

SLAUGHTER AND MAY

COVID-19 employment podcast series

Flexible working

Clare Fletcher	<p>Hello and welcome to the six and last in this series of Slaughter and May podcasts, looking at key topics for employers in the context of the COVID-19 pandemic.</p> <p>My name is Clare Fletcher and I am a professional support lawyer in the Employment team here at Slaughter and May.</p>
Dave Rintoul	<p>And I'm Dave Rintoul, one of the associates in the Employment team.</p>
Clare Fletcher	<p>Today's podcast focuses on flexible working in the context of COVID-19. Dave and I will look at some of the trends we have seen in the past few months, think about what we expect to see going forward, and highlight some of the legal risk areas. We will end with some key practical takeaways for employers.</p> <p>I should say this podcast is being recorded on 12 August, and reflects the law and guidance as it stands today.</p> <p>So Dave, can you set the scene for us in terms of the sort of flexibility we have seen during lockdown?</p>
Dave Rintoul	<p>Yes, listeners will be all too familiar with the impact that COVID-19 and lockdown has had on their own working patterns and arrangements.</p> <p>Homeworking had already been increasing gradually over recent years, but with lockdown came the arrival of home-working on an unprecedented scale and we have recorded a separate podcast dealing specifically with home working.</p> <p>For those with conflicting obligations like childcare, home-schooling and caring responsibilities - we've seen the swift introduction of informal flexible arrangements – some are working compressed hours, some have divided their days into 'shifts' with partners to ensure one can work while the other manages childcare and schooling; and others have simply muddled through, somehow fitting in their working hours around everything else that the lockdown has thrown at them.</p>
Clare Fletcher	<p>And I think both you and I fall into that category. And now with the relaxing of lockdown, and the re-opening of workplaces, many people have seen their working patterns changing yet again...</p>
Dave Rintoul	<p>Yes; with some now dividing their working time between the home and the workplace, we are seeing staggered shifts and staggered start and finish times to reduce density in the workplace and to avoid travel at busier times.</p>

SLAUGHTER AND MAY

	<p>Flexible furlough now allows employers to furlough workers for part of the week, although perhaps worth mentioning that at the moment there seems to be limited 'take up' of the flexibility offered by the latest version of the scheme. Partly we think due to the difficulties of monitoring and calculating working hours and furloughed hours, complexity around what can you reclaim from HMRC and what employers themselves must pay.</p> <p>More prevalent at the moment - employers are continuing to rotate employees on furlough (so parts of the workforce are spending weeks on furlough, while another cohort is working, before they are rotating).</p>
Clare Fletcher	<p>Looking forward then into the coming months - employers are facing some difficult decisions. The CJRS will close at the end of October, so employers will need to decide what they do with employees who are still furloughed at that stage. Assuming for now there is no redundancy situation – we've recorded a separate podcast on that.</p> <p>Some employees may be brought back on their previous working pattern. Perhaps more likely, changes will be needed so that the employee is able to work more flexibly and can be required to work more flexibly if needed.</p> <p>We might see a resurgence of the (previously maligned) zero hours contract, for example.</p> <p>On the other hand some employees who previously worked part-time flexibly may want to increase their hours, to provide more certainty and stability, for example if their partner has been made redundant.</p> <p>Overall there is a very uncertain outlook at the moment and I think employers will want as much flexibility as possible to respond to that.</p>
Dave Rintoul	<p>Yes and the situation continues to change all the time, of course. So the flexible arrangements that suit individuals at one point in time may well change as the current situation develops.</p>
Clare Fletcher	<p>At the moment the government's focus seems to be on getting people back to the workplace (provided that can be done safely).</p> <p>But an increase in virus levels could see further local or indeed national lockdowns. We may also see a return of shielding for vulnerable workers. And of course the childcare setting and school situation remains uncertain. All of these have the potential to impact on working patterns.</p> <p>So employers need to be prepared to adapt to these changing circumstances in the next few months. And one of the main themes I wanted to draw out today is that the current legal framework for flexible working is not very well suited to these current circumstances we find ourselves in.</p>

SLAUGHTER AND MAY

	<p>We may see some changes to the law in the coming months. Even before the COVID outbreak, the government had committed to make flexible working the default position for all jobs, unless the employer has a good reason to reject it. The COVID pandemic has strengthened the case for that – so I think it will be interesting to see how and when the law changes to keep pace with these new working models.</p> <p>In the meantime, Dave perhaps you could explain a bit more about the current legal framework, and what employers need to think about, when handling flexible working requests?</p>
Dave Rintoul	<p>Well the first thing to bear in mind is that anyone can make a request to work flexibly at any time - and for reasons we'll come onto, it is sensible to give all such requests proper consideration - but only certain requests that satisfy the statutory requirements need to be treated as 'formal' requests under the flexible working legislation.</p> <p>Only employees who have been employed for at least 6 months can make a formal request, their application must be in writing and contain certain prescribed information about the change being requested, the date that it would take effect, and what impact they think the change will have on the employer.</p> <p>There is no specific process required when considering a request, but the employer has to deal with requests in a "reasonable manner" (taking into account the relevant ACAS Code). This generally involves a meeting with the employee (which may have to be undertaken remotely at the moment) and a decision must generally be taken within three months of the request.</p>
Clare Fletcher	<p>And when they are making that decision, employers needs to bear in mind that a formal flexible working request can only be refused for one of eight specified statutory grounds. These include the burden of additional costs, a detrimental effect on the ability to meet customer demand, or on quality or performance; an inability to either reorganise work among existing staff (or to recruit additional staff), or there not being enough work during the periods the employee proposes to work.</p> <p>So that's the statutory process in overview – the next common question we are asked is what exposure could employers face for getting this wrong?</p>
Dave Rintoul	<p>Well there's limited direct exposure under flexible working legislation itself (the maximum amount of compensation that a Tribunal can award is, at the moment, £4,304) - which on its own may not be the sort of money that would keep employers awake at night...BUT there are important incentives for dealing with flexible working requests properly. Ignoring or mismanaging a request may leave employers exposed to other claims. Firstly for constructive dismissal based on breach of trust and confidence. And secondly, there is a really important discrimination angle to bear in mind when dealing with flexible working requests.</p>

SLAUGHTER AND MAY

<p>Clare Fletcher</p>	<p>Yes and just to pick up on that Dave, this means that employers should always handle requests for flexible working sensitively and reasonably, and shouldn't stick too slavishly to the statutory conditions, or rely on purely procedural defects to refuse an application. And to give a few examples of that:</p> <p>Informal requests of course don't fall within the scope of the statutory flexible working regime, but could still give rise to discrimination claims, if they are not handled appropriately.</p> <p>The same goes for requests from those who are not employees (and therefore not eligible for the statutory right to request).</p> <p>And finally an employment tribunal has quite limited scope to examine the refusal of a flexible working request under statutory scheme provided one of the eight statutory reasons I just spoke about has been shown; but the employees reasoning could clearly be far more relevant for discrimination purposes.</p>
<p>Dave Rintoul</p>	<p>The classic area of concern with flexible working requests is sex discrimination, since historically most requests have been made by women to help manage child caring responsibilities. But the world is gradually changing so do we think this is still a risk area, and will the COVID pandemic will make any difference?</p>
<p>Clare Fletcher</p>	<p>I think even before COVID we were starting to see a change of approach as you say Dave – more men are taking on childcare responsibilities. Tribunals are gradually catching up and accepting that it isn't inevitable that women will be disproportionately affected by a refusal to grant flexible working.</p> <p>Ultimately if there are a more even number of applications between men and women, it might be that indirect sex discrimination claims become less of a risk – but as ever, much will depend on the particular circumstances.</p> <p>What we've seen with COVID is that there has undoubtedly increased the number of men working flexibly, although there is also some evidence that women have been taking on the greater share of childcare and home schooling during lockdown. So for now, I think the risk of indirect discrimination remains.</p> <p>We shouldn't forget that requests for flexible working may involve a risk of discrimination on other grounds, including disability, age and race, and I'm thinking in particular here of employees who are more concerned about their vulnerability to COVID, and want working arrangements which help them manage that.</p>
<p>Dave Rintoul</p>	<p>Ok so moving away from discrimination - we think there's little doubt that employers will be dealing with an increased volume of requests in the coming months and years.</p> <p>With that comes the problem of competing requests. So how should employers approach and prioritise requests for flexible working from employees?</p>

SLAUGHTER AND MAY

	<p>The guidance from ACAS is that employers should consider flexible working requests in the order in which they are received. This would mean that if the first request is accepted, the second request must then be considered against the new background.</p> <p>However, the guidance goes on to acknowledge that employers may receive multiple requests for flexible working at the same time. In that scenario, ACAS suggests that employers can choose to stick with the “first come first served” approach, or alternatively discuss with applicants to see if there is room for adjustment or compromise before coming to a decision. This is clearly a sensible approach - and tribunals have in fact criticised employers in the past for not taking this approach.</p>
<p>Clare Fletcher</p>	<p>Yes so far so good in terms of ACAS’ approach here but another of the suggestions which ACAS make is that employers could choose which request to accept at random. Pull names out of a hat. We think there is unlikely to be much benefit to this approach and that employers need to be a bit wary of the ACAS guidance in this respect.</p> <p>The other key point I wanted to make here is that as far as ACAS and the statutory process is concerned, the reason for the employee is making the request is irrelevant. However, in the wider industrial relations context, the reason for request is likely to come into play.</p> <p>And although as part of the statutory process there isn’t any obligation to give their reason as to why they’re making their request. For the employers perspective, understanding that reason can help them to avoid discrimination (and we would say it would be reasonable for the employer to ask for that reason as part of the process). It can also help the employer deal with competing requests.</p> <p>But whatever method employers choose for dealing with competing requests, it will be really important to try and ensure consistency. So we would suggest employers make sure there is some central oversight (from HR for example) of all flexible working requests to help achieve this.</p>
<p>Dave Rintoul</p>	<p>Another of the difficulties with the current flexible working legislation is that it is generally reviewed as a right to request a permanent contractual change. Although strictly speaking nothing in the legislation prevents a request for a temporary change. A permanent change may not be a good fit with the needs of employers or employees at the moment, given that the significant uncertainty facing businesses due to COVID.</p> <p>One option that employers should consider if faced with requests that might pose some challenges in the longer term is to allow trial periods of flexible working.</p>

	<p>Now there's no specific provision in the flexible working legislation dealing with trial periods. That means that an employee can't insist on being given a trial period of his requested arrangements.</p> <p>However, as an aspect of the statutory duty to deal with applications in a reasonable manner, employers should be prepared to explain why it would not be feasible to offer a trial period, if that's its position.</p>
<p>Clare Fletcher</p>	<p>And from a practical perspective, when you're putting in place a trial period you will need to make sure it is long enough to enable a fair review of the new working practices. And we would suggest setting a number of review points during that period so that you can discuss how those arrangements are working, and make any necessary adjustments. Also it will be important to make sure the parties agree to extend the decision period so that the trial period takes place before the final decision.</p> <p>I think it is fair to say that having a trial period could make the employers ultimate refusal more contentious unless it is clear that the trial period has been unsuccessful from both sides.</p> <p>And lockdown has of course in many cases been a kind of informal trial period for flexible working – a dry run for arrangements which employees might now want to retain. And employers will need to decide if a permanent change can be justified once business as normal resumes – or alternatively if arrangements which were enough to get us through a highly unusual working situation are no more than that and can't be supported permanently.</p>
<p>Dave Rintoul</p>	<p>And just to pick up on that - an employee's circumstances during COVID may have led to a "taking" of flexibility.</p> <p>If the employer doesn't intend to support that flexibility on an ongoing basis, the issue they face is: how do they bring employees back to their usual working pattern?</p> <p>Much will depend on how and why the flexibility was first put in place, and what has changed now to justify a return to the usual pattern.</p> <p>In many cases there will have been no change to the employee's contractual arrangements, so on the face of it the employer could simply point to the contract and require the employee to perform its terms.</p> <p>At this stage the alternative arrangements are unlikely to have been persisting in a way which would entitle the employee to claim any contractual variation has impliedly taken place.</p> <p>However, trust and confidence (as well as good industrial relations) may weigh against the employer immediately requiring a change back to the usual working pattern.</p>

SLAUGHTER AND MAY

	<p>This is only likely to be successful with good communication and engagement with the affected employees.</p>
Clare Fletcher	<p>So the final point I wanted to discuss briefly is the wider implications of a workforce working more flexibly.</p> <p>Flexible working will often involve less visibility, at least in the traditional sense (and within “usual” working hours).</p> <p>In some cases there might lead to less cohesion within the workforce, which can lead to a greater risk of exclusion for those who work more flexibly.</p> <p>This may make it more challenging for managers to have oversight of their team, and more difficult to compare performance amongst employees. So businesses need to be aware of this, and think about new ways of making a fairer assessment where employees are working flexibly.</p> <p>There might also need to be new thinking around things like reward and benefit design. There are of course legal protections for part-time workers, which require a pro-rata approach to benefit entitlements (unless this would not be appropriate). But I think employers might need to think beyond that, in terms of what will truly incentivise flexible workers especially if this is to become the default approach in future.</p>
Dave Rintoul	<p>So, what are the key takeaways for employers?</p> <p>Employers should be reviewing their flexible working policy, and thinking in particular about:</p> <ul style="list-style-type: none"> • Allowing more than one application every 12 months – in the current climate it may be counter-productive to say you won’t consider further requests just because a formal request within the statutory regime has already been made. • Consider allowing temporary periods of flexible working, rather than a permanent contractual change. • Consider making provision for trial periods. • The increased volume of requests means you may well have to think carefully about how you deal with competing requests and how you reflect that in your policy. • Don’t be too process driven; we talked about this earlier, be aware of the wider legal and industrial relations context and consider all requests on their objective merits.

SLAUGHTER AND MAY

	<ul style="list-style-type: none">• Finally, think about flexibility by default and by design. As much as flexible working has been forced on many businesses by COVID, all the signs suggest they are here to stay, long after the pandemic has abated.
Clare Fletcher	<p>And that brings us to the end of today's podcast – and indeed the end of this series. Thank you all for listening.</p> <p>You can find all the podcasts in this series on our website.</p> <p>In the meantime if you would like more information about anything we have discussed in this podcast, please feel free to contact either Dave or me, or your usual Slaughter and May contact.</p> <p>Thank you and goodbye.</p>