

# Spearing | Waite

Employment Law

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## Newsletter

News update for  
HR Specialists



**Kim Abbott**

There have been a number of important changes as from 1st October 2007, some of the most important of which are as follows:

- **The Working Time (Amendment) Regulations 2007**  
These regulations provide that, from 1st October 2007, workers will be entitled to 4.8 weeks of paid leave each year, which equates to 24 days for a worker who works five days per week ("the Average Worker"). This entitlement will then increase to 5.6 weeks as of 1st April 2009, which means an entitlement of 28 days for the average worker.
- **National Minimum Wage Regulations (1999) (Amendment) Regulations 2007**  
The rate per hour for workers aged 22 or above rose from **£5.35** to **£5.52**; for workers aged 18 to 21, from **£4.45** to **£4.60**; and for workers aged under 18, from **£3.30** to **£3.40**.
- **Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (No 2.) Regulations 2007**

These regulations make changes to the definition of "adopter" for the purposes of the statutory right to request flexible working, and extend the right to private foster carers.

### **Flexible working requests...a trap for the unwary**

As from 6th April 2003, parents and others responsible for looking after children aged under 6 years of age (under 18 years of age if the child is disabled) have a right to request flexible working. The request has to be made in order to enable the employee to care for the child and is subject to the employee having been employed for at least 26 weeks.

In April 2007, the right to request flexible working was extended to carers of adults as a result of amending regulations. Now, employees have the right to request flexible working if they have 26 weeks' service and care for an adult who is their spouse, partner, civil partner, a relative, or an individual who lives at the same address.

One of the main issues facing employers, as a result of the recent changes, will be

ascertaining whether or not requests are genuine. There is nothing in the new regulations which sets out what "carer" actually means and there is no provision for employers to ask for proof of caring, parental responsibility, the level of care required or indeed why they, in particular, are needed to provide the care. The DTI guidance on this area does suggest that it may be reasonable for employers to ask for evidence or proof where they reasonably suspect abuse of the regulations. The problem with this is that it will never be clear when it is acceptable to make such an enquiry, and, in fact, doing so may prompt claims of victimisation/discrimination and/or even constructive unfair dismissal. With this in mind, questioning an employee would be dangerous without clear evidence of such likely abuse. If an employee is found to have committed any abuse of the regulations, then they are likely to be subject to disciplinary action and possible dismissal.

An added problem may arise as a result of a case which has been sent to the European Court of Justice ("the ECJ"), Coleman-v-Attridge Law [2006] ET/2303745/05. This case is looking to decide the question of whether or not the Disability Discrimination Act 1995 covers discrimination on the ground of association with a disabled person. If it is found to be the case that unlawful disability discrimination can take place, even where the individual making the complaint does not have the disability but is associated to someone who does, this could create more claims when refusing or responding to requests for flexible working.

Irrespective of any possible future developments, employers must be very aware of the possible risk of indirect sex discrimination, when responding to flexible working requests. This is most likely to arise where female employees make requests in respect of looking after children. The possible liability attached to such a claim is unlimited. To this end, claims relating to sex discrimination are

to be feared much more than any claim permitted under the flexible working provisions.

In making a flexible working request, there are certain statutory procedures which must be followed by both employee and employer. These procedures relate to details of the request, time frames, meetings and appeals.

An employer may refuse a flexible working request, provided the reason for so doing relates to one of the permitted grounds within the legislation. Otherwise, an employee would have the right to compensation (limited to 8 weeks' pay) and/or an order from an Employment Tribunal for the employer to reconsider its refusal.

A dismissal will be automatically unfair if an employee is dismissed because he made or proposed to make a request for flexible working, he was exercising or proposing to exercise his right under the procedure, or was bringing proceedings in relation to the procedure. An employee will also have the right not to suffer a detriment for any of the reasons mentioned.

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