

**EXPLANATORY MEMORANDUM TO  
THE FLEXIBLE WORKING REGULATIONS 2014**

**2014 No. 1398**

1. This explanatory memorandum has been prepared by The Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations deal with eligibility, applications and compensation in relation to statutory applications for contract variation to allow flexible working under the Employment Rights Act 1996 (“the 1996 Act”).

- 2.2 These Regulations lay down the qualifying condition for an employee to be entitled to make such a statutory application to his employer, prescribe the form of that application and state when it is to be taken as made. These Regulations also prescribe the maximum amount of compensation that can be awarded by an employment tribunal for a breach of the statutory right.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

4. **Legislative context**

- 4.1 Part 8A of the 1996 Act deals with the statutory right of an employee to make a request to his employer for a flexible working arrangement i.e. a variation in the terms of the employee’s contract as to the hours, times or location of work. Part 8A of that Act was supplemented by the provisions of the Flexible Working (Procedural Requirements) Regulations 2002 (S.I. 2002/3207) (“the Procedural Regulations”) and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (S.I. 2002/3236) (“the Eligibility etc. Regulations”).

- 4.2 Part 9 of the Children and Families Act 2014 (“the 2014 Act”) will be brought into force on 30<sup>th</sup> June 2014. Part 9 amends Part 8A of the 1996 Act in two main respects.

- 4.2.1 First the 2014 Act widens the eligibility by removing the requirement that an employee who exercises the statutory right to request flexible working must be a parent or carer. Eligibility will now be determined only by the employee’s length of continuous employment. Eligibility and other matters (form of the

application, date of when the application is made and compensation) are the subject of these Regulations. These Regulations replace the Eligibility etc. Regulations.

4.2.2 Secondly, the 2014 Act replaces the statutory process for dealing with an application for flexible working provided for by Part 8A of the 1996 Act and the Procedural Regulations with a duty on the employer to consider the flexible working request 'in a reasonable manner'. The procedure for dealing with an application is now specified solely in the 2014 Act. A Code of Practice issued in accordance with section 200 of the Trade Union and Labour Relations (Consolidation) Act 1992 will give guidance on handling requests to work flexibly in a reasonable manner. This Code is discussed in paragraph 9 below.

4.3 These Regulations:

- revoke the Eligibility etc. Regulations subject to savings;
- state that an employee must have at least 26 weeks of continuous employment in order to make a flexible working application to his employer under the 1996 Act;
- state that application must be in writing, must be dated and must give the dates of any previous applications;
- provide that the application is made on the day it is received by the employer and set out how that day is determined depending on the method of delivery; and
- state that the maximum amount of compensation that can be awarded by an employment tribunal for a breach of the statutory right is 8 weeks pay of the employee who brought a well-founded complaint.

## **5. Territorial extent and application**

5.1 This instrument applies to Great Britain.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The 2014 Act amends the 1996 Act to remove the restriction which limits the statutory right to request flexible working to parents and carers. This has been undertaken because the current restrictions on this statutory right create the cultural belief that flexible working is only of benefit to parents and carers and, consequently, primarily for women as they deliver the majority of the caring role. This has led to people with other commitments unable to make a statutory request to work flexibly. This culture means businesses are not recognising the benefits of flexible working. We wish to change

all of these things by removing the restriction which limits the right to parents and carers, thereby enabling more people to use the statutory right to request flexible working and, as a consequence, allow more employers to see the benefits of such arrangements.

7.2 We have preserved the qualifying period of 26 weeks' of continuous employment. The absence of a minimum qualifying period may adversely affect employers' confidence in hiring new staff due to concerns over what terms and conditions their new staff would be working under if they can make a statutory request to vary their contract as soon as they are employed. The qualification period also avoids creating unrealistic expectations for prospective employees. There were also no compelling reasons to change the requirements as to the form of the application, the date of making an application or the amount of compensation. Therefore these elements which were in the Eligibility etc. Regulations have been kept.

## **8. Consultation outcome**

8.1 The Modern Workplaces Consultation was published on the 16 May 2011 and ran for 12 weeks. The flexible working section of that consultation received 149 incomplete responses (where only contact details were registered) and 202 completed responses. The Government response was published in November 2012 and is available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82793/12-1269-modern-workplaces-response-flexible-working.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82793/12-1269-modern-workplaces-response-flexible-working.pdf).

8.2 85% of respondents were in favour of extending the right to flexible working to all employees, including 72% of employers and their representatives, 92% of individuals and trades unions, and 95% of charity and public sector respondents. 56% of consultation respondents supported the removal of the statutory process for flexible working applications to be replaced by a statutory code of practice, which comprised of 73% of employer and business representative respondents, 38% individuals and trades union respondents and 54% of charity/public sector respondents.

8.3 The Consultation also asked a series of questions about the possible content of a statutory code. There was support for a principles based approach, to give employers freedom to consider flexible working requests in a way which suits them provided they could demonstrate that the process was reasonable. There was also support for the code to be produced by Acas. On this basis, the department approached Acas to draft a statutory code.

## **9. Guidance**

9.1 The changes brought about by these Regulations will be publicised widely so that all who may be affected may be made aware of their effects. The Department will use appropriate communication channels and press avenues to publicise the changes.

9.2 Acas published a draft Statutory Code of Practice on handling requests to work flexibly in a reasonable manner on 25 February 2013. The consultation closed on 20 May

2013. After considering representations made on the draft and modifying it accordingly, Acas submitted the draft Code to the Department on 27 March 2014. The Secretary of State approved the Code on and laid it before both Houses of Parliament in draft on 1 April 2014. The Secondary Legislation Scrutiny Committee considered the Code on 13 May 2014 and published information about the Code in its 42<sup>nd</sup> report. Either House may resolve on or before 25<sup>th</sup> June 2014 that no further proceedings are to be taken on the Code. If no such resolution is made and if Acas then issue the Code in draft, the Secretary of State will by Order bring the Code into force on 30<sup>th</sup> June 2014.

9.3 Acas has also produced non-statutory guidance to supplement the Code which will be available on its website at <http://www.acas.org.uk/media/pdf/g/h/Handling-requests-to-work-flexibly-in-a-reasonable-manner-an-Acas-guide.pdf>.

## **10. Impact**

10.1 The impact on employers is average annual benefits from higher productivity, lower labour turnover, reduced absenteeism and the removal of statutory procedure, totalling £55.8m (of which the impact on business, charities and voluntary bodies is 70%). Allowing for administration and accommodation costs (but excluding transitional familiarisation costs), there is an estimated annual net benefit to employers of £16m (of which the impact on business, charities and voluntary bodies is 70%).

10.2 There is an estimated £45,000 cost to the exchequer, annually, from increased employment tribunal claims. An Impact Assessment was prepared for the Children and Families Act 2014 and is attached to this memorandum. It is also available online at <http://www.parliament.uk/documents/impact-assessments/IA12-030.pdf>

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 No special measures apply to small businesses. The removal of the requirement to comply with a statutory procedure when considering requests will be helpful to small businesses. All businesses will be able to be more flexible when dealing with these requests, but will be guided by a statutory code which will provide clarity and certainty on the legal requirement to deal with these requests in a reasonable manner.

## **12. Monitoring & review**

12.1 Section 134 of the 2014 Act requires the Secretary of State to carry out a periodic review of Part 9 of that Act (right to request flexible working) and to publish a report of the conclusions of any such review at intervals of not less than seven years. Such reviews will take into consideration the changes introduced into Part 8 of the 1996 Act by Part 9 of the 2014 Act, in particular whether the objectives have been achieved or are still relevant. We anticipate that any such review will include consideration of the provisions of these Regulations.

### **13. Contact**

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