

FLEXIBLE WORKING - PROVISIONS OF THE EMPLOYMENT ACT 2002

This is the essential, need-to-know, guide to the new right of request to flexible working, which becomes law in only a few weeks.

From several hundred pages in the 2002 Employment Act, we have extracted the key information you need to know and the action you must take. If you follow the guidance in the sections below it will help you ensure minimum compliance with the new legislation. But bear in mind organisations that simply focus on keeping within the law will miss a trick.

The new right of request means all employers will be fielding requests for flexible working patterns. A recent government press release estimates that the new right will generate 500,000 requests in a year of which 8% could proceed to Employment Tribunals - a staggering 40,000 cases! Just think about how much employer's time that will absorb.

A well-planned policy will allow you to deal with applications in a professional and planned way and make a competitive virtue of a legal necessity.

THE NEW FLEXIBLE WORKING LEGISLATION

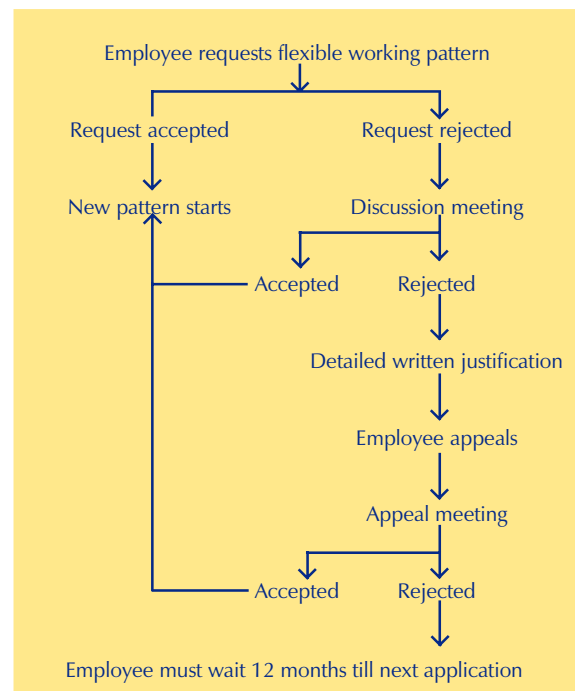
The new law on flexible working will take effect on 6th April 2003 when the Employment Act 2002 comes into force. From that date, mothers and fathers with young children will be able to apply to their employers to change their working hours or to work from home. The government estimates that around 3.7 million working parents will be able to apply to work flexibly.

ANALYSIS

The Government intends the new right of request to be "light touch legislation", so employees will have no actual right to work flexibly. But the legislation gives employers a definite nudge in the direction of accepting any requests by involving them in a potentially long and drawn-out procedure if employees are not satisfied with a rejection.

As the diagram opposite shows, allowing an employee to work flexibly means simply issuing a letter varying their contract however saying 'no' means coming up with a detailed justification of the rejection and, if the employee chooses, can tie up managers in a lengthy appeals process. And once this whole process is exhausted, the employee only has to wait 12 months until their next request. A determined individual with two children born two years apart could make six or seven requests before they no longer qualify.

FLEXIBLE WORKING PROCEDURAL FLOW CHART



There is no way to shorten the rejection process if the employee wants to go through all its stages (except by accepting the request). Any organisation that does not follow the procedures set out in the new law to the

letter risks defending themselves in front of an Employment Tribunal.

Nonetheless, any employer who is willing to take the time can probably find reasons for refusal that keep them within the law. This boils down to showing the employee has not made a good enough case and that their proposed change would involve too much extra expense for the organisation or effort by managers or colleagues.

But it is worth bearing in mind the effect on staff retention and morale of a general perception that managers are creatively finding ways not to accept flexibility requests rather than trying to see how they can support working parents.

BASIC PROCEDURE

To be sure to comply with the legislation employers will need to have their assessment processes in place by the April start date.

Items that need attention include:

- ♦ Who will be nominated to receive and assess requests?
- ♦ Who will deal with appeals?
- ♦ Who will be responsible for the paperwork (letters of explanation, varying contracts etc)
- ♦ What are the cost and efficiency implications of each type of flexible working (eg: homeworking, jobsharing) for different areas of the business?
- ♦ How will consistency of dealing with requests be ensured throughout the organisation?

Answering these questions will provide only the basic framework to deal with requests.

THE RIGHT OF REQUEST

Parents of children under the age of six (or under age 18 where the child is registered disabled) will be able to apply to change their work pattern to care for the child and to have their request taken seriously.

A parent is defined as anyone with responsibility for raising the child including guardians, adoptive and foster parents, or anyone who is the partner of one of the above and lives with the child.

Eligible employees can ask to change:

- ♦ their hours of work (eg part-time working, jobsharing, term-time working)

- ♦ their working times (eg variable hours, staggered hours, time off in lieu, annualised hours.
- ♦ their workplace (eg homeworking)

BACKGROUND TO THE ACT

Where do the provisions in the Act come from? The independent Work and Parents Taskforce was set up in 2001 to look at flexible working options for parents. Knowing that the Government was looking for a measure that would not over-burden employers the Taskforce recommended a new right for employees to ask to change their working patterns.

The concept came from the flexible working programmes introduced by employers such as Lloyds TSB in the late 1990s that also allowed employees to apply to their managers to work part time or from home, for example, to improve their work-life balance, but with no guarantee the request would be granted.

After consultation during 2002, the Government published two sets of draft Regulations: The draft Flexible Working (Eligibility, Complaints and Remedies) Regulations; and The draft Flexible Working (Procedural Requirements) Regulations 2002. The proposals outlined here are from these draft Regulations. Some small details may change when the final Regulations are published: these will be flagged-up by SwiftWork

MAKING A REQUEST

The application has to be made in writing (email and fax are acceptable) and must be dated.

It must state:

- ♦ that it is an application to change working patterns;
- ♦ the working pattern applied for and when the applicant wants to make the change;
- ♦ the effect, if any that the applicant believes the new working pattern would have on the employer and how this effect could be offset; and
- ♦ whether the applicant has made a previous request and, if so, when.

The Government says a model "best practice form" will be provided to help employees make requests along with an acknowledgement slip for employers.

THE EMPLOYER'S RESPONSE

Within 28 days of receiving the application (or of its being sent electronically), the employer must either:

accept the request and write to the employee notifying them of the variation to their contract and when the change will be effective; or

hold a meeting with the employee to discuss the request at a convenient place and time for both the employer and the employee.

If the person responsible for processing the application is away when the application is received, through sickness or annual leave, the 28-day time limit applies from the date they return.

At the meeting (and at any appeal meeting afterwards) the employee has the right to be accompanied by a colleague or trade union representative. Breaching this provision results in a compensation payment of up to two weeks' pay (currently limited to £250 per week).

Following the meeting, if the employer wishes to refuse the application, they must inform the employee within 14 days in writing, explaining the reasons for the refusal and the procedure for the employee to appeal against the decision.

REASONS FOR REFUSAL

Employers can refuse flexible working requests for any of the following reasons:

- ♦ the burden of additional costs
- ♦ detrimental effect on ability to meet customer demand
- ♦ inability to reorganise work among other staff
- ♦ inability to recruit extra staff (eg to cover the hours the individual no longer works)
- ♦ detrimental effect on quality
- ♦ detrimental effect on performance
- ♦ insufficient work during the periods the applicant has requested to work (eg applications for term-time working in an organisation with peak demand in school holidays)
- ♦ planned changes to the business

The explanation in writing of these reasons to the employee after the first meeting must be "sufficient".

That is it must have more detail than just a simple reference to one of the headings above.

RIGHT OF APPEAL

If the employee decides not to accept a refusal of their request, they have the right to appeal the decision within 14 days of receiving the refusal.

The employee must notify the employer in writing giving details of the reasons for the appeal. Within 14 days of receiving notice of the appeal the employer must either:

- ♦ accept the original request and inform the employee in writing; or
- ♦ hold another meeting to discuss the appeal with the employee.

Once a request has been refused or the appeal process is exhausted, an employee must wait for 12 months from the date of the first request before making another application.

ACCESS TO LAW

If an employee believes their employer did not follow the regulations in dealing with their request or rejected the application on the basis of false information, they can bring a complaint to an Employment Tribunal, within three months of the rejection of the request.

Normally, the complaint can be brought only when the employer's appeals procedure has been exhausted, but an earlier complaint is allowed if the employer fails to hold a first meeting, explain why a request has been refused, or provide a right of appeal.

Where a tribunal upholds the employee's complaint it can:

- ♦ order the employer to reconsider the application;
- ♦ order the employer to make a compensation payment to the applicant worth up to eight weeks' pay (where a week's pay is currently restricted to £250).

The legislation also protects any employee dismissed because they made an application, appealed against a refusal or brought a complaint because the employer did not follow the correct procedure. Employees in this position may bring complaints for unfair dismissal.

MORE INFORMATION

The relevant section of the Employment Act 2002 is available at:

<http://www.legislation.hmso.gov.uk/acts/acts2002/20020022.htm>

The draft Regulations are available at:

<http://www.dti.gov.uk/er/review.htm>

More flexible working topics can be found in the newsletter:

<http://www.flexibility.co.uk>

HOW SWIFTWORK CAN HELP

SwiftWork, as the specialists in flexible working can:

- ♦ advise on flexible working practices appropriate for your organisation
- ♦ help draft a policy framework
- ♦ provide flexible working guidelines for managers and staff
- ♦ provide training for managers in managing flexible working
- ♦ provide training in managing locations independent teams
- ♦ provide training for employees in responsible flexible working
- ♦ provide a complete, on-going, HR back-up service

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MANAGING FLEXIBILITY ONE DAY WORKSHOPS.

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