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Flexible Working Update

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THE FLEXIBLE WORKING (ELIGIBILITY COMPLAINTS AND REMEDIES)

AMENDMENT REGULATIONS 2006.

The Regulations come into effect in England on 6 April 2007.

Flexible working rights are not new and it was in the context of working parents caring for young children that they were first introduced as part of the Maternity and Parental Leave (Amendment) Regulations 2001 and the Flexible Working (Eligibility, Complains and Remedies Regulations 2002.

If you had been with your employer for at least 26 weeks and wanted to request a change in your working hours etc in order to care for a child who was not yet 6 (or if disabled – 18) you had a statutory right to request flexible arrangements. Employers had to provide written reasons for refusing but were not obliged to grant such requests.

For some time there has been lobbying that family friendly policies should extend beyond those who have young or disabled children. With the population getting ever older and people living longer, more and more adult workers are likely to be caring for elderly relatives rather than children.

From 6 April 2007 those rights are extended. The 2006 Regulations widen the scope of the 2002 Regulations, giving a statutory right to request a contract variation to care for an adult.

Once again the employee must have a minimum of 26 weeks qualifying service with the employer. The adult that they need to care for must be their spouse, partner or civil partner or a relative or living with them at their address.

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Relative for the purpose of the Regulations means anyone in the following list: -

Mother	Step son	Uncle
Father	Daughter	Aunt
Adopter	Step daughter	Grandparent
Guardian	Brother	Adoptive relationships
Special Guardian	Brother in law	Relationships of the half blood
Parent in law	Sister	Relationships of the full blood
Step Parent	Step sister	
Son	Sister in law	

“Living with them at their address” is not limited to the spouse, partner or relative category. It is in addition to those categories and thus would cover a lodger or flat mate who had been involved in an accident or developed and illness or disability requiring care.

You do not have to be currently caring for them. The Regulations confirm you can make the request if you are caring for or expect to be caring for a person aged 18 or over who falls into any of the categories.

As before the request must be made in writing and set out why you consider the requested changes can be accommodated by the employer. Only one request can be made in any 12 month period. Again the employee is not obliged to agree to make the requested changes or indeed any changes. They are obliged to consider them and give a written response to the request. They have eight business related reasons that they can cite for refusal (S80G Employment Rights Act 1996).

A case that employers need to at least be aware of is that of Coleman –v- Attridge Law [2006]. Mrs Colman was a legal secretary and brought a claim for both constructive dismissal and disability discrimination following her resignation in March 2005. Her claim was that her employer described her as lazy when she wanted time off to care for her disabled

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child (aged less than 6). She said she was not allowed to work from home, when other employees were; that other employees had no problems taking time off to deal with care arrangements for their children who were not disabled; that her manager had made pretty choice comments about her child and alleged she was using the child as an excuse to get the working conditions she wanted.

The Tribunal decided it had to refer the matter to the European Court of Justice (ECJ) to see whether she was entitled to the protection of the Equal Treatment Directive, as it was not she who was disabled but her child. She claimed she was entitled to the protection because she had been treated less favourably on the ground of her association with a person who was disabled. In this case her child.

If the ECJ decides that the Framework also covers associative discrimination, then the Disability Discrimination Act (DDA) will be interpreted to cover it as well. Mrs Coleman could then continue her case and the Tribunal would have to decide if she had treated less favourably because she has a disabled child.

Mrs Coleman could have made a request for flexible working under the 2002 Regulations, but the Employer was not obliged to agree. It is believed that the constructive dismissal part to the claim has been dropped so her case now hinges completely on the ECJ decision.

The expert view is that the ECJ is very likely to agree that Mrs Coleman does get protection. Certainly associative discrimination is not permitted in terms of most of the other discrimination areas and this point was picked up and argued when the DDA was going through Parliament.

Assuming that view is borne out when the ECJ reports later this year, it does have certain implications for employers dealing with requests for flexible working in order to care for a disabled child (and after 6 April 2007 – a disabled adult under the 2006 Regulations).

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Beware you are not leaving yourself open to a DDA claim by dealing with the flexible working request sloppily. If the request comes from an employee who cares for a disabled child or adult but they do not have 26 weeks qualifying service, don’t seize on that and reject the request out of hand. DDA claims do not require qualifying service periods.

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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