business could not service its customers properly; that work could not be re-organised among existing staff; that there would be a negative impact on the quality of the output of the business; that there would be a negative impact on the performance of the business; that there would not be enough work for the employee during the periods during which the employee proposes to work; or that the business has planned structural changes. The Secretary of State has a power to make regulations to add reasons to this list.

88. An employer could also refuse part of a request for one of the reasons above. This could mean that an employee requesting to undertake two courses may have only one approved.
89. Where an employer agrees to a request for "time to train" an employee will be required under the new section 63H to inform their employer if they do not start the course or cease to attend the course. They will also need to let them know if they change the type of training they undertake from what they have agreed with the employer. Regulations made under this section may specify how employees should inform their employer of any changes in the training.
90. New section 63I makes provision for an employee to complain to an employment tribunal in two specific circumstances:
 - where the employer has failed to comply with the duties concerning the consideration of a request (including procedural requirements); and
 - where the employer's decision to refuse a request, or part of it, was based on incorrect facts
91. A complaint to an employment tribunal must (unless the tribunal exercises its discretion to grant an extension) be made within three months of either an employer notifying an employee following an appeal of the decision to refuse a request, or (in certain kinds of cases specified by the Secretary of State) from the point where the employer is alleged to have failed to comply with a duty.
92. Subsection (4) of section 63I excludes employees from complaining to employment tribunals under section 63I in relation to the right to be accompanied at meetings, if provision about complaints in such circumstances has instead been made in regulations under section 63F.
93. New section 63J provides that an employment tribunal, where they find the applicant's complaint well-founded, must make a declaration to that effect and may require the employer to reconsider the request for "time to train". They may also make an award of compensation. The limit on the number of weeks' pay which a tribunal may award as compensation will be specified in regulations.
94. New section 63K provides that regulations made under these new provisions may make different provision for different cases.
95. New section 47F ensures that an employee has a right not to be subjected to any detriment by their employer as a result of making, or proposing to make, a request for "time to train", or submitting a complaint to an employment tribunal under section 63I, or alleging circumstances that would justify such a claim.
96. New section 104E ensures that an employee would be able to claim that they were unfairly dismissed if the reason for their dismissal was that they made, or proposed to make, a request for "time to train" or submitted a claim to an employment tribunal under section 63I, or alleged circumstances that would justify such a claim.