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The United Kingdom Flexible Working Act

Georgetown Federal Legislation Clinic

Prepared on behalf of Workplace Flexibility 2010 by the Georgetown Federal Legislation Clinic (Heather Sawyer, Assistant Director).

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The United Kingdom Flexible Working Act Spring 2006

In 2002, the United Kingdom passed new legislation granting employees with young or disabled children the right to request flexible work arrangements from their employers. The law does not guarantee a right to flexible working but seeks to increase flexibility in UK workplaces by requiring a process for negotiation between employees and employers. Stated simply, that process places the initial responsibility on the employee to propose a new work arrangement and explain its potential impact on the employer. The employee and employer must then consider the request together, and the employer may refuse the request only for certain business reasons.

Described as a "light-touch legislative duty" to consider requests,¹ the flexible working law is one part of the Government's broader effort to promote innovative and competitive business practices along with the fair treatment of employees.² Heralded by the Government as "a process that will foster dialogue in the workplace and provide a real chance to expand flexible working opportunities,"³ the flexible working law follows recommendations of the Work and Parents Taskforce convened by the Government following publication of its December 2000 GREEN PAPER ON WORK AND PARENTS: COMPETITIVENESS AND CHOICE.⁴

Among other things, the Green Paper explored whether the Government should enact legislation granting working parents the right to flexible working or leave this issue to best business practice. After reviewing public comment, the Government decided that legislation was needed to "build on good practice, be light touch and recognize the needs of small businesses."⁵ The Government convened the Taskforce to develop legislation that fit this prescription. Section I of this paper reviews the substantive and procedural requirements of the law that came out of this process. Section II reviews post-implementation research regarding flexible working requests in the United Kingdom.

I. Legislating the Right to Request and Duty to Consider: The Flexible Working Act and Related Statutory Instruments

Parliament created the right to request and the duty to consider flexible working arrangements through the Employment Act of 2002, which amended the Employment Rights Act 1996 (c. 18) by adding Part VIIIA: Flexible Working (the "Flexible Working Act")⁶ The Flexible Working Act includes the following four sections setting out the general substantive and procedural requirements for flexible working:⁷

- 80F – Statutory right to request contract variation;
- 80G – Employer's duties in relation to application under section 80F;
- 80H – Complaints to employment tribunals; and
- 80I – Remedies.

Within each section, Parliament authorized the Secretary of State to promulgate regulations — termed “statutory instruments” — for implementing and amending the general rights and duties set out in the Flexible Working Act. To be valid, statutory instruments regarding sections 80F, 80H, and 80I must be placed before Parliament but do not require affirmative approval.⁸ Statutory instruments regarding section 80G — employer’s duties — are effective only if a draft of the proposed regulation is placed before Parliament and approved by a resolution of each House.⁹ Validly enacted statutory instruments have the same legal force as the Act of Parliament under which they are enacted.¹⁰

The Flexible Working Act was brought into legal force on April 6, 2003.¹¹ To date, the Secretary of State has promulgated two statutory instruments: The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, invoking the Secretary’s authority under sections 80F, 80H, and 80I;¹² and The Flexible Working (Procedural Requirements) Regulations 2002, invoking the Secretary’s authority under Section 80G.¹³

Taken together, the Flexible Working Act and related statutory instruments set out the procedural and substantive requirements for flexible working in the United Kingdom today.

A. Employees’ Right to Request Flexible Working: Eligibility Criteria and Application Requirements

In general, the right to request a flexible work arrangement allows certain working parents to request a change to their usual work pattern. An eligible employee bears initial responsibility for initiating a request in writing, setting out the proposed new work pattern and explaining its potential impact on the employer. The specific eligibility criteria, permissible contract variation requests, and application requirements are set out below.

1. ELIGIBILITY CRITERIA

An employee with a child under age six, or under eighteen if the child is disabled,¹⁴ is eligible to make a request if he or she —

- i) has been continuously employed for at least twenty-six weeks;¹⁵
- ii) is —
 - (1) the mother, father, adopter, guardian or foster parent of the child; or
 - (2) married to or the partner of the child’s mother, father, adopter, guardian or foster parent;¹⁶
- iii) has responsibility for the child’s upbringing and is making the request to allow him or her to care for the child¹⁷; and
- iv) has not made another request within the past 12 months.¹⁸

Relatives (including grandparents, great grandparents, sisters, brothers, aunts or uncles) who may bear significant responsibility for the care and upbringing of a child apparently are not eligible to request flexible working patterns unless they are the adopter, guardian or foster parent of a child.¹⁹ The Flexible Working Act also excludes workers supplied by an agent under a work contract or other agreement (i.e., “agency workers”).²⁰

2. SCOPE OF FLEXIBLE WORK REQUESTS

The Flexible Working Act allows eligible employees to request to:

- change the number of hours they work;
- change the times when they are required to work; or
- work from home.²¹

The Secretary of State also may specify other terms and conditions that an employee may request to change,²² but has not yet done so.

3. APPLICATION REQUIREMENTS

Employee requests must be made in writing, specifying the requested change and proposed effective date, and explaining the employee's relationship to the child under his or her care.²³ The written request must explain what effect, if any, the employee thinks the change might have on his or her employer and how any such effect might be handled.²⁴ This places on the employee the initial responsibility for considering and explaining how the requested change might impact the employer.

The request for working flexibility must be made at least fourteen days prior to the child's sixth birthday, or eighteenth birthday if that child is disabled.²⁵ The Secretary of State may modify the maximum age of non-disabled children,²⁶ which would allow applications by parents of children over age six. The Secretary has not yet done so.

B. Employers' Duty to Consider Flexible Working Requests

The Flexible Working Act directs the Secretary of State to promulgate regulations governing the employer's procedural duties regarding flexibility requests and lists permissible grounds for denying such a request.²⁷ The Act frames the duty to consider a request as an affirmative obligation on the part of the employer — providing that the employer "*shall* only refuse the application" if he considers that one or more specified business justifications exist. The enumerated business justifications are:

1. the burden of additional costs
2. detrimental effect on ability to meet customer demand
3. inability to reorganize work among existing staff
4. inability to recruit additional staff
5. detrimental impact on quality
6. detrimental impact on performance
7. insufficiency of work during the periods the employee proposes to work
8. planned structural changes; and
9. other grounds specified by the Secretary of State.²⁸

To date, the Secretary of State has not provided additional business reasons for refusing flexible working

requests but has promulgated regulations regarding the application process and consideration of requests, as explained below.

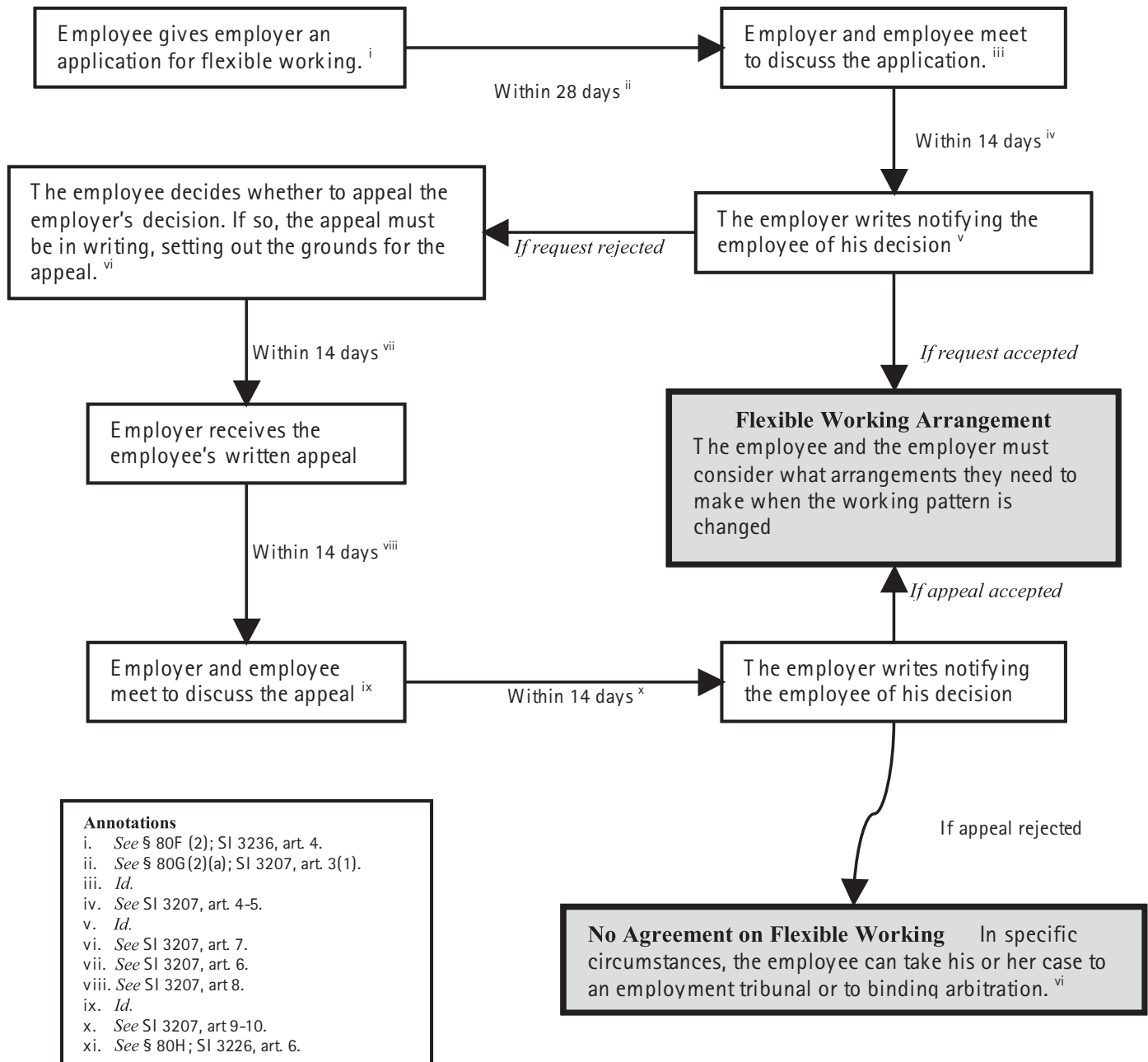
C. Mandatory Negotiation between Employee and Employer

The Flexible Working Act and statutory instruments mandate the following procedure for considering and resolving flexible working requests between an employee and employer:

- *Written application to employer:* Employees initiate a request by submitting a written request to the employer detailing the requested work flexibility, the potential impact on the employer, and citing the Working Flexibility Regulations.²⁹
- *Meeting to discuss application:* The employer must meet with the employee to discuss the application within 28 days.³⁰
 - *Employee's right to be accompanied:* The statute gives the employee the right to be accompanied at meetings by a fellow employee.³¹
- *Employer response to application following meeting:* The employer must respond to the employee's request in writing, specifying either acceptance of the flexible working proposal or the grounds for denial of the proposal within fourteen days of the meeting.³²
- *Employee appeal to employer:* An employee may appeal the employer's decision within fourteen days of receiving the employer's decision.³³ Such an appeal must be in writing, dated, and discuss the grounds of the appeal.³⁴
- *Meeting in response to appeal:* Unless the employer agrees to the employee's request for working flexibly within fourteen days of receiving the notice of appeal, the employer must meet with the employee to discuss the appeal.³⁵ Fourteen days after the post-appeal meeting, the employer must give its decision regarding the appeal, again explaining its grounds.³⁶

Throughout this process, communication between the employee and the employer (except the face-to-face meetings) must be in writing and dated.³⁷ Meetings are required to be at convenient times and places for both the employer and the employee (and also anyone accompanying the employee).³⁸ Procedural deadline requirements may be extended, in writing, by mutual agreement.³⁹ If the employee withdraws his or her application or comes to an understanding with the employer, the employee may not further appeal to the employer or an employment tribunal.⁴⁰ See Section I.D, below, regarding tribunal or arbitration appeal. The following flow chart illustrates this procedure.

Working Flexibility Procedural Requirements Flowchart⁴¹



D. Limited Appeal to an Employment Tribunal or ACAS Arbitration

The Flexible Working Act and statutory instruments provide a limited right of appeal where the employee and employer are unable to reach agreement through the mandatory negotiation process. Employees may not file a complaint if they simply disagree with the decision reached by an employer.⁴² Rather, a complaint may be taken to an employment tribunal or to arbitration with the Advisory, Conciliation and Arbitration Service ("ACAS")⁴³ only where:

- the employer has failed to follow **proper procedures** for considering an employee's request;⁴⁴ or
- the employer's decision to refuse the flexible working request was based on **incorrect facts**.⁴⁵

The Flexible Working Act authorizes the Secretary of State to specify the procedural violations that entitle an employee to file a complaint.⁴⁶ The Secretary has issued regulations permitting employees to file complaints where the employer fails to hold required meetings or to notify an employee of its decision.⁴⁷ While the Flexible Working Act does not explicitly permit employees to file complaints for an employer's failure to allow the employee to be accompanied by another employee at meetings with the employer, the Secretary has since authorized such complaints.⁴⁸

A complaint must be made within three months of the employer's denial of the employee's request, unless the employment tribunal determines this would not have been reasonably practicable.⁴⁹ A complaint may not be made if the application for flexible working has been withdrawn or disposed of by an agreement between the employee and employer.⁵⁰ For well-founded complaints, a tribunal or arbitrator may order an employer to: (1) reconsider the application following the proper procedure; and/or (2) compensate the employee.⁵¹ The Secretary has determined that the maximum compensation that may be awarded is 8 weeks' pay,⁵² with compensation for an employer's violation of an employee's right to be accompanied at meetings further limited to 2 weeks' pay.⁵³ While tribunals may order reconsideration under proper procedures, they are not permitted to overturn the employer's business judgment by ordering the employer to grant a flexible working request.⁵⁴

Employment Tribunals are governed by the Industrial Tribunals Act 1996⁵⁵ and provide public hearings before a three-person panel composed of a legally qualified chairperson, a representative of employer interests, and a representative of employee interests. Parties may or may not be represented by counsel and, though less formal than ordinary courts, the tribunal process can be time-consuming and costly.⁵⁶ Further appeal from a tribunal to an Employment Appeals Tribunal (EAT) is permitted only for errors of law.⁵⁷

Employees and employers also may agree to take their flexible work complaint to arbitration through ACAS.⁵⁸ Arbitration is intended to provide a "confidential, informal, relatively fast and non-legalistic" resolution of flexible work disputes.⁵⁹

Since implementation of the flexible working law, slightly over 400 Employment Tribunal complaints have been filed by employees regarding a denied flexible working request. These complaints constitute less than half of one percent (0.5%) of all Employment Tribunal claims during this time period. Less than 1% of all United Kingdom employers who rejected a request have had a complaint filed against them.⁶⁰

II. A Brief Review of the Post-Implementation Period

The most comprehensive repository of information regarding implementation of the UK law comes from a nationally representative employee survey conducted by the UK Department of Trade and Industry (DTI), which recently completed its second round of inquiry.⁶¹ There have also been assessments made by labor, industry and other non-governmental groups.⁶² The DTI survey, together with these other assessments, provide important insight into the utilization of, rationales for, and outcomes associated with the right to request flexible work.

Before discussing the preliminary findings of these sources, however, it is important to note some of their significant limitations. First, the DTI survey includes both those employees who are eligible to make requests under the law and those who are not. Since the data is often not disaggregated for these two groups, it is difficult to draw precise conclusions about the scope of the Flexible Working Act's impact. Second, the public and private surveys often do not contain comparable data, making it challenging to reconcile conflicting findings. Third, and finally, pre-legislation efforts to voluntarily promote flexibility shifted the baseline of industry practice and, as a result, make it hard to differentiate the added effect of the statutory requirements.

Despite these limitations, there are important early indicators of the nature of utilization of the UK law and of the barriers that persist. Unless otherwise noted, all data presented here is taken from the Second Flexible Working Survey of the Department of Trade and Industry (DTI).

Between April 2003 and January 2005, 14% of workers nationally submitted requests for flexible work arrangements, and most of those requests were granted. Among those requesting flexible work arrangements, 22% were employees who were eligible under the law because they had children under the age of 6. Requests for flexible work arrangements varied by gender, with women more likely to file requests whether or not they had children under six. Part-time options and alternative schedules were the most common flexible work arrangements requested by workers.

Child care needs constituted the largest single reason employees requested flexible work arrangements with 35% of those surveyed, regardless of eligibility status, reporting this need to DTI. Among those with children under 6, 72% requested flexibility for child care reasons. For ineligible workers with older children, child care continued to be a primary reason many sought flexibility, with 57% of requesters with children between the ages of 6-11 and 40% of those with children 12-16 citing this concern. Across the overall working population, other reasons for requesting flexibility included the desire to participate in professional development activities, to have more free time or more time with family, to make life easier, and to address health care needs.

A majority of employee requests have been either fully or partially granted (81%). Women, employees with dependent children, and employees who worked less than 40 hours a week were more likely to have their flexible work requests fully granted.⁶³ Most employees reported being satisfied with the outcomes of their requests: in 2005, 80% of all employees who made a request said they were satisfied or very satisfied with their working agreement.⁶⁴ However, 66% of surveyed employees who had changed their working pattern reported some negative consequences as a result, with the most reported negative consequence being a reduction in pay (22%).

Eleven percent of all employees who requested flexible work arrangements between April 2003 and January

2005 had their requests denied. This is a reduction from the 20% of employees whose flexibility requests were denied prior to the passage of the law.⁶⁵ Most denials (85%) were made without a stated reason. For the 15% of denials where reasons were given, the inability to meet customer demand or to reorganize work with existing staff, as well as excess costs to the business, predominated.

Between April 2003 and August 2005, of employees whose requests for flexibility had been denied, 420 employees filed claims with the Employment Tribunal.⁶⁶ Four out of ten claims included a complaint of unfair dismissal.⁶⁷ Women were more likely than men to win their tribunal cases. Some analysts attribute this in part to the fact that 64% of women's claims regarding flexibility denials also include an assertion of indirect sex discrimination.⁶⁸

Barriers to making flexible work a widespread practice persist, particularly because of significant eligibility limitations. The existing DTI data documents a substantial desire for flexibility among workers not currently eligible under the law, particularly, though not solely, among those with dependent children over the age of six. The planned 2007 expansion extends only to workers facing dependent elder care needs.⁶⁹ Inequitable access presents a problem to business also. A 2005 survey of employers found that 57% of those businesses reporting difficulty implementing the new regulations attributed at least some of their challenges to resentment from workers who were ineligible to request flexible work arrangements.⁷⁰

Eligibility limitations are not the only constraining factor in expanding flexibility. Some analysts have suggested that employees will request flexible work arrangements only if they are reasonably sure of a positive response.⁷¹ In addition, the financial cost to employees of certain flexible arrangements may be prohibitive. According to a major labor organization, 45% of UK employees would prefer to work fewer hours, but the majority of them could not do so if the change involved less pay.⁷² Lastly, many employees are not aware of the new statute; in 2005, 35% of employees did not know they had the right to request flexible work arrangements.

Although data on how the legislation has affected business is quite sparse, preliminary research indicates that the annual growth in requests for flexibility has been slow. An early post-implementation survey conducted by a human resources development organization showed that while 65% of responding employers had received flexible work requests, most had received only five or fewer requests. In the same survey, 72% of organizations saw no increase in the number of flexible working requests in comparison to recent prior years.

Few negative and some positive business consequences of the legislation have been identified by the Chartered Institute of Personnel and Development ("Chartered Institute"), an organization focused on human resources development. Their employer survey participants reported, among other things, that the institutional impact of the legislation had been negligible and few settings have faced significant problems complying with the new requirements.⁷³ Human resource managers and other employer representatives reported positive effects on the workplace, including perceived improvements in employee recruitment, morale, motivation, and retention; some also reported reduced absences and some reduction in costs.⁷⁴

Chartered Institute also identified "operational pressures" that were the most commonly reported implementation challenges faced by their business partners. These included: customer service requirements (73%); line managers' ability to effectively manage flexible workers (68%); line manager attitudes (67%); and existing

organizational culture (58%).⁷⁵ Additionally, 50% of the survey participants reported being concerned that if they said yes to one request, they would have to say yes to many more.⁷⁶

Some industry-based reports have been more negative. Research conducted by the Confederation of British Industry found in a September, 2005 survey that 26% of 420 senior executives surveyed reported that the right to request flexibility was having a negative impact on their business; this was an increase from 11% in 2004. They reported spending an increasing amount of time dealing with compliance-related administration, with almost 60% saying that valuable senior management time was being diverted to dealing with the impact.⁷⁷

The overall impact of this legislation on the organization of work and family in the UK remains unclear. There has yet to be a significant expansion of the number of full time employees who work a flexible schedule. According to a 2005 labor organization's analysis of the government data, 23% of full time employees in the UK had working time flexibility. They report that this represents less than a 1% increase since implementation of the law in 2003.⁷⁸ The uptake is slow in spite of the fact that most businesses are not reporting serious negative consequences and most workers who have made requests have had such requests granted.

A recent assessment of the law raises several overarching concerns.⁷⁹ The report's authors suggest that the right to request may reinforce gender inequalities through the emphasis on care-giving responsibilities. While women have been more likely than men to have their requests accepted, they also continue to face demotions in pay and position when they move to part-time work, reinforcing a "mommy track" in occupational career ladders. The report's authors also believe that the potentially positive impact of the law is blunted by the continued prevalence of long working hours in the UK. Finally, the authors argue that because the right to request is conditional, rather than substantive, employees have little ground on which to stand if they challenge an employer's decision. In effect, this limits the potential of the right to request to contribute to the modernization of working practices.

ENDNOTES

- ¹ Sir George Bain, *Forward to WORK AND PARENTS TASKFORCE, ABOUT TIME: FLEXIBLE WORKING*, 2001, at iv, iv, available at http://www.dti.gov.uk/er/individual/flexworking_report.pdf.
- ² Tony Blair, *Forward to DEPARTMENT OF TRADE AND INDUSTRY, COMMISSION WHITE PAPER ON FAIRNESS AT WORK*, 1998, Cm. 3968, available at <http://www.dti.gov.uk/er/fairness/fore.htm>; DEPARTMENT OF TRADE AND INDUSTRY, COMMISSION WHITE PAPER ON FAIRNESS AT WORK, 1998, Cm. 3968, at ch. 1 (setting out framework for voluntary and regulatory initiatives), available at <http://www.dti.gov.uk/er/fairness/part1.htm>; see generally, DEPARTMENT OF TRADE AND INDUSTRY, COMMISSION WHITE PAPER ON FAIRNESS AT WORK, 1998, Cm. 3968, available at <http://www.dti.gov.uk/er/fairness/index.htm>.
- ³ DEPARTMENT OF TRADE AND INDUSTRY, GOVERNMENT RESPONSE TO THE RECOMMENDATION FROM THE WORK AND PARENTS TASKFORCE 2 (2001), available at <http://www.dti.gov.uk/er/wptresponse.pdf> (hereinafter GOVERNMENT RESPONSE TO TASKFORCE).
- ⁴ DEPARTMENT OF TRADE AND INDUSTRY, WORK AND PARENTS: COMPETITIVENESS AND CHOICE, A GREEN PAPER, 2000, Cm. 5005, available at http://www2.dti.gov.uk/er/g_paper/pdfs/wpgreen.pdf.
- ⁵ GOVERNMENT RESPONSE TO TASKFORCE, *supra* note 3, at 2.
- ⁶ Employment Act, 2002, c. 22, § 47(1-2) (U.K.), available at <http://www.opsi.gov.uk/acts/acts2002/20022-f.htm#47>. The Employment Act 2002 also contained provisions related to maternity, paternity, and adoption leave and pay, employment disputes and tribunals, and other employment law issues.
- ⁷ The Flexible Working Act further amended the Employment Act of 1996 to protect employees from detriment or unfair dismissal as a result of exercising a right to request flexible working. See Employment Act, 2002, c. 22, § 47(3) (U.K.), available at <http://www.opsi.gov.uk/acts/acts2002/20022-f.htm#47>.
- ⁸ Employment Act, 2002, c. 22, § 51 (U.K.), available at <http://www.opsi.gov.uk/acts/acts2002/20022-f.htm#51>. Acts of Parliament may grant government ministers wide-ranging power to implement and/or amend legislation through statutory instruments. The enabling Act may require positive approval by either or both Houses of Parliament or may require only that the proposed regulation be placed before Parliament. See Slapper & Kelly, *The English Legal System*, at 74 (7th ed. 2004). Regulations placed before Parliament automatically become law after 40 days unless Parliament acts to annul them. *Id.*
- ⁹ See Employment Act, 2002, c. 22, sched. 7, ¶ 49 (amending Section 236(3) (procedure for making orders and regulations) of the Employment Act of 1996), available at <http://www.opsi.gov.uk/acts/acts2002/20022-p.htm#sch7>.
- ¹⁰ Slapper & Kelly, *THE ENGLISH LEGAL SYSTEM*, at 71 (7th ed. 2004).
- ¹¹ The Employment Act 2002 (Commencement No. 3 and Transitional and Saving Provisions) Order 2002, 2002, S.I. 2002/2866, sched. I, pt. III (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20022866.htm>.
- ¹² The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, Statutory Instrument (S.I.) 2002/3236 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm>. Because these regulations did not invoke the Secretary's authority under Section 80G (employer's duties), the statutory instrument was laid before Parliament and become effective without additional approval.
- ¹³ The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>. Because these regulations invoked the Secretary's authority under Section 80G (employer's duties), the regulations contained in this statutory instrument required parliamentary approval. The regulations were approved by resolution of each House of Parliament and took effect on April 6, 2003.
- ¹⁴ See Employment Act, 2002, c. 22, § 80F(3) (U.K.).
- ¹⁵ The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, S.I. 2002/3236, art. 3, ¶ (1)(a) (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm>. See also Employment Act, 2002, c. 22, § 80F(8)(i) (U.K.) (delegating definition of "qualified employees" to the Secretary of State with respect to duration of employment).

- ¹⁶ See Employment Act, 2002, c. 22, § 80F(1)(b) (U.K.); The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, S.I. 2002/3236, art. 1-3 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm> ("partner" includes different or same sex partners of a child's mother, father, adopter, guardian or foster parent).
- ¹⁷ See Employment Act, 2002, c. 22, § 80F(1)(b) (U.K.); The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, S.I. 2002/3236, art. 3, ¶ c (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm>.
- ¹⁸ See Employment Act, 2002, c. 22, § 80F(4) (U.K.).
- ¹⁹ See S.I. 3236, art. 2, ¶ 1 (defining "partner" to exclude relatives).
- ²⁰ See Employment Act, 2002, c. 22, § 80F(a)(ii), (b) (U.K.) (excluding and defining agency workers).
- ²¹ See *id.* at § 80F(1)(1)(i)-(iii).
- ²² See *id.* at § 80F (1)(iv).
- ²³ See *id.* at § 80F (2).
- ²⁴ See *id.* at § 80F(2)(c).
- ²⁵ See *id.* at § 80F (3). Subsection (7) of this title defines a 'disabled child' as one entitled to a disability living allowance under the Social Security Contributions and Benefits Act of 1992, § 71.
- ²⁶ See Employment Act, 2002, c. 22, § 80F(6) (U.K.) ("The Secretary of State may by order substitute a different age for the first of the ages specified in subsection (3).").
- ²⁷ See *id.* at § 80G(1)-(4).
- ²⁸ *Id.* at § 80G(1)(b)(i-viii).
- ²⁹ *Id.* at § 80F(2); SI 3236, art. 4.
- ³⁰ Employment Act, 2002, c. 22, § 80G(2)(a) (U.K.); The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 3(1) (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ³¹ Employment Act, 2002, c. 22, § 80G(2)(a)(k-l) (U.K.); The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 14 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>. The employees who request flexible work and those employees who accompany them in the meetings are protected from employer-caused detriment that might result when they exercise or seek to exercise their rights under this regulation. *Id.* at art. 16.
- ³² The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 4-5 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>. See also *id.* at art. 3(2-3) (waiving meeting requirement if employer agrees to variation).
- ³³ Employment Act, 2002, c. 22, § 80G(2)(d), (e) (U.K.) (employee may appeal if "dissatisfied with the employer's decision"); The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 6 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ³⁴ The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 7 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ³⁵ *Id.* at art. 8.
- ³⁶ *Id.* at art. 9-10.
- ³⁷ See, e.g., *id.* at art. 5.
- ³⁸ *Id.* at art. 11. The accompanying individual's convenience is covered by § 80G(2)(l) of the Employment Act of 2002 and by the 2002 regulation S.I. 3207, art. 14(5).
- ³⁹ The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 12 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ⁴⁰ Employment Act, 2002, c. 22, § 80H(2) (U.K.).
- ⁴¹ This flowchart is adapted from DEPARTMENT OF TRADE AND INDUSTRY, FLEXIBLE WORKING: THE RIGHT TO REQUEST AND THE DUTY TO CONSIDER, A GUIDE FOR EMPLOYERS AND EMPLOYEES, 2003, available at <http://www.dti.gov.uk/er/individual/flexwork-pl520.pdf>.

- ⁴² DEPARTMENT OF TRADE AND INDUSTRY, FLEXIBLE WORKING: THE RIGHT TO REQUEST AND THE DUTY TO CONSIDER, A GUIDE FOR EMPLOYERS AND EMPLOYEES, 2003, at 34 ("An employee has no right to make a complaint where they (sic) simply disagree with the business grounds provided by the employer for declining a request, and neither has the employment tribunal/ACAS binding arbitration powers to question the employer's business reasons."), available at <http://www.dti.gov.uk/er/individual/flexwork-pl520.pdf>
- ⁴³ Employment Act, 2002, c. 22, § 80H (U.K.) (allowing for complaints to employment tribunals); The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004, 2004, S.I. 2004/2333 (U.K.), available at <http://www.opsi.gov.uk/si/si2004/20042333.htm>. Arbitration requires the voluntary agreement of both parties. See *id.* at art. 7, ¶ 26(i).
- ⁴⁴ Employment Act, 2002, c. 22, § 80H(1)(a), (3)(b) (U.K.) (allowing for employee appeal to an employment tribunal for breach of regulations specified by the Secretary of State through regulations).
- ⁴⁵ *Id.* at § 80H(1)(b).
- ⁴⁶ *Id.* at § 80H(1)(a), (3)(b).
- ⁴⁷ The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, S.I. 2002/3236, art. 6 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm> (allowing complaint for employer's failure to follow procedures set out in 2002 regulation S.I. 2002/3207, articles 3(1), 4, 8(1), and 9, provisions regarding the duty to hold meetings and notify employees of decisions).
- ⁴⁸ See Employment Act, 2002, c. 22, § 80H(4) (U.K.) (prohibiting complaints for employer violation of employee right to be accompanied at meetings); The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 15(1) (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ⁴⁹ Employment Act, 2002, c. 22, § 80H(5) (U.K.).
- ⁵⁰ *Id.* at § 80H(3).
- ⁵¹ *Id.* at § 80I(1), (3) (tribunals or arbitrators may order employers to reconsider an application or to compensate an employee, with the maximum amount of compensation set by the Secretary).
- ⁵² The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, 2002, S.I. 2002/3236, art. 7 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023236.htm> (setting maximum compensation at 8 weeks' pay, with cross-references to provisions for calculating this amount).
- ⁵³ The Flexible Working (Procedural Requirements) Regulations 2002, 2002, S.I. 2002/3207, art. 15(3) (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023207.htm>.
- ⁵⁴ See *supra* n. 42.
- ⁵⁵ Industrial Tribunals Act 1996, 1996, c. 17, (U.K.), available at <http://www.opsi.gov.uk/acts/acts1996/1996017.htm>.
- ⁵⁶ See Slapper, *supra* n. 10, at 358-59.
- ⁵⁷ See *id.*
- ⁵⁸ The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004, 2004, S.I. 2004/2333 (U.K.), available at <http://www.opsi.gov.uk/si/si2004/20042333.htm>.
- ⁵⁹ Explanatory Memorandum to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 No. 2333, 2004, Stat. R. & O. 2004/2333, available at http://www.opsi.gov.uk/si/em2004/uksiem_20042333_en.pdf.
- ⁶⁰ ARIANE HEGEWISCH, THE CENTER FOR WORKLIFE LAW, ISSUE BRIEF: EMPLOYERS AND EUROPEAN FLEXIBLE WORKING RIGHTS: WHEN THE FLOODGATES WERE OPENED, 3 (Fall 2005), http://www.uchastings.edu/site_files/WLL/european_issue_brief_printversion.pdf.
- ⁶¹ Holt, H., and Grainger, H. (2005). *Results of the Second Flexible Working Employee Survey*. London, UK: Department of Trade and Industry. Retrieved on December 20, 2005, from <http://www.dti.gov.uk/er/emar/errs39.pdf>. The sample of 3,222 employees was generated through random digit dialing and was weighted to be representative of all adults in Great Britain aged 16 or over. The estimates produced are averages of three weekends of data collection.

- ⁶² See, e.g., Chartered Institute of Personnel and Development. (2005). *Flexible Working: Impact and Implementation*. London, UK: Author; Chartered Institute of Personnel and Development. (2003). *A Parent's Right to Ask: A Review of Flexible Working Arrangements*. London, UK: Author; Chartered Institute of Personnel and Development. (2005). *Employment and the Law: Burden or Benefit?* London, UK: Author; Confederation of British Industry. (2005). "News Release: Firms Make Family Friendly Policies A Reality — But New Employment Legislation Having a Negative Impact on Business." ; Fagan, C., Hegewisch, A., and Pillinger, J. (2006). *Out of Time: Why Britain Needs a New Approach to Working-Time Flexibility*. London, UK: Trades Union Congress; Hegewisch, A. (2005). *Issue Brief: Employers and European Flexible Working Rights*. San Francisco, CA: UC Hastings College of the Law, Center for WorkLife Law; Trades Union Congress. (2005). *Challenging Times: Flexibility and Flexible Working in the UK*.
- ⁶³ 72% of employees who worked less than 40 hours per week had their requests accepted, compared with 58% of those who worked 40 hours a week or more; 73% of women who had submitted a request had their request fully accepted, compared with 63% of men; and 73% of employees with dependent children had their requests fully accepted, compared with 63% of those without dependent children.
- ⁶⁴ 37% of employees reported that they were able to spend more time with their family, 25% reported having more free time, and 12% reported that they did not suffer from as much stress.
- ⁶⁵ Palmer, Tom. (2004). *Results of the First Flexible Working Employee Survey*. London, UK: Department of Trade and Industry, p. 10, footnote 5. Retrieved on March 15, 2006, from http://www.dti.gov.uk/er/emar/flex_survey_results.pdf.
- ⁶⁶ Hegewisch, A. (2005). *Issue Brief: Employers and European Flexible Working Rights*. San Francisco, CA: UC Hastings College of the Law, Center for WorkLife Law, p. 3. Retrieved on December 20, 2005, from http://www.uchastings.edu/site_files/WLL/european_issue_brief_printversion.pdf.
- ⁶⁷ Fagan, C., Hegewisch, A., and Pillinger, J. (2006). *Out of Time: Why Britain Needs a New Approach to Working-Time Flexibility*. London, UK: Trades Union Congress, p. 40. Retrieved on March 21, 2006 from <http://www.tuc.org.uk/extras/outoftime.pdf>
- ⁶⁸ Fagan, C., Hegewisch, A., and Pillinger, J. (2006), p. 44.
- ⁶⁹ Fagan, C., Hegewisch, A., and Pillinger, J. (2006), p. 9.
- ⁷⁰ Chartered Institute of Personnel and Development. (2005). *Employment and the Law: Burden or Benefit*, p. 22. See also Holt and Grainger. (2005), p. 19, and Hegewisch, A. (2005), p. 3.
- ⁷¹ Hegewisch, A. (2005), p. 2. See also Trades Union Congress, (2005).
- ⁷² Trades Union Congress. (2005). Data source is the nationally representative, government-sponsored Labour Force Survey.
- ⁷³ Chartered Institute of Personnel and Development. (2003), p. 3; Chartered Institute of Personnel and Development. (2005). *Employment and the Law: Burden or Benefit?* London, UK: Author, p. 21. Retrieved on January 13, 2006 from <http://www.cipd.co.uk/NR/rdonlyres/3359BAC2-5A40-43D0-B3A0-3A55C32EA477/0/emplawsr0605.pdf>. This survey is not based on a representative sample and had a response rate of 5.8%. The sample size is 601 organizations.
- ⁷⁴ Chartered Institute of Personnel and Development. (2005). *Flexible Working: Impact and Implementation*. London, UK: Author, p. 2. Retrieved on December 21, 2005 from <http://www.cipd.co.uk/NR/rdonlyres/257CE4EE-356B-43F5-8927-5C86203D7AA1/0/flexworksurv0205.pdf>. This survey is not based on a representative sample and a response rate is not provided. Surveys were sent to HR professionals in the private and voluntary sectors and 585 responses were received. The sample was diverse in regard to geographic location as well as organizational size. Chartered Institute of Personnel and Development. (2005). *Employment and the Law: Burden or Benefit*, p. 23. One example provided for cost savings was "hot-desking," where workers do not have their own desks, but are allocated work space according to their needs, keeping their personal belongings in lockers or filing cabinets when not in the office.
- ⁷⁵ Chartered Institute of Personnel and Development. (2005). *Flexible Working: Impact and Implementation*. London, UK: Author, p. 16-17. Retrieved on December 21, 2005 from <http://www.cipd.co.uk/NR/rdonlyres/257CE4EE-356B-43F5-8927-5C86203D7AA1/0/flexworksurv0205.pdf>. Respondents were asked to rate several categories of potential constraints on a scale of 1-5, 1 being "not important" and 5 being "very important."
- ⁷⁶ Chartered Institute of Personnel and Development. (2005). *Employment and the Law: Burden or Benefit*, p. 22. Note that respondents were given a list of pre-determined categories and could choose more than one reason for their difficulty in implementing the regulations.

⁷⁷ Confederation of British Industry. (2005). "News Release: Firms Make Family Friendly Policies A Reality – But New Employment Legislation Having a Negative Impact on Business." Retrieved on March 21, 2006, from <http://www.cbi.org.uk/ndbs/Press.nsf/0/3fd7fd2afd2f2c8b80257074004b930d?OpenDocument>. The CBI survey was not a random, nationally representative survey, but a survey of the organization's membership. The CBI represents approximately 240,000 businesses which employ approximately 1/3 of the private sector workforce. The figures from their previous survey, conducted in 2004, are reported in a position paper that can be found at <http://www.cbi.org.uk/ndbs/positiondoc.nsf/0/9965f253573ec7a08025701a0057139a?OpenDocument>.

⁷⁸ Trades Union Congress. (2005).

⁷⁹ Fagan, C., Hegewisch, A., and Pillinger, J. (2006).