

# Comment: How flexible is flexible working?

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David Hoey, partner at BTO Solicitors



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**David Hoey**

The law provides certain individuals with the right to ask to work flexibly.

But what does this mean in practice?

Flexible working is not limited. It involves some variation to the employee's working pattern, for example having flexible start and finish times, working from home or working compressed hours.

The law creates the right to request.

There is no right to flexible working as such.

Nevertheless, a failure to grant a request could give rise to other claims.

## **The law**

All employees who have worked for the same employer for at least 26 weeks and have not made an application for flexible working during the previous 12 months have the right to request flexible working.

A request must:

Say that it is a request for flexible working

Specify the change applied for and the date on which it is proposed the change should take effect

Explain what effect, if any, the employee thinks the change will make to his/ her employer

Explain how, in his/ her opinion, any such change might be dealt with

Be made in writing

State whether a previous application has been made by the employee to the employer and if so, when; and be dated.

If one or more of these essential details is omitted, the request will not be valid in terms of the Regulations.

If the request is valid, it should be considered.

Employers are expected to meet with the employee to discuss the request in good time and to communicate the decision within three months of the request being made (unless an extension of time is agreed between the parties).

The application is considered officially submitted on the day it is received by the employer, therefore it is recommended that employers acknowledge, in writing, the date on which it receives the request and diarises ahead to avoid missing the strict three month deadline.

The Advisory, Conciliation and Arbitration Service (ACAS) has **issued both a Code of Practice and written guidance** on how the process should work.

There is no requirement for employers to grant any request and each request should be considered on its merits.

Ultimately employers need to see whether the request can be accommodated and how best to manage the issues arising.

Flexible working can often benefit employers in achieving an engaged workforce with increased productivity, but each workplace is different.

If the request is granted, that usually results in a permanent change to the employee's contract of employment. Applications may be rejected, but only on one (or more) of the following specific grounds:

The burden of additional costs

Detrimental effect on ability to meet customer demand

Inability to re-organise work amongst 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 up to the employer to determine whether one or more of the specific grounds exists but it makes sense to explain the rationale and try and see whether an alternative agreement can be reached.

The aim is to find a solution that works for both parties.

Employers may also wish to consider a temporary agreement and/or a trial period for the new working pattern rather than rejecting the request.

Applications can be withdrawn by the employee at any time but can only be treated as withdrawn by the employer in certain limited cases.

**Good practice**

Employers should maintain flexible working policies which comply with the spirit of the legislation in this area and those dealing with requests should be trained.

Failing to comply with the statutory requirements, rejecting on incorrect facts or withdrawing applications in circumstances contrary to the legislation can lead to expensive and damaging claims.

Employment Tribunals have the power to order reconsideration of the flexible working application and can make an award of compensation up to eight weeks' pay.

Additionally, rejected applications can potentially lead to other headaches, such as unlawful discrimination and/ or constructive dismissal claims to name but a few.