

# employment focus

## Time to train: an employer's guide

From 6 April 2010, employees will have the legal right to request time off from work to undertake training or study. In this article, Neal Mellor answers some frequently asked questions and explains what the new legislation means for your business.

### Does the scheme apply to all businesses?

From 6 April 2010, only businesses with 250 employees or more will have to comply with the scheme. The right will be extended to cover all employees in all businesses from April 2011.

### Who is entitled to make an application?

Only employees with at least 26 weeks' continuous employment can make the request for time off to train. The right does not apply to agency workers.

### What kind of studying or training is covered?

An employee can request time off to undertake training or study that will "help the employee to be more

productive and effective at work and that helps their employer improve productivity and business performance."

### How does an employee make the application?

The employee's request must be in writing and include the following:

- A statement that the application is an application under section 63D of the Employment Rights Act 1996
- The subject matter of the training
- When and where the training will take place
- Who will provide or supervise it
- The name of the qualification (if any) to which the training will lead
- An explanation of how it will help the business
- The date of the application
- Whether the employee has made a previous request and, if so, the date of that request

### As an employer, what should I do when I receive a request?

Within 28 days of receiving the request, you must either accept the request and inform the employee in writing of your decision or meet the employee to discuss the request. Within 14 days of that meeting you must inform the employee in writing of your final decision.

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## Welcome

It has been a long, cold winter and the dreadful weather has only added to the gloom of the economic recession.

The severe reduction in economic activity has put a strain on employers resulting in reductions in turnover, depression of profits and lack of investment.

Inevitably, that strain has impacted on the relationship between employer and employee with plant closures and redundancies, pay freezes and moratoriums on recruitment.

However, it is at times like this that the retention of key personnel, essential to the success of the business as the economic climate improves, should be an important focus for every business.

Many firms have taken the opportunity to introduce a range of imaginative and novel flexible working arrangements designed to accommodate key workers whilst reducing the burden of wages and national insurance contributions. The management of the process of consultation and the legal aspects of the changes to terms and conditions of employment are matters upon which we can help.

The employment and pensions team at Hill Dickinson continues to grow with Emma Vennesson and Doug Frame joining the London team and the addition of Kate Morley to the Liverpool contingent.

This edition of employment focus, the last during my tenure as head of employment and pensions at Hill Dickinson, will, I hope, interest and inform you on a number of significant issues bound to affect the HR community over the coming months. I hand over to Jeff Middleton with every good wish for the continued success of a wonderful team that I have been proud to lead for the past seven years.



**Michael Morrison**  
michael.morrison@hilldickinson.com

## Stop press...

We are proud to announce Hill Dickinson was awarded 'National law firm of the year' at the prestigious Legal Business Awards in February. Our thanks go to our clients for their continued support as we continue to strive to develop our business for the benefit of our clients.

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### Do I have to agree to a request?

No, but if you refuse a request it must be for one or more of the following reasons:

- The proposed training would not improve the employee's effectiveness in your business or the performance of your business
- The burden of additional costs would be too great
- There will be a detrimental effect on your ability to meet customer demand
- You would be unable to re-organise work among existing staff or recruit additional staff
- There will be a detrimental effect on quality or performance
- There will be insufficient work during the periods the employee proposes to work
- There are planned structural changes to the business

### How do I notify the employee of my decision?

If you agree to a request for training you must inform the employee in writing and include:

- The subject of the training
- When and where it will take place and the timetable for its delivery
- Who will provide or supervise it
- What qualification (if any) the training will lead to
- How the cost of the training will be met
- How the time will be taken and whether it is paid or unpaid

If you refuse a request for training you will need to inform the employee in writing and include the following:

- The reason for refusing the request
- Why this reason applies
- The appeal procedure

### Can the employee appeal my decision?

If an employee wishes to challenge your decision, he may appeal against the decision within 14 days of receiving the written refusal.

### How many requests can the employee make to take time off to train?

You only have to consider one request in any 12 month period. However, there is nothing stopping you discussing training needs with employees on an informal basis.

### Do I have to fund the training?

No, and any time off is unpaid.

### What are the consequences of getting it wrong?

An employee can make a claim to the employment tribunal that:

- you failed to comply with the procedural requirements;
- you rejected the application on a ground that is not a permitted reason for refusal; or
- you based your decision on incorrect facts.

The tribunal may make an order for reconsideration of the application and/or make an award of compensation up to a maximum of eight weeks' pay subject to the current statutory cap (£380).

You must not treat an employee detrimentally or dismiss him/her for a reason relating to his/her request for time to train.

In addition, you should note that rejecting a request for time to train could give rise to a discrimination claim if, for example, you gave permission to a woman but not a man.

**Neal Mellor**  
neal.mellor@hilldickinson.com

# Buy-in or lose out

Managers within the operations side of a business usually see their main priorities to be making sales, hitting targets, getting deliveries out on time and providing a high level of customer service. Managing absence, monitoring performance and dealing with the intricacies of a collective redundancy can get in the way when you have a business to run!

A common complaint amongst HR professionals is the difficulty of getting their operators to 'buy in' to HR best practice. In this article Michael McNally looks at some of the ways an HR function can improve the level of engagement, whilst bearing in mind the demands made on operators.

## A culture of HR best practice

HR best practice should be as much a part of a manager's role as making a sale or providing excellent customer service. It should not be seen as something that gets in the way or only considered when there is enough time. If HR best practice is not already a core value of your business it will take time to become one but getting the support of senior managers and making it an objective as part of a manager's appraisal is essential to achieving this target.

## HR policies as a manager's tool

Managers should be encouraged to use HR policies as a management tool. For example, if a manager identifies poor performance and deals with it promptly, it will often improve the employee's performance and benefit the business. However, when a manager fails to deal with poor performance and only raises concerns at the point he/she wants to dismiss, he/she could invite a claim of unfair dismissal.

## 'Blended' and practical training

Operators are busy and may have little or no understanding of employment law. Make training simple, practical and regular. Use a variety of training methods that fit in with the demands of the manager's job and make it relevant to their daily experiences. For example, e-learning is being used by more and more organisations alongside traditional methods of training as it can be completed without creating too many diversions from the operation of the business.

## If they can't understand why, show them how

It may not always be possible to make managers understand why a particular route must be followed. However, if you put in place a framework that requires and encourages them to do what they have to do, you can still get to where you want to go! Simple things like compulsory completion of a checklist when conducting a disciplinary procedure can point the manager in the right direction and provide you with an assurance that the correct procedure has been followed.

## Let them sink or swim (sometimes!)

The HR function is there to support, advise and assist. Managers should be encouraged to understand and take ownership of the policies and procedures in place. If a manager conducts a disciplinary hearing he/she will have to defend his/her actions if the matter ends up in the employment tribunal. If the manager has taken no interest in the process and has simply gone through the motions he/she could find a visit to the witness stand a very unpleasant experience.

## Advantages of buy-in

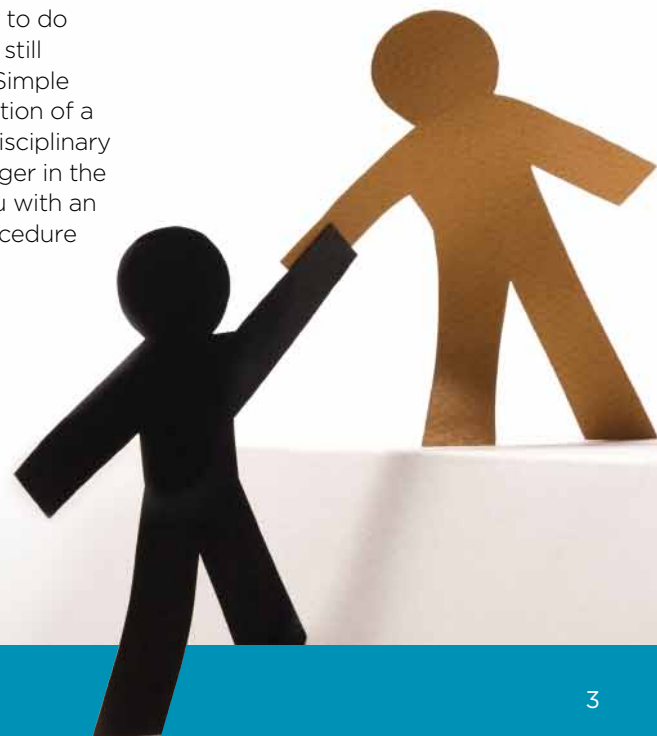
HR policies and procedures will be applied more effectively and successfully, thereby reducing the risk of disputes with employees.

If the business is involved in a legal dispute with an employee, say a tribunal claim form has been received, it will ensure the business is better equipped to defend any action.

Having an operations and HR function that works as a team will result in an improved and more successful business.

Michael McNally

michael.mcnally@hilldickinson.com



# The Equality Bill

## Discrimination old and new

John Gibson and Mark McKeating discuss the next big thing to hit the HR news headlines, the Equality Bill, and consider the possible impact this will have on employers.

**John:** From what I have read, the Equality Bill is a mixture of old and new.

**Mark:** In its current draft, this appears to be the case. The Bill brings together the existing discrimination legislation concerning sex, race, disability, sexual orientation, religion or belief and age and seeks to adopt a single approach where appropriate. There are also a number of important changes to the law. As an adjunct to the Bill, the Equality and Human Rights Commission is consulting on codes of practice on discrimination in employment, equal pay and services, public functions and associations.

**John:** What are the changes in the Bill and Codes likely to be?

**Mark:** You will recall that employment tribunals have already sought to extend protection against discrimination to those looking after disabled third parties and employees who are perceived to be of a particular sexual orientation. The Bill aims to codify these rulings.

However, the headline grabber for employers will be the duty to report on the gender pay gap.

**John:** How will this work in practice?

**Mark:** The Act will force private sector employers to publish information about differences in pay between male and female employees. This will apply to firms with 250 or more employees and is likely to come into force after April 2013. The public sector is also likely to be affected but from an earlier date.

The Bill goes even further to promote equality in pay in the workplace.

You may have come across some contracts of employment containing clauses which stop employees from discussing their pay or bonuses. The Bill will make these types of clauses unlawful and it will protect an individual from victimisation if action is taken against him for discussing his pay with colleagues.

**John:** I hear that the Bill will also introduce a duty to positively discriminate?

**Mark:** Current law does not allow an employer to take the under-representation of disabled, female or ethnic minorities into account when choosing between two equally-

qualified candidates. The Bill will change that. The framework document accompanying the Bill says that employers will be given “greater freedom to ‘fast-track’ or select recruits from under-represented groups, as long as they are equally suitable.” However, there is no absolute rule that this must be done in all cases.

**John:** Will the rules on compensation remain the same?

**Mark:** Currently, if the tribunal upholds a complaint of discrimination, it is only able to make awards of financial compensation. The Bill will empower tribunals to make recommendations that it believes will benefit the whole workforce rather than the claimant alone. For example, tribunals could order that an organisation revises its policies or provides training for its managers. With this in mind, employers should review their policies to ensure that they include basic components designed to avoid discrimination in the workplace.

**John:** The last I heard, the Equality Bill was due to come into force in October this year. Is this still happening?

**Mark:** It is due to be implemented, in stages, starting from 1 October 2010. However, as with other employment legislation forecast for later in 2010, it may be affected by the outcome of the May election. Given that 2010 marks the 40th anniversary of discrimination laws, it seems fitting to introduce the Equality Bill this year!

Mark McKeating

mark.mckeating@hilldickinson.com

John Gibson

john.gibson@hilldickinson.com

# Access for all?

Bill Chandler, from Hill Dickinson's award-winning property team, considers a recent Court of Appeal decision on wheelchair access which has potentially far-reaching and costly implications for many employers. Whilst this was a case decided in relation to a customer rather than an employee, the courts are likely to adopt a similar approach towards the duty to make adjustments under other parts of the Act, including the duty owed to disabled employees.

Do you run a business or provide a service? If so, how do you ensure that disabled customers and disabled employees enjoy the same opportunities as their able-bodied counterparts?

The Disability Discrimination Act 1995 (as subsequently amended) contains wide-ranging provisions designed to protect disabled persons from discrimination and harassment in most areas of life, including employment and, also, the provision of services.

In particular, the Act requires service providers to take reasonable steps to remove or alter physical barriers preventing entry to buildings.

It is only right that new buildings should be fully accessible. This is required by Part M of current Building Regulations but to what extent must older buildings be physically altered? Many service providers rely on alternative means of providing the service such as the service provider going to the customer

rather than vice versa. However, a recent case suggests that, in some situations, this may no longer be sufficient to satisfy the statutory duty.

The Court of Appeal has recently decided that the Royal Bank of Scotland had breached its legal duty by failing to install a lift at its main branch in Sheffield even though the lift would cost £200,000 and the bank would also lose an interview room to accommodate it. The branch in question is a nineteenth century listed building accessible only by stone steps.

Despite suggesting to a wheelchair-bound customer a combination of internet banking, telephone banking and the use of other branches, RBS became the first business to be forced, under the Act, to make physical alterations to a building to facilitate access by a disabled person. On 20 November 2009, the Court of Appeal upheld that decision and refused leave to appeal to the Supreme Court.

This decision affects you. If the courts have discovered a willingness to grant injunctions requiring physical alterations to buildings to protect customers from discrimination, they are also more likely to adopt a similar approach to claims brought by employees. Also, many employers will be service providers and need to consider whether they could be vulnerable to similar claims by their customers.

Whilst occupiers of smart new fully accessible buildings may sleep easily, any business operating out of older buildings should urgently review its arrangements for disabled customers and disabled employees in the light of this decision.

If you would like advice on any property-related matters, please contact Bill Chandler or any member of Hill Dickinson's property team.

Bill Chandler  
bill.chandler@hilldickinson.com





# Is your company struggling to manage its pension scheme?

According to the latest statistics compiled by the Pension Protection Fund (PPF), more than 7,000 of the 7,733 final salary pension schemes in existence have insufficient assets to cover their liabilities. Lisa Turner highlights some of the alternative ways companies can deal with their final salary pension scheme deficits in the current economic climate.



## Changing the promised benefits

Members of final salary schemes are protected against detrimental changes to their benefits already earned to date. However, it may be that the benefits can be changed for future employment which offers an opportunity to save costs and rationalise benefits. This could, for example, be either via a career average arrangement or, more radically, by closing the scheme to the future accrual of final salary benefits altogether and introducing a group personal pension scheme or a stakeholder arrangement.

## Cap on pension increases

This might be achieved by either freezing pensionable salary or restricting future salary increases. It involves severing the link between members' actual salaries and the salary used in the calculation of their pension benefits.

## Inducement exercises/enhanced transfer values

Inducement exercises can include offering members an incentive to forego non-statutory increases to pensions in payment or to transfer benefits out of the scheme on enhanced terms. They often require the employer to have money available to fund the inducement.

## Salary sacrifice arrangements

These involve members giving up a right to part of their salary in return for the employer paying an equivalent amount into their pension scheme. The arrangement results in a saving of national insurance contributions for both the company and the member but is subject to HMRC continuing to accept that the sacrificed amounts are not earnings for national insurance contribution purposes.

## 'Buy-ins' and 'buy-outs'

A 'buy-out' involves the removal of the scheme's liability, in whole or in part, to provide benefits thereby releasing the company from future liability.

A 'buy-in' is where the annuity purchased remains an asset of the scheme but, nevertheless, removes some elements of risk. Both 'buy-ins' and 'buy-outs' are usually undertaken as part of a liability management process.

#### Other liability mitigation exercises

There are various other ways to manage your pension scheme deficit including:

- contribution holidays and compromises above PPF funding levels; and
- emerging corporate solutions such as contingent asset guarantees (e.g. bank guarantees, legal charges and letters of credit) or negotiating with the trustees to take, for example, a lower rate of employer pension contribution.

#### Structured negotiations with the PPF and the Pensions Regulator

Many companies will find themselves in a situation whereby the business would be successful but for the sheer size of its pension scheme deficit to the point where there is no reasonable prospect of the company ever making good the deficit even if it undertook some of the liability mitigation exercises referred to above. In such situations the company may wish to seek a negotiated solution with the regulatory authorities to assume the responsibility of the pensions liabilities in return for appropriate mitigation. Ultimately this option allows businesses to continue to trade without the burden of the pension scheme. This is, however, very much a last resort.

There are a whole host of legal and regulatory issues surrounding the various alternatives referred to above but they can be achieved in the right circumstances.

If you would like to discuss any issue arising in respect of your pension scheme, contact our team of specialist pension lawyers on 0161 817 7200.

Lisa Turner  
lisa.turner@hilldickinson.com

# Developments round up...

#### Time off for trade union duties and activities – new Acas code of practice

The new Acas code of practice on time off for trade union duties and activities came into force on 1 January 2010. The new code, which replaces an earlier code on the same subject, provides further guidance on the provision of cover when union representatives take time off, payment for time off and the responsibilities of managers and union representatives in ensuring that time off arrangements are effective.

#### Unfair dismissal compensation limits from 1 February 2010

- Basic award: £11,400 (remains unchanged)
- Compensatory award: £65,300 (decreases from £66,200)
- A week's pay: £380 (remains unchanged)

#### Public Interest Disclosure Act (PIDA) claims in the Employment Tribunal

Any tribunal claim form containing an accepted PIDA claim received by the Employment Tribunal on or after 6 April 2010, can be forwarded to the 'relevant regulator' if the claimant consents to this being done. The tribunal claim form has been amended so that claimants can tick a box indicating whether their claim includes allegations of a protected disclosure and, if so, that they wish the tribunal to refer the allegations to the regulator. The idea is that the allegations would then be investigated quickly by the appropriate authority.



#### Fit notes

From 6 April 2010, regulations come into force which will replace the traditional 'sick note' (Med 3) with a new form of fitness for work medical certificate ('fit note'). Under the new system, doctors will be able to indicate whether their patient is unfit for work or may be able to work in certain circumstances (e.g. seated) or with appropriate support, if available. The regulations reduce the number of different medical statements available for doctors to issue.

#### Increase in social security benefits from 12 April 2010

- Statutory Maternity Pay (standard rate) increases from £123.06 to £124.88
- Statutory Sick Pay remains at £79.15
- Long Term Incapacity Benefit increases from £89.80 to £91.40
- Basic State Pension (Category A or B) increases from £95.25 to £97.65

Katie Tornes  
katie.tornes@hilldickinson.com

## Future developments

### Extension of paternity leave

Under new proposals, fathers will be able to take up to six months additional paternity leave in the second six months of their child's life if the mother has returned to work. If this leave is taken during the mother's maternity pay period, the leave will be paid at the same standard rate as Statutory Maternity Pay. The law will come into force in April 2010 and will apply in respect of children due to be born on or after 3 April 2011.

### The Financial Services Bill

The Financial Services Bill is expected to be enacted prior to the next general election which must take place prior to 3 June 2010. If enacted, the Bill will strengthen financial regulation, promote risk management and compliance and empower consumers by improving their rights and giving them more information. The Financial Services Authority would be able to make rules to prohibit specified types of remuneration, make contractual terms void if they breach such prohibition and provide for the clawback of payments made under void terms.

### Review of default retirement age (DRA)

The Government has commenced its review of the DRA and commissioned a survey of employers' policies, practices and preferences relating to age aimed at providing an insight into employers' attitudes towards the DRA. Any changes to the DRA will not be implemented before 2011.

### EU Agency Workers Directive

The consultation on the draft regulations to implement the EU Agency Workers Directive closed in December 2009 and the Government has announced its intention to sign the regulations in to law before the general election. The Government originally

intended that the regulations would come into force in 2010 but has reconsidered in light of the recession. It is likely that the regulations will come into force in October 2011 and, in any event, must do so no later than 5 December 2011.

### National Employment Savings Trust (NEST) (formerly known as Personal Accounts)

NEST is one of the pension schemes that employers may use to fulfil new duties under the workplace pension reforms due to come into effect in 2012. Unless an employer is already operating a qualifying workplace pension scheme, or has set one up, it will have to enrol each eligible employee into NEST which requires a minimum employer contribution. The aim of NEST is to provide access to workplace pension saving to millions of people, typically those on low to middle incomes.

### Stockton-on-Tees Borough Council -v- Aylott [2009] IRLR 533

In mid April the Court of Appeal is expected to hear the employee's appeal against the EAT's decision that the comparator test laid down by the House of Lords in the housing case of Mayor and Burgesses of the London Borough of Lewisham -v- Malcolm applies to disability-related discrimination in the employment field. Malcolm decided that the correct comparator is an able bodied person in the same situation as the disabled claimant. The employee in Aylott argues that the treatment received should be regarded as discrimination if it relates to the disability notwithstanding that an able bodied employee would be treated the same in an identical situation that did not arise from his disability.

Katie Tornes

[katie.tornes@hilldickinson.com](mailto:katie.tornes@hilldickinson.com)

For further details please contact:

Jeff Middleton  
Head of Employment and Pensions  
+44 (0)161 817 7260  
[jeff.middleton@hilldickinson.com](mailto:jeff.middleton@hilldickinson.com)

Editorial contact:

Joanne McKay  
Professional Support Lawyer  
+44 (0)151 600 8657  
[joanne.mckay@hilldickinson.com](mailto:joanne.mckay@hilldickinson.com)

Please feel free to contact any member of the employment team, details can be found on our website.

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