

Flexible working in the Post-Coronavirus UK

In 2019 and early 2020, both employers and employees had set views about flexible working. Some were of the view that it would increase productivity, whilst critics argued productivity would decrease and it would be difficult to implement. What was not predicted was a global pandemic to quickly put flexible and remote working to the test. If one thing is true the UK now has five months of experience of working “flexibly” and for many the negative expectation has not matched reality.

The advent of the current Coronavirus pandemic disrupted the traditional office based workplace model, with businesses having to adapt to remote working within a matter of weeks. Now as the UK gradually eases restrictions many business and employees are embracing the new way of working and are loathe to return to the rigid structure of the old normal.

Due to this, in the post-pandemic landscape we anticipate seeing a surge in flexible working requests from employees.

What are flexible working requests?

Flexible working is the term used when an employee wants to vary the nature of their attendance requirements at their place of work. The Coronavirus pandemic has resulted in most workplaces changing drastically and an anticipated effect of this is that upon a return to physical places of work there will be a far greater number of flexible requests made by employees who have experienced the potential advantages this brings.

Flexible working is not limited to one method of “flexibility” and could incorporate job sharing, part time work or working from home. Coronavirus has provided a test run in maximising the flexible working arrangements of many employers. For some employers this will be unwelcome. With the uncertainty surrounding the future of the traditional workplace, now is the time to plan ahead and consider how to accommodate and make the best use out of flexible working requests and arrangements.

How do flexible working requests work?

Employees have a statutory right to request that they participate in some form of flexible working if they have been with their current employer for at least 26 weeks. This right is set out in sections 80F to 80I of Employment Rights Act 1996 (ERA) together with the Flexible Working Regulations 2014 (SI 2014/1398) (Flexible Working Regulations). Employees are only permitted to make one statutory request for flexible working every 12 months.

To be a valid flexible working request, an employee's application must:

- Be in writing;
- Be dated;
- State that it is an application made under the statutory procedure;
- Specify the change that the employee is seeking and when they wish the change to take effect;
- Explain what effect, if any, the employee thinks the change would have on the employer and how any such effect could be dealt with; and

- State whether the employee has previously made an application to the employer and, if so, when.

How should flexible working requests be handled by an employer?

Employers have a duty to handle requests in a reasonable manner. They should discuss the request with the employee at a meeting, allow the employee to be accompanied by a work colleague or trade union representative (who has previously been informed of the meeting occurring, and arrange an appropriate venue to discuss the request (one that is convenient in time and location to both employer and employee)).

Once the request has been discussed, the employer has a decision period of 3 months beginning with the date the employee's request is made, or such longer period as the parties may agree.

There is no statutory requirement for a trial period, however this may be beneficial to both parties to see how the proposed arrangements work in practice.

An approved request is treated as a variation to the employee's contract and will be a permanent change. The employer is obliged to issue a "section 4 statement" documenting the change within one month of the changes taking effect. The employer may also wish to issue a new contract of employment although this is not required.

Not all requests should be approved, and there are some specific circumstances where a statutory flexible working request can be rejected:

- There are planned structural changes;
- The burden of additional costs;
- Quality or standards will suffer;
- They won't be able to recruit additional staff;
- Performance will suffer;
- They won't be able to reorganise work among existing staff;
- They will struggle to meet customer demand; or
- There is a lack of work during the periods you propose to work.

An employee can appeal a rejected request, although this is not specifically provided by legislation. ACAS suggests that a right of appeal is an essential to flexible working requests and falls under the ERA. An appeal meeting should be arranged and heard by someone not involved in the original request process if possible.

If an employee withdraws a request they are prevented from making another until 12 months from the date of the withdrawal has taken place. This can be in writing by the employee or by failure to attend a scheduled meeting.

Are there any issues surrounding flexible working requests that employers should be aware of?

In the event of a refusal which doesn't meet the statutory criteria, a claim can be made to the Employment Tribunal for up to 8 weeks' pay (with an upper limit of £538 per week). There is also a risk of indirect discrimination claims from, for example women who are more likely to have childcare responsibilities than men if a request is refused without justification. Compensation for discrimination claims is potentially uncapped and can include compensation for injury to feelings.

Adjusting to the “new normal”

Another major concern for business returning to their workplaces is that employees may not be quite as keen to continue “business as usual” on the basis of concerns for their own safety. Employers can do their best to inform employees of the changes that have taken place within a place of work to comply with health and safety, social distancing and hygiene requirements, however this may not be enough to entice an employee in some cases.

Communication and understanding of employee circumstances has never been more important. Taking a hard-line approach may further exacerbate any issue and provide the opposite of its intended effect, being to encourage the workforce back to work. In the theme of unexpected events this year, only time will tell what the landscape of the post 2020 workplace will look like. The only certainty is that it won't be the same as before.

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