

Ringling the changes

When it comes to employment legislation, it seems that change is the only constant. Greg Cain and Emma Warden outline the forthcoming statutory changes and consider how employers can make the most of them.

IT CAN BE HARD ENOUGH FOR EMPLOYERS

to keep abreast of the latest legislative changes, let alone find time to think strategically about them. However, with a little forward planning, they can ensure that statutory changes are implemented in a way that adds value to their business rather than red tape.

The new flexible working arrangements legislation is a good example of this. The legislation comes into force on 1 July 2008, and provides eligible employees with the right to request a change to their working arrangements. To be eligible, an employee must have "the care of any person" and must have been employed for at least six months.

Working arrangements are widely defined and include hours, days and place of work so that virtually any conceivable work pattern could be covered: for example, part-time, flexi-time, annualised hours, compressed hours, staggered start and finish times, job sharing, or home/remote working. Requests must be written, and must say (among other things) whether the change is to be temporary or permanent, and give the employee's view of what changes the employer may need to make to accommodate the employee's request.

The employer is required to notify the employee of its decision within three months. The grounds for refusal are very wide-ranging and include, for example, an inability to reorganise work among existing staff or to recruit additional staff, a detrimental impact on quality or performance, and additional cost.

The employee has limited scope to challenge an employer's refusal. Nevertheless, the importance of the flexible working scheme should not be underestimated. The new scheme is already quite high profile and this is likely to increase once the legislation comes into force. In practice, flexible working arrangements may provide an opportunity for employees and employers to find win-win solutions, which are particularly valuable in a tight labour market.

Statistics quoted in relation to the United Kingdom legislation, on which this scheme is based, record that nearly 80 percent of requests for flexible working arrangements have been accepted, 76 percent of businesses had found the impact of the legislation to be negligible, and 90 percent have reported no significant problems in complying with it. Also, anecdotal experience suggests that even businesses that were extremely reluctant to accept flexible working arrangements were able to adapt and generally make such arrangements work.

There are some differences between the UK and New Zealand schemes and it remains to be seen whether our scheme will be as successful, but if employers approach it positively, it could have real benefits. One is recruitment and retention. Acres of print have been published about our skills shortage and tight labour market, and employees with care obligations, who cannot work the same pattern as others, often end up leaving their employer. Compounding the problem is the fact that key roles involving reduced hours or bespoke working patterns are few and far between.

In the UK, some employers have used a positive approach to flexible working to build a reputation as employers of choice. All this means there is scope for genuinely flexible employers to gain a competitive advantage in the recruitment and retention battle.

There are also a number of specific measures that employers can take to ensure that flexible working runs as smoothly as possible. These are steps that would be consistent with the statutory framework, even though they are not required under it:

- **Flexible working policies:** Introducing a policy will ensure that employees and managers are clear about the process to be followed. It should also help to ensure there is consistency and fairness in decision-making, and would provide guidance about various issues (for

example, by clarifying whether or not an organisation is prepared to provide additional equipment or resources for employees working from home).

- **Standardise request forms:** Whether or not it is part of a policy, there may be benefits in providing a standard request form. This allows an employer to ensure all the information required under the legislation is provided, an appropriate level of detail is given, and there is information relevant to the employer concerned.
- **Build in flexibility:** Employers should build flexibility into each approved arrangement, for example by a trial period, or regular review points. Again, this is a matter which could be covered in a policy. Building in flexibility in this way allows the employer to check the practicability of the arrangement once it is in operation. Also, it allows the employer to reconsider the situation in light of later developments, such as requests from other employees. This ensures that as many requests as possible can be accommodated, and provides fairness between employees.
- **Meeting with employees:** A requirement of the UK legislation, which is not mirrored in New Zealand, is to hold a meeting with the employee to discuss their request before a decision is made. This two-way process enhances the prospect of a robust arrangement that accommodates both parties' needs. It also demonstrates to an employee that the request is being considered carefully, which should reduce the risk of a complaint if the request is refused. Employers should also state (or set out in a policy) that if an alternative arrangement is agreed as a result of this meeting, the original request will be deemed to have been accepted, in the terms of the arrangement agreed.
- **Detailed records:** Employers should keep an accurate record of the request, the deci-

sion (including the notice to the employee required by statute), and the process followed and factors considered. This ensures not only that there is appropriate evidence in the event of a challenge, but also that later decisions are more likely to be consistent. In addition, if the request is granted, it is important that the arrangement is properly documented, including any expiry date/review period and the effect of the arrangement (if any) on the employee's remuneration and benefits.

- **Requests outside the scheme:** Employers should consider, and possibly address in a policy, what is to happen if an employee makes a request outside the statutory scheme, which is only available to employees who have dependants in their care. Some employers may consider requests made for other reasons (for example, a partial retirement or a need to meet sporting commitments). A refusal of such a request could potentially be the subject of a personal grievance claim alleging unjustified disadvantage, notwithstanding that it is outside the statutory scheme.

None of these measures are required, or even contemplated, by the legislation, and not all of them will be relevant to all employers. However, they can help employers make the best use of the flexible working regime,

and even get ahead in the recruitment and retention race. They also might just stop you getting sued!

Rest breaks and breast feeding

In April, the Government introduced a bill providing for rest breaks and breast feeding. The Bill provides for the following *paid* rest breaks and *unpaid* meal breaks:

- One 10-minute rest break for up to four hours' work;
- One 10-minute rest break and one 30-minute meal break for between four and six hours' work; and
- Two 10-minute rest breaks and one 30-minute meal break for between six and eight hours' work.

For more than eight hours' work, the requirements will apply as if the work period had started again at the end of the eighth hour. Employers would also have to stagger the breaks, presumably to ensure reasonable intervals between them, but can agree on timing with employees.

The Bill has been referred to a Select Committee. The National Party supports the legislation going this far, but questions whether new rules are needed when most employers provide sufficient breaks to staff. The *New Zealand Herald* has commented that while it is fair that all employees should

be able to have breaks, it is important that employees who do not wish to have a break are not required to do so.

The Bill also requires employers to facilitate breastfeeding in the workplace by providing facilities and unpaid breaks, supported by a code of employment practice. This proposal has been criticised for introducing inflexibility into the workplace. However, the small print states that employers only have to provide for breastfeeding "so far as is reasonable and practicable in the circumstances", taking into account the employer's resources and operational environment. This arguably leaves room for employers for whom space or resources are a major constraint not to provide facilities or breaks for breastfeeding.

Where these constraints do not apply, the benefits potentially include employees returning to work earlier, improved retention rates, and increased loyalty and morale. This is a further example of how employers can benefit by proactively engaging with the new legislation. **et**

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