New law passed which will shake up flexible working regime

On 20 July 2023, the Employment Relations (Flexible Working) Act 2023 received Royal Assent and became law. The Act introduces reforms to the flexible working regime, which are due to come into force in a year's time. The statutory Acas Code of Practice on flexible working will be updated to reflect the changes to the law.

What is the background to the reforms?

In September 2021, the Government published a consultation setting out its proposals for change to the flexible working framework. In particular, views were sought on whether the right to request flexible working should become a Day 1 employment right (currently, 26 weeks' service is required before a statutory request can be made).

The Government responded to the consultation in December 2022 and confirmed that it would make the right to request flexible working a Day 1 employment right. It is estimated that this will bring a further 2.2 million employees within the scope of the flexible working regime.

Separately, the response confirmed that the Government would support the Employment Relations (Flexible Working) Bill 2022-23, a Private Members' Bill sponsored by the Labour MP, Yasmin Quereshi. The Bill received Royal Assent on 20 July

2023 and became the Employment Relations (Flexible Working) Act 2023.

What changes will be made to the flexible working framework?

The Act will make the following changes to the flexible working framework:

- Employees will no longer be required to explain what effect they think the requested change would have on their employer and how that effect might be dealt with.

- Employees will be permitted to make two flexible working requests per year rather than one.

- Employers will be required to consult with employees before refusing requests.

- Employers will have two months to make a decision on a flexible working request rather than three, unless an extension is agreed.

However, the Act does *not* take forward the Government's proposal of making the right to request flexible working a Day 1 employment right. The Government has said that secondary legislation will be introduced separately to implement this.

Are there any other changes employers need to know about?

On 12 July 2023, Acas launched a consultation on proposals to update its statutory Code of Practice on handling flexible working requests. Although the Code is not legally binding, it is taken into account by Employment Tribunals when considering relevant cases. The Code has been updated to reflect changes to ways of working since the Code was first introduced in 2014, and to reflect the new legal reforms. The draft Code encourages employers to approach requests with an open mind and engage in meaningful dialogue. It also:

- Provides clarity on what consultation should involve and recommends that meetings are held both when a request is to be rejected or accepted.

- Extends the categories of individuals who may accompany an employee at meetings to discuss a request (so that it mirrors the position for disciplinary and grievance meetings).

- Provides guidance on the information that employers

should set out to help explain their decision.

- Encourages employers to allow for an appeal process where a request is rejected.

- Provides information about the planned new right for workers to be able to request more predictable working patterns (which is separate to the right to request flexible working).

The consultation on the draft Code close 6 September 2023. Acas has said it will also update its non-statutory guidance on flexible working, which complements the Code.

Separately, on 19 July 2023, the Government launched a call for evidence on "non-statutory" flexible working. This covers regular flexible working arrangements that have been agreed outside the statutory regime, as well as ad hoc arrangements which are occasional or temporary in nature. In particular, the Government wishes to understand the extent to which individuals and businesses are using such practices, how and why they are using them, as well as the barriers and the benefits. It also wants to receive examples of best practice and case studies. The Government wishes to develop an evidence base in this area, which it says will inform the Government's future flexible working strategy.

What steps should employers take now?

The Act provides that the changes may come into force on a date or dates specified by the Secretary of State. The Government has said it "expects" the measures to come into force approximately a year after Royal Assent, in order to give employers time to prepare i.e. in July 2024. The intention is that the secondary legislation introducing the Day 1 right to request flexible working will be introduced at the same time.

Therefore, employers have a year to prepare for these changes. We would recommend that you consider taking the following preparatory steps:

- Consider whether you will specify what flexible working options would be suitable for a role in job advertisements and identify candidates' preferences in job interviews. Although this will not prevent an employee asking for something different on Day 1 of their employment, the hope is that discussing this upfront will allow a suitable pattern to be identified from the off, rather than having to deal with a request in the first few months of employment.

- Revise your flexible working policies to reflect the legal reforms. Although employees are no longer required to explain the potential effect of their request, we would recommend that this is still

encouraged on the basis that it may help speed up consideration of the request.

- Consider what your consultation process will look like. As the draft Code outlines, this should usually include a face-to-face meeting. Where you are tending towards rejecting a request, a meeting affords the employee an opportunity to make further submissions and allows time for consideration of alternatives. Where you are tending towards accepting a request, a meeting can add value by allowing an opportunity to discuss the request in more detail and think about ways to implement the arrangement successfully.

- Train HR and line managers on how these reforms will impact the handling of flexible working requests. When the Acas Code is finalised, HR and line managers should be asked to read it.

- Consider whether you need to devote further resource to the management of flexible working requests, in light of the ability to make two requests per year, the shorter time frame for providing responses and that requests may be made from Day 1 of employment.

- Consider whether record-keeping procedures should be strengthened (for example, to record how many requests have been made within a 12-month period and to document

what consultation has been undertaken).

In addition to the above, you may wish to contribute to the consultation on the Acas flexible working code and the call for evidence on non-statutory flexible working.

Employment Relations (Flexible Working) Act 2023

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.