

Flexible working – the statutory right to make a request

Employers are under a statutory duty to consider applications by certain employees for flexible working. The scope of eligible employees was extended in April 2009. The legislation sets out a procedure for employers to follow in the event of an application by an employee, and employees will be entitled to make claims against employers in the event that those procedures are not followed.

It is important to remember that the regulations only impose a duty on the employer to consider a request for flexible working. There is no duty to agree to the request. However, there may be other claims an employee can make if a request is refused.

Is the employee eligible?

On 6 April 2009, the right to request flexible working was extended to cover parents/carers of children under 17 where previously the right had only applied to carers of adults or parents/carers of children under 6 (unless the child was disabled).

From 6 April 2009, in order to make an application, the employee must:

- have at least 26 weeks' continuous employment with the company at the date that the application is made and also:
- in the case of an employee caring for a child under 17, or a disabled child under 18:
 - have or expect to have responsibility for the upbringing of a child and also be either:
 - the mother, father, adopter, guardian, foster parent or private foster carer of the child, or a person who has a residence order in respect of the child, or
 - married to or the partner (including same sex partners) of the child's mother, father, adopter, guardian, foster parent or private foster carer of the child, or a person who has a residence order in respect of the child
- in the case of an employee caring for an adult:
 - be or expect to be caring for a person in need of care aged 18 or over who is either
 - married to or the partner or civil partner of the employee
 - a relative of the employee, or
 - living at the same address as the employee

The definitions of most of these terms, including 'adopter', 'partner', 'residence order' and 'relative' are set out in the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (as amended).

The purpose of the application must be to allow the employee time to care for the child or adult in question.

The application

There is no automatic right to work flexibly. The employee must submit a written application in the prescribed form including certain specified details, such as the change they propose and how it might affect the employer. Employers may find it helpful to adopt standard forms or letters for employees wishing to make an application, so that all the information required by law is included.

Employees may apply to change their hours of work, times of work or place of work (between their home and the employer's place of business). If the application is to care for a child, it must be made before the day on which the child reaches the age of 17, or 18 in the case of a disabled child.

Only one application can be made a year and if the application is successful, any change to the employee's contract of employment will be permanent, unless agreed otherwise.

The employer's response

The company must, within 28 days of receiving the application, either write to the employee notifying them that the company agrees to the application or hold a meeting at a convenient time and place in order to discuss the application.

The employee has a right to be accompanied by a work colleague at the meeting. The colleague is entitled to address the meeting but not answer questions on behalf of the employee. Regulations provide for the meeting to be postponed if the employee's chosen companion cannot attend on the date set.

The employer must notify the employee of its decision in writing within 14 days of the meeting. Whether the request is accepted or refused, the notification must include certain details specified by law. If the application is refused, amongst other things the employer will have to explain which of the specified grounds apply (see below) and why.

Refusal of the application

There are specified grounds on which an application for flexible working may be refused, which are as follows:

- the burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to re-organise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes
- such other grounds as the Secretary of State may specify by regulations

In practice, it may be relatively easy for the employer to find a reason within these categories to refuse a request for flexible working. There is no right within the regulations for an employee to make a claim against the employer arising out of the reason for the refusal.

However, it is important to note that a refusal may give rise to a claim in the employment tribunal for other reasons, such as sex or race discrimination or constructive dismissal. It will be important to be consistent in granting or refusing requests and be able to show that there is a genuine reason for the refusal.

The appeal procedure

The employee may appeal in writing against the refusal of an application for flexible working within 14 days of receiving notice of the employer's decision. The employee must give grounds for their appeal.

Within 14 days of receiving the letter of appeal, the employer must either notify the employee that their application has been accepted or hold a meeting to discuss the grounds of appeal. The employee has the right to be accompanied at the appeal hearing as at the initial hearing. Where possible, the appeal should be heard by a more senior manager.

The employee must be notified in writing of the employer's final decision within 14 days of the appeal hearing. The notification will need to include either the agreed changes and the date on which they will take effect, or the grounds on which the appeal has been rejected and a sufficient explanation as to why those grounds apply.

Withdrawal of application

The employee can withdraw a request, or the employer can treat an application as withdrawn in certain specified circumstances relating to the employee's failure to attend the meetings or give certain information to the employer. The employer must provide the employee with written confirmation of the withdrawal, unless notice of the withdrawal was given in writing.

Remedies

The employee can bring a complaint in the employment tribunal if the employer has failed or threatened to fail to comply with the obligation to allow the employee to be accompanied at the initial or appeal hearing. Where the complaint is successful, the employee may be awarded up to two weeks' pay, subject to the current two statutory maximum on a week's pay for these purposes.

An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that he:

- made or proposed to make an application for flexible working
- exercised or sought to exercise the right to appeal against a decision regarding his or her application
- exercised or sought to exercise the right to be accompanied, or to accompany an employee making an application
- brought proceedings or alleged circumstances which would be a ground for bringing proceedings against the employer

In addition, an employee will be unfairly dismissed if the reason or the principle reason for the dismissal relates to one of the grounds listed above. There is no qualifying period for an employee to make this claim and the normal principles of unfair dismissal compensation will apply.

An employee may also bring a claim in the employment tribunal if the employer has failed to comply with certain procedural requirements. If the complaint is successful, the tribunal may award a sum of up to eight weeks' pay, subject to the current statutory maximum of a week's pay for these purposes.

An employee may also bring a complaint (once the employer has notified them of the decision to reject an appeal) on grounds that on the employer's refusal to allow flexible working was not based on a permitted business reason (see above), or was based on incorrect facts.

The employee may not bring a complaint based on any of these grounds if the application has been disposed of by agreement or withdrawn. The tribunal may award a sum of up to eight weeks' pay in respect a successful claim.

A complaint to an employment tribunal must be brought within three months of the date on which the employee receives notification of the employer's decision on the appeal or the date on which the breach of the regulations was committed.

Employer beware

The right to make a request for flexible working operates independently of existing employment law rights. If an employee's request for flexible working is turned down, the employee may still bring claims for constructive unfair dismissal and/or sex, race, disability or other discrimination, including so-called "discrimination by association" where the discrimination relates not to a characteristic of the employee but to a characteristic of the adult or child to be cared for (eg discrimination on grounds of the disability of an employee's child). For discrimination claims, there is no qualifying period and the tribunal can award unlimited compensation.

Employers should consider adopting a flexible working policy and standard forms for both the employee and employer to complete to ensure that the correct procedure is followed.

Contacts

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