Flexible Working Factsheet

Working Families

Overview

- The law covering flexible working is contained in the Employment Rights Act 1996 (as amended) and the Flexible Working Regulations 2014 (as amended) as well as the Equality Act 2010.

- A statutory flexible working request is a request made under the Flexible Working Regulations 2014 (as amended).

- A non-statutory flexible working request is a flexible working request which is not made under the Flexible Working Regulations but discrimination laws may still apply.

- There are eligibility criteria and procedural requirements in relation to statutory flexible working requests.

- There are no eligibility criteria or procedural requirements in relation to non- statutory flexible working requests (though your employer may request that you follow certain requirements they specify - check your staff handbook).

- Failure of your employer to follow the statutory flexible working request may give rise to specific employment tribunal claims under the law on flexible working.

- In certain situations, refusal of any flexible working request (whether statutory or not) may be discrimination under the Equality Act 2010, which could give rise to further claims in the Employment Tribunal.

What is flexible working?

Flexible working means altering the way an employee works, including changing their hours (e.g. reducing the number of hours or adjusting the pattern of working hours) or changing the location from which they work (e.g. working from home or elsewhere).

Statutory request

- All employees, regardless of how long you have worked for your employer, can make a statutory flexible working request.
- An employee can make 2 statutory flexible working requests in any 12 month period.
- The law requires that an employer considers a statutory flexible working request in a reasonable way and employers should follow the Acas Code of Practice when dealing with statutory flexible working requests.
- An employer can only refuse a request on permitted grounds.
- An employer must consult with the employee before making a decision – unless the employer accepts the employee's request in full.
- An employee must be informed of the decision (including the outcome of any appeal) within two months of making the request.
- An employee must not be disadvantaged or dismissed for making a flexible working request.
- The Employment Tribunal can order an employer to reconsider a request and pay damages.
- An Employment Tribunal will consider whether an employer has followed the ACAS Code of Practice when deciding if a request for flexible working has been handled reasonably.

In order to qualify as a statutory flexible working request, an employee's request must be in writing, dated, state that it is a statutory request, and state if the employee has made a request previously and, if so, when. It must also explain the change they would like to their working pattern and when they would like the change to start.

Some employers provide this government application form to employees applying for flexible working.

After the request

An employer is obliged by law to follow procedure when they have received a statutory flexible working request from an employee. There is also an expectation that the employer follows the ACAS Code of Practice.

The employer must communicate a decision on the outcome to the applicant within two months of the request being made, including the reasons if the request is denied. If the request is denied, it can only be for one or more of the following permitted business reasons, which are set out in the legislation:

- burden of additional costs;
- inability to reorganise work amongst existing staff;
- inability to recruit additional staff;
- detrimental impact on performance;
- detrimental impact on quality;
- detrimental impact on ability to meet customer demand;
- insufficient work for the periods the employee proposes to work; or
- a planned structural change to your business.

The reason given must be factually accurate and the decision must not be discriminatory (see below). It is important for the employer to demonstrate that the request has been properly considered and, if the request is refused, the reason needs to be fully explained: it is not sufficient just to cite one or more of the above listed reasons.

Discussion & trial periods

Once an employer has received a statutory flexible working request, they must consider it and must consult with the employee unless they intend to agree to the Flexible working request in full. Employers should discuss the flexible working request with their employee as soon as possible This will usually be in a meeting but can be via a written exchange or phone call. The employee should be allowed to bring a work colleague or trade union representative to this meeting, though there is no legal right to be accompanied. The employer and employee may wish to agree a trial period so that both parties can assess whether the new arrangement is working for the employee and for the business.

Appeals

There is no legal right of appeal but it is good practice for employers to allow an appeal if they turn down a flexible working request. The time limit of two months to respond to a request includes the decision on any appeal.

What if an agreement cannot be reached?

If an agreement cannot be reached, an employee might take further action. Depending on the situation, they could:

- Raise a formal grievance;
- Reach an agreement through mediation;
- Use the ACAS arbitration scheme; or
- Take legal action by making a claim to the Employment Tribunal.

Non-Statutory requests

A non-statutory flexible working request is a request which is not made under the law on flexible working. Anyone can make a non-statutory flexible working request at any time and there is no limit on the number of requests that can be made in any 12 month period.

Although the flexible working regulations will not apply to a non-statutory request, the Equality Act may apply in certain situations particularly if the request relates to child caring responsibilities or a disability (*see discrimination section below*).

Flexible working and discrimination

Depending on the circumstances, an unjustified refusal of any flexible working request may be discrimination under the Equality Act 2010 if your handling of the request results in less favourable treatment on the basis of a 'protected characteristic' that either (i) the employee has or (ii) the employee suffers together with a person who has the relevant 'protected characteristic.'

Direct Sex Discrimination

This is when an employer treats men less well than women, or women less well than men. For example, if women's flexible working requests are routinely allowed but a man's request for similar changes in his hours is refused, this could constitute direct sex discrimination.

Indirect Sex Discrimination

It has been successfully argued in court that, because women tend to have more childcare responsibilities than men, insisting that women work long or inflexible hours can amount to indirect sex discrimination. This occurs when:

1. an employer requires something of, or imposes a working practice on male and female employees (e.g. requiring full time work), which puts women at a particular disadvantage compared to men (or vice versa);

2. an employee suffers a disadvantage as a result of not being able to meet the requirement or practice; and

3. the requirement or practice cannot be objectively justified by the employer as genuinely necessary for the business (i.e. not considered a proportionate means of achieving a legitimate aim).

4. The Equality Act 2010 was amended on 1st January 2024 adding a new section 19a to enable individuals who do not have the relevant protected characteristic but are nevertheless disadvantaged in the same way as the disadvantaged protected group to bring a claim for indirect discrimination.

   Under the new section 19A Equality Act 2010, a man with caring responsibilities could also now argue that although he does not belong to the disadvantaged protected group (in this case women), he suffers substantially the same disadvantage as the protected group as a result of his childcare responsibilities.

Associative Disability Discrimination

It is unlawful to discriminate against someone because they are associated with someone with a disability. For example, an employee who is a carer for a disabled adult or child should not be denied flexible working because they care for a person with a disability.

In addition, if an employer requires something of all employees which puts carers of disabled people at a particular disadvantage (compared to people who are not carers for a disabled person) and this cannot be justified as genuinely necessary for the business, this

could amount to indirect associative disability discrimination. This is a new and developing area of law that employers need to be aware of. For more information on discrimination, please see here.

Other forms of discrimination

Age, disability, gender reassignment, marriage, civil partnership, race, religion, belief, sexual orientation, pregnancy and maternity are also protected characteristics under the Equality Act 2010.