
Advisory Bulletin *employersorganisation*

Employment Relations

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THE RIGHT TO REQUEST FLEXIBLE WORKING

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INTRODUCTION

1. From 6 April 2003, Part 8A of the Employment Rights Act 1996 gives parents the right to request a variation to their contracts so that they can work more flexibly and thereby balance their childcare responsibilities with their work commitments. Changes which relate to hours, times and place of work can be requested. Employers will have a duty to consider requests seriously and will be able to refuse only where there is a clear business reason. If a change is agreed, it will be a permanent variation of contract and there will be no right for the employee to revert back to the former arrangement. The Government has issued guidance (see Further Information) as to how the right is designed to work to ensure that the rights and responsibilities of both parties are understood.

There are two sets of regulations, which add the flesh to the bones of the Act: the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI No. 3236 and the Flexible Working (Procedural Requirements) Regulations 2002 SI No. 3207.

WHO DOES IT APPLY TO?

2. The right applies to employees who meet the following criteria:
 - Have 26 weeks' continuous service at the date of application;
 - Are the mother, father, adopter, guardian or foster parent of the child or are married to, or the partner (including same sex partner) of, one of the above;
 - Are responsible for the upbringing of the child, and
 - Are applying to work flexibly in order to care for the child.

Only service with the current employer will count for continuous service purposes and not previous continuous service with other local government bodies.

The application must be made more than a fortnight before the child becomes six or, if disabled¹, eighteen.

If a request is rejected a further request cannot be made for 12 months.

Definition of partner

3. The partner of a child's mother, father, adopter, guardian or foster parent is defined as a person who lives with the child and the child's mother, father, adopter, guardian or foster parent in an enduring family relationship. The Regulations make it clear that a person who is a relative of the child's mother, father, adopter, guardian or foster parent cannot be a partner and therefore would not be eligible to make a request. The following people are classed as relatives: a parent, grandparent, sister, brother aunt or uncle. Full blood and half blood relatives of this description are also covered.

¹ Entitled to Disability Living Allowance

4. Where the child’s mother, father, adopter, guardian or foster parent was adopted, their full blood and half blood relatives will still be classed as relatives. The adoptive parents will also be treated as relatives. However, no other adoptive relationships will be treated in this way. Therefore, any other member of the adoptive family could be a partner of the child’s mother, father, adopter, guardian or foster parent and would be able to make a request if they fulfilled the other criteria. The definition of partner is illustrated in the table below.

5.

Column A	Relatives of people in Column A who cannot be ‘partners’
Child’s: Mother Father Adopter Guardian Foster Parent	Parent* Grandparent* Sister* Brother* Aunt* Uncle* Adoptive Parent *Full blood and half blood relationships

DATE OF APPLICATION

6. An application will be taken as having been made on the day that it is received.

Where an application is made by e-mail or fax, it is taken to be received on the day it was transmitted.

Where it is sent by post, it is taken as being received on the day it would have been delivered in the ordinary course of post. Guidance issued by the Court of Appeal for employment tribunals in *Consignia v Sealy* [2002 IRLR 624] provides that a letter sent by first-class post, in the ordinary course of events will be delivered on the second day after it was posted (excluding Sundays, Bank Holidays, Christmas Day and Good Friday).

The same principles apply to the giving of notices by the employee and employer throughout the process.

WHAT CAN BE REQUESTED?

7. Changes to:
- The number of hours an employee is required to work
 - The times an employee is required to work
 - Where the employee is required to work – at home or a place of business of the employer.
8. According to the DTI’s guidance (available at www.dti.gov.uk/er/flexible.htm) this will cover working patterns such as annualised hours, compressed hours, flexitime, home working, job-sharing, self-rostering, shift

working, staggered hours and term-time working. The EO has a number of resources available on these issues see www.lq-employers.gov.uk/publications/fullisting.htm for further details. The DTI also has information on these areas at www.dti.gov.uk/work-lifebalance

MAKING THE APPLICATION

9. The employee must apply in writing (which includes e-mail and fax) and
- state that it is an application under the legal right to request flexible working;
 - state whether a previous application has been made and if so when;
 - set out the change applied for, e.g. a new working pattern, and the date they wish it to become effective;
 - explain the effect that they envisage the change will have on their employer, including how it might be accommodated;
 - explain how the employee satisfies the requirements relating to the relationship with the child, and
 - be signed and dated.

Employers can use their own forms for the application, but the DTI has produced a best practice form for each stage of the process. These are available from www.dti.gov.uk/er/individual/flexforms.htm

CONSIDERING THE APPLICATION - THE PROCESS

10. The Initial Request
- If the employer agrees with the proposal it must notify the employee of the variation that has been agreed to and the date on which it will take effect within 28 days of receiving the proposal.

If the employer does not agree it must meet with the employee to discuss the request within 28 days of it being made. This provides an opportunity to discuss any problems and consider alternatives.

- The employer must inform the employee of its decision within 14 days of the meeting.

If a variation is agreed, the employer must set out the agreement and the date from which it is to take effect.

If it refuses the request the employer must give the employee a notice setting out the grounds for refusal (see paragraph 15), explaining why they apply in the circumstances, and set out the appeal procedure.

11. The Appeal

- The employee has 14 days after the date he was notified of the decision to appeal in writing setting out the grounds of appeal.
- If the employer then decides to accept the request it must notify the employee of the variation and the date it is to start within 14 days after receiving the employee's notice of appeal.

If the employer does not initially accept the request it must hold the appeal meeting within 14 days after receiving the employee's notice.

- The employer must notify the employee of its decision within 14 days after the date of the meeting. If the request is accepted the employee must be informed of the variation agreed to and the date on which it is to take effect.

If the request is refused the employer must set out the grounds for the refusal, explaining why they apply.

12. The meetings should be arranged by the employer at a time and place convenient to both the employee and employer.

All notices should be in writing (which includes fax and e-mail) and should be dated.

TIME LIMITS

13. There may be a number of reasons why the time limits specified above are too short and an extension may be required. For example, more time may be needed to explore an alternative working pattern. Time limits can be extended where the employer and employee agree. A written record of the agreement must be made which states which period the extension relates to and the date the extension is to end. This must be dated and sent to the employee. This is to prevent a dispute arising as to whether the employer has complied with the time limits required or not.
14. Time limits will be automatically extended where the person who would ordinarily consider the application is absent because of annual leave or sick leave when the application is received. The 28 day period begins when that employee returns to work or 28 days after the application is made, whichever is the sooner.

REFUSING A REQUEST

15. If the request is rejected then the employer must inform the employee in writing, setting out the grounds for refusal. The only valid grounds for rejecting a request are provided in section 80G of the Employment Rights Act 1996. These 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
16. The employer must also provide a sufficient explanation as to why the business reason applies in the circumstances. The Work and Parents Taskforce envisaged that a couple of paragraphs would be sufficient. The DTI's guidance includes a number of examples indicating what is an appropriate level of explanation.

Employers can decide how this information is given. They will not be required to use a statutory form, but the Government has provided a best practice form (see www.dti.gov.uk/er/individual/flexforms.htm).

RIGHT TO BE ACCOMPANIED

17. An employee will have the right to be accompanied at the initial meeting and at the appeal by a worker who also works for the employee's employer. This is narrower than the right to be accompanied at discipline and grievance hearings where the employee is also able to ask a full-time official employed by a union or a lay union official who has been certified as having had experience of or training in acting as a worker's companion. However, it will allow any lay union official who works for the employer to accompany the worker.
18. The companion will have the right to address the meeting and confer with the employee during the hearing, but will not be permitted to answer questions on the employee's behalf.

If an employee's chosen companion is unavailable at the time proposed for a meeting then the employer must postpone the meeting to a time proposed by the employee provided this is convenient for the employer and within seven days beginning with the day after the day initially proposed by the employer.

19. If the employer fails to comply with the right to be accompanied then an employment tribunal can award compensation of up to two weeks' pay, subject to the statutory maximum, which is currently £260 per week. The claim must be brought within 3 months.

A companion is entitled to time off during working hours for the purpose of accompanying the employee. A union official is entitled to reasonable paid time off.

Employees are protected from suffering a detriment because they exercised or sought to exercise their right to be accompanied or accompanied or sought to accompany an employee.

If an employee is dismissed for one of these reasons then it will be an automatically unfair dismissal. There is no qualifying period or upper age limit for bringing a claim.

WITHDRAWAL OF APPLICATION

20. If the employee verbally withdraws their application then the employer should write to the employee to confirm this.

Where the employee fails to meet their responsibilities the employer may also treat an application as withdrawn. This will apply when an employee fails to attend without reasonable cause a meeting more than once or unreasonably refuses to provide the employer with information the employer requires to assess whether the contract variation can be agreed to. In these circumstances, the employer should write to the employee to confirm that the application has been withdrawn.

FAILURE TO COMPLY

21. An employee can complain to an employment tribunal that an employer:
- Failed to hold the initial meeting or appeal meeting
 - Failed to provide notice of a decision in accordance with the timescale
 - Rejected the application based on incorrect facts (a claim for this reason can only be brought after the application has been rejected on appeal).

A claim cannot be made where the application has been disposed of by agreement or withdrawn.

22. Complaints must be brought within 3 months of:
- the date of the failure to follow the procedure, e.g. after the relevant time limit has elapsed, or
 - the date of the rejection of the request following the appeal

or if this is not reasonably practicable, in such further period as the tribunal considers reasonable.

The tribunal will verify whether the employer has followed all the proper procedures and will examine any disputed facts relating to why the business grounds for refusal apply. However, they cannot question the employer's business reason itself.

- Remedies**
23. Where a tribunal upholds an employee's complaint it can order the request to be reconsidered. In such cases the request is taken to have been made on the date of the order.
- Compensation can also be awarded. This will be subject to a maximum of 8 weeks' pay, capped at the statutory rate, which is currently £260 per week.
- ACAS Arbitration Scheme**
24. Alternatively, if both parties agree the dispute can be referred to the ACAS Arbitration Scheme. The remedies and compensation which an arbitrator can award are the same as those available to an employment tribunal. The agreed reference to arbitration must be made within the same timescales as a claim to a tribunal.
- PROTECTION FROM DETRIMENT AND UNFAIR DISMISSAL**
25. An employee has the right not to be subjected to any detriment for a reason connected with the right to request to work flexibly. A dismissal for such a reason will be automatically unfair.
- FURTHER INFORMATION**
26. The DTI's guidance is available from www.dti.gov.uk/er/flexible.htm
- ACAS has published an advice leaflet 'Flexible Working' available from www.acas.org.uk/publications/pdf/flexibleworkin2.pdf
- Finally, the EOC has also issued guidance on the new right see www.eoc.org.uk/EOCeng/dynpages/Working_Hours2.asp
- Stationery office publications**
27. Stationery Office publications can be obtained by telephoning 0870 6005522 or from the internet at www.hms.o.gov.uk
- Receiving the Bulletin by e-mail**
28. The Advisory Bulletin is available by e-mail to local authorities and subscribers. One copy can be sent to each organisation and the receiver should therefore be willing to forward the Bulletin on to others in the same organisation. If you wish to receive the Bulletin by e-mail but are currently not doing so, please e-mail samantha.burberry@lg-employers.gov.uk who will let you know who in your organisation receives the Bulletin or add you to the list as appropriate.
- The ERU advisers**
29. Caroline Eccles, Samantha Lawrence, Kelvin Scorer, Joan Seaton and Andy Wilson will be pleased to answer questions arising from this Bulletin. Please contact us on 020 7296 6600 or fax on 020 7296 6739. All members of the Unit can be contacted by e-mail on: eru@lg-employers.gov.uk
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