

Employment Law Update

Summer 2023 - Recent Developments

- Changes to flexible working regulations
- The menopause and the workplace
- New employment protections for parents and carers
- Allocation of tips and service charges

Changes to Flexible Working Regulations

Changes to the Flexible Working Regulations are due to be implemented to make it easier for employees to request flexible working arrangements. These include a 'day one' right and simplified procedures. However, employers can still refuse the request provided they comply with the process under the regulations.

Working patterns changed during the pandemic, not least an increase in working from home. This remains an issue for employers and employees. This led to a consultation in 2022 to which the Government has recently published its response setting out its proposed changes to the regulations. These are as follows:

- Currently, all employees have the legal right to request flexible working after having worked for the same employer for at least 26 weeks. **This right will now apply from day 1 of employment.**

- The application must be in writing and an employer must usually make a decision within three months or longer by agreement. **This will now change to two months.**
 - Employers can only make one statutory application per 12 month period. **This will change to two applications per 12 month period.**
 - Employers must deal with requests in a "reasonable manner" which could include holding a meeting with the employee as well as offering an appeal process. **There is now an added "duty to consult with the employee as a means of exploring the available options such as any alternative forms of flexible working available, before rejecting their flexible working request.**
 - **The procedure for requesting flexible working will also be simplified by removing the requirement for employees to set out how the effects of their flexible working request might impact upon the employer.**
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- The employer can refuse an application if they have a good business reason for doing so. Examples of good business reasons are extra costs that will damage the business, the work cannot be reorganised among other staff or flexible working will affect quality and performance. **There are no proposals to change these provisions.**
- If the employer breaches the flexible working regulations or unreasonably refuses a request, then the employee's remedy is to bring a claim in the Employment Tribunal for which the compensation is up to 8 weeks' pay at the statutory rate of £643 per week. As there is no other enforcement mechanism in the regulations, this means that the employee's remedy is limited to minimal compensation only, even if the Employment Tribunal determines that the request has been unreasonably refused. The regulations do not therefore make much impact in practice provided that the employer follows the correct procedure. **There are no proposals to change these provisions.**

The implementation date is yet to be announced so the existing regulations will continue to apply.

Comment

The Flexible Working Regulations provide a right to request flexible working and not a right to demand flexible working. The proposed changes whilst increasing administrative burdens on employers are unlikely to make a significant difference, in practice. There is, of course, nothing to prevent employers and employees from agreeing flexible working on an informal basis rather than following the procedure under the regulations.

Menopause and the Workplace

The Government has recently published its response to the Women and Equalities Committee's (WEC) Report "Menopause and the Workplace".

Background

There is no specific protection for menopausal employees under the Equality Act which means they cannot bring stand alone discrimination claims against their employer for less favourable treatment due to the menopause. Any claim referring to the menopause must be brought in conjunction with other discrimination claims eg disability, age and sex.



As well as improvement in medical treatment, campaigners have also sought amendments to the Equality Act to provide better protection for menopausal employees.

WEC Report

The WEC addressed this lack of protection in its report published in July 2022 by proposing to implement combined discrimination provisions and in particular sex and age as a single dual protected characteristic under the Equality Act to protect women going through the menopause. They also proposed to make the menopause a new protected characteristic and a duty on employers to make reasonable adjustments, similar to disability discrimination.

Other recommendations included the appointment of a Menopause Ambassador to work with key stakeholder and produce model menopause policies as well as a pilot menopause leave policy with a large public sector employer. Also, for the Health & Safety Executive and Equality in Human Rights Commission to produce guidance on the menopause within six months and for flexible working requests to become a day one right.

Government's Response

Most of the WEC proposals were rejected by the government and in particular, the amendments to the Equality Act giving specific protection to menopausal employees. The government's view is that whilst it wishes to encourage menopausal women to continue working, it does not accept that it is necessary to introduce additional protection under the Equality Act.

They agreed to the appointment of a Menopause Employment Champion (not Ambassador) but not the model menopause policies. The Government states it remains supportive of the aim to educate and inform workplace colleagues about potential menopause symptoms and how they can support women at work. This will be the role of the Menopause Employment Champion who will work with the Women's Health Ambassador on the issue of menopause and employment.

They have also agreed amending the flexible working regulations to include a day one right. They agreed in part to the publication of HCS and EHRC Guidance. The other recommendations were all rejected.

Comment

Despite the Government's response, many companies are now introducing menopause policies and taking steps to assist and make adjustments for menopausal employees. Various organisations such as ACAS have also produced guidance. Although the MEC has now been appointed, it remains to be seen how much impact they will have.

New employment protection for parents and carers

Three private members bills have recently been passed which will give parents and unpaid carers new protections at work. Despite Government backing, there is no implementation date.



The bills provide the following protection:-

- Parents whose new born baby is admitted to Neonatal care will be able to take up to 12 weeks of paid leave. This is in addition to other leave entitlement such as maternity and paternity leave. Paid leave, however, will be at the statutory rate of £172.48 per week.
 - The redundancy protection which currently applies to women on maternity leave will be extended to pregnant employees and those who have recently returned from maternity leave. The protection requires an employer to offer the women a suitable alternative vacancy where one is available with the employer or an associated employer (i.e. a group company). It is up to the employer to decide whether the vacancy is a suitable alternative and it must be offered on the same terms and conditions of employment
 - There will be a new statutory entitlement to one week of flexible unpaid leave per year for employees who are caring for a dependent with a long term care need.
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Tips and service charges

New legislation will be implemented next year (to be confirmed) regarding tips and service charges. This will require employers to ensure all tips and service charges are allocated fairly between its workers. "Fairly" is not defined, but employers are required to have regard to a code of practice. This is being developed and will be put out for consultation in due course.



Employers will also be required to have a written policy on how they deal with tips. They must also keep records of all tips and service charges received for three years.

Employees will have the right to bring Employment Tribunal claims for non-payment of tips. The Tribunals will also be able to compel employers to revise their tip allocation policies. They will also be able to order the employer to pay tips and service charges not just to the individual bring the claim, but to any workers employed by the employer. In cases of serious breach, compensation up to £5,000 per claimant might be payable to reflect additional financial losses caused by non-payment.

Comment

Whilst well intentioned, this new legislation is likely to be onerous for employers, not least the additional record keeping as well as the risk of potential claims .

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Disclaimer - This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.

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