

Flexible Working:

The right to request and duty to consider

A guide for employers and employees

Please note that this booklet gives general guidance only and should not be regarded as a complete or authoritative statement of the law. Authoritative interpretations of the law can only be given by the courts. Readers should be alert to the possibility of developments in case law that may affect the rights described.

ER 36 Flexible Working: The right to request and duty to consider. A guide for employers and employees

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The material has been reviewed to take into account changes in the law and reflect good practice.

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Introduction

Under provisions set out in the Employment Rights (Northern Ireland) Order 1996 and regulations made under it, all employees have a statutory right to ask their employer for a change to their contractual terms and conditions of employment to work flexibly. The statutory right is a 'right to request' and not a right to be granted flexible working. The employee must have worked for their employer for 26 weeks continuously at the date the application is made and they can only make one statutory request in any 12 month period.

Employees who have been employed for less than 26 weeks, agency workers and office holders do not have a statutory right to request flexible working. Nevertheless, employers may still wish to consider a request from these groups as flexible working can bring business benefits as well as benefits to the individual.

Before 5th April 2015 the right only applied to the parents of children under 17 or 18 in the case of parents of disabled children or to those caring for an adult. **Now any eligible employee can apply to work flexibly for any reason.**

In recent years there has been a growing demand for flexible working, both from individuals who want to achieve a better balance between their work and home life and from organisations which want to align their business needs with the way their employees work and customer needs.

Anyone thinking about changing their work pattern should speak to their employer as early as possible in order to explore what opportunities are available. When doing so, employees should bear in mind that, under the statutory procedure, the process of making a request and having the employer consider it can take up to 14 weeks.

This booklet has been designed to provide advice for employers and employees about how the right to request flexible working operates and the duty on employers to consider requests seriously. It details the rights and responsibilities of all parties. A series of forms based on best practice is reproduced at Annex B of this guidance to aid the employee in making their application and the employer when considering their request.

The right to request flexible working allows eligible employees to ask their employer for a flexible working pattern and places a duty on the employer to consider the requests seriously. Employees may be eligible if they:

- have worked for their employer for 26 weeks continuously at the date the application is made.
- have not made a statutory request in the last 12 month period.

It is important to bear in mind that, if an employer agrees to an employee's request, this will result in a permanent change to the employee's contract of employment.

Rights and Responsibilities

The initial onus is on the employee to prepare a carefully thought-out application well in advance of when they would like the desired working pattern to take effect. The employer then follows a set procedure to help ensure a request is considered seriously, which seeks to facilitate discussion and enables both parties to gain a clear understanding of each other's thinking. An employer may only refuse a request where there is a recognised business ground for doing so. The basic rights and responsibilities under this legislation are set out below.

Employees' rights

- To apply to work flexibly.
- To have their application considered properly in accordance with the set procedure and refused only where there is a clear business ground for doing so.
- To be accompanied by a work colleague when meeting the employer to discuss the application.
- Where an application is refused, to have a written explanation explaining why.
- To appeal against the employer's decision to refuse an application.
- To take a complaint to an industrial tribunal or under the Labour Relations Agency's Arbitration Scheme in certain circumstances.
- To be protected from detriment or dismissal for making an application under the right.

Employees' responsibilities and best practice

- To provide a carefully thought-out application.
- To ensure their application is valid by checking that the eligibility criteria are met.
- To ensure the application is made well in advance of when they want it to take effect.
- To arrive at meetings on time and to be prepared to discuss their application in an open and constructive manner.
- If necessary, to be prepared to be flexible themselves, to reach an agreement with the employer.

Employers' rights

- To reject an application when the desired working pattern cannot be accommodated within the needs of the business.
- To seek the employee's agreement to extend time scales where it is appropriate.
- To consider an application withdrawn in certain circumstances.

Employers' responsibilities and best practice

- To consider requests properly in accordance with the set procedure.
- To ensure they adhere to the time limits contained within the procedure.
- To provide the employee with appropriate support and information during the course of the application.
- To decline a request only where there is a specified business ground (as set out in Art. 112G (1)(b) of the Employment Rights (Northern Ireland) Order 1996) and to explain to the employee in writing why it applies.
- To ensure that any variation from the procedure is agreed in advance with the employee and recorded in writing.
- To ensure that they do not subject the employee to detriment or dismissal for making an application under the right.

Eligibility

To make an application under the statutory right to request, the employee will have to meet certain criteria. This section explains what those criteria are and the types of flexible working for which an employee might apply. An employee who does not meet the criteria will not be able to make a request under the statutory right but may still approach their employer to work flexibly as many employers offer flexible working opportunities across their workforce.

Eligibility checklist

To be eligible to make a request under this right, a person must:

- be an **employee**;
- have worked for their employer **continuously for 26 weeks** at the date the application is made;
- not be an agency worker or a member of the armed forces; and
- not have made another application to work flexibly under the right during the past 12 months.

How often can an application be made?

One application every 12 months can be made under the right. This is regardless of whether a previous application was made in respect of a different flexible working arrangement. Each year runs from the date when the application was made.

What kind of changes can be applied for?

There is scope to apply for a wide variety of different types of working pattern. Eligible employees can make a request to:

- change the hours they work;
- change the times when they are required to work; or
- work from home (whether for all or part of the week).

A request may be as simple as asking to start half an hour later than usual to allow the employee to drop their child off at school. Or it may be a reduction in hours in order to move towards a planned retirement or to achieve a better work life balance

EXAMPLE: REDUCED HOURS

Mike, a tyre fitter, asks his manager if he can start an hour later each day. He accepts that this will mean a reduction in his pay. In his application, he states that he has asked the other fitters working in the branch whether they would be able to manage, and they have no problems with this. Mornings are usually less busy than afternoons, and they believe they would be able to handle any eventualities that occur. Mike's manager discusses the application with him and considers the circumstances carefully. He agrees the request.

Flexible working actually incorporates a wide variety of working practices. A flexible working arrangement can be any working pattern other than the normal working pattern in an organisation. Most people are familiar with working part-time for pro-rated pay or working different shift patterns. But other ways of working that employees may consider are outlined below.

Ways of working

- **Annualised hours** describes working time organised on the basis of the number of hours to be worked over a year rather than a week; it is usually used to fit in with peaks and troughs of work. Pay will depend on the hours worked each pay period.
- **Compressed hours** allows individuals to work their total number of agreed hours over a shorter period. For example, employees might work their full weekly hours over four rather than five days. They would be paid for a full-time job but would not receive overtime payments for the agreed extra hours they work in any one day.
- **Flexi-time** gives employees choice about their actual working hours, usually outside certain agreed core times. Individuals are paid for the hours that they work.
- **Home-working** doesn't have to be on a full-time basis and it may suit an employee to divide their time between home and office. What individuals are paid for depends on the hours they work. Employers are required to carry out a risk assessment of the activities undertaken by home-workers, identifying any hazards and deciding whether enough steps have been taken to prevent harm to them or anyone else who may be affected by their work. See - [Home working health and safety risk assessment.](#)

- **Job-sharing** typically involves two people employed on a part-time basis, but working together to cover a full-time post. Each individual employee receives pay for the hours they work.
- **Shift working** gives employers the scope to have their business open for longer periods than an eight-hour day. Agreed flexible working arrangements may mean that a shift premium is not needed.
- **Staggered hours** allows employees to start and finish their day at different times. This is often useful in the retail sector, for example, where it is important to have more staff over the lunch period but fewer at the start and end of each day. Pay will depend on hours worked in total rather than the time at which they are worked.
- **Term-time working** allows employees to take unpaid leave of absence during the school holidays

Making an application

The main opportunity for the employee to set out their desired working pattern and arguments why it can be implemented is through their application when making a request. The initial onus is therefore on the employee to provide a written application to their employer well in advance of when they wish the change to take effect. This section explains the information that must be included for an application to be valid and the issues that the employee will want to consider in preparing their application.

Form FW (A): Flexible Working Application Form, which accompanies this guidance (Annex B), may be used to make a request. Its use, however, is not mandatory. An application can be made in whatever form is most suitable to the employee. It may be through a letter to the employer, on a form provided by the employer, or via e-mail.

Form FW (A), however, will help the employee to ensure that all the minimum necessary information is provided and avoids any delay. Irrespective of how an application is made, the following table lists all the points that **must** be covered in the application in order for it to be valid and for it to be considered by an employer:

Application checklist

An application under the statutory procedure **must**:

- be **in writing** (whether on paper, e-mail or fax);
- state that the application is being made under the statutory right to request a flexible working pattern;
- explain what **effect**, if any, the employee thinks the proposed change would have on the employer and how, in their opinion, any such effect might be dealt with;
- specify the **flexible working pattern** applied for;
- state the **date** on which it is proposed the change should become effective;
- state **whether a previous application has been made** to the employer and, if so, when it was made; and
- be **dated**.

What information should an application contain?

The checklist above represents the minimum requirements for an application to be valid. The level of detail required will depend on the desired changes to the existing working pattern. In all cases it is in the employee's interest to be as clear and explicit as possible.

The written application must state **the date when the employee would like the new working pattern to start**. The proposed date should allow time for the application to be considered and implemented. There is no set time but an employee can expect it to take around fourteen weeks or longer if a problem arises. They must also state **if and when any previous application was made**.

Impact on the employer's business

The application provides the employee with the opportunity to set out the **reasons** why their preferred working pattern is compatible with the needs of the employer's business, as far as they are able to tell. It must therefore provide an explanation of what **effect**, if any, the employee thinks the proposed change would have on the employer and **how they feel any such effect might be dealt with**.

For example, the employee may argue that arriving half an hour later will have minimal impact on the business as this is the quietest time of the day and they can make up the time during the lunch period when it is far busier. This does not mean that the employee is expected to know every factor that might influence the employer's decision. It simply means that they should show they have considered the factors that they are aware of that are likely to influence their employer's decision. Evidence shows that applications for flexible working patterns succeed where they are soundly based on the business needs of the employer.

EXAMPLE: ALTERED HOURS

Emma, an assistant in a clothes shop, asks the shop manager if she can change her working hours from 8 a.m.-1 p.m. to 10 a.m.-3 p.m. In her application, she states that early mornings in the shop tend to be the quietest time and the other two assistants who would be in at that time agree that they could cover this period. She also states that the lunch period is the busiest time and that her new working pattern would result in an increase in the number of customers who could be served. After consideration, the shop manager agrees to the request and welcomes the fact that it will enable the business to better manage the busy lunch period.

How long the change in working pattern will last

Any request that is made and accepted under the statutory right will be a **permanent change** to the employee's contractual terms and conditions (unless otherwise agreed). The employee has no right to revert back to the previous working pattern. So, for example, if an employee's new flexible working pattern involves working reduced hours, he or she has no right to revert to working the hours he or she previously worked, although this is not to say that an employer will automatically reject a subsequent request to do so.

Clearly, making a permanent change to a contract of employment is a big step, and not to be entered into lightly. Employees who are concerned about this should consider suggesting a trial period, or think about whether a limited period of working flexibly might be more appropriate. Employees should discuss these possibilities with their employer when they meet to discuss their application.

Points to bear in mind when making an application

The box below suggests some issues that employees may wish to bear in mind when making an application.

HOW TO HELP YOUR EMPLOYER CONSIDER YOUR REQUEST

- A new working pattern will normally be a **permanent change** unless otherwise agreed. So think carefully about your request as you have **no right to revert back to your former hours of work**. If in doubt you might want to consider with your employer whether a trial period would be helpful.
- Think about **the date you would like your new working pattern to begin**. Be aware that the process can take up to 14 weeks to complete and sometimes longer where a problem arises.
- Clarify with your employer how they like applications to be made, but ensure that everything is in writing. Your employer may have their own form. If you are unsure, use **Form FW (A)** accompanying this guidance.
- Remember, the more notice you give your employer, the more likely they will be able to implement the change when it suits you. So **submit your application to your employer as soon as it is complete**. Remember, if you request a flexible working pattern that will result in you working fewer hours, your pay will be reduced too.
- It is to your advantage to **provide as much detail as possible** about the pattern you would like to work and why.
- Take time to **consider how your colleagues will manage** if your working pattern is changed. If you have any colleagues or friends who are already working flexibly, ask them about their experiences.
- **Think about what effect changing your working pattern will have on your job**. You should aim to show in your application that your plans will not harm your employer's business and may in fact enhance it. It may mean that you are available to provide extra cover at peak hours, thereby improving customer service.
- **Think about how any potential problems your plans may present to your employer could be overcome** and ensure that you include these in your application. For example, it may mean that you will not be in work when the business opens. What effect will this have on the business, and how could it be managed?
- **Check who will consider your application** and ensure that you submit it to the appropriate person. If the person is absent it may be necessary to send it to an alternative manager.

- If you are due to go on maternity leave think carefully about when to make your request. You might wish to mention to your employer before you take leave that you are interested in applying to work flexibly on your return. Bear in mind that you may need to attend meetings with your employer so that your request can be properly considered. If you want the changes to start on your return from maternity leave, you should make your application in good time.
- If you think that a trial period might be useful, you may wish to discuss this informally before initiating the formal procedure. Then you might be able to agree to have a trial period before the time frame for the formal procedure starts running.

Considering an application

The right places a legal duty on employers to consider all applications and establish whether the desired work pattern can be accommodated within the needs of the business. Employers should consider each application objectively on this basis, and not attempt to judge whether one applicant's need for flexible working is greater than another's.

It may be possible for an employer to agree to a request to work flexibly simply on the basis of the application itself and if so he should write to the employee within 28 days, specifying the contract variation agreed to and the start date. But, where this is not possible, a set procedure must be followed.

A flowchart summarising the procedure is included in Annex C of this guidance.

This section explains the first step in the process, which is to arrange a meeting to discuss the request with the employee.

SUMMARY

The meeting

- An employer must hold a **meeting** to consider the request within 28 days after the date an application is received.
- An employee can, if they wish, be **accompanied** to the meeting by another worker employed by the same employer.
- The employer must write to the employee informing them of their decision **within 14 days** after the date of the meeting.

The companion

- An employee has the right to **bring a companion** to the meeting.
- The companion must be a **worker employed by the same employer**, but not necessarily working at the same premises, and he or she can be the trade union representative.
- The employer must allow the companion **paid time off** during working hours to attend the meeting.
- The companion can **address the meeting or confer with the employee** during it.
- The companion is **not** allowed to answer questions on the employee's behalf.
- If the companion is unable to attend the meeting, the employee should rearrange the meeting for a date **within seven days** of the originally proposed time, ensuring that the new time is convenient to all parties; or consider an alternative companion.

How should an application be submitted and received?

An application will be considered to have been made on the day that it was received by the employer. For applications sent by e-mail or fax this is taken to be the day of transmission. For applications sent by post it means the day on which it would have been delivered in the ordinary course of post, unless shown to be otherwise.

How should an application be acknowledged?

It is best practice for the employer to acknowledge receipt of the request. An acknowledgement slip is included at the bottom of **Form FW (A)** which allows an employer to confirm the date on which the application was made. This is particularly important where there has been a delay in the application reaching the employer.

What happens if the application is incomplete?

If an employee fails to provide all the required information as set out in '**Making an application**', the employer should inform the employee of what they have omitted and ask them to re-submit the application when complete.

The employer should also inform the employee that they are not obliged to consider the application until it is complete and re-submitted.

If the employee unreasonably refuses to provide the employer with the information needed to assess whether the change should be agreed to, for example he or she has not described the desired future working pattern, the employer will be entitled to treat the application as withdrawn. The employee would not then be able to make another application under the statutory procedure for another 12 months. It is therefore important for the employee to provide any appropriate information if requested.

What happens at the meeting?

Experience shows that the best way for both parties to understand each other's position and identify a solution that suits them both is to hold a face-to-face meeting to discuss the request. The legislation requires the employer to arrange a meeting with the employee **within 28 days** after the application has been made. The meeting will provide both parties with the opportunity to discuss the desired work pattern in depth and consider how it might be accommodated. Both the employer and the employee should themselves be prepared to be flexible.

If the requested working pattern cannot be accommodated, the meeting also provides an opportunity to see if an alternative working arrangement may be appropriate. It may also be in the employer's and employee's interests to agree that the new working pattern will take place for an agreed trial period (for example, for 12 weeks) in order to see how it would suit them both. In this case, the parties could agree to extend the time for a final decision to be given by the employer until the end of the trial period. To do so the employer should specify the period of extension and its end date in writing (dated) to the employee. The employer's final decision can then be given once they have tried out the new pattern (see section on ['Exceptions to the procedure and withdrawals'](#)).

In some circumstances, the employer and employee may conclude that a permanent change to the latter's contract of employment is not the best solution. A solution here might be an informal agreement between employer and employee - outside the legislative framework - to flexible working for a limited period.

Alternatively, the employer and employee might agree under the formal procedure to a time-limited change after which the employee would revert back to the original working pattern. In this case, the employee would then have no right to make another request within a year, or to complain to a tribunal if he or she subsequently wanted the change to be made permanent.

HOW TO ENSURE YOU GET THE MOST FROM THE MEETING

Employer

You might want to:

- Make a list or draft an agenda of the issues you want to discuss at the meeting, e.g. if you are already aware that the request can be granted, you may want to discuss a suitable start date before formally accepting the request.
- Inform your employee of anyone you have asked to join the meeting.
- Ask your other workers if they would want to cover any extra hours that may be created as a result of granting the request.
- If you have a personnel or human resources section, speak to them so that you are clear about your options.
- Familiarise yourself with this guidance and the different types of flexible working.
- If it would be helpful to involve external expertise, be open to the proposition.

Employee

You should:

- Be prepared to expand on any points within your application.
- Prepare to be flexible. Your employer may ask if there are any other working patterns you would be willing to consider or if you would consider another start date or a trial period.
- If you are taking a companion along, make sure they are fully briefed on your request beforehand, provide them with a copy of your application, and inform your employer that a companion will be present. This will save time during the meeting.
- Familiarise yourself with this guidance and other sources of information on flexible working before the meeting.

The employer must ensure that the meeting is held at an appropriate time and place that is convenient to both parties. In most cases, this will probably be the usual place of work, but again, both parties should be prepared to be flexible about this. For example, if the employee is a mother who is about to return to work from maternity leave, it may be that she will find it difficult to travel to her workplace. In such circumstances, discuss the meeting place with her and consider whether there is an easier place to meet.

If it is difficult to arrange a meeting within 28 days after the application was made at a time and place convenient to all parties then the employer should seek the employee's agreement to extend the period. This is explained in detail in ['Exceptions to the procedure and withdrawals'](#). Failure to hold a meeting within the 28-day period or any extension, without the employee's agreement, will be a breach of the procedure (see ['Unresolved applications'](#) for more detail).

EXAMPLE: HOME WORKING

Ciara, the manager of a company's sales department, who commutes to work each day, requests to work from home one day a week in order to care for her elderly grandmother in the early evening. In the application, the manager states that she has asked other colleagues for their opinions, and they have no objections. She also explains that she has a computer with broadband Internet access at home, allowing her to stay in contact with the office.

Her employer weighs up the case against the business needs and agrees to accept the request. Both parties also agree to a trial period of twelve weeks after which they will decide whether the change should be permanent.

Can an employee bring a companion to the meeting?

The right allows an employee to be **accompanied at the meeting by one companion** if they feel this would help them. The companion must be a **worker employed by the same employer**. This can include a colleague or a trade union representative who works at any other premises which form part of the business.

The role of the companion is to support the employee. For example, if the employee has not attended many meetings before, it is possible that they may be nervous. The presence of a colleague can therefore make the meeting more productive for the employer and the employee.

The companion may also have some expertise about different types of flexible working. Experience shows that the involvement of such an individual can be helpful to both the employer and the employee. The companion is able to **address the meeting**, and to **confer with the employee** during it, but they may **not** answer questions for the employee.

The employee should contact their companion as soon as they know the date of the meeting to ensure they are free. If the companion is unable to make the initial meeting the employee must seek to rearrange the meeting for a time convenient to themselves, the employer and their companion. It should take place **within seven days** of the date of the initially proposed meeting. If this cannot be achieved, the employee should consider an alternative companion who can attend the meeting. **An employer must allow any of their workers to take time off during work hours to act as a companion. The employer must also continue to pay them for this time.**

What happens if the employee fails to attend this meeting?

An employee who fails to attend the meeting without notification should contact the employer as soon as possible to explain their absence, and to allow the employer to rearrange the meeting at the next mutually convenient time. An employer whose employee fails to attend the meeting more than once and does not provide a reasonable explanation may treat the application as having been withdrawn. In such circumstances, the employer should write to the employee confirming that the application is now considered withdrawn. For further information about when an application may be taken as withdrawn see [‘Exceptions to the procedure and withdrawals’](#).

Considering a request - reaching a decision

Once the employer and the employee have discussed the request, **the employer must notify the employee of the decision in writing**. Notification must take place **within 14 days** following the date of the meeting. This section describes the steps that need to be taken whether the application has been accepted, remains unresolved or has been rejected. An application may only be refused where the employer has a **specified business reason** for doing so. The acceptable business reasons are listed later in this section.

SUMMARY

- The employer must **inform the employee of their decision in writing within 14 days** after the day of the meeting.

If a request is accepted, the notification must:

- include a **description of the new working pattern**;
- state the **date from which the new working pattern is to take effect**;
- and
- be **dated**.

If a request is rejected, the notification must:

- state the **business ground(s)** for refusing the application;
- provide a **sufficient explanation** as to why the business ground or grounds for refusal applies or apply in the circumstances;
- provide **details of the employee's right to appeal**; and
- be **dated**.

How should an application be accepted?

When accepting a request the employer must write to the employee:

- detailing the **new working pattern**;
- stating the **date on which it will start**; and
- ensuring the notice is **dated**.

Form FW (B): Application acceptance form can be used to confirm a new working pattern. The agreed new working pattern will be a **permanent change**

to the employee's terms and conditions of employment, unless agreed otherwise. Where a trial period or time-limited period has been agreed, this should also be detailed in the written notice. When implementing the new working pattern, other factors that the employer should bear in mind are detailed below.

HOW TO ACTION AN ACCEPTED REQUEST

- Check whether you need to inform your personnel or HR section, if appropriate, of the new working pattern.
- Check to see if the employee's pay needs amending.
- Check if all health and safety requirements have been satisfied. This might be particularly relevant where the employee is to work from home.
- Consider who else you need to inform, including other colleagues.

What happens if the employer needs more time to reach a final decision?

If the employer needs more time to come to a decision, **they must obtain the agreement of their employee to an extension to the 14 days in which to inform them of the decision following the meeting.** In these circumstances, the proposal for an extension is likely to be in the employee's interests and the employee should be open to such requests. For example, an extension will be helpful where, following the meeting, the employer is willing to agree to the request in principle but needs more time to look into certain aspects of the proposed new working pattern. This could occur where an alternative working pattern was identified during the meeting. In such circumstances, the employer will need to agree with the employee an extension of the time limit to deal with the request. This is covered more fully under 'Exceptions to the procedure and withdrawals'.

Would a trial period help?

Trial periods can help both employees and employers because they provide an opportunity - without commitment - to test a particular working pattern to see if it works out to the satisfaction of both. An employee may, for example, be concerned about making what will be a permanent change to his or her contract of employment, while the employer might have concerns about the potential impact of the proposed change in the employee's working pattern on the

business. A trial period of, for example 12 weeks, will give both the employee and the employer a chance to find out whether the chosen pattern of working will really work out well in practice.

How would a trial period work in practice?

Trial periods can potentially happen at two stages before a formal agreement is reached:

- Firstly, the employer could give informal agreement to a trial before a formal flexible working request has been made by the employee; if this happened, the formal procedure would still be available to the employee if they wished to use it at some stage in the future.
- Secondly, if a formal application is made, an extension of time for the employer to make a decision (see 'Exceptions to the procedure and withdrawals') could be agreed and the trial period could happen before a final agreement takes place; in this case the rest of the formal procedure would still be available to the employee.

Would a temporary period of working flexibly be appropriate?

In some circumstances, particularly where caring for an adult is involved, a permanent change to an employee's contract of employment may not be the best solution for him or her. Where, for example, an employee suddenly becomes the carer of an adult with a terminal illness, the employer might consider that a temporary period of flexible working, agreed informally outside the formal procedure, might be appropriate. Alternatively, the employer and employee might agree to a time-limited change after which they would revert back to the original pattern.

How should an application be declined?

There will always be circumstances where, due to the needs of the business, the employer feels they are unable to accept a request. **Form FW(C): Application rejection form** is provided for refusing the request. In all such circumstances, the employer must, in writing:

- state which of the **listed business ground(s)** apply and have led the employer to reject the request;
- provide an **explanation** of why the business reasons apply in the circumstances;
- set out the **appeal procedure**; and
- ensure the written notice is **dated**.

What is a business ground?

An application can be refused only where there is a clear business reason. The **only** business ground(s) on which an employer can refuse an application are listed below. (One or more of these grounds can be selected.)

BUSINESS GROUNDS FOR REFUSING A REQUEST

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes.

How should the refusal be explained?

In addition to providing a specific business ground or grounds, the employer must include an explanation about **why the business ground(s) applies or apply** in the circumstances. Experience shows that an employee who understands why a business reason is relevant will accept the outcome and be satisfied that their application has been considered seriously, despite being disappointed that their application has been refused. It also shows that the reverse is true, particularly if the explanation is not sufficient to help the employee understand the reasons for the rejection.

The explanation should include the key facts about why a business ground applies. These should be accurate and clearly relevant to the business ground. To prevent any uncertainty, the explanation should avoid the use of unfamiliar jargon and should be written in a way that is easy to understand.

An explanation of around two paragraphs will usually be sufficient, although the actual length of explanation necessary to demonstrate why the business ground applies will differ depending on each individual case. It is not a requirement for the employer to provide a lengthy and complex explanation looking to cover each argument in fine detail, nor should the employee expect this. The aim is for the employer to explain to the employee, in terms that are relevant, why the requested working pattern cannot be accepted as a result of the business ground applying in the circumstances. If the argument does not look convincing to the employer it is unlikely to look convincing to the applicant. This is a vital stage in the constructive dialogue that maintains a good relationship between both parties.

HOW TO ENSURE THAT THE EXPLANATION ACCOMPANYING THE BUSINESS GROUNDS IS SUFFICIENT

Double check that the explanation:

- **says why the business ground is relevant and why the request cannot be accepted;**
- **is easy to understand** and avoids the use of unfamiliar jargon;
- includes **relevant and accurate** facts;
- **is not overly complex or unnecessarily long.**

An example might be a manager in a small firm manufacturing curtains who receives a request from an employee not to work Thursdays. The manager rejects the request, as the weekly fabric delivery is received on Thursday, and preparations begin for the following day's despatch of customer orders. The explanation might say:

I am sorry that I cannot grant your request to change the days that you work, but to allow you not to work on a Thursday would have a detrimental effect on the performance of the business.

Thursday is our busiest day of the week, when all staff are required to ensure that the machinists can continue making curtains while stock is received, and finished curtains are packaged ready to be despatched the following morning. You are aware that on a Thursday morning we receive our weekly delivery of fabric. This requires the involvement of all staff to help move the material from the delivery bay into the storeroom, before the newly made curtains can be prepared for despatch the following morning.

As I indicated when we met to discuss the application, if you decide to change the day you would prefer not to work to one earlier in the week, then I would be happy to reconsider your application.

Further examples of appropriate explanations can be found in [Annex A](#).

Any facts quoted in the explanation must be accurate. It is not a necessity for the employer to provide the detail in the explanation, but they should ensure that they are able to back up any facts should they subsequently be disputed. A decision based on incorrect facts to reject an application would provide an employee with a basis to make a complaint to an industrial tribunal.

Under the flexible working legislation, a tribunal does not have the power to question the employer's business reasons for declining a request nor is it allowed to consider whether or not the employee acted fairly or reasonably. However, a tribunal will want to see evidence of any facts relied upon to reject the application and, that the employer, has provided the employee with a sufficient explanation as to why the business ground(s) applies or apply to the application.

(If a flexible working tribunal case includes another element, particularly a claim under the Sex Discrimination (Northern Ireland) Order, a tribunal is able to re-examine the business grounds.)

The employee in the above example might at appeal argue they can recall instances of when curtains have been despatched at the beginning of the week. In such circumstances the employer will need to address this during the appeal, for example:

During our discussion of your appeal yesterday you said you could recall an occasion last month when the curtains were despatched on a Monday rather than on a Friday. You felt that it was therefore unfair of me to base my decision on the fact that everyone had to be in on a Thursday to prepare the newly made curtains for despatch the following morning.

I explained that you were absolutely correct about the delayed despatch last month, which resulted from the unusual occurrence of the delivery lorry breaking down. But, from the record book that I showed you it was clear this was the only occasion during the past six months when the curtains were not despatched on a Friday.

Further information on when an employee may have a right to pursue their application, including making an appeal or complaint to an industrial tribunal, can be found under '[Unresolved applications](#)' and '[How the right works with other legislation](#)'.

What happens at the appeal meeting?

It will never be possible for an employer to agree to a new working pattern in every circumstance due to the business needs of the organisation. In such situations, the reasons why the request cannot be accepted should be clear to the employee from the notice of the refusal, which must include the business reason and an explanation. However, there will be circumstances where the employee may believe that their request has not been properly considered and may want to appeal. The appeal procedure is summarised below.

APPEALING THE DECISION:

- An employee has **14 days** to appeal in writing after the date of notification of the employer's decision.
- If an appeal is made, the employer must arrange an appeal meeting to take place within **14 days** after receiving notice of the appeal.
- The employee can be **accompanied** to the appeal meeting.
- The employer must inform the employee of the outcome of the appeal in writing **within 14 days** after the date of the meeting.

An employee must make their appeal in writing within **14 days** after the date they receive written notice that their request has been rejected. When appealing against a refused request an employee will have to **set out the grounds for making the appeal** and **ensure that the appeal is dated**.

There are no constraints on the grounds under which an employee can appeal. It may be that they wish to bring to attention something the employer may not have been aware of when they rejected the application, e.g. that another member of staff is now willing to cover the hours the applicant no longer wishes to work. Or it may be that the employee wants to challenge a fact the employer has quoted to explain why the business reason applies.

The employer must arrange the appeal meeting within **14 days** after receiving notification that the employee wishes to appeal. The employee can be **accompanied by one companion**. This is on the same basis as the meeting to discuss the request and is detailed in '[Considering an application](#)'. There are no restrictions on who should hold the appeal meeting. Experience shows that an employee is far more likely to feel that their appeal has been taken seriously when a **manager senior to the one who originally considered the application** hears it. (This is not always necessary, nor possible, for many small businesses.)

The employer must inform the employee of the outcome of the appeal in writing within **14 days** after the date of the meeting. [Form FW \(E\): Appeal Reply Form](#) has been provided for this purpose.

If the appeal is upheld, the written decision must:

- include a **description** of the new working pattern;
- state the **date from which the new working pattern is to take effect**;
and
- be **dated**.

If the appeal is dismissed the written decision must:

- state the **grounds** for the decision. These will be appropriate to the employee's own grounds for making the appeal;
- provide an **explanation** as to why the grounds for refusal apply in the circumstances. The same principles apply as to what is a sufficient level of explanation at appeal as the amount of explanation that should be given following the initial decision; and
- be **dated**

A written notice of the appeal outcome constitutes the employer's final decision and is effectively the end of the formal procedure within the workplace.

EXAMPLE: APPEAL

Andrea, a telephonist, asks her line manager in a large call centre if she can work three evenings a week from 5pm to 9pm rather than five evenings a week. After the initial meeting, the line manager rejects Andrea's request on the grounds that it would not be possible to re-allocate work amongst existing staff and due to the difficulty of recruiting new staff to cover those shifts.

However, at the appeal meeting, Andrea informs her line manager that a colleague currently on maternity leave wishes to return for a couple of evenings a week. She adds that she has spoken to the woman and they would both be willing to undertake a job share. The employer explores the proposal with the other employee and subsequently agrees to accept the request.

What happens when the appeal meeting is missed?

The circumstance where the employee misses the appeal meeting should be handled in the same way as for an employee who misses the meeting to discuss the application, as described under '[Considering an application](#)'. An employee who fails to attend the meeting without notification should contact the employer as soon as possible to explain their absence. The employer should rearrange the meeting at the next mutually convenient time. An employer whose employee fails to attend a meeting more than once and does not provide a reasonable explanation may treat the application as having been withdrawn.

In such circumstances, the employer should write to the employee confirming that the application is now considered withdrawn. For further information about when an application may be taken as withdrawn, see [‘Exceptions to the procedure and withdrawals’](#).

Exceptions to the procedure and withdrawals

In the majority of cases, requests for flexible working will follow the procedure as laid out earlier in the guide. However, there will be occasions where it is necessary to deviate from this to help reach a suitable outcome. This section outlines the potential exceptions to the procedure and when an application may be taken as withdrawn. In all circumstances it is essential that a written record is made.

Extension of time limits

There are two circumstances where the time limits as laid out earlier in the guide can be extended.

- *Through agreement by the employer and the employee*

There will be exceptional occasions when it is not possible to complete a particular part of the procedure within the specified time limit. For example, it might be that the employer requires extra time to speak to another employee, who is on holiday, about whether they could work the hours left uncovered by the employee's requested working pattern. Or the employee themselves may be going on leave and as such will not be able to attend a meeting within the time limit. **Such extensions of time limits can only take place if they are agreed by both the employer and the employee.** The employer must make a written record of the agreement. **Form FW (F): Extension of Time Limit** can be used for this purpose.

The written record of the agreement must:

- specify what period the extension relates to;
- specify the date on which the extension is to end;
- be dated; and
- be sent to the employee.

- *Through the employer's absence*

Where an application is sent to the manager who will deal with the application, and the manager is absent from work due to leave or illness, an **automatic** extension applies. The period that the employer has to arrange the meeting will commence **either on the day of the manager's return or 28 days after the**

application is made, whichever is sooner. On a manager's return it will be best practice to acknowledge receipt of the application so the employee is aware that the extension has applied and knows the period within which they can expect to meet their employer to discuss the request.

There are no other circumstances where an automatic extension to any period applies.

EXAMPLE: EXTENSION OF TIME LIMIT

Mark, a stylist in a small hairdressing salon, asks to change the number of afternoons he works from five to three in order to care for his sister, who has a long-term illness. Marie, the manager of the salon, would like to accept Mark's request, and is almost certain that another stylist would be willing to cover the hours, as she had recently asked about taking on more work. However, that stylist is currently on holiday and Marie would like to double-check her availability before officially accepting Mark's request.

*Marie therefore completes the **Form FW (F): Extension of Time Limit** asking*

Mark to agree to an extension of fourteen days until the other stylist returns from annual leave.

When can an application be treated as withdrawn?

There will also be occasions when an application is **treated as withdrawn**. In all circumstances a **written record** must be made. **Form FW (G): Notice of Withdrawal** has been provided for this purpose.

There are three circumstances in which an application may be treated as withdrawn.

- ***The employee decides to withdraw the application***

An employee who withdraws their application will not be eligible to make another application for **12 months** from the date their application was made. This will therefore be a factor the employee will want to bear in mind when considering withdrawing their application. Where the employee decides to

withdraw their application, they should notify their employer as soon as possible and in writing. This is essential to avoid any misunderstandings and **Form FW (G): Notice of Withdrawal** can be used for this purpose.

An employer who is informed verbally that the application is withdrawn by the employee but does not subsequently receive written confirmation should **contact the employee to confirm** their intentions. Where the employer does not receive confirmation from the employee, the employer should confirm the withdrawal in writing.

- *The employee fails to attend two meetings*

In cases where an employee misses two meetings without reasonable cause, the employer may treat the application as withdrawn. It is therefore in the employee's best interests to **inform their employer as soon as possible if, and why, they are not able to attend a meeting**. For example, if an employee misses a meeting for a reason such as their child falling ill and informs the employer straight away, the employer should treat this sympathetically. However, if an employee simply misses a meeting and does not explain why, then they can expect their absence to be treated less sympathetically. The employer should warn the employee that they risk their application being treated as withdrawn if they miss another meeting without reasonable cause when rearranging the meeting.

- *The employee unreasonably refuses to provide the employer with the required information*

There may be occasions where the employer is willing to accept a request for flexible working, but requires the employee to provide them with certain information before they can do so. If an employee unreasonably refuses to provide the employer with the information, then the employer can treat the application as withdrawn. For example, an office worker may request to work from home three days a week and the employer may wish to ensure their working space meets health and safety standards. If the employee refuses to comply with this, the employer may treat the application as withdrawn.

Unresolved applications

Most applications will conclude with a satisfactory outcome either when the employer gives their decision or at appeal. But there will always be some cases, even after an appeal, where an employee feels their application has not been dealt with to their satisfaction. The employee may want to involve a third party or, in specific circumstances, be thinking of making a complaint to an industrial tribunal. This section outlines the options available.

HOW TO DEAL WITH AN UNRESOLVED APPLICATION

- through an informal discussion;
- the employer's grievance procedure;
- third party involvement, e.g. a Labour Relations Agency official, union representative;
- in specific circumstances, making a formal complaint to an industrial tribunal or the Labour Relations Agency Arbitration Scheme.

Speak to the employer informally

In the first instance, it is likely to be in all parties' interests to try to resolve the problem within the workplace. Evidence shows that the quickest and most effective way for an employee to resolve an issue is to speak with their employer.

It may be that there has been a simple misunderstanding of the flexible working procedure, which the employee believes affected the employer's decision. If the employee feels able to discuss this with the manager, the issue may be resolved without the need to resort to more formal mechanisms. For example, where a time limit has not been met in the first instance, it may be far more effective to speak to the manager and inform them that they need to reply as soon as possible due to their breach, rather than seek to pursue the matter to an industrial tribunal.

Employer's own grievance procedure

Employers should have a grievance procedure which the employee can use to attempt to resolve their complaint. Again, this has the advantages of being far quicker than involving external parties and allows the issue to be resolved at the workplace.

Third party conciliation/mediation

Despite the best efforts of both parties there will be cases where it may not be possible to resolve a disputed request at the workplace. In such circumstances, both parties can agree to try to resolve the issue through the use of an external third party mediator or conciliator. This might be someone from the Labour Relations Agency, a union representative, or another person with appropriate expertise. The purpose is to try to resolve the case in an informal fashion instead of immediately resorting to the more formal route of external arbitration or making a complaint to an industrial tribunal.

The third party will tend to contact the employer and employee and attempt to resolve the problem through discussion. They will talk through the issues, outline the law relating to the case where necessary and generally help parties become aware of the options open to them.

Parties who are considering going to a tribunal should bear in mind, however, that there are time limits for submitting a claim. The time limit in flexible working cases is three months.

External parties providing the remedy

If a dispute cannot be resolved between the parties, in specific circumstances the case can be heard by an external body which provides the remedy to the disagreement: either an industrial tribunal or through the Labour Relations Agency Arbitration Scheme.

In what circumstances can a formal complaint be made?

An employee may make a complaint to an industrial tribunal or to the LRA Arbitration Scheme where:

- the employer has failed to follow the procedure properly; or
- the decision by the employer to reject an application was based on incorrect facts.

Although a complaint can be made if the reason given by the employer for refusal is not one of the specified business grounds, **an employee has no right to make a complaint where they simply disagree with the business grounds**

provided by the employer for declining a request, and neither has the industrial tribunal/LRA binding arbitration powers to question the employer's business reasons, although it can examine the facts on which the business reason is based to see if they are correct

A breach of the procedure may, for example, be a failure to hold the meeting to discuss the application within the timescale (where no extension has been agreed) or where the employer fails to provide all the necessary information in their notice to the employee of their decision. Missing a deadline as laid out in the procedure by one day will technically constitute a breach, although in the vast majority of cases where this is simply an accident the problem should be resolved at the workplace.

Equally, it is important that the employer ensures that facts provided to explain why a business ground applies are correct. While a tribunal or arbitrator has no power to question the employer's actual business grounds for declining a request, any rejection based on incorrect facts will provide a basis for making a complaint.

Where an employee suspects that a fact given by the employer is incorrect they must first raise this at appeal. For example, an employee may appeal by arguing against the employer's grounds that there is no-one else to provide cover in their absence which, if not addressed by the employer at appeal, could be a basis for making a complaint to a tribunal or arbitrator.

Usually, then, an employee can only make a complaint to an industrial tribunal if they have received notification that their application has been rejected by the employer at the appeal stage. The exceptions to this are where there are breaches of procedure relating to deadlines for meetings or the giving of notice of a decision.

If an employee decides to ask for their case to be heard by a tribunal, it may also be possible to bring the case under the Sex Discrimination (Northern Ireland) Order 1976. The Order prohibits direct and indirect sex discrimination. In dealing with requests for flexible working, indirect discrimination is more likely to occur. Further information is available in ['How the right works with other legislation'](#).

Re-examination of the business grounds

It is worth noting that if a case is brought jointly with other legislation, e.g. the Sex Discrimination (Northern Ireland) Order, a tribunal may seek to re-examine the business grounds. This is due to the fact that other legislation requires business cases to be **objectively justified** or to be within a range of reasonable responses. The fact that an employer has sought to establish a business case, and has held meetings under the duty to consider, should help, for example, in establishing whether the decision could be objectively justified.

Remedies and compensation

An industrial tribunal or LRA binding arbitration, which finds in favour of the employee, will be able to order the employer to:

- reconsider an application by following the procedure correctly; and/or
- pay an award to the employee

The level of compensation will be an amount that the LRA or the industrial tribunal feels to be just and equitable in all the circumstances, limited to a maximum amount. The maximum level is eight weeks' pay. The week's pay itself will be limited to the maximum provided under Article 23(1) of the Employment Rights (Northern Ireland) Order 1996. This is reviewed annually and was increased on 22 March 2015 to £490.

In addition, where an employer is found to have prevented the employee from being accompanied either at the meeting to discuss the application or appeal meeting they may make a separate award of up to two weeks' pay. Again, the week's pay is capped, as set out above.

What is an industrial tribunal?

Taking a complaint to an industrial tribunal is always a last resort. A tribunal is a formal, legal, public hearing and generally has three members. The 'chairman' is legally qualified and there are two lay members drawn from people dealing with work-related problems.

If the employee has a grievance they are required to follow the steps set out in the Labour Relation Agency's [Code of Practice on Disciplinary and Grievance Procedures](#). These are to;

- Raise the matter informally. If this is unsuccessful,
- Raise the matter in writing using the employer's formal grievance procedure

There is a three month time limit for making a complaint to a tribunal regarding a breach of procedure, a detriment or dismissal, or the employer's failure to act.

An employee who wishes to make a complaint to an industrial tribunal and requires further information should go to [industrial tribunal](#)

They can obtain a copy of the claim form IT1 which can be completed online or can be obtained in hard copy.

When the Office of Industrial Tribunals and Fair Employment Tribunals (OITFET) receives the completed form, it will send a copy to a conciliator at the Labour Relations Agency who will try to help the two sides to reach a settlement of the complaint.

If conciliation is not possible or fails, the industrial tribunal will hear the case and both parties should attend the hearing. They may claim travelling expenses and other expenses within certain limits.

What is the LRA Arbitration Scheme?

The Labour Relations Agency was given the power to introduce the Scheme by the Industrial Relations (Northern Ireland) Order 1992, as amended, and the Fair Employment and Treatment (Northern Ireland) Order 1998. Subsequently, the Scheme has been established by means of the Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012.

The Scheme provides a voluntary alternative to a tribunal for the resolution of claims that could be the subject of proceedings before an Industrial Tribunal and/or the Fair Employment Tribunal.

Use of the Scheme is entirely voluntary and both the employer and the employee must agree to the dispute going to arbitration. Where both parties agree to use the Scheme, the decision of the arbitrator will be binding and the **employee will waive their right to go to an industrial tribunal**. The basis for making a complaint to the Scheme, and potential remedies available, including compensation, are exactly the same as they are at an industrial tribunal.

For more information on the LRA Arbitration Scheme please contact the LRA on (028) 9032 1442 and ask to speak to someone about arbitration or go to [LRA Arbitration Scheme](#)

The following table provides a breakdown of the main differences between the LRA Arbitration Scheme and an industrial tribunal hearing.

Differences between an industrial tribunal hearing and the LRA Arbitration Scheme

<i>Industrial Tribunal</i>	<i>Arbitration Scheme</i>
Likely to have to wait several weeks and possibly months before the case can be heard.	Hearing can be arranged within a few weeks.
Public hearing held at an industrial tribunal office or local courthouse.	Private hearing generally held at the offices of the Labour Relations Agency.
Hearing normally completed within a day.	Hearing normally completed within half a day.
Heard by a legally qualified Chair usually along with a panel of two other members.	Heard by a single LRA arbitrator who is experienced in employment relations and flexible working.
Witnesses cross-examined under oath as in a courtroom.	Asked questions informally by the arbitrator.
Legal representatives act for the parties in a large number of cases.	Legal representatives may be present but are given no special status.
If the claim is upheld the remedies may be reconsideration or compensation.	Same as tribunal - the awards are based on same criteria and reflect the same levels of payment.
Hearings and results are public.	Hearings and results are confidential.
Can jointly hear other claims (e.g. Sex Discrimination (Northern Ireland) Order 1976).	Can hear most claims that a tribunal can hear, but not all.

Protection from detriment and dismissal

Employees are protected from suffering a detriment or dismissal for making an application under the right to request flexible working. Qualifying employees i.e. who have 26 weeks continuous employment, who believe they have suffered detriment can generally complain to an industrial tribunal (see '[Unresolved applications](#)'). In most cases, employees will be able to make a complaint to an industrial tribunal if they are dismissed during the procedure of making an application.

What protection is there against detriment for requesting flexible working?

An employee is protected against being subjected to detriment by any act or deliberate failure to act by their employer because the employee:

- made (or proposed to make) an application to work flexibly under the right;
- exercised (or proposed to exercise) a right under the procedure;
- have made (or have stated their intent to make) a complaint to a tribunal in respect of their application to work flexibly;
- exercised (or sought to exercise) their right to be accompanied or have accompanied another employee.

Detriment can cover a wide range of forms of unfair treatment, such as denial of promotion, facilities or training opportunities which the employer would otherwise have offered or made available. Employees who suffer unfair treatment at work for the above reasons may make a complaint to an industrial tribunal.

In what circumstances is an employee protected from dismissal under the rights?

Dismissal means the termination of employment by the employer, with or without notice. It could also include constructive dismissal, where the employee has resigned because the employer has made a substantial breach of the contract of employment indicating that he or she intends no longer to be bound by it. Or, it could include the expiry of a fixed-term contract without its renewal or the end of a contract that expires when a specific task has been completed.

It is unlawful for an employer to dismiss an employee because the employee:

- made (or proposed to make) an application to work flexibly under the right.
- exercised (or proposed to exercise) a right under the procedure.
- have made (or have stated their intent to make) a complaint to a tribunal in respect of their application to work flexibly.
- exercised (or sought to exercise) their right to be accompanied or have accompanied another employee.

This protection against dismissal also applies if an employee is selected for redundancy on these grounds.

How the right works with other legislation

The right to request is designed to enable employers and employees to find flexible working solutions that suit them both. The right encourages dialogue and allows a lot of flexibility in how to consider a request whilst requiring employers to follow a basic procedure. Failure to follow the procedure or basing a refusal on incorrect facts will provide the employee with a basis to take their case to an industrial tribunal. Other legislation that employers should be aware of when considering requests is outlined below.

If an employee feels that a disputed request also breaches other legislation, it will be possible for both matters to be heard jointly at an industrial tribunal or to be dealt with under the LRA Arbitration Scheme. This section outlines how the various areas of legislation operate.

Discrimination legislation

- *Sex discrimination*

The Sex Discrimination (Northern Ireland) Order 1976 prohibits direct and indirect discrimination. **Direct discrimination** occurs where a woman or a man is treated less favourably than a person of the opposite sex in comparable circumstances because of their sex. Types of sex discrimination include sexual harassment and treating a woman adversely because she is pregnant (in which case there is no need for a male comparator).

In dealing with requests for flexible working **indirect discrimination** is more likely to occur. This might be an issue, for example, in the case of a woman returning from maternity leave and wishing to work part-time. To establish an indirect discrimination claim, an employee will need to show that it the action being complained about:

- is such that it would be to the detriment of a considerably larger proportion of people of one sex than of the other;
- cannot be shown by the employer to be justifiable irrespective of the sex of the person to whom it is applied; and
- is to the employee's detriment.

The Equality Commission for Northern Ireland (www.equalityni.org) can provide detailed information on sex discrimination.

- *Other forms of discrimination*

Employees can also make a complaint to an industrial tribunal if they believe they have been discriminated against on the basis of race, disability, age or sexual orientation. They can take a complaint to the Fair Employment Tribunal for Northern Ireland if they believe that they have been discriminated against on the basis of their religious belief or political opinion.

The [Equality Commission for Northern Ireland](http://www.equalityni.org) can provide detailed information on discrimination.

- *Part-time workers*

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 make it unlawful to treat part-timers less favourably in their contractual terms and conditions than comparable full-timers.

This means that when granting a request for flexible working that involves a reduction in hours, employers should be aware that their employees are still entitled to the same consideration in respect of training, promotion and financial issues. Contact the Labour Relations Agency on 028 9032 1442 to get advice.

Annex A: What is sufficient explanation?

Where there is a recognised business ground that prevents an employer from being able to accept an employee's application to work flexibly, the employer must include, as part of their written decision provided to the employee, an explanation as to why that ground applies in the circumstances. What constitutes an appropriate level of explanation is set out above, under '[How should the refusal be explained?](#)' Detailed below are examples of the explanations which might be given in different circumstances.

Example 1

Sasha, a systems administrator for a small IT company applies to change from working weekends to working her existing days off during the week. Sasha has recently participated in an extensive training programme to undertake the role. The systems administrator role includes undertaking maintenance of the computer system to ensure that all IT equipment is working fully during trading hours.

Her manager discusses the request with Sasha but is unable to agree to a change to the days when Sasha is required to work. When stating the business grounds she includes **inability to recruit additional staff** and the **burden of additional costs** within the explanation about why the grounds apply in the circumstances.

The role of the weekend administrator is vital to the running of the company. It is essential that the IT equipment is operational from the moment staff arrive on a Monday morning and maintenance occurs out of our core hours. You are aware of the difficulties that we have had during the past year of filling the systems administrator posts. The vacancy was advertised twice (at the JobCentre and in trade press) and on both occasions no suitable applicant was found.

You subsequently expressed an interest and agreed to receive the necessary training. We discussed at the time that a necessary part of the job was to fulfil the weekend systems administrator's duties. It was on this basis that I made the case to our board to invest substantially more on training this year than was planned and, specifically, to fund your course. The training programme was extensive and completed only last month. As such, we do not presently have the budget or resources to train anyone else. When we met to discuss your application I agreed also to speak to John, our other administrator, to explore whether he can change his hours but he is unable to help. I am afraid, therefore, that on this occasion I am unable to amend your working hours. I have attached details of the appeal procedure should you wish to appeal.

Example 2

Colin, a pharmacist, makes an application to the owner of the chemist's shop in which he works. He wants to amend his hours so that he can drop off and collect his child from school. At the meeting to discuss the request the owner explains that it is a legal requirement for a pharmacist to be on duty at all times. In his written decision the employer states that due to the business ground of an inability to reorganise work amongst existing staff he is unable to accept the request.

...because we handle prescriptions we are contracted by the NHS to provide a dispensing service between 8:30 and 5:30 each day. Despite both dispensers being prepared to cover your absence, by law I must have a qualified pharmacist on duty between these times. The only other weekday pharmacist is Sam who works part-time over the busy lunch period and does not want to change his hours of work.

You suggested during our discussion that I could make use of locum pharmacists to cover the periods when you would be absent, in the same way that I use locum pharmacists during periods of leave. I explored this with the locum agency and, as I speculated during our discussion, they confirmed that it is unlikely that a locum pharmacist would be willing to work for an hour in the morning and at the end of the day. As such, the agency said that they could not guarantee cover.

I regret therefore that I cannot agree to the work pattern set out in your application. You do have a right to appeal this decision which is set out below.

Example 3

Emma, an employee at a fish and chip shop, applies to work on a Monday and Tuesday instead of Thursday and Friday to account for a change in her disabled aunt's care arrangements. The employer provides **insufficiency of work** during the period the employee proposes to work as the business ground for not being able to agree to the request.

...as you know, Thursday and Friday are two of our busiest days of the week. Only Saturdays are busier. It is during this busy time when I need extra people to help out in the shop. However, at the beginning of the week, the shop is relatively quiet and, as such, I do not need extra staff at this time.

I am therefore afraid that I am unable to agree to your request. You do have a right to appeal this decision and details are attached.

Annex B: Best practice forms

The following pages contain best practice forms for use by employees and employers in making and responding to an application to work flexibly.

FW (A) Flexible Working Application Form:

Note to the employee

You can use this form to make an application to work flexibly under the right provided in law.

- Please ensure that you submit your application to the appropriate person well in advance of the date you wish the request to take effect.
- Provide as much information as you can about your desired working pattern. This will help your employer reach a decision.
- Complete all the questions as otherwise your application may not be valid.
- When completing Sections 4 and 5 think about what effect your change in working pattern will have both on the work that you do and on your colleagues.
- Once you have completed the form, you should immediately forward it to your employer (you might want to keep a copy for your own records).
- Your employer will then have 28 days after the day your application is received in which to arrange a meeting with you to discuss your request. If the request is granted, this will be a permanent change to your terms and conditions unless otherwise agreed.
- **When completing this form, ensure that you tick all of the REQUIRED boxes. If you cannot tick the boxes because you don't meet the criteria, then you won't qualify to make a request under the law.**

Please note that even if you don't meet all the legal qualifications, this does not mean that your request may not be considered. You can still approach your employer. Many employers offer flexible working to their staff as good practice.

Note to the employer

This is a formal application under the legal right to apply for flexible working. Employers have a legal duty to consider applications seriously. You have 28 days after the day you received this application in which either to agree to the request or to arrange a meeting with your employee to discuss it. You should confirm receipt of this application using the attached confirmation slip.

1 Personal details.

Name: _____ Staff or payroll number: _____

Manager's name: _____ National Insurance number: _____

To the employer

I would like to apply to work a flexible working pattern that is different to my current working pattern, under my right provided under Article 112F of the Employment Rights (Northern Ireland) Order 1996 (as amended by The Work and Families (Northern Ireland) Act 2015)..

I confirm that I meet each of the eligibility criteria as follows:

- I have worked continuously as an employee of the company for the last 26 weeks. (REQUIRED)
- I have not made a request to work flexibly under this right during the past 12 months.
(REQUIRED)

Date of any previous request made under the right (dd/mm/yy) _____

2. Describe your current working pattern (days / hours / times worked)

3. Describe the working pattern you would like to work in future (days / hours times worked)

4. I would like this working pattern to commence from:

5. Impact of the new working pattern.

I think this change in my working pattern will affect my employer and colleague(s) as follows:

6. Accommodating the new working pattern.

I think the effect on my employer and colleague(s) can be dealt with as follows:

Signature: (please print and sign here) _____ Date: _____

NOW PASS THIS APPLICATION TO YOUR EMPLOYER

Employer's Confirmation of Receipt (to be completed and returned to employee)

Dear: _____,

I received your request to change your work pattern on _____.

I shall be arranging a meeting to discuss your application within 28 days following this date. In the meantime you might want to consider whether you would like a colleague to accompany you at the meeting.

From: _____.

FW (B): Flexible Working Application Acceptance Form

Note to the employer

You must write, with your decision, to your employee within 14 days following the meeting. This form can be completed by the employer when accepting an application to work flexibly. If you cannot accommodate the requested working pattern you may still wish to explore alternatives to find a working pattern suitable to you both.

Please note that Form **FW (C): Flexible working application rejection form** should be used if the employee’s working pattern cannot be changed, and no other suitable alternatives can be found.

Dear: _____ Staff Number: _____

Following receipt of your application and our meeting on _____ I have considered your request for a new flexible working pattern

I am pleased to confirm that I am able to accommodate your application.

OR

I am unable to accommodate your original request. However, I am able to offer
the alternative pattern which we have discussed and you agreed would be suitable to you.

Your new working pattern will be as follows:

Your new working arrangements will begin from: _____.

Note to the employee

Please note that the change in your working pattern will be a permanent change to your terms and conditions of employment and you have no right in law to revert to your previous working pattern, unless otherwise agreed. If you have any questions on the information provided on this form please contact me to discuss them as soon as possible.

Name _____ Date _____

NOW RETURN THIS FORM TO YOUR EMPLOYEE

FW (C): Flexible Working Application Rejection Form

Note to the employer

You must write to your employee within 14 days following the meeting with your decision. This form can be completed by you when declining an application. Before completing this form you must ensure that full consideration has been given to the application. You must state the business ground(s) as to why you are unable to agree to a new working pattern and the reasons why the ground(s) applies in the circumstances. The list of the permissible business grounds under which a request may be refused are provided in the following link <https://www.nibusinessinfo.co.uk/content/refusing-flexible-working-request-outright>

Dear: _____

Staff Number: _____

Following receipt of your application and our meeting on _____ I have considered your request for a new flexible working pattern.

I am sorry but I am unable to accommodate your request for the following business ground(s).

The grounds apply in the circumstances because:

(You should explain why any other work patterns you may have discussed at the meeting are also inappropriate. Please continue on a blank sheet if necessary).

Name _____

Date _____

If your employee is unhappy with the decision, they may appeal against it. Details of the appeal procedure are set out below.

The Appeal Process

Note to the employee

If your employer turns down your request for flexible working, you have the right to appeal against the decision. If you wish to appeal, you must write to your employer, setting out the grounds for your appeal, within 14 days after receiving written notice of his decision.

Note to the employer

If you reject your employee's request for flexible working, your employee has the right to appeal against your decision. If your employee appeals against your decision to refuse a request for flexible working, you must arrange a meeting with your employee to discuss the appeal within 14 days after receiving the appeal letter.

After the meeting has been held, you must write to your employee within 14 days to notify him of the outcome of the appeal.

NOW RETURN THIS FORM TO YOUR EMPLOYEE

FW (D): Flexible Working Appeal Form

Note to the employee

If your application has been refused, you may appeal against your employer's decision. You can use this form to make your appeal. You should set out the grounds on which you are appealing, and do so within 14 days of receiving written notice that your application for flexible working has been turned down.

Note to the employer

This is a formal appeal made under the legal right to apply for flexible working. You have 14 days following your receipt of this form in which to arrange a meeting with your employee to discuss their appeal. See the following link: <https://www.nibusinessinfo.co.uk/content/employees-appeal-against-refusal-their-flexible-working-request>

Dear _____

I wish to appeal against your decision to refuse my application for flexible working. I am appealing on the following grounds:

(You may continue on a separate sheet if necessary)

Name: _____ Date: _____

NOW RETURN THIS FORM TO YOUR EMPLOYER

FW (E): Flexible Working Appeal Reply Form

Note to the employer

You may complete this form when replying to an appeal that an application to work flexibly has not been properly considered. You must return this form to your employee, giving notice of your decision, within 14 days after the meeting at which you both discussed the appeal. If you decide to turn down the appeal, you must state the grounds for your refusal. See link:

<https://www.nibusinessinfo.co.uk/content/employees-appeal-against-refusal-their-flexible-working-request>

Dear: _____

Staff Number: _____

Following the appeal meeting which took place on _____ I have considered your appeal against the decision to refuse your application to work a flexible working pattern.

A ACCEPTING AN APPEAL

Complete this section if you are accepting the employee's appeal.

I accept your appeal against the decision.

I am therefore able to accommodate your original request to change your working pattern as follows:

Your new working arrangements will begin from: _____.

Note to the employee

Please note that the change in your working pattern will be a permanent change to your terms and conditions of employment and you have no right in law to revert back to your previous working pattern.

B REJECTING AN APPEAL

Complete this section if you are rejecting the employee's appeal.

I am sorry but I must reject your appeal.

I must reject your appeal on the following ground(s):

The ground(s) apply because:

(You may continue on a separate sheet if necessary)

Name: _____

Date: _____

NOW RETURN THIS FORM TO YOUR EMPLOYEE

FW (F): Flexible Working Extension of Time Limit Form

Note to the employer

This form is provided for you to complete when confirming agreement with your employee that you wish to extend a time limit for part of the procedure, from that set out in the regulations. You may extend the time limit for any part of the process, providing your employee agrees to the extension. Information on when it might be appropriate to extend the time limits can be found in the following link: <https://www.nibusinessinfo.co.uk/content/extensions-time-limits-and-withdrawals>

Dear: _____ Staff Number: _____

I wish to extend the amount of time that the regulations allow me to:

Arrange a meeting to discuss your application (28 days)

Notify you of my decision regarding your application (14 days)

Arrange a meeting to discuss your appeal (14 days)

Notify you of my decision regarding your appeal (14 days)

I wish to extend the time limit to ____ days.

I need the extra time for the following reason:

If you agree to this extension, please complete the slip below and return it to me.

Signed: _____ Date: _____

NOW PASS THIS FORM TO YOUR EMPLOYEE

Note to the employee

To allow proper consideration of your request, your employer may wish to extend the permitted time limit for any part of the process. Your employer will need your agreement to any extension of the time limit. If you agree to the above request, please complete the agreement slip below and return it to your employer. See the section entitled 'Extension of time limits' in the following link:
<https://www.nibusinessinfo.co.uk/content/extensions-time-limits-and-withdrawals>

Cut this slip off and return it to your employer in order to confirm your acceptance of their request

Employee's Agreement to Time Extension (to be completed and returned to employer)

Dear: _____

I accept your request to extend the amount of time to ____ days

Signed: _____

Date: _____

FW (G): Flexible Working Notice of Withdrawal Form

Note to the employee

This form provides notification to your employer that you wish to withdraw your application to work flexibly. Once you have withdrawn your application, you will not be able to make another application until 12 months from the date your original application was made. For more information go to the following link <https://www.nibusinessinfo.co.uk/content/extensions-time-limits-and-withdrawals>

Dear: _____

I submitted a flexible working application to you on _____

I wish to withdraw that application to work flexibly

I understand that I will not be able to make another application until twelve months after the above date.

Name: _____

Date: _____

NOW RETURN THIS FORM TO YOUR EMPLOYER

Note to the employer

Once your employee has completed this form and returned it to you, the application is considered as withdrawn and you are not required to give it any further consideration. For more information go to the following link <https://www.nibusinessinfo.co.uk/content/extensions-time-limits-and-withdrawals>

You should complete the slip below and return it to your employee to confirm your receipt of the withdrawal notice.

Cut this slip off and return it to your employee in order to confirm your receipt of their withdrawal notice

Employer's Confirmation of Withdrawal (to be completed and returned to employee)

Dear: _____

You submitted an application for flexible working on _____

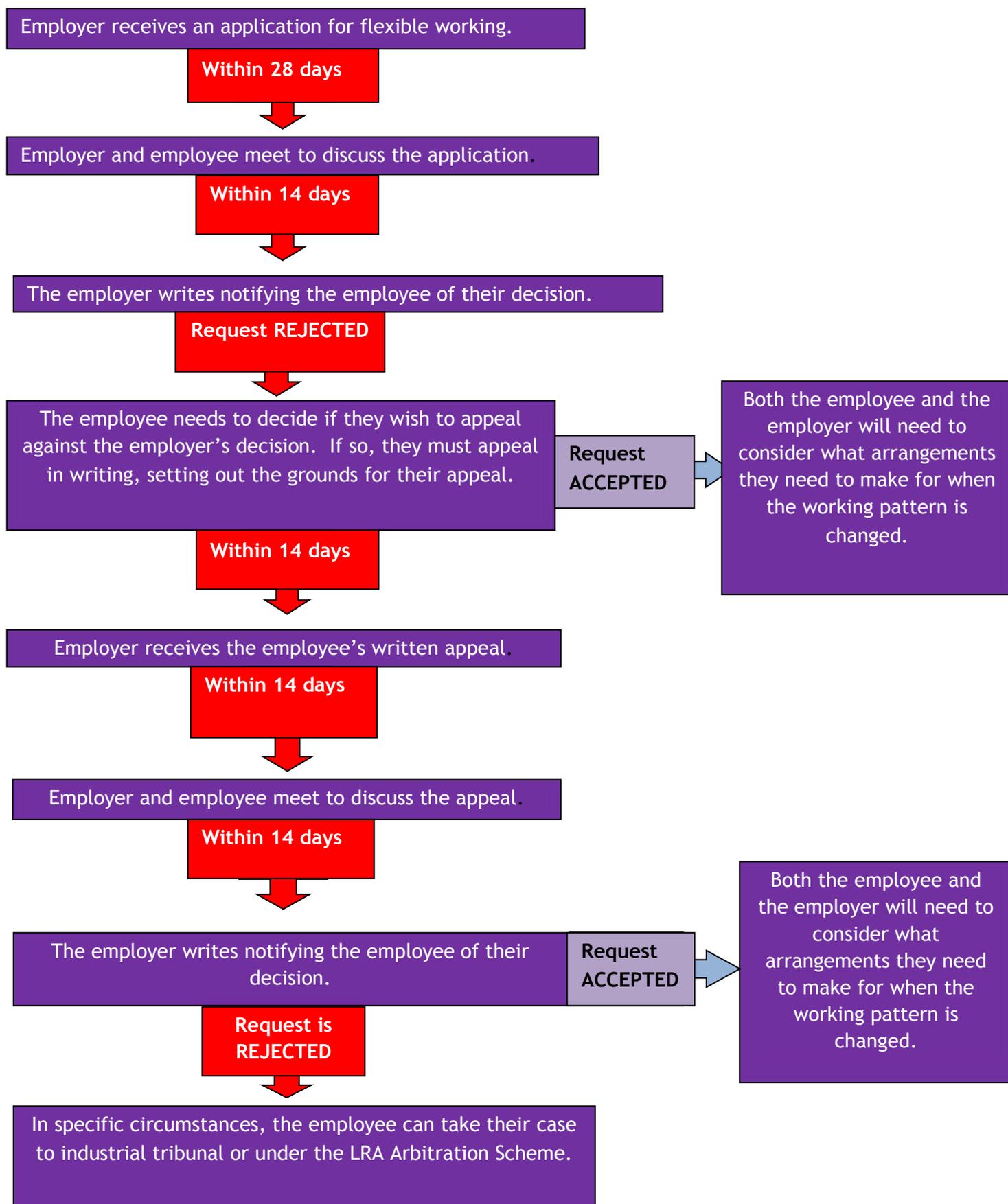
I confirm that I have received notice from you that you wish to withdraw that application.

Under the right to apply, you will not be eligible to submit another application until 12 months after the above date.

From: _____

Date: _____

Annex C: How does the process work?



Useful addresses

Labour Relations Agency

Head Office

2-8 Gordon Street

Belfast

BT1 2LG

Tel: 028 9032 1442

Fax: 028 9033 0827

Textphone: 028 9023 8411

Website: <http://www.lra.org.uk/>

E-mail: info@lra.org.uk

Regional Office

1-3 Guildhall Street

Londonderry

BT48 6BJ

Tel: 028 7126 9639

Fax: 028 7126 7729

Textphone: 028 9023 8411

Website: <http://www.lra.org.uk/>

E-mail: info@lra.org.uk

Office of the Industrial Tribunals and the Fair Employment Tribunal (OITFET)

Killymeal House

2 Cromac Quay

BELFAST

BT7 2JD

Tel (028) 9032 7666

Fax (028) 9025 0100

email: mail@employmenttribunalsni.org

website: www.employmenttribunalsni.co.uk

The Equality Commission for Northern Ireland

Equality House

7-9 Shaftesbury Square

Belfast

BT2 7DP

Tel: 028 9050 0600

Fax: 028 9033 1544

Textphone: 028 9050 0589

Website: <http://www.equalityni.org>

E-mail: information@equalityni.org

