

Welcome to the second of Swiftwork's briefings on the new right to request flexible working. In this issue we look past the basic mechanics of the Regulations to provide some guidance on accepting requests without harming business efficiency plus news of potential future developments.

Highlights include:

- **How to avoid a tribunal case**
- **Making contract variations flexible**
- **Self rostering and annualised hours as work-life options**

Research by the National Centre for Social Research suggested that the ability to request to work flexibly would produce applications from 1.3 million UK workers and that one-third of them would ask to reduce their hours. Since the new right only came in on the 6th of April it is too early to say if the prediction was accurate. It seems likely that rather than a flood of applications in the first months, there will be a steady small stream of employees asking to change their work patterns.

More to come?

What is certain is that the Government will be monitoring how the right of request beds down, both in the numbers of people taking their employers to tribunals for not following the rules and through research on the number of requests accepted and rejected.

Though the Regulations give employers a lot of scope to refuse requests from eligible employees, there are already rumblings from Ministers that they will be looking to tighten the law if they feel organisations are not acting in the spirit of the new law. A spokesperson for the Chartered Institute of Personnel and Development, Mike Emmot said the government was expecting employers to "do the right thing" otherwise the existing 'light touch' legislation could become heavier.

Employment Relations Minister Alan Johnson has promised the Government will give the right of request three years to bed down before reviewing it formally. Trade and Industry Secretary Patricia Hewitt has also indicated that after this initial phase she would look at removing the age six cut-off and extending the right to parents of older children and teenagers.

More work for the tribunals

Despite all the warm words from the Trade and Industry Secretary about the aim of the right of request being to get employers and employees together to talk about flexibility and work-life balance, the Government is allowing for a fair degree of conflict arising from the new right. The government's own impact assessment estimates that 92% of the predicted 500,000 requests each year will be dealt with by employers' own procedures. But that leaves 8% where the disgruntled employees feel they have been unfairly treated and turn to the law for help. That could mean 40,000 tribunal cases a year arising from the flexible working regulations.

The only way to avoid becoming part of this statistic is to make sure that everyone handling flexibility requests in your organisation knows the procedures and timescales they have to follow by law and applies them every time.

The discrimination trap

An inconsistent approach to flexibility requests could bring you a lot more trouble than just a legal claim for breach of the *Flexible Working (Procedural Requirements) Regulations*. If an employee believes that applications are being accepted or rejected with reference to the applicants' gender, they could claim Sex Discrimination. Under the Sex Discrimination Act 1975 (SDA), less favourable treatment of a woman than a man (or vice versa) because of their sex is direct discrimination. If there is any evidence that requests from eligible employees is more or less likely to be accepted because they are male or female, the organisation is laying itself open to a claim under the SDA.

Audrey Williams, Employment Partner at lawyers Eversheds told Swiftwork that employers have to watch out for unintentional bias in favour of female applicants. "There might be a more sympathetic approach taken in one case than another because the manager took the traditional line that a child needs its mother. But that would be discrimination," she warns.

And one type of tribunal claim is not much like another. While a successful complaint under the right of request rules can produce no worse result than a £2,000 compensation award and an instruction for the employer to reconsider their refusal, in sex discrimination cases there is no limit to the compensation a tribunal can order an employer to pay.

Age

One possible wrinkle in the right of request suggested by employment lawyers since the proposals were first published seems to unlikely to materialise after all. By December 2006 the UK has to implement EU legislation on age discrimination. The new law is expected to outlaw discrimination on the basis of age using a similar formula to that used for sex discrimination. This definition would include an offence of indirect discrimination where an employer set a requirement that employees of one age could comply with more easily than those in another age group. The argument goes that since the legal right to request flexible working is restricted to carers for children under six, this discriminates in favour of younger employees (a larger proportion of whom are likely to have such caring duties than, say, the over 50s). In an effort to clear up the uncertainty Swiftwork contacted the Department of Trade and Industry to see if they were aware of the potential problem. DTI spokesperson Richard Darlington told us that appropriate safeguards will be written into the legislation "The new regulations are still being drafted," he said, "They will be taking that into account."

Taken on trial

The flexible working Regulations and guidance state that any new working pattern agreed as a result of accepting an employee's request forms a "permanent change to the employee's contractual terms and conditions". This can seem pretty daunting, tying both employer and employee into the new arrangement for as long as the employment relationship lasts, whether it works or not. What many people miss is the clause that follows in the guidance that says "unless otherwise agreed".

This caveat is useful to both the parents and carers applying to change their hours or workplace and to their employers as it allows them to build in provisions for short-term and longer-term changes to any agreed pattern.

In the short term it means any new pattern can be agreed subject to a successful trial period, so that either the worker or the organisation can opt to revert to the previous

arrangements, or try an alternative pattern, if things do not work out after six months or a year.

In the longer-term there is nothing to stop firms including – with the employee’s agreement - a provision for the working pattern to be subject to review if business needs or the employee’s circumstances change. It is even feasible to make the contract variation subject to a fixed cut-off date, say when the employee’s children reach age six and eligibility under the Employment Acts technically ends.

Pattern recognition

The flexible working Regulations provide a list of alternative work patterns that eligible employees might request instead of the nine to five. Most of these, such as compressed hours or term-time working, are easily recognisable as staples of the employer-led flexibility programmes that have become common in recent years. But a couple of the suggestions might be unfamiliar, or seem out of place in a work-life balance initiative. Below we offer a quick guide to two of the more rarefied flexibility options, with case studies showing how they can provide win-win outcomes for employers and staff.

Annualised hours

The DTI’s listing of annualised hours as a work-life option has caused a few raised eyebrows, since traditionally the pattern is used by manufacturers to cope with seasonal ups and downs in demand for their products, and has little to do with work-life balance.

But there are exceptions. Hertfordshire County Council operates an employee-led version of an annualised system on a small scale. Assistant Director of Personnel, Carol Grimwood negotiated the pattern for herself 15 years ago after the birth of her second child. “I wanted to work full-time,” she explains, “but I also wanted the option only working a three-day week in school holidays.”

The answer was a scheme that is actually a hybrid of term-time working, compressed hours and annualised hours. Carol works nine-tenths of a full-time contract – an annual total of XXXXX hours. She works full-time, sometimes extended, hours in term-time and has two days off a week in the school vacations. The pattern varies slightly from year to year but is agreed at the beginning of the year. If there are unavoidable peaks in her workload during the vacations she will come in but take the extra hours as days off in quieter periods afterwards.

Other working parents in the authority’s central personnel team have since followed her example as have a handful of staff in other directorates.

“It’s been fabulous for me,” she says, “I don’t believe I could have got the same degree of flexibility, especially at senior management level, any other way.”

Self rostering

Where adequate staffing is vital to providing an efficient service, letting employees sort out their own rotas might seem to be a recipe for disaster. But in practice, in areas where staffing and skills levels are critical, self-rostering has managed to bring reliable service delivery at the same time as allowing employees more control over their working time.

Self rostering, which is gaining ground among nursing teams in the NHS, relies on groups of employees working out their own shift rotas a week or a month at a time,

including leave arrangements, with minimal supervision beyond a managerial check that the results provide full cover.

Nurses at Leeds Infirmary Cardiac Intensive Care Unit started scheduling their own shifts eight years ago as a six-month trial.

“We were rational about it. In any clinical area the majority of staff self-foster over Christmas and New Year. So we said ‘why not do it the rest of the year?’ And no one had a good answer,” explains Sister Jackie Whittle, who brought in the system along with a new shift pattern.

Self rostering was and is managed by a system of blank roster sheets posted up on the notice board in the unit’s staff coffee room three weeks ahead of the beginning of each four-week rostering period and staff can fill in their required mix of shifts on the line against their name. Important requests are filled in in red pen (and will not be changed without consultation with the individual) and less important shift preferences in pencil. The short-term rostering is backed up by a whole-year diary to take account of longer-term annual leave requests.

Suitably qualified staff in each team take turns as coordinator, responsible for making sure the roster is fair and has the right skills mix, passes round the F grades in each team week by week.

Those new to the process will be coached through the first few times by someone with rostering experience.

Jackie says there is an element of first-come, first served about the self-rostering system, but people have learnt to be reasonable about their scheduling “There is very strong peer pressure.” she says, “If you get someone requesting five earlys every week, their peers will stop that.”

As soon as the new shift pattern was brought in, the unit’s sickness absence level dipped dramatically says Jackie, and has remained lower since. Staff retention has also improved dramatically since rostering was extended. “ICU is traditionally seen as an area with high turnover,” she says. “Now we only lose three or four a year.”

Since agency staff have always been in short supply, the unit’s staff used to work a lot of overtime to cope with gaps in staffing. These gaps have been almost removed by self rostering.

The success of the whole arrangement, she believes, is down to a willingness among staff to see the ward’ staffing as something they “own” rather than just something they can have a say in.