

Update for Employers in Ireland – Right to Request Flexible and Remote Working

What You Need to Know

- (a) On 6 March 2024, the Code of Practice for Employers and Employees Right to Request Flexible Working and Right to Request Remote Working (the "Code of Practice") was published.
- (b) Employers and employees are obliged to have regard to the Code of Practice when considering applications for remote working arrangements.
- (c) Employers must also have regard to the code if terminating a flexible working arrangement.
- (d) The right to request remote working is set out in the Work Life Balance and Miscellaneous Provisions Act 2023 (the "2023 Act") that was enacted on 4 April 2023.
- (e) The right to request flexible working is set out in the 2023 Act where it amends the Parental Leave Acts 1993-2023 ("the Parental Leave Acts").

In this legal update, we will explain the concepts of flexible and remote working, identify who is eligible to make such requests and how an employer is to respond upon receiving such a request. We will also explore the circumstances in which such an arrangement can be terminated and the potential penalties for employers in the event of breaches of their responsibilities.

Key Terms

'Flexible working' is a working arrangement where an employee's working hours or working patterns are adjusted, including using remote working arrangements, flexible working schedules or reduced working hours. This can take different forms depending on the nature of the role and / or business (e.g. part-time, term-time, job-sharing, compressed working hours or remote working, etc).

'Remote working' is an arrangement whereby some or all the work ordinarily carried out by an employee at an employer's place of business under a contract of employment, is provided at a location other than at the employer's place of business without change to the employee's ordinary working hours or duties.

Who can make a request?

To make a statutory request for flexible working, an employee must be:

- (a) the parent or acting in *loco parentis* to a child under 12 years of age or under 16 years, if the child has a disability or illness; or
- (b) providing, or will provide, personal care to a specified person in need of significant care for a serious medical reason (e.g. the employee's child, spouse or civil partner, cohabitant, parent, grandparent or sibling).

All employees have the right to make a statutory request for remote working.

An eligible employee can make the request for remote working and flexible working from their first day at a new job, but they must complete a minimum of six months continuous employment with their employer before an approved arrangement can take effect.

Making a Flexible Working Request

An employee must submit their request for flexible working to their employer in writing as soon as is **reasonably practicable** but not later than eight weeks before the proposed starting date.

A request for flexible working for caring purposes must include the requested form, start date and duration of the arrangement.

Making a Remote Working Request

A remote working request follows the same format as a flexible working request.

However, where remote working is concerned, an employee needs to set out to their employer how they are confident that they can continue to perform their role remotely to the required standard and their individual specific reasons for making the request for remote working.

Examples of reasons for requesting remote work could include, but are not limited to:

- (a) reducing the daily commute and carbon footprint;
- (b) optimising quality of life outside normal working hours; or
- (c) neurodiversity or other circumstances which could favour a quiet working environment.

The application for a remote working arrangement must also include details of the proposed location (e.g. at home, and information on the suitability of the proposed location with reference to a number of factors), including

workstation suitability, data protection assurances and an agreement to a risk assessment.

Right to a Response

An employer who receives a request for flexible working must respond as soon as is reasonably practicable but not later than four weeks after receiving the request. If an employer has particular difficulties assessing the viability of the request, they can extend the four-week period for a further period not exceeding eight weeks.

Within four weeks of receiving the request, the employer must:

- (a) approve the request and include an agreement prepared and to be signed by the employer and employee which sets out the details of the agreed arrangement, the start date and duration, of the arrangement; or
- (b) provide notice in writing informing the employee that the request has been refused and the reasons for the refusal; or
- (c) provide notice in writing informing the employee that more time is needed to assess the request and set out the length of the extension.

An employer who receives a request for flexible working must consider the request, having regard to:

- (a) their own needs (e.g. the needs of the business);
- (b) the employee's needs (e.g. the reasons why the employee is requesting the arrangement); and
- (c) guidance set out in the Code of Practice where the request includes an element of remote working.

Considering a Remote Working Request

An employer who receives a request for remote working must consider the request having regard to the same factors required of flexible working requests, in an **objective, fair** and **reasonable manner**.

However, as distinct from flexible working request considerations, in reviewing whether a role is suitable for remote working, the following questions should be considered by an employer.

- (a) What type of work does the role entail and what are the employee's key duties?
- (b) Does the role include tasks that must be performed or are more efficiently performed on-site?
- (c) Do any health and safety issues arise if activities are undertaken remotely?

An employer may consider both the suitability of the role for remote working, as well as the employee's own suitability to work remotely.

In a situation where an employer cannot approve the arrangement sought by an employee, the parties should consider an alternative arrangement, where this is feasible.

Changes to a Flexible or Remote Working Arrangement

An employer and an employee can agree, in writing, a change to arrangements which have already been signed, before or after the arrangement has commenced.

Termination of a Flexible Working Arrangement

An employer can terminate an approved flexible working arrangement in certain circumstances, before or after it has started, if the employer is satisfied that the arrangement would have, or is

having, a substantial adverse effect on the operation of their business, profession or occupation for a number of reasons, including:

- (a) the unavailability of a person to carry out the employee's duties;
- (b) the nature of the employee's duties; and
- (c) any other matters relevant to the substantial adverse effect on the operation of the employer's business, profession or occupation.

Employers must also have regard to the factors which must be considered when initially assessing a request for a flexible working arrangement.

When considering termination of an arrangement, an employer should consider if their reasons for terminating the arrangement are objective, fair and reasonable.

An employer can terminate a remote working arrangement for the same reasons as a flexible working arrangement, in addition to re-consideration of those additional considerations specific to requests for remote working arrangements.

An employee can request by written notice, to be returned to their original working arrangements earlier than had been approved by providing reasons and a proposed date of return.

Abuse of an Arrangement

An employee must use the approved flexible working arrangement for the purpose for which it was approved. If an employer has reasonable grounds for believing that the arrangement is not being used for that purpose, they can give an employee written notice of termination, setting out the reasons for the termination and specifying the date on which the employee must return to their original working arrangement.

An employee must continue to meet all the requirements of their role while they are working remotely. If an employer has reasonable grounds for believing that an employee is not fulfilling all the requirements of their role, they can give an employee notice of termination of an arrangement, setting out the reasons for termination and specifying the date on which the employee must return to their original working arrangement.

Protection of Employees from Penalisation

An employer must not penalise an employee for proposing to or having exercised their rights to make a request for flexible or remote work or a request to return to a previous working arrangement.

Dealing with Concerns

Larger organisations with discrete HR units could consider designating a member of the HR team to be the point of contact for all requests.

A specific breach of the 2023 Act may be referred to the Workplace Relations Commission, within six months of the date of the breach, extendable to 12 months if the deadline was missed due to reasonable cause.

The Workplace Relations Commission, or the Labour Court on appeal, may direct the employer to comply with specific sections of the 2023 Act and / or award compensation to the employee, not exceeding 20 weeks' remuneration (four weeks in the case of a remote working request) to be paid by the employer.

Record Keeping

An employer must keep a record of approved remote working and flexible working arrangements. An employer who fails to retain records, is liable on summary conviction to a fine of up to €2,500. The record must be kept for three years.

All notices, or copies of notices, given or received by an employer or employee must also be retained by the employer and employee for one year.

Nothing in the Code of Practice shall prevent employers providing more favourable terms than those set out in the legislation.

Key Takeaway

Employees now have the right to request flexible working and remote working arrangements, and the Code of Practice provides useful and much-needed guidance to assist employers and employees in relation to how requests for flexible and remote working arrangements are both made and handled.

Please contact your usual Maples Group contact if you require assistance with any Irish employment and immigration matters.

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