

[Home](#) > [Apprenticeship funding: legal agreement to enable spending](#)



Education & Skills
Funding Agency

Contents

[State aid – clause 8](#)

[Information, audit and reporting – clause 9](#)

[Intellectual property rights – clause 10](#)

[Confidentiality – clause 11](#)

[Data protection – clause 13](#)

[Liability and indemnity - clause 15](#)

[Warranties – clause 16](#)

[Termination – clause 17](#)

[Variations and notices – clause 20 and 22](#)

[Dispute resolution – clause 23](#)

[Anti-bribery provisions](#)

We have received a number of queries from employers on the various clauses of the employer agreement and this document provides responses to commonly asked questions.

The employer agreement sets out the terms for use of the apprenticeship service by the employer and the obligations by which the employer agrees to be bound. It is a set of standard terms and conditions which have been designed to work for all different types of employers and it is not possible to amend the agreements for particular employers. Signing of the agreement is a condition of access to the service. If there is a legal basis on why an employer is not able to sign this agreement, the ESFA would welcome further information.

State aid – clause 8

State aid only applies to the following funds in the apprenticeship service:

- SME entitlement to full funding i.e. the additional 10% paid for these employers

The reports that an employer receives will identify any payments in the above categories. Due to the size of employers that pay the levy, and the limited timeframe for AGE payments to continue, we expect these payments to be small or zero for the majority of employers. The reporting we will provide is to help employers monitor the state aid they may receive through the apprenticeship service alongside any received from other sources. It is the responsibility of the employer to monitor and manage the overall level of state aid they receive.

When an employer is accessing funds under paragraph 139 of the funding rules (apprenticeship funding rules and guidance for employers) we do not consider this to be state aid: because it is government funding for education and training which is available to all employers on the same basis.

It is up to an employer to ascertain whether they are receiving any other sort of funding from the ESFA (eg under paragraph 140 of the funding rules) which could be state aid and also whether they are receiving public funding from any other body which might take them over the de minimis threshold. ESFA is not in a position to know this and cannot advise. Employers should follow their own legal advice about whether they are receiving state aid funding.

Information, audit and reporting – clause 9

The ESFA will endeavour to give employers a minimum of 7 days' notice prior to the commencement of an audit unless it has reasonable suspicion that fraud or illegal activity is occurring in which case no notice will be given. Except in the case of suspected fraud or illegal activity, the ESFA is unlikely to exercise its rights to audit under clause 9.1 of the agreement more than once a calendar year.

The ESFA will exercise its audit rights under clause 9.2 if it has reasonable grounds to believe fraud, illegal activity or another material breach of the agreement has been committed.

We would expect that employers will use reasonable endeavours to deliver any reasonably requested documents relating to the agreement for inspection and the ESFA may take copies of:

- the employment contracts between employer and the apprentices
- any agreement(s) between employer and the training provider
- any payment records between employer and the training provider
- any other documents reasonably required by ESFA in order to investigate any alleged illegal activity

Any disclosure of information to the ESFA or the ESFA's authorised representatives or auditors will be subject to the employer's reasonable confidentiality requirements, for example redaction of personal data and employer sensitive or confidential information as long as this does not prevent the ESFA from successfully conducting any audit or investigation when there is a suspicion of fraud, abuse or a material breach.

Intellectual property rights – clause 10

This clause only seeks to protect the IP belonging to the ESFA and does not grant us access to the

employers IP or any rights over them.

Confidentiality – clause 11

Clause 11 on the employer agreement covers the issue of confidentiality. Some employers have noted their confidentiality obligations should be subject to the disclosure required by law or by any relevant stock exchange. In such situations, with the exception of Freedom of Information which is already covered in clause 11, we would advise employers that if they need to disclose any further information for any valid reason, they can ask for our (ESFA) consent to do so.

Data protection – clause 13

Some employers have raised the fact that the General Data Protection Regulation (GDPR) will be coming into force in 2018 and are concerned that the data protection provisions only refer to the Data Protection Act 1998.

Whilst the employer agreement makes specific reference to legislation currently in force, it also provides for amendment, extension or re-enactment of legislation in the future, and an obligation to apply all applicable legislation. The ESFA is therefore confident that the agreement is sufficiently future-proofed for these purposes.

Our position is that the employer agreement requires both parties to comply with both current and future UK data protection regulations. We will comply with any data protection legislation which is in force in the UK at any given time, and we expect the same from employers signing the agreement.

Liability and indemnity - clause 15

Some employers have asked for their liability under the agreement to be capped. The ESFA's responsibility through the service is to direct funds for the apprenticeships to be funded so the employer agreement covers our complete liability to this effect. The employer responsibility is far wider (employing an apprentice, supporting the successful delivery of the apprenticeship, being responsible for instructing who receives funds and what they purchase etc). It would therefore not be acceptable for the ESFA to be exposed to any legal or financial risk arising from the activities of the employer. The ESFA is not doing anything which could give rise to any risk for the employer, so it is not appropriate for this provision to apply equally to both parties. As a public sector organisation, the ESFA has a responsibility to manage taxpayers' money effectively, and it would be imprudent to agree to accept any risk from the activities of the employer in this situation. The Crown must, however, apply proper and reasonable care in any enforcement of this agreement. While we have had a number of organisations raise this concern, this latter point has often been taken into account when deciding to sign the agreement.

The ESFA is making funding available for apprenticeship training, which the employer can choose to take advantage of or not, as the case may be. We do not think it would be appropriate for the ESFA to be exposed to any legal or financial risk arising from the activities of the employer as a consequence of having made that funding available to them.

Warranties – clause 16

This covers an employer's responsibility to support the apprenticeship and the apprentice; for example, to provide relevant employment in a safe environment, and with necessary resources to undertake the apprenticeship successfully including time for off the job training. It is useful to remind employers that the expertise to support delivery of the training and education required in the apprenticeship, plus any mandatory qualifications including English and maths, sits with the training provider the employer chooses.

Termination – clause 17

Both parties have the right to terminate on 30 days' notice. However, in practice, if the employer is unhappy and wants to terminate the agreement immediately, they can simply stop applying for any more funding. Some employers have suggested that clause 17.1 should be mutual. The situations set out in the first sub-clause regarding termination for breach or insolvency are only relevant to the employer and the employer's activities. Therefore, it is not mutual because it is hard to see how any of them could arise in respect of the ESFA.

Variations and notices – clause 20 and 22

Some employers have raised concerns about electronic notifications and emails being blocked or not being received. Any notifications to all users will be through the service and we will obtain verification (by digital acceptance/signature) that they have been received before enforcing any changes. In the event we are serving a notice e.g. termination, or notice of breach etc to an individual user or group of users, this would be done in writing and sent by post.

We have tried to draft the agreement with sufficient flexibility to cover any eventuality. However, we cannot exclude the possibility that we might need to vary the agreement for some reason (perhaps due to a change in the law or policy affecting apprenticeship training). In such circumstances, it would not be practicable for us to negotiate such a change individually with each and every employer. We need to have a unilateral right to vary the agreement if necessary. We are subject to a general public law obligation to act reasonably, and we would not use the variation clause in a way which was inconsistent with that obligation

Dispute resolution – clause 23

The ESFA's official complaints procedure is published and available on GOV.UK.

Some employers have highlighted part 9 of the complaints procedure which states that "The Complaints Adjudicator will not investigate certain complaints which are contractual disputes" – they have questioned whether this creates a tension between the complaints procedure and the agreement where it proposes in clause 23.1 that "Any complaint or dispute arising in relation to this agreement shall be resolved in accordance with SFA's official complaints procedure."

The employer agreement does not create a contract for services between a customer and a supplier. Neither party is paying the other for services rendered. The agreement simply sets out the terms on which an employer may access funding for apprenticeship training. Accordingly, we do not consider that any dispute regarding the employer agreement would amount to a "contractual dispute" and so the use of the complaints procedure would be appropriate.

Anti-bribery provisions

Some employers have come back to us asking that we include anti-bribery provisions into the employer agreement. Not all of our agreements contain Bribery Act provisions. We have opted not to include them here as these agreements are supposed to be fairly light touch and we will not be paying any funding directly to the employers. The majority of our standard anti-bribery clauses would not be relevant here. In any case, even if we did include Bribery Act provisions, the obligations would fall on the employer rather than the ESFA.

[Is there anything wrong with this page?](#)

Services and information

[Benefits](#)

[Births, deaths, marriages and care](#)

[Business and self-employed](#)

[Childcare and parenting](#)

[Citizenship and living in the UK](#)

[Crime, justice and the law](#)

[Disabled people](#)

[Driving and transport](#)

[Education and learning](#)

[Employing people](#)

[Environment and countryside](#)

[Housing and local services](#)

[Money and tax](#)

[Passports, travel and living abroad](#)

[Visas and immigration](#)

[Working, jobs and pensions](#)

Departments and policy

[How government works](#)

[Departments](#)

[Worldwide](#)

[Policies](#)

[Publications](#)

[Announcements](#)

[Help](#) [Cookies](#) [Contact](#) [Terms and conditions](#) [Rhestr o Wasanaethau Cymraeg](#)

Built by the [Government Digital Service](#)



All content is available under the [Open Government Licence v3.0](#), except where otherwise stated



© Crown copyright