

Introduction

By law, any of your employees with at least 26 weeks' unbroken employment can make a written request for flexible working. If they do so:

- You have 3 months (which can be extended by agreement) within which to consider the request, discuss it with the employee (if appropriate) and notify the employee of your decision.
- You must deal with the request in a reasonable manner.
- You can only refuse a request for one (or more) of the eight reasons set out in the legislation: see Refusing the Request
- The employee can complain to a tribunal about rejection of their request
- Only one request can be made in any 12-month period.

Who has a right to request flexible working?

- Only employees. This includes any employees who already work under a flexible working pattern. Agency workers do not have a statutory right to request flexible working
- The employee must have 26 weeks' unbroken employment to qualify for the right.
- Only one request may be made in any 12 months period.
- What kind of change in working pattern can your employees request?
- A change in the hours they work.
- A change to the times when they are required to work.
- A change to the place of work

There are in fact very few limits on what the employee could request by way of change to their working pattern.

How should an employee make a request?

The employee's request 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 your business and how any such effect could be dealt with.

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

How should you deal with a request?

If you receive a flexible working request under the statutory scheme you must:

- Deal with it in a reasonable manner. ACAS recommend that you should meet with the employee to discuss the request, permitting the employee to bring a companion to the meeting if they wish (however, there is no legal right to be accompanied), consider the request carefully by looking at the benefits of the requested changes, weighing these against any adverse impact on your business.
- Inform the employee of your decision in writing as soon as possible, and no later than 3 months after the request is made.
- Only refuse the request on or more of the prescribed reasons set out in the legislation: see Refusing the Request.

Trial periods

You may wish to offer a trial period rather than reject the request, particularly if you are unsure that the request is sustainable. Although an employee does not have a legal right to request a trial period, he or she may be able to argue that you should have offered a trial period as part of dealing reasonably with their request.

Granting the request

If you accept the employee's flexible working request, or both of you reach agreement on a variation of the request after discussion, the new work pattern will be a change to the employee's employment contract and will be permanent, unless otherwise agreed. This means that the employee cannot go back to their old arrangement without both parties consent.

Beyond the legal requirement to give the employee a written statement of any changes to their terms within one month of the changes taking effect, it is good practice to issue a new contract, or at least a letter, setting out the terms finally agreed.

Refusing the request

You are entitled to reject the request if the employee is ineligible to make a statutory request for flexible working or fails to comply with the procedure, both of which are explained above. In any other case, you can only refuse the request on one or more of the following prescribed reasons:

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

The ACAS Guide gives (non-binding) tips and examples in respect of these reasons.

In selecting the ground for refusal the wording of the legislation suggests that the test is a subjective one on your part. If you consider that one of the grounds applies, then the test is satisfied. The test does not on the face of it include any requirement of reasonableness. It would appear that, assuming one of the prescribed reasons for rejecting the request is given, an employee can only challenge your decision if your view is based on incorrect facts.

Although there is no statutory requirement on you to explain why the particular reason for rejecting the request applies, you might consider that an explanation would be beneficial to the employee and would support your decision, particularly in the event that the employee wishes to appeal (which ACAS suggest they should be permitted to do) or if the employee challenges your decision by bringing tribunal proceedings.

Appealing your decision

The legislation does not expressly require you to allow an employee to appeal against rejection of their flexible working request. However, ACAS recommend that employees should be allowed to appeal. There are no prescribed grounds of appeal.

If possible, the appeal should be heard by someone who was not previously involved in the process. This is the approach recommended by ACAS but this is not always necessary, or possible for many small businesses.

As with the initial decision, the outcome of an appeal should be given to the employee in writing, dated and, where the appeal is rejected, state the statutory ground relied on.

Complaining to an Employment Tribunal

If their flexible working request is refused, an employee may bring a claim in the employment tribunal on any of the following grounds:

- That you failed to deal with their application in a reasonable manner.

- That you failed to notify them of your decision on their application in time.
- That you rejected the application for a reason other than one of the statutory grounds.
- That your decision to reject the application was based on incorrect facts.

A claim cannot be submitted to a tribunal without first obtaining a certificate from ACAS confirming that the case was referred to it for conciliation and that process has come to an end.

The claim must normally be brought within 3 months less one day of being notified of the decision to reject the request. In appropriate cases, this time limit can be extended by up to one month to permit ACAS conciliation to take place.

Approach of the Employment Tribunal

A tribunal cannot question the business rationale behind your decision to refuse the request. Neither can it substitute its own decision as to whether the request should have been granted. This severely restricts the scrutiny to which your decision may be subjected. Essentially, the tribunal's role is restricted to:

- Reviewing the procedure you followed.
- Considering whether the request was taken seriously.
- Considering whether the decision was based on correct facts.
- Considering whether the reason given falls within the permitted grounds stated in the legislation.

What award can the Employment Tribunal make?

Where a tribunal finds that an employee's claim is well founded, it must make a declaration to that effect and may make either or both of:

- An order for reconsideration of the request.
- An award of compensation to be paid by you to the employee, of such amount as the tribunal considers just and equitable, up to a maximum amount of eight weeks' pay. A 'week's pay' is capped at (currently) £479.

ACAS arbitration scheme

ACAS's arbitration scheme for unfair dismissal claims also extends to claims under the statutory right to request flexible working. The process of arbitration is intended to be quicker, cheaper and less formal than pursuing a claim through an employment tribunal. The result can be appealed on limited grounds through ACAS, but is intended to be final, thereby avoiding any further litigation. Both parties must agree to arbitration under the scheme, although the scheme is not available if there is any issue other than a complaint of unfair dismissal or breach of the right to request flexible working.

Are there other claims employees can make if their request is rejected?

Some employees may make a request for flexible working for reasons which, if their request is refused, might give them a potential claim under the Equality Act and employers should be mindful of that risk when considering the request. Typically, these requests will be made by employees seeking to vary their working hours in accordance with childcare commitments (possibly on the return from maternity leave), religious requirements (such as not wanting to work on the Sabbath, or being allowed time off to pray or attend worship) or who are seeking adjustments because they are disabled.

Further reading

ACAS has produced a Code of Practice together with a guide on handling requests to work flexibly in a reasonable manner. The Code contains a process to follow when making and considering flexible working requests and includes both legal and good practice requirements.

- Code of Practice on handling in a reasonable manner requests to work flexibly:
<http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf>
- The right to request flexible working: an Acas guide: <http://www.acas.org.uk/media/pdf/1/a/The-right-to-request-flexible-working-the-Acas-guide.pdf>

The Information presented here has been provided by

If you would like advice about how the issues in this factsheet
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