



## Flexible working

### Background

Most people are familiar with the concept of "flexitime", whereby an employee works specified "core hours", but has the flexibility to work the remaining contracted hours at any time within certain broad specified bands of time.

However, a whole range of non-standard working arrangements have become increasingly common over the last decade – largely as a response to meeting recruitment difficulties, but also to improve motivation, to help retain qualified and experienced staff, and often to support and encourage Equal Opportunities and diversity initiatives. In addition, there has been pressure from employees who battle to maintain a satisfactory balance between their work and other commitments, and from the government, who have been taking steps to legislate towards facilitating this.

This is now commonly referred to as "work-life balance" and initiatives taken by employers to help employees manage this to best meet their needs and aspirations include the following:

- flexi-time
- staggered hours
- time off in lieu
- compressed working hours
- shift swapping
- self-rostering
- annualised hours
- job-sharing
- part-time working
- term-time working
- working from home
- tele-working
- breaks from work – including unpaid sabbaticals, or career break schemes.

The most common of these are part-time work, job sharing and flexitime. Many of these are non-financial benefits which give the employee greater control of his/her life, and enable a more satisfactory lifestyle to be achieved.

This overview deals with the statutory right to request flexible hours, and also looks at some of these other options. When considering any of these varied arrangements we would stress the need not only to consult fully with the individual involved, but also with all other staff affected: if you are considering a request from someone for a reduction in hours, how will the extra work be distributed? If you are considering more flexible working arrangements, what implications will this have in terms of cover, or the undertaking of routine tasks which have to be done at certain times? How will this impact on your ability to meet customer requirements at certain times of the year/month/day? By consulting fully, any issues will be properly aired and hopefully resolved, and by reaching agreement in advance this should prevent any feelings of resentment amongst other employees.

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## Flexible working – the statutory requirements

As from 6 April 2003, the parents of young or disabled children have had the right to request flexible working arrangements. However it should be noted that the right is to "request": there is no automatic right to work flexibly as there will always be circumstances where the employer is unable to accommodate an employee's request.

### Eligibility

The right applies to all employees (not "workers") who have a child aged under 6 (or disabled child under 18), and who have completed at least 26 weeks' continuous service at the date the request is made.

In addition, the employee must:

- make the application no later than two weeks before the child's sixth birthday (18th birthday in the case of a disabled child)
- be the mother, father, adopter, guardian or foster parent of the child, or be married to, or the partner of, such a person
- have or expect to have responsibility for the child's upbringing
- be making the application to enable him/her to care for the child
- not be an agency worker
- not be a member of the armed forces
- not have made another application to work flexibly under the right during the past twelve months (regardless of the outcome).

### How to make a request

The employee may request a change to his or her contracted hours of work, times of work and/or place of work.

A request must be put in writing (email is allowed), it must be signed and dated, must confirm the relationship with the child, and must state that it is such an application and confirm that no previous applications have been made in the last 12 months. In addition, the employee is required to specify the working pattern he/she wishes to adopt, and to explain the likely impact on the business, including how the request could be accommodated. The employee must also specify when he or she would like that change to take place. You may wish to use our standard request form to help ensure the employee provides all of the necessary information.

The employee may request, for example, a change of working hours, a change to the times he/she is required to work, or to work from home. Some requests may be minor: for example a delay in the start of working time to accommodate the school run, others may be more significant.

The employee should consider his/her request very carefully as only one application can be made each year, and an accepted application will normally mean a **permanent** change to the employee's terms and conditions, unless otherwise agreed. Employees who have been granted more flexible arrangements will not have the right to insist on a return to full-time working (or a return to their previous hours, or pattern of working, whatever these were) once their responsibilities for the upbringing of a young or disabled child have ceased or diminished. Therefore any proposals for change should be fully considered, especially where these may result in a drop in salary. The Regulations do seem to allow the parties to agree to a temporary change (if they wish) but many employers would be reluctant to guarantee that employees could revert back to their previous hours in several years' time: however this may be a preferred option in some (limited) cases. Also, a trial period may be agreed.

## Following receipt of a request

Since the timetable is strict for handling such claims, it is good practice to acknowledge receipt of a request in writing. Also do check the employee is eligible to make such a request. If any of the required information is not provided in the request, then employers should inform the employee that the application is incomplete, and explain what further information is needed.

On receipt of a request the employer must arrange a meeting to discuss this with the employee (unless the request is simply accepted and the employee notified in writing of the variation agreed to and the date on which it will take effect). This meeting should take place within **28 days** of receipt of the request. If the person who would normally consider the application is on sick or annual leave, the 28 day timescale commences on the day the individual returns. At this meeting, at which the employee may be accompanied by a fellow employee, the employer should discuss how best the request may be accommodated, and consider any other alternatives which may be a better solution.

Following the meeting, the employer must provide a written decision within **14 days** of the date of the meeting.

If the employer agrees to the request, this should be confirmed in writing, specifying the date on which the new contractual arrangements will apply and confirming what these arrangements are. Any changes are a permanent change to the terms and conditions unless otherwise agreed.

## Reasons for refusal

There is no automatic right to work flexibly, as there will always be circumstances where the employer is unable to accommodate the requested work pattern. Employers who reject an application will have to write and confirm this, providing a specific business reason, which **must** be one of those permitted by the legislation, eg:

- detrimental effect on the ability to meet customer demand
- inability to reorganise work within available staffing
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- burden of additional cost to the business
- insufficient work during the period the employee proposes to work
- planned structural changes, or
- any other such grounds as the Secretary of State may specify by regulations.

In addition, sufficient explanation must be included as to why the chosen grounds apply in relation to the employee, together with details of the appeal procedure.

A word of caution: whilst it may be possible to refuse a request for flexible working under one of the above business reasons, employers still also need to bear in mind indirect sex discrimination which will continue to play an important role in achieving flexible working patterns. A female employee may claim indirect sex discrimination if she feels that her request has been unfairly refused, and discriminates against women, as the compensation for this is unlimited, and can include an award for injured feelings.

## Right to be accompanied

The employee may ask to be accompanied at any meetings held in relation to his/her request, by a fellow employee – who has the right to paid time off during working hours to attend.

The companion is allowed to address the meeting (but not to answer questions on behalf of the employee) and to confer with the employee during the meeting. If the chosen companion will not be available at the time proposed for the meeting, the meeting should be postponed until a convenient time can be found within seven days of the date initially proposed by the employer.

Neither employee nor companion may be subjected to any detriment as a result of the employee seeking to exercise the right to be accompanied.

## Appeals

Any employee who feels that he/she has been unfairly treated by the employer's refusal of his/her request has **14 days** in which to appeal against the decision. An appeal should be made in writing, setting out the grounds for the appeal, and be dated.

Unless the employer decides simply to agree to the request and confirms the agreement in writing, the employer must hold a meeting to hear the appeal within **14 days** of the date on which the notice of appeal is given.

If the appeal is upheld, the employer should, within **14 days** of the meeting, set out in writing the contract variation agreed to and the date on which the variation is to take effect. Where the employer dismisses the appeal, the grounds for the decision and sufficient explanation as to why these grounds apply should be confirmed in writing – again, within **14 days** of the meeting.

## Timescales and meetings

The above timescales may be extended by agreement (in writing) between the employer and employee. If the employee fails to attend two or more meetings without providing a reasonable explanation, the employer may treat the application as withdrawn (although it is good practice to write to the employee to confirm this).

## Remedies

A claim to an employment tribunal may only be made in respect of the following:

- failure on the part of the employer to hold a meeting with the employee, or to notify the employee of the decision: compensation of up to 8 weeks' pay (subject to the statutory maximum on a week's pay as set out in the Employment Rights Act 1996)
- failure to comply with a request to be accompanied by a fellow worker – compensation may be awarded of up to 2 weeks pay (subject to the statutory maximum on a week's pay).

There is currently no mechanism for providing a remedy to an employee whose employer unreasonably refuses a request to work part-time, or who gives a reason which is different to one of those set out above, although tribunals can order the employer to reconsider the application. However, the Secretary of State has retained a power to impose penalties where an employer has failed to provide this information, so this may change!

## **Further advice on agreeing more flexible changes**

If considering requests which involve a reduction in hours, or changes in the number of days worked, do consider the following – the list below is not exhaustive and some of the items may not be appropriate, but it is a useful starting point! If considering home-working, see the separate section below.

- What are the new hours of work and how will these be measured (don't forget your obligations under the Working Time Regulations).
- If a small reduction in hours away from home is requested, can lunch/breaks be reduced to accommodate some of the reduced hours required? Or flexible start times/lunch hours/finish times within an office so that everyone gets what they want?
- What effect will the change in hours have on other staff? If reducing hours, how is the extra work going to be distributed? If changing hours, will this have any affect in terms of cover for phones, reception, dealing with client enquiries, other routine tasks etc which are timed to meet specific deadlines. Do consult with anyone else affected – if you can reach agreement on the best way forward this may prevent bad feeling or resentment from others.
- Might a job-share be a solution?
- If the job involves travel, for example working at clients' premises, can the changes be accommodated so that client needs are still met?
- If term time only working is requested, it would be advisable to specify that holiday entitlement must be used during this "non-working" period, and that holidays (other than perhaps odd days) must not be taken during term time.
- How will holiday and sick leave be affected/ monitored?
- How will any variable pay or bonuses be affected? (as above)
- Are pay and benefits pro-rated appropriately? (as above)

## **Extension to elderly or sick adult relatives**

The Government is currently considering whether this legislation should be extended – to cover all workers with caring responsibilities for elderly or sick adult relatives. This is likely to be introduced in April 2007. One in six people aged 16 or over care for a sick, disabled or elderly person – 6.8 million carers in the UK – and this is expected to increase to 22% within the next five years.

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The remaining sections deal with the other common types of flexible working. In line with your Equal Opportunities or diversity policy, you may wish to consider these for a range of reasons, not just for assisting staff with childcare responsibilities. You may find that staff appreciate these policies and accept them more enthusiastically if the criteria for consideration are broadened to include, for example, care of elderly or ill relatives or other dependents.

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## **The advantages of flexible working**

The business advantages of taking a more flexible approach can include:

- enhanced job satisfaction – many employers report that the main benefit of flexible working is increased staff satisfaction.
- increased productivity – statistics prove that a happy workforce is more productive.
- better utilisation of workers – flexibility can work both ways with work being done to meet the demands of the job, and time off being taken in quiet periods.
- less stressed workforce – workers can accommodate either family commitments or other outside activities and therefore feel less stress, as they are not so torn between conflicting demands.
- financial gain to employees? In some cases, the employees can benefit from reduced costs – of childcare, or domiciliary care and this is therefore an attractive benefit which costs the employer nothing but is very valuable to the employee.
- reduced turnover – people can fit demands of home life within their working lives and are also noticeably more committed to staying with an employer who facilitates this.

- wider pool for recruitment – flexible working is an overwhelming major attraction – proving even more of a pull than money. In addition, flexible schemes can attract a wider range of candidates who otherwise would be barred from applying (because of other commitments).
- better timekeeping – if people can fit their working time around outside commitments (eg the school run, rush hour traffic) their ability to arrive "on time" may be enhanced, and the business will benefit from their presence, rather than having to manage their absences.
- lower costs – in some organisations, the introduction of some form of flexitime system decreased costs as time which was previously spent attending appointments, taking long lunch hours, etc is now taken in the employee's own time and is no longer working time. In addition, having a "bank" of worked hours can reduce overtime payments – overtime is worked to meet the demands of the job but may not be automatically paid until say the end of each quarter, and it may be that the employee prefers to take the time in lieu.
- reduced casual absenteeism – in some environments employees take time off sick when they are not actually ill – in order to look after children, deal with personal or family emergencies, catch up on domestic issues etc. If employees can take this time off legitimately, they may well do so instead of "pulling a sickie". Two thirds of the organisations who offered flexible working believed that this helped reduce absence, as do flexible annual leave and occasional home working.
- accommodation savings: improving desk utilisation by replacing the conventional one-desk-per-employee arrangement with fewer "hot desks" can offer significant savings
- loyalty – because the employer has attempted to meet the employee's needs, greater loyalty is usually assured.
- lower travelling costs – for those who work at home some or all of the time, or who can travel outside of the rush hour periods.
- retention of experience: you may be able to retain older employees with particular experience who are happy to work beyond retirement age but not on a full-time basis (from 2006 there will be a relaxation of Inland Revenue rules which currently prevent employees from drawing their occupational pension while working for the same employer).

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## Home working

If an employee asks to work from home, there are a number of implications which need to be considered, including the following:

- **Management**

- ◆ how to manage someone you cannot see – consider the need for regular routine meetings, reporting requirements, don't forget training and development needs
- ◆ how to gain access to the home (bearing in mind the right to privacy)
- ◆ how you will measure productivity
- ◆ contractual issues – should you agree to homeworking as a privilege, not a right? – with you retaining the right to insist on a return to work if you feel it is being abused? Or would a change in circumstances be too expensive to accommodate? Will you give the employee the right to return to office-based work if he or she finds that home working is not the solution? You will also need to specify whether the new arrangements are made on a permanent or temporary basis, and if temporary, for how long the agreement will last, and whether it will be subject to review.

- **Working hours and conditions**

- ◆ how to monitor – if necessary
- ◆ when and how to contact the person – remembering that staff have the right to privacy out of hours.
- ◆ notification of absence and working time and other procedures for reporting in to the office
- ◆ what will be allowed as expenses – eg travel to and from your normal place of business? If required to travel to meet with you at the office, will such travelling time be paid etc? Will you make any contribution towards heat, lighting etc?
- ◆ meeting – required to attend routine meetings?
- ◆ training – requirement to attend business or other premises

- **Communications**

- ◆ how to achieve sense of belonging – ensure the person doesn't become isolated
- ◆ sense of trust
- ◆ ensure employee is kept up to date

- **Equipment**

- ◆ phone (separate line?), computer and any other equipment
- ◆ rules regarding personal use of this equipment
- ◆ maintenance of equipment
- ◆ allowance for small purchases – eg stationery?
- ◆ internet and email use and policy
- ◆ data protection requirements – both storage and access to information, and also ability to retrieve essential information if the worker is absent/ill
- ◆ security – is the information stored on the equipment kept securely? Does the employee have the appropriate methods of discarding waste material (eg shredders etc).
- ◆ remote access – to emails and phone messages whilst away etc – both by the employee and by the employer

- **Health and safety**

- ◆ normal health and safety legislation applies.
- ◆ requirement to have a risk assessment

- **Insurance**

- ◆ personal and public liability
- ◆ do you need to extend your insurance cover to cover work equipment not kept in the office?
- ◆ employee's home insurance must cover changed use – has the employee been advised to inform the home insurers and also mortgage holder (if any) of the change in usage of the home?
- ◆ access by loss adjusters
- ◆ planning regulations

- **Taxation**

- ◆ there may be a liability for capital gains tax if the premises are sold
- ◆ travel to and from the office – covered by expenses or not?
- ◆ homeworkers may claim a tax allowance for expenses for working at home, provided there are no appropriate facilities available to the employee on the employer's premises and the employee has no choice between working at the employer's premises or elsewhere.

Note that any request to work from home should be seriously considered: refusal is capable of amounting to indirect sex discrimination.

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## Teleworking

Teleworking has been broadly defined as work which makes use of IT, and is carried out away from the employer's premises on a regular basis. It therefore covers many mobile workers, as well as those who work from home.

The EU have a draft voluntary "framework agreement" on teleworking, which, whilst not legally enforceable, gives guidance on the sorts of issues employers should consider before introducing such arrangements. It recommends that teleworkers enjoy the same employment rights and conditions as their office-based colleagues. In the code, employees are given the right to return to conventional working at either the employee's or employer's request, and employers are generally expected to provide equipment used by teleworkers and take responsibility for data protection safeguards. They are also responsible for the health and safety of their teleworking employees.

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## Job sharing

Job sharing is increasingly used to cover the requirements for a full-time worker. Job sharing is especially effective in cases where it is essential that a particular job is covered during the whole working day (such as a receptionist), or where the employer may benefit from the input of two people, especially where the role is of a senior nature, and may utilise specific professional skills.

The commonest types of job shares are:

- married couples eg running a pub or residential accommodation
- joint MDs or senior office holders
- people with children or other caring commitments who do not wish, or are unable, to work full-time.

For these, the contractual issues are usually different:

- married couples are usually engaged jointly, ie 2 people agree to deliver one contract and have joint responsibility. If one is in breach, then both are liable to dismissal – so the contract needs to specify this (but the duties of both have to be meaningful for joint dismissal to be fair). In this case, the contract would include appropriate clauses making this clear.
- MDs are usually contracted as a job split – in which case the contract would normally be for two separate part-time roles, and work would be assessed and paid on an individual basis.
- those who do not wish to work full-time can be contracted as a job split (ie two x part-time jobs), either on a time or on a functional basis, or as a true job-share (where the duties of the post are undertaken in full by both parties).

The advantages of job-share arrangements include the additional skills and ideas provided by two people, additional cover provided for each other, and if holidays are taken at different times at least half of the job is still done. Retention can be higher, and job sharing is a means of attracting and retaining those within the business who have the necessary skills and experience but who are unable or unwilling to work full-time.

Issues to consider when setting up a job-share arrangement include the following:

- will the contracts be separate, interdependent or joint?
- consider the job description and if/how this will be split – also add the requirement to communicate between themselves and others. How will any decision making be dealt with? Are you going to give individual responsibility or not? Consider tasks such as budget control and expenditure – who is going to have responsibility. Consider line management and the extent to which some procedures may need to be carried out jointly (eg appraisal, discipline). How you will manage a situation where the job sharers' views/expectations differ?
- how will working hours/days be scheduled? Will these be set in advance, or left to individual/joint negotiation?
- must the parties cover for each other during sickness and holidays? If so, to what extent?
- Good communication systems are essential. For some roles a comprehensive hand-over is essential, and job-sharers may need to programme in a period of overlap, especially in jobs with more responsibility. Equally, good record keeping systems will assist in this.
- consider your appraisal scheme – will appraisals for the job-holders be done jointly or separately? Will performance targets be individual or joint? (This will depend on the extent to which the jobs are separate or truly shared.)
- how will promotion be dealt with? Are they "one" or can they be split?
- opportunities for training should be provided to both job-sharers, and they should both be invited to business functions, important meetings etc.
- consider payment – will any performance related pay be based on individual performance or joint performance?
- how will bonus and benefit packages be allocated? – consider sick pay, pension rights, cars, financial assistance etc. With regard to benefits such as bank holidays, a common sense solution is to apportion these pro rata and add them to holiday entitlement, thus enabling a fair allocation.
- overtime payments – you may wish to consider additional payments if requiring holiday or sickness cover on a full-time basis when the other job-share partner is absent. Also there may be additional cost if you require duplicate attendance at meetings/functions/training courses.
- what happens if one resigns? It is common for job-sharing contracts to stipulate that in the event of one partner resigning or leaving, the full-time job will first be offered to the remaining partner, alternatively a replacement will be sought. However, if a replacement cannot be found then the arrangement will come to an end, and if the business is unable to offer the remaining person suitable alternative work, or for the remaining person to continue part-time with the other half of the job being re-allocated, then he/she may be dismissed. However, this is an opportunity to re-think work distribution and roles, and a solution is usually found rather than losing both experienced employees.
- if one partner proves unsatisfactory and is dismissed, are both to be dismissed? (see above)
- outside work – will you retain your standard limitations on undertaking other paid employment outside your business or will you relax this? Is it possible to job-share two posts within the business?

This may seem a long list and look pretty onerous, but the advantages of job share can easily outweigh the administrative issues to be resolved.

Case law may make it easier for employees to insist that their employers give proper consideration to proposals for a job share. In *Hardys & Hansons plc v Lax*, the Court of Appeal decided that an employer's refusal to permit job sharing could amount to indirect sex discrimination. Prior to this, applicants had to show that refusing a part-time working request would have a disproportionate effect on women, or that female employees were disadvantaged – and if no-one is job sharing then there could be no detrimental treatment on grounds of sex. However, this case confirms the tribunals' ability to decide, in discrimination cases, whether the provision, criterion or practice at issue is objectively justified.

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## Career break schemes

Career break schemes are offered by many employers primarily as a way of retaining a link with your business and thereby hopefully enticing back employees who wish to take time out from their careers. But a career break scheme may also help to attract high quality applicants by demonstrating a commitment to long term career development and may complement other equal opportunities policies and practices.

Career breaks may be desired by employees for a number of reasons: the most common is for the care of young children, but career breaks can also be used for care of dependents, to undertake a course of study or research, to travel, or pursue some other interest.

Care needs to be taken with the wording of agreements for long-term career break schemes, to ensure that an employee cannot argue that his/her continuity of employment has been maintained. A custom and practice of allowing any other rights, such as pension rights, to continue could enable the employee to claim that his/her continuity of employment has been maintained for other purposes, such as redundancy or unfair dismissal – which may not have been intended!

It is advisable that the employee is required to resign, and it should be clearly specified that no contract of employment is in place during the career break, which will not be counted as part of the period of continuous employment. It is possible for the scheme to require participants to work for a specified number of weeks each year, for which they would be paid, and also to guarantee a post at a certain level, if the employee wishes to return.

Factors to take into account when considering whether to introduce a career break scheme include:

- firstly finding out whether employees would welcome such a scheme and how many of them would be likely to take it up
- whether the scheme will be restricted only to those with dependent children or others, or whether this should be expanded to cover other requirements, eg sabbaticals, career development, study, travel.
- costs of setting up and administering a scheme (set against the likely savings on recruitment, training and retention)

If you decide to introduce a scheme, it should include details of the following:

- what eligibility criteria should apply – for example, length of service requirement, only available to a certain level of staff
- what length of career break will be allowed
- whether you intend the contract of employment to continue during the period of leave (not recommended for long career breaks)
- whether or not continuous employment will be preserved during the period of absence
- if you do wish the contract of employment to continue, then consider arrangements re paid leave, pensions, holiday/sickness benefit rights, any other benefits calculated according to length of service
- how far in advance someone must apply, and to whom an application should be made
- clarify the decision making process. You may wish to stipulate that each case must depend on its merits, and agreement is subject to the needs of the business. Other additional criteria may be specified, eg you may wish to specify that the employee must have an satisfactory absence and disciplinary record.
- any appeals procedure (or use the grievance procedure)
- how to maintain contact with employees on career breaks – any requirements to keep in touch, work for defined periods, attend update sessions
- how to reintegrate the employee into the business on return from a career break.

- Finally, it would be advisable to include something which states that where the employee obtains alternative employment without the employer's consent, the employer has the right to terminate the employment break arrangements (and the contract of employment is that is still continuing) without notice.

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## Frequently asked questions (FAQs)

**Question** What if other employees resent one person leaving work early and they all ask to work different hours?

**Answer** The managers will still have to ensure that adequate cover is provided to meet business needs so it makes sense to make sure everyone is consulted when new working arrangements are introduced.

All employees should be treated fairly and not overloaded with work: resentment may well arise if no arrangements are made to deal with part of someone's job when they reduce their hours.

Remember, if hours are reduced so is the pay which will act as a deterrent to others!

**Question** How do you supervise employees working at home?

**Answer** In some cases people occasionally work from home or they regularly do specific tasks (report writing or preparing for a presentation) at home. In these situations a trust usually develops, and supervision is unnecessary as the employee is also regularly in the office.

If employees always work at home then employers need to set up a structured system for management. The emphasis will be on the completion of tasks rather than on time. Performance measures should be agreed and then monitored.

Communication is very important for those working at home. Assess when and how contact should be made. Steps should be taken by managers so that staff do not feel isolated. This could be done by regular contact, meetings, social events and support groups.

**Question** Will the use of job sharers or more part-timers cost more?

**Answer** More employees may mean higher administration, training, space and equipment costs. But by retaining experienced staff you will reduce the cost of recruitment and training, and may also be able to provide sickness and holiday cover more cheaply, if you would normally use agency staff for this.

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