

Flexible Working

Introduction

The right to request flexible working for parents came into force on 6 April 2003, for carers of adults on 6 April 2007 and was extended to parents of children aged 16 or under with effect from 6 April 2009. The law is set out in the Employment Rights Act 1996, the Flexible Working (Procedural Requirements) Regulations 2002 (as amended) and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (as amended). There is a duty on employers to give serious consideration to requests from parents and carers to work flexibly. Employees can request changes to their contracts on a permanent basis in relation to hours, location and pattern of work to enable them to care for a child or an adult. There is not an automatic right to these changes.

Eligibility

To be eligible to make a request, employees need 26 weeks' service at the date the application is made.

In order for an employee to make an application for flexible working if they care for a child who is aged 16 or under, or if disabled, aged under 18 (ie in receipt of disability living allowance) (or, from April 2011, aged under 18), the employee has to be either the mother, father, partner, or spouse of the child's mother or father, adopter, guardian, special guardian as appointed under the Children Act) foster parent or private foster carer and have responsibility for the upbringing of the child. Partner is defined as civil partner or a man or woman living together as if they were husband and wife.

To be entitled to make a request for a contract variation to care for an adult (aged 18 or over) who is in need of care, the employee must be caring for or expect to care for a spouse, partner, civil partner or relative. If the person does not fall into one of these categories, the adult in need of care has to live at the same address as the carer.

Making an Application

Only one application can be made every 12 months. This is regardless of whether a previous application was made in respect of a different caring responsibility. For example, an employee who wishes to make a request to care for an adult would still have to wait a year if the previous request had been to care for a child. The employee must make the request to



the employer in writing, including details of the desired working pattern, the proposed effective date and how they satisfy the requirements relating to the eligibility as described above. They also need to incorporate what effects their request to work flexibly will have on their employer's business and in their opinion how these might be dealt with.

Procedure

Unless the employer is automatically able to agree to the change, the employer must meet the employee within 28 days of the application. The employer and employee are free to agree an extension of this period. The purpose of the meeting is to discuss the proposal and how it may be arranged, and to consider alternative working patterns, should there be problems in accommodating the desired working pattern.

The employee has the right to be accompanied at the meeting by a fellow worker. If the chosen companion is not available to attend the meeting, the employer must postpone the meeting to a convenient time for the employer, employee and companion, within seven days beginning with the first day after the day proposed by the employer.

An application is considered as withdrawn if the employee fails to attend two or more meetings or unreasonably refuses to provide the employer with information required to assess whether or not to agree to the change.

Within 14 days of the meeting, the employer needs to inform the employee in writing of its decision, as follows.

1. If the employer is agreeing to the request, the start date and contract variation must be specified.
2. If the employer is rejecting the request, the business grounds for refusing the application and the appeal procedure must be specified. An employer may only refuse the application if there is a clear business reason relating to one or more of the following:
 - 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.



Appeal

The employee has the right to appeal against the employer's decision within 14 days of receiving the decision. The appeal must be in writing setting out the grounds for appeal. The employer must hold the appeal hearing within 14 days of this notice being given, but the employer and employee can agree an extension of time. The employee has a right to be accompanied by a fellow worker at the appeal hearing. The employer must give their written decision within 14 days of the appeal hearing.

Extension of Periods

As indicated above, an employer and employee may agree in writing to an extension of any of the above periods. If the person who would ordinarily consider the application for flexible working is on sick leave or annual leave, the 28 days in which to hold the meeting will run from the date of his or her return or 28 days after the application is made, whichever is the sooner.

Employees' Remedies

Employees are protected against suffering a detriment or being dismissed for exercising the right to request flexible working, or accompanying a fellow employee in their request, and may present a complaint to an employment tribunal within three months of the detriment or dismissal.

In addition, employees can bring a claim to an employment tribunal if the employer has failed to follow the necessary procedures outlined above or if the decision to reject the application was based on incorrect facts. Employment tribunals can make an order to require the employer to reconsider the application and/or award compensation. Compensation is limited to two weeks' pay for failure to allow the employee to be accompanied at a meeting and eight weeks' pay for failure to follow the prescribed procedure. The tribunal cannot question the commercial validity of the employer's decision. These provisions are independent of existing discrimination laws.

If you would like more information on this topic or advice on any other aspect of employment please contact Jayne Evans of JME HR Services:

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