FLEXIBLE WORKING FOR ALL WORKSHOP

WORKSHOP OBJECTIVES

- To understand the new Flexible Working legislation.
- To understand why SGBs should develop a new Flexible Working Policy.
- To identify implications of Flexible Working for all in practice.
- To understand the practical approaches and process that should be adopted to manage requests.
- To enable you to become more confident when making decisions about granting or refusing flexible working.

BACKGROUND

- Over the years there has been growing demand for flexible working, both from individuals who want to achieve a better work-life balance, and from organisations who want to align their business needs with customer needs.
- The right to request flexible working was introduced under the *Employment Act 2002* and came into force on 6 April 2003.
- At first, only carers of children under the age of six (or disabled children under the age of 18) qualified for the right to request.
- However, even before the legislation came into force, the government expressed an intention to review the impact of the right on employers with a view to an incremental expansion towards additional categories of employees.
- Subsequent development took place as follows:
    - 2006 legislation extended the right to those who care for adults;
    - 2009 legislation extended the right to cares of children under the age of 17 years.
    - 2010 coalition government stated its intention to extend right to request to all employees.
    - Finally on 30TH June 2014 the right to request will be extended to all employees.

The introduction of the Right to Request was not well received by employers, many of whom expressed concern that large numbers of employees would apply and that it would be difficult to refuse a request. To date it seems that the practical experience of employers has not substantiated these fears. In practice, although the procedure is somewhat bureaucratic, the grounds for refusal have not proved unduly restrictive. In fact, the introduction of the Right to Request seems to have provided a catalyst for employers to offer flexible working to wider categories of employees which has removed the focus from the detail of the statutory procedure.

WHAT IS THE RIGHT TO REQUEST FLEXIBLE WORKING?

- The right to request flexible working does not create a right to work flexibly or part-time. It simply provides a statutory framework through which a request from an eligible employee to work flexibly must be considered by the employer.
- The right to request itself is very limited in nature. It consists of:
    - A right to request to work flexibly.
    - A statutory request procedure.
    - An obligation on the employer to consider the request properly.
    - A limited number of grounds on which the employer can refuse the request.

CURRENT FLEXIBLE WORKING LEGISLATION

1. WHO CAN MAKE A REQUEST

Individuals can make a request where:

a) They are employed.
Only employees are able to take advantage of the statutory right. An "Employee" is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Subject to meeting the other criteria, the right applies to fixed-term employees and those employees who already work under a flexible work pattern. The right does not apply to self-employed contractors, consultants or agency workers.

b) They have 26 weeks' continuous employment at the date the request is made.
The usual rules regarding establishing continuity of service apply, so that service with an associated employer, or service prior to a TUPE transfer for example, will be included

c) They are not an agency worker or a member of the armed forces.
These categories of worker are specifically excluded from eligibility.

d) They have not made another request to work flexibly under the Right to Request Legislation in the preceding twelve months.
Although the circumstances of either the employee or the employer's business may change, the Right to Request Legislation does not include any mechanism for dealing with a further request within a 12-month period. There is however nothing to prevent an employee from making additional informal requests. While the employer will not be obliged to follow the statutory procedure in response to an informal request, a refusal without appropriate consideration could amount to indirect sex discrimination.

e) They are making the request to care for either (i) a child under 17 years old (or 18 years if disabled) or (ii) a person aged 18 or over who is in need of care.

2. CARING FOR CHILDREN

In addition to the criteria set out above, those individuals making a request in order to care for a child must satisfy the following criteria:

a) **Be making the request in relation to a child under 17 years old (or 18 years old if the child is disabled)**
   The last date on which an application can be made in respect of a child is the day before the child's 17th (or, as the case may be, 18th) birthday.
b) **Be either:**
   - The child's mother, father, adoptive parent, guardian or foster parent; or
   - The spouse, civil partner or partner of the child's mother, father, adopter, guardian or foster parent.
c) **Have or expect to have responsibility for the child's upbringing.**
   This requirement has not been tested in the courts and it is not clear what level of responsibility is necessary. However, where one of the required relationships specified above exists, it seems most unlikely that eligibility would be contested on the basis that the employee does not satisfy this criterion.
d) **Be making the application in order to care for the child.**
   There has not been any judicial consideration as to whether caring for the child must be the sole or main purpose of the flexible working application, or exactly what "caring for" a child might entail. It seems likely that a common sense meaning akin to "looking after" would prevail and the issue seems unlikely to be controversial where a child is concerned.

3. CARING FOR ADULTS

Those individuals making a request in order to care for an adult must satisfy the following criteria:

a) **Be or expect to be caring for a person aged 18 or over who is in need of care and who is:**
   - Married to, or the civil partner or partner of the employee; or
   - A relative of the employee; or
   - None of the above but who lives at the same address as the employee.

4. WHAT KIND OF CHANGE CAN BE APPLIED FOR?

An eligible employee may request:

- A change to the hours they work.
- A change to the times when they are required to work.
- To work from a different location (e.g. from home).

Underlying these three simple categories of flexible work, there are a wide range of possible work patterns. The scope of the legislation effectively includes applications for annualised hours, compressed hours, flexi-time, homeworking, job-sharing, self-rostering, shift-working, staggered hours and term-time working among others. There are in fact very few limits as to what the employee could request by way of variation.

5. THE RIGHT TO REQUEST PROCEDURE

i. The employee submits a written application setting out the work pattern that they are requesting and specifying their entitlement to make the application. The employee is also required to specify any effect that they anticipate the proposed work pattern would have on the employer's business and how such effects might be accommodated or addressed in practice.
ii. An employee can withdraw a request for flexible working after it has been made. However, they will be unable to make another application under the statutory scheme for 12 months from the date that their application was made.
iii. Within 28 days of receiving the request, the employer must arrange to meet with the employee in order to discuss the application. The employee is entitled to be accompanied by a worker employed by the same employer at the meeting.
iv. Within 14 days of the date of the meeting, the employer must write to the employee either to agree to the new work pattern and set a start date, or to provide grounds for the rejection of the application and set out the appeal procedure.
v. The employee can appeal the rejection of a request, but must do so within 14 days of the request being rejected.
vi. Within 14 days of receiving the appeal notice the employer must arrange a further meeting in order to discuss the grounds of appeal.
vii. Within a further 14 days after the meeting the employer must deliver the appeal decision.

The time periods set out may be extended by mutual agreement (which must be recorded in writing), but the employer cannot unilaterally extend the time periods save in one very limited situation, where the individual who would ordinarily consider an application is absent from work on annual leave or on sick leave on the date the application is made.

6. REJECTING OR REFUSING THE REQUEST

A request may only be refused on eligibility or procedural grounds or on one or more prescribed statutory reasons.

a) **Procedural grounds -** the request may be refused because it does not meet the statutory criteria. If either the employee is not eligible or the employee fails to comply with the procedure then strictly speaking the employer would be entitled to refuse the request.

b) **Prescribed statutory reasons** – the legislation recognises that an employer may have entirely legitimate business reasons why it cannot accommodate a specific flexible working request. There are eight specific grounds for rejecting a request and only these grounds may be raised as reasons for rejection.
These are:
   1. The burden of additional costs.
   2. Detrimental effect on ability to meet customer demand.
   3. Inability to re-organise work amongst existing staff.
   4. Inability to recruit additional staff.
   5. Detrimental impact on quality.
   6. Detrimental impact on performance.
   7. Insufficiency of work during the periods the employee proposes to work.
   8. Planned structural changes.

It is essential that the employer's notice of refusal is dated and states which of the statutory grounds applies. A rejection decision must also contain "sufficient explanation" as to why the chosen ground(s) apply in relation to the application

In selecting the ground for refusal the test is a subjective one on the part of the employer. If the employer considers that one of the grounds applies, then the test is satisfied. The test does not on the face of it import any question of reasonableness into this judgment.

NEW FLEXIBLE WORKING LEGISLATION

From 30th June 2014, all employees will have a statutory right to ask their employers to work flexibly provided they have worked for their employer for 26 weeks or more.

At the same time, the Government will remove the current statutory procedure for considering requests. Instead, employers will have a duty to consider all requests in a **"reasonable manner"** and notify employees of their decision within 3 months, unless an extension has been agreed. Employers will still have the flexibility to refuse requests on business grounds.

Acas has produced (i) a draft code of practice and (ii) supplementary good practice guidance on handling requests in a reasonable manger.

(i) Draft code of Practice

The Code sets out that on receiving a request, an employer should arrange to discuss it with the employee as soon as possible. It is good practice for an employer to allow employees to be accompanied at a discussion by a work colleague or a trade union representative if they wish. The employer should then consider the request objectively, 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. The employer must weigh up the advantages, possible costs and potential logistical implications of granting the request.

If the employer accepts the request, or accepts it with modifications, the employer should discuss with the employee how and when the changes might best be implemented. If the employer rejects the request it must be for one of the 8 business reasons set out above and an explanation of these reasons, including how they apply to the application, must be given to the employee.

(ii) Supplementary good practice guidance on handling requests in a reasonable manger

We will look at this in more detail in the "practical approaches and processes to manage flexible working requests" section below.

SUMMARY OF CHANGES TO FLEXIBLE WORKING LEGISLATION

Current position	**Changes from 30th June 2014**
Currently available to employees with children under the age of 17 (18 if disabled) or caring responsibilities for an adult dependant.	The right the request is extended to **all** employees with 26 week eligibility period.
Right to request flexible working procedure, according to a strict time-table.	Employers must deal with requests in a reasonable manner and within 3 months
Employers must follow procedure.	Acas produced a Code of Practice and guidance on dealing with handling request to work flexibly.
Employers have a statutory duty to consider applications.	Unchanged.
Once agreed it becomes a permanent change to the contract of employment.	Unchanged.
An employee has the right to appeal if necessary against the outcome.	No right of appeal but Acas recommends consideration of appeals as good practice.
Negotiate an agreement if requested hours are not possible.	Unchanged.
Right of accompaniment to the meeting to discuss request,	No right of accompaniment but Acas recommends consideration of allowing a companion as good practice.
Only one application can be made in a 12 month period.	Unchanged.

DEVELOPING A NEW FLEXIBLE WORKING POLICY

Acas believes that employers should create the right environment where employees can be sure decisions regarding their requests will be handled objectively and fairly.

Employers should consider introducing a new policy for handling requests to work flexible. A policy can help ensure consistency in handling a request and can also make it easier to communicate information on the right to request in a transparent manner to all employees.

It should help explain to employees the new right to request flexible working is open to not only parents and carers.

Issues that the new policy should cover:

- How employees should make the application, including who the application should be made to and what should be covered in the application.
- A statement to the effect that the employer will consider the request and will only reject it for one of the eight business reasons.
- Who can accompany the employee at any meeting regarding the request.
- What arrangements there are for appeals.
- The time limits on dealing with requests.

Some employers may choose not to have a written policy. However, they should ensure their employees know how to apply and must still abide by the law.

IMPLICATIONS OF NEW FLEXIBLE WORKING FOR ALL

Employment relations minister Jenny Willott said: “By enabling any employee to work flexibly, we want to remove any cultural assumption that flexible working is only for women, or just parents and carers.”

Although the Act is described by Willott as “good for business”, it has faced considerable criticism from business groups including the CBI and the British Chambers of Commerce (BCC) in particular. In 2012 the BCC said the changes risked “causing unnecessary friction between parents and employers and will raise unrealistic expectations about the level of flexibility most businesses are able to accommodate”

However, many employers already offer the right to request on a wider basis. Employers which have already agreed to make the right to request available to all their staff have generally reported favourable results in terms of staff retention and morale. Of course, this approach is likely to be easier for larger employers with flexible staffing requirements. It is inevitably smaller employers, which constitute the vast majority of UK employers, and those with a highly specialised workforce, which face more of a challenge in seeking to accommodate requests to work flexibly.

Whilst the aim of the Children and Families Act is to help people achieve a better balance between their work and home life, employers can benefit too. Business research suggests

that, in light of technological advances, not only is flexible working viable, but Generation Y has come to expect it. Flexible working is therefore a hot topic: not only can it enhance motivation and loyalty, it can also lower staff turnover and help to recruit and retain top talent.

However, to make flexible working 'work' it will be important to ensure that employees understand not only their rights, but also how business needs will inform employers' decisions. Remember that employers will still be able to reject requests if there are legitimate business reasons for doing so. A clear right to request policy should help to ensure buy-in to these business-focused decision making principles, ensuring that the right to work flexibly operates to the benefit of both employees and the organisation as a whole.

PRACTICAL APPROACHES AND PROCESSES TO MANAGE FLEXIBLE WORKING REQUESTS

Since the right to request came into force, relatively few claims have made their way to the appellate courts. Most flexible working claims have been made together with claims for direct or indirect sex discrimination; claims which could in fact have been made before the right to request came into existence.

Demonstrate serious consideration of the request

In practice, many employees will choose initially to make an informal approach to their line manager about changing their work pattern. The line manager's response is likely to affect the employee's approach and attitude towards the business. The line manager should be supportive and encouraging, even if this means directing the employee to make a formal statutory request. Under no circumstances should a line manager give the employee the impression that the request is hopeless or bound to be rejected. Even if the request is ultimately rejected the line manager is not in a position to convey this to the employee until the request has been properly considered. A negative and discouraging attitude can also increase the likelihood of an employee making a sex discrimination claim and reduce the chance of an employer successfully defending such a claim.

Before the meeting

Before the meeting to discuss the application takes place, the employer should do some homework. First of all, the issues raised by the employee as potential effects of the new work pattern and ways to mitigate those effects should be considered. The views of line management, and where relevant, affected colleagues, should be sought, and any other alternative ways to meet the employee's objectives should be highlighted and considered.

Very often, although the initial proposal cannot be accepted for good commercial reasons, there may be other work patterns which would satisfy the needs of both parties. The better reasoned the employer's response, the more likely it is to be accepted by the employee.

Consider alternatives

In most cases an employee will propose the "best" result for them, which may not be acceptable to the employer. However, the consideration process should be wider ranging and should consider any alternatives which might be available. In many of the initial tribunal cases in this area employees have expressed a willingness to consider other possibilities and to fit in with the needs of the business. In such situations the employer needs to be particularly wary of an indirect sex discrimination claim. 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 addition, if an employer is reluctant to consider a permanent change to the employee's working arrangements it may in some circumstances, be possible to agree to a temporary change.

Ensure consistency

Employers should aim to ensure that flexible working requests are recorded, and preferably processed, in a way that ensures that decisions are made consistently. For larger organisations with a centralised HR function, HR should be involved in ensuring that decisions are considered consistently and that the basis of rejection of any request is also consistent with previous decisions. Where inconsistent decisions are made the employer should explain the inconsistency (for example on the basis that the organisational capacity for flexible working has been reached and that to grant any further requests would undermine the business). This is particularly important where the applicant may be able to rely on a discriminatory distinction between themselves and previous, successful, applicants.

Explain the decision and the reasons fully and clearly

Although the Flexible Working Regulations give little guidance as to the content of the refusal, it is clear that an employee is entitled to receive some explanation as to why a particular application cannot be accepted. While tribunals have been extremely reluctant to consider the commercial rationale for such a decision, they remain entitled to find that a rejection has been made on the basis of "incorrect facts", a finding which should be easier to make where the basis of the decision is unexplained.

Consider carefully whether a role cannot be performed flexibly and whether (and how) that belief is justifiable

Many organisations have roles which they consider could not be performed on a flexible basis. Often such a contention does not survive critical analysis and may not be capable of being objectively justified. It is important to consider whether the belief that a role cannot be

performed on a flexible basis is due to stereotypes, prejudice or genuine business need. Cost may be an issue, but in Webster v Princes Soft Drinks ET/1803942/2004 the tribunal acknowledged that employers will have to put up with a certain level of cost and inefficiency for the sake of improving flexible working practices.

How to deal with competing requests?

In light of the extension of the right to request, it is conceivable that employers may receive competing requests from team members. The question for employers is how such requests should be managed?

The Acas Guidance recognises that, in such situations, it may not be possible to agree to all requests. It suggests that each request should be taken in turn; having considered and approved the first request the employer should remember that the business context has now changed and can be taken into account when considering the second request against the business reasons. The Guidance suggests that employers might consider the following:

- If the employer is unable to distinguish between all of the requests, it may consider (with the employees' agreement) some form of random selection such as drawing names from a hat. If such a selection process were used, it would be good practice to make this approach known to all employees from the outset in a flexible working policy.

- If the employer cannot accommodate any further requests for flexible working it may consider calling for volunteers from existing flexible working employees to change their contracts back to other arrangements thereby creating capacity for granting new requests to work flexibly.

- If the employer is not sure whether it can accept the request for business reasons it may agree (in writing) flexible working arrangements for a temporary or trial period rather than rejecting the request. In fact, in all cases it may well be sensible to have a yearly contractual review right so that the employer can re-assess the business need and the employee can regularly review his or her situation.

What are the impacts of discrimination laws?

The Acas Guidance also makes clear that employers are not required by the law to make value judgments about the most deserving request; an employer should consider each case on its merits looking at the business case and the possible impact of refusing a request.

However, in considering requests, an employer must be careful not to inadvertently discriminate against particular employees because of their protected characteristics under the Equality Act 2010 including for example, disability, sex, pregnancy and maternity.

Employers should therefore be careful where, for instance, flexible working arrangements would be a reasonable adjustment for a disabled employee, or where a rejection of a new mother's request to work flexibly could be seen as indirect sex discrimination.

So, how should employers deal with competing requests where some requests come from protected groups – for example if the employer receives one flexible working request from a working mother and the other from a women who wants time off to attend a professional course?

Realistically, against the threat of potential sex and disability discrimination claims from some groups of employees, value judgments will inevitably have to be made by employers.

What are the consequences of breach?

Employees may be able to bring a legal claim if they think they are being treated badly because they asked for flexible working arrangements.

The employee may bring a tribunal claim if the employer wrongly treats the request as withdrawn or if the employer's decision is not made in time. The claim must be brought within three months of the date on which the application is treated as withdrawn or the final decision is communicated. The tribunal may order the employer to reconsider the application and may award compensation not exceeding eight weeks pay.

ACTION PLAN

- Review and amend existing flexible working policies.

- Review home-working practices and policies. Employers will still be responsible for health and safety of employees on flexible working arrangements. Home-working practices and policies should take account of factors such as workplace assessments and the provision of IT equipment.

- Consider training for managers. Managers may be well placed to take decisions on flexible working requests, being closer to individuals and therefore better placed to see how flexible working could work for a specific employee from a practical perspective. Additionally, in practice, many employees will choose initially to make an informal approach to their line manager about changing their work pattern. Line managers should therefore be aware that they must not be seen to reject the request outright; they should be supportive and encouraging, even if this means directing the employee to make a formal statutory request.

- Consider examining in advance the staffing requirements of the business. This will help employers deal with requests and justify their decisions.