

## **Time off for training – the statutory right to make a request**

As of 6 April 2010, employers with 250 or more employees are under a statutory duty to consider requests ("applications") by eligible employees for time off for training or study. The right was introduced under the Apprenticeship, Skills, Children and Learning Act 2009, which amends the Employment Rights Act 1996 (ERA 1996).

The duty will extend to all other employers from April 2011. The legislation sets out a procedure (which closely mirrors the procedure for the right to request flexible working) for employers to follow where an employee makes an application, and employees will be entitled to make claims against employers in the event that those procedures are not followed.

It is important to remember that the regulations only impose a duty on the employer to consider an application for time off for training. There is no duty to agree to it. However, applications must be taken seriously to avoid disputes which could lead to other claims such as discrimination or constructive dismissal.

Where an application is agreed to, there is no obligation on the employer to pay for the training or to pay the employee for time spent undertaking the training, and this will be a matter to be decided by the employer.

### **Who is eligible?**

Eligible employees are those who have 26 weeks' continuous service when they make the application. There are certain groups not eligible for the right, such as agency workers and young employees of compulsory school age or certain 16- to 18-year-olds who already have a separate right or duty to undertake study or training.

Of course an employer and any employee may make other arrangements for study or training without following the statutory procedure – it is not obligatory. However, once an eligible employee has made a proper statutory application, the employer must be sure to comply with every stage of the statutory procedure to avoid potential claims.

### **Definition of training or study**

The study or training does not need to be of a particular type and the parameters set out in the legislation are very wide. It can be provided or supervised by the employer on its own premises (including whilst the employee is performing their job), it can be at the employee's home, or be provided or supervised by someone else in a different location, or be entirely without supervision. It can even be undertaken abroad. It does not have to lead to the award of a qualification. However, in order to fall within the statutory procedure, the application for time off for training must be made to enable the employee to undertake study or training which has the purpose of improving:

- the employee's effectiveness in the employer's business, and
- the performance of the employer's business.

In their application the employee has to set out, amongst other criteria, how the proposed study or training would achieve this purpose.

## **The request**

Employees have to set out certain information in an application for time off for training which is specified by Regulations. Employers may find it helpful to adopt standard forms or letters for employees wishing to make an application, so that all the information required by law is included. Only one application may be made per 12 months, unless there have been certain changes which are set out in the legislation.

## **The employer's response**

The company must, within 28 days of receiving the application, either write to the employee notifying them that the company agrees to the application or hold a meeting at a convenient time and place in order to discuss the application.

The employee has a right to be accompanied by a work colleague of their choice at the meeting. The companion is entitled to address the meeting and confer with the employee but not answer questions on their behalf. Regulations provide that the companion must be allowed paid time off during working hours to attend the meeting and that it may be postponed if the companion cannot attend on the date set.

The employer must notify the employee of its decision in writing within 14 days of the meeting. Whether the application is accepted or refused, the notification must include certain details specified by law. If the application is refused, amongst other things the employer will have to explain which of the specified grounds apply (see below) and why.

## **Refusal of the request**

There are specified grounds on which an application for time off for training or study may be refused, which are as follows:

- the proposed study or training would not improve the employee's effectiveness in the employer's business or the performance of the employer's business
- the burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to re-organise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes
- such other grounds as the Secretary of State may specify by regulations

When refusing an application, the employer has to set out which of the specified grounds apply, a sufficient explanation as to why those grounds apply, and details of the appeal procedure. In theory, it may be relatively easy for the employer to find a reason within these categories to refuse an application for time off for training. However, following the appeal stage, the employee can challenge the employer's refusal of their application in the Employment Tribunal on the basis that the employer's decision was based on incorrect facts. Case law suggests that an Employment Tribunal is allowed to investigate the evidence to see if the reason specified is genuine and whether there is enough evidence to support that reason – although the Tribunal is not allowed to determine whether the employer acted fairly or reasonably. Therefore whilst in theory the employee's ability to challenge a refusal is limited, employers should be careful to ensure that they are consistent and can objectively back up the reason given, especially since it could lead to other claims such as discrimination or constructive dismissal.

The employee may appeal against any decision to refuse or partly refuse an application, and there is a strict appeal procedure to be followed.

## **Accepting the request**

Where an employer accepts an application, it must notify the employee in writing setting out certain details specified in the legislation. It is up to the employer to decide whether it will pay the employee for time off to train or study, or whether it will pay for the costs of the training or study. The employer is under no obligation to do so, but if it does, this throws up contractual issues which will need to be considered in each case, for example, are there conditions attached to the payment, and would the employer want to recoup costs paid if the employee left during or shortly after the end of the training?

## **Remedies**

An employee may bring an Employment Tribunal claim that:

- the employer did not follow the specified statutory procedure
- following an appeal, an employer has not based their refusal on the specified grounds
- following an appeal, an employer has refused their application based on incorrect facts.

Where such a claim is successful, the Tribunal may order the application to be reconsidered and make an award of compensation. Compensation for this type of claim is what the Tribunal considers to be just and equitable, up to a limit of eight weeks' pay (subject to the current statutory cap on a week's pay).

An employee may also make a complaint that an employer has not allowed or threatened not to allow the employee to be accompanied by the worker of his or her choice. Compensation of up to two weeks' pay may be awarded. Similarly, employees, and workers who accompany an employee making an application, have the right not to be dismissed or subjected to a detriment on grounds of seeking to enforce their right to be accompanied or to accompany an employee under the legislation. A dismissal for this reason will be automatically unfair and there is no qualifying period of service.

Where a claim is successfully linked to a complaint of discrimination, there is no qualifying period and a Tribunal may award unlimited compensation.

## **Action points**

Employers should:

- consider adopting a time off for training policy and standard forms or letters for both employer and employee to ensure that the correct procedure is followed
- make sure managers are trained in how to deal with such requests and ensure a consistent approach is taken
- ensure contractual issues are properly dealt with in writing, for example changes to hours of work and pay, and payment by the employer for time off or the costs of the training.

(cont'd)

## Contact

For further information or advice, please contact the employment team at [employmentinfo@bllaw.co.uk](mailto:employmentinfo@bllaw.co.uk)

### SOUTHAMPTON

T: 023 8090 8090

F: 023 8090 8092

### OXFORD

T: 01865 248607

F: 01865 728445

### LONDON

T: 020 7405 2000

F: 020 7814 9421

### PORTSMOUTH

T: 023 9222 1122

F: 023 9222 1123

This publication is not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

Blake Laphorn uses the information it holds about you to contact you where necessary if (for instance) you have registered to attend a seminar that we are hosting or have requested information regarding the services that we provide. We will also use it to administer, support, improve and develop our business and to contact you for your views on our services, as well as to let you know about other products and services which we offer which may be of interest to you. We may send them by post, telephone or fax, email or SMS. If you would rather NOT receive further information by any particular format, or at all, or if your details need updating, please contact Jina Patel on 020 7814 5449 or by email at [jina.patel@bllaw.co.uk](mailto:jina.patel@bllaw.co.uk).

We will not disclose any of your personal identifiable information to any third parties without your express permission to do so, unless we believe that we should do so to comply with the law.