

HEALTH AND SAFETY ADVISERS' BRIEFING

This briefing examines the various means by which branches can attempt to secure adequate levels of paid time off for health and safety advisers to perform their various functions and the legal provisions which can be used to support them.

> **Rights to paid time off as a trade union lay official**

The role of the health and safety adviser is, of course, a very wide-ranging one, requiring adequate time off if the job is to be done effectively. Lack of facilities time is a common cause of complaint among NEU health and safety advisers.

The role of branch or district health and safety adviser can combine the functions of branch or district officer and workplace safety representative. Accordingly, health and safety advisers can approach the issue of time off from two main angles, both of which take account of legal provisions. There are also important codes of practice and agreements to take into consideration.

> **Sources of entitlements to paid time off for union officers and reps**

The Safety Representatives and Safety Committees Regulations 1977, also known as the 'Brown Book' are the primary source of statutory entitlements for the health and safety adviser. These Regulations specifically cover safety representatives, whether for one or more workplaces. The second legislative resource relevant to NEU local officers is the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) which covers trade union officers generally¹. The Brown Book can be downloaded online at <https://www.tuc.org.uk/sites/default/files/BrownBook2015.pdf>. ***Note that both these legislative provisions apply to all types of schools and employers, including academies, free schools, 6th Form Colleges and independent schools.***

> **Safety Representatives and Safety Committees Regulations 1977**

Many health and safety advisers will also be the safety rep in their school appointed under Regulation 3 of the Safety Representatives and Safety Committees Regulations 1977. As such they have an entitlement under Regulation 4(2) of these Regulations to take 'such time off with pay during the employee's working hours as shall be necessary for the purposes of performing their functions ... and undergoing such training in aspects of those functions as may be reasonable in all the circumstances ...'.

Time off for Inspections

The Regulations do not specify an exact entitlement. The NEU, however, puts forward the following guide to the amount of time that might be required:

¹ NEU Health and Safety Advisers who combine the roles of Division Secretary with Health and Safety Adviser, or who are not themselves safety representatives in a school, will have a particular need to be familiar with the provisions of TULR(C)A as they will not be covered by the Safety Representatives and Safety Committees Regulations 1977.

Quarterly (or termly) inspections

Small single site schools	one half day per inspection
Large single site schools	one day per inspection

Routine duties

Small single site schools	one hour per week
Large single site schools	two hours per week

Time Off for Training

Regulation 4(2)b of the Safety Representatives and Safety Committees Regulations entitles safety reps to “such time off with pay during the employee’s working hours as shall be necessary” to undergo training to enable them to carry out their functions effectively.

The Code of Practice to Regulation 4(2)(b) of the Safety Representatives and Safety Committees Regulations 1977 describes the type of training to which safety representatives are entitled.

New reps should be permitted time off with pay to attend basic training facilities approved by the TUC or their own union. Further training should be undertaken where the safety representative has special responsibilities. This would certainly be the case for safety representatives who are also NEU health and safety advisers. It is recommended that ‘at least a few weeks’ notice’ is given when a safety representative has been nominated for a training course.

Time Off For Advisers Appointed as ‘Roving’ Safety Reps

The Safety Representatives and Safety Committees Regulations 1977 provide that recognised unions may appoint safety representatives to represent employees at more than one workplace, provided that those representatives share the same employer as the employees in question². The Regulations also provide for more than one safety representative to be appointed for each workplace.

Health and Safety Advisers who are appointed as official safety rep for all schools in their area are in a strong position to negotiate much higher levels of paid time off to carry out their functions since the time off with pay ‘as shall be necessary’ will be commensurately greater, both in terms of routine duties and training.

> Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A)

Under the Trade Union and Labour Relations (Consolidation) Act 1992, trade union officials of independent and recognised unions have the statutory right to a reasonable amount of time off, with pay, from their normal work for attending to specified trade union duties. The Act defines officials as including ‘officers of associations or sections and persons elected or appointed in accordance with the rules of the union to be a representative of its members or some of them.’ The specified duties are:

- duties concerned with negotiations with the employer on matters proper for collective bargaining, or performance on behalf of employees; and

² See FAQs for information on securing time off where different employers are involved.

- training relevant to these duties which is approved by the TUC or by the Union of which the official is a member.

ACAS Code of Practice

A helpful guide to interpreting the provisions of TULR(C)A is the Code of Practice No. 3 published by the independent Advisory, Conciliation and Arbitration Service (ACAS) entitled 'Time Off for Trade Union Duties and Activities'. The most recent version of this document was published in January 2010. The Code of Practice includes the relevant statutory provisions on time off, as set out in TULR(C)A. It also includes practical guidance on the interpretation of the statutory provisions. The Code of Practice is available from the ACAS website at <http://www.acas.org.uk/index.aspx?articleid=2391>. The 2010 edition includes a number of improvements – many of which were suggested by the NEU during the consultation process on the revised Code. A brief summary of these improvements is set out in the Appendix to this briefing.

Although failure to observe any provision of the Code does not of itself render a person liable to any proceedings, the provisions may be taken into account in determining any question arising during employment tribunal proceedings relating to disputes about facilities time. For this reason the NEU would expect employers to comply with all aspects of the Code.

Types of trade union duties covered by TULR(C)A

The ACAS Code of Practice referred to above gives examples of the types of duties which are covered by the Trade Union and Labour Relations (Consolidation) Act 1992. These include negotiating or performing functions related to:

- terms and conditions of employment
- engagement of termination of employment
- allocation of work
- matters of discipline
- union membership
- facilities for trade union officials
- machinery for negotiation or consultation or other procedures.

The usual functions of NEU health and safety advisers, including attendance at meetings, undertaking case work, communicating with safety representatives and members would, therefore, be covered by the ACAS Code of Practice.

Training

As far as time off for training is concerned, ACAS notes that officials will perform their duties to a higher level if they have the right skills and knowledge. ACAS advises that time off should be permitted for:

- initial basic training;
- training for changes in the structure or topics of negotiation; and
- training for legislative changes.

The ACAS Code of Practice notes that it is not always sufficient for an employee representative to attend just one course since they may well, depending on their role, need further training in order to carry out specific responsibilities and keep up-to-date with legal aspects. This guidance is helpful to Health and Safety Advisers who may encounter problems obtaining time off every year to attend the Health and Safety Advisers' Briefing.

Giving Adequate Notice

The ACAS Code of Practice states that representatives should give ‘as much notice as possible’ of the purpose of the time off, the intended location and the timing and duration of time off required. In the case of time off relating to training, a copy of the prospectus detailing the content of the course should be provided, if requested.

Circumstances in which paid time off can be refused

Time off can be refused in the following circumstances:

1. where insufficient notice has been given;
2. where a request does not fall within the definition of time off rights; and
3. where, in the circumstances, the request is not reasonable.

> Agreement on Facilities for Union Representatives – Burgundy Book

Meanwhile, Appendix III of the **Burgundy Book** ‘Agreement on Facilities for Representatives of Recognised Teachers’ Organisations’ reflects the provisions of the ACAS Code and fleshes out how they apply to accredited representatives of the teachers’ organisations.

The Burgundy Book Agreement recognises that the teachers’ organisations and the employing local authorities enjoy a common understanding of their joint responsibility for ensuring a well-ordered system of trade union organisation and industrial relations. The Agreement states that ‘*local authorities have been advised that they should pursue policies designed to fulfil the recommendations of the ACAS Code of Practice with regard to facilities for Union representatives*’. Local authorities are expected to formalise collective bargaining arrangements at local level, in line with the Burgundy Book Agreement³. Schools outside of local authority control, such as academies and free schools are not legally compelled to accept the Burgundy Book arrangements, and further information for health and safety advisers working in such schools is detailed in the following FAQ section.

This briefing, therefore, includes guidance on the provisions of the ACAS Code of Practice, the statutory provisions to which they refer, and the Burgundy Book Agreement, so as to provide NEU local officers with a comprehensive picture of their rights in this area.

Problems securing appropriate time off

There is a number of reasons why health and safety advisers might experience difficulties in agreeing appropriate time off with their employer, or other employers in their area. These are addressed in the FAQs below. Advisers who believe they are being unfairly or unreasonably denied paid time off to perform their functions should, in the first instance, seek assistance from the appropriate NEU regional office, or, in Wales, NEU Cymru.

Ultimately, the Employment Rights Act 1996 allows an employee to present a complaint to an employment tribunal if the employer has failed to allow paid time off as specified in either the Trade Union and Labour Relations (Consolidation) Act 1992 or the Safety Representatives and Safety Committees Regulations 1977.

³ The issue of working with employers other than local authorities is dealt with in the ‘frequently asked questions’ (FAQs) section of this briefing.

The following frequently asked questions may, however, assist in providing additional information with regard to common problems.

Frequently Asked Questions

I'm having difficulties securing agreement to perform my functions as a 'roving rep'. What can be done about this?

NEU health and safety advisers may encounter obstacles when requesting time off to undertake inspections and other functions at schools other than their own, namely:

- attempts by their own school to deny time off;
- attempts by the other school to deny access to the premises; and
- arguments over who pays for supply cover.

> Dealing with Refusals to Grant Time Off

With regard to the first of these obstacles, the statutory rights of safety representatives are clear and cannot be overridden. Time off may only be refused where the absence would create some insuperable difficulty at the school at that particular time. Even then, time off would need to be permitted at the earliest subsequent opportunity. Regulation 5 (1) of the Safety Representatives and Safety Committees Regulations 1977 does specify that safety representatives should give the employer 'reasonable notice in writing' of their intention to inspect the workplace. Guidance to this Regulation states that it is desirable that the employer and safety representatives should plan a programme of formal inspections in advance.

With regard to the second obstacle, there may well be objections to 'roving' reps coming onto the premises from outside to carry out an inspection or investigate an accident. However, provided the safety representative has been formally appointed in accordance with the legal requirements, denial of access to the premises is a breach of the law.

The third possible obstacle – who pays for supply cover? – is really a matter for schools and employers. Since 2013, funding for supply cover for facilities time has been delegated directly to maintained schools' budgets; this funding also goes directly to academies. School forums must make an annual decision as to whether this funding remains at school level or is 'de-delegated' back to the local authority to manage as a central pool for facilities time cover. **The NEU strongly encourages all school forums to de-delegate this funding, as this ensures schools do not incur further costs, and prevents issues with funding arising when local officers represent members across the local authority area.**

There is no automatic entitlement for academies and academy chains to 'de-delegate' this funding to the local authority. However, many authorities do operate a 'buy-in' system whereby academies can contribute into the central facilities time 'pot'. **In such cases, the NEU strongly encourages academies to buy into such arrangements.**

Whether the funding comes from an LA central budget or from the school's own budget does not affect the legal right to time off for NEU health and safety advisers who are also properly appointed safety reps. An obvious solution, where funding does not come from the local authority, would be for an arrangement to be made whereby a school on the receiving end of an inspection from a 'roving' rep based in another school reimbursed the school where the rep was based.

Health and Safety Advisers who are unsuccessful in persuading their employer to allow reasonable levels of time off under the Safety Representatives and Safety Committees Regulations 1977 should contact their NEU Regional Office or NEU Cymru for further advice. Ultimately, a complaint may be presented to an employment tribunal under the Employment Rights Act 1996. Rights under the Safety Representatives and Safety Committees Regulations 1977 may also be enforced by reference to the Health and Safety Executive, which may issue an improvement notice requiring the employer to change its practice with regard to time off.

What about schools in which the local authority is not the employer?

The situation is slightly more complicated in schools in which the local authority is not the employer. This applies to a number of school types, including foundation schools, voluntary aided schools, academies, free schools, 6th form colleges and independent schools. In such schools the governing body or academy trust is the employer, not the LA.

Such employers, therefore, are not obliged to recognise safety representatives who are not employed at their institutions. This does not, however, prevent non-LA employers from agreeing to recognise such a safety representative and affording them the rights of inspection which would apply to safety representatives employed directly by such schools.

Similarly, where safety representatives are employed otherwise than with the local authority, LAs and head teachers will not be obliged to recognise them as safety representatives for employees in LA-maintained schools. Again, however, there is nothing to prevent LAs and head teachers from agreeing to do so as if they were employed at an LA-maintained school. An agreement to this effect between the LA and the Union will be binding upon head teachers employed by the LA under their statutory conditions of service.

It is recognised that some non-local authority employers will object to one of their employees spending time on union business relating to another employer's employees. It may be possible to overcome such objections if the local authority can be persuaded to contribute towards the costs of the local officer's time spent on NEU business within the local authority sector. Local authorities in this position could be reminded that, if they fail to do this, they will have to pay the costs associated with a replacement NEU local officer anyway, so it is in their interests to continue to fund the experienced person with whom a good relationship has already been established. However, where local authorities allow academies to 'buy into' facilities time central pots, and the academy has chosen to do so, then the funding for supply cover will come out of these central funds rather than the academies own budget.

The NEU would argue that there is indeed much to be gained by schools and employers adopting a flexible approach in this regard given the potential for employers to benefit from the health and safety expertise of NEU-trained health and safety advisers. Precise arrangements will be the subject of local negotiations, supported by NEU regional/Wales offices as appropriate.

My employer is not the local authority. How might I secure agreement with my employer along the lines of Appendix III of the Burgundy Book relating to facilities time?

(See also the above question: what about schools in which the local authority is not the employer?)

The wording of Appendix III of the Burgundy Book agreement reflects a time when local authorities were the employers of teachers in most schools. The situation is different today, especially where secondary schools are concerned. Local authorities remain the employers

of staff in community and voluntary controlled schools, amongst others. As such they have responsibility for provision of paid time off for trade union duties. Although local authorities are not the employers of staff in voluntary aided schools, generally these schools have formed part and parcel of the arrangements for community schools.

The position is somewhat different in academies, free schools, independent schools and 6th form colleges. It is, however, worth noting that where a school is replaced by an academy, the trade union recognition agreement automatically transfers, as does the existing facilities agreement. The process of transferring to a new employment structure will usually involve possible revision of the bargaining agreement in order to adapt the existing provisions to the new structural arrangements, with reference to the academy governing body as employer rather than the local authority.

Precise arrangements will be the subject of local negotiations, supported by the relevant NEU regional/Wales office as appropriate. To assist, a model recognition agreement, the 'Model Agreement for Academies in England' has been developed and is now agreed between a number of unions and endorsed by the TUC.

This can be put forward in those academies which are successor schools with teachers who have transferred from a previous school. As the recognition agreement will transfer to the new employer, it will not be necessary to argue for recognition as such, but the model agreement will allow for more appropriate machinery and rights as the Burgundy Book machinery will not easily match the new structure.

It can also be the subject of agreement in new academies where there is no transfer of recognition. In such cases, the agreed model would be proposed by the relevant unions for agreement by the academy governing body.

The agreed model provides rights for time off with pay for trade union duties both relating to co-worker employees of the Academy governing body. It also commits the academy to participation in arrangements within the local authority area with regard to time off for local and national trade union officers.

My existing facilities time allocation is under threat – what can I do?

Where facilities time is coming under attack from unsympathetic local politicians, who see it as an easy target, one possible solution is to seek to ensure that facilities time is placed on the agenda for Schools' Forums. Given that both trade unions and local authority officers are represented on these bodies, there is a greater opportunity to protect existing arrangements. Schools' Forums must also make an annual decision as to whether facilities time funding is to be de-delegated to the local authority, and it is important that trade unions put the case forward for why this should be done.

The introduction of large numbers of academies in some local authorities has led some local authorities to seek to reduce the overall budget for facilities time on the basis that there are fewer union members employed by the local authority. Where this is the case, some NEU divisions have successfully argued that authorities should negotiate with academies to persuade them to make a contribution to the facilities time budget, thus ensuring that the budget and, as a result, the overall amount of facilities time, is not reduced.

My facilities time is insufficient. How can I best argue for an increase?

It is important to note that the entitlement to paid time off to undertake union duties is not defined as a particular number of hours. ACAS expects union representatives and

employers to be reasonable in handling requests for time off. There is, however, no precise numerical definition.

It is, however, in the interests of harmonious industrial relations that sufficient time is made available.

The following strategies may help persuade employers to be more generous:

- **Appeal to the self-interest of the employer.** A good trade union lay officer can help defuse problems before they become too serious. He or she can also deal with many routine queries and requests for information which would otherwise need to be dealt with by the employer. Following sensible advice from NEU local officers can save money in the long term if it means that schools don't make expensive mistakes in the handling of personnel issues. Sound health and safety advice, when followed, not only benefits all staff and pupils, (not just NEU members) but can help prevent schools falling foul of health and safety regulations.
- **Look at membership figures.** If membership has risen, this is a strong argument in favour of increasing levels of facilities time. In terms of what is reasonable, the ACAS code does mention 'the number of workers'. It also highlights the difficulties for trade unions in ensuring effective representation in respect of part time workers and those employed at 'dispersed locations'. Schools certainly fall into such categories.
- **Check with neighbouring divisions** how your allocations compare and highlight any inferior arrangements.

Ultimately if an employer refuses to allow reasonable paid time off for trade union duties, there may be grounds for complaint to an Employment Tribunal. This is, however, very much a last resort. It is better to try to resolve disputes through discussion and conciliation, including a full-time officer from the appropriate NEU Regional Office or, in Wales, NEU Cymru.

What rights to unpaid time off apply to union members and representatives?

Alongside the right to paid time off for trade union duties, there is a corresponding right to unpaid time off for trade union activities. This applies equally to members and union representatives. The ACAS Code of Practice recognises that in order to function effectively and democratically, trade unions need the active participation of members. This reflects the wording of Section 170 of TULR(C)A 1992 which sets out that members of independent and recognised trade unions should be permitted reasonable time off during working hours to take part in 'any activities of the Union'. Attending workplace meetings, meeting full time officials and voting in union elections are included in the ACAS Code of Practice as examples of trade union activities.

There is, however, no statutory requirement that union members, or representatives, be paid for time off taken on trade union **activities**, as opposed to trade union **duties** which are described earlier.

The NEU would of course argue that division and local association officers are engaged in trade union duties, and as such benefit from the statutory entitlement to paid time off under the TULR(C)A 1992. The same goes for representatives in academies who have an enhanced role in respect of their establishment. See the question above for further advice on the position of local officers who do not work in local authority schools.

NEU school representatives should be able to argue that they are entitled to paid time off as long as they are engaged in trade union duties, as described above and not just trade union activities.

I'm being denied reasonable time off for training – what are my rights?

Section 168(2) of TULR(C)A 1992 states that employees who are representatives of an independent trade union recognised by their employer are to be permitted reasonable time off during working hours to undergo training. The training must be relevant to the carrying out of their trade union duties as described above and approved by the relevant union or by the TUC.

Section 169 of TULR(C)A 1992 states that an employer who permits time off for officials to attend training relevant to their duties at the workplace must pay them for the time off taken. The employer must pay either the amount that the officials would have earned had they worked during the time off taken or, where earnings vary with the work done, an amount calculated by reference to the average hourly earnings for the work that they are employed to do.

Regulation 4(2)b of the Safety Representatives and Safety Committees Regulations 1977 also entitles safety reps to “such time off with pay during the employee’s working hours as shall be necessary” to undergo training to enable them to carry out their functions effectively. New reps should be permitted time off with pay to attend basic training facilities approved by the TUC or their own union. Further training should be undertaken where the safety representative has special responsibilities.

There is no statutory requirement to pay for time off where training is undertaken at a time when the official would not otherwise have been at work. However there is case law which lays down that staff who work part time will be entitled to be paid if staff who work full time would be entitled to be paid. In all cases, the amount of time off must be reasonable.

The Burgundy Book Agreement states that authorities should ‘give encouragement and support to accredited union representatives wishing to attend courses’. Equally, teachers’ organisations should ‘have regard to the needs of the school in arranging their training programmes’.

As far as the issue of local officers delivering training to members is concerned, the Burgundy Book Agreement lists as one of principal matters with which accredited representatives will deal ‘functions connected with the training of teacher representatives, including attendance at training courses arranged by the recognised teacher organisations at national, regional or authority level for this purpose’.

In March 2001 the Public and Commercial Services Union (PCS) won a key victory at an Employment Tribunal over a representative’s right to time off for health and safety training. The union took a case against the then DSS when a representative was refused time off work to attend an in-depth course which she needed to complete in order to carry out her functions.

PCS provided evidence of the value of the course and challenged the management decision as being unreasonable. The tribunal concluded that time off should have been granted.

**NEU Health and Safety Unit
January 2019**

> **APPENDIX: FURTHER INFORMATION**

Summary of 2010 changes to ACAS Code of Practice No. 3 'Time Off for Trade Union Duties and Activities', available from the ACAS website at <http://www.acas.org.uk/index.aspx?articleid=2391>.

- The Code uses the term 'union representative' rather than 'union official'. A term which could be used to describe both a local officer's role and a school representative's role might assist NEU school representatives in obtaining time off for the trade union duties they undertake.
- A reference to e-learning has been introduced. However, it is referred to as 'an additional learning aid rather than a replacement to attendance at approved trade union courses'. It is clearly stated that where e-learning is available, time needs to be made available during normal working hours, rather than in a union representative's own time.
- Employers are urged to bear in mind the difficulties for trade union representatives in ensuring effective representation and communication with various groups of workers, including part time workers, those with disabilities, and those working at dispersed locations. Added to this list have been workers on leave for reasons of maternity, paternity or care responsibilities with whom it is equally important that union representatives maintain contact.
- In terms of the list of facilities that should be provided, the 2010 Code refers to e-mail, intranet and internet facilities, rather than just a telephone. Also two additional bullet points have been included relating to facilities which it is recommended be provided. These are: a space where an employee and union representative can meet to discuss confidential matters; and access to members who work at a different location
- In respect of confidential communications between union representatives and their members, the 2010 Code makes clear that employers must respect the confidential and sensitive nature of communications between union representatives and their members and should not normally carry out regular or random monitoring of union e-mails.

Facilities Time for Health and Safety Advisers: Examples

Details of facilities time arrangements for Health and Safety Advisers can be obtained from NEU Regional Offices or, in Wales, NEU Cymru.

Local Health and Safety Structures: Examples

Local health and safety structures and arrangements vary across the country. If you would like more advice about setting up a health and safety committee at LA level, please contact the Health and Safety Unit at NEU Headquarters.

More detailed information on the role of the health and safety adviser is set out in the NEU Briefing 'The Role of the Adviser: The Adviser's Job Description', also available from the Health and Safety Unit at NEU Headquarters.