

Trade Union Access

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Introduction

Labour's Plan to Make Work Pay set down a clear commitment to a right of union access to the workplace for recruitment and organisational purposes. This would modernise the currently restrictive approach to trade union access and bring it into line with union access rights in other countries.

What does the Act say?

- The Employment Rights Act falls short of this commitment. It does not provide a directly enforceable right of union access. Instead, it creates a framework for unions to negotiate access agreements with employers. Where the parties fail to reach an agreement, an 'access agreement' may be imposed by the Central Arbitration Committee (CAC).
- Where an access agreement is in place and the employer fails to comply with it, the Act provides that the trade union may make a complaint to the CAC, which may make a declaration that the complaint is well founded, and an order requiring the terms of the agreement to be complied with. If the CAC order is not then complied with, the union can seek a penalty to be imposed on the employer. According to the Government, the maximum penalty available to the CAC will be £75,000 for an initial breach, up to £150,000 for a second breach and up to £500,000 for additional breaches.

What are the defects?

- A right to access is not the same thing as a right to negotiate about access: the Act provides only a right to negotiate about access. Where the employer is hostile to the union, this negotiation process can be used as a tool of delay and obstruction. The complexity of the framework will support a culture of legalism and stalling litigation by employers rather than providing for effective union access.
- When deciding whether or not to impose an access agreement, the CAC is directed by the Act to consider a number of principles including that: 'access should be refused entirely only where it is reasonable in all the circumstances to do so'. However, the Act also empowers the Secretary of State to use secondary legislation to stipulate circumstances in which access must not or may not be granted. The Government has now stated its intention to use this power to limit the access procedure in significant ways:
 - (a) First, it's going to exclude applications for access in respect of employers with fewer than 21 workers. This means the exclusion of the majority of private sector employers and a sizeable proportion of private sector workers.

- (b) Secondly, it's going to provide that access agreements should not be granted by the CAC unless they have an expiry date, which is at most two years after the point when they come into force. This means that after a maximum of two years, the whole process of negotiation will have to be gone through again.

- (c) Finally, it's going to provide that the CAC may refuse access when the employer already recognises an independent trade union in respect of one or more of the relevant workers.

- The enforcement procedures are inadequate and will not have a deterrent effect, particularly where the employer is well-resourced. Critically, there is no remedy for a trade union where its rights under a negotiated agreement have been breached or where an employer fails to comply with a CAC imposed access agreement. Financial penalties are a penalty for the employer but they are not a remedy for the union. Penalties of £500,000 or less may not act as much of a deterrent in the case of larger companies.

What needs to be done?

The following changes would ensure that the right of union access is proportionate and effective:

- *As in other jurisdictions, union officials should have a **right of access** to the employer's property subject to a short period of notice, for example 24 hours, for the purposes of recruitment and organisation.*
- *Where the union has reasonable grounds to suspect that the employer is not complying with statutory duties under employment law and/or health and safety legislation, access should be granted for those purposes without notice.*
- *Remedies must be accessible and dissuasive. Penalties for employer non-compliance should be ordered directly by the EAT and paid to the union.*
- *But the primary remedy for non-compliance should be specific performance (or a statutory equivalent) of an access agreement or a CAC imposed 'default access agreement'.*
- *There should be no exclusion of employers with 21 or fewer workers.*
- *The requirement for an expiry date should be removed so that unions do not have to negotiate new access agreements every two years.*



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