

FLEXIBLE WORKING REGULATIONS 2020

JANUARY 2020



Isle of Man
Government

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Introduction

The potential business benefits of suitable flexible working arrangements for both employers and workers are now widely accepted¹. The right to request flexible working in the Isle of Man was introduced by the Flexible Working Regulations 2007 (“the 2007 Regulations”), which were made under enabling powers contained in the Employment Act 2006 (“the 2006 Act”). The Regulations were based on UK Regulations made in 2002².

On 1st January 2020 modifications to the 2006 Act made by the Equality Act 2017 relating to the existing right to request flexible working came into operation. Given the extensive amendments to the 2006 Act a new set of Regulations is required as the 2007 Regulations contain provisions which are inconsistent with the amended provisions in the Act.

The Department is consulting on the draft Flexible Working Regulations 2020 (“the draft Regulations”).

The main contents of this document are as follows –

- Section 1 describes the right in the 2006 Act (prior to the amendments made by the Equality Act) and the 2007 Regulations.
- Section 2 sets out the changes made to the 2006 Act and the proposed changes in the new Regulations together with background information.
- Appendix 1 sets out the text of the draft Regulations.
- Appendix 2 provides a detailed comparison of the old and new flexible working regimes.

¹ See for example <https://archive.acas.org.uk/media/4901/Flexibility-in-the-Workplace-Implications-of-flexible-work-arrangements-for-individuals-teams-and-organisations/pdf/Flexibility-in-the-Workplace.pdf>

² The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002 No. 3236)

About the consultation

Consultees are asked two questions (see section 2 below). If you would like to respond to one or both of these questions please send a submission by email or post or to:

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Department for Enterprise
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St George's Court
Upper Church Street
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IM1 1EX

Tel: (01624) 685375
Email: Steven.Tallach@gov.im

Please note that the Department will assume, unless you tell us otherwise, that you do not object to your response or the name of your organisation (or your own name if you are responding as an individual) being made public. If you want all or any part of your reply to be treated as confidential, then please indicate this clearly in your reply.

The consultation period ends on **Friday 21st February 2020**.

Following consultation, the Department will:

- review and evaluate comments received from consultees;
- amend the draft Regulations as necessary;
- seek the approval of the Council of Ministers for the new Regulations;
- submit the final Regulations to Tynwald for approval; and
- advise consultees as to any amendments to be made to the draft Rules.

Section 1: the right in the 2006 Act and the 2007 Regulations

This section sets out the existing right at sections 66, 99-102 and 122 of the Employment Act 2006 (prior to the amendments made by the Equality Act) and the Flexible Working Regulations 2007.

(a) Entitlement

An employee who has been continuously employed for at least 26 weeks has the right to apply to his or her employer to request flexible working in order to enable him or her to care for a dependant. A request may not be made within 12 months of a previous request.

An 'employee' for this purpose does not include an agency worker.

A 'dependant' is —

- the employee's spouse or civil partner;
- the employee's child, if under the age of 6 or disabled (a child is 'disabled' if he or she is entitled to Disability Living Allowance);
- the employee's parent; or
- a person who lives in the same household as the employee, but is neither an employee, tenant, lodger or boarder of the employee, nor a child over 6.

An employee can request:

- a change in working hours;
- to work from home.

If a request is accepted, it will lead to a permanent change in the employee's terms and conditions of employment.

(b) Procedure

A request must be made in writing and state:

- that it is an application for a change in the terms and conditions of employment;
- the change requested and the date when it should take effect;
- what effect the employee thinks the change will have on the employer and how that effect might be dealt with;
- how the employee meets the conditions as to relationship with the dependant to be cared for.

Unless the employer notifies the employee within 28 days that the request is agreed to, the employer must arrange a meeting with the employee within that period to discuss the request. The employer must give the employee notice in writing within 14 days of the meeting, either agreeing to the change and the starting date or else refusing the request. Where the request is refused, the notice must state the grounds of refusal and inform the employee of the right of appeal.

The employer may refuse a request only on one or more of the following grounds:

- the burden of additional costs;

- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff, or to recruit additional staff;
- detrimental impact on quality or performance;
- insufficient work at the time the employee proposes to work; and
- planned structural changes.

The employee may appeal against refusal of the request, and the employer must hold a further meeting to discuss the appeal within 14 days. The employer must notify the employee of the decision on the appeal within 14 days of the meeting.

An employee is entitled to be accompanied at any meeting by a fellow-worker of his or her choice, who may address the meeting and confer with the employee. The fellow-worker is entitled to take time off with pay for this purpose.

(c) Enforcement

Except where the request is disposed of by agreement or withdrawn, the employee may make a complaint to the Employment and Equality Tribunal that:

- the employer has not followed the above procedure;
- the employer's decision was based on incorrect facts.

A complaint may not be made until the employer notifies the employee of the decision on appeal, or fails to hold a meeting or to notify a decision within the time allowed, and must be made within 3 months of the appeal decision or failure, but the Tribunal can allow a complaint out of time if there was a good reason for the delay. Where the complaint is successful the Tribunal makes a declaration, and may order the employer to reconsider the request and award compensation of up to 8 weeks' pay.

(d) Detriment and unfair dismissal

The employee has a right not to suffer detriment for seeking flexible working, exercising any right against the employer, bringing Tribunal proceedings, or alleging a ground for bringing proceedings.

Dismissal of an employee for such a reason is automatically unfair.

Where the complaint is successful the Tribunal makes a declaration, and may award compensation of an amount which the Tribunal considers just and equitable, having regard to the employer's infringement and the employee's loss. The maximum amount of compensation that can be awarded to an employee who has suffered a detriment is the sum of the basic award and the compensatory award that could be awarded on a finding of unfair dismissal.

Section 2: the new flexible working regime

This section contains information on –

- the modifications to the 2006 Act made by the Equality Act 2017 relating to the existing right to request flexible working; and
- the proposed changes to the 2007 Regulations.

Amendment of the 2006 Act

The 2014 consultation document on the Equality Bill contained a number of suggested employment law reforms which were unrelated to the Bill's main proposals and which subsequently formed Schedule 22 of the Bill. One of the proposed reforms was to widen the right to request flexible working, to be accomplished by amending the relevant provisions in the 2006 Act and then making new regulations. The consultation document stated -

'In the UK the Flexible Working Regulations 2014 came into force on 30th June. The Regulations extend the right to make a request for flexible working to any employee who has been employed for 26 weeks (not just parents of children under 17, or 18 if disabled, and certain carers - as was previously the case and remains the case on the Isle of Man).

The basic right to request is unchanged. Employees can make up to one written request every year, the employer needs to deal with it within three months, and can refuse on any of eight (very wide) business grounds. A tribunal cannot normally investigate the rights and wrongs of the refusal, only whether the procedure has been properly followed. Maximum compensation for a failure to comply is eight weeks' pay.'

Following Royal Assent to the Equality Act the amendments to the flexible working provisions contained in the 2006 Act were brought into operation on 1st January 2020. The modifications to the 2006 Act reflect the changes which had been made to the UK's flexible working regime.

Most significantly, the changes widen the eligibility of employees who may request flexible working by removing the previous requirement that an employee who exercises the statutory right must be a parent or carer. The previous right did not extend to employees with other commitments, and, in consequence, the right has sometimes been seen as a right to be exercised by women only as traditionally more women than men have taken primary responsibility for bringing up children and acting as carers.

The revisions to the 2006 Act have also replaced the previous very prescriptive process for dealing with an application for flexible working, set out in the 2007 Regulations with a general duty on the employer, at section 100(1)(a) of the Act to consider the request "in a reasonable manner".

The draft Flexible Working Regulations 2020

The draft Regulations are based on the UK's Flexible Working Regulations 2014. They are much shorter than the 2007 Regulations, in part because, as discussed above, the process for making a flexible working request is far less prescriptive while in addition some process requirements, previously contained in the Regulations, are now contained in the 2006 Act.

Specifically, the Regulations set out:

- who is entitled to exercise the right;
- how an application for flexible working must be made
- the calculation basis for the date on which an application is taken as made; and
- the maximum amount of compensation that can be awarded by the Employment and Equality Tribunal for a breach of the statutory right.

The Regulations must be approved by Tynwald before they come into operation.

There is one major point of divergence from the UK regulations: whereas in the UK an employee requires at least 26 weeks of continuous employment with his or her employer to make a flexible working request, it is proposed that an employee in the Island should be able to make a request irrespective of his or her length of service.

The changes already made by the amendments in the Act and those it is proposed be made by the new Regulations will increase the number of employees who will be able to exercise the right to request flexible working, and so further encourage flexible working as an option for both male and female employees in the Island.

Further information

Tables setting out the differences between the 2006 Act prior to and following its amendment and between the 2007 Regulations and the draft Regulations can be found below at Appendix 2.

A copy of the Employment Act 2006 (as of 1 January 2020) can be found here:

https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0021/EmploymentAct2006_14.pdf

A copy of the Flexible Working Regulations 2007 can be found here:

<http://www.tynwald.org.im/links/tls/SD/2007/2007-SD-0096.pdf>

Questions to consultees about the draft Flexible Working Regulations 2020:

- 1. Do you support the proposal to extend the right to request flexible working to all employees, irrespective of their length of service?**
- 2. Do you have any other comments to make about the draft Regulations?**

Appendix 1: the draft Flexible Working Regulations 2020

Statutory Document No. 20XX/XXXX



Employment Act 2006

FLEXIBLE WORKING REGULATIONS 2020

Approved by Tynwald:

Coming into Operation in accordance with regulation 2

The Department for Enterprise makes the following Regulations under sections 99 and 102(3) of the Employment Act 2006.

1 Title

These Regulations are the Flexible Working Regulations 2020.

2 Commencement

If approved by Tynwald³, these Regulations come into operation on XX XXXX 2020.

3 Interpretation

In these Regulations —

“**the 2006 Act**” means the Employment Act 2006;

“**electronic communication**” has the same meaning as in the Electronic Transactions Act 2000;
and

“**flexible working application**” means an application under section 99 of the 2006 Act (statutory right to request flexible working).

4 Application, revocation and saving⁴

(1) These Regulations apply to a flexible working application made on or after X XXXX 2020.

(2) The Flexible Working Regulations 2007⁵ are revoked but continue to apply to a flexible working application made before XX XXXX 2020.

³ As required by section 175 of the Employment Act 2006

⁴ The Flexible Working Regulations 2007 continue to apply by virtue of section 58(5)(d) of the Legislation Act 2015

⁵ SD 96/2007

5 Entitlement to make an application

- (1) For the purposes of section 99 of the 2006 Act, an employee is a qualifying employee if he or she –
 - (a) is employed by the employer (irrespective of the duration of employment); and
 - (b) is not an agency worker.
- (2) Any qualifying employee is entitled to make a flexible working application.

6 Form of application

A flexible working application must –

- (a) be in writing;
- (b) state whether the employee has previously made any such application to the employer and, if so, when; and
- (c) be dated.

7 Date when application is taken as made

- (1) A flexible working application is taken as made on the day it is received.
- (2) Any such application is received, at the time of its receipt under unless the contrary is proved, –
 - (a) if sent by electronic communication, determined in accordance with section 2 of the Electronic Transactions Act 2000 (time and place of dispatch and receipt of electronic communication);
 - (b) if sent by post, on the day on which it would have been delivered in the ordinary course of post; and
 - (c) if it is delivered personally, on the day of delivery.

8 Compensation

For the purposes of section 102 of the 2006 Act (remedies) the maximum amount of compensation is 8 weeks' pay⁶ of the employee who presented the complaint under section 101 of the 2006 Act (complaints to Tribunal).

MADE

LAURENCE SKELLY
Minister for Enterprise

⁶ A week's pay is calculated in accordance with Schedule 6 of the Employment Act 2006 and subject to the limit in paragraph 10(e) of that Schedule

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke and replace the Flexible Working Regulations 2007.

They provide that an employee is entitled to make a flexible working application irrespective of the duration of the person's employment provided that the employee is not an agency worker. They also make provision for the form which such an application must take and when it is taken to be made and for the maximum amount of compensation that the Employment and Equality Tribunal can award in relation to a complaint that an employer has failed to deal correctly with such an application.

Appendix 2 Comparison of the old and new flexible working regimes

(a) Employment Act 2006

Employment Act 2006 (prior to 1st January 2020)	Employment Act 2006 (post 1st January 2020)
<p>An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that the employee —</p> <p>(a) made (or proposed to make) an application under section 99 (statutory right to request flexible working),</p> <p>(b) exercised (or proposed to exercise) a right conferred on him or her under section 100 (employer’s duties in relation to section 99),</p> <p>(c) brought proceedings against the employer under section 101 (complaints to tribunal), or</p> <p>(d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.</p> <p>(section 66 flexible working; detriment)</p>	<p>(b) has been repealed because the employer’s duties in section 100 have been repealed.</p>
<p>A qualifying employee may apply to an employer for changes to terms and conditions if the change relates to hours, times and place of work, or such other aspect as the Department may specify by Regulations; and if the purpose of the employee is to enable him or her to care for a dependant (section 99(1) (statutory duty to request flexible working)).</p>	<p>The requirement that the purpose of the change to terms and conditions is care for a dependant has been repealed, to encourage greater use of flexible working arrangements for more diverse purposes.</p>
<p>An application to work flexibly must: state that it is such an application; specify the change applied for and the date on which it should be effective; explain what effect the change would have for the employer and how it might be dealt with; and explain how the employee meets the condition as to caring for a dependant (section 99(2)).</p>	<p>The requirement that the employee explain how they meet the condition as to caring for a dependant has been repealed, given the change to section 99(1) above.</p>
<p>An employee may only make one application for flexible working in a twelve month period (section 99(3)).</p>	<p>Unchanged.</p>
<p>The Department may by regulations make provision about the form of application and when the application is to be taken as made (section 99 (4)).</p>	<p>Unchanged.</p>
<p>An employee is qualified to make an</p>	<p>Unchanged.</p>

<p>application if they satisfy the conditions as to duration of employment set out in Regulations and they are not an agency worker (section 99(5)).</p>	
<p>The meaning of dependant is defined (section 99(6)).</p>	<p>The definition has been repealed, consequent to the change to section 99(1) above.</p>
<p>An employer shall deal with the application in accordance with a detailed process contained in Regulations made by the Department and shall only refuse the application on certain specified grounds, such as the burden of additional costs, detrimental effect on ability to meet customer demand and inability to re-organise work among existing staff (section 100(1)) (employer's duties in relation to a statutory working request).</p>	<p>An employer must deal with the application "in a reasonable manner" and is to notify the employee of the decision on the application within the decision period. However the grounds on which an employer may refuse the application are unchanged.</p>
<p>Section 100(2) to (4) specifies the sort of provision that Regulations may make under section 100(1)(a), such as provision for the holding of meetings on the flexible working request within certain time limits, a right of appeal and right to be accompanied to meetings on the flexible working request. These provisions are specified in the Flexible Working Regulations 2007.</p>	<p>Section 100(2) to (4) have been repealed and replaced by the provision in section 100 (1)(a) that the employer must deal with the application "in a reasonable manner" and the provision in sections 100(1A) to (1D).</p> <p>Section 100(1A) extends the time limit for an employer to deal with an application where the employer has permitted an appeal.</p> <p>Section 100(1B) specifies that the decision period under subsection (1)(aa) is 3 months from the date on which the application was made, or such longer period agreed between employer and employee.</p> <p>Section 100(1C) provides that an agreement to extend the decision period may be made before it ends or retrospectively before the end of three months after the end of the decision period.</p> <p>Section 100(1D) specifies the circumstances in which an application is to be treated as having been withdrawn by the employee.</p>
<p>An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -</p> <p>(a) made (or proposed to make) an application under section 99 (statutory right to request flexible working), or</p> <p>(b) exercised (or proposed to exercise) a right conferred on him or her under section</p>	<p>As in the case of section 66 above, (b) has been repealed because the employer's duties in section 100 have been repealed.</p>

<p>100 (employer’s duties, etc.), or</p> <p>(c) brought proceedings against the employer under section 101 (complaints to tribunal), or</p> <p>(d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.</p> <p>(section 122 (flexible working; unfair dismissal))</p>	
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(b) Flexible Working Regulations

Flexible Working Regulations 2007	Draft Flexible Working Regulations 2020
Provision on entitlement to make application/duration of employment (regulation 3) provides that an employee must have been employed for 26 weeks continuously in order to make and application for flexible working	Provision on entitlement to make application/duration of employment (regulation 5) provides that an employee may make an application for flexible working regardless of the length of time he or she has been employed
Form of application (regulation 4) provides that an application shall be made in writing, state whether a previous application was made, and be dated.	Form of application provision (regulation 6) is unchanged.
Date when application is taken as made is the day the application is received (regulation 5)	Unchanged.
Withdrawal of application by the employee (regulation 6)	Provision on withdrawal of application by the employee removed – though there is now provision on withdrawal in section 100(1D) of 2006 Act.
Duty to hold meeting (regulation 7)	Provision on duty to hold meetings removed as there are no longer powers to include such provision in regulations - such provision relating to meetings is now contained in section 100 of the 2006 Act.
Notice of decision (regulation 8)	Provision on notice of decision removed as there are no longer powers to include such provision in regulations – such provision as to the decision period is now in section 100(1)(aa) and (1B) of the 2006 Act.
Right of appeal (regulation 9)	Provision on right of appeal removed as there are no longer powers to include such provision in regulations – such provision for appeal is now in section 100(1A) of the 2006 Act.
Meeting to discuss appeal (regulation 10)	Provision on meeting to discuss appeals

	removed, though as noted above there is some provision on appeals in section 100(1A) of the 2006 Act.
Notice of decision on appeal (regulation 11)	Provision on notice of decision on appeals removed, though as noted above there is some provision on appeals in section 100(1A) of the 2006 Act.
Time and place of meeting (regulation 12)	Provision of time and place of meeting removed as there are no longer powers to include such provision in regulations.
Right to be accompanied (regulation 13)	Provision on right to be accompanied removed as there are no longer powers to include such provision in regulations.
Extension of time (regulation 14)	Provision on extension of time removed, though there is provision for extension of time in section 100(1C) of the 2006 Act.
Details specific breaches of regulations by employer entitling employee to make complaint to Tribunal (regulation 15)	The provision has been not included in the regulations as the employee's remedy is now to make a complaint under amended section 100(1)(a) of the Act, grounds for which include the employer not dealing with the application in a reasonable manner or notifying the employee of the decision on the application period within the decision period.
Compensation - the maximum amount of compensation that the Tribunal may award under section 102 of the Act where it finds a complaint by an employee under section 101 of the Act well-founded is 8 weeks' pay (regulation 16).	Compensation (regulation 8) – the maximum compensation that can be paid remains 8 weeks.

