

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
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Flexible Working

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Flexibility exists in many different ways and although those involved may have their own specific reasons for why their relationship has developed like it has, flexibility is generally driven by one of four causes, being: numerical flexibility; functional; financial; and temporal.

What is flexible working?

The term "flexible working" applies to any working pattern, working time or place of work which is adapted to suit the needs of either the employee or the employer or both. However in this paper we are focussing on a specific aspect of flexibility and that is the ways in which employees are permitted to take time off work.

There are many different ways to achieve flexibility

Many employers want numerical flexibility in the workforce: the ability to increase or decrease the number of staff they have working for them at any one time. For some industries, numerical flexibility is crucial for example to meet seasonal influences such as in the travel and agriculture sectors. Employers will generally be able to anticipate demand for their services, but there will always be the possibility of the unforeseen which creates an additional call on resources. There are a number of ways employers can be flexible, through the use of fixed term contracts, part time contracts, casual staff, annual hours contracts, zero hours contracts and simple overtime. What works best will depend on the particular employer and the nature of the demand for their services, such as having a staff bank which can fill a gap caused by an employee calling in sick. Others may need to deliver a service 24 hours a day, 7 days a week for 52 weeks of the year. This is not limited to the care sector and, for example in manufacturing can allow production lines to run continuously and through flexible shifts still allow employees the benefit of a work/life balance.

Employers will seek functional flexibility through multi and cross-skilling, ensuring that employees are trained to perform a number of different tasks, perform a wide range of tasks and constantly acquire new skills; all to meet the changing nature of the employer's work.

Employers will also offer staff financial flexibility so that the amount they are paid depends on the job done, hours worked, or the amount the employer can afford. Examples are performance related pay or profit sharing, piece work and hourly wage.

We have discussed in other papers some of the ways in which employers seek flexibility. Please see our website at www.wrigleys.co.uk and 'Atypical Workers' from our 2005 Employment Update Seminar. In the past we have looked at the different forms of contracts and the relationships which can exist, especially (but not exclusively) in the voluntary and community sector.

Form of contract -v- Substance of rights

The different form of contracts available can deliver flexibility, each having its advantages and disadvantages and each having a potential for abuse. Statute has sought to address some of those abuses, for example in terms of part time working, fixed term working and agency. There are those who claim, with some justification that the potential for and that actual abuse continues. In this paper we are not looking at the different forms of contract, but rather the specific statutory and contractual rights and non-contractual arrangements (the latter based on no more than the employer's discretion) which can be used to provide flexibility and which may apply regardless of the actual form of contractual relationship that exists between the employer and employee.

It is important to bear in mind that 'flexible working' is not just seen from the employer's perspective. Employee's have a basic need to apply a limited resource, their time, to meet conflicting demands.

However, it is not just employees who seek flexibility and many rights are not exclusive to employees. 'Employment' rights continue to be extended to workers, a wider category that will include employees as well as some self employed contractors who have agreed to personally provide a service.

There are various tests applied to help determine whether any individual is an employee, a worker or self employed but this is not something that we will deal with here. For more information please see our website at www.wrigleys.co.uk where we have discussed employment status in previous talks at our Employment Update Seminar.

Where does flexibility come from?

Some flexible working patterns are available as statutory rights, such as maternity, paternity or parental leave. Workers will have a legal right to exercise such rights, to request or to take time off from work or to change their working patterns provided that they meet the required statutory criteria.

Flexibility can also be based on a contractual right, with the relevant rights contained in the contract of employment or a staff handbook. The right may have arisen through trade union or other pressures, but often may now be seen as common practice. Contractual rights often build on statutory rights, such as employer's sick pay, holiday entitlement, but as well as enhancing existing (basic) statutory rights will often go beyond what statute offers, such as in the case of flexitime and term-time working.

Perhaps more importantly flexibility relies upon the goodwill between an employer and their workers. Statutory and contractual rights will often include an element of discretion on the part of the employer. Whilst the exercise of any discretion may be open to challenge by a disgruntled worker, it remains that many employers will go beyond what they are obliged to offer.

Now we will turn to look at specific areas and examples of flexible working.

Statutory rights

1. Flexible Working Requests

'Flexible Working' is a specific right granted by the Employment Act 2002 to carers of children under the age of six or disabled children under the age of eighteen. On 6 April 2007 the right was extended to include employees who care for, or expect to care for, adults.

Carers have the right to apply to their employer for a more flexible working pattern, which may include more flexible hours or times of work, or flexibility in terms of the employee's place of work. It is only a right to request, not a right to demand changes. The regulations require employers to consider requests in accordance with a prescribed procedure.

The detail is contained in The Flexible Working (Procedural Requirement) Regulations 2002, The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, which came into force on 6th April 2003 and The Work and Families Act 2006.

To be eligible to apply for Flexible Working an employee carer must be either:

- the mother, father, adopter, guardian (within the meaning of s.5 Children Act 1989) or foster parent of a child, or be married to or the civil partner of such a person and living with the child or be the partner of such a person; or
- caring for an adult to whom they are married, or who is their partner or civil partner; or who is a near relative; or who falls into neither of those categories, but lives at the same address as the employee.

A near relative will cover parents, parent-in-law, adult child, adopted adult child, siblings (including in-law), uncles, aunts, grandparents and step-relatives. The carer must also:

- have been continuously employed by their employer for a period of no less than 26 weeks; and

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- in the case of those caring for children must have or expect to have responsibility for the child's upbringing.

A request for Flexible Working must specify the change suggested including when the change should be introduced, what the employee considers will be the work impact of the change and how this can be dealt with; that it is a request for Flexible Working; and whether any previous requests have been made in the previous 12 months (only one request can be made in any 12 month period). The Request must be made in writing and be signed and dated. An employer has a statutory duty to consider the Request seriously and should either agree the change in writing or meet with the employee within 28 days of the date of application to discuss it and, if the Request cannot be met, to consider alternatives. The 28 day time period only applies to this meeting and does not set the framework in which any agreed changes must take effect. An employee has the right to be accompanied to the meeting.

An employer may only reject an application for Flexible Working on one or more of the specific business grounds that appear in the Employment Rights Act 2002. These include:

- the burden of additional costs;
- the detrimental effect on the business's ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- the detrimental impact on quality;
- the detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes; and
- any other ground the Secretary of State may specify.

The acceptance of the proposed change or the grounds on which it is refused must be explained to the employee in writing within 14 days of the meeting. The employee has the right to appeal. The appeal should be heard within 14 days and a decision provided to the employee within a further period of 14 days. The time limits can be extended by agreement.

If the employer fails to follow the correct procedure or unreasonably rejects a request for flexible working, the employee may seek compensation from an

employment tribunal of up to 8 weeks pay (subject to the statutory cap on a weeks pay - currently £310 and revised in February each year).

In addition rejecting a request from a female employee may amount to indirect discrimination on the basis that women are more likely to be the primary carers. Compensation for discrimination is uncapped.

An employee has the right not to be subjected to any detriment by the employer on the ground that the employee has exercised the right to request flexible working. Any employee who is dismissed for exercising that right will be automatically unfairly dismissed; the one year continuous employment requirement for taking such a claim to the employment tribunal will not apply, but note that for the request to be valid the employee must have been continuously employed for not less than 26 weeks.

The effect of the application being accepted will be a variation of the terms and conditions of the employee's contract of employment and the variation will be permanent unless the employer and employee agree otherwise.

2. **Maternity Leave**

Maternity leave is time taken off work by female employees in connection with the birth of a child.

In April 2007 maternity and parental rights changed quite significantly with amendments to the Employment Rights Act 1996 implemented by the Maternity and Parental Leave etc (Amendment) Regulations 2006 and the Work and Families Act 2006.

2.1 **Period of leave**

Maternity leave lasts for a maximum of 52 weeks which comprises a maximum 26 weeks of 'Ordinary Maternity Leave' (OML) and a maximum 26 weeks of 'Additional Maternity Leave' (AML)

All pregnant employees regardless of their length of service and whether they are full time or part time are entitled to OML which may be taken at any time from the eleventh week before the Expected Week of Childbirth (EWC).

In certain situations OML will start automatically; in the event of any early birth before OML was due to start; and where there is a pregnancy related absence from work less than 4 weeks before the EWC.

Since 1 April this year, new mothers regardless of their length of service are also entitled to AML, which automatically commences at the end of the OML period. There is no separate notification requirement for AML.

Before 1 April 2007, mothers needed to have had at least 26 weeks continuous employment with their employer at the start of the 14th week before their EWC to qualify for AML.

2.2 Maternity pay and other benefits

To qualify for Statutory Maternity Pay (SMP), a woman must have worked for her employer for at least 26 weeks ending with the 15th week before the EWC, even if, in the event, the baby is born earlier. She must also have been earning at or above the Lower Earnings Limit for payment of National insurance contributions (currently £87 and revised in April each year). Those not eligible for SMP may be eligible for Maternity Allowance, paid directly by the State. Qualifying mothers whose EWC was the week beginning 25 March 2007 or earlier are entitled to a total of 26 weeks' SMP.

Qualifying mothers whose EWC was for 1 April 2007 or later are entitled to a total of 39 weeks' SMP.

In either case, the rate of pay is currently 90 per cent of the employee's average earnings for the first six weeks, followed by either 90 per cent of her average earnings or £112.75 per week, whichever is lower, for the remaining period of entitlement.

Statutory Maternity Pay normally commences at the start of OML.

In addition to SMP, employees are entitled to any non-cash benefits as provided by their contracts which will continue for the OML period. Such benefits do not continue into AML save at the employer's discretion. Contractual rights will continue through both OML and AML (although in more limited terms), including provisions relating to notice, dismissal, grievance, redundancy, non-competition and confidentiality.

While an employee is on OML she continues to accrue annual leave in the normal way. While on AML she is not entitled to contractual annual leave though her right to accrue statutory holiday under the Working Time Regulations 1998 continues.

Employers must continue to pay pension contributions whilst SMP or any contractual maternity pay is paid.

2.3 Notification Requirements

After the 21st week of pregnancy, the midwife or GP will provide a MATB1 certificate to confirm the expected date of childbirth. There is a requirement to notify the employer by the end of the 15th week before

EWC, or as soon as reasonably practicable thereafter giving details of the EWC and the date on which the employee expects to start OML.

The employer has 28 day to confirm the expected date of return, assuming that the employee takes the full period of OML.

The employee can change their mind about the start of OML, but must give notice at least 28 days before OML was originally intended to start and at least 28 days before the new start date.

During maternity leave, employees have the right to be notified of any changes in the workplace, including any internal vacancies advertised.

An employee can chose to return early from maternity leave. For employees with the EWC before 1 April 2007 at least 28 days notice must be given for an early return (from OML or AML). For employees with an EWC from 1 April 2007 8 weeks notice is required.

2.4 **Return to Work**

An employee may not return to work during the first two weeks following the birth. If she is a factory worker, she may not return for four weeks. Criminal sanctions can be imposed on an employer who is in breach.

For employees with an EWC from 1 April it will now be possible for the employee, in agreement with her employer, to do up to ten days' work during her Maternity Leave without losing SMP or ending her leave. These are known as "Keeping in Touch days". Keeping In Touch is by agreement and neither can insist.

Any work done on any day during the maternity pay or maternity leave period will count as a whole Keeping in Touch day. Although the new rules do not specifically say that the employee is to be paid, it is recommended that until this area becomes clearer, payment is made in order to avoid potential claims for detriment, under equal pay or for national minimum wage. If the employee is receiving SMP, her employer may count any payment for Keeping In Touch as going towards the employees' entitlement for SMP in that week.

If a woman returns to work during or after a period of OML she is entitled to return to the same job on the same terms and conditions. If she returns to work during or after a period of AML she is entitled to return to the same job unless it is not reasonably practicable. She should be offered a similar job that is suitable on terms and conditions which are no less favourable.

Other maternity related rights to time off

Ante-natal care (s 55 Employment Rights Act 1996)

All pregnant women have a right not to be unreasonably refused paid time off work for ante-natal care, including time spent travelling to ante-natal appointments. Although there is no legal definition of "ante-natal care" the DTI guidance note says that it "can include parentcraft and relaxation classes" if they are recommended by a doctor or midwife.

However the time off must relate to ante natal care and not generally to the health of the mother or child even if time off is based on medical advice. Payment is at the statutory rate, but the employer always has discretion to allow the usual contractual rate of pay.

Employers may ask pregnant employees to try to minimise disruption to their work if possible but must recognise that there is little flexibility in the medical appointments system. Employers may ask to see the appointment card and a certificate signed by a GP, midwife or health visitor confirming the pregnancy and the actual appointment.

Leave following a Miscarriage or Stillbirth

If a baby is stillborn from the 25th week of pregnancy, or later, then ordinary maternity leave and paternity leave and maternity and paternity pay rights apply. If the mother miscarries in the 24th week of her pregnancy, or earlier, she will not be entitled to any maternity leave or maternity pay and there is no right to the corresponding period of paternity leave or paternity pay. If the baby is born alive no matter how far into the pregnancy but later dies, employees are entitled to ordinary maternity and paternity leave and pay. Extra care and sensitivity is of course needed in all of these circumstances.

3. **Paternity Leave**

Paternity leave is time off by employees following the birth or adoption of a child. Paternity leave is not restricted to fathers but the partner of a mother or adopter must live with the mother or adopter and the child in an enduring family relationship but is not a relative (parent, sibling or uncles or aunts). The employee must have worked for their employer for at least 26 weeks by the 14th week before the Expected Week of Childbirth (even if in the event it is born early) or date of placement and must have or expect to have responsibility for the child's upbringing or care. An employer may ask for a self-certificate confirming that the employee is entitled to the leave.

While on Paternity Leave, an employee is entitled to receive the usual contractual benefits and accrue annual leave. The employer must continue to make pension contributions.

3.1 Period of Leave

Employees may take either one week in total or two continuous weeks' paid leave during the first 56 days including and following the date of the birth or placement.

3.2 Paternity Pay and other benefits

During Paternity Leave, employees who were earning at or above the Lower Earnings Limit are entitled to Statutory Paternity Pay (SPP).

The current rate of SPP is £112.75 a week or 90% of the employee's average weekly earnings if this is less. The rate is revised in April each year.

During paternity leave the employee's contract of employment will continue save in relation to pay or other cash benefits which are suspended.

3.3 Notification Requirements

There is a requirement to notify the employer of the intention to take paternity leave by the end of the 15th week before EWC, or as soon as reasonably practicable thereafter giving details of the EWC and the date on which the employee expects to start paternity leave.

In the case of adoption an employee must tell their employer that they intend to take adoption leave no more than 7 days after the day the adopter is notified of having been matched with the child or, if this is not reasonably practicable, as soon as is reasonably practicable.

In addition as soon as practicable after birth or placement the employee must notify this fact to the employer.

The employee can change their mind about the start of paternity leave, but must give notice at least 28 days the new start date.

To qualify for SSP, employees must notify their employer that they want to get it at least 28 days before they want it to start.

Where an employee is entitled to both pay and leave, the notice given for leave by the fifteenth week before the week the baby is due can count as notice that the employee would like to receive SPP as well.

3.4 Return to Work

At the end of Paternity Leave, an employee is entitled to return to the same job as before on the same terms and conditions of employment, unless a redundancy situation has arisen.

3.5 The Future

The Government is consulting on extending paternity leave by introducing Additional Paternity Leave (APL) by the end of the current parliament (2010). Employees will be entitled to take APL if the mother or adopter returns to work before the end of their maternity/adoption leave. It is proposed that APL will start any time from 20 weeks after birth or placement and must end no later than 52 weeks from that date. During APL employees will be entitled to receive Additional Paternity Pay equivalent to the statutory pay which the mother or adopter has relinquished by returning early (i.e. the unexpired portion of SMP or SAP)

4. Adoption Leave

Adoption leave is time off work taken by employees which have been matched with a child for adoption. Adoption leave, and pay, work in a very similar way to maternity and paternity leave and pay.

To qualify, an employee must have worked for their employer for at least 26 weeks before they were told they had been matched with a child for adoption. They must also comply with notification requirements and have average weekly earnings equal to or above the Lower Earnings Limit.

In the case of a couple, only one person may take Adoption Leave. The other may be entitled to Paternity Leave. This right applies to both heterosexual and same-sex couples.

4.1 Period of Leave

Adoption leave lasts for a maximum of 52 weeks which comprises a maximum 26 weeks of 'Ordinary Adoption Leave' (OAL) and a maximum 26 weeks of 'Additional Adoption Leave' (AAL)

Where the child is placed before 1 April 2007 employees are entitled to 26 weeks' OAL. Where the child is placed after 1 April 2007 employees are entitled to 26 weeks OAL and 26 weeks AAL (with the same rights and conditions as OML and AML respectively).

The period of leave may commence on a pre-determined date no earlier than 14 days before the expected date of placement, and no later than the expected date of placement.

4.2 Adoption Pay and other benefits

Statutory Adoption Pay (SAP) is paid at the same rate as SPP (currently £112.75 or 90% of average weekly earnings).

Similar to rights during maternity leave, in addition to SAP, employees are entitled to any non-cash benefits as provided by their contracts which will continue for the OAL period. Such benefits do not continue into AAL save at the employer's discretion. Contractual rights will continue through both OAL and AAL (although in more limited terms), including provisions relating to notice, dismissal, grievance, redundancy, non-competition and confidentiality.

While an employee is on OAL they continue to accrue annual leave in the normal way. While on AAL they are not entitled to contractual leave though the right to accrue statutory holiday under the Working Time Regulations 1998 continues.

4.3 Notification Requirements

An employee must tell their employer that they intend to take adoption leave no more than 7 days after the day they are notified of having been matched with the child or, if this is not reasonably practicable, as soon as is reasonably practicable.

Once the employee has provided notice of the intended start date of adoption leave, the employer should, within 28 days, notify the employee of the date on which the OAL will end.

Employees who take Adoption Leave have the same rights to be kept informed of developments in the workplace, including any internal vacancies advertised, as mothers on Maternity Leave.

An employee can choose to return early from adoption leave. For employees with the placement before 1 April 2007 at least 28 days notice must be given for an early return. For employees with a placement from 1 April 2007 8 weeks notice is required.

4.4 Return to Work

Employers can make reasonable contact with employees on OAL and AAL. For employees with a placement from 1 April it will now be possible for the employee, in agreement with the employer, to do up to ten days' work during the Adoption Leave without losing SAP or ending the adoption leave. These are known as "Keeping in Touch days". Keeping In Touch is by agreement and neither can insist.

Any work done on any day during the adoption pay or adoption leave period will count as a whole Keeping in Touch day. Although the new rules do not specifically say that the employee is to be paid, it is recommended that until this area becomes clearer, payment is made in order to avoid potential claims for detriment or for national minimum wage. If the employee is receiving SAP, the employer may count any payment for Keeping In Touch as going towards the employees' entitlement for SAP in that week.

An employee returning to work during or after a period of OAL is entitled to return to the same job on the same terms and conditions. An employee returning to work during or after a period of AAL is entitled to return to the same job unless it is not reasonably practicable. If not the employee should be offered a similar job that is suitable.

5. Parental Leave

Employees who have worked for their employer for one year have the right to unpaid parental leave to look after a child or make arrangements for the child's welfare. They need not be the child's biological parent, but must have parental responsibility and this will cover the mother, father, partner, civil partner and anyone else who may have obtained a formal parental responsibility order under the Children Act 1989.

Parental Leave is taken to care for the child, but this is widely interpreted to simply allow the parent to spend time with the child or to undertake some activity or make arrangements for the good of the child, for example viewing schools or seeing a doctor about the child even though the child may not be present

5.1 Period of Leave

13 week's leave may be taken before the child is five, or 18 week's leave where the child is disabled which must be taken before the 18th birthday. Where the child is adopted then leave must be taken within 5 years of the date of placement or by the child's 18th birthday if that is earlier.

Leave accrues for each child, including in the case of multiple births and can only be taken in blocks of 1 week. For parents of a disabled child leave can be taken one day at a time. A maximum of 4 weeks leave can be taken in any one year.

5.2 Pay and other benefits

Parental leave is unpaid.

During parental leave the employee's contract of employment will continue save in relation to pay or other cash benefits which are suspended.

5.3 Notification Requirements

At least 21 days notice must be given to the employer of the intention to take leave. The employee can change their mind about when they want parental leave to begin, but must still give 21 days notice of the new start date.

5.4 Return to Work

As long as the leave is not for longer than 4 weeks in a year an employee has a right to return to the same job with the same terms and conditions. An employee may not be treated unfavourably for taking or asking to take parental leave.

6. Working Time

This covers a number of separate rights, including the right to paid annual leave as follows:

Maximum weekly working time - 48 hours with young workers restricted to 8 hours per day and 40 hours per week. The average is calculated over a 17 week period, but this period can be extended;

Length of night work - 8 hours in each 24 hour period. Young workers are subject to restrictions between 10pm - 6am or 11pm-7am;

In work rest - Adult works are entitled to a minimum 20 minute break where the working day is more than 6 hours. Young workers are entitled to 30 minutes where the working day is over 4 and a half hours;

Daily rest - Adult workers are entitled to not less than 11 consecutive hours rest (12 hours for young workers) in each 24 hour period;

Weekly rest

Adult workers are entitled to:

- An uninterrupted rest period of at least 24 hours in each 7 days; or
- Two uninterrupted rest periods each at least 24 hours in each 14 days; or
- One uninterrupted rest period of at least 48 hours in each 14 days

Young workers are entitled to rest periods of at least 48 hours in each 7 days.

Holidays

The right to annual leave applies to workers. All workers have the right to a minimum of four weeks paid holiday, calculated pro rata (20 days holiday based on a 5 day working week; 24 days for those who work 6 day weeks). A day is calculated by reference to the usual day worked, so that a worker who works three hours a day five days a week would be entitled to 20 days holiday (4 weeks x 5 days per week), which for that individual equates to 60 hours (20 days x 3 hours per day). The calculation is pro rata to take account of those who start or leave work part way through the holiday year.

From 1 October statutory holiday will be extended to 4.8 weeks (24 days based on a 5 day week) and from 1 April 2009 will increase further to 5.6 weeks (28 days based on a 5 day week).

There are currently eight permanent bank and public holidays in Great Britain. There is no statutory right to take these days as holiday (paid or unpaid). If paid leave is given on bank holidays then it will count towards the statutory entitlement.

Whilst the increase in statutory holiday is stated to take account of public holidays there is still no right to have these days as paid holiday. When any employee can take holiday is a matter of agreement with their employer. The Working Time Regulations set out formal notice requirements which must be followed if the employee is seeking to exercise the statutory right to take paid holiday. An employer can refuse a holiday request, even for statutory holiday where the needs of the business require, although where such refusal may have the effect of denying the statutory right to paid holiday there will be grounds for complaint to an employment tribunal.

A point to note is that where an employer allows full-time workers paid leave on a bank or public holiday (and here we are concerned with contractual holiday entitlement over and above the statutory rules) consideration must be given to the position of part-timers. The usual practice is to allow part-time workers to take a pro rata holiday entitlement, although recent tribunal decisions have cast some doubt on this position. Care should still be exercised as such decisions can be limited to their particular facts which involved an employer who operated on a 7 day week basis. Those employers working on a 5 day week are best advised to continue to allow pro-rata entitlement for the time being.

More detailed information concerning the Working Time Regulations, including information on the problem with actually paying for holiday as part of the weekly wage (rolling up), is available on our website and two papers from our June 2004 Employment Update Seminar.

7. **Time Off for Dependants** (s57A Employment Rights Act 1996)

Employees have a right to a reasonable amount of unpaid time off work to deal with unexpected or sudden emergencies involving their dependants or to make any necessary longer term arrangements for them. What is reasonable will depend on the situation. To take advantage of the right it is essential that the employee complies with the notice requirements and informs the employer of the reason for absence, and its likely duration, as soon as reasonably practicable.

'Dependant' includes a spouse or civil partner, children, parents and other people living in the employee's home as part of their family.

In *Qua v John Ford Morrison [2003] IRLR 184* the EAT gave guidance on how Time Off for Dependants works:

- There is no limit to the amount of time an employee can take time off;
- The right is for time off for real emergencies. The right doesn't apply if the employee knew about the event in advance;
- Employers should consider the individual circumstances of the employee seeking time off; and
- the inconvenience and disruption to the employer's business is irrelevant.

The right does not permit an employee to take time off to care for a dependant personally, except to the extent that this is "necessary" to deal with an immediate crisis. Nor will the right apply once it is known that the dependant is suffering a particular medical condition and is likely to suffer recurring illness although it would apply if arrangements unexpectedly broke down.

An employee is also entitled to take reasonable time off work during working hours to take 'action which is necessary in consequence of the death of a dependant'.

This will include making arrangements such as for the funeral organisation, attending the funeral, registering death and applying for probate. Time off for Dependents does not extend to dealing with the emotional aspects of death; sadness, sense of loss, bereavement and unhappiness, but there is no statutory right to compassionate leave.

Employers should bear in mind that what constitutes "necessary" actions following bereavement may depend in part on the employee's religion or belief and refusal to accommodate the religious observations of employees might

constitute discrimination contrary to the Employment Equality (Religion or Belief) Regulations 2003.

Hindus, for example, believe that cremation should take place without delay, and that a 13 day period of mourning should follow, during which the bereaved should remain at home.

8. **Time off during Redundancy Notice** (s 52 Employment Rights Act 1996)

An employee who has been given notice of dismissal on grounds of redundancy is entitled to take a reasonable period of time off to look for another job, or to arrange training for future employment. The employee must be eligible for redundancy pay (i.e. completed two years continuous employment) even though redundancy pay may not be payable in the circumstances e.g. unreasonable refusal of alternative employment.

It is not enough that the employee is 'at risk' of redundancy or the employer is consulting on potential redundancies. The employee must be under notice of dismissal. Therefore fixed term employees whose contracts are about to end will not be under notice even though expiry of the fixed term will be a dismissal.

Paid time off is limited to no more than 2/5ths of a week's pay in total, regardless of the length of time off allowed i.e. the actual (reasonable) time off may be longer than the period for which there is a right to be paid.

If the employer refuses, the employee's only remedy is to complain to an employment tribunal.

9. **Public Duties** (s50 Employment Rights Act 1996)

Employees have the right to reasonable time off to perform 'public duties', for example being a magistrate, local authority councillor or school governor (not including private schools), a member of a local authority, police authority, local education authority, educational governing body, health authority or primary care trust; or a member of a statutory tribunal, environmental agency, or the boards of prison visitors.

What is reasonable will, as always, depend upon the circumstances, but will take account of how much time off is required to perform the duties of the public office, how much time off the employee has already been allowed for this or other permitted purposes (e.g. trade union duties, pension scheme trustees, etc as referred to below); and the circumstances of the employer's business.

There is no right to be paid for time off, but in practice employers will exercise their discretion. An employer does not comply with the statutory obligation to permit reasonable time off simply by re-arranging the employee's duties to make up for any lost time.

A complaint in relation to a failure to permit reasonable time off will be made to the employment tribunals within three months of the refusal/failure.

10. Study or training

Employees aged 16 and 17, who did not reach a certain standard of education at school, are entitled to take reasonable time off work to go on training courses or to continue their study to allow them to reach that standard. This time off should be paid at their normal rate of pay, and does not have to be made up later on. Employees who turn 18 while studying have the right to complete the course.

The relevant standard of achievement which sets the entitlement to time off is set out in the Right to Time off for Study or Training Regulations 2001 (SI 2001/2801).

The right to time off can also be enforced against a service user where the employee is contracted out e.g. in terms of agency. However the right to be paid is only enforceable against the employer and not the end service user. Whether there is an employment relationship with an employment agency is a matter that is regularly before tribunals.

There is an issue whether this statutory right can be objectively justified following the introduction of the Employment Equality (Age) Regulations 2006 on the basis that older employees do not have the right to time off for study or training purposes, or to be paid for doing so. A policy of seeking the attainment of minimum standards of education is equally valid to those who are above the age of 17.

11. Employee Representatives

11.1 Discipline and Grievance hearings (s10(6) Employment Relations Act 1999)

A worker who is required or invited to attend a disciplinary or grievance meeting has a statutory right to be accompanied by a fellow worker. To give effect to this right the fellow worker has a corresponding right to paid time off to act as the companion. However this is not a stand alone right and if the employer unreasonably refuses paid time off then it is the worker who is attending the meeting who would have a cause of complaint and not the companion. However the companion would have a right to claim pay, and is protected against any detriment (and dismissal) for having acted or agreed to act as a companion.

11.2 TUPE (s61 Employment Rights Act 1996)

Under the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006, those who act as an employee representative (or who is a

candidate in an election) have a right to paid time off work for consulting over redundancies or business transfers. There is also the right to paid time off for training to perform such functions.

11.3 Trade Union Duties (s168 Trade Union Labour Relations (Consolidation) Act 1992)

Employers are obliged to give reasonable paid time off to trade union officials for the performance of such functions. Similar considerations apply as for those employees elected as representatives for the purposes of TUPE (see above).

Workers who act as union learning representatives also have a right to reasonable paid time off for training and for carrying out their duties (s168A)

11.4 Information & Consultation

There are a number of circumstances in which an employer is required to inform and/or consult employees and/or employee representatives. These include:

- The Transnational Information and Consultation of Employees Regulations 1999;
- The Information and Consultation of Employees Regulations 2004; and
- The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

Employee representatives are entitled to reasonable paid time off to perform their functions, although none of the Regulations above include any element of time off for training.

11.5 Health & Safety

Health and Safety representatives, including candidates for election as Health and Safety representatives must have reasonable paid time off to carry out their role

11.6 Occupational Pension Scheme Trustees and Directors of Trustee Companies (s58 Employment Rights Act 1996)

Trustees of occupational pension schemes, or directors of trustee companies which act as trustee of an occupational pension scheme, are entitled to reasonable paid time off to perform their duties or to attend training. The provisions are contained in the Occupational Pension

Schemes (Member-Nominated Trustees and Directors) Regulations 2006 (SI 2006/714). Occupational schemes are becoming less common; however the increasing legislation that applies to such schemes maintains the importance of this right.

12. **Sickness Absence**

Not strictly speaking flexible work! However it is still a statutory right to be paid for what is time off work.

It can often be difficult for an employer to understand or accept why they are required to pay an employee who is unable to work. The answer lies in the legal principal that employees are not, per se paid for the work they do (although some clearly are) but rather for making their services available, the willingness to work. Even though the employee is sick they remain willing to work and therefore entitled to pay.

To qualify for Statutory Sick Pay, an employee must have been absent from work for at least 4 consecutive days (including weekends and bank holidays). The employee must also comply with the notification requirements and have average weekly earnings equal to or above the Lower Earnings Limit.

Statutory Sick Pay is paid at the standard rate (currently £72.55 a week) for the days that are normally worked (known as Qualifying Days). It is not paid for the first three Qualifying Days in any period of sickness (unless the employee has already had at least one four day period of sickness in the previous 8 weeks).

A sick employee must notify his employer within 7 days of becoming sick. Employers can ask for evidence in the form of a doctor's note if the period of absence is longer than 7 days, or a self-certificate for shorter absences. Failure to notify and to provide evidence of continued sickness absence will affect the right to receive sick pay.

13. **Religious Observances**

Employees may request flexibility to accommodate religious observances. This might include the provision of short breaks during the working day to observe prayers, varied hours when employees are fasting for religious reasons, flexible hours to avoid the need for the employee to work on holy days, or time off for religious observances.

The case of *Khan v NIC Hygiene* concerned a Muslim employee who was dismissed when he took 5 weeks' holiday and 1 week's unpaid leave to go on the pilgrimage to Mecca. The employer claimed that it had refused the time off because employees were generally not permitted to take more than 5 weeks' leave at once. The Tribunal decided that this policy amounted to indirect

discrimination against Muslim employees because the pilgrimage is a requirement of their religion.

Employers should:

- consider requests for flexible working to accommodate religious observances carefully
- ensure that any refusal can be objectively justified
- adopt a consistent approach to such requests
- avoid making blanket refusals

Contractual or Discretionary (Non-Statutory) Rights

In addition to any statutory right to flexible working, an employment contract, statement of terms or staff Handbook or policy statement may confer contractual, or identify non contractual (i.e. employer's discretion), benefits. Often non-statutory rights will expand on or enhance existing statutory rights, for example by extending entitlement to request flexible working requests to all parents regardless of the age of the child to be cared for or by providing for additional maternity benefits during additional maternity leave periods.

Employers should be aware that flexible working provisions might be incorporated into employment contracts by custom over a period of time. In *Albion Automotive Ltd v Walker & Others CA 2002 EWCA Civ 946, CA 2002*, enhanced redundancy terms that had been agreed on various occasions in the past were held to have become contractual terms implied by custom and practice. This effectively removed the employer's discretion and extended those rights to all employees.

Examples of Contractual or Discretionary (Non-Statutory) Rights

Most of the following examples seek to respond either to short term or to medium term changes in a worker's personal circumstances which leaves the worker unable to commit to what would be seen as their normal duties or work responsibilities. They come under a variety of disguises and different descriptions but they essentially relate to a reduction in working hours, more favourable arrangement of agreed hours or a temporary suspension of service. Each however anticipates that the relationship will continue and return to whatever amounts to normal service at some point.

1. Sick Pay

There is no entitlement to statutory sick pay during the first three qualifying days. Also statutory sick pay is limited both by amount and the period for which it is

paid. It is common to see some form of extension to sickness benefits in the contract of employment, but equally common for the contract to provide only for the statutory scheme.

2. **Duvet Days**

'Duvet days' are essentially days on which a worker can ring up and explain, on a 'no questions asked' basis, that he is not coming in. Often introduced by employers to tackle sickness absence, two or three days of the worker's annual leave are normally allocated as duvet days.

3. **Time Off In Lieu (TOIL) and Banked Hours**

Offering time off in lieu is an alternative to paying for overtime. Workers are allowed to take time off to compensate for extra hours they have worked. Workers must agree to take time off in lieu and must arrange to take it at a time that is convenient for their employer. Similar considerations should apply as where staff seek to take holiday, ensuring that there is adequate coverage. Limits should be set as to the amount of TOIL that can be accrued and for how long it can accumulate without being lost.

4. **Flexi-time**

Flexi-time allows workers the freedom to choose when they start and finish work, within certain limits agreed with their employer. In effect, employees are required to work during core hours and must work an agreed number of hours over a settlement period, for example over a four week period. Individual employees can make their own decision about when to work outside of the core hours.

Where employees work in excess of the agreed hours there may be some process to compensate then in terms of time off (flexi-leave) payment in lieu or carry forward of a maximum number of hours against the next settlement period.

Where employees fail to work the agreed number of hours they may be added to the next settlement period or, if this was a regular occurrence, there could be disciplinary proceedings.

Employers operating a flexi-time system do carry additional administration, part of which is a need to ensure that the Working Time Regulations 1998, concerning in-work, daily, weekly and annual breaks and the average number of hours worked, are followed.

5. **Staggered Hours**

As a slight variation on flexi-time the employer may seek to agree set hours on an individual basis with some staff starting and finishing early, or starting and finishing late. This may allow the business to open longer hours than if everyone

worked the same and to respond to service demands, for example by ensuring minimum cover at the start and end of the day and during lunch breaks.

6. Shift Swapping/Self Rostering

Workers are free to come to arrangements among themselves to cover all the shifts required, provided all required shifts are covered. Alternatively workers nominate the shifts they would prefer, leaving their employer to compile shift patterns matching their individual preferences. Where a need for a change arises then staff can resolve this directly and between themselves.

7. Term-time Working

A worker remains on a permanent contract but can take paid/unpaid leave or reduce their hours during school holidays. This may be seen as a positive solution to childcare difficulties which gives plenty of advance warning to employers. However the long absences can make it difficult to arrange for other staff to cover with the resultant disruption if temporary cover is brought in. Also, the fact that some staff are automatically earmarked for absences may put pressure on other staff who feel that they cannot book their own time off during school holidays

8. Compressed/Consolidated Working Hours

Workers can choose to cover their total number of contractual hours in fewer working days, for example working 4 longer days instead of 5 days.

9. Holiday Purchase Scheme

Some employers have schemes whereby employees can buy and sell holiday days on an annual basis. The cost of a day's holiday will usually vary according to salary and be taken out of an employee's annual pay. There is usually a limit to the number of days that can be bought or sold.

10. Home Working/Teleworking

Workers spend all or part of their week working from home or somewhere else away from the employer's premises. The employer normally provides technological facilities in the home worker's home. However employers need to be careful to undertake the correct risk assessments as they would for any work place.

11. V-time Working (Voluntary Reduced Work Time)

Workers agree to reduce their hours for a fixed period with a guarantee of full-time work when this period ends. Pay and benefits are reduced proportionately to the reduction in working hours. This can be used, with agreement, as a temporary measure to respond to a reduction in work load and as a potential alternative to

redundancy. However it can also allow flexibility to meet an individual worker's needs where there may be some sudden change in personal circumstances which doesn't call for the worker to absent themselves from work completely. This can allow for child care or other care responsibilities.

12. **Compassionate Leave**

Employees who need time off to cope with a situation that doesn't fall under the 'time off for dependants' right, may have a contractual right to time off which may be paid or unpaid.

It is good practice for employers to have a policy on compassionate leave, which is included in employees' contracts or in the staff handbook and which takes proper account of matters such as religious observance.

13. **Medical Appointments**

There is no statutory right to time off to see the doctor or dentist but most employers will allow it, although generally there is a request that appointments are made so as not to unduly affect work requirements.

Employers should remember that if an employee needs medical attention because of a disability, refusing to grant time off might be construed as a failure to make reasonable adjustments. Care should be taken to ensure that any refusal is reasonable in all the circumstances.

Fertility Treatment

There is no statutory right to leave for fertility treatment but some employers allow it - for example one particular employer is known to offer all women staff five days' paid leave for fertility treatment with the option of swapping shifts or taking additional unpaid leave if necessary.

14. **Jury Service**

There is no statutory right to time off for jury service per se (strangely it is not identified as a public duty - although arguably it may fall under the statutory tribunal category) but employers can be fined for contempt of court if they refuse it. There is a right to apply to defer service, for example because the employer's business would be unduly affected. An employee who is dismissed for taking time off to do jury service may be able to make a claim for unfair dismissal to an employment tribunal.

Employees are not entitled to be paid for the time that they take off (unless their employment contract says differently) but can claim money back from the court. Their employer should fill out a Certificate of Loss of Earnings to claim for loss of earnings.

15. **Voluntary Reserves**

Members of the Military Adult Voluntary Reserve Forces (the Territorial Army.; the Royal Naval Reserve; the Royal Marines Reserve and the Royal Auxiliary Air Force) are typically committed to 30 days' training a year. They have no statutory right to take time off (paid or unpaid) to attend training, but as they may be considered to gain valuable, transferable skills employers are recommended to take a flexible approach.

Even if Reservists are called into full-time service with the Regular Forces on military operations, in normal circumstances, an employer is not obliged to grant time off. The Armed Forces use "intelligent selection" to identify Reservists for mobilisation, which includes dialogue between the Reservist and their employer to determine whether they are available to be mobilised. Operational tours currently range from short tours of three months or less, up to a maximum of 12 months.

In the unlikely event of compulsory mobilisation of the Reserves the Ministry of Defence is not required to seek employers' consent and there is no statutory period of notice prior to an issue for mobilisation. An employer can apply for exception or deferral on the grounds that it is thought that the employee's absence will cause serious harm to his business or a related business.

As long as their employing organisation has continued unchanged in their absence and the employee applies for reinstatement within 6 months of being called up Reservists are entitled to be reinstated in their old jobs following demobilisation. The relevant conditions for the application for reinstatement are set out in the Reserve Forces (Safeguard of Employment) Act 1985. If a Reservist cannot be reinstated in his original role, then an equivalent position with the same terms and conditions must be offered.

Dismissing an employee because they are a Reservist can amount to a criminal offence and so too can a failure to reemploy. Compensation may also be payable calculated on the basis of 52 weeks salary.

16. **Special Constabulary**

There is no statutory right to time off for members of the Special Constabulary, whose voluntary commitment to the Police is 8 hours a fortnight. However some employers support the Special Constabulary by signing up to a Police Employer Support Volunteer Scheme (EVS).

17. **Sabbatical/Career breaks**

At their employer's discretion, workers may be allowed to take an extended period of time off, either paid or unpaid often for the purpose of study or travel. As a sabbatical it may be used to reward staff, for example for long service. However

it can be used to allow for child care, or care of a sick relative, or for any other purpose which falls within the criteria allowed as part of a relevant employer's policy.

In some cases employees may be required to resign but are given a commitment that they will be allowed to return. Such commitments can be very weak and amount to no more than an agreement to treat any future application for employment favourably. Employers should take care in offering any commitment on a return as this can leave them with less flexibility to deal with organisational changes e.g. redundancy, than if the employee had remained employed.

18. **Unpaid Leave**

Absence from work for a set period of time, as agreed between the employer and employee. The contract of employment remains in force but the salary stops.

19. **Employee Volunteering and Voluntary Work**

There is no right to time off for voluntary work, but as the skills and competencies gained through voluntary work can make employees more marketable, employers often view voluntary work positively and support them by granting them discretionary paid or unpaid leave.

Voluntary Work is sometimes seen as different from volunteering, but perhaps it is little more than who is looking at the issue. Volunteering refers to time taken out of work, whereas voluntary work may be seen as the principal work. There are issues for national minimum wage because whilst voluntary work is excepted there is no clear guidance whether this include volunteering

Most voluntary workers will not have a contract of employment and will not qualify as an employee.

Managing Flexible Working

Employers will have two main drivers when introduce flexible working patterns in the workplace. The first will be to satisfy their legal obligations by complying with statutory duties. The second, and perhaps better reason, is the benefits to the organisation in terms of recruitment advantages, increased productivity, improved staff moral and reduced absenteeism.

When implementing any flexible working practice, an employer should ensure that:

- Clear statements about how the scheme should work, and procedures for resolving situations are made available to staff, e.g. within the Staff Handbook or written contract;

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- A consistent approach is used, regardless of irrelevant characteristics such as gender, race etc;
- Staff are not able to sign up for arrangements that might fall foul of health and safety or employment legislation, e.g. by working for too long without breaks; and
- Adequate records are kept

A flexible working scheme should not disadvantage anyone.

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