

EDUCATION AND SKILLS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Local education authority

Legal background

Part 1: Duty to participate in education or training: England

Chapter 3: Employers

Sections 19 and 20: Interpretation

29. *Section 19* defines the contracts of employment to which duties in this Chapter apply. These are contracts with a duration of more than eight weeks and which include more than 20 hours work per week. *Section 20* explains what counts as making appropriate arrangements. A person has made appropriate arrangements if he or she has enrolled on a course or courses constituting relevant education or training (defined in section 6), or arrangements have otherwise been made for him or her to receive relevant education or training, or if he or she is participating in full-time education or training. A person does not need to have enrolled for sufficient (that is, enough hours in the relevant period) relevant education or training in order to count as having made appropriate arrangements. For example, he or she may be waiting for a course to end before enrolling on another.

Sections 21 to 26: Commencement of employment

30. *Section 21* places a duty on employers not to employ a person unless they have taken reasonable steps to check that the person has made appropriate arrangements to participate in relevant education or training. The duty does not require the employer to check that the arrangements cover relevant training or education that is sufficient (that is enough hours in the relevant period). For example, an employer would check that a potential employee could produce a letter from a learning provider indicating that he or she had enrolled on a course. The section provides for an exception to this if the contract is made conditional on the person making arrangements to undertake appropriate education or training, in which case he or she must have done so before employment commences. This enables an employer to have a role in a young person's decision about the type of education or training to pursue.
31. If an employer does not fulfil this duty, *section 22* provides for a local education authority to serve a penalty notice on the employer and sets out the circumstances in which the notice can be given. It provides for the amount of the financial penalty to be determined by regulations, and sets out the requirements for what is included in the notice. Should the employer fail to pay the financial penalty, the local authority could pursue the debt in a county court.

32. *Section 23* provides for an employer to object to a penalty notice within two weeks of being given the notice under section 22. The local education authority must consider the employer's notice of objection and either withdraw the penalty notice, reduce the amount of the penalty (if the amount was incorrect) or confirm the penalty notice. The local education authority must then notify the employer of its decision within a prescribed time period.
33. *Section 24* enables an employer to appeal to the First-tier Tribunal against a penalty notice given under section 22. The employer could appeal on the grounds that: they did not commit the contravention stated in the penalty notice; the circumstances in which the contravention took place make the penalty notice unreasonable; or the amount stated in the penalty notice is too high. Any appeal must be made within the time limit set by the Tribunal Procedure Rules under paragraph 4 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal has the power to: allow the appeal and cancel the penalty notice; replace the penalty with a smaller amount (if the amount was incorrect); or dismiss the appeal. If an appeal has been made, but not yet determined, *section 25* provides the local education authority with the power to withdraw the penalty notice. *Section 26* sets out the sums that must be repaid to an employer if a penalty notice is withdrawn under sections 23 or 25.

Sections 27 to 36: Employer to enable participation in education or training

34. These sections place a duty on employers to permit an employee, who is subject to the duty in section 2, to participate in education or training. *Sections 27* and *28* set out how a young person can notify an employer of the arrangements for appropriate education or training that he or she has made, what form that notification should take and what information the young person must tell the employer. Where a young person notifies the employer before beginning employment, the employer may fulfil the duty by arranging the employee's working hours around the time he or she is required to attend training, by allowing the employee time off to participate, or through a combination of these two mechanisms. Hours spent training will not count towards the 20 hours of work per week a young person must be doing to be counted as being in full-time occupation. This may mean that the employee needs the employer to rearrange working hours rather than allowing time off during working hours, in order not to take the employee below the 20 hours per week required.
35. If notification is given after employment has begun, for example where arrangements have changed, under section 28 the employer must, so far as is reasonable, permit the employee to participate in education or training in accordance with appropriate arrangements. The employer may fulfil the duty by offering to vary the terms and conditions of the employment contract, or by permitting the employee to take time off to participate, as far as is reasonable. What is reasonable is determined by having regard to the needs of the young person in fulfilling the duty to participate, the circumstances of the employer's business and the effect of the person's absence from work on the running of the business.
36. *Section 29* provides that if a person reaches 18 years of age, remains in employment and has been participating in education or training in order to fulfil the main duty, the duty on the employer remains in place until the course finishes, the young person ceases to be resident in England, the person attains a level 3 qualification or the person attains the age of 19.
37. *Section 30* provides that an enforcement notice may be issued by the local education authority where the employer has not fulfilled the duty to enable participation. The Government's intention is to issue guidance to local education authorities to the effect that an employer should first be asked to fulfil the duty and given the chance to remedy the mistake voluntarily before an enforcement notice is issued. The notice sets out the steps the employer must take in order to meet the duty. Section 18 requires local education authorities to have regard to such guidance issued by the Secretary of State.

38. If the employer fails to comply with the requirements in an enforcement notice, [section 31](#) provides that a local education authority can issue a penalty notice and states what information the penalty notice must contain. Should the employer fail to pay the financial penalty, the local education authority could pursue the debt in a county court.
39. [Section 32](#) enables a local education authority to withdraw an enforcement notice (provided that, if a penalty notice has been issued, any appeal against it has not yet been determined). Where an enforcement notice is withdrawn, no penalty notice can be issued and any penalty notice already issued ceases to have effect.
40. [Section 33](#) provides for an employer to object to a penalty notice within two weeks of being given the notice under section 31. The local education authority must consider the employer's notice of objection and either withdraw the penalty notice, reduce the amount of the penalty (if the amount was incorrect) or confirm the penalty notice. The local education authority must then notify the employer of its decision within a prescribed time period. Under [section 34](#) an employer may appeal to the First-tier Tribunal against a penalty notice given under section 31. The employer could appeal on the grounds that: they did not commit the contravention stated in the penalty notice; the circumstances in which the contravention took place make the penalty notice unreasonable; or the amount stated in the penalty notice is too high. Any appeal must be made within the time limit set by the Tribunal Procedure Rules under paragraph 4 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal has the power to: allow the appeal and cancel the penalty notice; replace the penalty with a smaller amount (if the amount was incorrect); or dismiss the appeal.
41. [Section 35](#) provides that a penalty notice can be withdrawn by a local education authority, until any appeal under section 34 has been determined, regardless of whether a notice of objection has been given. If a penalty is reduced or withdrawn, [section 36](#) provides that any sums of money already paid must be repaid to the employer with interest at the appropriate rate.

Sections 37 to 39: Supplementary

42. [Sections 37, 38 and 39](#) amend existing legislation to add taking time off or seeking to take time off (or to rearrange working hours) in order to participate in education or training as a result of the duty in section 2 to the grounds on which a person has a right not to suffer detriment, to the grounds on which dismissal is to be treated as automatically unfair, and to the grounds on which selection for redundancy is to be treated as automatically unfair. In order to claim unfair dismissal a person does not need to have the usual period of one year's continuous employment. Section 39 provides that section 63A of the Employment Rights Act 1996, which establishes a right to paid time off for young people aged 16-19 if they do not already have a level 2 qualification, does not apply to people subject to the duty to participate and will continue to apply only in Wales and Scotland.