

Flexible working, parental rights and family-friendly provisions

ember resource

The law is stated as at 06 April 2009 Please click on the individual questions below to see the answers.

Which legislation governs parental rights and other family-friendly provisions?

The area of parental rights and family-friendly provisions has undergone an extensive and significant period of expansion over the last five years. The key legislation includes:

Flexible working

- Employment Rights Act 1996
- Employment Act 2002, especially section 47
- Employment Act 2002 (Commencement No.3 and Transitional and Saving Provisions) Order 2002 (SI 2002/2866)
- The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236)
- The Flexible Working (Procedural Requirements) Regulations 2002 (SI 2002/3207)
- ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (SI 2003/694)
- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006
 (SI 2006/3314)
- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2007 (SI 2007/1184)
- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (No. 2) Regulations 2007, (SI 2007/2286)
- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009 (SI 2009/595) applies to England Wales and Scotland.

Parental leave and time off for dependants

- o The Employment Rights Act 1996, as amended
- o The Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312)
- The Maternity and Parental Leave (Amendment) Regulations 2001 (SI 2001/4010)
- The Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2006 (SI 2006/2014).

Family friendly provisions generally

Work and Families Act 2006

In addition to the above, the legislation relating to maternity, paternity and adoption leave and pay, and part-time working, also constitute an important part of the range of family-friendly provisions. For further examples of relevant key legislation see our Maternity, paternity and adoption leave and pay FAQ and our Part-time work FAQ.

- o Go to Maternity, paternity and adoption leave and pay FAQ
- Go to Part-time work FAQ
- Do employees have the right to work flexibly?

No, employees do not have the right to work flexibly. Certain employees have a right to formally request more flexible working arrangements - see the question below for details of which employees qualify.

Employers have a duty to consider the requests properly. A request for flexible working which is refused may also give rise to a claim for breach of the flexible working legislation or for sex discrimination or potentially for age discrimination. Handling a request for flexible working correctly is therefore extremely important as there have been an increasing number of successful sex discrimination claims where an employer has refused a request for flexible working, especially where the request involves part-time working. See the question below on refusing a request for flexible working.

In the light of the current economic climate various types of flexible working, for example, four day weeks, reduced hours and sabbaticals have been voluntarily suggested by some employers as a way of avoiding redundancies.

The Department for Business, Enterprise and Regulatory Reform website has published guidance on the right to request flexible working and the results of surveys into the landscape of flexible working. *The Third Work Life Balance Employer Survey: executive summary* published in November 2007 demonstrates that the availability and take-up of work-life balance arrangements has increased since 2003. Two or more flexible working arrangements are used by employees in over 40% of workplaces. The vast majority (92%) of employers said that they would voluntarily consider a request to change a working pattern from any employee not just parents or carers.

- o Read guidance on BERR website
- Read executive summary of survey
- Which employees qualify to make a request for more flexible working arrangements?

Employers can consider a request for flexible working arrangements from any of their workers, and it is sensible to do so if they wish to retain and attract staff.

However, they must consider such requests from those who make an application to facilitate the care of a child under the age of 17 years (or under 18 years if disabled) and the carers of adults who are in need of care. (The Regulations specifically refer to children under 'the age of 17'. However many sources refer to children aged 16 and under. These are two ways of expressing the same concept. In this FAQ we follow the Regulations). There are some qualifying requirements which are common to all applicants and the additional requirements depending upon whether the application is to care for a child or adult.

The extension to children under 17 years takes effect from 6 April 2009 in England, Wales and Scotland (before that the right applied to children under six years).

Currently all applicants must meet the following qualifying requirements ie those who:

- have employee status for further details on determining employee status see our Employee status FAQ
- o have been continuously employed by the employer for at least 26 weeks by the application date
- o not have made another application to work flexibly under the right during the past 12 months
- o are not agency workers, or members of the armed forces as they are expressly excluded.
- o <u>Go to Employee status FAQ</u>

Additional qualifying requirements for parents

In addition parents* must meet the following requirements:

- o Be the parent of a child aged under 17 years or under 18 years where disabled (this applied to any child up to the age of six years before 6 April 2009).
- Have responsibility for the upbringing of the child and be making the application to enable them to care for the child.
- Make the requests for flexible working before the child's 17th birthday (or 18th birthday if the child is disabled).

'Parents' include:

- o biological parents
- foster parents
- o adoptive parents
- o married couples, unmarried couples and same sex couples
- o parents of children where the child is under 18 if the child is disabled.

Additional qualifying requirements for carers of certain adults

Employees with caring responsibilities for adults including those with elderly or disabled relatives must meet the following requirements:

- be or expect to be caring for:
 - a spouse, partner, civil partner or relative, or
 - an adult who is not a spouse, partner or relative but lives at the same address as the employee.

The most common examples of those includes are mothers, fathers, adopters, guardians, and civil partners of the adult in need of care. In addition grandparents, parents-in-law, sons, daughters, uncles, aunts, brothers, sisters, brothers and sisters-in-law, sons and daughters-in-law are all included within the definition of relative. Step-relatives and half-blood relatives are also included in the definition. Adoptive relationships and relationships which would have existed but for an adoption i.e. the employee's natural relatives are also included.

Those employers who have adopted their own flexible working policy should ensure that it reflects the statutory procedure and includes, at least, the range of relatives who are included in the legislation.

The Department for Business, Enterprise and Regulatory Reform and ACAS have published guidance on the right to request flexible working, taking into account the new legislation.

- o Go to BERR guidance
- o Go to ACAS guidance
- What sort of flexibility is covered by a request for flexible working?

A qualifying employee can request a change to the terms and conditions of their employment relating to, for example:

- o changes to their hours and times of work
- o changes to places of work
- part-time working
- job sharing
- o working from home
- o working term-time only
- o working shifts

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- increased holiday entitlement.
- Is there a formal procedure to follow when making and responding to a request for flexible working arrangements?

Yes, the procedure is summarised in the table below:

The employee makes a request to change terms and conditions of employment. The employee will specify in writing (including email):

- that they have or expect to have, responsibility for the upbringing of the child (and is either the mother, father, adopter, guardian, special guardian or foster parent; or, married to or the partner of the child's mother, father, adopter, guardian, special guardian or foster parent) or
 - that they have or expect to have responsibility caring for an adult and is the spouse, partner, civil partner or relative of that adult or is not the spouse, partner, civil partner or a relative but lives at the same address as that adult the change applied for
- that the application is being made under the statutory right to request flexible working
- o if and when any previous application was made
- the date on which it is proposed the change should become effective
 the effect, if any, the employee thinks the change would have on the employer
- o how, in their opinion, any such effect might be dealt with
- the age of the child if the application is made to care for a child
- or, for the carer of an adult, state their relationship to that adult
- The application should also be dated.

The employer and employee must meet to discuss the application within 28 days of the application at a time and place being convenient to both. The employee can take a 'companion' along. If companion cannot attend then the employer must defer meeting to a new time within 7 days of original date.

- Within 14 days of the meeting employer must provide written and dated notification of their decision.

 If the application is rejected the notification must state which grounds for rejection apply (see the question below on factors that may be taken into account) with an explanation as to why those grounds apply and the appeal procedure.

 If appealing, the employee must send dated written notice setting out the grounds of
- If appealing, the employee must send dated written notice setting out the grounds of appeal within 14 days of the date of rejection of application.
- Within 14 days of receiving the appeal, the parties must meet at a mutually convenient time and place for the appeal meeting and the employee can be accompanied by a companion again.
- Within 14 days of the appeal meeting, the employer must give written and dated appeal decision. A rejection must contain the grounds and an explanation as to why the grounds apply.

The companion must be employed by the same employer as the applicant, and the companion is entitled to paid time off work to attend the meeting.

The Department for Business, Enterprise and Regulatory Reform (BERR) provide a flexible working application form (Form FW(A)) which may be used to make a request, although its use is not mandatory and a letter or email to the employer will be sufficient. This is available on the BERR's website.

o <u>View BERR flexible working forms</u>

More information about this procedure is also available on the BERR and ACAS websites and in the Flexible Working (Procedural Requirements) Regulations 2002 (SI 2002/3207) as amended.

- o <u>Go to BERR website</u>
- Go to ACAS website
- Can an employer refuse a request for flexible working if they believe that the employee has not provided enough evidence of their caring responsibilities?

The legislation does not require the employee to provide evidence of either parental or caring responsibility, although the employee should supply as much information as possible as a matter of best practice.

An employer can theoretically refuse a request for flexible working if they really can prove that the employee does not have the caring responsibilities they claim, as in that case the employee will not be protected by the flexible working legislation. Requests for flexible working can only be made for the purpose of providing care.

A wide range of caring responsibilities are relevant in any event. The Department for Business, Enterprise and Regulatory Reform guidance suggests that the need for emotional support will be sufficient. Accordingly an elderly, lonely, depressed relative in need of company to alleviate their condition is 'in need of care'. The sort of care-giving activities given by carers of adults who request flexible working include:

- o emotional support
- o keeping the care recipient company
- help with dressing and bathing
- o help with mobility (for example, walking, getting in and out of bed, and to the toilet)
- o nursing tasks

- o giving/supervising medicines
- o escorting to hospital, doctor, dentist or chiropody appointments
- o practical household tasks (for example, preparing meals, shopping, cleaning)
- help with financial matters or paperwork.

This is not an exhaustive list.

The best course of action for an employer who suspects some form of dishonesty concerning the information supplied is to request evidence (if this is available). In some circumstances it may be appropriate to invoke the organisation's disciplinary procedure. However, a mere suspicion of the employees' dishonesty will not be enough, and in any event the employee may still be protected by other legislation, for example that governing discrimination.

Some examples follow:

- An employee seeking flexible working in order to care for her disabled aunt will not need to show that the aunt qualifies for disability living allowance.
- o An employees seeking flexible working in order to care for her elderly step mother or a child will not need to show why other family members cannot provide that care.

The best approach an employer can take and that intended by the legislation, is that the employer should decide whether to grant the request by focusing on their business grounds and whether flexible working can be accommodated rather than the employee's personal circumstances.

- o <u>View BERR guidance</u>
- If an employer refuses a request for flexible working, can a further application be made at a later date?

A further application can be made at a later date but an employee must wait 12 months from the date on which their last application was made before making any further requests unless the employer agrees to voluntarily consider another request within a 12 month period.

Can an agreed flexible working procedure be varied?

The flexible working procedure can be varied where the parties agree. The agreement must:

- o be recorded in writing by the employer, and
- o specify what time-limit the extension relates to
- o state the date on which any extension is to end, and
- o be dated, and
- sent to the employee.
- What factors can an employer take into account when considering whether to refuse a request for flexible working?

An employer will only be able to refuse a request if they can show that one of the following grounds applies:

- inability to rearrange work among existing staff
- o burden of additional costs
- o detrimental effect on the ability to meet customer demand
- o inability to recruit additional staff
- o detrimental impact on quality or performance
- o insufficiency of work when the employee proposes to work
- planned structural changes.

The grounds for refusal potentially give an employer some scope to properly refuse an application for flexible working. However, refusing a request for flexible working may give rise to a sex discrimination claim if it is not handled carefully. An employer should allow requests where they can, on a trial basis where necessary. If they do refuse a request then the facts of each case should be carefully considered and documented, and particularly the reasons for refusal. The following examples illustrate the emphasis which tribunals place on a full consideration of the grounds for refusal.

In Webster v Princes Soft Drinks ET/1803942/2004 2005 ET an employee whose request for flexible working was refused won her claim for indirect sex discrimination. The employee was a senior financial accountant who applied to job share her post. The employer complied fully with the Flexible Working Regulations in its consideration of the request and during the process expressed some concerns about the risk that the different management styles of the job sharers would interfere with their shared management of the employees who would report directly to them. The tribunal found that those concerns about the risk of different management styles did not justify the refusal of the job share which was indirectly discriminatory. The employer should have considered delegating routine tasks to other members of staff.

By contrast in *Georgiou v Colman Coyle*(*unreported, EAT/503/00 13 December 2001, EAT*) an employee whose request for flexible working was refused lost her claim for indirect sex discrimination. The employee was a female solicitor who made a request to work part-time or from home on a part-time basis. The employer complied fully with the Flexible Working Regulations in its consideration of the request. During the process the employer expressed some concerns about the fact that the office was small, the need for two full-time solicitors, that commercial clients required a prompt and efficient service, and that attendance at the employer's premises was necessary in order to allow access to files and proper supervision of work. The employer was also concerned that reduced fee income would substantially affect their profitability. The tribunal found that those concerns did justify the refusal of the employees flexible working request and the employee did not succeed in her claim of indirect sex discrimination.

If an employer refuses a request for flexible working what claims may the employee make?

The employee can make a number of claims including:

- that the employer has failed to deal with the request for flexible working properly, and/or
 that the application was rejected on the basis on incorrect facts, and/or
- o for unfair dismissal, if they have been dismissed or subjected to a detriment for exercising or
- for unfair dismissal, if they have been dismissed or subjected to a detriment for exercising or proposing to exercise rights under the flexible working provisions (in most cases this will be automatically unfair), and/or
- that the refusal to allow the request for flexible working (for example by refusing part-time working) amounts to indirect sex discrimination contrary to the Sex Discrimination Act 1975.

See our FAQs on Part- time work and Sex discrimination for further information on the related claims an employee may make if a request for flexible working is refused.

o Go to list of FAOs

Note that claims relating to the refusal of the request for flexible working must be made within three months of the 'relevant date', ie either the date on which the appeal decision was given, or the date of any procedural breach by the employer. If the claim is simply for failure to honour the flexible working provisions then an employment tribunal can:

- o order reconsideration of the decision
- award such compensation as it considers just and equitable up to a maximum of eight weeks' pay, capped at the statutory maximum (For latest figures see Employment law at work data)
- O Go to Employment law at work data
- award up to two weeks' pay for failure to allow a companion to attend, also capped at the statutory maximum.

As an alternative to tribunal proceedings, an employee may bring a flexible working dispute before Acas. The scheme only covers flexible working and unfair dismissal claims. For further information see:

- Acas website
- o our FAQ on Tribunal claims and compromise.
- o Go to Acas website
- o View Tribunal claims, settlement and compromise FAQ

Which employees qualify for parental leave?

Parental leave applies to:

- male or female employees, and
- o full-time or part-time employees
- o who have one year's qualifying service
- o and have responsibility for the care of a child under five years of age.

Note that:

- Different age limits apply to different family-friendly policies. In the case of flexible working, the right arises before the child reaches 17 years of age - see question above on employees who qualify. With parental leave the child must be under five years of age.
- o Different rules apply for parents of disabled children (see question below on disabled children)

What must an employer offer by way of parental leave?

In addition to the right to take maternity, paternity and adoption leave (see our FAQ on Maternity, paternity and adoption leave and pay), an employer must offer unpaid leave which complies with the following principles:

- Maximum overall leave employees are entitled to take up to 13 weeks' unpaid leave.
- o The leave must be taken before the child's fifth birthday or the fifth anniversary of the adoption of the child.
- The leave is in respect of each child for whom the employee has parental responsibility. For example, parents of triplets are entitled to 39 weeks (if they can afford to take the time off without payment).
- The leave can be for any purpose connected with the care of the child.
- o No more than four weeks parental leave can be taken in any one year.
- In default of any agreement to the contrary parental leave may only be taken in blocks of one week or multiples of a week.
- 21days notice must be given of the intention to take leave, and of when the leave begins and ends.

Note that employers can conclude collective or workforce agreements which can then be incorporated into an employee's contract of employment setting out the provisions governing parental leave, as long as the provisions are at least as favourable as the principles set out above.

See also the question below on parental leave for employees with disabled children.

o See also Maternity, paternity and adoption leave and pay FAQ

Are there any exceptions to the parental leave provisions for parents with disabled children?

Yes, the following principles apply to parents of disabled children. Parents of disabled children:

- o are not required to take leave in blocks of one week
- o are given an extended period in which to take parental leave, up to the date of the child's 18th birthday
- the overall amount of leave available to parents of disabled children is increased from 13 to 18 weeks.

Disability is defined as being entitled to disability living allowance.

See also question above on what parental leave employers must offer.

Does the employee have the right to return to the same position following a period of parental leave?

Yes, any employee who takes parental leave for a period of four weeks or less, unless the leave is added to the end of additional maternity leave, has the right to return to the same job, on the same terms and conditions.

For employees who take a longer period of parental leave, or whose leave is added to the end of additional maternity leave, the right is to return to the job they left before their leave commenced, unless it is not reasonably practicable to allow this. In such a case, the employee would have the right to return to a job which was suitable and appropriate in the circumstances.

The Employment Appeal Tribunal (EAT) had to consider what the right to return means in *Blundell v The Governing Body of St Andrew's Catholic Primary School and another [2007] IRLR 652, EAT.* It upheld a tribunal decision that returning to a teaching job at a primary school was the same job even though it was not teaching the same subject in the same way as before the maternity leave had started. The employer concerned therefore won the major part of the case. However the employee won on one issue, namely that loss of the opportunity to influence the choice of class to be taught amounted to a detriment.

 If an employer refuses parental leave or time off for dependants, what claims may the employee make?

A variety of employment protection is in place for employees who qualify to take parental leave or time off for dependants, including claims for the following:

Parental leave

- Detrimental treatment, if this arises out of exercising the right to take parental leave.
 Detrimental treatment may take many forms, for instance, inferior terms and conditions or refusal to consider an employee for promotion. The employment tribunal may award compensation to an employee who suffers such a detriment.
- Automatically unfair dismissal, if an employee is dismissed for the reason that they took or sought to take parental leave. This includes a redundancy situation where the employee was selected for a reason connected with parental leave.

Time off for dependants

- A declaration they were unreasonably refused permission.
- Compensation which is just and equitable.
- If they are dismissed for this reason, they may also claim automatically unfair dismissal.

(See sections 57A and B of the Employment Rights Act 1996).

 What must an employer offer by way of time off for dependants, for example if a family member dies or is ill?

Since 1999, an employer must permit an employee to take a reasonable time off during working hours to take action necessary in connection with one or more of the following:

- o when a dependant falls ill
- o when a dependant is injured or assaulted, or gives birth
- o to make longer-term arrangements for a dependant who is ill or injured
- o the death of a dependant
- o an unexpected incident involving a child of the employee when the child is at an educational establishment
- o when there is an unexpected disruption or breakdown in care arrangements for a dependant.

Note that illness for these purposes includes mental illness.

 Does the need for time off to care for a dependant have to be a sudden and unexpected emergency?

Although the time off for dependants provisions are designed to deal with unusual disruptions such as illness or a break down in care arrangements, the need for time off does not have to be a sudden and unexpected emergency.

The key issue is for employers and employees to behave sensibly and consider if the time off is necessary. For example in *Royal Bank of Scotland Plc v Harrison* [2009] *IRLR 28, EAT* the employee's childminder unexpectedly told her she could not cover a work day. The employee was given two weeks notice of this. The employee could not make other arrangements and asked her employer for the day off and was refused. The employee took the day off anyway, and was disciplined. The Employment Appeal Tribunal confirmed that she was entitled to the time off to deal with the unexpected disruption to care for dependants. The employee was still protected even though she had two weeks notice, there did not have to be a 'sudden and unexpected emergency'.

For more guidance on the way in which time off for dependants operates see the question below

Who is a 'dependant' for the purposes of the time off for dependants provisions?

A dependant is quite narrowly defined as a spouse, parent or child of the employee, or someone who lives in the household as part of the family, rather than being a lodger or a tenant.

The definition is extended to any person who reasonably relies on the employee for assistance to make care arrangements where that person has fallen ill, or been injured or assaulted.

 What information is an employer entitled to from an employee who needs to have time off work to care for a dependant?

The employee should, as soon as reasonably practicable, inform their employer of the reason for the absence and for how long the absence is expected to continue.

It may in some circumstances be reasonable for the employee to inform the employer on their return to work where it was not practicable to make contact earlier.

Numerous cases are now being reported on time off for dependents and some useful guidance concerning the information to be given on each occasion of absence comes from the following cases.

Truelove v. Safeway Stores plc [2005], ICR 589, EAT suggests that employers should not be overly demanding in the information they require before granting a request for time off for dependants. The employee only has to communicate enough to put an understanding in the employer's mind that something has happened to cause the breakdown of the usual (in this case childcare) arrangements and to make it necessary, urgently, for the employee to be absent from work.

Mr Truelove worked for Safeway Stores he indicated that he may need to leave work on the next day because his partner had a meeting. Before he left work that day he confirmed that there was no one to look after his child the next day. He did not mention that some alternative arrangements he had made had fallen through. He did not attend work and was subsequently disciplined.

Mr Truelove complained to the employment tribunal that he had been unreasonably refused time off during working hours to deal with the unexpected disruption of arrangements for the care of a dependent. (See Employment Rights Act 1996 section 57A and s.57B.)

Safeway Stores argued that:

- he had not disclosed the reason for his absence, namely the disruption to the original arrangements, and
- o they did not have enough information to determine whether the right for time off applied.

Mr Truelove won on appeal to the Employment Appeal Tribunal which held that there had been sufficient communication to the employers of why Mr Truelove was not going to be there the next day. The reasonableness of an employee's request should involve consideration of how often the problem had happened before, whether or not there was another way of solving the problem and the business needs of the employer.

Qua v.John Ford Morrison Solicitors [2003] ICR 482. provides more extensive guidance on dependant leave. In this case a legal secretary was dismissed after 10 months because of 20 days absence arising out of medical problems for her 4 year old son. The Employment Appeal Tribunal specified the following questions for the tribunals to consider in approaching these claims:

- Did the employee take time off during working hours?
- o If so, on how many occasions and when?
- On each of those occasions, did the employee inform the employer of the reason for the absence?
- o Did the employee inform the employer how long they expected to be absent?
 - If not, were the circumstances such that the employee could not inform the employer until after they returned to work?
 - Did the employee seek to take time of to deal with one of the situations listed above in the question 'What must an employer offer by way of time off...?'

If the employee can answer 'yes' to all of the above questions, then right to time off arises. It is then necessary to assess:

- o Was the amount of time taken off reasonable in the circumstances?
- o Was principal reason for the dismissal taking that time off work?

If so, a claim of automatically unfair dismissal arises.

 Are any future developments expected in the area of flexible working, parental rights and family-friendly provisions?

Consultation and changes in the area of family friendly provisions have been on-going for years. Facilitating flexible working voluntarily appears to be a the heart of the Government's approach. Details of the consultation on the Government's suggested initial measures were set out in a ten-year childcare strategy document published in July 2004. The Work and Families Act 2006 started implementing some of this strategy.

In addition to recent enhanced flexible working provisions referred to in the questions above, the Government published it's draft legislative programme for 2008/2009 in May 2008 which included a new a right to request time off for training. This legislation is now expected to come into force in April or October 2010 and will almost certainly not be extended to include agency staff. The processes of this new right will be based on the existing model of the right to request flexible working. Employees will have the right to request time off for training once they have worked for their employer for 26 weeks. Employers will be obliged to consider seriously requests that they receive but can refuse a request if there are good business reasons to do so. Employers will not have to pay the salary or training costs for time off to train although they may offer to do so if they wish.

More details on the consultation paper and the Government response published in March 2009 are available on the Department for Innovation, Universities and Skills (DIUS) website.

O Go to DIUS website

Other changes

For detailed information on the further future changes, including for example the recent increase in the minimum holiday entitlement and increases to paid maternity and paternity leave changes see our Bank holidays and Maternity, paternity and adoption leave and pay FAQs.

- o Go to Bank holidays FAQ
- Go to Maternity, paternity and adoption leave and pay FAQ

Some aspects of the government's strategy have an impact on employment law issues, but the overall strategy is extensive with a wider remit than employment law alone; it also attempts to address children's services and education generally. Other options under consideration in a childcare context in the future include:

- out of school childcare places for all children aged 3 -14 between the hours of 8am 6pm each weekday before 2010
- a goal of 3,500 local community children's centres by 2010.

For details of developments since this update see our Recent developments section.

O Go to Recent developments section

See also our Part-time work FAQ for further information in this area.

O Go to Part-time work FAQ

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