Law Society of Scotland

Consultation Response

Making flexible working the default

December 2021

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Department for Business, Energy & Industrial Strategy consultation: *Making Flexible Working the Default.*[1] We have the following comments to put forward for consideration.

Consultation Questions

Section 1: Who are you?

1. Other- Professional Body

2. Other

3. Not applicable.

4. Not applicable.

5. Not applicable.

6. Not applicable.

7. Not applicable.

[1] https://www.gov.uk/government/consultations/making-flexible-working-the-default

Section 2: Building Back Better with Flexible Working

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

Neither agree nor disagree

9. Please give reasons for your answer, including any considerations about costs and benefits that may affect employers and/or employees.

We would expect in reality that if someone wanted to work flexibly in a way that was different to the hours and terms agreed at the time the job was accepted, that it would be sensible for this to have been discussed as part of the recruitment process – a request to change hours/ pattern/ location of work made on day one or shortly thereafter (after alternative terms have been agreed) is unlikely to be welcomed by many employers given the additional cost/management time in dealing with a request. It would be better for employers and prospective employees to be encouraged to discuss the options around flexible working at the recruitment stage.

However, we recognise that from an employee perspective, it may not always be possible to have a discussion with a prospective employer in relation to flexibility at the recruitment stage (for example, if the circumstances that lead to the request occur after employment commences). It may therefore be preferable, from an employee perspective, to have the option to request flexible working from day one of employment.

There is also a practical consideration, in that some unscrupulous employers may be reluctant to employ individuals who make a flexible working request during the recruitment process and may refuse to offer them employment under the guise of another reason. This may apply disproportionately to disabled people, particularly those with hidden impairments, or carers, who may fear discrimination at the recruitment stage. Accordingly, consideration must be given to safeguarding against any hidden motivations.

10. In your organisation, do you currently accept requests for flexible working arrangements from employees that have less than 26 weeks continuous service? Please answer this question from the perspective of the employer.

Not applicable.

11. 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.

Yes, the list of business reasons remains valid.

12. If yes, please give reasons for your answer.

We would suggest that this list of reasons remains valid, in particular because of the impact that the pandemic has had on how people work. Some examples of why we believe these reasons continue to be valid are as follows:

- Employers' requirements vary tremendously from sector to sector. By dispensing with certain reasons employers, who have a valid reason for refusing a request, may be left without an appropriate option. For example, employers in the manufacturing sector who would need to be able to turn down a request because of a lack of work to do during the proposed working times may be left without sufficient legal avenues. This could lead to convoluted rationale being applied, and to an increase in litigation.
- Equally many employers are now grappling with the issue of encouraging employees back to the workplace and may be facing requests from staff, particularly from senior/experienced employees, to work permanently from home. This creates a potential problem for many sectors, which need senior members of staff to be in the office/on site, for at least part of the week, in order to train other members of staff through tacit knowledge-sharing and/or to supervise junior members of staff on a face to face basis, and/or to work on projects which require collaboration and team-working and/or show visible leadership. With this in mind, our view is that allowing requests to be refused because of the detrimental impact on quality should be maintained.
- It will also be important for employers to retain the ability to turn down requests to work from home full-time if working from home would allow employees to avoid the less popular tasks which need to be done in the workplace. For example, a PA who wishes to work from home full time could avoid having to ever carry out large scale photocopying tasks or filing hard copy documents – the employer in that instance may need to rely on the detrimental impact on performance as a reason to be able to turn down this request.

Whilst we understand that there may be a groundswell of opinion to reduce the list of available reasons, we believe the existing list could be viewed as a positive if it were presented as a checklist for an employer to help them work through the impact of a request. This approach may encourage rather than discourage an employer to accept a request by demonstrating that the request will have limited and/or manageable consequences – particularly in the climate that we now have where flexible working is much more commonplace and accepted as a positive development by employers.

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

See above – we believe all reasons should be maintained.

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

Agree

15. Please give reasons for your answer

We believe that employers should be asked to confirm that they have **considered** whether alternative working arrangements could be implemented, if the original request cannot be agreed. Most employers already look to consider alternatives in any event in practice both from an employee engagement perspective, and also potentially to protect themselves from claims of indirect sex discrimination. The consideration of alternative working arrangements is an important step in dealing with the request and providing confirmation that this has been done should provide reassurance to employees that their request has been given due consideration.

However, this should be a requirement *to confirm* that the employer has considered alterative arrangements – not a requirement *to offer* an alternative arrangement. Imposing a requirement to offer an alternative arrangement would be an unfairly onerous obligation on employers.

Furthermore, care must be given to avoid placing any unduly onerous duties on micro-employers and to a lesser extent, SME businesses. They may simply not be equipped to deal with the additional burdens imposed.

16. 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?

Yes.

We understand that this proposal would place a requirement on employers to set out at least one alternative flexible working arrangement, and to confirm why it is rejected in line with ‘business grounds’, as well as providing statutory grounds for refusing the original request. We are concerned that this would be unduly onerous on employers. It could create a temptation for employers to create an alternative flexible

working arrangement which could be easily rejected, in order to meet this requirement rather than genuinely considering what might work, and may therefore have unintended consequences.

17. If yes, would this requirement have an effect on the time taken by employers to handle a request?

Don’t know

It is difficult to predict exactly how much time this might take, but it is likely to be substantial, relative to the time taken dealing with the original request. Introducing this type of requirement potentially creates a ‘shadow process’ whereby the employer needs to undertake similar steps relating to the alternative flexible working arrangement, as well as the original request. A failure to meet this requirement would presumably also create an additional ground for appeal.

18. 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?

No

19. Please give reasons for your answer.

Allowing employees to make more than one formal request per year could lead to employers having to deal with repeat requests, where the original request has been turned down, without any material change in circumstances justifying that repeat request. We note there is already nothing to prevent an employer from considering requests outside of the formal statutory process where more than one request has been made.

As an alternative, guidance could make it clear that whilst employees are only allowed to make one request per annum under the statutory regime they should be allowed to make additional requests, outside of the scheme, within a 12 month period where there has been a material change to their own personal circumstances – for example the birth of a new baby or having to take on caring responsibilities or where there has been a material change to the way their work or department is organised – for example an increase or decrease in staffing levels, an office relocation, a departmental restructure etc. This would require clear explanation of what would be considered a material change for the purposes of a flexible working request.

20. 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?

No

21. Please give reasons for your answer.

Whilst many employers are in a position to respond to a request more swiftly than the timeframe currently permits, employers with small HR teams and, conversely very large employers with complex structures and lines of management responsibility, may require the 3-month window. A shorter timeframe could encourage employers to refuse more requests, as they would not have time to work through the request and its implications properly. Employers may also be less likely to be encouraged to run a “soft trial” of what the flexible working request would look like. The 3-month window affords time for proper and due consideration of a request which could lead to a significant change in the operating model of an employer.

We recognise, however, that the 3-month window is generous in the majority of cases, and that employees requesting flexible working may be significantly inconvenienced by a lengthy wait for a response, for example where the request is due to new childcare or caring responsibilities.

It may be appropriate to require employers to acknowledge the request within a shorter time period (for example 4 weeks of receiving it), and to change the emphasis of guidance so that employers are encouraged to deal with requests promptly and at the very latest within 3 months of the request being made.

22. 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?

No amendment is required.

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

Please see our answer to question 19, above.

24. 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?

No amendment required.

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

Please see our answer to 21, above.

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

Yes.

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

We believe the legislation could make it clearer that temporary arrangements are permissible – at present the legislation refers to the fact that once a request has been accepted this will result in permanent changes to the contract of employment. We believe this potentially discourages time-limited requests.

We also believe that the use of trial periods should be actively encouraged in the guidance as we believe that this would ultimately lead to more requests being granted.

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

Ad hoc and informal flexible working is helpful where there are temporary or short-term requirements for flexibility. It can be helpful to retain employees with caring responsibilities and/or ill health. Where employers are able, they should be encouraged to keep lines of communications between line managers, employees and the HR team open to allow employees the opportunity to discuss their working arrangements.

More informal flexible working is particularly important to consider in the wider context of promoting gender balance, particularly where there isn’t necessarily a desire by the employee or business for a permanent

change to employment terms but rather where having ad hoc flexibility has been helpful from an employee engagement perspective and has assisted with productivity.

The impact of having employees working flexibly on a temporary or informal basis can be felt by others in the team/wider organisation in terms of the impact on work distribution and supporting more junior colleagues. This impact needs to be addressed and considered by managers from the outset.

Agreeing to an ad hoc or informal request could lead to an expectation that a formal request would be agreed to or has been agreed to over time, resulting in a variation of terms of employment.

We would suggest that the above issues should be considered in the context of a call for evidence on ad hoc and informal flexible working.

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