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GUIDE TO

flexible working requests

How to make flexible working work for your business.

By law, eligible employees have a right to request a flexible working arrangement to accommodate their personal commitments, interests or lifestyle.

When dealing with flexible working requests, however, employers typically face operational, financial and cultural challenges.

Yet where an organisation has a clear position on the role of flexible working, and effective procedures and technology in place, successful flexible programmes can, beyond ensuring compliance with your legal obligations as an employer, improve work-life balance and employee wellbeing, and help to protect the bottom line.

This guide will help:

- HR teams
- Line managers & supervisers
- SME business owners

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Flexible working: what the law says

Employees who have at least 26 weeks' continuous service have the right to make a statutory request to work flexibly.

An employee can make a request to change their terms and conditions of employment relating to:

- The hours they are required to work
- The times they are required to work
- The place where they are required to work, between home and the employer's place of work

Underlying these three categories of request, there are a wide range of possible work patterns.

Types of working patterns

There are few limitations on how an employee could request to change their working pattern.

Arrangements could include:

- Flexitime – where the employee works core hours and but arranges the remainder of their weekly hours as suits them.
- Part-time – where the employee works fewer than full-time hours.
- Job sharing – where two employees share a position, each having part-time hours to make up the full-time hours of the role.
- Compressed hours – where an employee works their usual number of hours but in fewer blocks of work.
- Shift work – where several employees work on the same job but over different periods of the working day, usually to ensure 24-hour cover.
- Annualised hours – where an employee has a level of flexibility over their working times provided they fulfil their annual hours.
- Term-time only – where an employee only works when their children are in school with the time off between terms generally being unpaid.
- Working from home – where the employee works from home instead of at a business site for part or all of the week.
- Staggered hours – where an employee works different hours to other employees.

Employer benefits of flexible working

Progressive employers are approaching flexible working as a way to improve employee performance and enhance the employer brand.

TALENT ATTRACTION

Flexible working options are increasingly becoming a key consideration for job candidates and offer appeal to a more diverse and skilled workforce.

TALENT RETENTION

Flexible working can improve morale, productivity and job satisfaction, contributing to a more positive employee experience and greater talent retention.

COST SAVINGS

Efficiences in talent attraction and retention will see reductions in recruitment costs

REDUCED SICKNESS ABSENCE

With flexible working, employees can better balance work and personal demands on them, improving employee wellbeing and reducing absence.

Adopting flexible working

Done well, flexible working can deliver organisational returns.

Research shows that flexible workers have a higher level of job satisfaction, commitment and are more likely to increase discretionary effort compared to those who do not work flexibly. It is for employers to ensure they are actively responding to emloyees' needs, addressing barriers to adoption, such as stereotypes about flexible workers being less committed to their performance, or a fear of setting precedents that overturn traditional working practices.

CULTURE

Any concerted effort to promote flexible working and leverage organisational benefits will for most companies demand a cultural shift. Flexible working policies and procedures should be developed to encourage employees to consider whether flexible working is appropriate for them, and to encourage rather than deter requests from being made. Sharing examples of successful flexible working within the company can be extremely effective in challengeing misconceptions and broadening reach. Training and ongoing support will also be needed for managers to understand how to manage flexible workers.

TECH

Technology plays a critical role in supporting this growing movement. The proliferation of online devices and improved connectivity enables personnel to work and perform outside of the confines of a traditional workplace and traditional working hours.

The HR software market also offers substantial choice and variety. Software solutions can be used to help facilitate a broader range of flexible arrangements, as well as supporting fluid interactions and communication between colleagues and continued employee engagement with the organisation and its culture.

Statutory & non-statutory requests

Meeting your obligations can help avoid workplace disputes and costly tribunal claims.

Statutory requests

Employers with more than 26 weeks' employment service are by law permitted to make one statutory request for flexible working in any 12 month period. Employers are under a legal obligation to consider such requests and to inform the employee of the decision within a reasonable timeframe, generally within three months of the request, or a longer period if agreed with the employee.

A request under the statutory procedure must specify the date when the employee proposes that it should take effect and explain what effect the change will have on the employer (if any) and how that effect may be dealt with.

Non-statutory requests

It is possible to have a request made by an employee for flexible working which does not comply with the criteria for a statutory flexible working request. Perhaps they do not have the requisite length of service to make a statutory request, or they have already made a statutory request in a twelve-month period.

Within reason, it would be advisable for an employer in these circumstances to consider the request following the same procedure for statutory requests.

This can reduce the risk of discrimination claims arising out of the employer's failure to consider a request for flexible working and can help to create a positive working environment in which employees feel that they are treated equally.

Procedure

The ACAS Code of Practice provides guidance on how employers should on handle requests to work flexibly in a reasonable manner.

Employers are advised to approach all requests in line with the ACAS procedure to reduce legal risk.

Should a complaint result in a claim, the Employment Tribunal can assess the employer's conduct and procedure against the standards set by ACAS. Where the employer has not followed the guidance, the Tribunal has powers to uplift any compensations awarded against them.

How to handle a flexible working request

What should you do if you receive a statutory flexible working request?

Once an employer has received a written request, they should arrange to talk with their employee as soon as possible.

The employer should consider the new working pattern requested by the employee before meeting them to discuss it.

Any potential business issues should be identified, together with ways to mitigate them. It could be advisable to discuss the request with the employee's manager, and if relevant, their colleagues.

Any alternatives should also be considered as this will demonstrate that the employer has considered the request seriously and that is more likely to engage the employee in discussions about alternatives if the employer has researched the request first.

If the employer intends to approve the request then a meeting is not needed, they can simply write to the employee to accept the request.

Where the working pattern requested by the employee cannot be accommodated by the employer, it may still be possible to reach an agreement which satisfies both parties.

Following the meeting and once the employer has made their decision they must inform the employee of that decision as soon as possible, in writing. If the employer accepts the employee's request, or accept it with modifications, they should discuss with the employee how and when the changes might best be implemented.

The law requires that all requests, including any appeals, must be considered and decided on within a period of three months from first receipt.

ACAS guidance

To summarise, ensure your internal procedure for handling flexible working requests includes the following:

1. ARRANGE
a meeting with the employee to discuss the application as soon as possible after receipt, unless the intention is to approve the request, allowing them to be accompanied by a work colleague.

2. CONSIDER
the request carefully, looking at the benefits of the requested changes in working conditions for the employee and the business and weighing these against any adverse business impact of implementing the changes.

3. INFORM
the employee of the decision in writing as soon as possible.

4. DISCUSS
with the employee how and when the changes might best be implemented, if the employee's request is granted, or granted with modifications.

5. ALLOW
the employee to appeal the decision if the request is rejected. A request can be rejected only on certain specified grounds.

Refusing a request

Employers are not required to agree to flexible working requests.

An employer can reject the request but it must be for one of the following business reasons, as set out in the legislation:

- The burden of additional costs
- An inability to reorganise work amongst existing staff
- An inability to recruit additional staff
- A detrimental impact on quality
- A detrimental impact on performance
- Detrimental effect on ability to meet customer demand
- Insufficient work for the periods the employee proposes to work
- A planned structural change to your business

For most employers, it is usually not difficult to align a refusal for a flexible working request based to at least one of the permitted business reasons and the wording of the statute suggests that the test is subjective on the part of the employer.

What this means is that if the employer considers that one of the permitted grounds applies, then the test is satisfied. On the face of it the question of reasonableness is not a factor in the employer's decision and the employee could only challenge the decision if the employer used incorrect facts in making the decision.

An employer who rejects the request should allow their employee to appeal the decision.

The appeal process provides an opportunity for a review of the employee's request and for the employee to question in detail why the employer's decision has been reached and whether the grounds for refusal were based on correct facts. Ideally, any appeal should be decided by an individual not involved in the original decision.

REASONS TO REFUSE

Ultimately, a tribunal may not challenge the commercial validity of your decision but it can compel you to reconsider the request and/or award the employee compensation of up to eight weeks' pay.

Managing legal risks

All employees have the right to be treated fairly and without discrimination at work.

This applies when requesting flexible working. A proactive approach to legal risk management is needed by employers to avoid making common mistakes.

Exposure to tribunal claims

Employers are advised to assess fully the legal risks of refusing a request for flexible working.

Employers are not required to agree to flexible working requests. Should a request be refused, an employee can complain to an employment tribunal on the grounds that their employer:

- Reached a decision in relation to a flexible working request based on incorrect facts;
- Failed to deal with the request in a reasonable manner, within the required timescale;
- Treated the request as having been withdrawn when it was not entitled to do so; or
- Refused the request other than on one of the specified grounds.

If the employee remains unhappy after the flexible working request procedure has concluded, the employer should advise the employee to raise a formal grievance using its grievance procedure.

If possible, the grievance procedure should be conducted by someone unconnected with the flexible working request process.

Although an employment tribunal does not have the authority to challenge the commercial validity of any employer's decision, it can require the employer to reconsider the employee's request and/or award the employee compensation of up to eight weeks' pay.

An employee with less than the usual required minimum qualifying service may bring a complaint of unfair dismissal where the dismissal is for one of a number of reasons connected with the right to request flexible working.

Discrimination

Usually the biggest risk an employer faces in turning down a flexible working request is not relating to enforcing the procedure but an employee bringing a claim under discrimination legislation.

Potential discrimination scenarios could include a flexible working request made by an employee seeking to vary their working hours in accordance with childcare commitments (possibly on the return from maternity leave), religious requirements, (such as not wanting to work on the Sabbath) or who are seeking adjustments because they are disabled.

Employers should also be wary of indirect sex discrimination claims, as the wider the options that the employee is willing to consider and therefore the wider the range of options being rejected by the employer, the more difficult an employer may find it to objectively justify the refusal of the request in the event of a challenge on the grounds of indirect sex discrimination.

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Discrimination & flexible working

Sex discrimination

From a sex discrimination prospective, both men and women can make requests to work flexibly under the statutory provisions.

In the case of Walkingshaw v. John Martin Group, a man was denied the right to work part-time following his wife's maternity leave and he claimed direct sex discrimination because women in his workplace were regularly allowed to work part-time. Such a claim can only succeed where a man can demonstrate that a woman's request would have been granted, or at least seriously considered.

If the employer would have treated a request equally badly, whether from a man or a women, then the claim would not succeed.

The most likely recourse for a female employee is a claim for indirect sex discrimination on the grounds that women are more likely than men to have primary responsibility for childcare, so fewer women can comply with the requirement to work full time.

This assumption was considered in the case of London Underground Limited v. Edwards, in which the Court of Appeal, in deciding that a new shift system was potentially indirectly discriminator, noted that women are more likely than men to be single parents caring for children.

This assumption that women have the greater burden of childcare has led to a further assumption of an employer requiring that a job be performed on a full-time basis would have a disproportionate impact on women as compared to men because they have greater childcare commitments.

Disability discrimination

Employers should also keep in mind their duty to make reasonable adjustments under the Equality Act 2010 when considering a request for flexible working from an employee with a disability.

The duty to make reasonable adjustments is unique to the protected characteristic of disability. Where the duty to make reasonable adjustments arises the employer must effectively treat the disabled person more favorably than others in an attempt to reduce or remove the individual's disadvantage.

One of the ways that an employer may need to do this is by altering an employee's working hours which the employee may ask for by making a request for flexible working.

Religion and belief

Regarding potential claims an employer could face based on religion and belief and flexible working requests, the Equality and Human Rights Commission Code of Practice states, that 'manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices' and goes on to explain that the requirement to work specified hours could be a provision, criteria or practice which disadvantages an employee and could give rise to claims of indirect religious belief discrimination.

Common mistakes when handling a flexible working request

Failure to consider each request on an individual and equal basis. Each request for flexible working must be considered on its own merits and disadvantages. For instance, where requests are received simultaneously from two employees in the same department, it would be unacceptable to deny one of those requests simply because the other has been denied.

Failure to follow the correct process for handling flexible working request. Once the policy is in place, it must be followed. The policy lays out the procedure so that the employee knows what to expect and the employer knows the steps to take. Should the employer not follow the procedures laid out in their policy, they may find themselves facing at best an internal appeal for unfair treatment or perhaps even an employment tribunal.

The process, from request to decision and/or appeal, takes too long. A decision should be made and the employee informed within a time limit of 3 months. Should the process take longer than this, it could be argued that the employer is unreasonably delaying a decision.

Poor explanation of decision to refuse. Should an employer decide to deny a request, they must be able to demonstrate in a manner that is reasonable and legal that it would not be feasible for that employee to work on a flexible basis, and this must be communicated to the employee.

Making changes

Withdrawing a flexible working request

An employee can withdraw a request for flexible working at any time after it has been made.

Technically, if they do withdraw the request, they will be unable to make another request under the statutory procedure for 12 months from the date of their initial request.

Should the employee, without good reason, fail to attend the first meeting arranged by the employer to discuss the request and a rearranged meeting, the employer is entitled to treat the request as withdrawn. Also, in the event of an appeal, and the employee fails without good reason to attend a first and second meeting arranged by the employer, they can treat the request as withdrawn.

The ACAS Guide suggests that the employer should ascertain and consider the reasons for the employee failing to attend both meetings before reaching any decision to close the request. The employer must notify the employee of the decision.

There is no definition of what amounts to a 'good reason' and this is not explored within the guidance. However, tribunals are likely to take a common sense approach to whether an employee's explanation is credible and excusable in the specific circumstances.

Changing a flexible working arrangement

It is possible to agree that the arrangements are temporary, or subject to a trial period.

Where this is not the case, typically once a flexible working request has been agreed, it forms a permanent change to the employee's contract, unless agreed otherwise by the parties, and cannot be changed without further agreement between the employer and employee.

An employee who has already had a statutory request for flexible working accepted can make a subsequent request to change their working pattern again, provided that 12 months have passed since the initial request.

Employees can make only one statutory request for flexible working arrangements in any 12-month period.

Employers may decide to consider requests made outside of the statutory process in any event and it is usually safest to do so.

Flexible working policy

It is best practice to have a flexible working policy in place.

Given the variety in the type of requests employers can receive, a robust HR policy should provide a number of important details that give clarity over who is eligible, how to make a request and how a request will be handled.

The law is not prescriptive in terms of how a request should be treated, but does state that applications should be dealt with in a reasonable manner and within three months.

It is generally advisable for any flexible working policy to be stated as being non-contractual.

This enables the employer to change it without the employee's agreement, although an employer should ensure that the procedure complies with the statutory scheme and does not lead to unlawful discrimination.

A non-contractual policy also avoids arguments that a failure to follow the procedure amounts to a repudiatory breach of contract.

However, where the procedure has been negotiated through collective bargaining with a trade union, it may become incorporated into the employee's contracts. This will depend on the agreement with the union or the employer's custom and practice. Any amendments to the procedure would therefore also have to be collectively negotiated.

The policy can also be extended to those who are ineligible for the statutory scheme, if desired.

Employers are allowed to treat individual requests on a case-by-case basis but should be careful not to discriminate against employees because of any protected characteristic in dealing with flexible working requests and it is important for any policy to account for this.

what to include in the policy:

Any policy would need to reflect the ACAS Code of Practice on handling in a reasonable manner requests to work flexibly. The ACAS Guide suggest that a flexible working policy should:

Explain how employees should make a request, including who the request should be made to and what should be covered by the application.

Include a statement to the effect that the employer will consider the request and will only reject it for one of the eight business reasons.

State who can accompany the employee at any meeting regarding the request.

Explain what arrangements there are for appeals.

Set out the time limit on dealing with requests.

HR advice & support

DavidsonMorris can support your organsation in taking an effective & compliant approach to flexible working.

Our employment lawyers are on hand to assist employers of all sizes with employment law advice, representation and risk management guidance, working closely with our HR consultant colleagues to provide a complete people-focused strategic and advisory service for employers.

As a dedicated team, we bring expertise across the full employment law spectrum, with specialist experience in flexible working including:

- Developing compliant procedures for handling flexible working requests
- Drafting flexible working policies
- Delivering training to HR and managers
- Advice on specific employee requests and complaints
- How to leverage flexible working for wider organisational benefit

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WE CAN HELP

Our business employment specialists are on hand to support you and your organisation with all aspects of flexible working.

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ABOUT DAVIDSONMORRIS

We are specialists in employment & immigration law and human resources and global mobility consultancy.

As employer solutions lawyers, we provide strategic consultancy and managed services that ensure businesses and HR practices are both fully compliant with legal requirements and effective in meeting their people-led business objectives.

Immigration
Employment
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davidsonmorris.com

LONDON
37 – 39 Lime Street
EC3M 7AY
+44 (0)20 7494 0118

MANCHESTER
3 Hardman Square
M3 3EB
+44 (0)161 637 0673

CAMBRIDGE
20 Station Road
CB1 2JD
+44 (0)1223 803 848

ABERDEEN
7 Queens Gardens
AB15 4YD
+44 (0)1224 826 573

BIRMINGHAM
2 Snow Hill Queensway
B4 6GA
+44 (0)121 607 8246