

“ Plain speaking legal advice ”

More Flexible Working Rights
HR Forum Briefing Note

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Most employers have been well aware that from 10 January 2002 employees who have been with you for at least 26 weeks and who wish to change their working hours or introduce other flexible arrangements in order to care for a child who is not yet 6 (or if disabled, 18) can request such changes. This was under the Maternity and Parental Leave (Amendment) Regulations 2001. It has always been an entitlement to make a request, not an obligation on the employer to grant it.

From the 6th April 2007, the Flexible Working (Eligibility, Complaints, and Remedies) Regulations 2002 will extend those rights for employees who have to care for adults. At the moment the definition of carer has not been established and until the Government decides exactly what definition it is going to adopt, employers won't know for sure how many employees are likely to acquire the new right.

Although it is only a right to request, nonetheless the DTI estimates that after the 2001 regulations came into force, employers accepted some 77% of requests to go onto flexible working and discussed and reached a compromise on a further 16%. Whether that rate will be maintained under the new regulations is very difficult to say.

The stance the Government seems to be adopting is to concentrate on the relationship between the employee and the person for whom they care.

The draft regulations currently define a carer as being an employee who:

- (1) Being continuously employed for not less than 26 weeks
AND
- (2) Is or expects to be caring for a person aged 18 or over who is:
 - (a) Married to the partner or civil partner of the employee
OR
 - (b) A relative of the employee
OR
 - (c) Living at the same address as the employee

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They have also made it clear that “partner” means not the employee’s spouse or civil partner but someone with whom the employee is living as if they were their spouse or civil partner.

The difficulty with the definition seems to come in respect of the word “relative”. There seem to be two options that are currently being looked at insofar as the draft regulations are concerned. The first defines “relative” as an immediate relative including, parents, parents-in-law, adopters, guardians, children, and children-in-law. The second is much broader and includes all of the above but also siblings, siblings-in-law, half siblings, uncles, aunts, and grandparents.

In both options adoptive relationships are included.

There has been quite a lot of controversy over the definition. Those bodies that are representative of the employee are arguing that both options are too restrictive because they limit the definition of carer by reference to a family relationship. What, for example, happens in respect of an employee who can show they act as a carer for somebody outside of the immediate family relationship? It may be that someone is caring for a next-door neighbour or an old family friend who is no longer capable of looking after themselves. The definition of carer that is used in the Employment Relations Act 1999 confirmed that where there was no family relationship, an employee could qualify as a carer if somebody “reasonable relies upon the employee for assistance”.

Employees organisations on the other hand, prefer the first option on the basis that it is much more precise. The employers’ main concern is of course focussed on the need to balance flexible working to ensure they have sufficient levels of skills and resources available in the work force.

The new regulations, as currently drafted, will follow the same procedure as the 2001 regulations, namely that it is only a right to apply for flexible working. An employee will only be entitled to make one flexible working application per year. There is no obligation on the employer to grant the request but they must hold a meeting with the employee (who has the

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right to be accompanied by a work colleague) within 28 days of receiving the request. Within 14 days of the meeting the employer must write to the employee either (1) agreeing to the request and specifying the variations to the contract, when they come into effect, and if it is to be for a trial period what the trial period will be or (2) rejecting the request, in which case the employer must give reasons as to why the request is being rejected.

If a request is refused, then employee has the right to appeal and again the employer is obliged to consider the request and give reasons for any rejection.

The DTI estimates 1 million employees will acquire the right to request flexible working if the first definition of “relative” is used but that figure will increase to approximately 1.5 million if the second definition is used.

From the data available as a consequence of the 2001 regulations, it does seem that employers are relatively happy to allow flexible working up to a certain level. Once you reach junior management and above, it appears that employers are less happy with the concept of flexible working and a survey carried out by the DTI indicated that in some 61% of work places, flexible working was not regarded as appropriate for managers.

If you wish to discuss the issues above further in relation to your particular circumstances please contact Frankie Tierney on 01276-686222

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