

Insight: Employment & Benefits

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Changes to rights to request flexible working and to paternity leave

Introduction

In April 2003 the government introduced the "right to request flexible working". This did not create a right to work flexibly or part-time. It simply provided a statutory framework through which a request from an eligible employee to work flexibly must be considered.

The introduction of the right to request flexible working was initially not well received by employers, many of whom expressed concern that large numbers of employees would apply and that it would be difficult to refuse a request. To date it seems that, generally speaking, the practical experience of employers has not substantiated these fears. Advantages of flexible working schemes for employers include: (i) higher productivity; (ii) retention of key staff; (iii) the ability to attract new and well-qualified employees; (iv) avoidance of compulsory redundancies; and (v) reduction of office costs.

The concept of flexible working has been further promoted by the implementation of the Additional Paternity Leave Regulations (the "**APL Regulations**") in April 2010. As the "stay at home mum" becomes less common, working parents require more control and choice as to how they manage their childcare arrangements. These regulations allow working fathers to take up to six months' paternity leave when a mother has returned to work without using up her full entitlement to maternity leave. The government proposes to begin consultation on providing employees with even more flexibility for shared parental leave, although it is likely to be some time before any further measures are introduced.

The APL Regulations also apply to male or female employees where their partner is the child's adopter and to female employees in a same-sex relationship where their partner gives birth to or adopts the child. For ease of reference, this Insight refers to working fathers and working mothers, but those references apply as appropriate to the relevant partner in an adoption or a same sex-relationship or where the male employee is not the child's father but is the spouse or partner of the mother.

How the right to request flexible working has developed

Originally, the right to request flexible working was available only to parents with a child under the age of six (or parents of a disabled child under the age of eighteen). From April 2009 this right was extended to the parents of children under the age of 17, including adoptive parents, guardians or foster parents or the spouse, civil partner or partner of the child's mother, father, adopter, guardian or foster parent.

In April 2007, carers of certain categories of adults were also given the right to request flexible working. To qualify, the employee must be or expect to be caring for a person aged eighteen or over who is in need of care and who: (i) is married to, or the civil partner or partner of the employee; (ii) is a relative of the employee; or (iii) falls into neither category



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but lives at the same address as the employee. The definition of relative includes relationships through marriage (e.g. the employee's sister-in-law), adoptive relationships and relationships of full blood or half blood.

The government has recently announced that the right to request flexible working will be extended to parents with children under the age of 18 from April 2011. Although this is an increase of only one year in the age of the child concerned, it is estimated that an additional 300,000 employees will become eligible for this new right.

Individuals must be continuously employed by the same employer for more than 26 weeks before a request for flexible working can be made. The right to request flexible working is very limited in nature. It consists of:

- (i) a right to request to work flexibly (e.g. hours, days, location);
- (ii) a statutory request procedure;
- (iii) an obligation on the employer to consider that application properly; and
- (iv) a limited number of grounds on which the employer can refuse the request.

The employee's request must provide an explanation of what effect, if any, the employee thinks the proposed change would have on the employer and how they feel any such effect might be dealt with. In most cases, an employee will propose the "best" result for him or herself, which may not be acceptable to the employer. However, the process should consider any alternatives which might be available.

Employers need to be particularly wary of any risk that a discrimination claim might be brought against them. This is particularly important in the light of provisions of the Equality Act 2010 which came into force on 1 October 2010, especially those introducing the concept of indirect disability

discrimination and harmonising the definition of discrimination to cover "associative" and "perceptive" cases.

Employers will need to be vigilant to ensure that requests for flexible working are treated seriously and that efforts are made to accommodate such requests where possible. The wider the range of options put forward by the employee but rejected by the employer, the more difficult an employer may find it to justify objectively the refusal of the request and the more open the employer may be to an allegation of discrimination.

A request may only be refused on eligibility or procedural grounds, or on one or more of the prescribed statutory grounds. It is essential that the employer's notice of refusal is dated and states which of the grounds of refusal applies. In selecting the ground for refusal the test is a subjective one on the part of the employer. However, if the employer's view is based on incorrect facts or discriminatory reasons, the decision could be challenged.

Once a request has been made under the statutory procedure, the employee cannot make a further request within the next 12 months. However, if a claim is brought, a tribunal may order the employer to reconsider the application and may award compensation not exceeding eight weeks' pay. A tribunal should not question the commercial rationale or business reasons behind an employer's decision to refuse a request. Neither should a tribunal substitute its own decision as to whether the request should or should not have been granted.

Additional Paternity Leave Regulations

The Additional Paternity Leave Regulations 2010 will apply to parents whose child's birth is due on or after 3 April 2011. Additional paternity leave will give fathers a right to up to six months' additional leave which can be taken once the mother has returned to work. This will give parents more choice in childcare responsibilities and, for the first time ever, the option of dividing a period of paid leave between them.

The eligibility requirements for additional paternity leave ("**APL**") to a large extent mirror those for ordinary paternity leave ("**OPL**"), i.e. the employee must: (i) be continuously employed by their employer for a period of not less than 26 weeks ending with the week immediately prior to the 14th week before the child's expected week of childbirth ("**EWOC**"); (ii) be the father of the child, or be married to or the civil partner of or the partner of the child's mother; and (iii) have, or expect to have, main responsibility for the child's upbringing.

The requirement of a 26 week qualifying period for both ordinary and additional paternity leave has not yet been abolished, contrasting with the position of mothers who can take maternity leave regardless of how long they have been employed by their employer. It remains to be seen whether the government, as part of its continued efforts to promote flexible working and equalise the position between fathers and mothers, will turn its attention to this issue.

In addition, for a father to take APL, the mother must return to work having not exhausted her entitlement to statutory maternity leave. Therefore, only if the mother decides not to take a proportion of her statutory leave will the father's right to take APL crystallise.

The earliest a father will be able to take APL will be: (i) 20 weeks from the date of birth of the child; or (ii) 20 weeks from the date of placement for adoption. The minimum period of APL that may be taken will be two weeks and the maximum period will be 26 weeks or until the child is 12 months old, whichever is shorter. APL must be taken in multiples of complete weeks and as one period.

An employee will be required to give a minimum of eight weeks' notice of their intention to take APL and an employer will be required to confirm an employee's entitlement to APL within 28 days of the date of the employee's notification.

The contract of employment will continue throughout APL and fathers will have a statutory right to benefit from the terms and conditions of employment which would have applied had they been at work, except for terms relating to remuneration. A father taking APL will be entitled to return to the same job on the same terms and conditions as before APL began.

Additional statutory paternity pay ("**ASPP**") will be paid at the same rate and will be calculated in the same way as statutory paternity pay and will broadly mirror the existing entitlement. ASPP will be conditional upon the mother: (i) being entitled to either maternity allowance or statutory maternity pay; and (ii) returning to work not less than two weeks after the birth of the child but at least two weeks before her maternity allowance period or

maternity pay period expires. The number of weeks for which ASPP is payable will then depend on the number of weeks the mother had left of her entitlement to statutory maternity pay.

Interesting questions will arise as to whether employers who offer female employees enhanced maternity pay should extend similar enhancements to employees opting to take APL. Since paternity leave can be taken by members of either sex, the appropriate comparator for a man taking paternity leave is not a woman taking maternity leave but a woman taking paternity leave. If a woman taking paternity leave would not be entitled to enhanced paternity benefits, the government takes the view that employers who offer enhanced maternity pay do not also have to offer enhanced paternity pay. However, the position is not entirely certain and employers who do not offer equal benefits to employees taking additional paternity leave may well face a sex discrimination claim. Employers are unlikely to receive requests for APL much before 3 April 2011 and need to use the time until then to consider what benefits they wish to offer to employees on paternity leave. Some employers might even wish to consider restructuring their maternity and paternity pay policies as a whole and equalising benefits, whether this be up or down, to a set level for all employees in order to avoid any risk of discrimination claims.

Future plans for flexible working

The Government intends to continue developing plans for flexible working and will launch a consultation on a new "properly flexible system" in the first half of 2011 with a view to introducing a new flexible working system in 2015. The reforms being considered include:

- (i) allowing fathers to step in and take leave after 6 weeks – this is the stage at which many mothers return to work because at this point the more generous maternity pay (90% of normal weekly earnings) is replaced by statutory maternity pay, currently at £124.88 per week and increasing to £128.73 per week from 11 April 2011 (or 90% of normal weekly earnings if lower);
- (ii) allowing each parent to share leave, splitting it between them and taking it in chunks rather than two consecutive lengthy periods of leave; and
- (iii) introducing a "use it or lose it" system in which fathers are offered a block of leave within, say, 10 weeks of the birth.

It is anticipated that these proposed reforms will face some opposition from businesses and it is hoped that the four year timeframe for introduction of these reforms will prevent the risk of springing changes on employers in times of economic uncertainty and allow employers the time to put in place any arrangements and plans necessary to deal with the proposed reforms.