

Flexible working consultation: Making Flexible working the default

Community Union Response

Introduction

Community is a union with members in sectors across the economy including steel and manufacturing, justice, education, finance, logistics and many more.

We believe that making flexible working the default is an appropriate policy choice but have some concerns about the extent to which this will increase the take-up of flexible working as hoped.

We therefore believe that focus on the job advertisement stage, requiring employers to include the available flexible working options in their adverts would be helpful to ensure that people have the choice to take up roles where flexible working is feasible.

A further point we would stress is that flexible working is not a substitute for reasonable adjustments. We are hearing reports of employers seeking to use flexible working request legislation to accommodate requests of disabled workers to work from home when it's clear that this should actually be reacted to through the framework of reasonable adjustments. (Partly this allows employers to refuse a flexible working request rather than fulfilling their obligation to make reasonable adjustments).

Broadly, we fully agree that flexible working should be the default. This helps people to manage in a range of situations including:

- a. Childcare responsibilities
- b. Caring responsibilities
- c. Recover from disease
- d. Medical appointments
- e. Managing the symptoms of menopause
- f. Supporting their lifestyle
- g. Approaching Retirement

Reinforcing the importance of flexible working in helping people to remain in the workforce, a survey commissioned by Community found that almost 60% of women who had been working from home during the pandemic said that the ability to work from home helped them to manage their menopause symptoms. Flexible working is a critical part of the toolkit for building inclusive workplaces, with corresponding benefits for businesses in terms of productivity and staff retention.

Additionally, increasing flexible working can help the UK meet its climate goals. A recent analysis by global consultancy Advanced Workplace Associates (AWA) found that smart working practices can reduce carbon generated by office workers by up to 26%. This will be achieved by driving down commuting journeys and cutting consumables, such as printing and paper.

Consultation question responses

Do you agree that the Right to Request Flexible Working should be available to all employees from their first day of employment?

Strongly agree

The benefits of flexible working are clear: increased productivity, reduced absences, the ability to recruit and retain staff who would otherwise have been excluded from the workforce, resulting in a more diverse workforce, and reduced absences. The benefits accrue to both employers and to employees.

An ACAS poll found that 55% of employers expect an increase in staff working from home or remotely in another way for some part of the week.

We believe that removing the two-year qualifying period to make a flexible working request will widen access to these important benefits. It will encourage employers to change their practices to align with what is increasingly clear is the preference of their workforce. We hope that in response to potential requests employers will be more proactive in considering the flexible working offers they could make for the individual circumstances of their workforce.

However, we have concerns more generally that making the Right to Request Flexible Working a day 1 right will not of itself increase the take up of flexible working.

ACAS, and the Flex for All campaign have both separately called for employers to advertise specific flexible working arrangements within job adverts, and to state that they encourage a conversation about flexible working. This would encourage the discussion to happen up front and ensure that flexible working is agreed in a collaborative manner.

Furthermore, all roles should be deemed suitable for flexible working unless the employer can demonstrate that not making flexible working available would be a proportionate means of achieving a legitimate aim. The modification from “business reasons” to “objective justification” would ensure that flexible working legislation aligns with the Equality Act 2010.

Another concern is that under the proposed scheme, less scrupulous employers may choose deliberately to reject applicants on the grounds that they intend to request flexible working. A worker treated against in this way wouldn’t typically have any recourse unless there was a direct breach of the equality act. To combat this possibility, the protection against detriment to job applicants could be extended.

Many of the employers we work with have a strong culture of flexible working and we are keen to see others adapt their culture to support it. Yet concerns remain that the right to request is particularly focussed on women and parents and careers. It’s also associated with detriment to careers, in places where the culture of flexible working is not there. Organisations should have leadership from the top as well as clear policies in relation to flexible working. Again, there are examples of good practice amongst the employers that we work with.

Finally, there is a lack of wider awareness about the right to request flexible working which presents another barrier. Awareness raising campaigns would be beneficial especially those which highlight some of the available forms of flexible working as too often it is perceived that flexible working means only working from home, and often seems inaccessible to those in blue collar jobs.

Given your experiences of Covid-19 as well as prior to the pandemic, do all of the business reasons for rejecting a flexible working request remain valid? Please answer this question from the perspective of the employer.

No

We believe that the business reasons should be replaced with objective justification in the Equality Act, which would mean all roles should be deemed suitable for flexible working unless it can be shown that the unavailability of flexible working is a proportionate means of achieving a legitimate aim.

Currently employers find it too easy to turn down reasonable requests, with TUC research from 2019 showing that 3 in ten flexible working requests are denied¹.

Despite changing working practices throughout the pandemic having demonstrated that a range of different flexible working approaches are viable, CIPD research shows there has actually been a drop in all forms of flexible working except home-working since the onset of the pandemic².

Do you agree that employers should be required to show that they have considered alternative working arrangements when rejecting a statutory request for flexible working?

Agree

Please give reasons for your answer

We agree that employers should suggest alternatives and believe this is good practice. Suggesting of alternatives also helps people to understand the flexible working options that may be available beyond what first comes to mind.

We agree with ACAS that either codifying this in the regulations, or, providing a code of practice which sets out the ways in which employers can demonstrate that reasonable alternatives have been considered before rejecting a request, would both be suitable solutions. Of course, an alternative may not always be possible, and this should be accounted for without allowing employers who are unwilling to properly consider requests to cover their tracks.

Would introducing a requirement on employers to set out a single alternative flexible working arrangement and the business ground for rejecting it place burdens on employers when refusing requests?

No

Too often employers have a blanket policy of refusing flexible working requests. This is not an undue burden given the need to change the culture at employers who have adapted the least.

However, in some cases it may be unhelpful to require one alternative to be considered. This would allow unscrupulous employers to put forward an implausible solution, as part of a “tick box exercise”.

The approach of requiring employers to set out flexible working arrangements would operate most effectively if combined with a duty to set out flexible working options within job advertisements.

Do you think that the current statutory framework needs to change in relation to how often an employee can submit a request to work flexibly?

Yes

¹ <https://www.tuc.org.uk/news/one-three-flexible-working-requests-turned-down-tuc-poll-reveals>

² <https://www.cipd.co.uk/knowledge/fundamentals/relations/flexible-working/flexible-working-impactcovid>

We believe that an employee should be able to make a change to their flexible working arrangements depending on circumstances. Allowing multiple requests could therefore help individuals manage fluctuating needs. It should be borne in mind that when circumstances have changed in this way the alternative for workers may well be to exit the workforce entirely to allow them to manage such needs. The result of that is of course increased recruitment costs for employers, or higher absence rates.

It should be noted that of course employees can currently make an unlimited number of non-statutory requests but allowing multiple requests per year should give the statutory underpinning to encourage employers to take these requirements seriously.

Do you think that the current statutory framework needs to change in relation to how quickly an employer must respond to a flexible working request?

Yes

Workers facing time critical situations will need prompt responses in order to enable them to understand whether they can continue to work or not.

If the Right to Request flexible working were to be amended to allow multiple requests, how many requests should an employee be allowed to make per year?

There should not be a limit on the number of requests an individual can make

Allowing workers to make multiple requests per year will help individuals to manage fluctuating needs. The number of requests should be reduced if recommendations about advertising flexible working were taken forward, helping to ensure that there isn't an unduly burdensome number of requests.

If the Right to Request flexible working were amended to reduce the time period within which employers must respond to a request, how long should employers have to respond?

Other, please specify

We agree with the TUC's proposal for a staged approach, with the requirement for a meeting within 2 weeks of receiving a request, and a final response communicated within 2 weeks of that meeting (4 weeks total).

However, this should be coupled with the requirement discussed above for flexible working arrangements to be described within job advertisements, meaning far fewer employees would need to make an individual request later on in the employment relationship.

Please share your suggestions for the issues that the call for evidence on ad hoc and informal flexible working might consider.

As indicated in the consultation document, time off for medical appointments is a key issue. We recognise that there will be certain groups particularly affected including people who are disabled and people undertaking surgery as part of transgender healthcare. Community has recently developed guidance for employers setting out best practice when it comes to allowing people time off for this type of healthcare³. Another key issue is childcare and flexibility being able to respond to

³ <https://community-tu.org/mymembership/advice-centre/time-off-work-for-trans-healthcare/>

childcare needs. Additionally, women experiencing the menopause may benefit from additional time off and greater flexibility on working hours and homeworking.

Please direct questions to research@community-tu.org