

Flexible working

With the new school year, employers may find themselves faced with requests from employees for flexible working arrangements to enable parents to accommodate any changes in childcare arrangements. Below is some guidance on how employers should deal with such requests.

Statutory right to request flexible working

In order for an employee to make an application for flexible working, he or she must:

- have 26 weeks' service at the date of the application
- care for a child who is aged 16 or under, or under 18 if disabled
- be either the mother, father, partner or spouse of the child's mother or father, adopter, guardian, foster parent or carer and have responsibility for the upbringing of the child.

The application process

An employee may only make one application for flexible working arrangements every 12 months.

The request must be in writing and include details of the desired working pattern, the proposed effective date and confirm that he or she is eligible to make the request. The employee must explain what effects he or she believes the request to work flexibly will have on his or her employer's business and, in his or her opinion, how these might be dealt with. This is to help provide the employer with the relevant information in order to consider the request.

Unless able to agree to the change automatically, the employer must meet the employee within 28 days of the application. The employee has the right to be accompanied at the meeting by a fellow worker.

Within 14 days of the meeting, the employer needs to inform the employee in writing of the decision. If the request is agreed, any changes to the employee's terms and conditions must be confirmed in writing.

It is possible for both parties to agree an extension to the time limits. If this is the case, the agreement should be recorded in writing so as to avoid any confusion at a later stage.

An employer can only refuse a request for flexible



working arrangements on one of the following grounds:

- burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes.

So as to avoid any claim of sex discrimination or failure to comply with the statutory procedures, it is imperative that an employer gives serious consideration to an employee's request and can fully explain reasons for refusing the request. In order to show that due consideration was given, employers will need to consider proposals to facilitate the request, eg the possibility of a job share. It may

therefore need to investigate with local recruitment agencies to see if this would be feasible.

As an alternative to refusing the request outright, employers may consider agreeing to a trial period. If so, it is advisable for the employer to set out in writing what the operational concerns are and why the trial period has been agreed. An employer should also agree a review date before the end of the trial period so that, if the hours do have to be changed again, the employee has sufficient advance warning to make alternative care arrangements.

If the employer does not do so, there is a risk that the employee will think that the trial has worked out and be disappointed when the employer wishes to change his or her mind at the end of the trial. An employer will also need very good reasons to change its mind. As such, it is not recommended that employers use a trial period simply to postpone making a decision.

Where a request is refused, the employee has the right to appeal in writing within 14 days of receiving the decision. The employer must hold the appeal hearing within 14 days of this notice being given. Again the employee has a right to be accompanied and a decision must be confirmed in writing within 14 days of the appeal hearing.

Remedies

Employees are protected against suffering a detriment or being dismissed for exercising the right to request flexible working. Employees can also bring a claim if the employer has failed to follow the above procedures or if the decision to reject the application was based on incorrect facts. Employment tribunals can make an order to require the employer to reconsider the application and/or award compensation. Compensation is limited to eight weeks' pay for failure to follow the prescribed procedure.

Furthermore, employers may be exposed to claims for sex discrimination. It is therefore imperative that the process is completed thoroughly.

Are interns working for you?

Offering internships to students during their holidays can provide benefits on both sides — an opportunity for them to gain experience in business and for the business community to benefit from new talent.

In most cases, internships are intended to be short periods of work experience, usually for students or graduates. However, employers need to be aware of their legal responsibilities to interns before making the decision to take them on.

An internship is a general term which can result in different situations from an employment law perspective. Employers have to be careful when considering taking on interns, as there is a risk that the intern could be considered a worker. A worker is an individual who has entered into, or works under, a contract of employment, or undertakes to perform work personally for another and the relationship is not genuinely one of a client or customer on the one part and a profession or business undertaking on the other.

If an intern is considered to be a worker, he or she must receive the National Minimum Wage (NMW). Failure to pay workers the NMW could result in an employer having to pay arrears of back pay, but also face a possible fine based on half of the arrears due, subject to a minimum of £100 and a maximum of £5000. It will not be sufficient for an employer to argue that both parties agreed it was a voluntary arrangement.

There may be some exemptions to the NMW, so it is worth checking. For example, students undertaking work experience as part of a "sandwich" course in association with a higher education establishment will be exempt



from the NMW, provided the placement does not exceed one year. However, this does not apply to all internships, so employers need to be aware of the risks. Workers will also be entitled to annual leave and rest breaks under the Working Time Regulations 1998.

A worker could also be considered to be an employee if there is an employment contract based on mutuality of obligation; the employer is obliged to provide work and the individual has to carry it out. If they are employees, they are also protected from unfair dismissal. Although most unfair dismissal claims require one year's service, there are a number of situations in which an employee can claim unfair dismissal from the outset of the employment.

The key issue is therefore whether interns actually work for the employer. If interns are just going to come to a place of work for a few hours a day, to get a feel for "office life" for example, this may not be considered work. However, the more interns actually do for the employer, the more likely it is that they will be working for the employer. Encouraging work shadowing and limiting the period of work experience to a short amount of time might help to demonstrate that the individual was not working for the employer.



Five were exposed to asbestos fibres

A shop fitting company has been fined after five workers were exposed to potentially deadly asbestos fibres at the Arndale Centre in Manchester.

Two workers spent five days ripping out old shop fittings in October 2009 before they discovered that asbestos had been used in some of the ceiling panels.

Another three management staff at the Arndale Centre were also potentially exposed to the fibres during routine checks on the work.

The shop fitting company was said to have ignored a report which stated asbestos was present in the shop it was working on.

The company admitted three breaches of the Control of Asbestos Regulations 2006 and a breach of s.3(1) of the **Health and Safety at Work, etc Act 1974**. It was fined £4000 and ordered to pay £3215 towards the cost of the prosecution.



Equality Act: disability focus

The Equality Act 2010 came into force on 1 October 2010. It consolidated the provisions of the previous anti-discrimination statutes (including the Disability Discrimination Act 1995) and secondary legislation into a single Act.

A major aim of the 2010 Act was to improve protection for disabled people and their carers. This article focuses on the disability provisions of this new legislation and their implications for disabled people and their employers.

Types of disability discrimination

Under the Equality Act 2010, there are now six main types of disability discrimination.

1. Direct discrimination.
2. Indirect discrimination.
3. Discrimination arising from a disability.
4. Failure to comply with the duty to make reasonable adjustments.
5. Victimisation.
6. Harassment.

The six types of disability discrimination include two that are new: indirect discrimination and discrimination arising from a disability. These are dealt with below.

What's new?

The Act brings some important changes to disability discrimination law. The following are the most notable changes.

- The definition of disability is largely unchanged, but the list of capacities (including mobility, speech, manual dexterity, etc), which was previously used to determine whether an impairment affects a person's ability to carry out normal day-to-day activities, has been dropped.
- The 2010 Act allows for the concept of discrimination by association — in other words, someone can claim that he or she has been discriminated against because of someone else's disability. The legislation also covers

perceived discrimination — ie where someone is discriminated against because of his or her perceived disability. This allows a successful claim to be brought even where the person is not actually disabled, but perceived to be so. This approach also applies to harassment.

- Indirect discrimination is introduced in the context of disability for the first time. This is where an employer's policy puts those who share a particular characteristic (eg a particular disability) at a disadvantage, compared with those who do not share it. It may be hard to prove that those with a particular disability are all disadvantaged in the same way, as the effects of a particular disability can vary greatly from person to person.
- The Act creates a new offence of discrimination arising from a disability. This occurs where an individual is treated unfavourably because of something arising as a consequence of his or her disability, eg dismissal for long-term absence. The disabled person no longer needs to find a comparator — the stumbling block in the past.
- Both indirect discrimination and discrimination arising from a disability will be subject to a justification defence if the employer can show that its conduct was a "proportionate means of achieving a legitimate aim".
- The Act limits pre-employment health screening. This restricts questions asked at interview, on application forms and medical questionnaires. If an employer asks about an applicant's health before offering a job, without falling within the exceptions set out below, the Equality and Human Rights Commission (EHRC) can take action against the employer. If the employer relies on information obtained from pre-employment health screening in a discriminatory fashion (eg not offering the job as

a result) and the disabled person brings a claim alleging direct discrimination, the burden of proof will shift to the employer to show that it did not discriminate. There are some situations in which pre-employment health screening may be acceptable, including, for example, whether a candidate can comply with the requirements of the selection process or to decide whether reasonable adjustments are required for interview or whether the candidate is able to carry out a function intrinsic to the role applied for.

- The duty to make reasonable adjustments is retained but there is also included a provision relating to the provision of auxiliary aids. An "auxiliary aid" in this context is something which provides support or assistance to a disabled person, eg an adapted keyboard, text-to-speech software, or a hearing loop.

The Equality Act 2010 retains the ability to treat disabled people more favourably than able-bodied people without falling foul of disability discrimination provisions. The Act is supported by two Codes of Practice on Employment and Equal Pay. The final version of the Employment Code is not yet available.

Still to come...

One further provision is due to come into force in April 2011 — combined (or dual) discrimination. This will enable claims to be brought on the basis of two strands of direct discrimination taken together, eg sex and disability.

The 2010 Act will have significant practical implications for employers. Next month's article will consider the necessary action points for employers.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in September.

Tax & VAT	Employment	Legal	Health & Safety
1. HMRC information powers — enquiring into closed years.	1. Conduct.	1. Contract.	1. Accident recording and reporting.
2. Capital gains — sale of business/shares and entrepreneurs' relief.	2. Absence/sickness.	2. Company and clubs.	2. Risk assessment.
3. VAT international services and place of supply.	3. Disciplinary procedures.	3. Other legal.	3. Policy implementation.

Event diary

Legislation timetable



For more information or to book please contact:

**Employment on
01455 897193**

**or Health & Safety on
01455 897192**

Fax: 01455 897026

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

Event diary — Open Course Schedule 2010

Health & Safety			
Course title	Duration	Date	Location
Health & Safety in the Workplace Level 2	2 days	2–3 November	Holiday Inn, Swindon
Manual Handling Training for the Trainer	2 days	9–10 November	York Pavillion
Manual Handling Training for the Trainer	2 days	16–17 November	Gonville Hotel, Cambridge
Health & Safety in the Workplace Level 2	2 days	23–24 November	Botleigh Grange, Southampton

Employment			
Course title	Duration	Date	Location
Dealing with Discipline	½ day	5 October	The Garfield House Hotel, Glasgow
Essential Employment Law	1 day	14 October	Holiday Inn Heathrow Ariel
Sensitive Workplace Issues	1 day	4 November	Bedford Lodge Hotel, Newmarket
Essential Employment Law	1 day	18 November	Croner Consulting, Leicestershire

IOSH Managing Safely Croner Consulting also offer 4-day IOSH Managing Safely courses. 18–21 October 2010 at Croner Consulting at Hinckley. The 4-day course costs £600.00 plus VAT, and fills up quickly, so please book soon to ensure your place! For further details on this IOSH course, please contact Emma Newman on Tel: 01455 897192.

Legislation timetable

Area	Legislation	Details	Date
Discrimination	Equality Act 2010	Equality Act (Sex Equality Act Rule) (Exceptions) Regulations 2010 — the Equality Act 2010 requires occupational pension schemes to have a "sex equality rule" for the equal treatment of men and women. Under these regulations, certain rules, practices, actions and decisions relating to occupational pension schemes are exempted from this rule. Equality Act (Age Exceptions for Pension Schemes) Order 2010 — this Order allows exceptions from the non-discrimination rule in the Equality Act 2010 as it applies to the protected characteristic of age for certain rules, practices, actions and decisions relating to occupational pension schemes. The exceptions applying to age also relate to payments by the employer to personal pension schemes. Equality Act (Consequential Amendments, Saving and Supplementary Provisions) Order 2010 — this Order makes amendments to the Equality Act 2010 that arise as a consequence of the Equality Act 2010 (Commencement No.2) Order 2010. Equality Act (Disability) Regulations 2010 — these regulations supplement provisions in the Equality Act 2010 that provide protection from discrimination for disabled people. Equality Act (Offshore Work) Order 2010 — this Order applies Part 5 of the Equality Act 2010 to offshore work. It replaces previous orders extending anti-discrimination law to offshore work.	The Government announced on 3 July that the first wave of implementation of the Act would take place on 1 October 2010. On this date, the majority of the Act's provisions came into force.
National Minimum Wage	The National Minimum Wage Regulations 1999 (Amendment) Regulations 2010	The new rates of the National Minimum Wage, which came into force on 1 October 2010, are: £5.93 per hour for low paid workers aged 21 and over; £4.92 per hour for 18 to 20-year-olds; and £3.64 per hour for 16- and 17-year-olds. From October 2010, the adult rate applied from a worker's 22nd birthday. From October 2010, the adult rate applies from a worker's 21st birthday. An apprentice minimum wage of £2.50 per hour will also be introduced. The new rate will apply to those apprentices who are under 19 or those who are aged 19 and over but in the first year of their apprenticeship. The accommodation offset will rise from £4.51 to £4.61 per day.	1 October 2010
Additional Paternity Leave	The Additional Paternity Leave Regulations 2010	Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father (currently under review).	The Regulations are expected to benefit parents of babies due on or after 3 April 2011 or children matched for adoption on or after 3 April 2011
Agency Workers	Agency Workers Regulations 2010	Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay.	1 October 2011
Pensions	Pensions Act 2008	The Government is proposing to provide access to a private pension to all employees aged between 22 and state retirement age, who are earning more than £5000 a year and are not currently enrolled in a workplace pension scheme.	2012

Selecting protective footwear

A wide range of foot protection is available. Determining what type is suitable will depend on the risks involved. Suppliers of PPE should be able to provide further information for employers.

Physiology

Some of the main types of foot protection are outlined below.

- Safety boots and shoes can provide protection against falling objects, slipping, sharp objects on the floor, temperature, etc depending on the features they include. They usually have slip-resistant soles, steel toecaps to protect against falling objects or crushing, and can have steel mid-soles to protect against nails and other sharp objects. Boots provide ankle protection.
- Wellington boots provide protection against water and wet conditions. They are available in different materials, some of which provide insulation or chemical resistance. They can include steel toecaps and mid-soles, padding, cotton linings and are available from ankle boots to waders.
- Anti-static or conductive footwear prevents the build-up of static electricity and reduces the risk of igniting a flammable or explosive atmosphere.

Selecting suitable foot protection

The type of footwear selected will depend mainly on the hazards the wearer is exposed to. Selection must be based on the protection required and compatibility with the work being done, as well as comfort and style. The ability of footwear to resist corrosion, abrasion and general wear and tear must also be taken into consideration.

Safety footwear should be as comfortable as possible and should be available in different sizes, including different width fittings where necessary. Boots should be worn where ankle protection is needed. Footwear should be as light and as flexible as possible, to reduce the fatigue of wearing it for long periods, and should be resistant to working in wet conditions.

Manufacturers' instructions regarding care, appropriate use and level of protection should always be followed.

The less expensive materials used for waterproof footwear may be good at keeping water out, but are often not permeable. As a result, wearing footwear made with these materials for long periods can mean that feet get hot and sweaty. Breathable, water-resistant materials are available and are more comfortable and hygienic; however, they are also more expensive.

Features of safety footwear

- **Soles** — work boots and shoes should have soles with treads for slip-resistance. Soles can be heat and oil resistant, slip resistant, shock resistant, anti-static or conductive. Safety footwear that is intended for use where it will be exposed to oils, solvents or liquids needs moulded soles that are bonded to the uppers. Soles that are stitched or glued may separate from the uppers and expose the feet to hazards. Where nails or other sharp objects piercing the feet are a hazard, footwear with

steel or fibre mid-sole inserts should be worn.

- **Steel toecaps** — these should be capable of resisting a heavy or sharp object falling on them from a considerable height. Footwear complying with BS EN 12568 will offer this resistance.
- **Waterproofing** — people working in wet places should wear safety footwear impervious to water. Rubber and PVC are inexpensive waterproofing materials, but will not allow air through to let the feet "breathe". There are breathable materials available which also allow perspiration to get out, and may, therefore, be more comfortable and hygienic, but are likely to be more expensive. The length of time that non-breathable waterproof footwear has to be worn should be the decisive factor in selection, as basing the choice only on cost is likely to lead to an increase in foot diseases.

Resources

The HSE's Slips Assessment Tool (SAT) is a free software package that allows the user to assess the slip potential of pedestrian walkway surfaces when used in conjunction with a surface roughness meter. See www.hse.gov.uk/slips/sat/index.htm for more details.

Due to the number of falls from vehicles reported each year, the HSE has provided a guidance sheet entitled "Selecting the right footwear to avoid falls from vehicles" (code WPT04). This can be viewed at www.hse.gov.uk/fallsfromvehicles/wpt04.pdf.



Worker paralysed after being crushed by beam

A Doncaster housing developer was recently fined £30,000 after a worker was left paralysed from the chest down when he was crushed by a steel beam weighing more than 660 pounds.

On 7 April 2009, the 24-year-old employee was working as part of a bricklaying team sub-contracted to a construction company at a site in Oxley Road, Huddersfield.

He was helping the driver of a telescopic fork-lift truck to lift a steel beam onto two brick pillars. Although the beam initially landed as intended, as the forklift was withdrawing, the forks caught the beam, dislodging it from the pillars and the beam crashed down on top of him. He suffered extensive injuries, including spinal damage, which resulted in him being left quadriplegic.

The Health and Safety Executive prosecuted the Doncaster-based construction company for its role in the incident. The company pleaded guilty to breaching regulation 8 of the Lifting Operations and Lifting Equipment Regulations 1998 and was fined £30,000, as well as being ordered to pay £16,062 in costs.



London Borough of Brent v Fuller

Mrs Fuller worked as an administrator in a school for pupils with social and emotional difficulties who could regularly be disruptive. In May 2007, Mrs Fuller intervened when staff were trying to control a pupil. She was instructed by the head teacher not to interfere with discipline and behavioural restraint of pupils; however, no formal disciplinary warning was issued.

In October 2007, a more serious incident occurred involving a child being restrained. Once again Mrs Fuller intervened. This time, she was subject to disciplinary proceedings for allegations of gross misconduct, including use of unacceptable and inappropriate language in front of a child, repeated and inappropriate intervention into behaviour management issues and failure to follow reasonable management instructions.

When deciding to dismiss summarily, the school took into account the fact that Mrs Fuller was aware that she should not have intervened as a result of the previous incident in May. The claimant issued a claim for unfair dismissal.

The tribunal held that the dismissal was unfair, as the May incident had been built up into more than it was and the "one off" incident in October did not merit dismissal. The respondent appealed.

The Employment Appeal Tribunal (EAT) overturned the tribunal's decision. It found that the tribunal had agreed that it was for management to decide on appropriate restraint but had then proceeded to substitute its own judgment about what it would have done concerning Mrs Fuller's intervention.

Additionally, the tribunal had adopted an incorrect

approach in relation to the incident in May. The EAT held that the May incident was relevant, as although no formal warning was given, an instruction was given to Mrs Fuller not to interfere when a pupil was being restrained.

In the case of *Airbus UK Ltd v Webb* (2008), the Court of Appeal held that an expired warning was relevant as a matter relating to the background of the case. Mrs Fuller was dismissed as a result of the October incident only and the May incident was only relevant in so far as it made Mrs Fuller aware that her behaviour was unacceptable.

The EAT held that as the tribunal had erred in law by substituting its own views as to whether or not the decision to dismiss fell within the band of reasonable responses, the judgment was therefore set aside and Mrs Fuller's claim for unfair dismissal was dismissed.

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to cronerinfo@wolterskluwer.co.uk

Q: An employee has recently approached me with allegations that she is being bullied and singled out by her line manager. She is worried about her job, especially as she is a single parent, and does not want to raise the matter formally. Others in the team have approached me stating that they are aware something is going on and are feeling uncomfortable watching it. What advice can I give her, aside from raising this formally?

A: You have a duty of care to this employee and she should be encouraged to give you details of the incidents to which she is referring. Should she decide not to disclose any more information, you should do all that you can to investigate and establish as full a picture as possible about what has been going on. From a pragmatic perspective, it would be wise to reassure this person that you will treat her concerns with confidentiality and in accordance with your grievance procedures. Reassure her that this is not going to impact on

her employment and offer support and guidance throughout the process.

In the meantime, given that her colleagues have raised concerns over this employee, you should investigate further and document their comments in the form of witness statements.

Once you have established some initial details and facts, it may be necessary to consider suspending the line manager if the facts appear to suggest that he or she has in fact been bullying the employee. The line manager is essential to your investigations and you will need to interview him or her as soon as possible and obtain a statement as part of your process.

If the employee at the centre of this cannot be persuaded to disclose any further details then suggest to her that you will still investigate, based on the feedback from various staff members, and build your investigations up from there. Your investigations should still be thorough and reasonable. Once you have investigated as fully as possible, you should consider whether disciplinary action would be appropriate in all the circumstances. You can advise the employee that the matter is being dealt with by the company but do not give any details of any disciplinary outcome.

Contact us

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