Flexible Working

The Law and Good Practice

A Guide for Employers

Equality Commission FOR NORTHERN IRELAND

Labour Relations AGENCY
Improving Employment Relations

Equality Commission for Northern Ireland

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A Note about the Text

For ease of reference and use, the publication is divided into three main parts: Part 1, Part 2 and Appendices. The differences between the separate parts are as follows:

Part 1

(pages 3 to 11)

This Part is a guide to *good practice* and it is the most important part of the publication from a practical point-of-view. It describes the reasonably practical steps (including the *"do's and don'ts"*) which the Equality Commission recommends that employers should take in order to promote equality of opportunity in employment and to comply with the laws relating to flexible working.

However, Part 1 does not describe in detail the underlying legal provisions and principles that regulate the subject and upon which the good practice recommendations are based. By contrast, those matters are described in Part 2.

Part 2

(pages 12 to 26)

This Part is quite legalistic and sets out and explains the underlying legal provisions and principles which underpin the good practice recommendations made in Part 1.

Appendices

(pages 27 to 30)

These contain some additional information such as a classification of different types of flexible working arrangements and information about other sources of information and advice.

Part One

Contents

1. Introduction

1.1 Modern attitudes to working life are such that many workers, some of whom may be managers and employers themselves, wish to achieve more equitable and satisfactory balances between their working lives and their personal and family lives.[1]

1.2 Perhaps this was always so, but a significant difference between now and times past is that many employees are now able to exercise a raft of legally enforceable employment rights which may assist them to achieve more satisfactory work/life balances. These rights can be particularly strong where an employee is seeking to achieve a more satisfactory work/life balance in order to attend to his or her parental or caring responsibilities, or where a disabled employee might require flexibility in his or her working arrangements for disability-related reasons.

1.3 One consequence of this is that employers may not be able to make snap decisions to refuse their employees' requests for flexible working arrangements or time-off, but instead must often follow legally enforceable procedures and/or provide reasoned, fair and justifiable decisions. This does not mean that the needs and rights of employees will necessarily over-ride the needs of an employer's business, or vice versa. But the nature of an employee's legal rights will often require an employer to weigh his business needs against those of his employee in order to reach an appropriate and proportionate balance between the two.

1.4 However, it would be unjust to imply that employees must always force reluctant employers to accede to requests for flexible working arrangements. On the contrary, employers' attitudes are generally positive. There is evidence to show that most employers in Northern Ireland believe that employees should be able to achieve a satisfactory work/life balance, and that the provision of flexible working arrangements either has no negative impacts on their businesses or that it delivers positive benefits, such as increased employee motivation, commitment and productivity, less absenteeism and better employee relations.[2]

1.5 The purpose of this publication is to provide information about the laws which regulate this subject and to provide guidance for employers on the good practice measures that will assist them to comply with those laws and, at the same time, promote equality of opportunity for a wide range of employees and job seekers.

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[1] A list of common flexible working arrangements is set out in Appendix 1 (pages 26-27).

[2] *Report on Flexible Working Patterns: Comparison of Employee and Employer Surveys conducted in 2003 and 2006 [Department of Employment and Learning, 2007]*. Available to download from: http://www.delni.gov.uk/index/publications/pubs-employment-rights/fwp-comparison-2003-2006.htm

2. Promoting Equal Opportunities in Employment

2.1 There is a close correlation between the promotion of equal opportunities in employment and the provision of flexible working arrangements.

2.2 Employers who operate inflexible working practices, such as requiring all employees to work to traditional *"nine-to-five"* working patterns, may deny equality of opportunity in employment to some people, or classes of people. This will most likely occur where an individual's particular personal, caring, family, medical, cultural or religious needs conflict with the strict work patterns laid down by his or her employer.

2.3 The employees most likely to be disadvantaged by these conflicts are:

- employees, particularly women, who need time-off work to attend to their parental and caring responsibilities;
- some disabled employees, if they need particular reasonable adjustments, such as time-off for rest periods or to attend for medical treatment;
- employees with strong religious beliefs, if they are required to work on their sabbath days, or on other days of religious significance to them.

2.4 Where employees suffer such disadvantages, there is a risk that the inflexible working practices giving rise to them may, depending on the particular circumstances of each case, be unlawfully discriminatory (particularly, disability discrimination, or indirect sex or marital status or religious or race discrimination). Further information about the anti-discrimination laws which are relevant to this subject is given in Part 2 of this Guide.

2.5 There is also a substantial risk that inflexible working practices, or any refusal to consider employees' requests for change, or any failure to adhere to certain statutory procedures which may apply when considering such requests may cause breaches of other statutory employment rights. Further information about these rights is given in Part 2 of this Guide.

2.6 By taking reasonably practicable steps, particularly of the kind recommended below, you can significantly promote equal opportunities in employment for a substantial number of people and, at the same time, reduce the possibility that unlawful discrimination or other breaches of statutory employment law may occur.

3. Basic Good Practice

3.1 The task of complying with the network of legal rights which employees enjoy can best be achieved if employers and managers understand their responsibilities, are committed to fulfilling them and go about making decisions in a reasoned, consistent and fair manner. You should try to make this happen by establishing a framework or environment in which decisions can be made accordingly.

3.2 The Equality Commission strongly recommends that you take the following steps to establish such a framework or environment-

Step 1

3.3 **Develop and implement an Equal Opportunities Policy and a Harassment Policy** which acknowledges your commitment to promoting equality of opportunity in employment to all persons and to providing your employees with a good and harmonious working environment in which they will be treated with dignity and respect and not subjected to harassment.[3]

Step 2

3.4 **Develop and implement a policy on flexible working** which acknowledges your commitment to providing flexible working arrangements, and to providing fair and non-discriminatory treatment to those employees who avail of them, or wish to avail of them.

Step 3

3.5 **Establish a systematic and objective procedure** for considering employees' requests for flexible working arrangements and for implementing the decisions that are made.[4]

Step 4

3.6 **Inform employees about the policies**; for example, by including them in the employees' handbook, or on the workplace intranet or noticeboard.

Step 5

3.7 **Provide training to all managers** so that they understand their employers' responsibilities in relation to these legal rights and their own responsibilities under the relevant policies and procedures.

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[3] The Equality Commission has separately published Model Equal Opportunities and Harassment Policies and we strongly recommend that you use these Models to develop your own policies. For further information, refer to Chapters 4 and 5 and Appendices 5, 6 and 7 of our publication *A Unified Guide to Promoting Equal Opportunities in Employment [ECNI, 2009]*.

[4] At the very least, employers should have a procedure that complies with the statutory procedure set up under the *Flexible Working (Procedural Requirements) Regulations (NI) 2003* when considering requests for flexible working submitted by qualifying employees who have parental or caring responsibilities. Further information about this procedure is given in Part 2.

Step 6

3.8 **Amend recruitment and selection procedures** to build in a stage where consideration will be given to allowing for flexible working arrangements when developing the particular job structures of each post (i.e. where, how and when each job will be performed) and in developing the corresponding job descriptions and personnel specifications.

Step 7

3.9 **Monitor and review the operation** of the policy and procedure periodically; for example, every three years, or some other period that the employer considers appropriate.

4. Considering Individual Requests for Flexible Working

Disability-related flexible working needs

4.1 When you are considering flexible working issues that are related to a disabled employee's needs (i.e. compliance with the reasonable adjustment duty under the *Disability Discrimination Act*), you should have regard to the next section of this Part (i.e. Section 5).

General flexible working requests

4.2 The following recommendations relate to all other requests for flexible working. The recommendations are additional to the basic good practice steps outlined in Section 3 and are intended for use when you are considering individual requests for flexible working arrangements, *particularly for requests that are made for family or caring reasons*.

4.3 Many employees will have the right to complain to an industrial tribunal if their employers reject their requests for flexible working arrangements. Depending on the particular circumstances that apply in each case, employees might make allegations of unlawful discrimination or breach of statutory employment rights or both (refer to Part 2 for further information about how the rights may overlap).

4.4 The law (both legislation and case law) outlines the factors that industrial tribunals will take into account when judging these matters and these can be translated into some *"do's and don'ts"* which may assist you to comply with the law when considering individual requests.

4.5 The following *"do's and don'ts"* are not merely recommendations of good practice. In some instances they are more than that (refer to Part 2 to learn why this is so).

4.6 ***"Do's"***

- follow the flexible working policy and procedures that you have established and keep a written record of the decision-making process.

- apply the policy consistently and fairly to all employees who apply for flexible working arrangements.

- consider the request at the appropriate time, i.e. when a request is made and within the time-limits set down within the policy and procedures, and do not leave it until after a grievance or complaint is lodged.

- keep an open mind and give serious and genuine consideration to the employee's request.

- consider any alternative arrangements that may be wholly or partially suitable too.[5]

- when weighing up the various factors and options-

    - check that the information upon which the decision will be based is factually correct and only consider information that is so.[6]

    - give considerable weight to any express commitment that you have made to promote flexible working practices and/or equal opportunities.

    - give considerably more weight to those options that are likely to have no, or less, adverse impact on the employee compared to those which you consider to be merely convenient or desirable to the business.

    - give considerably more weight to those options that are genuinely essential for the operation of the business compared to those that are merely convenient or desirable.

[5] Even if you cannot grant an employee's request in full, arrangements which partially satisfy the request may have a less discriminatory or adverse impact on the employee and may be easier to justify than stricter, more inflexible arrangements.

[6] For example, if you are worried that a part-time working proposal may lead to some gaps in service coverage during particular hours of the day, you should check or test to confirm that this will be so rather than rely on a mere guess or presumption. Or, if you believe that you will be unable to recruit another employee to cover for gaps in service, you should have correct factual evidence to show why this is so.

4.7 ***"Don'ts"***

- don't start the process with a closed mind towards the employee's proposals.

- don't refuse to consider requests solely on the basis of legal technicalities alone – it is always better to give consideration to the request by seeking to balance the substantive factors in question (i.e. your needs and those of the employee).[7]

- don't assume that because a particular option is more convenient or desirable for the business that it is genuinely necessary.

- don't treat cost or expense as the sole deciding factor; although, it is legitimate to consider the relative financial costs of various options along with other factors (like those listed in paragraph 4.8).

- don't discriminate against employees on any of the statutory anti-discrimination grounds. For example, do not operate a practice of only granting the requests of women employees who need time off to attend to their caring responsibilities but of rejecting the requests of men who have similar needs.

4.8 There is no exhaustive list of business-related or other legitimate factors that you might take into account when balancing your own needs or aims against those of an employee, but they might include the ones listed below. The following are particularly relevant to the *Article 112F right to request flexible working arrangements*[8] because a refusal to grant the employee's request must be shown to be for one of the following reasons

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

[7] For example, don't refuse to consider a request for flexible working arrangements solely because the employee does not yet have sufficient length-of-service to satisfy any relevant statutory eligibility criteria that may apply. The reason for this recommendation is more fully explained in Part 2 of this publication at sections 1.1 to 1.5.

[8] *Article 112F of the Employment Rights (NI) Order 1996*. Refer to Part 2 for further information.

The need for careful consideration

4.9 However, as the list of *"do's and don'ts"* indicate, it will not be sufficient for you merely to cite one of the above reasons as an excuse for refusing a flexible working request. You should always remember that an employee may have a right to complain to an industrial tribunal and in that forum your reasons will be closely scrutinised to test, whether, depending on the nature of the complaint, they are based on incorrect facts and/or whether they are unlawfully discriminatory and/or objectively justified.

5. Disabled Employees and Flexible Working

5.1 The primary focus of this publication has been on the provision of flexible working arrangements for employees for "family friendly" reasons. Most of the relevant laws are particularly appropriate for reinforcing the rights of employees who have caring responsibilities for children or other dependants. Disabled employees who have caring responsibilities may equally benefit in the same way from these "family friendly" rights.

5.2 But, there are other circumstances in which disabled employees may require flexible working arrangements and where their employers may be under a duty to provide them.

5.3 These are situations in which the arrangements (e.g. policies, practices and procedures) under which a disabled employee is currently working places him or her at a substantial disadvantage compared to non-disabled employees. In such situations, you, as their employer, will be under a *duty to make reasonable adjustments*, meaning that you must take such steps that are reasonable in the circumstances to eliminate the disadvantage that the disabled employee is under.

5.4 The duty envisages, for example, that, depending on what is reasonable in the circumstances, you might alter a disabled employee's working hours, place of work or allow him or her to take time-off for rehabilitation, assessment or treatment. Therefore, the duty to make reasonable adjustments is also in effect a duty to provide (reasonable) flexible working arrangements for the disabled employees who need them.

5.5 This duty is imposed on employers by the *Disability Discrimination Act 1995*. Where the duty applies, a failure to comply with it is an act of unlawful disability discrimination against the disabled employee concerned.

5.6 The best source of information and guidance about the *Disability Discrimination Act* and the reasonable adjustment duty is the **Disability**

Code of Practice for Employers, which may be obtained from the Equality Commission or downloaded from our website.

5.7 For the purposes of illustration, the Code of Practice cites the following examples of situations where the duty to make reasonable adjustments might arise and indicates the kinds of flexible working arrangements that might be appropriate solutions-

> *An employer allows a person who has become disabled more time off during work than would be allowed to non-disabled employees to enable him to have rehabilitation training. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.*
>
> **This example is from page 85 of the Code**

> *Allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability…[or] permitting part time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.*
>
> **This example is from page 85 of the Code**

> *A disabled employee has been absent from work as a result of depression. Neither the employee nor his doctor is able to suggest any adjustments that could be made. Nevertheless the employer should still consider whether any adjustments, such as working from home for a time or working less hours, would be reasonable.*
>
> **This example is from page 92 of the Code**

Part Two

Contents

1. The Links between the Anti-Discrimination Laws and the Other Statutory Employment Laws

1.1 Employees who are aggrieved by their employers' refusals to grant requests for flexible working arrangements and who believe that they have suffered unlawful discrimination (see Section 2 of this Part) or a breach of their other statutory employment rights (see Section 3 of this Part) may complain to an industrial tribunal.

1.2 There may sometimes be an overlap between an employee's rights under anti-discrimination law and under statutory employment law so that an employee may sometimes be able to exercise his/her rights under both simultaneously. For example, a refusal to permit a working mother to work part-time may give her a right to complain of indirect sex discrimination and of a breach of her *Right to Request Flexible Working Arrangements* under *Article 112F of the Employment Rights (NI) Order 1996*.

1.3 An employee's rights under anti-discrimination law are in some ways wider than some of the other employment rights. For example, employees do not need to have worked for any particular length-of-time before they can exercise their rights under anti-discrimination law. This means, for example, that a working mother could seek flexible working arrangements from her employer from the moment she is appointed to her post and has a right to complain of indirect sex discrimination if her request is rejected.

1.4 In comparison, to exercise many of the employment rights discussed in Section 3 of this Part, such as the *Right to Request Flexible Working Arrangements* under *Article 112F*, employees have to satisfy certain eligibility criteria (e.g. in some cases the employee must have 26 or more weeks continuous service), and both the employees and the employers may have to follow certain statutory procedures when respectively submitting and considering requests.

1.5 You should note the distinctions between employees' rights under the anti-discrimination laws and their separate rights under statutory employment laws. It is important that employers and employees alike adhere to statutory and internal procedures, but it would also be prudent to avoid relying too heavily on legal or procedural technicalities to refuse to deal with employees' requests for flexible working arrangements, particularly where they might have alternative rights under anti-discrimination law.

The *"do's and don'ts"* recommendations

1.6 In Section 4 of Part 1 of this Guide, there is a list of good practice recommendations set out in the form of *"do's and don'ts"*. The list was

devised as a set of recommendations to assist employers to comply with their responsibilities under both the anti-discrimination laws and the other statutory employment laws.

1.7 It was noted in Section 4 of Part 1 that the list of *"do's and don'ts"* are not merely recommendations of good practice and that in some instances they are more than that. This distinction arises from a peculiar aspect of the overlap between the two sets of laws concerning the different legal tests that an industrial tribunal will apply in the event of having to determine a complaint that involves both sets of allegations. The issue can be summarised as follows:

- to avoid indirect discrimination, inflexible working arrangements must be *objectively justified*: meaning that you must seek to attain an appropriate balance between your legitimate needs and aims and those of your employee.

- to comply with the additional *Article 112F Right to Request Flexible Working* you must follow the prescribed statutory procedure when considering requests. Also, any decisions to refuse requests must be made on one or more specific grounds (see paragraph 3.18 below) and must be based on correct facts.

- The *objective justification* standard under anti-discrimination law is a higher standard of justification than that required by the *Article 112F Right*. But, in many cases, employees with caring responsibilities may be eligible to bring complaints under both sets of laws and often do. In such cases, you would be better advised to aim to justify your decisions under the higher anti-discrimination law standard.

- Where an employee can only bring a complaint under the *Article 112F Right*, then you need only justify your decision under the lower standard required by *Article 112F*. However, it would be a better and safer practice (from a *good practice* point-of-view), if you aimed to satisfy the higher anti-discrimination law standard on all occasions.

1.8 So, for these reasons, the *"do's and don'ts"* were devised as a uniform set of practices that aim to promote good practice and legal compliance by addressing a number of separate, but often overlapping, legal rights, particularly in relation to requests for flexible working that are connected to the family or caring responsibilities of employees.

2. The Anti-Discrimination Laws

2.1 It is not intended to give a fully comprehensive and detailed guide to the anti-discrimination laws here, but only to highlight the ones that employees are most likely to rely on as a means of gaining flexible working arrangements, and to protect their enjoyment of those arrangements once attained.

Sex Discrimination against Women

2.2 The *Sex Discrimination (NI) Order 1976* is the law that prohibits sex discrimination in employment. It is particularly relevant to the provision of flexible working arrangements because women are much more likely than men to want or need flexible working arrangements.[9] Women are more likely than men to find it difficult or impossible to work under inflexible working practices as a result of their predominant role as the primary carers of children and dependant adults.

2.3 This means that women are at a substantial risk of suffering *indirect sex discrimination* if an employer fails, *without objective justification*, to permit his or her employees to have flexible working arrangements. If such discriminatory practices cannot be objectively justified then they will be unlawful. Consequently, if the practices cannot be objectively justified then they should be abandoned or modified, according to what is appropriate in the circumstances.

2.4 Some examples of the kinds of inflexible working practices that typically leave employers vulnerable to claims of indirect sex discrimination by women are-

- a requirement for all staff to work between 9.00am and 5.00pm;
- a practice of refusing to allow any employees to start later or finish earlier than the "normal" working hours;
- a requirement for all staff to work 5 days per week – Monday to Friday;
- a practice of refusing to permit new mothers, on their return from maternity leave, to reduce the number of hours or days they normally work.

2.5 Whether an employer will be able to objectively justify a particular set of strict and inflexible working practices such as these will vary from case to

[9] *Report on Flexible Working Patterns: Comparison of Employee and Employer Surveys conducted in 2003 and 2006 [Department of Employment and Learning, 2007]*. Available to download from: http://www.delni.gov.uk/index/publications/pubs-employment-rights/fwp-comparison-2003-2006.htm

case depending on the particular circumstances that apply in each. In short, the employer must seek to attain an appropriate balance between his legitimate needs and aims and those of his employee. Section 4 of Part 1 of this Guide outlines the kind of thought process that employers should follow when considering this issue.

Sex or Marital Status Discrimination against Men

2.6 The *Sex Discrimination (NI) Order* prohibits sex discrimination against men too, but in relation to requests for flexible working from men it operates in a different way than it does for women. The reason is that men generally are not disadvantaged to the same extent as women by inflexible working practices. Consequently, a man would not be able to complain of *indirect* sex discrimination as a woman can.

2.7 On the other hand, men may, in principle, complain of discrimination under the *Sex Discrimination (NI) Order* in two other ways.

2.8 The first way is that it may be possible for a man to complain of direct sex discrimination if you refuse to grant him flexible working arrangements, or refuse to consider his request for such arrangements.

2.9 However, such a complaint might only have a realistic prospect of success if the man can point to a female employee (or employees) who has (or have) been treated more favourably by you in the same or similar circumstances (e.g. where both the man and the women are seeking flexible working for the same or similar reasons, such as to attend to their children's needs or those of other dependants). For example, it would be direct sex discrimination if you have a practice of granting the requests of female employees, but habitually reject the similar requests of male employees.

2.10 For employers, the risk of direct sex discrimination against men occurring may be eliminated, or at least significantly reduced, by taking the good practice steps recommended in Sections 3 and 4 of Part 1 and by treating similar requests from men and women with equal degrees of genuine consideration.

2.11 The second way in which men might be able to challenge a denial of flexible working arrangements is by showing that the denial is an act of *indirect marital status discrimination*.

2.12 This is a form of discrimination that can only occur against married people (or, those in civil partnerships). Thus, it is a potential ground of challenge that is open to any married employee (male or female) who needs time off

work to look after their children or other dependants. It is not open to single, or unmarried, employees.

2.13 The basis of a complaint might be an allegation that your refusal to provide flexible working arrangements causes substantial disadvantage for married employees compared to unmarried employees, perhaps because married employees may be more likely to have children or other dependants than unmarried employees.

2.14 If a complainant could establish a prima facie case of indirect marital status discrimination, it would be necessary for you to defend your decision on the basis that the inflexible practices are *objectively justifiable*. This would have to be done in the same way as discussed previously in relation to indirect sex discrimination.

Discrimination against Disabled People

2.15 The legalistic aspects of this important subject were summarily addressed in Section 5 of Part 1 of this publication and no further comments need to be made here. As noted in previously, the best source of guidance is the Disability Code of Practice for employers, which may be obtained from the Equality Commission.

Indirect Religious or Racial Discrimination

2.16 The *Fair Employment & Treatment (NI) Order 1998* is the law that prohibits religious discrimination in employment, and the *Race Relations (NI) Order 1997* is the law that prohibits racial discrimination in employment.

2.17 These laws may be relevant to the provision of flexible working arrangements in certain circumstances for a reason connected to the religious observances of some employees.

2.18 The reason is that employees with certain religious beliefs, particularly where these are strictly observed, may be more likely than employees who do not share those beliefs to find it difficult or impossible to work on certain days (e.g. religious feast days), or may require time-off during normal working hours for prayer breaks.

2.19 An example of such issues is the difficulty that some employees may have with working on their particular Sabbath days; e.g. Christians on Sunday, or Jews and Muslims on Friday/Saturday.

2.20 Employees in this position may also be associated with particular racial groups due to the close relationship that sometimes exists between religion and national origins: for example, the close association of Islam with North Africa, the Middle East, Pakistan, Bangladesh and India.

2.21 Consequently, employees in this situation are at a risk of suffering *indirect religious discrimination or indirect racial discrimination* if you fail, *without objective justification*, to permit them to have flexible working arrangements in relation to these matters.

2.22 If inflexible working practices cannot be *objectively justified* then they will be unlawful. In the event of a complaint, it is for you to establish the objective justification defence. This would have to be done in the same way as discussed previously in relation to the objective justification defence in indirect sex discrimination cases.

2.23 If inflexible practices cannot be objectively justified then they should be abandoned or modified, according to what is appropriate in the circumstances.

Discrimination against Part-Time Employees

2.24 The preceding sections of this publication discussed how some of the anti-discrimination laws may provide some employees with rights to have flexible working arrangements. In contrast, this section discusses how those same laws may protect an employee's enjoyment of flexible working arrangements after he or she has attained them.

2.25 When providing flexible working arrangements, it is also extremely important that you ensure that employees who avail of such arrangements, or who seek to do so, will continue to be treated fairly and without unlawful discrimination when compared to employees who have not availed of those rights. To do otherwise would be to undermine an employer's commitment to promoting equality of opportunity, and is likely to cause unlawful discrimination.

2.26 The law protects part-time employees, or other employees who enjoy flexible-working arrangements, from attempts by employers to treat them less favourably than comparable full-time employees. Less favourable treatment might include paying them lesser hourly rates of pay, denying them access to work-related benefits (e.g. company sick pay schemes), or by applying different access criteria to such benefits (e.g. longer qualifying service), or denying them access to training or other career development opportunities, or by dismissing them.

2.27 The law provides part-time employees with a number of separate legal rights which might protect them from this type of less favourable treatment. These rights might, depending on the particular circumstances of each case, overlap and an employee might be able to rely on more than one in order to gain protection.

Victimisation

2.28 If an employee has relied on any of the anti-discrimination laws in order to gain flexible working arrangements (e.g. by taking legal action, or by threatening to do so), then if you subsequently retaliate against that employee by treating him or her less favourably than other employees that is called *victimisation*. This is a form of discrimination that is prohibited by the anti-discrimination laws.

Indirect discrimination or disability discrimination

2.29 Employees who make use of flexible working arrangements are perhaps more likely to be women, or disabled persons, or persons who have particular religious beliefs (or members of an associated racial group). If you treat such employees less favourably than other employees, even if the action does not amount to victimisation, it might still amount to indirect sex or religious or racial discrimination, or disability discrimination.

Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000

2.30 These regulations are a separate law which prohibit less favourable treatment of part-time workers compared to full-time workers in relation to the terms and conditions of employment unless the different treatment is objectively justified. Complaints may be brought to an industrial tribunal.

2.31 The Department of Employment and Learning has published a guidance book about these regulations (see Appendix 2 for a list of useful publications).

3. Statutory Employment Rights

3.1 In addition to their rights under the anti-discrimination laws, many employees have a number of statutory employment rights which aim to promote their equality of opportunity by assisting them to reconcile the demands of their work and family/social lives. For example, qualifying employees have a *right to request flexible working arrangements; or, a right to take parental leave or time-off for dependants.*[10]

3.2 As indicated before, particularly in Section 1 of this Part, an employee may exercise his or her statutory employment rights separately to or, sometimes, in conjunction with their rights under anti-discrimination law, as there is often an overlap between the two.

3.3 These rights set the minimum level of protection that employees are entitled to receive. You are free to provide your employees with contractual terms and conditions of employment that are more favourable than those provided by statute.

3.4 You should take account of these rights when developing your flexible working policies and procedures, and any training for managers on flexible working procedures should cover them.

3.5 It is not intended to give a fully comprehensive and detailed guide to these rights here, but only to highlight them. The brief summaries set out below do not describe the various qualifying criteria and exceptions that apply. Furthermore, you should note that the qualifying criteria and exceptions and the meanings of some of the relevant concepts are prone to change over time due to legislative amendments or judicial interpretation.

3.6 The best official sources of information about these rights and developments are the Labour Relations Agency, or the Department of Employment and Learning, or the website *NIbusinessinfo.co.uk*. Their contact details are provided in Appendices 2 and 3.

3.7 Further information may also be obtained from a series of publications issued by both of those organisations. See Appendix 2 for a list of these publications.

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[10] Employees may also be entitled to benefit from a raft of other statutory employment rights which give them rights to time-off for non-family related reasons. For example, employees may have rights to time-off to carry out public duties, trade union activities, jury service, study or training or to hunt for other jobs in the event of redundancy. It is recommended that you take account of these rights when developing your own policies and practices; however, it is not intended to discuss these non-family/social related rights in this Guide. Further information about them may be obtained from the Department of Employment and Learning and the Labour Relations Agency (see Appendices 2 and 3 for contact details).

3.8 A list of the relevant rights is set out below. They are grouped into three different categories based on the reasons underlying the particular rights in question-

A. Working hours and time-off for holidays

1. Right to a maximum working week of 48 hours
2. Right to paid holidays
3. Shop workers and Sunday working

B. Time-off to look after children or to care for other persons

1. Right to request flexible working arrangements
2. Parental leave
3. Time-off for dependants

C. Time-off for reasons related to childbirth or adoption

1. Time-off for ante-natal care
2. Maternity leave
3. Adoption leave
4. Paternity leave

A. Working Hours and Time-Off for Holidays

Right to a maximum working week of 48 hours

3.9 The primary law is set out in the *Working Time Regulations (NI) 1998, as amended.* The general rule is that *"a worker's working time, including overtime, in any reference period* [generally 17 weeks] *which is applicable in his case, shall not exceed 48 hours for each seven days".* For *"young workers"* [i.e. aged 16 to 18 years] the limit is 40 hours. Employees may agree to work longer than the 48 hour limit, and there are other exceptions for certain occupations (e.g. emergency services, police and armed forces).

Right to paid holidays

3.10 The primary law is set out in the *Working Time Regulations (NI) 1998, as amended.* The general rule is that employees have a right to receive a minimum paid holiday entitlement of 5.6 weeks per year if they work full-time over a five-day week (i.e. equivalent to 28 days holiday leave per year). Employees who work part-time are entitled to the pro-rata equivalent. Holiday pay is equivalent to the normal rate of pay.

3.11 Holiday entitlement accrues from the date of commencement of employment, but otherwise there is no length-of-service qualification. Bank and public holidays may be counted as part of the entitlement and employers retain ultimate control over when employees may exercise their rights to take holidays.

Shop workers and Sunday working

3.12 The primary law is set out in the *Shops (Sunday Trading & c) (NI) Order 1997*. The general rule is that shop workers have the right not to be dismissed, or to be subjected to any other detriment, for refusing to work on Sundays.

B. Time- Off to Look after Children or to Care for Other Persons

Right to request flexible working arrangements

3.13 The primary law is set out in *Article 112F of the Employment Rights (NI) Order 1996, as amended*, and in associated regulations; namely, the *Flexible Working (Procedural Requirements) Regulations (NI) 2003* and the *Flexible Working (Eligibility, Complaints and Remedies) Regulations (NI) 2003*.

3.14 Qualifying employees[11] are entitled to ask their employer for a change in the terms and conditions of their employment relating to-

- the hours they are required to work,
- the times they are required to work, or
- the place they are required to work.

3.15 The right may only be exercised by a qualifying employee for the purpose of enabling him or her to care for a relevant person (i.e. a child or other dependant)[12].

3.16 The *Article 112F Right* is a procedural right – it requires the employee and employer to follow a prescribed procedure. For example (and without setting out all the details), the request must be made in writing and the employer must meet the employee within 28 days to discuss it and, subsequently, notify the employee of the decision within 14 days.

[11] Qualifying employees must have worked for their employers for a continuous period of 26 weeks prior to making their request.
[12] As from 18th July 2010, a "relevant person" is a child aged 16 years or under, or a disabled child aged 18 years or under, or a dependant adult (e.g. a spouse, or partner or civil partner, or another relative, or another person who lives at the same address).

3.17 If the employer accedes to the request, the effect is that the employee's terms and conditions of employment relating to the hours, times or place of work will be permanently changed.

3.18 The most important requirement of the procedure is that the employer must consider the request and may only refuse it if one or more of the following grounds apply-

- the burden of additional costs;
- detrimental affect 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;

3.19 The right is enforceable by complaining to an industrial tribunal that the employer has failed to comply with the proper procedure; or that he based a decision to refuse the request *"on incorrect facts"*.

3.20 Further guidance about the process of considering requests is given in Section 4 of Part 1 of this Guide.

3.21 The Labour Relations Agency ("LRA") runs an arbitration scheme that provides a voluntary alternative mechanism to the industrial tribunal for the resolution of disputes relating to the *Article 112F Right*. Parties to such a dispute who agree to use the arbitration scheme waive their rights to take their case to an industrial tribunal. The scheme is intended to be faster and cheaper than the tribunal system and is non-legalistic, with no cross examination of parties or witnesses by legal representatives. Employers should contact the *Arbitration Secretary* at the LRA directly for further information.

3.22 The best official source of information about this right is the Department of Employment and Learning's publication: *ER36 – Flexible Working: a guide for employers and employees*.

Parental leave

3.23 The primary law is set out in the *Maternity and Parental Leave etc. Regulations (NI) 1999, as amended.* The general right will permit an

eligible employee to take a set period of unpaid leave from his/her employment in order to care for a child.

3.24 An employee is eligible if he/she has been continuously employed by the employer for not less than 1 year, and has parental responsibility for the child in question.

3.25 The right is only exercisable in respect of children who are under 5 years of age; or under 18 years in the case of disabled children; or in the case of adopted children, within 5 years of their placement.

3.26 The period of entitlement to parental leave is up to 13 weeks in total for each child up to their 5th birthday (or, up to the 5th anniversary of the placement of an adopted child), or up to 18 weeks in total for each disabled child up to their 18th birthday.

3.27 In the case of children who are not disabled, in any one year employees may only take up to 4 weeks parental leave and they must take it in weekly blocks on each occasion, with a minimum of one week at a time. Various combinations of leave-taking are possible. For example, a parent might take his or her total 13 weeks entitlement as follows: 4 weeks in each of the first, second and third years, followed by only 1 week in the fourth year. The parents of disabled children are entitled to greater flexibility and may take more than 4 weeks in a single year – but, they are still subject to their overall 18 weeks total entitlement.

3.28 There are various procedural rules that apply and employers may postpone an employee's period of parental leave in certain circumstances.

3.29 The best official source of information about this right is the Department of Employment and Learning's publication: *ER25 – Parental leave: a guide for employers and employees*.

Time-off for dependants

3.30 The primary law is set out in *Article 85A of the Employment Rights (NI) Order 1996, as amended.* The general right allows employees to take a *reasonable amount of time-off* to deal with certain unexpected or sudden emergencies and to make any necessary longer term arrangements. The law does not specify the amount of time-off that is *reasonable*, as this will vary depending on the circumstances of each incident.

3.31 It is not a right to *paid* time-off, but there is no qualifying length-of-service.

3.32 The right can be exercised in a number of situations, such as to provide assistance when a dependant falls ill, gives birth or is injured; or to deal

with the consequences of a dependant's death; or because of the unexpected disruption or termination of a dependant's care arrangements.

3.33 The best official source of information about this right is the Department of Employment and Learning's publication: *ER24 – Time off for dependants*.

C. Time-Off for Reasons Related to Childbirth or Adoption

Time-off for ante-natal care

3.34 The primary law is set out in *Article 83 of the Employment Rights (NI) Order 1996, as amended.* The right entitles pregnant employees to *paid time-off* to attend ante-natal appointments made on the advice of a registered medical practitioner, registered midwife or registered health visitor.

3.35 The entitlement applies regardless of the employee's length-of-service and should be paid at the normal rate of pay. Ante-natal care may include relaxation and parentcare classes, as well as medical examinations.

3.36 Fathers do not have a corresponding statutory right to paid time-off to accompany their partners to ante-natal appointments.

Maternity leave

3.37 The primary law is set out in *Articles 103 and 105 of the Employment Rights (NI) Order 1996, as amended* and the *Maternity and Parental Leave etc. Regulations (NI) 1999, as amended.*

3.38 Employees are entitled to take 52 weeks statutory maternity leave: 26 weeks of Ordinary Maternity Leave and 26 weeks of Additional Maternity Leave. There is no qualifying length-of-service.

3.39 An employee must take at least 2 weeks maternity leave immediately following the birth of her child, or at least 4 weeks in the case of factory workers (i.e. this is called *"compulsory maternity leave"*).

3.40 Qualifying employees are entitled to receive Statutory Maternity Pay ("SMP") for up to 39 weeks. Employees who do not qualify for SMP may alternatively be entitled to receive Maternity Allowance.

3.41 This short description does not adequately explain the full intricacies of employees' rights in relation to maternity leave and omits important subjects, such as their right to take "Keeping in Touch Days" and their rights on their return to work and the various procedural requirements. Employers should consult the best official source of information about this

right; namely, the Department of Employment and Learning's publication: *ER16 – Maternity rights - a guide for employers and employees.*

Adoption leave

3.42 The primary law is set out in *Articles 107A and 107B of the Employment Rights (NI) Order 1996, as amended* and the *Paternity and Adoption Leave Regulations (NI) 2002, as amended.*

3.43 These rights correspond to the rights that female employees have in relation to maternity leave. For example, qualifying employees are entitled to take 52 weeks statutory adoption leave: 26 weeks of Ordinary Adoption Leave and 26 weeks of Additional Adoption Leave. There are also similar rights to Statutory Adoption Pay, "Keeping in Touch Days" and rights on return to work.

3.44 This short description does not adequately explain the full intricacies of employees' rights in relation to adoption leave. Employers should consult the best official source of information about this right; namely, the Department of Employment and Learning's publication: *ER35 – Adoptive parents - a guide for employers and employees.*

Paternity leave

3.45 The primary law is set out in the *Paternity and Adoption Leave Regulations (NI) 2002, as amended.*

3.46 The general rule is that eligible employees are entitled to take paternity leave for either 1 week, or 2 consecutive weeks.

3.47 The leave period cannot be taken as odd days or as two separate weeks. Employees can take only one period of leave, even if more than one baby is born as a result of the same pregnancy. The leave period does not have to be taken immediately following the child's birth, but it must be completed within 56 days of the date of birth.

3.48 Employees who are taking statutory paternity leave may be entitled to receive Statutory Paternity Pay, or in the alternative, Income Support.

3.49 This short description does not adequately explain the full intricacies of employees' rights in relation to paternity leave. Employers should consult the best official source of information about this right; namely, the Department of Employment and Learning's publication: *ER34 – Rights to paternity leave and pay.*

Appendix 1

Types of Flexible Working Arrangements

1. Some of the most common types of flexible working arrangements that are used in workplaces in Northern Ireland are described below.[13]

2. This is not an exhaustive list. In addition, employers and employees may consider combining one or more of the options as a means of attaining the most satisfactory work/life balance. For example, together you might agree that the employee may work part-time, with flexi-time hours and with some time spent working at home.

Flexi-time working

3. Flexi-time refers to a flexible pattern of working around a compulsory "core" working period which allows employees to vary their start or finish times. For example, employees may be required to work a standard 37 hour week and during a "core" period between 10.00am to 4.00pm. But, they may start work at anytime between 8.00am and 10.00am and finish work at any time between 4.00pm and 6.00pm. A scheme is also likely to make particular arrangements for "balancing" the hours worked in a given period, and for "banking" hours which might then be taken as whole or half days off.

Part-time working

4. A part-time worker is simply an employee who works less than the standard number of hours in the working week. For example, if in a particular workplace the standard working week is 37 hours long, then a part-time worker is any employee whose contract of employment requires them to work less than that, e.g. 30 or 25 or 20 or 15 hours, etc.[14]

Job-sharing

5. Job-sharing is a variation of part-time working where a particular post is split, usually between two post-holders. For example, one post-holder might work mornings, while the other works afternoons; or, the first might work Mondays and Tuesdays, while the other works Wednesdays to Fridays.

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[13] *Report on Flexible Working Patterns: Comparison of Employee and Employer Surveys conducted in 2003 and 2006 [Department of Employment and Learning, 2007]*.

[14] Under the *Fair Employment & Treatment (NI) Order 1998*, and its associated monitoring regulations, registered employers are required to monitor the community background and sex of their employees. For the purposes of this legislation only, a part-time worker is deemed to be a person who works less than 16 hours per week. However, this is a special meaning that relates only to the monitoring duties under the *Fair Employment* legislation. For all other purposes, a part-time worker is simply one who does not work the standard number of hours in the working week.

Working from home

6. Working from home for all or part of the week may be a practicable option in some circumstances. This is sometimes called *teleworking* or *remote working*. It is important for the employer and employee to consider a number of factors before using this method of work, such as health and safety and data protection issues. The Department of Employment and Learning has published a guide to these matters: *Guidance on teleworking*, which may be downloaded from the Department's website.

School term-time working

7. In this form of part-time working the employee only works (full or part-time) during the months when the schools are in term. Consequently, the employee will not work during the school holidays.

Compressed hours

8. In this form of working, the employee might work the standard amount of hours per week (e.g. 37 hours), but does so over 4 days instead of the normal 5 days. Another variation might be a "9 day fortnight". It is important for the employer and employee to consider a number of factors before using this method of work, such as the issue of rest breaks and other compliance with the *Working Time Regulations (NI) 1998*. The Department of Employment and Learning has published a guide to these matters: *Working Time Regulations: a detailed guide*, which may be downloaded from the Department's website.

Annualised hours

9. Under an annualised hours scheme, an annual total of hours is agreed, and these are worked in variable quantities over the year by agreement between the employer and employee. These kinds of schemes are most common in industries that have peaks and troughs of demand.

Appendix 2

Useful Publications

Publications by the Equality Commission

The following publications are available to download, free-of-charge, from the Equality Commission's website: **www.equalityni.org**

- A Unified Guide to Promoting Equal Opportunities in Employment
- Disability Code of Practice – Employment and Occupation

Publications by the Department of Employment and Learning

The following publications are available to download, free-of-charge, from the Department's website: **www.delni.gov.uk**

- ER16: Maternity rights - a guide for employers and employees
- ER24: Time off for dependants
- ER25: Parental leave: a guide for employers and employees
- ER34: Rights to paternity leave and pay
- ER35: Adoptive parents: a guide for employers and employees
- ER36: Flexible working: a guide for employers and employees
- Guidance on teleworking
- Part-time work: the law and best practice
- Working Time Regulations: a detailed guide
- The Shops (Sunday Trading & c.) (NI) Order 1997

Publications by Invest NI

The *NI Business Info* website provided by Invest NI is a free online publication which offers practical guidance on a whole range of matters of interest to businesses, such as employment matters, including flexible working, plus other matters such as tax, the environment, health and safety, grants and many other topics. The website may be found at-

Homepage: **www.nibusinessinfo.co.uk**
Employment page: **www.nibusinessinfo.co.uk/employment**

Publications by the Labour Relations Agency

The following publications are available to download, free-of-charge, from the Agency's website: **www.lra.org.uk**

- Information Note No.3: Holidays and holiday pay
- Information Note No.11: Time off – Rights and responsibilities

Appendix 3

Useful Contacts

Equality Commission for Northern Ireland

Website: www.equalityni.org

Address: Equality House
7 – 9 Shaftesbury Square
Belfast
BT2 7DP

Telephone: 028 90 890 890
Fax: 028 90 331 544
Textphone: 028 90 500 589
Email: information@equalityni.org

Labour Relations Agency

Website: www.lra.org.uk
Email: info@lra.org.uk

LRA Belfast Office:

Address: 2 - 8 Gordon Street
Belfast
BT1 2LG

Tel: 028 9032 1442
Fax: 028 9033 0827

LRA Londonderry Office:

Address: 1 - 3 Guildhall Street
Londonderry
BT48 6BB

Tel: 028 7126 9639
Fax: 028 7126 7729