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Trade, Labor and EU Law Perspectives

Work-Life Balance and the Right to Request Flexible Working

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On 13 June 2019, the EU Council adopted the Directive on Work-Life Balance for Parents and Carers. The Directive was proposed in 2017 and it was one of the key legislative initiatives that the European Commission presented alongside its proposal for the European Pillar of Social Rights. It contains significant enhancements to existing EU legislation, such as the introduction of 10 working days of paid paternity leave for fathers; an individual right for workers to four months of paid parental leave that exists at least until the child reaches the age of 8 (two months of which is not transferable to the other parent); and an annual right to 5 days of carers leave. Member States have a period of 3 years in which to implement the Directive's provisions in their national laws.

One of the novelties of the Directive is the creation of a 'right to request flexible working arrangements for caring purposes' (Art 9). This applies to workers with children up to a specified age (which must be at least 8 years old) and to carers. 'Carer' is defined as 'a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason' (Art 3(1)(d)). Workers in these categories are entitled to request adjustments to 'their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours' (Art 3(1)(f)).

The idea of a 'right to request' begs the question what obligations does this entail for the employer? The Directive specifies that 'employers shall consider and respond to requests for flexible working arrangements … within a reasonable period of time, taking into account the needs of both the employer and the worker. Employers shall provide reasons for any refusal of such a request or for any postponement of such arrangements' (Art 9(2); see also Recital 36). This makes it clear that there are new procedural obligations for employers in relation to how they handle such requests. In principle, it should be possible for a worker to bring legal proceedings where an employer simply fails or refuses to consider a request. In relation to a failure by the employer to justify a refusal, it might be open to a court to look beyond the mere absence of justification and to review justifications that fail to show that the needs of the worker were taken into account. The implicit duty to undertake a fair process when handling requests for flexible working arrangements could encourage employers towards greater accommodation of parents and carers. In order to ensure compliance with the Directive (and implementing legislation), it would seem advisable for

employers to ensure that there is a procedure at workplace level through which such requests can be formally considered. Practical guidance for employers on providing workplace adjustments has been published by the ILO.

As I have argued elsewhere, many workers will encounter situations during their working lives where, for a variety of reasons, they would benefit from a change to their existing working arrangements. Often these issues can be worked out through informal dialogue between the worker and the employer. While law is not a pre-requisite to finding solutions, it can intervene to assist the worker by requiring an employer to engage in a dialogue and to explain a refusal to accommodate. In practice, one of the challenges for for an individual worker is the imbalance of bargaining power when making such a request. In this regard, it is notable that the Work-Life Balance Directive does not ascribe a role for collective actors in the 'right to request' process. This is an oversight that neglects the real world dynamics of a worker asking her employer for a change to her terms and conditions. A right for workers' representatives to participate in the process could aid workers' bargaining position. Workers' representatives may have access to sources of training and advice that improves their knowledge of the legal obligations on the employer. They may also possess memory of accommodations that the employer has already granted in the past to other workers.

Notwithstanding its limitations, the right to request flexible working arrangements displays a subtle understanding of the possible role for law, seeking to nudge employers towards fair process and reasoned decision-making, while exercising restraint in relation to managerial prerogative. This seems a template that could be readily extended to other types of request for accommodation. For example, the 'right to request' model might offer an initial mechanism by which the EU could respond to the situation of workers who are seeking accommodations from their employers related to religious practice.

This entry was posted on Friday, June 21st, 2019 at 1:07 pm and is filed under EU law is the body of law, consisting of primary and secondary legislation, that relates to the European Union. Primary legislation most importantly refers to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Secondary EU legislation, such as Directives and Regulations, is based on the principles and objectives as laid down in the Treaties (TEU and TFEU).">EU Law, ILO, Labor Law
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