

The Code of Practice on Remote and Flexible Working: an expert's view

The Code of Practice for Employers and Employees on the Right to Request Remote and Flexible Working was published in March 2024. Employees now have the statutory right to request remote working arrangements and employees who are carers or parents of young children can separately request flexible working arrangements. In this article, Barry Reynolds* outlines the new rules and considers their likely impact.

The new Code gives effect to the relevant provisions of the Work Life Balance and Miscellaneous Provisions Act 2023. It provides guidance on how the relevant rights and obligations under that Act are triggered and fleshes out procedures which must be adhered to.

In summary, it may be of assistance to employees in setting out how to substantiate requests for remote or flexible working. It may assist employers who need to assess whether or not requested arrangements will be suitable and workable.

Many employers have already landed on their preferred working models

However, the Code is unlikely to lead to a seismic change in work practices or to a deluge of claims to the Workplace Relations Commission.

Employers do not have to grant all such requests. They can still make decisions taking account of their business needs. These new employee rights stop well short of guaranteeing new work patterns or remote working arrangements.

The request

Under the Code, employees can make requests for:

- flexible working which is the adjustment of working hours or patterns and could encompass for example part-time work, job-sharing, flexitime or compressed working hours;
- and/or remote working which means working at a place other than the employer's premises.

Employees cannot (under the Code at least) request that the arrangement commence prior to completing 6 months' continuous employment. They must make the request not later than 8 weeks before the proposed commencement of the arrangement.

Requests must be signed and in writing. They must specify the arrangement proposed, its start date and its duration.

If required by the employer, the request must be accompanied by further information. In the case of flexible work, this information may include a child's birth certificate or a medical certificate stating that a named relevant person is in need of significant care or support. In the case of a remote working request the employee must set out the rationale for the request, and its suitability "having regard to the code of practice".

The response

In respect of either remote or flexible work requests, the employer then has four weeks to consider a request and

- approve it and enter in to an agreement with the employee, or
- refuse it with reasons given, or
- extend the time in which to consider it by up to another 8 weeks.

Compromise positions can be explored.

The Code fleshes out some examples of potential reasons to support employees' requests and employers' responses, such as suitability of workstations and the impact of remote work on efficiency. These are suggestions really and not a checklist. They will of course not apply to every case.

Variation of arrangements

Once "approved remote/flexible working arrangements have been agreed", they are not set in stone. They can be postponed or varied for reasons such as having a "substantial adverse effect" on business or because the arrangement is being abused. Again, time limits apply in such scenarios.

The employee will usually have to be given seven days in which to make representations on retaining their arrangement.

POLICIES ON WORKING ARRANGEMENTS

Many employers will now wonder if they need to put in place a tailored policy. The Code itself suggests that "A policy should best reflect the workplace and be proportionate to the size and resources of the organisation".

The reality is that many employers have already landed on their preferred working models with many, offices in particular, facilitating, or even requiring, hybrid work. While some pushback on remote working is being referenced in the media, remote work is commonly facilitated because it works well in the interests of both parties.

In many such businesses, requests for remote work will still be made informally and largely outside of the new procedures. They won't be in writing, nor will they have regard to the Code as it will not be necessary to invoke it.

However, these employers should ensure that whatever written policies they currently have in place are not inconsistent with the Code. It is not strictly speaking mandatory to have an internal policy.

Some employers will prefer not to put in place a lengthy new policy. They may prefer to ensure that employee and management expectations are set and managed in accordance with existing culture.

Others will wish to put in place detailed policies to help avoid inadvertent breaches and to help manage expectations from among the employee population.

It is possible that the Code will be invoked more for flexible working requests than for remote work requests. But given its limitations, further set out below, it may not necessarily result in more of those requests being granted.

RISK OF CLAIMS

Where requests for remote work or flexible work patterns have been made under the Code, employers who reject those requests may face statutory complaints. However, neither the Act nor the Code confer on employees a statutory right to work remotely or flexibly.

There is a right to make a request and to challenge the speed and manner of the employer's responses. But challenges brought to the Workplace Relations Commission will not be concerned with assessing the merits of a refusal. They will be confined to lack of adherence to the applicable timelines and procedures.

To minimise the risk of such complaints, when employers receive requests for a change to their working arrangements (and the request is made under the Code), the employer should ensure that it is conscious of the relevant timeframes and should prepare a considered response, taking in to account the contents of the Code.

The various steps and timelines set out in the Code are key because it is the failure to observe those steps that can lead to claims. Employers risk being ordered to comply with the Act and could face awards of up to 4 weeks' pay in respect of remote working requests and 20 weeks' pay in respect of flexible working requests.

The emphasis is however on internal procedures, firstly those set out in the Code itself and then, where disagreement ensues, the employer's own existing grievance procedures. Generally speaking, only once these procedures have been exhausted will complaints proceed to the WRC.

PROTECTED GROUNDS

The Code forms part of a trend which started with the widespread (and necessary) adoption of remote working models several years ago. It can also be seen as following on from the so called 'right to disconnect' which itself was the focus of a Code in 2021. Unlike the 2021 Code, employees have newly conferred, albeit limited, rights under the 2024 Code.

Leaving the Code aside, it is in any event vital that employers look at the substance of requests for remote or flexible work and the reasons given by employees. This is less about the Code and more about the general obligation to treat staff fairly and not in a discriminatory manner.

In some cases there will be pre-existing legal risks in refusing remote or flexible work requests. The refusal and manner of dealing with the request could constitute discriminatory treatment.

For instance, a request to work partially from home could be a form of reasonable accommodation under the Employment Equality Acts in respect of a disability. It may otherwise form part of an effort by an employee to remove obstacles to them fully performing their role.

There are many instances in which, independently of the Code, employers should consider requests for reduced hours, job sharing etc. reasonably, to include, for example, staff who returning from maternity leave.

REFLECT PRACTICE

It is worthy of comment that the requirement to have six months' service prior to an arrangement under the Code taking effect is now in sharp contrast with the revised UK position.

There, the right to request flexible working has recently become a day one right. Removing the service requirement in Ireland would in some cases also be more reflective of how hybrid and other flexible arrangements are often agreed at the hiring stage.

The Code seeks to strike a balance. This is encapsulated by its acknowledgement that "not all workplaces will be conducive to remote working". In essence, working arrangements must make sense for both parties. While there may well be claims against employers who do not follow the applicable procedures, employers will still be able to refuse requests.

The broader context is that employers must treat the Code as being only part of the question. There will be many instances where employers are obliged to consider accommodating or facilitating staff requests to vary working arrangements, not because of the Code, but by reason of potentially having protected characteristics or otherwise where it would be reasonable to give consideration to those requests.

While employees have newly conferred rights under the Act and the Code, their provisions are unlikely to result in significant change.

*** *Barry Reynolds is Partner at employment law firm GQ| Littler.***