

**Call for evidence:  
non-statutory  
flexible working**

**TUC response**

# Introduction

## Call for evidence

On 20 July 2023, the Department for Business and Trade launched a call for evidence on non-statutory flexible working, closing date 7 November 2023. The definitions used in the call for evidence are as follows<sup>1</sup>:

“Statutory: contractual flexible working arrangements agreed using the statutory Right to Request Flexible Working legislation.

Non-statutory (regular): flexible working arrangements which are regular, recurring and/or standardised, but agreed outside the statutory right to request framework. For example, an individual works two days per week from home and works three days in a workplace. This arrangement is generally understood by the individual to reflect either an agreement between themselves and their manager/supervisor or an agreed organisational approach to this way of working.

Non-statutory (ad hoc): flexible working arrangements which are occasional, time-limited and irregular in nature without significant impact on others in the workplace. For example, an individual agrees with their manager to alter the start and end times of consecutive workdays at short notice to enable their attendance at a medical appointment.

These categories are not mutually exclusive. An individual may benefit from arrangements under each of these headings – for example, someone working part time may alter the start and end times of consecutive working days to accommodate a medical appointment.”

## About the TUC

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy including around one million disabled people. We support trade unions to grow and thrive, and we stand up for a better life for everyone. Every day, we campaign for more and better jobs, and a more equal, more prosperous country.

The TUC’s response focuses on four key questions in the call for evidence.

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<sup>1</sup> <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-non-statutory-flexible-working/call-for-evidence-non-statutory-flexible-working#next-steps>

# Response

## Section one: non-statutory (ad hoc) flexible working

### What do you feel the benefits are to being able to access non-statutory (ad hoc) flexible working? Please provide examples.

Without access to non-statutory ad hoc flexible working, and other forms of flexible working, we have seen evidence of certain groups having to take annual leave, unpaid leave or sick leave to manage events in their lives causing them disadvantage in comparison to other workers.

TUC research found that over one in five working women have had to take time off work because of domestic abuse<sup>2</sup>. Carers UK<sup>3</sup> found that 38 per cent of carers had used annual leave for their caring responsibilities and 22 per cent had also used sick leave. UNISON's survey of members also found that 24 per cent of those with caring experience had taken unpaid leave and CIPD research shows that 35 per cent of employers say that 'family/home/caring responsibilities' are among the top five causes of short term absence – below only stress, minor illnesses such as colds, and musculoskeletal issues<sup>4</sup>.

Disabled workers are also disadvantaged with many having to take annual leave, sick leave or unpaid leave to attend appointments, rehabilitation, assessments, treatment or counselling. In a survey of union reps by the TUC published in 2021<sup>5</sup>, sickness absence and disability was the second most common equality area tackled by reps with 53 per cent of them reporting this. This demonstrates what a common issue it is in workplaces, but many employers do not have disability leave policies in place<sup>6</sup>.

Research into the impact of the menopause demonstrates similarities. An Usdaw survey<sup>7</sup> of retail workers found that 1 in 5 women had taken time off work due to menopause related symptoms and a survey of police officers and staff<sup>8</sup> found that 35 per cent of respondents had taken annual leave or rest days to take time off because of their symptoms. In addition, research by Newson Health and Wellbeing Centre<sup>9</sup> found that half of respondents reported having time off work due to menopausal or perimenopausal symptoms, 31 per cent of women had thought about reducing their working hours and 32 per cent had thought about leaving their job. A survey by Bloody

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<sup>2</sup> <https://www.tuc.org.uk/research-analysis/reports/domestic-violence-and-workplace>

<sup>3</sup> <https://www.familyandchildcaretrust.org/holding-or-moving-supporting-carers-and-parents-employment>

<sup>4</sup> Ibid

<sup>5</sup> <https://www.tuc.org.uk/EqualityAudit2021>

<sup>6</sup> Ibid

<sup>7</sup> <https://www.tuc.org.uk/research-analysis/reports/menopause-and-workplace>

<sup>8</sup> [www.polfed.org](http://www.polfed.org) and search 'menopause survey'

<sup>9</sup> <https://www.newsonhealth.co.uk/>

Good Period also found that 25 per cent of respondents said they felt that time they have had to take off due to menstrual health issues has impacted their career progression<sup>10</sup>.

Having to use leave places these groups of workers at a disadvantage as they are losing out on rest days via annual leave – leading to a higher risk of burn out and exhaustion, being placed at risk of poor treatment due to sickness absence trigger processes, losing out on income through unpaid leave and/or missing out on experience and progression<sup>11</sup>. And for all these groups, flexible working has been cited as essential to remove barriers in the workplace.

Therefore, employers providing ad hoc flexibility is important to reduce this. Ad hoc flexibility can be via line manager request, but employers must have in place policies such as paid carers leave, disability leave, parental leave, domestic abuse leave, flexi-time and other forms of support which remove the disadvantage that people might face and clearly outline the types of flexibility offered by the employer.

We are concerned that without clear policies around non-statutory ad hoc flexibility that discrimination could take place as it is likely that groups already disadvantaged and who experience discrimination in the workplace are less likely to ask for ad-hoc flexibility or be granted ad hoc flexibility. Therefore, employers must have clear policies in place and monitor who gets access to both regular and ad hoc flexibility to ensure discrimination is not taking place.

## **What would you like to see in an employer's, flexible working, compassionate leave and OH policy?**

For all policies, they should be negotiated and agreed with the recognised trade union.

### **Flexible working policy**

Below is a list of things the TUC believes should be in a policy around requesting flexible working.

- All policies should meet the requirements of the Acas statutory code of practice as a minimum.
- A statement around an employer's commitment to equality and the benefits that flexible working brings to both workers and employers.
- The policy should outline the types of flexible working available, definitions of them and to which workers they are available. Employers should ensure that flexible working options are available to all workers. Whilst not every type of flexible

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10 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.bloodygoodperiod.com/\_files/ugd/ae82b1\_66bbbfefcf85424ab827ae7203b2c369.pdf

11 <https://www.familyandchildcaretrust.org/holding-or-moving-supporting-carers-and-parents-employment>

working will be available to all workers, there will be a flexible working option for every role.

- It should be clear who flexible working is available to and we would like to see employers go beyond the law and offer flexibility to workers as well as employers.
- Provide all workers with the opportunity to make unlimited flexible working requests rather than limits set out in legislation. Best practice employers already permit this, for example this became a contractual requirement for NHS employers in England and Wales in 2021<sup>12</sup>. More than 2 requests per year allows workers to respond to changing life circumstances. In practice, the majority of workers won't need to make several requests. However, this provision will be absolutely crucial for those people who do need multiple requests.
- The policy should detail how to submit a request and be clear about what is required under law, what details and supporting information to provide, how to indicate if the request relates to the Equality Act, what meetings will be held, the timeframe for these, who can attend and when the response will be given.
- We would want all employers to hold a meeting with a person making a request, regardless of whether the employer plans to accept or reject a request. This meeting could help counter some of the disadvantages that flexible workers experience, including but not limited to, overwork, isolation and lack of access to progression and development. For example, FDA research in 2019 found that part-time workers reported receiving no adjustment in their workload and 35 per cent of part-time women felt that flexible working had a negative impact on their career progression/performance weighting<sup>13</sup>.
- The policy should state that a union representative or companion can attend any and all meetings in connection to a flexible working request.
- Employers to provide a response within one month of the request.
- The policy should contain a positive commitment to flexible working, that requests will be accepted unless there is a clear reason why it cannot work and should explain clearly how the request will be assessed.
- A policy should provide a commitment that evidence and explanation will be provided if a request is rejected. Employers could develop questionnaires they have to complete when assessing the request that is shared with the worker.
- Policies should contain a commitment to consult on a request with the aim of reaching agreement, for example if an employer thinks a request cannot be accommodated a consultation meeting could be held to talk through concerns and try and overcome them or to seek alternatives. Research by BEIS and EHRC found

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12 <https://www.england.nhs.uk/wp-content/uploads/2022/02/B0395-flexible-working-raising-the-standards-for-the-NHS.pdf>

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

that mums reporting employers' initial reluctance to agree flexible working requests was fairly common and between 24 per cent and 39 per cent of requests were only approved following discussion showing the importance of talking about a request before deciding on rejection<sup>14</sup>.

- A statement on who will take the decision. They should be a person with sufficient training and authority.
- The policy should clearly outline the process for appeal including timelines. Appeals should be conducted by a person not previously involved with a request to ensure impartiality and build employee trust in the process.
- The policy should outline any options for trialling new arrangements and explain how any contractual changes will take place.
- The policy should contain a commitment to monitor requests and responses to them by protected characteristics and monitoring of the treatment of flexible workers i.e., pay and progression to avoid discrimination. The NHS Terms and Conditions handbook, section 33 provides an example of how flexible working reporting works in practice<sup>15</sup>.
- A statement that flexible workers will not be subject to detriment or disadvantage. This is important given the high rates of discrimination that flexible workers experience. BEIS and the EHRC 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<sup>16</sup>. The TUC's own survey of working mums found that 86 per cent of mums who worked flexibly told us they had experienced discrimination and disadvantage as a direct result of this<sup>17</sup>.

More detail on what the TUC believes a request process should look like can be found in our Acas consultation response on the statutory code of practice<sup>18</sup> and our response to the government consultation on making flexible working the default submitted in 2021<sup>19</sup>.

The above outlines what a policy around requesting flexible working should contain. We also believe employers should have collective agreements on flexible working for example flexi-time policies, home working policies, policies for agreeing shift patterns.

A flexi-time policy should have:

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<sup>14</sup> <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>

<sup>15</sup> <https://www.nhsemployers.org/publications/tchandbook>

<sup>16</sup> <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>

<sup>17</sup> <https://www.tuc.org.uk/research-analysis/reports/disabled-workers-experiences-during-pandemic>

<sup>18</sup> <https://www.tuc.org.uk/research-analysis/reports/acas-consultation-flexible-working-code-practice>

<sup>19</sup> <https://www.tuc.org.uk/research-analysis/reports/tuc-response-government-consultation-making-flexible-working-default>

- agreed start/finish times.
- clarification on any roles that need to be exempt.
- flexitime recording methods.
- any limits to overtime and credit/debit hours.

A shift working policy should include:

- team rostering, with shifts set by workers and managers.
- 4 weeks notice of shifts.
- steps to avoid last minute changes.
- staff to have contracts that reflects their regular hours.
- additional remuneration for night shifts to reflect childcare costs and the inconvenience.

A home working policy should include:

- for jobs that can be done remotely, remote working should be offered as standard, should people want to take it up.
- the percentage of time workers are able to work from home, or if this is a free choice.
- if workers can decide which locations they would like to work from.
- if necessary what aspects of a role or job can be done remotely and what needs to be done from a workplace.
- information on covering additional costs of working from home, such as heating and upgrading internet connections.
- methods to ensure that remote workers are doing their agreed hours, taking breaks, and reporting their overtime or flexitime.
- methods to ensure homeworkers aren't left out of opportunities for training, development, and decision making within the organisation.
- a 'right to disconnect' policy, ensuring members have free time in their lives and not expected to respond to work messages at any time.
- a commitment to not introduce any monitoring, or surveillance technology into workers homes via work devices.
- a commitment to the TUC [manifesto](#) on the use of artificial intelligence (AI) at work
- information on health and safety at home.

Employers should also include possible flexible working options in job adverts to ensure transparency for applicants, with the successful applicant being able to take the

options up and flexible working should be part of the job design process. TUC research<sup>20</sup> shows how this would benefit applicants and research from Zurich and the Behavioural Insights Team shows the retention and recruitment benefits for employers<sup>21</sup>.

In addition, to support all of the policies listed above and any other policies related to flexible working, all line managers should have training in to how to effectively support and manage staff who work flexibly. This is essential to ensure policies are followed and staff treated fairly.

The TUC's principles for employers on flexible working contain more information on what employers should be doing in relation to flexible working agreements<sup>22</sup>.

### Compassionate or special leave policy

The TUC, Better Health at Work and Cruse Bereavement Care have developed a sample bereavement policy. The full policy and guidance is online<sup>23</sup>, but the key points to include in any policy are:

- a statement demonstrating commitment to support staff.
- the law on parental bereavement leave.
- clear information on what paid bereavement leave is offered.
- arrangements for asking for leave for example who to notify, flexibility in taking the leave, any notice needed, return to work.
- additional employee support for example Employee Assistance Programmes, reasonable adjustments, ongoing support, signposting to other organisations.

### Occupational health policy

An OH policy should include the following:

- a statement to demonstrate that occupational health professionals are properly accredited and information on other specialists<sup>24</sup>.
- the relationship between OH and the organisation.
- information on how medical data is stored.

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<sup>20</sup> <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>; <https://www.tuc.org.uk/research-analysis/reports/making-flexible-working-default>

<sup>21</sup> <https://www.zurich.co.uk/media-centre/part-time-hires-double-since-launch-of-flexible-working-initiative#:~:text=Around%2012%25%20of%20Zurich's%20UK,blocking%20career%20progression%20for%20women>

<sup>22</sup> <https://www.tuc.org.uk/research-analysis/reports/future-flexible-work>

<sup>23</sup> <https://www.tuc.org.uk/tuc-northern-bereavement-toolkit>

<sup>24</sup> <https://www.tuc.org.uk/research-analysis/reports/medical-referrals-employment-%E2%80%93-doctor-appropriately-qualified>



- the OH process including timeframes.
- a commitment that cost of non-attendance will not be passed on to the worker.
- OH services should only be outsourced if needed.

## **Section two: non-statutory (regular) flexible working**

### **What are the benefits of offering/accommodating non-statutory (regular) flexible working arrangements?**

The benefits of flexible working in general are widely documented. We believe a key benefit of employers offering non-statutory regular flexible working, for example home working, hybrid working, compressed hours, flexitime, is that it means that people do not have to make a statutory request. The legislative framework for this contains numerous barriers for workers. Firstly, it is right to request, and we know that many people don't feel comfortable asking. More than two in five (42 per cent) working mums who responded to a TUC survey<sup>25</sup> would not feel comfortable asking about flexible working in a job interview, mainly because they think they would be discriminated against and rejected.

When asked if they had requested flexible working at their current place of employment – 31 per cent had not and 36 per cent had only asked for some of the flexible working they need<sup>26</sup>.

More than four in ten 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<sup>27</sup>.

These fears are not unfounded, TUC research shows that three in ten flexible working requests are denied, and 50% of mums told us in our survey said their current employer had rejected or only accepted part of their flexible working request<sup>28</sup>. In addition, EHRC and BEIS research revealed that over half (51 per cent) of mothers had experienced discrimination or disadvantage as a direct result of having a flexible working request approved<sup>29</sup>.

We also know that disabled workers have similar fears, feeling unable to ask for reasonable adjustments, an important one being flexibility in hours or location, due to fear of negative treatment or rejection. Again, these fears are not unfounded. TUC

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<sup>25</sup> <https://www.tuc.org.uk/research-analysis/reports/denied-and-discriminated-against>

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>

research<sup>30</sup> before the pandemic found that 45 per cent of disabled workers who asked for reasonable adjustments failed to get any or only got some of the reasonable adjustments they asked for put in place and one in 12 disabled workers (8 per cent) told us they had been subjected to bullying and/ or harassment.

Therefore, having workplace policies and agreements that explicitly state what flexible working is available that allow for regular flexible working would remove the onus on the individual to ask and would clearly demonstrate the employer's commitment to flexible working helping to reduce some of the fear around asking.

We also know the flexible workers experience high rates of discrimination, one way to tackle this is to make flexible working the normal way of working. A key way to achieve this is to have policies, which all staff can take advantage of. Policies in addition can contain measures to address some of the downsides of flexible working for example a commitment to monitor who has access to training and development will ensure employers are aware if the uptake of flexible working is having an impact on access to training or a right to disconnect policy can address long hours cultures when working from home.

Normalising flexible working for everyone can help to challenge norms around caring responsibilities and domestic labour as men will gain much needed access to flexible working. This is key tackling gender discrimination in the labour market including ending the gender pay gap. Recent polling by the TUC found that half (53 per cent) of new dads and partners entitled to paternity leave who request flexible working don't get the flexibility they ask for and this was higher for those on lower incomes<sup>31</sup>.

In addition, having access to regular flexible working would allow people to move more freely in the labour market as many feel stuck in jobs because of fear of losing flexibility. A survey of 3,000 parents found that nearly seven in 10 working dads (69 per cent) and eight in ten working mums felt stuck in their current role because of concerns they would not find another job with the right flexibility<sup>32</sup>. It is therefore essential that any flexible working available is included in job adverts, so people understand the options open to them before applying for a job.

A particular important policy that is not mentioned in the call for evidence is disability leave. Disability leave is planned or unplanned time off from work for a reason related to someone's disability. It is a type of 'reasonable adjustment' which disabled workers may be entitled to under the Equality Act 2010. Disability leave can allow for both ad hoc or regular flexible working and it is important that employers have this policy as without it, they may not be meeting duties on the Equality Act 2010. It also reduces the amount of sick leave that disabled workers have to take, which puts them at a significant disadvantage in the workplace due to sickness absence triggers.

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30 <https://www.tuc.org.uk/research-analysis/reports/disabled-workers-experiences-during-pandemic>

31 <https://www.tuc.org.uk/news/half-new-dads-dont-get-flexibility-they-ask-work-tuc>

32 <https://www.peoplemanagement.co.uk/article/1744634/fathers-struggle-to-get-flexible-work>

It is important that all policies are negotiated with recognised trade unions where there is one.

### **What are the drawbacks of offering/accommodating non-statutory (regular) flexible working arrangements?**

We have heard concerns from workers that where they have access to flexible working via a workplace agreement or policy, they would prefer to have this written into their contract for security as there is fear that an employer can withdraw the policy. Trade union representatives play an important role in ensuring that employers follow workplace policies but low collective bargaining coverage in the UK means many workers do not have these protections. Below are some examples of where we have seen flexible working arrangements withdrawn.

There have been numerous examples in the media<sup>33</sup> now where employers have changed policies on home and/or hybrid working for example increasing the number of days in the office without proper consultation with trade unions or staff.

A 2016 NASUWT flexible working report<sup>34</sup> 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. 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.

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<sup>33</sup> <https://www.nytimes.com/2023/08/07/business/zoom-return-to-office.html>;  
<https://www.hrmagazine.co.uk/content/news/return-to-the-office-what-employers-are-doing-to-incentivise-in-office-work/>

<sup>34</sup> chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/https://www.nasuwat.org.uk/static/uploaded/6fd07ce3-6400-4cb2-a8a87b736dc95b3b.pdf