EMPLOYMENT LAW
NEWSLETTER

Welcome to our March newsletter, bringing you the latest updates and insights in employment law. In this edition our focus is family friendly rights. In particular we take the opportunity to look at some of the additional family friendly rights taking effect in April, alongside the recent case of Wilson v Financial Conduct Authority relating to flexible working.

At the end of this newsletter, with April just around the corner, you will also find details of the planned increases to national minimum wage rates and other payments.

FAMILY FRIENDLY RIGHTS – APRIL'S CHANGES

In addition to a new tax year April 2024 brings with it several changes to our current family friendly laws. Are you aware of them all?

New right to carer's leave
All employees, no matter their length of service, will from 6th April be able to take up to one week's unpaid leave during any rolling 12-month period to assist them with providing or arranging care for a dependent with long-term care needs.

How can this leave be taken?
It will be possible for this leave to be taken using half days, individual whole days or a one-week block.

There will be a need to give notice of the intention to take this leave which will be a minimum notice period of twice as many days as the employee wishes to take in leave, subject to a minimum of 3 days' notice.

Who counts as a dependant?
A dependant will include spouse, civil partner, child or parent of the employee or anyone else who reasonably relies on your employee to provide or arrange care. Those living in the same household as the employee (but not as lodger, tenant etc) may also qualify.

Long term care will include any illness or injury (physical or mental) that requires or is likely to require care of more than three months, or where the dependant requires care due to old age. Long term care will also be met where the dependant would be classed as disabled under the Equality Act 2010. You can learn more about what counts as a disability under the Equality Act 2010 in issue 9 of our newsletter which can be found here.

Can employers insist on evidence of caring responsibilities and/or decline a request to take leave?
As an employer you will not be able to insist on evidence of caring responsibility, nor refuse any request from an employee to take this leave.

You may however ask that the employee postpone the leave where you reasonably consider the operation of your business will be unduly disrupted if leave is taken when requested and can accommodate the request within a month of the initial leave period asked for.

Written confirmation confirming why you cannot accommodate their original leave request and the new dates agreed will need to be given to the employee within seven days or the date they originally asked the leave to start from, whichever is earlier.

Anything else employers should know?
Whilst the leave will be unpaid employees will remain entitled to all other contractual benefits such as the use of any company car, healthcare, and accruing annual leave as examples.

There will be legal protections in place for any employees who are treated unfavourably or even dismissed because they either may take advantage of this new right or do in fact do so, so it will be important to be aware of and allow your employees to exercise this right if they need to.

How should employers prepare?
It will be important that those in the business tasked with approving or declining leave, paid or unpaid, are aware of this new right to avoid any inadvertent employment tribunal claims arising.

If there is a need to ask an employee to postpone their leave it will also be important to act and agree this quickly. Make sure everyone knows what they need to do in that instance!

For any employers who already offer time off for caring responsibilities your employees can only take advantage of whichever right is more favourable, not both. To help avoid any confusion here we suggest you consider updating your existing internal policy to make this clear.

Changes to the taking of paternity leave
From 6th April changes are coming in to when and how paternity leave can be taken, and which will apply to those whose baby's expected week of childbirth (EWC) or expected date of placement for adoptions is after 6th April.

Presently paternity leave can only be taken in one block either of one of two consecutive weeks and must be taken within 56 days (8 weeks) of the birth of the child (or placement for adoptions).

From 6th April it will be possible to take the two-week paternity leave entitlement in two separate one week blocks. It will also be possible to take this leave anytime within the first year following birth (or placement for adoptions).

Anyone wanting to take paternity leave will still need to give their employer notice of their entitlement and intention to take leave as per current legal requirements, so effectively by the 15th week before the EWC or within seven days of notice of match in adoption cases. However, for those where the EWC is after 6th April they will only need to give 28 days' notice of the actual dates when they wish to take leave and may change these dates with 28 days' notice. Shorter notice periods already apply in adoption cases.

Redundancy – changes to current protections for pregnant employees and parents on statutory leave

Presently for any individual facing redundancy whilst on maternity leave (or shared parental/adoptive leave) the law gives them priority over fellow redundant colleagues to any suitable alternative roles available within the business.

From 6th April 2024 this priority is being extended to those who are pregnant (from the moment they tell their employer) as well as to those returning from statutory leave upon or after 6th April until 18 months after the birth of their child or placement of the child (for adoptions).

For any partners taking shared parental leave only these extended protections will only apply where this leave starts on or after 6th April and lasts for a minimum of six consecutive weeks.

It will be important for employers to ensure they fully understand and apply these protections correctly in a redundancy situation to avoid potential claims for unfair dismissal and discrimination. Taking early legal advice will be key and the Employment Team here at Lightfoots can help.

Flexible Working

In our December newsletter we outlined various changes to the statutory flexible working regime then expected to come into force in or around July this year.

On the 11th December 2023 additional regulations were also laid before Parliament to make flexible working a day one right from 6th April 2024, with an understanding the Government would look to bring all changes in together. We would however mention that as at the date of this newsletter it is currently unclear if all changes will, in fact, come in at the same time on 6th April, or just the change to make flexible working a day one right!

If all changes do come in together, what do they mean for employers?

To recap the key changes being made to the statutory flexible working regime are:

- All employees will now be able to make a statutory flexible working request from their first day of employment;
- Employees will now be able to make two rather than one statutory flexible working request in any 12-month period;
- As an employer you will now be required to respond to any statutory requests (which usually includes dealing with any appeal) within two months. This is being reduced from the current three months. It will remain possible to agree time extensions with the employee, if needed;
- The procedure for employees to follow is being simplified. Employees will no longer have to address in their request the effect, if any, it may have on your business and how that effect could be dealt with; and
- If you, as an employer, intend to reject the request you should firstly consult with the employee before doing so.

Will these changes make it more difficult for employers to decline flexible working requests?

Whilst employers are going to have less time to respond and will need to consult before declining a request, there is no change to the eight permitted business reasons you, as an employer, can continue to rely on to refuse a statutory flexible working request.

Accordingly, whilst it is likely that flexible working requests will continue to increase, in appropriate circumstances they can still be declined as the recent case of Wilson v Financial Conduct Authority below confirms.

What practical steps should employers be taking?

ACAS have issued an updated draft Code of Practice on handling flexible working requests ahead of these changes which you can find here. We recommend all employers read and follow this guidance when responding to formal flexible working requests. It will also be important to ensure that those internally who handle flexible working requests are likewise aware of these changes, especially the reduced timescales to respond!

We also offer a practical flexible working guide, updated flexible working policy and template letters.

FLEXIBLE WORKING – THE CASE OF WILSON V FINANCIAL CONDUCT AUTHORITY

On the 20th December the Tribunal gave its decision in the case of Miss Wilson v Financial Conduct Authority, a case relating to a request for flexible working.

The facts

Miss Wilson worked as a Senior Manager for the Financial Conduct Authority (FCA).In December 2022 she made a statutory flexible working request asking to work entirely remotely. This followed a period of remote working due to the Covid pandemic and national lockdown measures. Post pandemic the FCA reviewed working practices and introduced a policy allowing employees to work 40% from the office and 60% remotely. For Senior Managers this was a 50/50 split.

The FCA declined Miss Wilson's request. Whilst it recognised that Miss Wilson had performed very well remotely during the pandemic, they felt granting the request would in their words "…have a detrimental impact on performance or quality of output as you will not attend face to face training sessions, departmental away days/meetings, and you will not be able to provide face to face training or coaching to team members or new joiners. Your ability to input in Management strategy meetings and be involved in in-person collaboration will also be negatively impacted."

The FCA also felt that as a Senior Manager there was a reasonable expectation that junior colleagues should have the ability to meet with her from time to time and removing this possibility would also negatively impact the department.

Miss Wilson unsuccessfully appealed the decision internally before submitting an Employment Tribunal claim challenging the FCA's position that her request, if granted, would have a detrimental impact on quality and performance. As a remedy she sought a declaration that the FCA reconsider her request and compensation.

The decision

Taking into account both the evidence given by Miss Wilson and witnesses for the FCA the Tribunal Judge considered it clear that the FCA had taken Miss Wilson's excellent performance into account, as well as the fact that strictly speaking much of her work could technically be achieved remotely. The Judge also considered that the Claimant's position within the FCA, as a Senior Manager was also important, including the fact of her managerial responsibilities and was a relevant factor for the FCA to take into account when considering the performance and quality expected and potential detriment that may arise in granting Miss Wilson's request.

Accordingly, the Tribunal was satisfied that the individual merits of Miss Wilson's request had been considered and this was not simply a case of the FCA trying to enforce its internal attendance policy, and that the FCA's decision was therefore not based on incorrect facts and the FCA were accordingly entitled to decline the request as it had.

The Tribunal accepted the FCA's determination that whilst it was possible for Miss Wilson to carry out much of her role remotely, they were carried out more effectively in person.

Takeaway for employers

As part of its decision the Employment Tribunal acknowledged that since the pandemic a number of businesses have had and continue to grapple with debates over whether a physical presence in the office remains necessary. They also acknowledged that the answer to that debate will "differ considerably" between businesses and that there will "not be one solution which will work for all companies or even for all roles within a company".

It is also important to remember that the statutory flexible working procedure still only gives employees the right to request flexible working. Provided employers consider the request in accordance with their legal obligations and have valid grounds to decline the request, based on one of the eight permitted grounds available, they can legitimately do so. Just remember from 6th April to consult with the employee first!

It should, however, be noted that Miss Wilson was awarded one week's pay as compensation, capped to £643. The reason for this was the FCA took longer than the permitted three months to determine her statutory request, including the appeal process. This was despite all other aspects of Miss Wilson's claim failing and delay being unintentional. Unfortunately, there was internal confusion at the FCA as to who was handling the request leading to delay.

Any employer wishing to avoid having to pay such compensation should ensure all statutory flexible working requests are dealt with in a timely manner and from 6th April within the reduced time scale of two months from receipt of the request, including any appeals process. If such requests fall to individual managers to respond, rather than HR, also ensure everyone is aware of this.

If for any reason additional time is needed this should be agreed with the employee and before the initial two months expires. Any extension agreed should be recorded in writing.

LOOKING FORWARD TO APRIL – A REMINDER OF INCREASES TO NATIONAL MINIMUM WAGE AND OTHER STATUTORY PAYMENTS

Finally, this newsletter would not be complete without a reminder that with April around the corner there will be changes to both the National Minimum Wage rates (announced back in November 2023) as well as other statutory payments.

National Minimum Wage:	£11.44 for those aged 21 and above (national living wage), £8.60 for 18-20 years, £6.40 for those under 18, and apprentices under 19 or during first year of their apprenticeship.
Statutory maternity, paternity, adoption pay, shared parental pay and parental bereavement pay:	£184.03 per week* or 90% of employee's average earnings, whichever is lower. * Employee entitled to 90% of their average earnings for the first six weeks of any period of statutory maternity or adoption leave.
Statutory Sick Pay	£116.75 per week, increasing from £109.40 per week.
Week's pay for statutory redundancy pay calculations	£700 per week, increasing from £643. An online statutory redundancy calculator can be found here.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

- We can help introduce and/or update any internal policies and practices to ensure you are ready for the legal changes outlined above and others due to come in force later this year as set out in our December newsletter;
- We offer a detailed guide helping employers successfully navigate their legal requirements when it comes to responding to flexible working requests. We can also provide template response letters; and
- We can help you navigate the complexities of employment law when it comes to redundancies, especially in light of the new additional family friendly protections highlighted above.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

Contact Us

Louise Nunn
Partner/ Head of Employment Law
01844 268 316
lnunn@lightfoots.co.uk

Charlotte Coles
Solicitor
01844 212 305
ccoles@lightfoots.co.uk