

# Returning to Work

## Getting work and home commitments in balance through flexible working



### Overview

For many parents and carers of children returning to work after absence on maternity or other family leave, working hours and arrangements can be a key concern. This is a time when you may want to consider changes to hours and arrangements, such as a transfer to part time working, a change of location or home working.

Since April 2003, there has existed a right to request flexible working from your employer if you meet the eligibility criteria. This does not give a right to work flexibly, but it does mean that your employer has to consider your request properly.

It is also important to note that since April 2006, there is a right to request flexible working for other carers, although these rights are not covered in this factsheet.

*For more information on maternity and paternity rights, please see our factsheets 'Paternity Rights', and 'Maternity Rights', part of the Employment Law series.*

### Who has the right?

- If you have responsibilities for a child you may have a right to request flexible working
- The right applies to you once you have been employed with the same employer for 26 weeks or more
- This right applies to you if you are either the mother, father, adopter, guardian or foster parent of the child. The same applies if you are married to or are the partner or civil partner of someone in this position, or if you expect to have responsibility for the upbringing of the child
- You have the right to request flexible working if the child you care for is under 17, or, if disabled (defined as entitled to Disability Living Allowance), under 18
- If you are caring for a person aged 18 or over you also have the right to request flexible working. A 'carer' is defined as someone who cares for an adult who is either their spouse or civil partner, a relative or a person living at the same address. This right came into force on 6th April 2007.

### What is flexible working?

Flexible working includes a variety of alternative working hours and patterns, such as:

- Alterations to hours of working e.g. earlier or later start to the day
- Flexitime
- Changes to a shift pattern
- Fixed shifts
- Annual hours
- Part-time working/reduced hours
- Job sharing
- Working from a different location
- Home working.

### How to make a request

To have your request considered, you must follow the specified request procedure:

- The request for flexible working can be made at any time from the birth of your child up to the day before his or her seventeenth birthday. If the child is disabled, a request may be made up to the day before his or her eighteenth birthday
- You must make the request in writing and give the proposed pattern and date of change to working hours
- You can only make one request per year
- The application must state whether you have made a previous application and if so, when it was made
- You must also state the effect the changes will have on your employer
- You should check your employees handbook for further information
- The procedure which your employer must follow is also specified:
- The employer must hold a meeting to discuss your application within 28 days of the request being made
- After the meeting, the employer must respond to your request for flexible working within 14 days
- If the request is refused, reasons for refusal must be given
- You have the right to appeal within 14 days of being notified of the decision
- You have the right to be accompanied to the meeting.

### Granting of request

If your request is agreed, your employer must write to you within 14 days of the meeting to agree the new work pattern and the start date. This means that there is a permanent change to your terms and conditions of employment, so you cannot go back to your old arrangement without your employers consent.

### Refusal of request

If your employer refuses your request to work flexibly they must provide the reasons for the refusal. There is a wide range of permissible reasons for refusal, including:

- The burden of additional costs
- A detrimental affect on ability to meet customer demands
- An inability to re-organise work among existing staff
- An inability to recruit additional staff
- A detrimental impact on quality
- A detrimental impact on performance
- An insufficiency of work during the periods the employee proposes to work
- Planned structural changes.

Given the wide range of permissible reasons for refusal, it is an unfortunate fact that any employer not wishing to grant a request will easily find a legitimate reason to back their decision. All the same, employers must follow the correct procedure and give your request proper consideration.

## Failure to follow procedure or factual error

You only have the right to challenge a refusal if it is made after a failure to follow the specified procedure or if the decision is based on incorrect facts. A challenge on either of these grounds is brought by making a complaint to an Employment Tribunal. This must be brought within three months less a day of the refusal or within three months less one day of the appeal. The Employment Tribunal can order your employer to reconsider their decision.

The Tribunal can order compensation in respect of any breach by your employer, but compensation is limited to eight weeks' pay. In these circumstances, one week's pay is currently (as of 1st February 2011) limited to a maximum of £400, which means a maximum award of £3,200. Therefore, in a situation where you have had to resign as a result of any failure by your employer to grant your request, and it takes you some time to find alternative employment, you are likely to be under-compensated by the Tribunal unless you have some other form of claim you can pursue such as constructive unfair dismissal.

## Indirect sex discrimination

It may be possible to prove that a refusal to allow a request for part time or other form of flexible working is indirectly discriminatory on grounds of sex. These are very complex and technical claims, and what follows is only a summary of the general position.

Indirect sex discrimination against a woman occurs where a provision, criterion or practice (PCP) is applied equally but:

- It puts women as a group at a particular disadvantage when compared with men;
- It puts her at that disadvantage; and
- It cannot be shown to be a proportionate means of achieving a legitimate aim.

The PCP must have been applied to both men and women (for example, a requirement that all employees work full-time, or from the office, or that all employees are present at work on a given day or at a particular time). This means that general policies or practices which tend to discriminate may be unlawful if they cannot be justified.

You first have to show that a policy is being followed which has an adverse impact on women as a group. In general, an Employment Tribunal will accept that in the workforce as a whole, more women than men are likely to have childcare responsibilities. This means that in many cases, the key question will be whether the employer can justify their action by providing good business reasons for it. The way in which the legislation is formulated and the current pattern of childcare responsibilities in society as a whole means, however, that a refusal of a request made by a man is much more difficult to challenge.

The advantage to a claim of indirect sex discrimination is that the Tribunal will in most cases have to look at the reasons for the employer's decision, not just the process. The other advantage is that where you bring a claim for indirect sex discrimination, the potential compensation available to you is unlimited, depending on your actual loss. This means that if you have had to resign as a result of your employer's refusal to allow your request, then you may be able to recover the loss of earnings you suffer as a result.

*For more information about pursuing a claim for indirect sex discrimination, please see our factsheet 'Sex Discrimination', part of the Employment Law series.*

## Make a formal request

You should make a formal request under the flexible working procedures described above, even if you are convinced that your employer will turn down your request. Check your employer's flexible working policy as well. The approach adopted by your employer in response to your request could be important as evidence for any future indirect sex discrimination claim. If you are hoping for new arrangements to be in place when you return from maternity leave, it is important to make the request as soon as possible after the birth of your child, given the length of time the procedure can take. If not, there is a risk that you would have to return to work full time until the procedure has been completed, which may not fit in with your childcare arrangements.

It is important to remember that you have three months less one day from the date of the last discriminatory act by your employer to start your claim against your employer. That last discriminatory act might be your employer's refusal to allow your request, the date of your appeal or the date that you resign or are dismissed by your employer. To be on the safe side, you should seek legal advice as soon as possible, preferably whilst you are going through the procedure with your employer. You don't have to tell your employer you are getting advice.

## Feel that you have been unfairly treated?

We have experts in maternity and flexible working issues and have dealt with many claims which are maternity or flexible working related. Many disputes will be capable of being resolved internally without going to an Employment Tribunal.


## EqualityXpress


If you think you may have a claim for maternity-related discrimination, all you need to do is fill in our online questionnaire at [www.rjw.co.uk/equalityxpress](http://www.rjw.co.uk/equalityxpress) and respond to some straightforward questions. Our solicitors will then assess your prospects of succeeding in a claim, and contact you with their opinion. The service is free and 100% confidential.

## Contact Us

*Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:*

 **0800 916 9015**

 **Email: [enquiries@rjw.co.uk](mailto:enquiries@rjw.co.uk)**

 **Web: [www.rjw.co.uk](http://www.rjw.co.uk)**

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This factsheet is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this factsheet please seek formal legal advice. This information was correct at time of going to press February 2011.