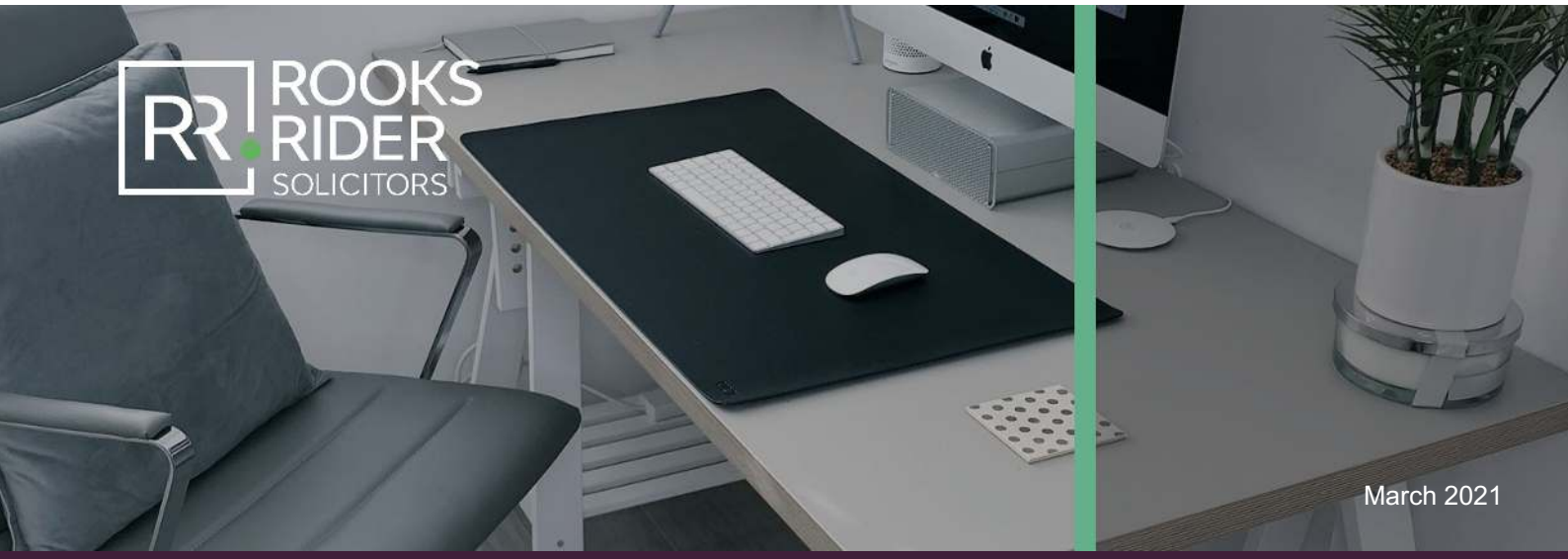

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Dealing with Flexible Working Requests: An Employer's Guide

Initially brought in to support those employees with caring responsibilities, the right to request flexible working was introduced in 2003. Since then, the number of flexible working arrangements has grown slowly and steadily. As of 30 June 2014, all employees with at least 26 weeks' continuous service have been able to make a request for any reason.

However, over the past year, the Covid-19 pandemic has been the catalyst for a rapid and significant change in mindset for employers, as they have been forced to fully embrace flexible working.

As many employers now look to start planning how their workforce will be organised after the pandemic, how should employers deal with any flexible working requests they receive?

What is flexible working?

Flexible working essentially means a working arrangement that suits an employee's needs. It will typically involve a variation to an employee's contractual terms and conditions. It can take many forms and may include:

- remote or home working (as we have predominantly seen during the pandemic);
- having flexible start and finish times; and
- agreeing to work part-time.

Who can make a request?

Since 30 June 2014, employees have a statutory right to request that their employer change their contractual terms and conditions of employment to work flexibly, provided they have worked for their employer for 26 weeks continuously at the date the application is made. An employee can only make one statutory request in any 12 month period. Employees who have been employed for less than 26 weeks, agency workers and office holders do not have a statutory right to request flexible working.

Previously, the right only applied to the parents of children under 17 (or 18 for parents of disabled children) or to those caring for an adult.

Making an application

Employees must make their request in writing, setting out:

- the date of their application, the change to working conditions they are seeking and when they would like the change to come into effect;
- what effect they think the requested change would have on the employer and how, in their opinion, any such effect might be dealt with; and
- that they are making a statutory request and, if they have made a previous application for flexible working, the date of that application.

Employees should be made aware that, once the employer approves or rejects their application under the right to request, they do not have a statutory right to request another variation in contractual terms for a period of 12 months, although employers and employees are free to agree such variations outside the statutory provisions.

What employers must do

Employers must deal with statutory requests for flexible working in a 'reasonable manner'. Ultimately, if an employer does not handle a request in a reasonable manner, the employee can bring a claim in an employment tribunal.

It is important that an employer deals with requests in a timely manner, as the law requires the consideration process to be completed within three months of the date that the request was received, including any appeal. If, for some reason the request cannot be dealt within three months, then an employer can extend this time limit, provided the employee agrees to the extension.

In practice, since the majority of employees across the country will have worked flexibly (in one form or another) during the pandemic, employers should not need three months to deal with a request. In addition, if requests are not dealt with relatively promptly, the employee making the request is more likely to feel undervalued by their employer.

Agreeing the application

If the employer agrees with the changes proposed by the employee, it should write to the employee with a statement of the agreed changes and a start date for flexible working. The employer should also vary the employee's contract to include the new terms and conditions. This should be done as soon as possible, but no later than 28 days after the request was approved.

Once a contract has been varied, an employee has no right to return to the previous terms and conditions and, if the employee wanted to do so, they would need to make a fresh application (after 12 months has elapsed since their previous application). Employers and employees could agree to a trial period of the new terms to circumvent this.

Rejecting an application

Requests to work flexibly must be considered objectively and an employer should only refuse them if there is a business reason for doing so.

The legislation prescribes several business reasons, which an employer may base its decision on, including:

- extra costs which will damage the business;
- the work cannot be reorganised among other staff;
- people cannot be recruited to do the work;
- flexible working will affect quality and performance;
- the business will not be able to meet customer demand;
- there is a lack of work to do during the proposed working times; and
- the business is planning changes to the workforce.

Appeals

Employees no longer have a statutory right to an appeal. However, employees should be offered an appeals process, as this will help employers demonstrate that they are handling requests in a reasonable manner.

Employees can complain to an employment tribunal if the employer:

- didn't handle the request in a reasonable manner;
- wrongly treated the employee's application as withdrawn;
- dismissed or treated an employee poorly because of their flexible working request, e.g. refused a promotion or pay rise; or
- rejected an application based on incorrect facts.

Employees cannot complain to a tribunal simply because their flexible working request was rejected. However, employers need to ensure that they deal with any

requests fairly and consistently and take care not to discriminate against an employee making such a request, otherwise they may face a claim for discrimination on one of the grounds prohibited under the Equality Act 2010.

Informal requests for flexible working

In practice, staff do not necessarily need to invoke the statutory procedure and may make informal approaches to their employer, perhaps via their line manager or HR department, about the possibility of changing their working patterns, either temporarily or permanently. There is nothing to stop any member of staff asking their employer to vary their working pattern at any time, regardless of their length of service or employment status. In addition, there is also no limit to the number of informal requests an employee may make.

If you would like further advice on how to deal with a request for flexible working in a 'reasonable manner' or any other aspect of the flexible working regime, please contact Aaron Heslop in our Employment team for an initial consultation.

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