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Fair Work Amendment Bill 2013

Submission to House of Representatives Standing Committee on Education and Employment

Carers Victoria submission

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1 Introduction

1.1 About Carers Victoria

Carers Victoria is the state-wide peak organisation representing more than 700,000 family carers across Victoria – people caring for ageing parents, children with disabilities, and spouses with mental illness or chronic health issues.[1]

Carers Victoria is a member of the National Network of Carers Associations and the Victorian Carer Services Network. Carers Victoria is a non-profit association which relies on public and private sector support to fulfil its mission with and on behalf of carers. Carers Victoria is a membership based organisation. Our members primarily consist of family carers, who play an important role in informing our work, contributing to advocacy and strategic aims, and distributing information more widely to other carers.

1.2 About this submission

Carers Victoria welcomes this opportunity to comment upon the Fair Work Amendment Bill 2013. The Bill has the potential to improve the lives of many people with caring responsibilities.

This submission will be relatively brief. It will be confined to comments about the right to request flexible working arrangements for carers (Schedule 1-Family-friendly measures Part 3).This is the part of the Bill most specific to the circumstances of people with caring responsibilities. Although not a focus of this submission, significant numbers of carers will also have a keen interest in the right to request flexible work for employees with a disability, employees over 55 years old and those experiencing family violence.

2 Carers and workforce participation

Australian Bureau of Statistics data estimates that there are 2.6 million carers in Australia, of whom 770,000 are primary carers.

Carers have lower rates of workforce participation than other Australians of equivalent age. Survey of Disability, Ageing and Carers (SDAC) data shows that 58.3% of carers participate in the workforce in comparison with 69.7% of non carers.[2] For primary carers,[3] the workforce participation rate drops further to 42.3%.

Patterns of participation also differ according to carer status. Primary carers in particular are more likely to work part time than full time (52% of employed primary carers work part time) in comparison with employed non-carers (38% of whom work part time). The much lower rate of full time employment for primary carers is also the case for the broader population of carers (19.2% of carers work full time versus 42% of average Australians).

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[1] This submission will use the term 'carer' to refer to those people caring for a person with a disability, chronic health condition, mental illness or a person with age related frailty.

[2] Australian Bureau of Statistics, Survey of Disability, Ageing and Carers (SDAC) 2009

[3] A primary carer is a person who provides the most informal assistance, in terms of help or supervision, to a person with one or more disabilities (ABS Disability, Ageing and Carers, Australia User Guide)

Understandably, these lower levels of workforce participation rates translate into lower income levels for carers. The average income for carers is 25% lower than that of non-carers[4] and carers are over represented in the lowest two income quintiles. Lower incomes combine with the need to meet additional costs of disability caring to create significant financial hardship for many carers.

There is also evidence that carers tend to work in lower paid jobs than the general population. A report produced jointly by Deakin University, Australian Unity and Carers Australia found that, even among carers who work full time, average earnings are $7200 less per year than the general population.[5]

These statistics speak to the considerable difficulties faced by many carers in combining their care responsibilities with paid employment. Although there is strong evidence that the majority of unemployed carers would like paid employment,[6] many cannot because of multiple barriers. Others choose to work in casual jobs or in roles with reduced responsibility and skill level as a trade off with their caring role.

For those caring intensively over many years, the costs are extended even beyond the caring years by reduced or negligible superannuation accumulation. This means that many ex-carers continue to be dependent upon income support for an aged pension.

Paid work brings benefits in addition to the obvious financial ones. It can provide dignity, a sense of purpose, structure and social participation. Carers commonly report that employment creates a respite effect – a break from caring and an opportunity to have social interaction, and a different identity and role than that of 'carer'. The population of carers is not homogenous. Many carers have healthy and satisfying lives. There is some evidence that it is those carers who are locked out of the workforce for long periods who have the worst health and wellbeing.

This has several important implications for policy. At a personal level, it is largely individuals carrying the opportunity costs of caring. Recent discussion about the need for a National Disability Insurance Scheme (NDIS)[7] has highlighted the inequity of this situation, recommending that the costs of care be borne more evenly across the community. At a broader economic level, Australia can ill afford to forgo the labour and skills of such a large proportion of the population. At the same time, modeling shows that the availability of family carers relative to the number of those needing care will decline in future years. This will create additional demands upon care systems and, in turn, government revenue. Supporting individuals to achieve a more even balance of paid employment and caring responsibilities should be part of any effort to improve the sustainability of care.

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[4] ABS SDAC 2004

[5] Cummins, RA, Hughes, J, Tomyn, A, Gibson, A, Woerner, J, & Lai, L 2007, 'Special report: the wellbeing of Australians: carer health and wellbeing' *Australian Unity wellbeing index,* survey 17.1, Deakin University, Carers Australia & Australian Unity, Melbourne.

[6] This submission will use the term 'paid work' to emphasise that unpaid caring is also work and should be valued as such.

[7] Now named 'DisabilityCare Australia'

3 What carers need

A 2008 study of those carers in receipt of carer specific income support payments[8] identified the following main barriers to paid employment (see Table 1). While some of the listed barriers are clearly beyond the scope of this submission, it is highly relevant that difficulty in arranging working hours was one of the major impediments. Note that, for carers encountering the most difficulty, it can be the combination of multiple barriers that hinder workforce participation rather than any single factor.

Table 1 (Edwards et al 2008)

Main barriers to employment identified by female carers who were not in the labour force but would like to work, by payment type

	Payment type	
	Carer Allowance only	Carer Payment
	%	%
No alternative disability care arrangements available	22.4	21.6
Would be too disruptive to the person with the disability	12.7	17.6
Difficult to arrange working hours	23.0	15.7
Loss of skills from being out of the workforce	3.0	2.0
Age	6.7	17.6
Cost of paying for disability care while at work	2.4	2.0
Other	27.3	23.5
No difficulties expected	2.4	0.0
Number of observations	**165**	**51**

Notes: Excludes those aged 65 years or older. Of the 84 carers who indicated that there was an "other" barrier to employment, 27 (32.1%) indicated that their own health was a factor.

Source: FCPDS 2006

Carers Victoria, Carer Australia and other members of the network of Carer Associations have consistently advocated for carers to have a right to request flexible work.[9] The current Act supports this right for a parent (or a person who has responsibility for a child) of a child under school age or a child with a disability up to the age of 18 years.[10] The Amendment Bill's extension of this right to carers regardless of the age of the person needing care is to be whole heartedly welcomed.

[8] Edwards, B, Higgins, DJ, Gray, M, Zmijewski, N, & Kingston, M 2008, 'The nature and impact of caring for family members with a disability in Australia', *Research report*, no. 16, 2008, Australian Institute of Family Studies (AIFS), Melbourne

[9] Carers Victoria, Submission to Better Support for Carers 2008, Carers Australia pre budget Submissions, 2012-13, 2013-14

[10] Fair Work Act 2009

4 Key issues for the Amendment

4.1 Eligibility

4.1.1 Definition of carer

The Amendment Bill states that an employee may request changes in working arrangements if they are a carer within the meaning of the *Carer Recognition Act 2010*. In turn, the *Carer Recognition Act* states that:

(1) For the purpose of this Act, a ***carer*** is an individual who provides personal care, support and assistance to another individual who needs it because that other individual:

(a) has a disability; or

(b) has a medical condition (including a terminal or chronic illness); or

(c) has a mental illness; or

(d) is frail and aged.[11]

It is possible to mount alternative definitions of a 'carer'. For example, the 2012 Adam Bandt Fair Work Amendment (Better Work/Life Balance) Bill proposed that a right to request flexible work should apply to an employee 'who has responsibility for the care of another person'.[12] This definition would potentially be more inclusive than that used in this Amendment Bill. Broadening the definition further in this way might be welcomed as a positive step by work-life advocates who refer to the international evidence that a right to request is most effective and least administratively problematic when it is a universal right for all employees.[13] In countries where the right of request is limited to certain groups, there can be sensitivity and awkwardness in asserting a right that is not available to all members of the workforce. There is also a persuasive argument that eligibility should refer to caring responsibilities because it is these that are most relevant to determining the level and type of flexibility required rather than whether an employee has a particular identity or not.

On balance, Carers Victoria supports the Amendment Bill's definition of carer for two reasons:

- although a universal right to request flexible work for all employees may be more beneficial to carers than a more bounded one, there is recognition that a stepped approach to achieving change is more realistic, given Australia's current political and industrial relations dynamics, and
- the Amendment Bill's reference to the Carer Recognition Act is an appropriate use of the Act. The Carer Recognition Act needs to be routinely applied to other legislation in order to develop currency and potency.

[11] Carer Recognition Act 2010 5(1)
[12] Fair Work Amendment (Better Work/Life Balance) Bill 2012
[13] This is the case for legislation in the Netherlands

4.1.2 Proof of carer status

There is also a more general issue about the application of right to request provisions that relates to practice. The Bill's Explanatory Memorandum makes it clear that the legislation has no evidence requirement attached to the request, but that 'It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees'.[14] In these circumstances, it can be very unclear for employees and employers alike as to the level of evidence and information that is necessary to trigger a desired change. Employees may disclose aspects of their situation in great detail as a way of educating their employer or advocating for their case. Caring by definition involves a person who receives care. An employee may feel inhibited in disclosing information about their family member's condition or level of disability because they wish to protect their privacy and dignity, particularly when there is great stigma in the community about the person's condition. On the other hand, an employee may feel obliged to provide more information than necessary about their family member, in doing so breaching the privacy of their family member.

Over-disclosure of sensitive and personal information can change the dynamic between an individual employee and employer. The employer has more personal information about an employee who is requesting flexible work than other non-requesting employees. Some employees will be very aware of this possibility and may be wary of making the disclosures that they may need to achieve an evidenced request. The employer has a responsibility to manage this information securely and to ensure that it is only used in respect to the initial purpose of the disclosure.

Guidelines about managing disclosure and information are necessary to assist employees and employers. The Victorian Equal Opportunity and Human Rights Commission's *Family Responsibilities – Guidelines for Employers and Employees* provide a useful example of how these guidelines can be made accessible and relevant.[15] Development of guidelines should consider the merits of using employee Statutory Declarations as a way of providing accountability without the need for over disclosure.

4.1.3 Duration of employment and eligibility

The current Fair Work Act states that, in relation to a request for flexible work arrangements,

65 (2) The employee is not entitled to make the request unless:

- *(a) for an employee other than a casual employee-the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or*
- *(b) for a casual employee-the employee:*
  - *i. is a long term casual employee of the employer immediately before making the request; and*
  - *ii. has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.*

[14] House of Representatives, Fair Work Amendment Bill 2013 Explanatory Memorandum
[15] These guidelines were made to support the Equal Opportunity Amendment (family responsibilities) Act 2008 (Vic)

It can be presumed that this clause is the product of a compromise. It does, however, contain potential problems for employees. For example:

- prospective or recently appointed employees cannot request the flexibility they might need in order to sustain their care responsibilities or, indeed, paid employment
- current employees who have negotiated workplace flexibility may feel that they cannot move jobs to another employer because of the possibility of losing it
- the provisions for casual employees contains several undefined and subjective terms, for example, 'long term', 'reasonable', 'regular', 'systematic'. These ambiguities weaken the provision.

The current 12-month qualification risks diluting the principle behind the right to request. It could support a dynamic in which employees need to effectively earn a right to request through demonstrating value and good performance.
While international evidence shows that workplace flexibility does tend to increase employee retention, productivity and loyalty, this should not be a trade-off for individual employees. Such an assumption would undermine the basis and clarity of the legislation- that employees' right to request flexibility is informed by their carer status, not their work performance, productivity or seniority. Use of probation periods and the 'reasonable business grounds' clause are available to employers seeking to mitigate the risk of new employees exploiting or abusing a right to request flexible work. As for any anxiety that employees would miss out on jobs if they disclosed their carer status during the job application process, this speaks to limitations of current discrimination laws or problems with their application in this arena.

The current 12-month qualification requirement means that, in effect, the right to request flexible work is limited to long-term employees with recently emerged care responsibilities. Carers with long term care responsibilities, such as those with a family member with a lifelong condition disability, require workplace flexibility from their first day of work. For them, there is no magical change in care circumstances that occurs after working for the same employer for 12 months. This group of carers, who are numerous and already significantly disadvantaged, will remain unable to find the workplace flexibility they need and will continue to be shut out of permanent jobs under the Amended Bill. Limiting eligibility for a right to request in this way may also have the unintended consequence of discouraging carers from disclosing the reality of their care situation to employers.

There is a need to review this requirement. More extensive and detailed research about the impacts of the *Fair Work Act* upon employees (and different cohorts of carers), prospective employees and employers may be needed in order to inform future amendments of the Act in this regard.

4.2 Reasonable business grounds

The Amendment Bill contains a new, non-exhaustive list of what might constitute reasonable business grounds. The intention behind this as a way of educating employers and employees about interpretation of the Act is a worthy one. As such, they are necessarily confined by the role and format of legislation. For example, there is no detail about how an employer might determine what 'excessive cost' might mean in relation to a request, and how this might be determined or calculated. Further guidance is likely to be necessary, again through production and dissemination of employer-employee guidelines.

4.3 Strengthening the legislation for carers

There is formal evidence from other jurisdictions, and anecdotal evidence from Australia that carers are highly sensitive to workplace dynamics. They will carefully weigh up the risks of disclosure about their care situation with the likelihood of achieving the flexibility they need. Carers commonly report that they felt they had to leave their paid job because of a lack of flexibility. Many carers will choose to do this rather than make a request for flexibility. In short, if they do not think that their request will be taken seriously, they will not make one and will leave their job instead. This can be wasteful for both the carer and employer.

These issues often remain hidden. Surveys that only measure the outcomes of requests made for flexible work do not reveal the broader picture of employee and employer behaviour and its implications. One example of this is that, in other countries with equivalent legislation the issues have had a gendered aspect, with men less likely to make a request for flexibility because they thought it more likely that the request would be refused due to community norms about gender roles.[16]

The Amendment Bill does not address the key concern that the *Fair Work Act* does not have enough ‘teeth’ to be effective for carers needing flexible work.

4.3.1 Legislative support to ensure that requests are taken seriously

The Act does not require that employers demonstrate that they have taken a request seriously. There is also little guidance about how this might occur. A meaningful process would involve joint problem solving between both parties to arrive at a mutually acceptable arrangement in good faith. This process may require time and creativity. The legislation does not encourage this; indeed the new list of examples of reasonable business grounds in the Amendment may further shift the balance towards a focus on refusal rather than finding solutions.

4.3.2 Right to appeal an adverse decision

The Fair Work Act contains no provision for an employee to appeal the refusal of a request for flexibility. An employer complies with the Act by making

… a written response to the request within 21 days, stating whether the employer grants or refuses the request.

There is no doubt that many employers are reasonable and will support flexible work because they understand the family pressures and responsibilities faced by most employees. Furthermore, work done in the United Kingdom has demonstrated that providing employees with flexibility is sensible and cost effective on business grounds because it results in better employee retention, productivity and loyalty.[17]

This legislation should not be aimed at well informed and reasonable employers. In spite of how prevalent disability and caring are in our community, their impacts are still not

[16] See Hegewisch article at the end of this document
[17] See www.employersforcarers.org

commonly understood by all employers. A more robust expectation that a request is taken seriously and that appeal is possible would have added value in raising awareness about caring issues.

Evidence from other countries shows that a right to request flexible work does not result in ‘an opening of the floodgates’ of requests. Please see attached article by Ariane Hegewisch for more detail. This may be of some reassurance to Australian employers, as will a reminder that the right is to make a request for flexibility not a right to flexibility. It should also not be assumed that a right to appeal will result in a large number of appeals. With sufficient guidance and education about the legislation for employers and employers, only a small number of appeals should eventuate. There is a balance to be achieved here: weak legislation will ensure that few requests are made because of low expectations by the employees who need flexibility.

5 Recommendations

Carers Victoria recommends that:

1. Guidelines are collaboratively developed to support employers and employees to apply the provisions of the Fair Work Act. It may be beneficial to have separate guidelines addressing the right to request flexible work. Guidelines should include:

- advice about what constitutes good practice in terms of process
- material about disclosure issues and respective responsibilities
- suggestions and examples of types of flexible work arrangements
- detail and resources to support adequate documentation, and
- more detail about how to consider reasonable business grounds.

2. The 12 month qualification period before employees can make a request for flexible working arrangements is reviewed and omitted to allow recent or new employees with existing care responsibilities to request flexibility.(Fair Work Act 65 (2)(a)).

3. Terms of definitions relating to entitlement of casual employees to request flexibility are clarified (Fair Work Act 65(2)(b)).

4. Rigorous and fine grained research is conducted into the impacts of right to request legislation on different parties and cohorts.

5. The Fair Work Amendment Bill details that employers must demonstrate that they have taken a request for flexible work seriously.

6. The Amendment includes a right for employees who have requested flexibility to appeal an unreasonable adverse decision through a third party such as Fair Work Australia.

WORK LIFE LAW
UC Hastings College of the Law

FALL 2005

ISSUE BRIEF

Employers and European Flexible Working Rights: When the Floodgates Were Opened

by Ariane Hegewisch*

"Sorry—but no. If I let you change your hours, the floodgates will open and everyone will want a change." This is a common response by line managers to employees asking for change in their working time arrangements. Such a "no" makes it impossible to find out whether the fear about "yes" is justified. But recent European statutes obliging employers to be more positive towards employee requests for different working hours provide a testing ground for what happens when the flexible working "floodgates" open. This report discusses three new laws related to working time flexibility: the Dutch Working Time Adjustment Act 2000, the German Part-time and Fixed Term Employment Act 2000 and the UK 2002 Right to Request Flexible Working. These "light touch" laws are designed to prompt employers to take a positive approach to flexibility requests, while acknowledging the realities of global competition: employee rights are conditional on fitting in with operational and business requirements.

Is the European experience relevant to the US?

While European and US corporate environments are markedly different, many challenges faced by European employers are familiar to their US counterparts: a dramatic increase in the number of working mothers over the last three decades; a growing number of employees caring for elderly relatives; baby boomers looking for gradual retirement options; and employee demand for flexibility while returning to education during their working lives. Working time flexibility has become a high priority for employees, as expressed to employers and governments. As in the US, European employers have introduced flexible working benefits. But in many companies such policies exist only on paper, with a wide divergence between actual and potential beneficiaries of workplace flexibility. When the workplace proves to be inflexible, employees are less committed and more likely to look for a new job. Higher recruitment and training costs, lower productivity and motivation are the results.

This issue brief summarizes how employers have fared under the new European Flexible Working laws.[1] A basic description of the laws is provided at the end of this brief.

Lesson 1: The flood did not happen.

Employee requests in all three countries have been significant but overall numbers have been manageable. The Netherlands, the world's champion when it comes to part-time employment, saw the highest level of requests for reduced hours, from 14 percent of employees.[2] Three and a half percent of UK employees applied for permanent part-time work; in line with the broader definition of flexibility in the UK Statute almost as many applied for flextime, and smaller numbers for other arrangements such as a compressed work week, regular home-based work and temporary reductions in working time.[3] In both the Netherlands and the UK requests for flexible working were already high prior to the introduction of the new rights; data does not allow a differentiation between requests made strictly under—or even because of—the new rights and the continuation of previous trends. In Germany, where statistics only capture requests made strictly within the legal framework, 128,000 employees made a request for reduced hours in 2003, less than half of one percent of German employees; high unemployment and the recession are a likely reason for this low level of response.[4]

Lesson 2: Most employers received one request but very few more than five.

Requests were fairly evenly spread between employers, with the majority of employers receiving at least one but rarely more than five requests. In the Netherlands 80 percent of larger employers—those with 10 or more

employees are covered by the full law—had at least one request; 16 percent of smaller employers reported a request.[5] In the UK, a third of employers received no requests and only 15 percent of employers received more than five requests.[6] For most UK employers, particularly those who already operated a flexible working policy, the requests were "fairly insignificant"[7]. One in 10 German employers received a request in 2003, according to a representative survey by the labor department;[8] a membership survey of the German chamber of commerce in 2001 reports requests in a quarter of respondent companies.[9] These are not insubstantial numbers, yet with requests limited to one or at most a few employees in most organizations, they have been manageable.

Lesson 3: There is a big difference between the number of people who say they would like to reduce hours and those who will actually make a request.

Requests for reduced working time are substantially below what one would expect from surveys on working time preferences. A European Union study suggests that a fifth of European male and over a third of female full-time employees would prefer part-time work.[10] In reality, at most half of them actually approach their employer. A major reason is financial: in practice many people are not able to forgo the income. Yet there also is another factor at play: people tend to ask only if they are reasonably sure of a positive response. In the Netherlands, almost a quarter of those who would like to change hours did not approach their employer because they feared that they would be turned down. Others, particularly managers and professional workers, do not ask because they fear a request could jeopardize their position in the company or because they cannot imagine how their job could be done differently.

In the United States, 24 percent of women (32 percent of those with children under 18) and 13 percent of men in principle would like to change from full-time to part-time work, according to a 2002 study by the Families and Work Institute, but 70 percent of them say they could not afford a reduction in income.[11] There are also a substantial number of employees who feel part-time work would not fit with their career or that it would harm the economic success of their organization. More than four out of 10 of those, however, also believe that their employer simply would not allow such a request. These are the employees who might vote with their feet and change jobs when the opportunity occurs.

Lesson 4: The large majority of requests were acceptable to employers.

The majority of requests in all three countries were acceptable to employers without conflict, either fully or with some amendments. As one might expect, the country with the lowest overall requests, Germany, had the highest acceptance rate of more than nine out of 10 requests; in the UK seven out of 10 requests were fully accepted and one in 10 partially[12]; in the Netherlands, over six out of 10 requests were fully accepted and one in 10 partially.[13] According to Susan Anderson, the Director of Human Resources Policy for the Confederation of British Industries (CBI), "The CBI believes that the new right to request flexible working has made huge strides in promoting different ways of working—with nine out of 10 requests accepted by employers."[14]

Lesson 5: Costs were not a major problem of implementation.

Prior to the introduction of the UK Right to Request, employers were very concerned about the potential costs of meeting its requirements. This fear has shown to be unsubstantiated.[15] Nine out of 10 UK employers said they experienced no significant problems with the implementation of the UK Right to Request. Less than 13 percent of UK employers mentioned cost as a problem in relation to the implementation of the right.[16] The consequences of the Right to Request were more of an organizational nature: practical problems with assessing people's requests and assessing alternatives, the management of employee expectations and, particularly for the UK, the management of potential resentment between employees with small children who are formally covered by the legislation and those not covered. Implementation has also raised the need for support and training of line managers who have to move away from "presenteeism." It is also true, however, that many employers are unable to make a detailed assessment of costs—or benefits—of flexible working requests because no monitoring mechanisms are in place. In Germany, the majority of employers accommodated requests for reduced hours through rationalization or redistribution of work, thus not only not incurring additional costs but realizing savings.[17]

Lesson 6: It makes business sense to extend flexibility rights to all employees.

Employers have found it easier to manage the right to flexible working if it applies to all employees irrespective of caregiving status. Limiting the right to a subgroup of employees, such as parents of pre-school or disabled children, as is the case under the UK law, not only causes resentment but also makes it more difficult to accommodate requests. Parents of young children tend to be relatively homogenous in their demand for working hours; when all employees are included there is a better chance of covering the whole array of the employers' working time needs. The Dutch and German laws apply to all employees, irrespective of their reasons for wanting to change their working hours. The UK government now proposes to extend the right to carers of adults.[18] "Once there is a critical mass of people wishing to work flexibly—not only parents—this increases the chances of finding a workable solution for the team," advises the CIPD, the UK equivalent of the Society for Human Resource Management.[19] European and US case studies show that organizations will reap real benefits from flexible working once they go beyond a piecemeal response to individual requests and integrate flexibility into their broader strategic approaches.[20]

Lesson 7: A legal framework can help corporate HR objectives.

In all three countries requests for changes in working hours or working time flexibility are nothing new. Many companies had voluntarily introduced flexible working policies or did so in the context of collective agreements. Yet, a problem not unfamiliar to many US employers, often policies look good on paper but implementation is uneven or policies become symbolic. Under these circumstances, the new legislation offered companies the opportunity to update and revitalize their policies. This positive effect is attested by human resource managers: "The [UK] Right to Request has furthered the cultural change that was already underway in terms of increasing the acceptability of flexible working and in seeing the benefits for the business and individual-particularly in areas of the business with few people on flexible contracts." said the human resource manager of a major transport company. "People have a framework, line managers have a process by which to agree or disagree" is the assessment of the benefits of the legislation by a human resource manager for the well-known retail chain Marks & Spencer.[22]

Lesson 8: Men want flexibility too but differently from women.

All three statutes apply equally to men and women and moreover have greater sex equality in family work as an explicit target. Predictably perhaps, in all three countries the majority of requests have come from female employees. Yet there have also been a significant number of requests from men. Over a fifth of requests for part-time work in Germany were made by men; one in 10 male employees in the UK requested flexible working. However, types of requests vary between men and women. Men are much less likely to reduce their working hours when their children are very young (although over one in 10 UK fathers of pre-school kids has done so) but once children reach school age, differences between men and women begin to even out. Men are more likely to seek changes in working time which do not involve a drop in income, such as flex-time, working from home or temporary reductions in their hours. While many employers treat requests from men and women equally favorably, data from the UK shows that men's requests are more likely to be rejected than women's.[23] Such a differential response potentially constitutes sex discrimination and has been challenged as such in the courts.

Lesson 9: Few requests have ended up in court, but where they have it is because employers did not do their homework.

In the Netherlands and Germany less than 30 requests per country resulted in court action in the first two years of the laws;[24] given that the majority of workplaces in these countries have some form of union or employee representation it is rare for conflict not to be solved internally. In the UK, where it is only possible to query procedural issues and not the substantive decision of the employer, slightly over 400 claims were lodged at the employment tribunals in the first two years of implementation. This figure might seem high but constitutes less than half of one percent of all tribunal claims during the same period. Less than one percent of all UK employers rejecting a request have had a claim against them. Judgments have tended to go against employers who made blanket statements about the lack of feasibility of an option without being able to demonstrate that any alternatives had been considered in good faith. Where rejections were based on factual and specific business reasons and where alternatives were considered, judges have tended to find for employers.

Other factors in law cases include:

- Scheduling vs. overall number of hours, where employers have accepted a request for part-time work but have scheduled the hours differently from the request, creating problems with childcare and caring arrangements. Under German law both numbers and scheduling of hours are equally protected; under Dutch law employees have few rights in relation to scheduling.
- Delays in the response to requests, which is a particular problem for pregnant women trying to arrange childcare for their return to work. To prevent this problem Dutch courts have made interim injunctions.
- Binding nature of a request: whether or not an employee can be held to a request for reduced hours if the employer responds by agreeing to fewer hours but schedules these in a different way from the request. Here courts have tended to find against the employee, holding that an accepted request constituted a formal and permanent change of the employment contract.
- Sex discrimination and flexible working: the UK has well-established case law ruling that withholding alternative working patterns from working mothers potentially constitutes indirect discrimination/disparate impact. It is now common for female employees to claim both sex discrimination and breach of flexible working regulations when appealing an employer's refusal to grant a request; the UK Sex Discrimination Act provides a stronger basis for querying the employer's decision and stronger remedies.

Lesson 10: A more inclusive process of developing legislation works best.

The three countries have adopted different approaches to legislating flexibility, yet in terms of impact, what seems to matter most is the process of developing the law and the timing of its introduction, rather than the legislative details.

In the Netherlands and the UK the passing of the legislation was preceded by wide and inclusive consultations. The UK working party drafting the law included both the largest UK employers association (the CBI) and trade unions; the statute has the full print of approval from the CBI. In Germany, employers were much less involved in the development of the law and have remained hostile towards it. This might be another reason for the much lower level of requests under the German law. The economy is another explanatory factor for the acceptability of the new laws. Dutch and UK employers faced considerable labor shortages when the laws were introduced and hence were open to exploring new ways to attract and retain staff. In Germany the law was introduced against a background of historically high unemployment, leading to much less employee confidence in taking up their rights and much less employer commitment to facilitating change.

Conclusion

The European experience suggests that employers have little to fear from employee rights to flexible working. The floodgates have not opened and the new individual rights to reduced hours and flexible working, designed as they are to take account of business factors, have not caused problems for the vast majority of employers. Rather than forcing a sea change, the laws have strengthened the existing trend among employers to offer flexible working arrangements. The laws are no magic wand to overcome hostility towards new work arrangements, stereotyping and differential treatment of people on flexible schedules or the lack of imagination of how things could be done differently. But these laws are helping employers in Europe to push the boundaries of work organization and to establish new ways of doing things which benefit both employers and society.

Many US workplaces already offer a wide array of formal and informal flexibility. The same was true of Dutch, German and UK workplace prior to the introduction of the new laws. Yet the challenge is not to develop policies but to make sure that they are implemented. In an ideal world, employees will feel free to discuss their working time needs with their manager and see whether a mutually satisfactory solution can be found. In the real world, many employees do not feel able to do so and consequently work below their best or walk at the first opportunity. A legislative framework which recognizes both the individual and the business case can make an important contribution to creating a new organization of work which is both more balanced and more productive.

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What the Flexibility Laws Entail

The new European flexible working statutes offer employees a conditional right to change their working hours. While the employer has to consider a request seriously and in good faith, the request only has to be accepted if it is manageable in the organizational and business context. The detail of the laws varies between countries, as outlined below.

Who can make a request?

In the Netherlands[24] and Germany[25] the law applies to all employees irrespective of the reasons for their requests; in the UK[26] the right only applies to employees who seek a change so that they can care for a pre-school child or a disabled child under 18; the right will be extended to carers of adults by April 2007.[27]

In the Netherlands and Germany only employers above a certain size (10 employees in the former, 15 in the latter) are covered; in the UK there are no size restrictions. The laws set out tenure restrictions: employees must have been with the organization a minimum of 12 months in the Netherlands and six months in Germany and the UK before they can make a request. Requests are limited to once every 24 months in the Netherlands and Germany and once every 12 months in the UK.

What kind of requests can be made?

The Dutch and German laws are limited to a reduction or increase of weekly working hours and their scheduling. The UK law takes a broader approach; it includes a change in the hours of work, the scheduling of work (schedule changes can be requested even if overall hours stay the same) and the location of work. The official guidance provides a long list of possible options including part-time work, compressed work week, partial or permanent telecommuting, job sharing, sabbaticals, annualized hours, flex-time and term-time working, and encourages both employer and employee to think beyond that list. In all three countries, changes result in a permanent alteration of the employment contract.

What is the process for making a request?

Requests have to be made in writing in all three countries, at least four months before the proposed starting date in the Netherlands, at least three in Germany, and not specified in the UK. The written request must include the proposed starting date, the proposed new weekly hours and the proposed scheduling of these hours. The UK statute adds an important additional requirement: the application must "explain what effect, if any, the employee thinks the change applied for would have on his employer and how, in his opinion, such effect might be dealt with."[28]

Employers in the Netherlands and Germany have until one month before the proposed starting date to respond; in the UK they must set up a meeting with the employee to discuss the request within 28 days of receiving it and then have two weeks to formally respond after the meeting.

When can an employer deny a request?

Employers in the Netherlands are subject to the strongest test: they can reject a request changed hours only if there are serious countervailing business reasons. The law spells out some of the reasons, such as inability to recruit someone to fill in the "lost" hours or health and safety concerns. The German law is similar but the "business or organizational reasons" need not be "serious". An important difference between the Dutch and German law concerns the new scheduling of hours: in Germany, the employer's response to the requested scheduling of hours falls under the same stringent test as the response to the number of hours. Dutch employers have to consider employees' wishes with "reasonableness and fairness" but are not subject to the same serious business test when scheduling hours.

UK employers have considerably more leeway in their response to a request. The law includes reasons for refusal: the burden of additional costs; detrimental effect on the ability to meet costumer demand, on performance or on quality; the inability to re-organize work among existing staff or to recruit additional staff; insufficiency of work during the period where the employee proposes to work; and planned structural changes. Other grounds can be added by regulation at a later date.

Can an employee appeal the employer's decision?

If an employer rejects a request, an employee can appeal and the appeal needs to be heard subject to the same criteria governing disciplinary hearings. Once the internal processes are exhausted in the Netherlands or Germany, an employee can contest the employer's decision in the courts. In the UK, employees' rights to challenge a decision externally are more limited: the employee can appeal to an Employment Tribunal (the lowest level labor courts) only if the employer fails to follow the procedures set out in the statute or justifies the rejection by a ground not part of the seven business grounds set out in the law. The actual business evaluation of the request cannot be challenged.

In the UK the tribunal can award damages of up to eight weeks of £270 ($475) per week. There is no provision for punitive damages under the Dutch and German laws: a claim is for contract alteration, and if the claim is won, the employer will have to make the relevant changes to the employee's employment contract.

A right to gradual return to work for new parents in Germany.

German parents (mothers and fathers) also have a right, under separate law, to work a part-time schedule of between 19 and 30 hours per week for up to two years after the baby is born. This right is unconditional; that is, it applies irrespective of the business context. German parents have the right to take up to three years of parental leave per child, with a means-tested stipend, and to return to the same or at least a job of equivalent level and pay at the end of the leave period. It is very common for mothers to take such leave, both because childcare facilities for the under threes are very underdeveloped and because of beliefs regarding mothering of young children. The purpose of this law in the German context is to encourage mothers to return to work sooner and to help them maintain skills and labor market attachment. A study two years after the passing of the new regulation found that only a very small number of parents had asked for a change to part-time hours, but given that the law only applied to new parents and has a pre-notification requirement, it is perhaps too early to judge its impact.

What happens to terms and conditions when working hours are reduced?

The issue of equal treatment for part-timers is covered under separate legislation. In the Netherlands it has been illegal since 1996 to differentiate between employees (for example regarding hourly wages, paid leave or access to pension schemes) simply on the basis of the number of hours they work unless such differences are objectively justified.[29] This general principle was reflected in the 1997 European Directive on Part-time Work[30] and the principle of equal treatment for part-timers has been incorporated into legislation in all European Union member states, including Germany and the UK. Based on the fact that the large majority of part-time workers continues to be female, there also is a considerable body of case law challenging adverse terms and conditions for part-time workers as sex discrimination.[31]

Endnotes

[1] This briefing is complementary to the recent New America Foundation Work & Family Program policy proposal: *Win-win flexibility*, by Karen Kornbluh (June 2005), available at http://www.newamerica.net/Download_Docs/ pdfs/Doc_File_2438_1.pdf and the Center for Law and Social Policy's *How to Exercise Flexible work: Take Steps with a "Soft Touch" Law;* Work-Life Balance Brief No. 3 on the UK Right to Request,by Jodie Levin-Epstein (June 2005) available at http://www.clasp.org/publications/work_life3_annotated.pdf.
[2] MuConsult. (2003). *Onderzoek ten behoeve van evaluatie Waa en Woa. Eindrapport.* Amersfoort: MuConsult, available at http://docs.szw.nl/pdf/129/2004/129_2004_3_5271.pdf (includes English summary).
[3] Holt, H., & Grainger, H. (2005). Results of the Second Flexible Working Employee Survey. *dti Employment Relations Research Series, No. 39*, available at http://www.dti.gov.uk/er/emar/errs39.pdf.
[4] Wagner, S. (20 Oct 2004). Teilzeitarbeit: Ein Gesetz liegt im Trend. *IAB Kurzbericht, Nr 18*, available at http://doku.iab.de/kurzber/2004/kb1804.pdf.
[5] MuConsult. (2003). As above.
[6] This data is based on two studies: 1) a survey of 510 public and private employers across size bands by the UK equivalent of the Society for Human Resource Management: Chartered Institute of Personnel and Development, CIPD/Lovell. (October 2003). *A parent's right to ask: A review of flexible working arrangements.* London: Chartered Institute of Personnel and Development; and 2) a smaller government sponsored study of 35 employers prepared for the Department of Trade and Industry (DTI): Camp, C. (2004). *Right to request flexible working: Review of impact in the first year of legislation.* London: Working Families. A full evaluation of the impact of the Right to Request will be conducted in 2006, three years after its implementation.
[7] Camp (2004), p.17.
[8] Wagner (2004).
[9] Deutsche Industrie- und Handelskammer. (Fall 2001). Mehr Konflikte, weniger Flexibilitaet: Erfahrungen mit dem Teilzeit-und Befristungsgesetz. Ergebnis einer DIHK Unternehmensbefragung;.
[10] Fagan, C., and Warren, T. (2001). *Gender, employment and working time preferences in Europe*. Dublin: European Foundation for the Improvement of Living and Working Conditions.
[11] Galinsky, E., Bond, J., & Hill, E. (2004). *When Work Works: A Status Report on Workplace Flexibility.* New York: Families and Work Institute, p.12.
[12] Holt, H., and Grainger, H. (2005). As above, p.17. Excludes people who were still waiting for a response.
[13] MuConsult (2003) as above. Excludes people who were still waiting for a response.
[14] Confederation of British Industries (CBI) News Release. (20 Sept 2005). Part-time working does not make women second class citizens, says CBI, available at http://www.cbi.org.uk/ndbs/press.nsf/0/0ee8ebdf0eb8c0928025707c00558de0?OpenDocument. The CBI is the largest UK employer association.
[15] Camp (2004), p. 4; CIPD/ Lovell (2003), p. 9.
[16] This proportion is higher for small employers who may have less scope for accommodating working time reorganization; CIPD/Lovell (2003).
[17] Magvas, E., & Sptiznagel, E. (2002). Teilzeitgeset bereits im ersten Jahr einvernehmlich umgesetzt. I*AB Kurzberichte, Nr 23,* p. 2, available at http://doku.iab.de/kurzber/2002/kb2302.pdf; and Wagner (2004). Such potential cost savings are of course particularly high in a recession.
[18] UK Government Consultation Paper. (February 2005). *Work and Families: Choice and Flexibility*, available at http://www.dti.gov.uk/er/choice_flexibility_consultation.pdf.
[19] CIPD (2005), p.13
[20] UK Department of Trade and Industries (DTI) in association with the Trade Union Congress (TUC) and the Confederation of British Industries (CBI). (2005). *Practical ways to reduce long hours and reform working practices*; available from: http://www.dti.gov.uk/er/work_time_regs/LONGWORKINGHOURS.pdf; Corporate Voices for Working Families (2005). *Business Impacts of Flexibility: An Imperative for Expansion*, Washington, DC, November 2005.
[21] Camp (March 2004) as above.
[22] Holt & Granger (2005), p.17: 73% of female requests compared to 63% of male requests were fully accepted in the UK.
[23] Burri, S. (2005). Promoting working time adjustments in the Netherlands. *Working Time for Working Families: Europe and the United States*. Friedrich Ebert Stiftung: Washington DC, p.68, 71, available at http://devhector.uchastings.edu/site_files/WLL/FESWorkingTimePublication.pdf.
[24] *Wet aanpassing Arbeitsduur.* (2000). Stb.2000, 114 en 115 (Working Hours Adjustment Act 2000). For a detailed description of the law see Burri, S., Opitz, H.C., & Veldman, A.G. (2003). Work-Family Policies on Working Time Put into Practice: A comparison of Dutch and German case law on Working Time Adjustment. *International Journal of Comparative Labour Law and Industrial Relations, Vol. 19/3*, pp.321- 346.
[25] *Gesetz ueber Teilzeit und befristete Arbeit*. (2000) BGBI I 2000, 1966; Part-time and fixed-term employment law, in force from Jan 1, 2001; see Burri et al (2003) above for a detailed discussion in English.
[26] The Right to Request Flexible Working came into force in April 2003 through the Employment Act 2002 Part 4, Section 47 and has been inserted as Part VIII A of the Employment Rights Act 1996, accompanied by the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 and the Flexible Working (Procedural Requirements) Regulations 2002. Detailed guidance on the implementation of the right for employers and employees is available at http://www.dti.gov.uk/er/individual/flexwork-pl520.pdf.
[27] Department of Trade and Industry. (October 2005). *Work and Families: Choice and fairness; Government response to public consultation*, available at http://www.dti.gov.uk/er/consultationchoiceflexibility2005final.pdf.
[28] Employee Employment Act 2002, 80F.
[29] *Wet verbod van onderscheid naar arbeidsduur. Stb.* 1996, 391 (law prohibiting differentiation because of working time) in force since 1 November 1996. For a discussion of legislative approaches to part-time work in the Netherlands, see Burri, S. (2005).
[30] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work; OJ L 14 of 20/01/
[31] A discussion of European case law on part-time employment can be found in Heron, A. (2005). Promoting and protecting reduced-hours work: European Union law and part-time work. *Working Time for Working Families: Europe and the United States*. Friedrich Ebert Foundation: Washington DC, available at

WORK LIFE LAW

UC Hastings College of the Law

About Us

The Center for WorkLife Law is a nonprofit research and advocacy organization that seeks to eliminate employment discrimination against family caregivers such as mothers and fathers of young childen and adults with aging parents. WorkLife Law works with employees, employers, attorneys, legislators, journalists, and researchers to identify and prevent this discrimination.

Family caregiver discrimination takes many forms, including:

- Refusing to hire or promote family caregivers based on the assumption that they will not be dedicated workers;
- Creating a hostile work environment for family caregivers to force them to leave their jobs, and
- Imposing job requirements or restrictions on caregivers that are not imposed on other workers.

Employers have, for example: fired pregnant employees or suggested that they get an abortion if they wish to remain employed; given promotions to less qualified fathers or women without children rather than to highly qualified mothers; developed hiring profiles that expressly excluded women with young children; given parents work schedules that they could not meet for childcare reasons; and fabricated work infractions or performance deficiencies to justify dismissal of family caregivers. Increasingly, employees are successfully suing their employers for such discrimination. The goal of WorkLife Law is to prevent the discrimination from occurring in the first place, thereby alleviating the need for employees to resort to the courts for protection.

WorkLife Law seeks to eliminate caregiver discrimination by:

- Advocating on behalf of family caregivers who may be experiencing discrimination at work;
- Working with employers to identify and prevent discriminatory practices against family caregivers;
- Providing technical guidance to state and federal policy makers who seek to develop public policies to prevent family caregiver discrimination;
- Providing technical guidance to lawyers who advise employers on how to avoid family caregiver discrimination, and to lawyers representing employees who believe they have been discriminated against based on their status as family caregivers; and
- Working with the press to document common challenges facing family caregivers, and to highlight employers and policies that have successfully overcome such challenges.

WorkLife Law is based at the University of California Hastings College of the Law and is directed by professor and author Joan C. Williams. It was founded as the Program on Gender, Work & Family at American University Washington College of Law in 1998 and is supported by research and program development grants, university funding, and private donations.

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