

FLEXIBLE WORKING

All employees within a business have the right to apply for flexible working - so long as they have worked for the business for a continuous period of at least 26 weeks as of the date that they make an application for flexible working and only once every 12 months, ie: they haven't applied to work flexibly under the statutory right within the previous 12 months.

This right enables employees to *request* a flexible working arrangement but does not guarantee them the right to work flexibly. This is due to the needs of the employer and business not necessarily being able to accommodate the employee's requested working pattern.

The right to request flexible working is designed to encourage both employee and employer to consider flexible working as an option, to facilitate discussion and negotiation to ensure a solution is found that meets the needs of all involved.

The responsibility to consider the desired work pattern falls on the employee and the employer, in turn, is responsible for considering and responding to the application in a reasonable manner.

The right to apply for flexible working arrangements allows employees to apply to vary one or more of the following:

- The hours they work
- The times they work
- Their place of work (eg: home or office)

This covers working patterns such as flexi-time, part-time working, annualised hours, home working, job sharing, shift working, staggered hours and term-time only working.

ACAS CODE OF PRACTICE ON HANDLING IN A REASONABLE MANNER REQUESTS TO WORK FLEXIBLY

As of 2014, there is a statutory ACAS Code of Practice on Handling in a Reasonable Manner Requests to Work Flexibly. This is a code of practice that is intended to assist businesses and employers consider and respond to requisites by their employees for flexible working. It can also be used when considering cases brought before an employment tribunal if it is relevant to do so.

THE APPLICATION

Flexible working requests from an employees are required to be submitted in writing and should include the following information:

- The date of the application itself

- Written details of the change(s) to that they are making an application for
- The date that they would like the change(s), if agreed to by the employer, to come into effect
- Written details of the effect (if any) that the employee believes the change(s) would have on the business and how any such effect could be handled
- A written statement that the request is being made under the statutory right for employees to make a flexible working request
- If applicable, a note stating that the employee has previously made a flexible working application with details on the date it was submitted

It is the responsibility of employers to make clear to all of their employees what information they need to include in their written requests to work flexibly.

NOTE FOR EMPLOYEES: the process for an employer to respond to an application can take up to three months.

CONSIDERING & RESPONDING TO REQUESTS

When an employer receives a written request to work flexibly they are obligated to consider it.

They must then organise a discussion with the employee that has made the request as soon as it is possible after the date that the request is received. An exception to this would be if the employer is planning to approve the request exactly as it has been requested. In this instance, the employer must simply inform the employee that it has been approved and both parties then are required to make the necessary changes to put the request into effect.

Where a meeting is required, this should take place in a private location where the discussion won't be overheard by others.

The employee is allowed to be accompanied by a work colleague to this meeting as well as any appeal meetings / discussions. Employers must inform employees of this in advance of the meeting, with enough time for them to arrange for this if they wish to be accompanied.

Employers must consider the request in detail, considering both the potential positive and / or negative outcomes that approving the changes requested could incur. Employers must also ensure that they adhere to anti-discriminatory laws, rules and regulations when considering this request.

Once a decision has been made by the employer then the employee must be informed of said decision as soon as it is possible to do so. To avoid any confusion, the decision and its reasoning should be put into writing.

If the request is accepted, or accepted with some edits or modifications, then the employer and employee should discuss how and when the change(s) should come into effect.

If, however, the employer rejects the request from the employee then it must be for one of the reasons laid out within the legislation surrounding the right to flexible working requests. These reasons, of which one or more could be a reason for a business to refuse an employee's request, are listed below:

1. Requested change(s) will add the burden of additional costs to the business
2. Requested change(s) will have a detrimental effect on the company's ability to meet customer demand(s)
3. Requested change(s) won't allow for the ability to reorganise work with existing staff
4. Requested change(s) would require the business to recruit additional staff but the business is unable to do so
5. Requested change(s) will have a negative impact on quality
6. Requested change(s) will have a negative impact on performance
7. Requested change(s) will not provide a sufficient amount of work during the proposed periods of time that the employee would be working if the change(s) came into effect
8. Requested change(s) do not fit with planned structural changes to the business

If the request is rejected by the employer then the employee has the right to appeal the decision that has been made. The Code of Practice suggests that it would be helpful for the employer to speak with the employee about their reasoning for rejecting a request to inform the employee of the reasoning further which could help reveal new information or a previous omission.

The decision made by the employer, whether approving or rejecting a request, must be communicated to the employee who has made the request within three months of the initial date of the request being made. The exception to this would be if all parties involved (ie: employer and employee) agree to an extension.

WITHDRAWING AN APPLICATION

It is possible for an application to be withdrawn by the employee themselves (though if they do, they will forfeit their right to make another request for flexible working for 12 months). The application can also be considered to be withdrawn if one or more of the following apply:

- The employee, without good reason, fail to attend the meetings that were arranged to discuss their request for flexible working
- The employee without good reason, fail to attend the meetings that were arranged to discuss their appeal to a rejected request for flexible working

If one or both of the above apply, the employer must notify the employee that their conduct has resulted in their application being withdrawn. This should ideally be done in writing, with the full explanation detailed.

WHAT ACTION MIGHT AN EMPLOYEE TAKE?

When an employee makes a request for flexible working, they have the right not to be treated in any detrimental way or unfairly dismissed on any grounds that relate to their flexible work request.

Any dismissal would be considered immediately unfair, regardless of the length of their employment. There is a possibility that the rejection of a flexible working request could result in a claim of unlawful discrimination.

The right to request flexible working is separate from, and independent of, other legislation such as the Equality Act (2010) which provides legislation regarding sex discrimination, or the Equality Act (2010).

This is worth noting as it could be relevant when considering a request for flexible working in which the rejection of such a request could be considered as indirect sex discrimination (for example; if a woman returning from maternity leave requests a flexible working pattern to accommodate for child care needs), or could be considered that an employer was not adhering to their duty to provide reasonable adjustments for a disabled employee.

As with any rejection of a flexible working request, the employer would need to fully justify their decision in line with the rules of the law and legislation.

Employees have the right to present any complaints that they have regarding the response, reaction or decision made to their request for flexible working to an employment tribunal if they believe one or more of the following:

- The employer hasn't dealt with their request for flexible working in a reasonable manner
- The employer hasn't notified the employee of their decision regarding the flexible working request within the designated three month period
- The employer has rejected the request for a flexible working arrangement for a business reason that isn't one of the reasons permitted by the legislation (detailed above)
- The employer has based their decision on incorrect facts

Please note; employees can only issue a claim within an employment tribunal once their employer has informed them of their decision or the three month decision period (or longer if has been previously agreed) has elapsed without the employer informing the employee of their decision. Following this, the employee has three months in which to bring any claim.

If an employer treated an application as withdrawn (as detailed above) but the employee believes this was done so without the employer having legitimate grounds to do so then a complaint can also be made to an employment tribunal in this case.

If an employee is successful within an employment tribunal then the tribunal itself may enforce a reconsideration of the request to a flexible working arrangement and it is possible that the employer may have to pay compensation to the employee.

USEFUL LINKS

- <https://www.gov.uk/flexible-working>
- <https://www.acas.org.uk/making-a-flexible-working-request>

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