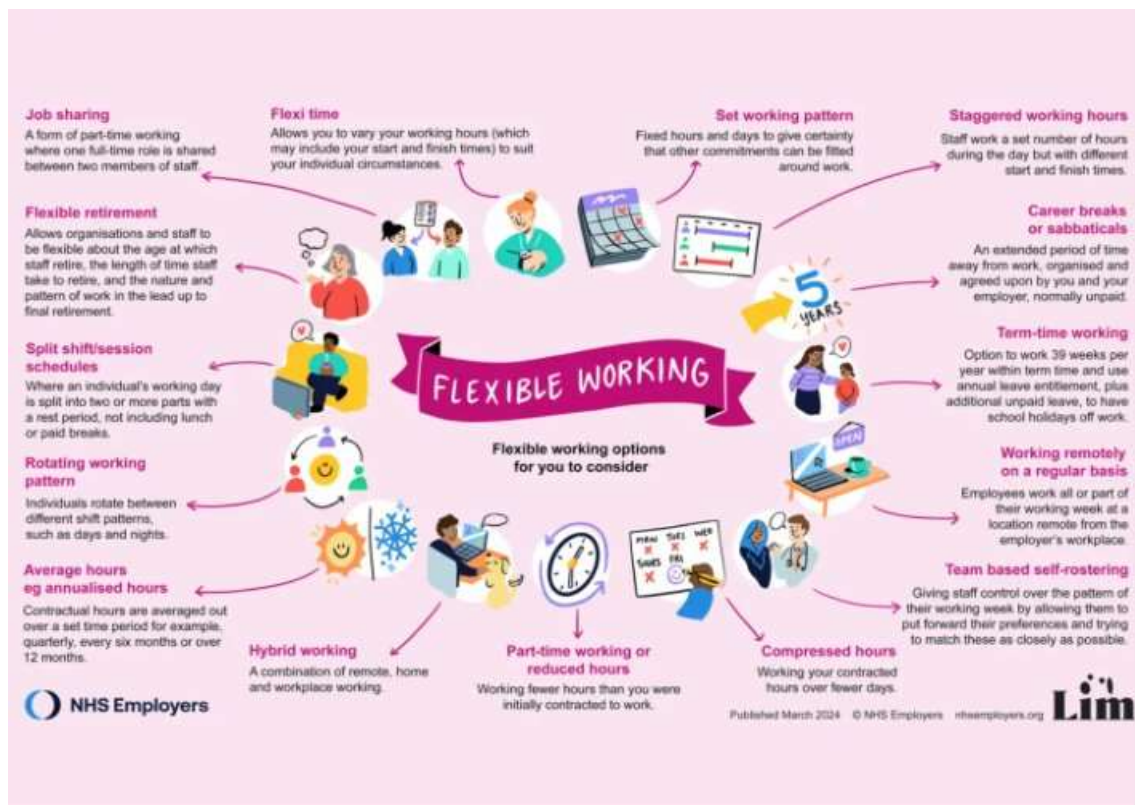


Flexible working – the law

What is flexible working?

Flexible working involves making a change to when, where or how someone works. The below example from the NHS shows the range of options flexible working can include.

The TUC believes some form of flexible working can work in every job but that exploitative, one-sided flexibility such as zero-hours contracts is not flexible working.



This document outlines the law on making a statutory flexible working request. Employers and workers can agree to informal flexible working arrangements, and this is very common. However, in this situation, the employer does not have to follow the Acas Code of Practice and there is no statutory protection from unfair dismissal and detriment.

What does the law say?

How to make a request?

All employees (not workers) can make a statutory flexible working request from day 1 in the job. They must make a written request, and it must include:

- that it is a statutory request
- the date of the request
- details of what change they want
- when the change will start
- the date of any previous statutory request.

Employees can make two requests every 12 months but can only have one 'live' request at any one time.

How must an employer respond?

The employer must

- respond to a request within 2 months, including any appeal process.
- handle the request in a reasonable manner, in line with the Acas Code of Practice
- accept the request unless there is a genuine business reason not to
- consult the employee and discuss any alternative options – unless they've agreed to the request in full
- not dismiss or cause detriment to the employee because of their request

The eight business reasons are:

1. extra costs that will damage the business
2. the work cannot be reorganised among other staff
3. people cannot be recruited to do the work
4. flexible working will affect quality
5. flexible working will affect performance
6. the business will not be able to meet customer demand
7. there's a lack of work to do during the proposed working times
8. the business is planning changes to the workforce

Note there is no statutory right to appeal and no right to be accompanied but both are in the Acas Code of Practice.

What is a 'live' request?

A request is live until any of the following happen:

- The employer has made a decision
- The employee has withdrawn the request
- The employer and employee reach an outcome
- 2 months have passed since application

The 'Live' period includes any appeal and is extended if both parties agree to extend the 2 months.

A request is considered as withdrawn if:

- the employee withdraws it
- the employee misses 2 meetings to discuss the request or appeal without good reason

An employer must tell the employee they are considering the request as withdrawn.

Equality Act 2010

Many flexible working requests will relate to protected characteristics. Key bits of the Equality Act 2020 are:

Indirect discrimination – this happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic, the employee is disadvantaged as part of this group and the employer cannot justify it. Also applies to someone without PC who experiences the same disadvantage as the person with the PC.

Reasonable adjustments - where a disabled person is at a substantial disadvantage compared with people who are not disabled, there is a duty to take reasonable steps to remove that disadvantage.

Employment Tribunal

An employee may be able to make a claim to tribunal if:

- The employer did not deal with the request in a reasonable manner (in line with the Acas CoP)
- The employer rejected the request without a genuine business reason, did not consult with the employee before rejecting the request or made the decision based on incorrect facts
- The employer did not communicate the decision in the time period
- The employee was dismissed or experienced detriment as a result of flexible working
- The employee experienced discrimination during the request

Case Law – not exhaustive

- British Airways PLC v Mr B Rollett and Others (EAT, August 2024, EqA should be re-interpreted to allow claims for indirect discrimination by people who did not have the PC but suffered the same disadvantage)
- Dobson v North Cumbria NHS Foundation Trust (EAT, 2023, sex discrimination was objectively justified)
- Allen vs Primark Stores (EAT, 2022, example of indirect sex discrimination, importance of correct pool)

- Mrs A Thompson v Scancrown Ltd T/a Manors (ET, 2021), indirect sex discrimination)
- Hedger v British Deaf Association (ET, 2019, constructive unfair dismissal, indirect sex discrimination and breach of the requirements for handling flexible working requests)
- Starmer v British Airways (EAT, 2005, example of indirect sex discrimination)
- Compton Ltd v Ruddy IRLR 171 (EAT, 2006, established employer breach ERA96 if reject a request without a lawful reason)

Employment Rights Bill

The Employment Rights Bill will introduce changes to flexible working legislation. The legislation will likely into effect in 2027.

The Bill:

- Introduces a new reasonable test – employers will only be able to reject requests if it is reasonable, but business reasons remain. Employers rejecting a flexible working request will have to state grounds for refusal and explain why the rejection is reasonable.
- Gives powers to the Secretary of State to set out steps in regulation that employers must follow as part of the consultation requirement.