

Flexible Working

This advice note summarises the law in England and Wales relating to an employee's right to request flexible working, the procedure for doing so and the grounds on which an employer may reject such a request.

Introduction

The legislation governing the right to request flexible working does not create a right to work flexibly or part-time. It simply provides a statutory framework through which a request from an eligible employee to work flexibly must be considered.

Care of a dependant

A flexible working request must be made in order to care for:

- A child under the age of 17;
- A disabled child aged 18 and under (and in receipt of disability living allowance);
- A person aged 18 or over who is in need of care.

Who can make a request?

In order to be eligible to make a request to work flexibly a person must:

- Be an employee;
- Have been in continuous employment for 26 weeks at the date the request is made;
- Not be an agency worker or a member of the armed forces;
- Not have made another request to work flexibly under the Right to Request Legislation in the preceding 12 months.

There are additional criteria, discussed below, depending on whether the request is made to care for a child or an adult.

Caring for children

The additional criteria applicable when a request is made in order to care for a child under the age of 17 (or 18 and under if s/he has a disability) are:

- The child must be born;
- The employee must be the child's mother, father, adoptive parent, guardian or foster parent; or the spouse or partner of the child's mother, father, adopter, guardian or foster parent;
- The employee must have or expect to have responsibility for the child's upbringing; and
- The employee must be making the application in order to care for the child.

Caring for adults

The additional criteria applicable when a request is made in order to care for a person aged 18 or over who is in need of care is that the person must be:

- Married to or the civil partner or partner of the employee; or
- A relative of the employee; or
- None of the above but someone who lives at the same address as the employee.

What kind of change can be applied for?

An eligible employee may request:

- A change to the hours they work;
- A change to the times when they are required to work; or
- To work from a different location (for example, from home).

The right to request procedure

The employee must comply with the steps and time limits outlined below.

- The employee is required to submit a written application to include:
 - The proposed work pattern that they are requesting;
 - Specification of their entitlement to make the application;
 - Any effect that they anticipate the proposed work pattern would have on the employer's business and how such effects might be accommodated or addressed in practice.
- Within 28 days of receiving the request, the employer must arrange to meet with the employee in order to discuss the application. The employee is entitled to be accompanied by a worker employed by the same employer at the meeting;
- Within 14 days of the date of the meeting, the employer must write to the employee either to agree to the new work pattern and set a start date, or provide grounds (see below) for the rejection of the application and set out the appeal procedure;
- The employee can appeal the rejection of a request, but must do so within 14 days of the request being rejected;
- Within 14 days of receiving the appeal notice, the employer must arrange a further meeting in order to discuss the grounds of appeal and within a further 14 days of that meeting, the employer must deliver the appeal decision;
- The above time periods may only be extended by both the employee and employer's mutual consent, except in very limited circumstances, for example, where the personnel required to hear the application or appeal are not available and cannot be substituted.

Granting the request or reaching an agreement

The procedure may result in either an agreement of the pattern requested or a 'compromised' version of the request which has been reached through the discussion process.

If the procedure does result in a new work pattern, then:

- Both parties must be entirely clear as to the scope of the new work pattern;
- The employer should issue a new contract setting out the new agreed terms;
- The employer should produce a letter setting out the terms and expressly amending the contract accordingly with effect from a stated date; and
- The contract or the letter of variation should be signed by the employee and retained by the employer.

The new work pattern will be a contractual variation to the employee's employment and will be permanent, unless a further variation is mutually agreed.

Once the employer has agreed the new working pattern, any further change to the contractual terms (including a change back to the original working pattern) will be a contractual variation and requires the agreement of the employee.

Grounds for refusing the request

A request may only be refused on the following grounds:

- Eligibility: for example the person requesting flexible working is not an employee;
- Procedural grounds, where the employee fails to comply with the statutory procedure; or
- One or more of the eight prescribed statutory 'legitimate business reasons' set out below:
 - The burden of additional costs;
 - Detrimental effect on ability to meet customer demand;
 - Inability to reorganise 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.

The employer's notice of refusal must:

- State which of the statutory grounds applies;
- Contain 'sufficient explanation' of why the chosen ground(s) apply in relation to the application;
- Be dated.

Appeal

If the employee chooses to appeal, the appeal meeting will provide an opportunity for a further review of the employee's request and for the employee to question, in detail, why the employer's decision has been reached and whether the grounds for refusal were based on correct facts.

There are no prescribed grounds of appeal so an employee can appeal either the decision itself or the application of the reason relied upon and may raise any other relevant point at the appeal hearing.

The form of the appeal meeting is not prescribed but if possible, the appeal should be heard by someone who has not been previously involved in the process, although this is not always necessary or possible for many small businesses.

As with the initial decision, the rejection of a request on appeal must be in writing, dated and state the statutory ground relied upon.

Potential Claims

Breach of the Right to Request Procedure

An employee can pursue a claim against an employer if the procedure is not correctly followed. A claim can only however be pursued on the grounds:

- That the employer did not:
 - hold a meeting within 28 days of the request;
 - notify a decision; or
 - offer a right of appeal.
- The employer refused the request for a reason other than one of the eight prescribed reasons set out above; or
- The decision to refuse the request was based on incorrect facts.

The claim must be presented within three months of either the procedural breach or the date on which the employee is notified of the decision on appeal. Time can be extended in limited circumstances.

If the employer is found liable, it can be ordered to pay up to eight weeks' pay (subject to a statutory cap). A tribunal can also order the employer to reconsider the request.

Detriment or dismissal

Employees also have the right not to be subjected to any detriment as a result of making a request for flexible working. Additionally, a dismissal will be automatically unfair if the reason or principle reason for the dismissal is the fact that the employee made a request for flexible working.

Discrimination

The rejection of a flexible working request has the potential to amount to unlawful discrimination. Therefore, it is essential that this be considered by employers when considering and responding to any request.

If you would like further advice on this topic or specific information, please contact Nick Jones on 0117 904 5912 or njones@lyonsdavidson.co.uk

The purpose of this general advice note is to provide a general summary of information around a specific topic. It should not however be taken as legal advice and should not be relied on as such. We recommend that you always obtain specific legal advice in respect of a particular issue or matter. Please contact our employment team if you have questions about anything related to the subject matter of this note.

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