

Work and Parents: Competitiveness and Choice

Consultation on the draft regulations to implement the right to request flexible working and the duty on employers to consider requests seriously

Summary of responses

Introduction

The consultation on the draft regulations to accompany the primary legislation in the Employment Act 2002 to implement the new right to request flexible working took place between 10 July and 10 October 2002. 85 formal responses were received by the end of the consultation. Just under a quarter of the responses were from individual employers of all sizes, employing over 174,000 staff. In addition 25 employer representative groups, representing a membership of over 4.4 million members responded. 16 employee representative groups, covering just over 8.7 million workers also responded. The remaining 24 responses came from charities, academics, legal advisors, parent groups and individuals. To supplement the consultation officials met key stakeholders and the Small Business Service held two small business focus groups.

There will be two sets of regulations: 'The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002' and 'The Flexible Working (Procedural Requirements) Regulations 2002'. Both sets of regulations keep as close as possible to the Work and Parents Taskforce's recommendations¹. The key questions surrounding the regulations were set out in the consultation document published and are set out in turn below.

1. Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002

Definition of relationship

- *Are the criteria defining who may be considered a parent and their relationship with the child appropriate?*
- *Is it appropriate to include adoptive parents and foster carers within the scope of the right?*

The vast majority of responses considered the definition criteria appropriate. There was support from both employers and employees alike for the wide definition set out in the draft regulations to reflect today's family relationships.

¹ The Work and Parents Taskforce was established by the Government to consider the detail of the right. It set out its recommendations in its report 'About Time: Flexible Working' in November 2001.

This definition includes biological parents, adoptive parents, foster parents and legal guardians, and their married partners. Like the Paternity and Adoption regulations, these regulations also cover unmarried partners living with the child.

There was almost unanimous support for the inclusion of adoptive parents, and the inclusion of foster parents was also widely supported. Some concern was expressed regarding the fact that foster care is by definition of more temporary duration and undertaken for financial reasons.

There were also some detailed questions raised concerning definitions and the specific wording used, including 'blood relative', 'enduring family relationship' and 'responsibility for the upbringing of the child'. A key message was that these regulations should be consistent with the drafting used in the Paternity and Adoption Regulations.

Outcome: The definition of the relationship with the child is to be kept broadly the same, but amended to be consistent with the approach taken in 'The Paternity and Adoption Leave Regulations 2002'.

Adoptive and foster parents are to be covered by the new right.

Form of application

- *Should an application under the right have to be made on a statutory application form for it to be valid or should there be freedom about the form of an application, allowing requests to be made in freeform letters, on tailored forms devised by employers and on a best practice form provided by Government?*

The majority of responses argued for a standard best practice form which is not statutory. About a quarter supported a statutory form, largely on the basis that it would avoid issues of misinterpretation and information not being provided, and to ensure a clear signal to employers of their duty to consider the application seriously.

Some employee representatives raised concerns that a statutory form might deter employers from extending the scope of the right within their own organisations. Many employer representatives noted that some employers already have their own forms which they should not be discouraged from using where appropriate.

Some concern was expressed about there being no requirement on employers to provide an acknowledgement to the application.

Outcome: Applications to work flexibly under the right will not have to be made on a statutory application form. The Government will provide a best practice application form to accompany the guidance, which will include an acknowledgement slip.

Date of making application

- *Should the date the application is made be the date on which the employer receives it?*

The vast majority of responses supported the proposal that the date an application is made should be the date on which it is received by the employer.

Outcome: The date an application is made will be the date it is received by the employer. The detail in the regulations on what is meant by 'received' will be simplified.

Breaches of procedure by employer

- *Do the regulations ensure that all breaches of the procedure, where appropriate, provide for the employee to be able to make a case to an employment tribunal?*

The vast majority of respondents felt that the provisions in the draft were sufficient. Some employee representatives considered that the breaches could be made clearer.

Outcome: Overall, the Government considers that the regulations sufficiently cover the breaches of the procedure, and there is no need to substantially amend them. However, the regulations will be amended to clarify that they include the circumstance where an employer readily agrees to a flexible working pattern, thus removing them of the need to hold a meeting, and then fails to give proper notice. The breaches will be amended to cover the same scenario at appeal.

Compensation

- *What number of weeks' pay will provide a meaningful level of compensation and act as an incentive to ensure employers consider applications properly?*

This was a difficult issue and the responses were largely split into two main arguments. Employers argued for a lower limit, the majority, especially the smaller employers, requesting 4 weeks' pay as the maximum, although there were also small clusters at 6, 8 and 12-13 weeks' pay. The only employers to go above 13 weeks' pay were from the public sector. Conversely all the employee representatives argued for the limit to be set at 52 weeks' pay or more. The arguments for each of these positions were set out in the draft consultation document.

Outcome: On balance it has been decided to set the maximum amount of compensation that a tribunal may award at eight weeks' pay, with a week's pay subject to the cap under the Employment Rights Act 1996. The cap is reviewed annually and currently set at £250.

Failure to allow the employee to be accompanied at the meeting to discuss the application or appeal will, as proposed in the consultation, be treated separately, with an employment tribunal being able to make an award of up to 2 weeks' pay (capped, as above).

2. Flexible Working (Procedural Requirements) Regulations 2002

The Meeting

- *Is the approach taken in the regulations to arranging the meeting appropriate?*

The majority of responses felt that the outlined approach was appropriate and practicable. There was unanimous agreement that responsibility for arranging the meeting should lie with the employer with an emphasis on the mutual convenience and agreement.

Outcome: The regulations outlining how a meeting should be arranged will remain unchanged.

Employee's right to be accompanied

- *Should the regulations allow for an employee's companion to be from outside the company or should the regulations allow for an employee's companion to be only from within the company?*
- *Which approach would better serve the needs of small employers and their employees? Why?*
- *Should the guidance suggest employers should consider allowing the employee to be accompanied by someone who is outside the scope of the regulations where it might be helpful in reaching a solution suitable to them both?*
- *Should the role of the companion follow the existing definition as set out in the ERA 1999? If not, how should it differ?*

Opinion remained divided on who could be the companion and the arguments largely remained as described in the consultation document. The majority of employee representatives argued for consistency with the existing right set out in the ERA 1999. This was also supported by some employer representatives on consistency grounds. A few respondents commented that the right to have a companion should be restricted to an appeal meeting only.

A number of employees suggested that the guidance should allow for flexibility and employer's discretion, especially for small or non unionised employers where there may be difficulty finding an appropriate colleague within the workplace. A small number of employee representatives argued that there should be no restrictions and that employees should have free choice.

The majority of employer representatives wanted a far more limited definition, ranging from the companion being restricted to a colleague from within the workplace only, or slightly extended to allow for an internal trade union representative and workers from another site. Employers raised the general concern that the meeting should not mirror a grievance and disciplinary hearing.

Most respondents expressed concern at the definition of 'friend', agreeing that it was not appropriate to include this within the regulations and that the companion should be more precisely defined.

There was general agreement by all parties that the role should reflect the existing definition in ERA 1999.

Outcome: The Work and Parents Taskforce recommended the companion should be a fellow employee, friend or appropriate, recognised trade union representative. Noting the concerns expressed about the inclusion of friend, the Government believes allowing the companion to be another worker employed by the same employer would keep close to the Taskforce definition. It would, for example, allow a local recognised union representative based at a different site to accompany the employee. The regulations will be amended to reflect this definition. The regulations will allow the companion to address the meeting (but not answer questions on behalf of the employee) and confer with the employee during the meeting.

Remedy for refusal to allow accompaniment

- *Is the remedy set out in section 11 of the ERA 1999 appropriate in cases where the employer fails to comply with the right to be accompanied set out in these regulations?*

The vast majority of responses to this question expressed agreement that the remedy should be identical to that set out in ERA 1999. A small number suggested that two weeks' pay as a remedy was not substantial enough. One employer suggested that there should not be a separate remedy for this issue.

Outcome: The remedy for where an employer fails to comply with the right to be accompanied in the Flexible Working regulations will be consistent with the remedy set out in the Employment Relations Act 1999 section 11.

Employer's decision

- *Is it sensible to provide the employer with choice about the form of how they provide written notification (as opposed to giving notice on statutory form)?*
- *Is the information that the employer must provide appropriate?*
- *Is it appropriate that the guidance to accompany the right should indicate the level of explanation that an employer should provide when a request is declined, including a set of examples covering a range of circumstances?*

The majority of responses argued for a standard best practice form which is not statutory, although most suggested that the guidance would need to provide a selection of example forms/ letter templates to illustrate the level of explanation required when declining a request. It was also raised that the guidance should urge employers to consider and discuss all possible options before declining a request.

Most responses were content for 'sufficient explanation' to be expanded upon in the guidance, although employers stressed that this was a key issue and would want the guidance to provide as much clarity as possible.

Outcome: The Government will provide a set of best practice forms to help employers consider applications seriously.

When a request is agreed, the employer will specify in writing the variation in work pattern agreed to and the date from which it is to take effect. Where a request is refused, the employer will need to set out the business grounds for refusal, provide a sufficient explanation as to why these grounds apply and set out the appeal procedure.

Appeal procedure

- *For an employee's appeal to be valid should it have to be on a statutory form, or should the employee be provided with complete freedom as to how they can provide a written appeal? In the latter case, the Government would provide a voluntary 'best practice' form.*

This was uncontroversial with unanimous agreement that there should be provision for appeals and for internal processes to be utilised fully before resorting to an employment tribunal.

Outcome: A employee will not have to use a statutory form. They will have complete choice as to how they make a written appeal.

Extension of time limits

- *Is the approach of requiring the employer to seek the employee's agreement for an extension to the time when they must give notice of their decision appropriate where further action is identified at the meeting to consider whether a desired working pattern can be implemented?*
- *Is it sufficient for the draft regulations to provide for employers and employees to be able to agree variations of time limits, and leave it to best practice about whether a written record is made, or should variations be recorded in writing as misunderstandings may occur and evidence of the agreement may be required at a later stage?*
- *Should there be an automatic extension to the time period where an application is submitted and the individual is absent? If so, what types of absences should justify an extension and for how long?*

There was unanimous agreement that all variations needed to be recorded in writing to avoid disputes, with the majority believing it important that both parties agree.

Some employee representatives did not support an automatic extension where the employer was sick or absent as a result of annual leave. Employers however, expressed concern about potentially finding themselves in breach of the procedure without ever being aware that a request had been submitted, or having insufficient time to deal with a request properly.

It was suggested that an automatic extension should be limited to specific absences and subject to a cap.

Outcome: All extensions to time limits will need to be recorded in writing by the employer. There will be an automatic extension of the period in which a manager has to arrange the first meeting, up to a maximum of 28 days, where the absence is due to sickness or annual leave.

Withdrawal of application

- *Are the circumstances in which an employer may consider an application as having been withdrawn described in the regulations appropriate?*

The majority of responses considered that the draft regulations covered all circumstances adequately. However, there was concern that failure to attend a meeting irrespective of the reason was too harsh a test for potentially considering an application as withdrawn.

Outcome: An employer will only be able to treat an application as

withdrawn where the employee has failed to attend a meeting more than once where they have failed to provide reasonable cause. Unless provided by the employee, an employer will have to confirm the withdrawal of an application in writing.

Other comments

There were a number of further comments made concerning the main framework of the right as set out in the primary legislation in the Employment Act 2002, for instance the issue of the age of the child and length of qualifying service. These issues were outside the scope of the secondary legislation, although these issues will be revisited when the right is reviewed in three years' time.

Several responses suggested issues to be covered in guidance. The DTI plans to test the draft guidance with interested stakeholders in due course.

DTI

November 2002

List of responders to consultation

A small number of respondents submitted responses in confidence and are thus not listed below.

ACAS
AMICUS
AMP
Asda
Association of Certified Chartered Accountants
Association of Convenience Stores
Association of Licensed Multiple Retailers
Association of University Teachers
BAA plc
Better Regulation Task Force
Birmingham Chamber of Commerce and Industry
British Dental Association
Brewing, Hospitality and Leisure (British Beer and Pub Association, British Hospitality Association, Business in Sport and Leisure)
British Chambers of Commerce
Business Services Association
Cabinet Office, Conditions and Job Evaluation
Church of England Board for Social Responsibility
Clarks Solicitors
Close the Gap (Scotland)
Communication Workers Union, Equality Department
Confederation of British Industry
Contact a Family
Council for Disabled Children
Denbighshire County Council
Department of Health
Electricity Association
Employers Organisation for Local Government
Employment Lawyers Association
Employment Law Bar Association
Engineering Employers' Federation
Equal Opportunities Commission
Food and Drink Federation
Federation of Master Builders
Federation of Small Businesses
GMB
Graphical Paper and Media Union
Greater Manchester Low Pay Unit
HM Customs and Excise
Imperial College of Science, Technology and Medicine
Institute of Directors
Islington Law Centre
Kent Police College
Law Society, Employment Law Committee
Legal-Island

London Borough of Camden
Manchester Chamber of Commerce
Marks and Spencer
Maternity Alliance
NAAFI
NASUWT
National Association of Citizen's Advice Bureaux
National Hairdressers Federation
National Union of Teachers
Newspaper Society
New Ways to Work
North Lanarkshire Council
Pay and Employment Rights Service, Yorkshire & Humberside Low Pay Unit
Prospect Union
Public and Commercial Services Union
Radio, Electrical and Television Retailers' Association
Retail Motor Industry Federation
Six Continents PLC
Small Business Council
Small Business Service
South East Employers
South Wales Chamber of Commerce
Thompsons
Trades Union Congress
Travers Smith Braithwaite
UNIFI Research
UNISON
Union of Shop, Distributive and Allied Workers
University of Birmingham
West Dunbartonshire Council
Wiltshire Wholesale Electrical Company Ltd
Work Foundation
Working Men's Club and Institute Union Limited