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FLEXIBLE WORKING: IMPLICATIONS FOR YOUR BUSINESS

The government has announced plans to extend workers rights to request flexible working to parents of children up to the age of 16.

Currently the right to request flexible working is open to parents of children under 6 (or disabled children under 18) or to carers, provided that the employee making the request has attained at least 26 weeks continuous service with his or her employer. The employee and the employer must follow the procedural requirements when making or considering a request for flexible working. If the employer fails to comply with the procedures in place the employee may file a complaint with the Employment Tribunal.

There are various options for flexible working availability including part time working, 'flexi-time', job-sharing, home working, term-time working, annual hours, compressed working and shift working. More than 90% of requests for flexible working were approved by employers last year. Employers need to familiarise

themselves with the procedural requirements and review their contracts and policies to ensure greater flexibility in working patterns.

The government's announcement that the right to request flexible working may be extended to parents of children up to the age of 16 has been met with mixed reactions. Small businesses are naturally concerned about the impact of extending the scheme.

- Does my business have a policy in place for dealing with requests for flexible working?
- Is my business able to accommodate employee's requests for flexible working?
- On what grounds can I refuse an employee's request for flexible working if my business simply cannot cope?

These are all questions which employers may find themselves considering. For guidance and information please call 0800 1804835.



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THE WORKING TIME REGULATIONS AND ON-CALL WORKERS

The Working Time Regulations 1998, provide that employees over the age of 18 are entitled to:-

- A daily rest period of 11 consecutive hours
- An uninterrupted rest period of not less than 24 hours per week
- A rest break of 20 minutes for a 6 hour long working day, and
- Adequate rest breaks, where the pattern of work puts the workers health and safety at risk.

However, for employees who work a shift pattern or are 'on call', means that the distinction of what is 'working time' and 'rest time' becomes blurred.

The landmark case of Anderson v Jarvis Hotels highlighted the difficulties. Mr Anderson worked at the hotel and undertook 'sleep overs', in which he was required to sleep on site after he had finished his working shift.

Mr Anderson claimed that his time asleep was working time. The Employment Appeal Tribunal agreed, noting that his employer required him to be on the premises during the 'sleep over' period. Furthermore, in McCartney v Oversley it was

decided that the whole period the employee was on site was working time. The employee complained that she had been refused a minimum daily rest break, as the whole 24 hours she was required to be available was working time and that the 'down time' she had could not be classed as a rest break.

So, for all those employers employing employees whose working hours are not defined the employer must be aware that if a worker is to remain in the workplace and remain available for work for a further period after their working shift, with a view to providing services, this time may well be considered working time even if the worker is allowed to sleep during this period.

An exception to the rule is Regulation 21 of the Working Time Regulations. If an employers business is of a security, surveillance or residential institution nature, an employee may be classed as a 'special case worker'. This type of worker can work and be on call for extended hours so long as they receive an equivalent compensatory rest at a later date.

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LAY-OFF v REDUNDANCY ?

Employers are becoming increasingly concerned about work levels in view of an economic slowdown. In the absence of work in the short term, one alternative to redundancy is to lay-off. The employer may prefer this option.

Lay-off does not result in the employee's dismissal and so once work levels have picked up again the employee will still be available for work.

However, the employer needs to consider what payments should be made to the laid-off employee. Ordinarily the employee is entitled to full pay in the absence of a contractual provision or agreement providing otherwise.

However, if the employee is laid-off with no pay, or reduced pay, he or she may be entitled to Statutory Guarantee Pay, which is paid by the employer. The current rate being £20.40 per day and at a maximum of 5 days for any 3 month period. But an employer should not consider lay-off if a genuine redundancy situation has arisen. Furthermore, employers beware if you decide to act unreasonably, especially if the employee is laid off for an indefinite period, as an employee can resign and claim Constructive Dismissal

See our guidelines below:

HARRASSMENT BY THIRD PARTIES

As of 6th April 2008 employers are now liable for 3rd party acts of 'harassment' towards their employees. Changes to the Sex Discrimination Act 1975 now means that an employer must take reasonable steps to protect an employee from harassment by a 3rd party. Where the harassment is known to have taken place on at least 2 occasions, but not necessarily treatment from the same individual, the employer has the obligation to implement procedures to protect and prevent such treatment towards their employees. A failure will constitute unlawful sexual harassment.

Unlawful sexual harassment now also includes: unwanted conduct relating to the sex of the person and where a person finds them self in an intimidating environment when they witness a person being subject to harassment related to sex.

Whilst unlawful harassment is now defined as 'unwanted conduct that is related to a [woman's] sex or that of another person therefore widening the definition to include those who are affected are not necessarily the recipient!

There are no set guidelines in place, yet, as to the actions an employer must take to protect and prevent harassment towards their employees. But in the meantime an employer should ensure that any concerns of harassment are logged and if necessary the 3rd party confronted; be seen to be taking the appropriate action. Introducing a work policy on the issue would be a step in the right direction.

Other changes to the Sex Discrimination Act include:

- A woman who is pregnant or on maternity leave need only now show that she was treated less favourably on grounds of her pregnancy or maternity leave.
- Women whose expected week of childbirth is after 5th October 2008 will enjoy the same rights during Additional Maternity Leave in respect of the terms and conditions that are currently provided during Ordinary Maternity leave.

	LAY OFF	REDUNDANCY
Meaning	No work available for employees, who are asked therefore to stay at home without receiving pay. Lay-off is <u>temporary</u> in nature.	No work available for employees on an on-going basis and therefore employee / employees are <u>dismissed</u> .
Are Employer's Actions Lawful?	Employer cannot lay-off employees <u>without pay</u> unless – 1. contractual provision in Contract of Employment 2. verbal or written agreement with employee 3. trade union / industry agreement 4. evidence of established custom.	The Employee Rights Act 1996 sets out the statutory definition of redundancy. If the employer cannot justify the dismissal on legitimate grounds the employee may have a claim for Unfair Dismissal. The employer must follow certain statutory procedures.
Statutory Minimum Entitlement	If qualifying employee is laid off without pay he may be entitled to <u>Statutory Guarantee Payment</u> ("SGP")	If qualifying employee is dismissed as a result of redundancy he may be entitled to <u>Statutory Redundancy Pay</u> ("SRP")
Eligibility	- employees only (based in UK) - qualifying period: 1mth employment - subject to reasonable requirement to do alternative work - employee must be available to work	- employees only - qualifying period: 2 years employment - not belonging to excluded class - there must have been a dismissal (and as a result of redundancy)
Employee's Remedies	- Employment Tribunal claim for Unlawful Deduction of Wages (if employee receiving no salary) - claim for SGP - Constructive Dismissal/ Redundancy	- Unfair Dismissal (if employer cannot justify redundancy / statutory procedures not followed correctly) - Employment Tribunal claim for SRP

AGE DISCRIMINATION - THINK TWICE BEFORE RETIRING AN EMPLOYEE ON HIS RETIREMENT DATE

Before dismissing an employee on his or her retirement date an employer must consider The Employment Equality (Age) Regulations 2006, 'Statutory Retirement Procedure', and the implications of 'Age Discrimination'.

At present the default retirement age of any employee is 65 years old and compulsory retirement of an employee at this age is not necessarily direct discrimination towards their age - just so long as the new procedures are followed!

The 'Statutory Retirement Procedure' introduces the steps to be followed by the employer. If followed correctly and in the correct timeframe, it could mean that the employer avoids any potential liability for an Age Discrimination claim. The new procedure aims to eliminate the retirement of those employees who are dismissed solely due to their age.

Schedule 6, paragraph 2, of the 2006 Regulations lists the duties of an employer in the run up to the retirement of an employee:-

1. There is a duty by the employer to inform the employee of the intended retirement date and their right to request to continue working beyond the retirement. The time frame for this is less than 12 months but more than 6 months, prior to the employee's retirement date.



2. If the employee issues a written request to continue working beyond their retirement date, the employer must hold a meeting with the employee to discuss and consider the request further.

It is crucial that employers take note of the new 'Statutory Retirement Procedure' as by complying with the procedure an employer can avoid committing Age Discrimination in relation to retirement. A complete failure to follow the procedure will leave an employer open to liability for an Age Discrimination claim and possible Unfair Dismissal of an employee.

For further information on the 'Statutory Retirement Procedure' and how you can ensure the procedures are implemented correctly, contact one of our Team on 01793 51 1055 or 0800 180 4835.

ARE SABBATICALS AN ALTERNATIVE?

As businesses look to cut costs and reduce overheads in this current economic climate many are considering an alternative to redundancy and are offering staff sabbaticals instead.

Sabbaticals are still a relatively new concept to many UK businesses with employers traditionally reluctant to let staff go, but times are changing.

Lisa Wright, Employment Solicitor with us, says increasing numbers of employers are turning to sabbaticals as a way of streamlining their workforce during times of recession.

"Redundancies will be the obvious option but there is a growing reluctance to let go of valued employees who still have potential to contribute to the business," she says. "If and when business does pick up again, the services of some employees who have been made redundant will be sorely missed."

"The employee can remain 'employed' without receiving pay and can be reintegrated into the business at the conclusion of the sabbatical," added Lisa Wright.

However, a sabbatical has to be voluntary and employers cannot ask employees to take unpaid leave against their will.

"We would strongly advise employers to have a written sabbatical policy explaining issues such as eligibility, length of leave, notice requirements and entitlement to pay during the career break," says Lisa Wright. All staff should be treated fairly when applying for a sabbatical and a work policy in place to cover such leave will ensure both parties act fairly and follow an agreed procedure.

"Sabbaticals are also an attractive proposition for employees with the business who feel they need to refresh and will return renewed with creative energy following an extended break." concluded Lisa Wright.

AGENCY WORKERS TO BENEFIT FROM 12 WEEKS EMPLOYMENT

A permanent worker is as an employee with a contract of employment. Whereas- an agency worker is a temporary worker and will find work through an employment agency. The primary benefit being that the work this type of worker undertakes is flexible. Both the contract of employment and pay is provided by the employment agency to the worker.

However, the gap between permanent and temporary workers is soon to become even smaller as a proposal between the government and Trade Unions is set to provide stronger legal protection for agency workers. If the proposal proceeds to legislation, agency workers will receive

similar employment rights to those of permanent employees, so long as they have completed 12 weeks employment. The enhanced benefits received after the completed requisite period will include holiday pay and equal pay, the same as their permanent counterparts receive. But long term benefits such as sick pay and pension rights will still be excluded.

With approximately 1.4 million agency workers in the UK (BBC news states) it is not a surprise that controversial discussions have surrounded the proposal, especially the question of whether the new enhanced rights are at all 'fair' in employment terms.