



Flexible Working and how to manage flexible working requests

In April 2009 the right to request flexible working was extended to include employees with children up to and including 16 years old. The age is still the same for employees with disabled children under 18.

This is a big jump from the previous age that was restricted to children up to the age of 6.

Employees with 26 weeks continuous employment have the right to make a written flexible working application to care for the child if they are within the age groups. They must have parental responsibility for the child (this includes biological parents, legal guardians, adoptive and foster parents and spouses of these, including same sex partners as long as they have parental responsibility for the child).

There is a specific process that must be followed and a brief overview is:

Employee:

- The application must be made no later than 2 weeks before their 16th (or 18th) birthday
- They must confirm their relationship to the child
- They must set out their proposal and explain what effect they think this will have on the Company's business and how this may be dealt with
- They must specify a start date for the proposed change, giving the Company reasonable time to consider the proposal and implement it. This may take 12 -14 weeks
- They must state whether a previous application has been made and if so the date on which it was made

The Company:

- Will arrange a meeting with the employee within 28 days of receiving the application to discuss the request. This meeting will not be required if you agree to the terms of the application and notify the employee accordingly within 28 days of receiving their application.
- Allow the employee to be accompanied by a work colleague if they so wish
- Will notify the employee of the decision within 14 days of the date of the meeting. This notification will either:
 - a) accept the request and establish a start date and any other action or
 - b) confirm a compromise agreed at the meeting or
 - c) reject the request and set out clear business reasons for the rejection together with notification of the appeals process.
- Will hear the appeal within 14 days of being informed of the employee's decision to appeal. They will be allowed to be accompanied by a work colleague if they so wish.
- Will notify the employee of the decision on the appeal within 14 days after the date of the meeting. The notification will either:
 - a) uphold the appeal, specify the agreed variation and start date or
 - b) dismiss the appeal, state the grounds for the decision and contain a sufficient explanation of the refusal.

If the Company approves the application, the variation in contractual terms is a permanent one and the employee will have no automatic right to change back to their previous pattern of work, unless the application seeks the variation for a specified time period only. A trial period may be agreed.

Refusing applications

You are entitled to refuse an employee's application on 8 recognised business grounds:

1. the burden of extra costs
2. a detrimental effect on being able to meet customer demand
3. an inability to reorganise work among other employees
4. an inability to recruit additional staff
5. a detrimental effect on quality
6. a detrimental effect on performance
7. planned structural changes
8. insufficiency of work during the periods requested

You should give serious consideration to each application that must be considered on its own individual merit and only reject if there are clearly objectively justifiable specific business reasons. The focus should be on evaluating the new arrangements to find out which ones the company is able to realistically accommodate. The decision must be on business grounds and does not have to be on the employee's own personal circumstances.

You would be expected to review requests positively and to see what can be done to overcome any difficulties and inconveniences, looking at any potential alternatives that could be a workable business solution, but not to start from a point of which focuses on why the request will not work. It is always a good idea to agree a trial then you have a better understanding of it and how the change has affected the business and if it does not work then you have substantive evidence to prove this. However, most of the time employers find that the trial works and has been very positive and beneficial.

A trial period is not a permanent change and both sides must be aware that it will not prejudice the statutory process at a later date.

If the application is rejected outright then the employee has the right to appeal. If an appeal hearing is held and no compromise on flexible working is made then the employee has the opportunity to make a claim before an employment tribunal.

Employment Tribunal and costs

The employee can make an employment tribunal claim on the grounds that the decision to reject was based on incorrect facts or that the procedure was not carried out properly.

An ET doesn't normally have the power to question your business reasons for declining a request or consider whether or not you acted fairly or reasonably. If the employee brings a case of discrimination then the ET may examine the circumstances of the decision to ascertain whether any discrimination occurred and will want to see how you evidenced the decision, i.e.

- The facts you relied upon to reject the application
- That you provided a sufficient explanation as to why the business ground(s) applied

You do run the risk of having a claim being found if you do not follow the statutory process for managing flexible working applications which on their own carry potential liabilities of up to 8 weeks pay (currently limited to £350, but rising to £380 in October 2009), but you have a bigger liability that the claim will include sex or disability discrimination even if the procedure requirements were met. These costs do not have a cap, although in reality they not likely to be at the higher end of awards, but this is never guaranteed.

If you require further information or assistance on this matter then please don't hesitate to contact a member of the HR Solutions team.