

The following terms and conditions are specific to all customers working with ELS for End-Point Assessment (EPA) services.

Our customers must agree to these terms and conditions before any contract commences.

We have tried to state our terms and conditions as clearly as possible, however, if you have any queries at all about these terms and conditions, please do not hesitate to contact us.

For context, ELS provide an EPA Agreement for all new contracts, where all terms, conditions and contract details are outlined. The following terms and conditions are the same as outlined in all ELS EPA Agreements.

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1. Provision of the End-Point Assessment (EPA)

ELS as the Apprentice Assessment Organisation (AAO) shall provide EPA Services to Training Providers at the Training Provider's order through ACE360. ACE360 is a purpose built and secure digital learner management system (LMS) administered by Explosive Learning Solutions. Through ACE360, Training Providers will complete apprentice, employer, and EPA details to activate the EPA services for each apprentice.

ELS will perform any EPA services it provides to Training Providers with reasonable care and skill.

Without prejudice to its rights generally under an ELS EPA Agreement, the Employer shall have the right to enforce the benefits it is due under this clause.

2. Commencement and duration

All EPA Agreements shall commence on the date outlined in the Agreement document and will continue until the Agreement is terminated by one of the Parties giving the other at least 3 months' notice, unless the agreement is terminated, in accordance with the Termination clause.

3. Charges and Payment

In consideration of the provision of EPA Services by ELS, Training Providers shall pay the charges as set out in the Charges Sheet section of their EPA Agreement.

Payment of the charges shall be in accordance with an invoice to be issued by ELS, the terms of which (other than the obligation to pay) shall (i) be agreed by the Parties, and (ii) not be inconsistent with the other terms within the Agreement (with the other terms of the Agreement taking precedence in the case of such inconsistency).

Where the charges are set out in a Charges Sheet section of each Agreement, the payable Charges shall be those described in the Charges Sheet at the time of the issuing of an invoice by ELS unless agreed otherwise and evidenced in the invoice.

4. Rights and obligations belonging, and in relation, to Employers

An Employer for which a Training Provider has secured an EPA with, has the right to expect that ELS shall perform EPA services with reasonable care and skill. Such skill shall include ELS being and remaining registered on the Register of Apprentice Assessment Organisations, until at least the obligations upon it under an EPA Agreement are discharged and providing its services in accordance with each Agreement.

Training Providers shall not take steps to influence or hinder the choice of the Employer in selecting an AAO.

A Training Provider shall enter into arrangements with an Employer that allow for the AAO to discharge its obligations under their EPA Agreement.

5. Subcontracting

ELS acknowledges and accepts that it is responsible for the acts and omissions of any sub-contractor delivering EPA services, or any part of EPA services, pursuant to each EPA Agreement.

6. Information, audit and reporting

Each Party within the Agreement shall comply with any reasonable request from the other Party to supply information, or data to the requestor in connection with any EPA delivered to Apprentices under the Agreement which is required by the requestor in order to fulfil its obligations under the Agreement or, to fulfil any reasonable obligations it has to the ESFA.

Each Party shall keep all documents, information, data, reports, accounts and records relating to the Agreement for a minimum of 6 years after the end of the financial year in which the final payment under the Agreement is made. Each Party shall supply copies of the same to a requesting Party if copies are required by the requestor in order to fulfil its obligations under this Agreement or, to fulfil any reasonable obligations it has to its External Quality Assurance organisation, the ESFA, Ofqual or any other public authority.

Each Party shall assist and cooperate with the other in relation to any audit or investigation by the ESFA or its authorised representatives or auditors.

7. Intellectual property rights

The Parties agree that all rights, title and interest in or to any information, data, reports, documents, procedures, forecasts, technology, Know-How and any other Intellectual Property Rights whatsoever owned by either Party before entering into an EPA Agreement or developed by either party during the term of the Agreement, shall remain the property of that Party.

Each Party has a licence to utilise the intellectual property of the other in order to fulfil its obligations under the Agreement.

8. Confidentiality

Each Party shall, during the term of an EPA Agreement and thereafter, keep secret and confidential all Intellectual Property Rights or Know-How or other business, technical or commercial information disclosed to it as a result of the Agreement and shall not disclose the same to any person save to the extent necessary to perform its obligations in accordance with the terms of the Agreement or save as expressly authorised in writing by the other Party.

The obligation of confidentiality contained in this clause shall not apply or shall cease to apply to any Intellectual Property Rights, Know-How or other business, technical or commercial information which:

- (a) at the time of its disclosure by the disclosing Party is already in the public domain or which subsequently enters the public domain other than by breach of the terms of the Agreement by the receiving Party;
- (b) is already known to the receiving Party as evidenced by written records at the time of its disclosure by the disclosing Party and was not otherwise acquired by the receiving Party from the disclosing Party under any obligations of confidence;
- (c) is at any time after the date of the Agreement acquired by the receiving Party from a third Party having the right to disclose the same to the receiving Party without breach of the obligations owed by that Party to the disclosing Party;
- (d) is lawfully required to be disclosed to the External Quality Assurance organisation or any public authority; or,
- (e) is reasonably and lawfully required to be disclosed to any professional adviser, consultant, contractor or other person engaged by the ESFA in connection with the Agreement.

This clause creates an obligation of confidentiality in relation to the Employer and shall be capable of being relied upon by it.

9. Data protection

- a. Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 9 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.
- b. The parties acknowledge that for the purposes of the Data Protection Legislation, the Training Provider is the data controller and ELS is the data processor (where Data Controller and Data Processor have the meanings as defined in the Data Protection Legislation).
- c. Without prejudice to the generality of clause 9.1, ELS shall, in relation to any Personal Data processed in connection with the performance by ELS of its obligations under this agreement:
 - i. Process that Personal Data only on the written instructions of the Training Provider
 - ii. Ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Training Provider, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or

destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);

- iii. Ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and
- iv. Not transfer any Personal Data outside of the European Economic Area unless the prior written consent of the Training Provider has been obtained and the following conditions are fulfilled:
 - 1. The Training Provider or ELS has provided appropriate safeguards in relation to the transfer;
 - 2. The data subject has enforceable rights and effective legal remedies;
 - 3. ELS complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred; and
 - 4. ELS complies with reasonable instructions notified to it in advance by the Training Provider with respect to the processing of the Personal Data;
- v. Assist the Training Provider, at the Training Provider's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- vi. Notify the Training Provider without undue delay on becoming aware of a Personal Data breach;
- vii. At the written direction of the Training Provider, delete or return Personal Data and copies thereof to the Training Provider on termination of the Agreement; and
- viii. Maintain complete and accurate records and information to demonstrate its compliance with clause 9.3 and allow for audits by the Training Provider or the Training Provider's designated auditor.

10. Anti-discrimination

ELS shall not unlawfully discriminate within the meaning and scope of any law, enactment, order, or regulation relating to discrimination in providing EPA services under any EPA Agreement.

11. Limitation of liability

Each Party's liability under an EPA Agreement is limited to the amount paid to ELS under it.

12. Warranties

ELS warrants, undertakes and agrees that:

- (i) it has all necessary resources and expertise to deliver EPAs to Apprentices and to liaise with the ESFA and any other government department or agency in order to ensure that Apprentices that have been successfully assessed through an EPA are, as a result, in a position to successfully complete their Apprenticeships and receive certificates to demonstrate the same;
- (ii) it has not committed, nor shall it commit, any Prohibited Act;
- (iii) it shall at all times comply with all relevant legislation and all applicable codes of practice and other similar codes or recommendations when carrying out activities in connection with any EPA Agreement, and shall notify the ESFA (or Institute for Apprenticeships, as the case may be) immediately of any significant departure from such legislation, codes or recommendations;
- (iv) it shall comply, or cooperate with Employers and Training Providers in complying, with the requirements of the Health and Safety at Work etc. Act 1974 and any other acts, orders, regulations and codes of practice relating to health and safety, which may apply to Apprentices and any other employees or persons carrying out activities in connection with the provision of EPA services;
- (v) it has, and adheres to, adequate procedures for dealing with any conflicts of interest;
- (vi) it has and shall keep in place systems to deal with the prevention of fraud and/or administrative malfunction;
- (vii) all information that it discloses to the ESFA or any other public authority pursuant to this Agreement shall be to the best of its knowledge and belief complete, true and accurate;
- (viii) it is not subject to any contractual or other restriction imposed by its

own or any other organisation's rules or regulations or otherwise which may prevent or materially impede it from meeting its obligations under this Agreement; and,

- (ix) as of the date on which it begins to provide services under an EPA Agreement there has been no material change in its financial position or prospects since the date of its last accounts which would reasonably be expected or would or does affect the performance of its obligations under the Agreement.

13. Termination

Without affecting any other right or remedy available to it, either Party may terminate an Agreement with immediate effect by giving written notice to the other Party if:

- (i) the other Party (or a sub-contractor of it) commits a material breach of any term of the Agreement;
- (ii) the other Party (or a sub-contractor of it) commits a breach of the Agreement which is irremediable or which it fails to remedy before the deadline specified in a written request from the innocent Party requiring the breach to be remedied;
- (iii) the other Party (or a sub-contractor of it) repeatedly breaches any of the terms of the Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of the Agreement;
- (iv) the ESFA (or Institute for Apprenticeships, as the case may be) or the innocent Party becomes aware of any fraud or financial irregularity by the other Party in connection with this Agreement;
- (v) any employee or other individual carrying out activities on behalf of a Party has (a) acted dishonestly or negligently at any time in connection with the Agreement or (b) taken any actions which, in the reasonable opinion of the ESFA or the innocent Party, bring or are likely to bring the innocent Party or the Employer's name or reputation into disrepute (save where the actions of the innocent Party or the Employer have substantially or wholly caused such disrepute);
- (vi) the Training Provider commits or committed a Prohibited Act;
- (vii) the other Party fails to maintain its registration with the ESFA (either on the RoAAO, or the RoATP); or,
- (viii) there occurs, in respect of the other Party, any Insolvency Event or Change of Control which, in the reasonable opinion of the innocent Party, may affect the other Party's ability to comply with its obligations under the Agreement.

Without affecting any other right or remedy available to it, either party may terminate an Agreement for any reason by giving at least 3 months' notice in writing to the other Party, or such shorter or longer notice period as may be mutually agreed in writing between them.

Following the termination of an Agreement, the clauses dealing with the following shall remain in full force and effect: Definitions and interpretation; Information, Audit and Reporting; Intellectual Property Rights; Data Protection; Limitation of Liability; Notices; Dispute Resolution; Joint and Several Liability; Contracts (Rights of Third Parties) Act 1999; and, Governing Law.

14. Force majeure

Neither party shall be in breach of an Agreement nor liable for delay in performing, or failure to perform, any of its obligations under an Agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances, the affected party shall be entitled to a reasonable extension of the time allowed for performing such obligations.

15. Assignment

Neither Party may, without the prior written consent of the other Party, assign, transfer, or in any other way make over to any third party the benefit and/or the burden of an Agreement.

16. Variation

Subject to explicit provision in each EPA Agreement, no variation of an Agreement shall be effective unless it is in writing and signed by the Parties.

17. Severance

If any provision or part-provision of an Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part provision under this clause shall not affect the validity and enforceability of the rest of an Agreement.

If one Party gives notice to the other of the possibility that any provision or part-provision of an Agreement is invalid, illegal or unenforceable, the Parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

18. Waiver

No failure or delay by either party to exercise any right or remedy under an Agreement shall be construed as a waiver of any other right or remedy.

19. Notices

All notices and other communications in relation to each Agreement shall be in writing and shall be deemed to have been duly given if personally delivered, e-mailed, or mailed (first class postage prepaid) to the address of the relevant Party, as referred to above or otherwise notified in writing. If personally delivered or if e-mailed, all such communications shall be deemed to have been given when received (except that if received on a non-working day or after 5.00 pm on any working day they shall be deemed received on the next working day) and if mailed, all such communications shall be deemed to have been given and received on the second working day following such mailing.

20. Dispute resolution

Any dispute arising in relation to an Agreement shall be resolved in the following manner and the Parties shall endeavour to resolve the dispute in good faith. Should that endeavour not result in a resolution, then either Party may propose a mediation process to resolve the dispute. The other Party shall be free to reject such proposal. Should such a proposal be rejected, not made or fail to resolve the dispute, the Dispute shall be finally resolved by the courts of England and Wales.

21. No partnership or agency

An EPA Agreement shall not create any partnership or joint venture between the Parties, nor any relationship of principal and agent, nor authorise any Party to make or enter into any commitments for or on behalf of the other Party.

22. Joint and several liability

Where either Party is not a company nor an incorporated entity with a distinct legal personality of its own, the individuals who enter into and sign an Agreement on behalf of that Party shall be jointly and severally liable for its obligations and liabilities arising under the Agreement.

23. Contracts (Rights of Third Parties) Act 1999

An EPA Agreement does not and is not intended to confer any contractual benefit on any person pursuant to the terms of the Contracts (Rights of Third Parties) Act 1999.

24. Entire Agreement

An EPA Agreement (including any Order Form issued pursuant to it) constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter save that variations to the Agreement may be agreed between the Parties and must be evidenced in writing.

25. Governing law

Any EPA Agreement shall be governed by and construed, in accordance with the law of England and Wales and the parties irrevocably submit to the exclusive jurisdiction of the English and Welsh courts.