

Making flexible working the default

ReWAGE response to BEIS consultation [close date: 01/12/2021]

This consultation on flexibility as default assumes that the current principle in UK legislation on flexible working that it is a right to request rather than an employee's right to work flexibly is to be retained within any amended legislative approach. The implied arguments for this retained government position are not only those of reducing legislative burdens on employers but also that systems of work organisation vary by sector, firm and occupation and that personal and family circumstances and preferences vary so that no one system of flexible working suits everyone. In this response to the consultation, we have accepted the government's position, though consideration of legislating for a right to flexible working should still be considered if current proposed amendments do not provide for flexibility as default.

However, how far this principle of request can be made compatible with the notion of flexibility as default informs our responses to the key questions in the consultation. We take default to mean: i) that refusals of requests for flexible working should be exceptional rather than standard and be based on evidence, ii) that if rights to request from day one are to empower people to apply for new jobs or re-enter employment then decisions on flexible options must be made within the recruitment process and without prejudice to those requesting flexible working, and iii) that there should be evidence of serious negotiation on possible solutions to requests for flexible working.

Should the Right to Request Flexible Working be available to all employees from the first day of their employment?

There are very strong economic and equality arguments for making the Right to Request Flexible Working (RTRFW) available to all employees from the first day of employment.

The economic case

The economic case arises from the restrictions on skill and talent development consequent on the current 26-week employment eligibility requirement before there is a statutory right to request flexible working. The consultation document stresses the 2.2 million employees that are estimated to have changed job and who are not eligible under the RTRFW regulations. However, due to the absence of a right to request flexible working from day one, many may either not have felt able to enter employment or opted to take a job designed as part-time (or flexible in some other way) that may not make the best use of their skills and talents. In addition, many in employment and with agreed flexible working arrangements will also not have felt able to change jobs because they cannot transfer their right to request flexible working from their current employer to another employer.

Opportunities to change job is one way in which people can develop their skills, expertise and careers and moreover contribute to reducing skill shortages in particular areas, an issue of increasing importance for the economy. Such options may not be available to those needing some flexibility to meet their care or health needs as they are not empowered to

request these arrangements at the point of hire.¹ Moreover, many may find themselves in a situation where they are not being offered opportunities for development or promotion that they desire in their current jobs, and therefore have even more need of opportunities to change their employment situation. A second way in which more access to flexible working can promote economic development and productivity is through its impact on employee commitments and engagement.²

The equalities case

With respect to equalities, the RTRFW has made a significant contribution in helping those who face personal or family constraints on their possible working arrangements³ to maintain their position in an organisation and thereby continue to utilise their developed skills. This contrasts with the tendency, before this right was available, for mothers and others with constraints to feel obliged to leave their current employer and often take a part-time job that also frequently involved occupational downgrading with the consequent loss of opportunities to maintain their skills and employment status.⁴ The RTRFW thus reinforced the benefits for example of maternity leave in enabling continuity of employment and career.

However, although the current RTRFW has made some impact in enabling employment and career continuity it has not ensured full development of the talents of those needing flexible work arrangements. This stems from three factors:

1. Not all those eligible to request flexible working either feel able to request or are successful with their requests. We discuss below how if it really is to be flexibility by default then the right to refuse a request should be exceptional and supported by evidence that stands up to independent scrutiny, to limit this problem and encourage

¹ A 2019 Working Families survey found 65% of those responding said they could not risk changing jobs as they would not necessarily be able to make the same arrangements re: working hours as in their current job. <https://workingfamilies.org.uk/wp-content/uploads/2019/11/WF-and-FFWS-response-on-flexible-working-parental-leave-and-pay-transparency.pdf>

² Family-friendly working practices have been found to be associated with better worker attitudes to work (commitment, satisfaction, intent to stay) – see Butts, M. M., Casper, W. J., & Yang, T. S. (2013). How important are work–family support policies? A meta-analytic investigation of their effects on employee outcomes. *Journal of Applied Psychology*, 98(1), 1.). Similar findings are emerging with respect to the experience of hybrid and remote working during Covid (see Forbes, S., Birkett, H., Evans, L., Chung, H and Whiteman, J. (2020) *Managing Employees During the COVID-19 Pandemic: Flexible working and the future of work*. Project report. Equal Parenting Project. [Managing Employees During the COVID-19 Pandemic: Flexible working and the future of work - Kent Academic Repository](#); and Spellman, C, McBride, J and Smith, A. (2021) The impact of COVID-19 on the Good Work Agenda and flexible working - <https://evidencehub.northeastlepp.co.uk/report/impact-covid-19-good-work-agenda-and-flexible-working>

³ The key categories of people facing constraints include those with primary responsibilities for young children, those with responsibilities for the care of the elderly or sick, those who are disabled and those with health conditions

⁴ In an early study Dex, S. and Shaw, L. (1986) *British and American women at work: do equal opportunities policies matter?* London: Palgrave Macmillan) showed that the expectation that women in the UK would only work part-time after having children led to them change employers and take a lower graded occupation; in contrast the United States where more women stayed in full-time work occupational downgrading did not occur to the same extent. Work by Connolly and Gregory further confirmed that the much of the negative impact from part-time work occurred when this was associated with having to change employers rather than working reduced hours with the employer for whom they had worked full-time (Connolly, S.; Gregory, M. 2008. “Moving down: Women’s part-time work and occupational change in Britain 1991–2001”, *The Economic Journal*, 118(526) F52–F76).

those who need flexibility for their own or their family's well-being⁵ to make requests. In some cases, requests for flexibility within the current contractual arrangements may be turned down and working part-time or flexible hours made contingent on accepting either freelance status or zero or minimum hours contracts. Required changes to employment contracts (other than changes to implement the type of flexibility sought) in return for agreements for flexible working should be considered a breach of the right to request legislation and give rise to a possible complaint to an employment tribunal.

2. Those granted their requests may find that these arrangements come at a cost of training and development and access to interesting work, as well as more limited promotion prospects. A research review on the motherhood pay gap⁶ revealed little evidence that these outcomes were the consequence of detailed assessments of the productivity or the potential of part-time workers. Instead, they may reflect assumptions on the part of employers that either part-time staff have no interest in further development and promotion or that part-time hours are not suitable for challenging and high productivity work. Similar prejudice existed pre-pandemic with respect to working from home where it was refused on grounds of expected lower productivity but evidence from the Covid experience of working from home suggests these views were often not justified.⁷
3. Those facing a lack of development opportunities are not able to use personal agency to remedy their situation by seeking alternative employment as it may not be possible for them to work 26 weeks without some flexibility in employment arrangements and they also have no guarantee that flexibility would be agreed to after 26 weeks. There is a danger that the lack of a right to request flexible working from day one in some cases changes the balance of power heavily in favour of the employer. There is therefore a strong equalities case in favour of the RTRFW from day one. This 26-week eligibility requirement to request flexible working also limits the range of jobs that those returning to work may be able to apply for and accept, again contributing to under-utilisation of people's skills and capacities.

⁵ For example, research by Zhan et al. (2009) found that opportunities to reduce hours/work flexibly in those moving towards retirement than moving to new types of work, so that flexible working can help the achievement of longer working lives with less risk to mental health (Zhan, Y., Wang, M., Liu, S. & Shultz, K. S. 2009. Bridge employment and retirees' health: A longitudinal investigation. *Journal of Occupational Health Psychology*, 14, 374-389). The results of this study were replicated in a systematic review focused on wellbeing and mental health: <https://whatworkswellbeing.org/blog/retirement-and-wellbeing-what-works/>

⁶ See Grimshaw, D. and Rubery, J. (2015). 'The motherhood pay gap: a review of the issues, theory and international evidence'. Conditions of Work and Employment Series, No. 57, Geneva: ILO. https://www.research.manchester.ac.uk/portal/files/30943466/FULL_TEXT.PDF1.pdf.

⁷ A number of research studies exploring the impact of remote working under Covid have not found significant evidence of productivity problems and have also reported on productivity advantages (see for example Felstead, A. UK productivity could be improved by a permanent shift towards remote working, research shows: <https://www.cardiff.ac.uk/news/view/2432442-uk-productivity-could-be-improved-by-a-permanent-shift-towards-remote-working-research-shows;>

[Felstead, A.](https://www.cardiff.ac.uk/news/view/2432442-uk-productivity-could-be-improved-by-a-permanent-shift-towards-remote-working-research-shows;) and [Reuschke, D.](https://doi.org/10.1108/ITP-11-2020-0758) (2021) "A flash in the pan or a permanent change? The growth of homeworking during the pandemic and its effect on employee productivity in the UK", *Information Technology & People*, ahead-of-print 2021 <https://doi.org/10.1108/ITP-11-2020-0758>; CIPD 2021 Flexible working: lesson from the pandemic report: <https://www.cipd.co.uk/knowledge/fundamentals/relations/flexible-working/flexible-working-lessons-pandemic>; Wilcocks. L. 2020 Remote working: here to stay? http://eprints.lse.ac.uk/104509/1/businessreview_2020_04_02_remote_working_here_to.pdf

The inclusion of flexible work opportunities in adverts

This RTRFW from day one would be further strengthened by a requirement to indicate flexible working possibilities in job adverts. This openness would do much to empower those not having the development opportunities they seek to consider changing jobs. However, this option has been ruled out on the argument that it would encourage some employers to say flexible working would not be available. However, this argument discounts the positive reputational impacts that could come from making flexible work opportunities openly available and the negative impact of saying no flexible options are available. Employers could not be allowed to state that flexibility is not available if they already have employees working flexibly in similar jobs. The inclusion of this opportunity in adverts would give confidence to those needing flexibility that it might be worth applying to these organisations and further strengthen the impact on job mobility and skill and talent development thereby contributing to both economic and equality effects.

Do all the business reasons for refusing a request remain valid?

If the policy is flexibility as default, then it would follow that the presumption should be that the request be granted unless the employer faces unusual and difficult conditions in granting these requests. Otherwise, it is only the flexibility to request that is the default. Given widespread evidence of limited negative impacts of flexible working on productivity during the pandemic (see footnote 7), it would no longer be plausible for employers to assert problems of productivity or higher costs and instead a refusal should only be made when there is evidence that would stand up to independent scrutiny that in this particular context flexible working is not possible or would lead to significant extra costs or risks.

Furthermore, given the rapid changes to work organisation that took place under Covid, the continued inclusion of a reason for refusal that a restructuring is going to take place has limited validity; working flexibly can both be introduced in many contexts relatively quickly and can likewise be further changed, if necessary, under a restructuring.

Should employers have to show that they have considered alternative ways of working before rejecting a request and how many requests per annum should be permitted?

The policy is billed as flexibility as default. For this strapline to have practical validity the expectation should be that efforts should be made to find an accommodation where possible that fits the employee's request for flexibility. Thus, a refusal of a specific request for flexibility for one of the eight business reasons without a meeting to explore alternatives that might be mutually acceptable would not be consistent with a policy of flexibility as default. There is a focus on negotiation over what works in a particular context in the consultation document, rather than on extending employee rights to flexible working as applies in some countries.

For this approach to have validity in practice it would be appropriate to build in some requirements for meaningful negotiation to take place with some costs to employers if they do not negotiate in good faith. For example, one possibility would be to allow multiple requests for flexibility if no meeting and option of alternative modes of flexible working takes place. If a thorough investigation of flexible options takes place (and which should be documented both with dates and persons present at meetings plus options discussed), then maybe one formal request per year is acceptable unless there is a material change in the employee's personal circumstances or health. Opportunities to ask for further changes in

flexible working should be available to those who have had their requests granted as there could be further changes in the employee's circumstances or health.

What is the appropriate response time to be allowed for requests for flexible working?

If the default of allowing requests for flexible working from day one is to be an effective substitute for not making mandatory mention of flexible working opportunities in job adverts, then it is vital that such requests are considered and decided upon during the recruitment process. Making such a request should also not be a reason for not being selected for the post. Unless the decision is coterminous with the job offer the applicant may not know if they can accept the job. Those already in post could be expected to wait a reasonable time for a decision. However longer than a month before either a positive response or a meeting organised to discuss possible options may be difficult for some as requests may reflect rapidly changing family and personal circumstances. Moreover, there is evidence⁸ that more rapid returns to work for these needing flexibility due to health problems is likely to lead to a more rapid and effective full recovery.

Some additional issues to consider

Flexible working as a life stage issue

While the proposal for temporary flexible work options would be a useful and helpful improvement, this change does not go far enough in recognising that needs with respect to working patterns are related to life cycle and life stage issues⁹ and that rights to request returns to regular working and hours of work are also important to ensure equality of opportunities and the full development of the talents of the workforce. The UK has no right to return to full-time work for those who have reduced hours or to end the flexible working arrangements. Other countries¹⁰ provide these rights at least in part – for example to have the right to the next full-time vacancy that emerges. This absence means that those with care needs may have to enter permanently onto a part-time track with all the reduced opportunities this may involve and without the right to return to a full-time track.

Predictable working hours should be an option under the right to request provisions.

Accommodation of work and life depends not only on opportunities for flexibility but also on predictability of work arrangements and demands as this is needed when the employee has major care or other personal commitments that need to be arranged to fit with work. The RTRFW should therefore include rights not to be asked to change working hours at short notice – that is, to be protected from employer-driven flexibility where this flexibility would make it difficult for that person to enter or stay in the role. This accommodation is possible: the recent, revised NHS policy on flexible working includes exactly this request as one form

⁸ For anxiety, depression and muscular-skeletal conditions in particular, faster return to work has been found to lead to more sustainable recovery, suggesting the need for quick decisions concerning rights to request flexible working for workers with health conditions (see Kendall, N., Burton, K., Lunt, J., Mellor, N., Daniels, K. (2015). *Development of an Intervention Toolbox for Common Health Problems in the Workplace*. HSE Books and Etuknwa, A., Daniels, K., Eib, C. (2019). Sustainable return to work: A systematic review focusing on personal and social factors. *Journal of Occupational Rehabilitation*, 29, 679-700.)

⁹ See, for example, Pocock, B. and Skinner, N. (2012) 'Good jobs, bad jobs and the Australian Experience' in C. Warhurst, F. Carre, P. Findlay and C. Tilly (eds) *Are bad jobs inevitable?* London: Palgrave Macmillan.

¹⁰ For example rights to return to full-time work apply at least for parents in Slovenia, Spain and Germany with right to apply in France, see Grimshaw, D, Johnson, M., Rubery, J. and Kaizer, A. 2016 *Reducing Precarious Work Protective gaps and the role of social dialogue in Europe*, report to DG employment, European Commission <https://documents.manchester.ac.uk/display.aspx?DocID=48958>

of 'flexible' working, in recognition of the problems that variable shift patterns cause for NHS workers in managing care responsibilities.¹¹

About the authors

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About ReWAGE

[ReWAGE](#) is an independent expert advisory group modelled on SAGE that is co-chaired by Warwick and Leeds Universities. It has been convened to support the government's strategic response to the recovery and renewal of work and employment in the UK as it tackles the impact of Covid-19. It is funded by the [Economic and Social Research Council](#).

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¹¹ <https://www.nhsemployers.org/sites/default/files/2021-06/NHS-Staff-Council-joint-statement-June21.pdf>