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GUIDANCE NOTE

The Right to Request Flexible Working From 30th June 2014

July 2014

On 30th June 2014 the Children and Families Act 2014 extended the right to request flexible working to all employees, not just those with caring responsibilities. This note sets out the new law.

Under the new law any employee with at least 26 weeks' continuous employment can make a flexible working request. An employee can only make one request in any 12 month period. Subject to having 26 weeks continuous service, fixed-term employees and those already under a flexible working pattern can make a request. This right does not apply to agency workers.

The procedure to be followed is now far less prescriptive than that previously in force. Equally, the penalties for a breach of the procedure are limited: more details at the end of this note.

Procedure

The procedure comprises of the following steps:

1. The employee must make a request for flexible working to the employer. The request must be in writing, must be dated and must contain the following prescribed information:-

    - details of the changes the employee is requesting and the date on which they wish the change to take effect. This can include changing the hours of work, times or days they work or place of work, amongst other proposals;

    - an explanation of what effect, if any, the change would have on the employer and how this could be dealt with; and

    - whether the employee has previously made a flexible working request and if so, when.

2. The employer then has a period of three months in which to consider the request, discuss it with the employee and then inform the employee of the decision. This time period may be extended by mutual agreement.

3. The new law does not expressly require an employer to offer a right of appeal to an employee against a decision regarding their flexible working request. However, the ACAS Code suggests that an employee should be given an opportunity to appeal, so that the employer can show that a reasonable procedure was followed. Further an opportunity to appeal would meet the requirement that an employer should deal with a request in a 'reasonable manner' (see below).

    It would therefore be advisable to give a right of appeal, especially as the Employment Tribunal when deciding on any complaints must take the ACAS Code into account.

Dealing with the Request

An employer must deal with a request for flexible working in a reasonable manner.

Although there is no statutory definition of what constitutes dealing with a request in a reasonable manner, the ACAS Guide and the ACAS Code suggests that this means giving careful consideration to the request and discussing it with the employee. Discussions should be held in private and the employee should be allowed to be accompanied by a work colleague.

If, without good reason, an employee fails to attend a meeting which has been set up to discuss the flexible working request and then fails to attend a further rearranged meeting the employer can treat the flexible working request as withdrawn. This would also be the case where an employee is given the right to appeal and fails to attend two appeal meetings.

Refusal of a Flexible Working request

A request may only be refused on eligibility grounds or for one or more of the prescribed statutory reasons, which are listed below.

Refusal on Eligibility Grounds

The request may be refused because it does not meet the statutory requirements. If either the employee is not eligible (i.e. has less than 26 weeks continuous service) or the employee fails to comply with the procedure then strictly speaking the employer would be entitled to refuse the request.

If the employee fails to meet the eligibility criteria then the employer should consider whether the application merits consideration despite it not being a request in accordance with the statutory procedure. If the application is to be rejected then it would be advisable to reject it on one or more of the statutory grounds following serious consideration, rather than to simply reject the application because the employee does not fit the criteria for the statutory request. This is because, if the request is rejected without being given serious consideration, the employee may have grounds to bring a claim of discrimination claim under the Equality Act if they have a prescribed characteristic, e.g. disability, sex.

If the request is technically flawed because it does not contain the prescribed information then the employer should consider explaining this to the employee and suggesting they re-submit a valid request. The prohibition on re-submitting a request within 12 months will not apply where the request itself is procedurally invalid.

Refusal of Request for a Prescribed Reason

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 refusing a request, which are set out in section 80G of ERA 1996 and only these grounds may be raised as reasons for rejection. These are:

- The burden of additional costs.
- Detrimental effect on ability to meet customer demand.

- Inability to re-organise work among existing staff.
- Inability to recruit additional staff.
- Detrimental impact on quality.
- Detrimental impact on performance.
- Insufficiency of work during the periods the employee proposes to work.
- Planned structural changes.

It is essential that the employer's notice of refusal is dated and states which of the statutory grounds (listed above) within section 80G(l)(b) of ERA 1996 applies. It is also good practice to include an explanation of the reasons for refusal. The notice of refusal of an initial application must also set out the appeal procedure; if you decide to offer an appeal.

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. It would appear that, providing that one or more of the eight prescribed reasons are given, only if the employer's view is based on incorrect facts, could the decision actually be questioned.

It would be advisable to give a full explanation to an employee of the reason for refusing a request for flexible working, so as to be transparent and avoid any claims of discrimination or unfair treatment.

Potential Claims

An employee may bring an Employment Tribunal claim against an employer in relation to a flexible working request on the basis that:

- the flexible working request was not dealt with in a reasonable manner;
- the employee was not notified of the decision within the three month (or longer if agreed) time period;
- the request was refused for reasons other than the Prescribed Reasons;
- the refusal was bases on incorrect facts; or
- the employer treated the request as withdrawn when it did not have reason to do so.

If an employees' claim is successful the Employment Tribunal may make an order for the employer to reconsider the request and/or award compensation of up to 8 weeks' pay (capped at the statutory rate; £464 per week as at April 2014).

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

ASHTON BOND GIGG
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