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Focus on Flexible and Family Friendly Rights

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STANDING UP FOR YOU

Charlotte Moore explains the new Parental Leave Regulations that come into force later this year

Shared parental leave: the mechanics

THE SHARED Parental Leave Regulations, which come into force on 1 October 2014 as part of the Children and Families Act, usher in a new concept in the statutory rights of parents to take time off to look after their children.

The new system applies to mothers whose expected week of childbirth is on or after 5 April 2015 as well as adoptive parents who have been matched for adoption on or after that date.

The leave must be taken within the first year after the baby is born and the mother has to take at least two weeks' maternity leave directly after the birth.

Under the new system:

- Mothers will still be entitled to 52 weeks' maternity leave but will have flexibility as to whether to take the leave as maternity leave or shared parental leave.
- Mothers can choose to end their maternity leave after the initial two-week compulsory maternity leave.
- Mothers will no longer need to wait until their child is 20 weeks old before their partner can go on leave (a condition of additional paternity leave, which is being scrapped).
- Working parents can decide how they would like to share the remaining leave.
- The new regulations will allow parents to convert the woman's entitlement into parental leave and pay which they can both share, either separately or at the same time.

To qualify for shared parental leave, employees must meet a number of eligibility requirements and then follow prescribed notice requirements in order to take the leave.

Eligibility

To access the scheme, each parent has to satisfy a two-stage test. The first part requires them to show that they have been economically active and have worked for 26 of the previous 66 weeks and earned £30 per week for at least 13 of those 66 weeks.

The second stage of the test looks at the leave and pay to which the individual will be entitled.

To qualify for leave, the person has to show they have worked for six months at the start of the 15th week (known as the qualifying week) before the child is born or matched for adoption.

To qualify for pay, they have to show they have earned more than £111 per week in the eight weeks leading up to that qualifying week.

Leave curtailment notice

The mother must give her employer a leave curtailment notice in writing stating the date when she wants her statutory maternity leave to end. She has to do this sometime between the 11th week before

the baby is due and nine weeks before the end date of the shared parental leave.

The parents can then opt into the shared parental leave system by giving their employer notice that they intend to do so.

Notice of entitlement and intention to take shared parental leave

Not less than eight weeks before the start date of the first period of leave, the mother must give her employer a written notice specifying the start and end dates of any statutory maternity leave she intends to take as well as the start and end dates of the shared parental leave that she and the other parent intend to take.

She also has to sign a declaration that she satisfies all the eligibility criteria for shared parental leave along with a similar declaration from her partner, which states that they consent to the amount of leave the mother intends to take.

The partner has to give their employer a similar notice of entitlement and intention to take parental leave eight weeks before the date on which they want it to start.

There is no limit to the number of times the parents can vary the amount of shared parental leave that each of them intends to take, but they can only make three leave requests to their employer. ➲

To qualify for shared parental leave, employees must meet a number of eligibility requirements and then follow prescribed notice requirements

- Once the mother has given notice of intention to take shared parental leave, her employer can, within 14 days of receiving the notice, ask her to provide a copy of the child's birth certificate and the name and address of the partner's employer (who can then ask the partner for the same information). The employee then has 14 days in which to provide the information.

Giving notice of a period of leave

Not less than eight weeks before the start date, employees have to serve their employer with a period of leave notice in writing, setting out the start and end dates of each period of shared parental leave requested in that notice. They can vary those periods on three occasions.

The parents have the right to ask to take the leave in one chunk or in discontinuous periods

The parents have the right to ask to take the leave in one chunk or in discontinuous periods. If they ask to take it in one continuous block, the employer has to allow them to take the leave on the dates requested.

However, if they ask to take it in discontinuous periods, employers can agree to the request, propose alternative dates or refuse the periods requested. This has to be done within two weeks of receiving the notice. If the two parties cannot come to an agreement within those two weeks, the employee can either withdraw their request or take the leave as a continuous period.

Any discontinuous periods of leave must be taken in multiples of complete weeks and the minimum period that can be taken is one week.

Right to return

If the employee takes 26 weeks' leave or less in total, they are entitled to return to the job in which they were employed before they went on leave. If they take more than 26 weeks and it is not reasonably practicable for their employer to let them return to that job, they can ask their employee to return to one that is similar.

Terms and conditions

An employee who takes shared parental leave is entitled to the benefit of all the terms and conditions of employment that would have applied if they had not been on leave. Equally, they are bound by any obligations arising under those terms and conditions.

Keeping in touch

Employees are allowed to work for up to 20 days for their employer during a period of shared parental leave without bringing it to an end. This could include training or any other activity that an employee undertakes to keep in touch with their workplace, but is in addition to the 10 Keeping in Touch days during maternity leave. If the employee works during their period of leave, it will not extend the duration of the leave.

Draft regulations

Although the regulations are unlikely to change before they come into force on 1 October, it is possible that the government will make a few tweaks. If that happens, Thompsons will keep readers up to date via the weekly LELR.

The Children and Families Act 2014 introduced a number of changes to family friendly rights, including shared parental leave and comparable rights for adopters. Emma Game looks at the implications of these new rights for parents.

Shared parental leave: the implications

ALTHOUGH MOTHERS and fathers can continue to take "traditional" maternity and paternity leave and pay, the new regulations will allow them to convert the woman's entitlement to maternity leave and pay into parental leave and pay which they can both share.

To qualify for the leave, employees must meet a number of eligibility requirements and then follow prescribed notice arrangements in order to take the leave. To read about these requirements in detail, have a look at the previous article by Charlotte Moore.

Will the notice requirements be a help or hindrance?

While the proposals in principle are straightforward, there is no doubt that the notice requirements are complex. First of all, the mother has to give a leave curtailment notice; then both the mother and father have to give a notice of entitlement and intention to take shared parental leave; and finally both parents have to give notice of a period of shared parental leave.

The fact that one barrister has likened the process to "playing four dimensional chess" sums up the complexities that both employees and employers face. Despite the government's claim that the system is straightforward and simple to follow, the regulations are so complex that it seems unlikely that both parties will be able to understand how they are supposed to work at a practical level.

For one thing, employees may not realise that they have to give such specific (and different) notices, all within certain time frames. It seems quite possible that these detailed requirements will put individuals off making an application for shared parental leave, particularly if their employer has no internal guidance or procedures they can follow.

The Department for Business Innovation and Skills has said it will provide guidance for employers to help them understand the new system. Hopefully, this will encourage employers to write up their own policies and procedures to assist employees who may be considering taking shared parental leave, for example by providing precedent forms and notices.

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Pay

Presumably most parents will want to take leave that benefits not only their child caring arrangements but also their finances. However, once they give notice to curtail maternity leave and shared parental leave begins, payments to both parents will be based on the flat rate of statutory maternity pay only.

Given that mothers are entitled to 90 per cent of their earnings under the ➲

➲ statutory maternity leave scheme for the first six weeks (for the following 33 weeks, they are only entitled to statutory maternity pay), it seems very unlikely that many will want shared parental leave to start during those initial six weeks.

The same applies to mothers who have contractual maternity policies that go over and above the statutory minimum in terms of pay while on maternity leave, but not while on shared parental leave, meaning that they are unlikely to be interested in taking shared parental leave at all.

Refusing the request

If the employee makes a request to take shared parental leave in one chunk, the employer cannot refuse it. If, however, they ask to take it in discontinuous blocks, the employer can refuse. The refusal does not have to be on any particular grounds and there is no requirement for it to be reasonable.

This does not seem a sensible way to proceed as an unreasonable refusal or a refusal for some specific business reason could easily cause friction between the employer and employee and cause a breakdown in what might otherwise have been a good working relationship. In addition, the way the employer chooses to consider and respond to a request could result in the employee lodging a formal grievance.

Employers will need to be careful that they deal with requests for shared parental leave from both male and female staff in the same way to avoid any allegations of direct discrimination

Employees could also argue that an unreasonable refusal could constitute a breach of the implied term of mutual trust and confidence and in certain circumstances, give rise to a discrimination claim.

For instance, a claim of indirect sex discrimination would arise if an employer applies a provision, criterion or practice (PCP) that puts female employees at a disadvantage compared to male employees (or vice versa); puts that particular individual at a disadvantage; and the employer cannot justify the PCP as a proportionate means of achieving a legitimate aim.

A claim of direct sex discrimination would arise if an employer discriminates against an employee because they are female (or indeed because they are male). In other words, employers will need to be careful that they deal with requests for shared parental leave from both male and female staff in the same way to avoid any allegations of direct discrimination.

It would also seem sensible for employers

to have some sort of guidance in place setting out how they intend to deal with shared parental leave requests and the reasons they will rely on to decide whether they will agree to or decline a request. For example, employers will have to consider how they are going to be able to accommodate employees who want to take multiple blocks of leave and how the work of that individual will be covered in their absence.

If more than one employee wants to take the same period of time off work, the employer will need to give careful consideration to how they will respond to competing requests to avoid unfairness and potential discrimination claims.

Employers should be encouraged to implement new policies and to do this in consultation with the recognised union. Any maternity, paternity and adoption leave policies will also need to be amended in light of the new changes.

Employment protection

Employers are not allowed to subject their employees to any disadvantage or detriment because they asked to take or took shared parental leave or refused to do any work during their parental leave.

The protection comes into effect from 1 October 2014 when employees have the right not to be dismissed or subjected to a detriment for making or proposing to make use of the new system.

If an employee thinks that they have been dismissed or subjected to a detriment, they may want to make an employment tribunal claim. Claims must be submitted to the tribunal within three months less one day of the detriment/date of termination. Before lodging a claim, the claimant must contact ACAS and start the process of Early Conciliation.

Conclusion

At this stage it is difficult to say with any certainty whether the new regulations will create more flexibility for parents in the workplace by building on the family friendly rights that are already in place. Given the complexities of the regulations, there is a good chance they may just discourage employees from applying for shared parental leave.

We can only hope that the further guidance that the government has promised will simplify the process and encourage employers, with the assistance of trade unions, to implement internal policies and procedures that will be accessible to both parties.

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Jo Seery looks at the new right to work flexibly, the implications and how unions might respond

Flexible working

SINCE 30 JUNE 2014, all employees in England, Scotland and Wales who have been continuously employed for at least 26 weeks have had the right to ask to work flexibly.

The key changes are as follows:

- The statutory right to request flexible working has been extended to all eligible employees, not just those with caring responsibilities for children and dependents
- The statutory procedure has been repealed and replaced with a duty on the employer to deal with requests in "a reasonable manner"
- There is no statutory right of appeal after a request has been refused
- There is no statutory right to be accompanied at a meeting to discuss a flexible working request.

Employers can treat a request as withdrawn if the employee fails to attend two meetings to discuss a flexible working request.

What is the right?

The right to request is just that, a right to ask to work flexibly, not a right to be allowed to work flexibly. Under section 80F of the Employment Rights Act 1996 employees can ask for:

- A change in their hours of work, for example from full time to part time
- The times that they want to work, for example, later start and finish times, and
- The flexibility to work from home.

Any request must be in writing and include:

- That it is a statutory request
- The change applied for, and
- What effect, if any, the change would have on the employer and how it could be dealt with.

It is important that the request covers all three points otherwise it may be deemed invalid. For instance, in Hussain -v- Consumer Credit Council, the tribunal held that the employee had not made a valid request because they did not make clear how the proposed flexible working would impact on the employer's business. However, employees do not have to tell their employer why they are making the request.

Employees can only make a request once within a 12-month period, starting with the date they made the application. If the employer agrees this will result in a permanent change to the employee's contract. Employees who want to return to work on a flexible (but temporary) basis, for example following a long period of sickness absence, should check their capability or ill-health policies and contact their union representative.

Employees do not have to tell their employer why they are making the request

How should the employer respond?

The previous statutory procedure has been repealed and replaced with a general duty on the employer to deal with the flexible working application in "a reasonable manner" and notify the employee of their decision within three months of the date of the request unless they have agreed a longer period. This can be done retrospectively provided that the agreement to extend is made within three months of the expiration of the first period.

What does "reasonable manner" mean?

Rather unhelpfully, the regulations do not define the phrase "reasonable manner", although a new ACAS "Code of Practice for Handling Requests to Work Flexibly in a Reasonable Manner" recommends that employers:

- Consider the request and discuss it with the employee as soon as possible
- Allow the employee to be accompanied and tell them this prior to any discussion
- Inform the employee of their decision in writing as soon as possible
- Allow the employee to appeal the decision.

Strangely, there is no statutory obligation on the employer to hold a meeting with the employee but the ACAS Code recommends that the employer discusses the request with the employee and allows them to be accompanied at such a meeting.

The Code also recommends that, when considering the request, employers should take into account the benefits of the change for both the employee and the business. Not surprisingly, perhaps, they are not allowed to discriminate against an employee when considering a request.

As tribunals can take the ACAS Code into account, it is likely that an employer who fails to arrange a meeting will be found not to have acted in a "reasonable manner". Similarly, an employer who fails to allow an employee the right to be accompanied or to appeal against a decision to refuse an application for flexible working may also be found to have acted unreasonably.

On what basis can employers refuse a request?

The grounds for refusing a request remain the same. In other words, employers can refuse an application for one of the following reasons: burden of additional cost, detrimental effects on ability to meet customer demands, inability to reorganise work among existing staff, inability to recruit additional staff, detrimental impact on quality, detrimental impact on performance, insufficiency of work during the periods the employee proposes to work and planned structural changes.

This gives employers a great deal of scope to refuse a request, particularly as they do not have to give a reason. However, guidance on the Government's Business Information website (www.nibusinessinfo.co.uk) advises employers to explain the business ground.

In **Commotion Limited -v- Rutty**, the Employment Appeal Tribunal held that tribunals were entitled to look at the available evidence to ascertain whether the employer's decision to refuse was factually correct. Unions should use this case when representing members to remind employers that they cannot simply cite one of the business reasons outlined. Instead they should investigate how the request can be accommodated, not how it can be refused.

The ACAS Code recommends that employers deal with requests promptly and notify employees of the decision as soon as possible

Although there is no statutory obligation on employers to notify their employees in writing of their decision, the ACAS Code recommends that they do so in order to "avoid future confusion on what was decided". Apart from anything else, employers who fail to put their decision in writing are likely to find it more difficult to defend a claim.

Employers must respond to (and make a decision about) a request within three months of receiving it, but can extend this period if the employee agrees as long as they do so ➲

➲ within six months of the original request. The ACAS Code recommends that employers deal with requests promptly and notify employees of the decision as soon as possible.

When can the employer treat a request as withdrawn?

Even though there is no statutory obligation on employers to arrange a meeting to discuss the flexible working request, they can treat it as withdrawn if:

- the employee fails without "good reason" to attend the first and second meetings to discuss it, or
- the employer allows the employee to appeal but the employee fails to attend the first and second appeal meetings.

The key issue for unions is to ensure that competing requests by members for flexible working are dealt with fairly, consistently and in a reasonable and non-discriminatory way

"Good reason" is not defined in the legislation or the Code. The ACAS Guide recommends that employers find out why their employee did not turn up before deciding to treat the application as withdrawn. For instance, if the employee could not attend because it was not convenient or because it was arranged at short notice, a tribunal might well consider these to be "good reasons".

What remedies are available to an employee?

Employees can bring a number of potential claims to a tribunal if:

- The employer failed to deal with their application in a reasonable manner
- The employer failed to notify the employee of the decision
- The employer rejected the application on incorrect facts
- The employer treated the employee's application as withdrawn without satisfying the grounds for doing so.

A claim must be brought within three months less one day of the date the employee was notified of the decision of the appeal or date of the breach.

If the claim is successful, the tribunal can make a declaration; make an order for reconsideration of the application; or order the employer to pay compensation.

The amount of compensation that can be awarded is limited to eight weeks' pay fixed at £464 per week, giving a maximum of £3,712. In addition, claimants have to pay a Type B fee (£250) to lodge the claim as well as a hearing fee of £950 bringing the total in fees to £1,200.

Employees can also bring claims for automatic unfair dismissal if they were dismissed for bringing proceedings under the flexible working provisions. Similarly, they have the right not to be subjected to a detriment for asserting their right to flexible working. However, employees can no longer bring a claim for detriment or dismissal for having requested that they be accompanied to a meeting to discuss flexible working, as the statutory right to be accompanied at these meetings no longer exists.

Early Conciliation applies to flexible working claims and employees should be advised to contact their union representative for advice before contacting ACAS. There is also an ACAS arbitration scheme that applies to flexible working requests unless another claim is likely to arise. In other words, if it looks as though the claimant has a potential discrimination complaint (as well as a complaint about flexible working) then they cannot use the arbitration scheme.

Issues arising from the statutory right

The key issue for unions is to ensure that competing requests by members for flexible working are dealt with fairly, consistently and in a reasonable and non-discriminatory way. The government consultation paper of May 2011 proposed that employers prioritised requests according to the employee's need to work flexibly.

However, this proposal did not appear in the amended legislation or in the ACAS Code. Instead, the ACAS Guide suggests that requests should be considered in the order that they are received.

Given that refusing a request could lead to a claim of discrimination, employers would be better advised to carry out an equality impact assessment in consultation

with the union. Certainly, public sector employers will need to ensure that they comply with the public sector equality duty to eliminate discrimination, advance equality of opportunity and foster good relations between those who have a protected characteristic and those who do not when considering flexible working applications.

Although a failure to carry out an equality impact assessment would not of itself give rise to an individual claim for discrimination, a failure to carry one out may be treated as evidence if an employee brings a claim for indirect discrimination.

One other possible consequence of extending the right to flexible working to all employees may result in employers trying to review all shift patterns and working hours. However, any changes to terms and conditions must be agreed with employees. Unions may also need to remind employers of the existence of collective agreements.

Indirect discrimination

In most cases, a failure to grant a flexible working request is more likely to lead to a potential claim for indirect discrimination given the limited grounds on which a claim can be brought and the low levels of compensation.

These claims arise where:

- a provision criterion or practice (PCP), such as a requirement to work full time, is applied to all employees
- those with a protected characteristic are put at a particular disadvantage when compared with those who do not have the protected characteristic, and
- the individual is put at an actual disadvantage.

In a claim for flexible working, examples of PCPs could include refusing a request; a requirement to do the job full time; a requirement to work flexible shifts and/or a requirement to work weekends.

Whether the PCP puts an employee at a particular disadvantage will depend on who is affected by it. So, for example, if the employer imposes a requirement to work weekends it may be possible to show that this puts women at a particular disadvantage if they find it harder to work weekends because of their caring responsibilities.

Unions should use the ACAS Guidance "Asking and Responding to Questions of Discrimination in the Workplace" to request further information from the employer, such as a breakdown of staff who work weekends by gender.

If the union can show that women in general are put at a particular disadvantage, the next issue is whether or not the individual is actually put at a particular disadvantage. This should not be a problem as most employees are likely to be able to establish that they are put at a particular disadvantage if their flexible working request is not granted.

Employers can defend a claim of indirect discrimination, however, if they can show that it was a proportionate means of achieving a legitimate aim. The tribunal then has to weigh the reasonable needs of the employer against the discriminatory effect on the employee.

A failure to grant a flexible working request may also amount to a failure to make a reasonable adjustment for people with a disability. In particular, the Equality Act 2010 provides that where a PCP puts a disabled person at a substantial disadvantage compared with those who are not disabled, employers are required to take such steps as it is reasonable to take to avoid the disadvantage. As in the case of indirect discrimination, it is important to identify the correct PCP to establish that the disabled employee was put at a particular disadvantage.

Employers can defend a claim of indirect discrimination if they can show that it was a proportionate means of achieving a legitimate aim.

Conclusion

As many unions have already negotiated flexible working policies that apply to all employees, the new statutory provisions are unlikely to present a problem in those workplaces. However, unions should ensure employers continue to comply with existing collective agreements in respect of flexible working that are more comprehensive than the statutory procedure.

LELR aims to give news and views on employment law developments as they affect trade unions and their members. This publication is not intended as legal advice on particular cases.

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