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Q&A: The new flexible working regime

Who can apply for flexible working?

With effect from 30 June 2014 **any employee** with at least 26 weeks' service has the right to make a request for flexible working **for any reason**.

What kind of changes can an eligible employee request?

They may request changes to their employment terms if the change relates to: a change in the hours they work; a change to the times when they are required to work, or, a change to the place of work (as between their home and any of the employer's workplaces), i.e. working from home; part time working, job sharing or flexitime.

How does an employee make a request for flexible working?

The request must be in writing, and include the following information:

1. The date of their application, the change to working conditions they are seeking and when they would like the change to come into effect.
2. What effect, if any, they think the requested change would have on the employer and how, in their opinion, any such effect might be dealt with.
3. A statement that this is a statutory request and whether they have made a previous application for flexible working within the last 12 months.

What should an employer do when they receive a request?

Employers must consider the request objectively, and arrange to speak with the employee as soon as possible. The employer has a **three-month** decision period to consider the request, discuss it with the employee and notify the employee of the outcome. Employers must deal with the application in a "*reasonable manner*". ACAS has published a Code of Practice "*Requests to work flexibly in a reasonable manner",* which will be taken into account by the employment tribunal. Click here for a link to the ACAS website.

On what grounds can an employer refuse a flexible working request?

Employers can only refuse a request for one (or more) of only eight reasons: 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; or planned structural changes.

The new regime does not expressly require an employer to allow the employee a right to appeal their decision if the request is refused, and the employee does not have the right to be accompanied to any meetings where the request is discussed. However, the ACAS guidance recommends that

employers consider giving employees an appeal and consider allowing them to be accompanied. The Acas guide suggests that allowing employees to be accompanied may assist employers in considering applications by certain employees, for example, where English is not their first language, where being accompanied may be a reasonable adjustment for a disabled employee or for employees who lack confidence.

When can an employee bring a claim in the Employment Tribunal?

An employee who has made an application under the statutory procedure may bring a claim on the basis that:

- The employer failed to deal with their application in a reasonable manner.
- The employer failed to notify them of the decision on their application within the decision period.
- The employer rejected the application for a reason other than one of the statutory grounds.
- The employer's decision to reject the application was based on incorrect facts.
- The employer treated the application as withdrawn but neither of the grounds entitling the employer to do so applied.

What can a Tribunal award?

Where a tribunal finds a claim is well founded, it must make a declaration to that effect and may make either or both of: an order for reconsideration of the request, or, an award of compensation as the tribunal considers '*just and equitable*'. The maximum amount of compensation is eight weeks' pay, which is subject to the statutory cap. The current statutory cap for a week's pay is £464. Therefore, the maximum that an employee could potentially receive is £3,712. However, employees may also seek to claim constructive dismissal, or more likely allege that they have been discriminated against. Employers should remember that compensation for discrimination claims is uncapped.

Comment from Philip Henson, Partner and Head of Employment Law, DKLM LLP

Employers should anticipate that flexible working will become the "*new normal*" in the next 2-3 years as employees strive to find a better work life balance. It is likely that we will see several initial claims in the employment tribunal, for example where an employer receives two competing requests for flexible working, and prefers one over the other.

Employers should remember that they will need to explain their decision fully and document the rationale for granting or refusing a request. Each request will need to be assessed on its individual merit. The less stringent new regime does, however, allow some scope for creativity. For example, as the employer has a 3 month period (beginning with the date on which the employee's request is made) in which to communicate its decision, employers may want to suggest that this period (or part of it) be used as a trial period to review whether the employee's request is feasible.

We recommend that all clients review their existing flexible working policies, or adopt a new flexible working policy. If you need a new flexible working policy, or training, thenplease contact:

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