

Making flexible working the default

Response to BEIS consultation

Introduction

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

We welcome the opportunity to respond to the Department for Business, Enterprise and Industrial Strategy's consultation on making flexible working the default.

We agree with the government that measures need to be introduced to make flexible working the default and that this should be central to 'our ambition to build back better'¹. However, we believe the proposals in this consultation will fail to reach that aim, we set out the reasons for this in our response. To truly make flexible working the default, the TUC propose that the government introduce:

1. a legal duty on employers to consider which flexible working arrangements are available in a role and publish these in job advertisements, with the new postholder having a day one right to take up the flexible working arrangements that have been advertised. If an employer does not think that any flexible working arrangements are possible, they should be required to set out that no form of flexible working is suitable in the job advert and why.

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. Flexible working legislation would reflect objective justification as set out in the Equality Act 2010.

2. a day one right to request flexible working for all workers, with the criteria for rejection mirroring the objective justification set out above. Workers should have a right to appeal and no restrictions on the number of flexible working requests made.

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/101952/6/flexible-working-consultation.pdf page 10

The current situation

The mismatch between workers wanting and getting flexible working

Prior to the Covid-19 pandemic, the proportion of the workforce with flexible work arrangements was significantly less than the number of working people wanting to access flexible working. CIPD Working Lives research in 2019 showed UK workers tend to have a poor work–life balance². Based on a measure of how often job demands interfere with family life, the UK ranked 24th out of 25 countries. The survey found that, excluding the self-employed, one in five employees (21 per cent) had no flexible working arrangements available to them. Yet the unmet demand extended far wider than this. Overall, two thirds of UK employees (68 per cent) wanted to work flexibly in at least one form that was not currently available to them, with the most popular arrangements being flexi-time (70 per cent of those who cannot use this arrangement would like to do so), compressed hours (58 per cent) and working from home (49 per cent).

This lack of flexible working in comparison to those who want it continues, TUC research³ in May 2021 showed that more than four out of five (82 per cent) workers in Britain want to work flexibly in the future, rising to 87 per cent amongst women workers. More than nine out of ten (91 per cent) of those who worked from home during the pandemic want to spend at least some of the time working remotely. However, Timewise research this year has shown that only one in four jobs are advertised with flexible working⁴.

Flexible working is not a ‘nice to have’

As well as being popular amongst the UK public, flexible working is essential for certain groups to work. Nine in 10 mums who responded to a TUC survey⁵ who worked flexibly (92 per cent) said that they would find it difficult or impossible to do their job without it, and was higher for single mums.

Genuinely making flexible working the default would be an important catalyst for promoting greater gender equality. Research⁶ has shown that many of the underlying causes of the gender pay gap are connected to a lack of quality jobs offering flexible work. Due to the unequal division of unpaid care, women often end up having to apply for part

² https://www.cipd.co.uk/Images/uk-working-lives-2019-v1_tcm18-58585.pdf

³ <https://www.tuc.org.uk/sites/default/files/2020-08/Carers%20leave%20response%20final%20%281%29.pdf>

⁴ https://timewise.co.uk/article/flexible-jobs-index/?type=article&loadMore=1&pageId=1&postsPerPage=8&order=menu_order&orderdir=DESC&category%5B0%5D=29&topic=-1&contentType=-1&taxonomy=articlecategory&excludeld=-1&publicOnly=1&fromKH=0

⁵ <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

⁶ <https://timewise.co.uk/article/article-real-reasons-behind-gender-pay-gap/>

time work, with 75 per cent of part-time workers being women⁷. Opening up flexible working to all could also help to balance the burden of care between parents.

Flexible working also addresses some of the barriers to older workers, women experiencing the menopause, disabled workers, carers and those experiencing domestic abuse⁸. Flexible work⁹, for example, phased retirement, would allow older workers to stay in the workforce for longer and remote working has the potential to help address geographic inequality by opening up higher paid office-based jobs, disproportionately located in London and the South East, to workers across the country.

It is also essential for resourcing our public services. UNISON reported to us that many members who require flexible working feel driven to look for a new job rather than requesting flexible working as they know the request is unlikely to be accepted in their current workplace. In a survey of NAHT school leadership members, only 4 per cent reported that there are no barriers to school leaders working flexibly.

An RCM¹⁰ member survey carried out in 2021 found that 67 per cent of midwives and maternity support workers who had left or were considering leaving the NHS could be encouraged to return if there were greater opportunities to work flexibly.

An FDA survey of members¹¹ in April 2021 also found that 66 per cent of members said they'd turn down a promotion if the role didn't allow flexible working. This demonstrates flexible working is needed both to keep people in sectors but also allow them to develop within them.

The right to request has not increased access to flexible working.

Despite the length of time legislation has been in place and the incremental broadening of its scope, it has not brought about the changes intended. The proportion of employees doing no form of flexible working (under the Labour Force Survey definition) has only changed by 4 percentage points, from 74 per cent to 70 per cent between 2013 and 2020¹².

The BEIS Post Implementation Review (PIR) of the 2014 flexible working regulation also recognises this, stating that the use of types of flexible working arrangements overall among employees, excluding homeworking, has not changed significantly since 2012-14¹³.

Additionally, there is limited evidence that after 26 weeks the number of working people accessing flexible working significantly increases. TUC analysis of the Labour Force Survey¹⁴ shows that the percentage of employees on flexi-time (the most popular form of flexible work) with less than three months service is 9.3 per cent and only increases to 11 per cent for employees with between six months and less than 12 months service.

⁷ <https://www.tuc.org.uk/sites/default/files/2019-10/BEISFlexibleworking.pdf>

⁸ <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

⁹ https://www.tuc.org.uk/sites/default/files/2020-08/olderworkers11_3.pdf

¹⁰ <https://www.rcm.org.uk/media/5412/flexible-working-guidance3.pdf>

¹¹ <https://www.fda.org.uk/home/Newsandmedia/Features/The-future-world-of-work.aspx>

¹² <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

¹³ https://www.legislation.gov.uk/ukxi/2014/1398/pdfs/ukxi0d_20141398_en.pdf

¹⁴ <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

Our analysis suggests that the current right to request does not appear to drive a significant increase in access to flexible working, but there is more of a gradual rise, perhaps associated with seniority or trust built over time. If government is to achieve its ambition of making flexible work the default, more is needed than merely further tweaks to a system that has clearly failed to deliver a substantial increase in flexible working.

If government is to drive a significant rise in access to flexible working, they should act to make it the default through introducing:

- a legal duty on employers to consider which flexible working arrangements are available in a role and publish these in job advertisements, with the new postholder having a day one right to take up the flexible working arrangements that have been advertised. If an employer does not think that any flexible working arrangements are possible, they should be required to set out that no form of flexible working is suitable in the job advert and why.

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. Flexible working legislation would reflect objective justification as set out in the Equality Act 2010.

- a day one right to request flexible working for all workers, with the criteria for rejection mirroring the objective justification set out above. Workers should have a right to appeal and no restrictions on the number of flexible working requests made.

We lay out further details on these asks in response to the consultation questions below.

Impact of one sided, enforced flexibility

A challenge for the government is also to ensure that flexible working is genuine flexibility and not a byword for casualisation and insecure work or a cover for introducing this.

Labour market statistics this year show that there are almost a million people on zero-hours contracts, an increase on 2020¹⁵. TUC research¹⁶ has shown that BME, women and disabled workers are disproportionately represented in insecure work.

Those with no or few guaranteed hours are often offered work at the whim of their employer, facing irregular hours and therefore irregular income, as well as last minute shift cancellations. Rather than pick and choose their hours, many workers feel compelled to work whenever asked. If shifts are turned down, there is an implicit threat that they could lose future work. So, flexibility exists for the employer, but not the worker.

This makes it nearly impossible for workers to plan their finances or time. This is a particular issue for parents who must arrange childcare or those with other caring responsibilities.

¹⁵

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/data/sets/emp17peopleinemploymentonzerohourscontracts>

¹⁶ <https://www.tuc.org.uk/news/bme-women-almost-twice-likely-be-zero-hours-contracts-white-men-tuc-and-rotta-find>

Strengthened legislation on flexible working needs to establish stability and predictability through work patterns like mutually agreed predictable shifts. There should be an effective ban on zero-hours contracts by giving workers the right to a contract that reflects their regular hours. This would also benefit those on short-hours contracts (such as eight hours a week) who regularly work much longer. This right should be coupled with rules obliging employers to give at least four weeks' notice of shifts and compensation to workers for shifts that are cancelled at late notice.

Gaps in the consultation

We have responded to the specific questions set out in the consultation below, setting out why we believe the government's proposals fall short of making flexible working the default. However, we believe there are also other areas the government should consider, which are not covered by the narrowly framed questions in the consultation document.

Monitoring of flexible working requests

If the government wants to create a good flexible working culture, there need to be ambitious targets for improvement. The consultation does not propose any monitoring of flexible working to understand whether change is being achieved over time.

There should be requirements on employers to put in systems around the take up of flexible working and the retention and progression rates of those staff who are affected by these decisions. Such monitoring would support employers to understand the barriers workers face and deliver transparent, equal and fair access to flexible working.

The TUC believes the following monitoring information should be reported by all employers who are required to report gender pay gap data (currently this applies to employers with 250 staff or more but TUC has consistently recommended reducing this to 150 over a 12 month period):

- The number of flexible working requests granted and rejected broken down by:
 - sex, age, ethnicity, disability and sexual orientation
 - whether the requests were formal or informal
 - whether the requests were time-limited or not
 - employment status (zero hours contract, agency worker, self-employed, freelancer, fixed term contract and permanent employee)
 - pay quartile
- the proportion of jobs advertised as flexible and the proportion of flexible workers appointed
- the number of appeals received, and their outcomes

In our work around gender, ethnicity and disability pay gap reporting, the TUC has consistently stressed the need for employers to include targeted action plans identifying the steps they will take to address any identified gaps. The monitoring data discussed above should be used to inform these plans and which should include the steps employers are taking to create a supportive workplace culture in relation to flexible working for all workers.

The government's pay gap portal provides a widely accessible location for individuals who might want to find out more about their prospective employer. Employers should therefore be required to publish this information on the government's gender pay gap reporting portal along with their pay gap data, narrative and action plan. This would allow prospective and current workers a clear picture of an employer's commitment to flexible working.

The NHS Terms and Conditions handbook, section 33 provides an example of how mandatory flexible working reporting could work in practice¹⁷.

Monitoring and surveillance

An increase in home working could result in an increase of surveillance of working people, for example through key logging, recording social media usage and software which photographs workers via webcam. One in six (16 per cent) union reps told us in a 2020 survey that they had noticed workers being subjected to new monitoring technologies as a result of the increase in homeworking during the pandemic¹⁸.

A survey conducted by the LSE's Centre for Economic Performance found that more than 60 per cent of firms have adopted new technologies or management practices since the start of the pandemic and more than 90 per cent said they expected to keep the changes in place. Out of the firms who had not adopted new technologies, a third planned to do so in future¹⁹.

Recent YouGov polling commissioned by Prospect²⁰ also revealed the extent to which workers are uncomfortable with monitoring and surveillance while they are working remotely, with 66 per cent being uncomfortable with keystroke monitoring and 80 per cent uncomfortable with camera monitoring.

We are calling for the amending of employment and data protection legislation and provide for statutory guidance to ensure that no unlawful discriminatory decisions can be made using AI, secure appropriate work/home boundaries and privacy rights, and guarantee transparency and explainability in relation to technology at work (see the TUC's AI manifesto for proposals in full²¹).

¹⁷ <https://www.nhsemployers.org/publications/tchandbook>

¹⁸ https://www.tuc.org.uk/sites/default/files/2020-11/Technology_Managing_People_Report_2020_AW_Optimised.pdf

¹⁹ <https://cep.lse.ac.uk/pubs/download/cepcovid-19-009.pdf>

²⁰ <https://prospect.org.uk/news/workers-are-not-prepared-for-the-future-of-working-from-home/>

²¹ <https://www.tuc.org.uk/AImanifesto>

We are also calling for a statutory duty to consult trade unions in relation to the deployment of high-risk AI and automated decision making (ADM) systems in the workplace.

In addition to specific legislative steps, truly making flexible working the default would help to reduce the stigma flexible workers face and the negative treatment they receive. A lack of trust by employers of home workers could be influencing the trend towards increased monitoring and surveillance, driven by a view that those at home cannot be trusted to work productively.

Right to disconnect

Limiting working time or more importantly maximising time outside work, has always been a core element of ensuring a fair deal for workers and home working could be a threat to that. FDA research²² in the senior civil service has found that an increase in remote working was identified by members as having the potential to lead to a blurring of the boundaries between work and home, an expectation of constant availability and an encouragement of digital presenteeism. While flexible working has the potential to improve work-life balance, an 'always on' culture, and the rise of 'on-demand' services requiring 'on-demand' workers, could lead to longer working hours.

Polling by Prospect²³ in April 2021 after the third UK lockdown, showed that whilst the majority of respondents (58 per cent) said home-based working had a positive impact on work-life balance, many were finding it difficult to switch off from work. Their research found 30 per cent of new remote workers reported working longer unpaid hours during the last year.

The government should introduce a statutory right for employees and workers to disconnect from work, to create 'communication-free' time in their lives. This would be in line with international good practice. This right has been in force in France since 2016 and Ireland brought in a new code of practice on the right to disconnect this year. Portugal this month (November 2021) introduced new rules that mean employers could be fined for contacting workers outside of office hours.

Expanding rights to all workers

We have long been concerned about the rising prevalence of insecure work. Black workers, women and disabled workers are all overrepresented in insecure work. These workers are forced to work without many of the most basic employment protections including the right to request flexible working.

Equity, the entertainment union, has highlighted that the particular challenges faced by those in the entertainment industry on highly insecure contracts who feel they are

²² <https://www.fda.org.uk/home/Getinvolved/flexible-working-civil-service-making-reality.aspx>

²³ <https://library.prospect.org.uk/id/2021/00381?display=authoritypdf&revision=1>

vulnerable to exclusion from employment opportunities if they make requests to improving work-life balance.

To protect those in insecure work, any new rights to (and in turn existing rights) flexible working must be granted to all workers, not just those classified as employees.

The public sector equality duty was specifically introduced to ensure that proper consideration was given to the impact of policies on people from groups protected by the Equality Act. The TUC believes that the government needs to review the disproportionate impact that limiting flexible working to employees would have on groups with protected characteristics when it conducts its equality impact assessment of this policy proposal.

Government must also ban zero-hours contracts, tackle false self-employment, and guarantee all workers day-one employment rights.

The role of trade unions in ensuring access to flexible working

Statutory rights to flexible working are essential, but the role of trade unions in ensuring access to flexible working should be recognised.

The PIR of the Flexible Working Regulations 2014²⁴ stated that take-up of flexible working was greater among workplaces with a recognised union than the economy overall.

The review also stated that employers that reported any employees that were members of a trade union or independent staff association (60 per cent) were more likely to be aware of the extension in eligibility of the right to request flexible working than employers that had no employees that were members of a union (39 per cent).

As we can see unions play an important role in increasing access to flexible working. Equality reps play a significant role in raising awareness of flexible working to parents and carers and disabled workers.

Equality reps can help to develop collective policies and practices that will enable the organisation to deliver effective flexible working.

Granting equality reps statutory recognition and paid time off for union duties would allow them to be even more effective within workplaces and increase take up of flexible working.

We must also ensure that all workers, regardless of where or how they work, have access to a trade union and are able to participate in trade union activities. Union reps who work from home must also be able to access the facilities and facility time they need to carry out their duties.

Consultation questions

²⁴ https://www.legislation.gov.uk/uksi/2014/1398/pdfs/uksiod_20141398_en.pdf

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

Strongly agree but with the caveats set out below.

Please give reasons for your answer

Whilst we agree with the proposal to make the right to request flexible working available to all employees from their first day of the job, we do not believe this goes far enough and will not ensure that flexible working becomes the default, as is the government's stated aim.

For workers that need flexible working, a right to request on day one would mean workers having to ask during an interview about the flexible working that would be available to them. More than two in five (42 per cent) working mums who responded to a TUC survey²⁵ on flexible working said they would not feel comfortable asking about flexible working in a job interview, mainly because they think they would be discriminated against and not appointed to the post because of their request. Only 37 per cent said they would feel comfortable raising this.

Union reps also reported similar concerns to us, stating that their members would not feel comfortable asking for flexible working in a job interview due to the fear that it would be used against them by the employer in the appointment decision.

If workers did not raise flexible working during the interview process, they would need to ask on their first day of the job. Again, our research tells us this will not work, either for individual workers or to bring about default flexibility. In the same survey, when asked if they had requested flexible working at their current place of employment – 31 per cent of working mums had not and 36 per cent had only asked for some of the flexible working they need. More than four in 10 of those who hadn't asked were put off by worries about their employers' negative reaction (42 per cent) or because they thought the request would be turned down (42 per cent). Only one in 20 (5 per cent) working mums who hadn't made a flexible working request said it was because they didn't need it.

Similar concerns affected those who only asked for some of the flexible working they needed. Nearly three in four said the reason they did not request everything they needed was because they believed the request would be turned down (73 per cent) and half (50 per cent) were put off by worries about harm to future career prospects.

Respondents to our survey were also at all stages of their careers and many had been in roles for a significant amount of time. We believe the reluctance to ask about flexible working would increase if this were on the first day or first few months of a new job as workers would be in their probation period and looking to establish themselves in a new workplace.

Research conducted by the government itself echoes these results. BEIS and EHRC²⁶ found that nearly two in five (38 per cent) mothers did not request the flexible working they

²⁵ <https://www.tuc.org.uk/sites/default/files/2021-10/Report.pdf>

²⁶ <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancyand-maternity-discrimination-research-findings>

wanted, typically because they did not think it would be approved or because they were worried their employer would view their request negatively.

Low request rates are also an issue for fathers, who may have less understanding of their rights as flexible working has traditionally been seen as something for women. A study using data from Understanding Society, the UK Household Longitudinal Survey, found that almost a third of fathers believed flexible working arrangements that reduce working hours are unavailable to them, compared with one in 10 mothers²⁷. Fathers in workplaces with no trade union presence were more like to believe flexible working requests were unavailable.

Working mums fears of being turned down are not unfounded. Half (50 per cent) of working mums in our survey said their current employer had rejected or only accepted part of their flexible working request²⁸. TUC research prior to the pandemic also showed that three in 10 requests for flexible working are turned down²⁹. A member survey by RCM in 2021 found that over a third (36 per cent) of RCM members who had made a request to work flexibly had their request rejected³⁰.

Negative workplace cultures and stereotyped perceptions of flexible working also shape the experiences of those mums who work flexibly. 86 per cent of mums in our survey who worked flexibly told us they had experienced discrimination and disadvantage as a direct result of this³¹.

Again, our findings reflect the government's own research on the gendered stigma attached to flexible working. BEIS and the EHRC³² found over half (51 per cent) of pregnant women and new mothers had experienced discrimination or disadvantage as a direct result of having a flexible working request approved. A poll of 3,000 working parents found that one in ten fathers had quit a job after having a flexible working request turned down³³.

The consultation states that it 'seems wholly appropriate that the starting point [for flexible working] should be an employee request'³⁴. Our research and the government's own research demonstrate this not to be the case. Workers are put off requesting due to stigma surrounding flexible working and the high likelihood of being rejected. BEIS' PIR of flexible working regulations³⁵ also highlights that the right to request model has failed to meaningfully increase levels of flexible working to date.

²⁷ Cook R, O'Brien M, Connolly S, Aldrich M, Speight S. Fathers' Perceptions of the Availability of Flexible Working Arrangements: Evidence from the UK. Work, Employment and Society. November 2020. doi:10.1177/0950017020946687

²⁸ <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

²⁹ <https://www.tuc.org.uk/research-analysis/reports/transparency-flexible-working-and-family-related-leave-and-pay-policies>

³⁰ <https://www.rcm.org.uk/media/5412/flexible-working-guidance3.pdf>

³¹ <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

³² <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancyand-maternity-discrimination-research-findings>

³³ <https://www.peoplemanagement.co.uk/news/articles/fathers-struggle-to-get-flexible-work#gref>

³⁴ Page 10

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/101952/6/flexible-working-consultation.pdf

³⁵ https://www.legislation.gov.uk/uksi/2014/1398/pdfs/uksiod_20141398_en.pdf

Therefore, to change cultures and reduce the barriers to flexible working, which the government agrees is necessary, the starting point should be transparency around what flexible working is available.

We believe the government should introduce a duty on employers to publish the flexible working options that are possible in a role in job adverts and give workers the right to take up the advertised flexibility from day one. If employers feel that a role cannot accommodate any form of flexibility, they should be required to transparently set out the reasons that justify this.

A TUC survey of working mums³⁶ shows the popularity of this approach, 99 per cent of those who responded believed the government should implement this policy and 99 per cent also stated they would be more likely to apply for a job if it included the types of flexible working available in the job advert.

The practical and legal steps to this policy should be as follows:

- When employers recruit to a post they would have a legal duty to consider which flexible working arrangements are available in the role and publish these in the job advertisement.
- If an employer considers that no flexible working arrangements are appropriate for the new role, they should set out that no form of flexible working is suitable in the job advert and why.
- 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. Flexible working legislation would reflect objective justification as set out in the Equality Act 2010.
- The new postholder would have a day one right to take up the flexible working arrangements that have been advertised.
- Where there is a union, the review of what flexible working options in each job role should be done with union representatives and in line with collective bargaining structures.

Polling of HR managers³⁷, conducted for the TUC by YouGov³⁸, reveals that this process would be easy for most employers to follow. Around six in ten (59 per cent) of HR managers polled said it would be easy to include specific information about the types of

³⁶ <https://www.tuc.org.uk/sites/default/files/2021-10/Report.pdf>

³⁷ <https://www.tuc.org.uk/news/tuc-poll-seven-10-hr-managers-support-greater-flexible-working-their-workplace>

³⁸ YouGov conducted an online survey of 903 HR managers between 11-25 November 2021. Total sample size was 903 adults. Fieldwork was undertaken between 11th - 25th November 2021. The survey was carried out online. The figures have been weighted and are representative of all HR DMs.

hours-based flexible working arrangements available in each job advert, or they already do this. This rose to 62 per cent of HR managers when asked about home or remote working.

In order put flexible working options in job ads, companies would need to identify the types of flexible working that are possible in a job before advertising. Over three quarters (78 per cent) of HR managers polled said this would be easy to do for home or remote working, or that they do it already. Almost two thirds (62 per cent) of those polled said this would be easy to do for hours-based flexible working arrangements, or that they already do this.

These figures were not significantly different for HR managers from SMEs (1 to 249 employees):

- 59 per cent said it would be easy to include specific information about the types of hours-based flexible working arrangements available in each job advert, or they already do this. This rose to 61 per cent when asked about home or remote working.
- 63 per cent of those polled said this would be easy to identify the types of hours-based flexible working arrangements, that are possible in a job before advertising, or that they already do this. This rose to 75 per cent of respondents when asked about home or remote working.

As well as being easy for most employers to implement, we believe that the duty to publish specific flexible working options in an advert or set out why flexible working cannot be accommodated in line with the above would also not be complicated to enforce. We propose that responsibility for enforcement sit with the EHRC and would envisage the enforcement approach reflecting that taken by the Commission in relation to pre-employment health questionnaires or discriminatory advertisements. The EHRC is currently solely responsible for dealing with enforcement in relation to both pre-employment health questions (s60 Equality Act 2010) and publication of discriminatory adverts³⁹. In relation to discriminatory adverts the EHRC sets out its approach in a series of publications⁴⁰. Upon receipt of a complaint the EHRC assess the content and context of the advert along with any correspondence between the advertiser/publisher and complainant. They may then write to the advertiser and/or publisher to ask what their justification is for the advert. If the Commission receives a reliable justification or an assurance that it was an error and will not happen again, they close the complaint. However, if a satisfactory assurance is not received, the Commission considers whether taking further steps, such as enforcement action, might be of significant public benefit.

As the Commission itself highlights, this balanced and proportionate approach means that most complaints in relation to discriminatory adverts are resolved without taking formal action. A similar approach is adopted in relation to pre-employment health questions. It is telling that in the eleven years since the passage of Equality Act 2010 the EHRC has to date, not pursued one enforcement action in this area, demonstrating the relatively minor resource demands of the Commission's staged approach to its sole enforcement role and the effectiveness of its approach. The enforcement of a duty to publish flexible working options in job adverts is unlikely to take up more resource for the EHRC than that allocated

³⁹ See s54(3) https://www.legislation.gov.uk/ukpga/2006/3/pdfs/ukpga_20060003_en.pdf

⁴⁰ <https://www.equalityhumanrights.com/en/publication-download/what-equality-law-means-advertisers-and-publishers>

to their work on unlawful advertisements as this is far wider in scope, covering not only job advertisements but also advertisements for goods, facilities and services and accommodation.

We believe however that the EHRC should be given additional, ringfenced funding to drive employer compliance in the first two years of a new advertising duty.

To ensure individuals are aware of their rights, changes to legislation should be accompanied by a public messaging campaign, so individuals would have a better understanding of when to report advertisements.

In the case of a failure of an employer to offer advertised flexibility to a successful candidate, the most appropriate route to redress would be through a claim in the Employment Tribunal.

We also believe the remedies outlined as part of the Employment Rights Act for flexible working fall short. Employment tribunals in claims regarding flexible working should be able to make recommendations to employers and the amount of compensation awarded should be increased. The process for flexible working requests outlined in this response should form part of an ACAS statutory code of practice. Therefore, the Employment Tribunal would have the power to increase compensation by 25 per cent if there has been a failure to comply with the code of practice by the employer.

Workers should also have the option to report an employer to the new Single Enforcement Body once established. The body should have a role in monitoring compliance and the ability to take action, including imposing financial penalties against employers breaching the rules. For the body to work effectively the government must confirm long-term sustained funding and the government must provide a clear timeline for when the body will be introduced.

We propose that the EHRC take responsibility for enforcing the setting out of flexible working options in job adverts due to their current responsibilities on publication of discriminatory adverts (as stipulated above), rather than the Single Enforcement Body.

In addition to these protections, given the level of disadvantage we know that flexible workers experience, detrimental treatment following a flexible working request, including during the recruitment stage, should be treated in the same way as anti-discrimination measures. This ensures all flexible workers are protected from detriment.

BEIS' PIR of the 2014 flexible working regulations⁴¹ also notes that the promotion of flexible working policies is critical to the success of flexible working in organisations. However, it also reports that the share of workplaces where managers actively promote flexible working has only risen five per cent since the right to request legislation was extended to all employees in 2014, from 43 per cent in 2013 to 48 per cent in 2018-19.

This demonstrates that a model based on the right to request flexible working, has not led to a significant increase in employers promoting flexible working. It is therefore unrealistic

⁴¹ [tps://www.legislation.gov.uk/uksi/2014/1398/pdfs/ukiod_20141398_en.pdf](https://www.legislation.gov.uk/uksi/2014/1398/pdfs/ukiod_20141398_en.pdf)

to expect that changing the right to requests to a day one entitlement to lead to an increased advertising of flexible working by employers.

The consultation document states that a day one entitlement to request flexible working, will encourage employers to consider what flexible working is available in advance of the recruitment process. But as we have seen with gender pay gap reporting, an approach of encouraging employers to voluntarily provide certain information is largely ineffective,

Sustained government action promoting a voluntary approach to the gender pay gap resulted in 280 employers signing up to the scheme⁴², but only five employers actually went on to publish their data. However, when mandatory reporting was introduced more than 10,000 employers reported their gender pay gap in the first year– close to 100 per cent compliance.

In addition, we also have concerns about how the right to request as a day one entitlement would impact those on Universal Credit, especially for single parents and minimum hours requirements. Simply making the right to request a day one right could mean asking those on Universal Credit to apply for and take a job, make a flexible working request and then turn down the job should they not secure the flexibility. This might result in them being financially sanctioned by the Department for Work and Pensions. An advertising duty would mean Universal Credit recipients would know in advance of applying whether a job will fit in with the minimum hours requirement and whether it will work with their care arrangements.

Providing flexible working options in job adverts is also beneficial for the employer as it will attract more applicants. Research from Timewise suggests that one in 10 flexible jobseekers will not apply to a job advert that just claims the role is 'open to flexibility'; a further three in 10 are cautious about applying. This is because people are unsure of what it means or worry that employers are not serious about offering flexible working, which they rely on⁴³.

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

If no, please state which reasons from the list above are no longer valid and why.

Employers currently have an almost unfettered ability to turn down a flexible working request, given the breadth of the eight business reasons that can currently be used to justify a refusal. Union reps working in retail have told us of employers who reject almost all flexible working requests made by staff saying that accepting the request would encourage others to do the same and would be bad for business.

⁴² <https://www.gov.uk/government/publications/think-act-report>

⁴³ <https://timewise.co.uk/article/gaining-an-edge-in-the-fight-for-talent/>

TUC research⁴⁴ in 2019 showed that three in 10 flexible working requests are denied and that flexi-time (the most popular form of flexible working) was unavailable to over half (58 per cent) of the UK workforce, rising to nearly two-thirds (64 per cent) for people in working-class occupations.

TUC's survey of working mums⁴⁵, half (50 per cent) of working mums said their current employer had rejected or only accepted part of their flexible working request. As stated in our answer above, stigma attached to flexible working and negative attitudes towards it, lead to high numbers of requests being rejected and high numbers of workers not requesting in the first place.

BEIS⁴⁶ acknowledges the need for supportive workplace cultures to increase access to flexible working in its PIR, but additionally demonstrates the right to request in its current form has not led to these positive cultures.

In response to the statement 'It's not the employer's responsibility to help people balance their work with other aspects of life' - 25 per cent of employers agreed with this in 2013 and 26 per cent in 2018-19. In response to the statement 'People who work flexibly are just as likely to be promoted as those who do not' – 13 per cent of employers disagreed in 2013 and this rose to 15.6 per cent in 2018-19.

Research also suggests we cannot rely on the pandemic to have changed approaches to flexible working. The number of jobs advertised as remote dropped by 24 per cent between June and August of this year⁴⁷. CIPD research also shows a drop in all forms of flexible working (other than homeworking) since the onset of the Covid-19 pandemic⁴⁸.

Significantly narrowing the criteria by which employers can reject flexible working requests would be one step to ensure that negative employer attitudes and stigma associated with flexible working do not limit access to flexible working. It would also ensure that more workers have access to flexible working overtime, thus reducing the stigma associated with it.

To make flexible working the default, we must have legislation that is based on flexible working being offered in all circumstances unless the employer can properly justify why it is not possible.

We believe the most effective way to achieve this is for flexible working legislation to reflect the objective justification as set out in the Equality Act 2010. Flexible working request could only be rejected if such a rejection was a proportionate means of achieving a legitimate aim. Therefore, instead of the current list of business reasons, section 80G of the

⁴⁴ <https://www.tuc.org.uk/research-analysis/reports/transparency-flexible-working-and-family-related-leave-and-pay-policies>

⁴⁵ <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

⁴⁶ https://www.legislation.gov.uk/ukxi/2014/1398/pdfs/uksiod_20141398_en.pdf

⁴⁷ <https://www.peoplemanagement.co.uk/news/articles/vacancies-remote-roles-fall-peak-companiesreturn-offices-figures-show#gref>

⁴⁸ <https://www.cipd.co.uk/knowledge/fundamentals/relations/flexible-working/flexible-working-impactcovid>

Employment Rights Act would state 'shall only refuse the application where refusal is a proportionate means of achieving a legitimate aim'.

Workers should also be able to make a complaint to an Employment Tribunal if the decision by their employer to reject a request was not a proportionate means of achieving a legitimate aim. It should be the employer's responsibility to demonstrate this and remedies should be in line with those outlined on page 13.

We believe this is an effective method as employers are already familiar with this process in their responsibilities under the Equality Act 2010 and are used to applying the objective justification criteria to flexible working requests of those with protected characteristics, who currently make up the majority of those requesting flexible working.

If we continue with a model based on employer approved requests with broad criteria for rejection, this is unlikely to lead to a significant rise in access to flexible working. Access to flexible working, and consequently to the labour market will continue to be blocked for many workers, including women, disabled workers and older workers.

In relation to making a request, the requirement for the request to expressly state that the request is made under s80F Employment Rights Act 1996 should be removed. This condition provides employers with a simple and unfair way to reject a request, penalises those not familiar with the law and seems completely unnecessary for the process of the request.

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?

Strongly agree but with the caveats set out below

Please give reasons for your answer.

We believe that employers should need to provide more information to workers on why their flexible working request has been rejected to demonstrate a thorough review of the request has taken place.

As outlined above we believed a proportionality test should be introduced for the advertising duty, replacing the current business reasons. Introduction of a proportionality test would encourage dialogue between the employer and worker and require an employer to consider whether steps short of blanket refusal, i.e. an alternative, would meet the legitimate aim.

To create a transparent process for workers, this process should follow these steps:

1. A meeting within two weeks of the request between the employer and worker to discuss the flexible working request. At this stage alternatives could be discussed if the original request is not feasible. The worker should have the right to be accompanied by a trade union representative or a companion, that could be a colleague

2. Alternatives should be developed in consultation with the worker and their trade union to ensure they are reasonable. And more than one alternative should be explored.
3. Employers should be required, within two weeks of the meeting, to set out their decision of the flexible working request in writing. In addition to demonstrating that they have considered alternative working arrangements, employers should also be required to set out in detail why the requested flexibility and alternative working arrangements won't work, with evidence and therefore why the flexible working request is being rejected. This should be modelled on above suggestion on objective justification outlined on page 16.
4. Workers should have the right to appeal the employer's decision. These should be not be conducted by those involved in the initial rejection of the flexible working request. Workers should also have the right to be accompanied by a trade union representative or a companion, that could be a colleague.

To ensure this process is followed, we believe it should be part of an ACAS statutory code of practice. Breach of this process would be grounds for an employment tribunal claim, with the potential for an uplift to the tribunal award due to a breach to an ACAS code of practice. Remedies should be in line with those on page 13.

We can see that including a review period after a flexible working request has been made could benefit some workers, to ensure that they are not locked into rigid contractual changes for fluid situations and so that workers can change their request, should it prove to be unsuitable. It could also encourage a reluctant employer to test flexibility rather than it be refused on the assumption of negative impacts that are demonstrated to be false when trialled. However, we are aware that some workers prefer the security of a contractual change and are wary that an employer could use a review period as a way to disguise an ultimate refusal. Therefore, we would suggest that a review period be considered as part of the dialogue stage as an option and part of guidance. Trial periods should not be used as a way to disguise a refusal of flexible working or provide the employer with a route to backtrack on flexibility. Any decision by an employer to revoke flexible working after a trial period should be recorded as a refusal under monitoring statistics.

If this process is not followed, we have concerns that alternatives may leave workers without the flexible working they truly need. Our survey of working mums⁴⁹ shows that more than a third of mums (36 per cent) only asked for some of the flexible working they needed. A partial acceptance or an alternative offer could leave them a long way away from the flexibly arrangements they truly need.

We are also concerned that a common alternative offered by employers could be part time work. A lack of flexible working currently forces women with caring commitments to work in part time roles in order to manage work and care, reducing their earnings and future pension. Women's overrepresentation in part time work is a significant factor in the gender pay and pension gap.

⁴⁹ <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

FDA research in 2019⁵⁰ found that part-time workers reported receiving no adjustment in their workload and 40 per cent of part-time women felt that flexible working had had a negative impact on their career progression/performance weighting.

Additionally, without this process the alternatives recommended could not meet the needs of the worker and result in employers offering alternatives that ultimately workers turn down because they do not offer the flexibility they need.

There is also a need to strengthen the current legislation through allowing individuals to scrutinise and challenge an employers' reason for rejecting a request.

The right of appeal should not be optional. As well as being required to set out the reasons for rejection in writing, employers should be required to consider appeals relating to flexible working requests. These should be not be conducted by those involved in the initial rejection of the flexible working request. Workers should also have the right to be accompanied by a trade union representative or a companion, that could be a colleague

Research conducted by NASUWT showed that only eight per cent of teachers said flexible working requests were encouraged in their workplace. Teachers told them they did not bother to apply for flexible working or seek to appeal an adverse decision on the grounds that they were unlikely to be successful⁵¹.

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

Introducing a requirement on employers to set out alternative flexible working arrangements would not place burdens on employers refusing requests.

This approach would operate most effectively if coupled with an advertising duty (please see pages 11-13). If employers have thought up front about the flexibility that could be accommodated in particular roles, then they would be aware of the range of flexible working options available and could quickly and easily set out a workable alternative flexible working arrangement or arrangements. Such an approach would not only facilitate speed and ease of response but also promote consistency in responding to requests.

We also believe that a requirement to set out business grounds for rejection would not place burdens on employers refusing requests and is essential for the fair operation of a request-based system. As set out above (on pages 15 and 16), we believe that the business reasons for rejecting requests for flexible working should be changed so that employers must apply a proportionality test. In order for workers to be able to challenge refusal of a request to work flexibly they must understand the reasons given.

⁵⁰ <https://www.fda.org.uk/home/Getinvolved/flexible-working-civil-service-making-reality.aspx>

⁵¹ [naswt.org.uk/static/uploaded/6fd07ce3-6400-4cb2-a8a87b736dc95b3b.pdf](https://www.naswt.org.uk/static/uploaded/6fd07ce3-6400-4cb2-a8a87b736dc95b3b.pdf)

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

Please give reasons for your answer.

There should be no limits on the number of times workers can make flexible working requests. Best practice employers already permit this, for example this became a contractual requirement for NHS employers in England and Wales in 2021.

One application in 12 months is impractical given that workers can experience multiple life changes during a year that they may need to respond to. For example, changes to caring requirements or health conditions may require existing arrangements to be altered or new flexible working arrangements to be put in place. This also applies if a worker has requested – and has been granted – a temporary request, the current law would prevent them from making a request to extend this.

The ability to request more than once in a year would also allow workers to respond to changing circumstances within an organisation, for example to increase their own hours where another team member has reduced theirs or a request to remote work as technological changes occur in a company. The current situation where workers are effectively locked out of making flexible working requests for a year following a request could in no way be described as facilitating default flexibility.

In practice, the majority of workers won't need to make several requests as they will have thought through carefully what they need. However, this provision will be absolutely crucial for those people who do need multiple requests for the reasons outlined above.

Employers also expect workers to demonstrate continued flexibility. Usdaw, the Union of Shop, Distributive and Allied Workers, told us that in the retail sector, employers will frequently expect staff to change their hours, so workers need to be able to make more than one request in a year as a way of having some degree of control over their work life balance in the event of a change to hours demanded by the employer.

As has been highlighted previously, if an employer has assessed which types of flexibility are possible within a particular role (as would be the case under an advertising duty) it will be far easier for them to deal with multiple requests in a 12-month period.

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

Please give reasons for your answer.

Yes, employers must be required to respond to flexible working requests much faster than they currently do now. The Communications Workers Union (CWU), reported to us that it is common for members not to even receive a response from their employer and the Association of Educational Psychologists (AEP) reported that many of their members are forced to wait until close to the end of the three-month period before they receive a response. Usdaw, echoed these comments telling us that employers see the right to request model as a vehicle to say no rather than enabling flexible working.

A three month wait time is impractical for workers to be able to plan their lives as some changes will need to be met instantly for example an immediate health issue. Unions have informed us that such a long wait time forces members into taking a leave of absence as they are unable to work whilst they wait for the response. This adversely impacts on both the worker and the employer as they must make arrangements to cover that work.

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

Please give reasons for your answer, including any consideration about costs, benefits and practicalities.

Please see answer on pages 19 and 20.

Removing the limits on the number of requests and granting flexibility unless it is a proportionate means of achieving a legitimate aim would also mean that workers have the opportunity to easily amend flexibility without being locked into a contractual change should they wish to. Currently employees, if a request is accepted, are locked into a contractual change for a 12 month period with no opportunity for review or amendments.

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

Please give reasons for your answer, including any consideration about costs, benefits and practicalities.

We believe there should be a staged approach to responses. Employers should be required to set up to a meeting (as outlined on page 17) within two weeks of receiving the response. A final decision in writing with explanation (as set out on page 17) should be communicated to the worker within two weeks of the meeting. Therefore, the whole process would take a maximum of four weeks.

We believe this swift approach is possible because if an employer has thought up front about the flexibility that can be accommodated in that role, then a decision about a request can be made more quickly as employers already understand what is possible within a role.

If published in job adverts, workers are also already aware of what is possible within a role and requests will likely reflect this and can therefore be reviewed quickly.

It is also likely that if employers have communicated to applicants what flexibility can be accommodated and they have the right to take this up when they start, there would be far fewer individual requests during the life cycle of employment, leaving capacity for employers to respond to the requests they do get more quickly.

In response to all the questions in this consultation, we believe any changes to legislation should be accompanied by clear guidance and support to employers to assist them with changes and to raise awareness of new rights to flexible working. Guidance should also cover job design, so employers are effectively supported in thinking about the flexibility that is available in jobs before the roles are advertised.

Are you aware that it is possible under the legislation to make a time-limited request to work flexibly?

Yes

What would encourage employees to make time-limited requests to work flexibly? Please provide examples.

A faster and more transparent process for reviewing flexible working requests, as outlined in other questions, would encourage workers to make time-limited requests. Workers are currently unlikely to ask for time-limited flexibility as they must wait three months for a response.

Additionally, as we have seen through our research (and BEIS research), cited earlier in this response, workers do not make flexible working requests or do not request all of the flexible working that they need, time-limited or otherwise, because they fear the negative consequences of doing this.

Normalising flexible working through culture change underpinned by legislation and supported by an effective enforcement regime driven by an appropriately funded regulator, would encourage this.

We also believe a starting point for employers should be to monitor the number of flexible working requests they receive, the nature of these requests and the impact as outline on pages 6 and 7. Understanding the current situation can inform action plans for improvement and help employers to spot where barriers to flexible working exist.

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

The TUC would welcome a call for evidence on 'ad hoc' and informal flexible working and would be happy to work with BEIS to ensure the experiences of working people across different sectors and occupation groups are appropriately reflected in responses. BEIS need to allow sufficient time taken over this call for evidence and must engage with workers and

trade unions to understand the needs and experiences across different sectors and in different work arrangements and all the different requirements for flexibility. This will enable better understanding of the barriers that exist and what has worked in the past.

Such a call for evidence could helpfully include requests for information on current areas of good practice such as joint team rota development whereby teams work together to design their rota, with a focus on accommodating workers requirements, including ad hoc requirements where possible.

The call for evidence should also include examples of international approaches which facilitate informal flexibility, including legislative approaches. One recent example of this is the approach taken in Portugal where parents now have the right to work from home without having to arrange it in advance with their employers, up until their child turns eight years old⁵².

Any call for evidence should seek information on the extent to which informal flexible working leads to discrimination and disadvantage or unequal access. This is because of the increased likelihood that decisions on ad hoc flexibility will be taken by line managers and could therefore be affected by the strength of relationship with an individual or biases held by the line manager. It should also include the steps that employers have taken to eliminate discrimination and disadvantage in the allocation of ad hoc flexibility and the effectiveness of these steps. This information could be used to inform future guidance for employers on designing and implementing policies and processes to ensure fairness in allocation and experience of this type of flexibility.

Workers desire for informal flexible working as opposed to formal flexibility should also be assessed in the call for evidence. Whilst we recognise that some workers may want informal flexible working, there needs to be investigation to ensure that informal flexibility is not used to prevent access to formal flexibility that workers may want, but employers are unwilling to grant. Any call for evidence should also assess whether informal flexibility leads to flexibility being revoked at short notice.

A 2016 NASUWT flexible working report⁵³ found that around 30 per cent of teachers said that they were more likely to be granted flexible working on an informal, rather than formal, contractual basis. The reasons for the informality of approaches were varied but included reluctance on the part of employers to visibly support flexible working.

Teachers who had access to this type of informal flexible working arrangement were likely to accept such an agreement. However, some found that these arrangements, due to their informality, were revoked at short notice with no reason given. This usually occurred during changes of management at the school. In these circumstances, where reduced hours had not been formally agreed and documented as a variation to contract, teachers found themselves vulnerable to their hours being drastically reduced or increased overnight.

⁵² <https://www.euronews.com/next/2021/11/08/portugal-makes-it-illegal-for-your-boss-to-text-you-after-work>

⁵³ <https://www.nasuwat.org.uk/uploads/assets/uploaded/6fd07ce3-6400-4cb2-a8a87b736dc95b3b.pdf>