

Response ID ANON-XCP7-1R14-A

Submitted to Making Flexible Working the Default
Submitted on 2021-12-01 15:42:08

About you

What is your name?

Name:
The City of London Law Society (Employment Law Committee)

What is your email address?

Email:
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What is your organisation?

Organisation:
The City of London Law Society (Employment Law Committee)

Are you happy for your response to be published?

Yes, but without identifying information

Would you like to be contacted when the consultation response is published?

Yes

Are you (select the appropriate option):

Representing employers' or employees' interests

Please specify (if other):

Are you (select the appropriate option):

An employer or someone who is responding on behalf of an employer

If you are an employer, how would you classify your organisation?

Classification of organisation:

If you are an employee, what type of organisation do you work for?

Not Answered

Other (please specify):

If you are an employer, how many employees work for your organisation?

Number of employees (employer):

If you are employed, how many people work for your organisation?

Not Answered

If you represent employers or employees, who do you represent?

Other (please specify)

Who do you represent?:
Lawyers representing employers and employees in the City of London

Introduction

Legislative changes to better support flexible working

Making the Right to Request flexible working a day one right

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

Agree

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

The right to request flexible working from the first day of employment would be positive from an employer and employee perspective. It will encourage employees to make a request at the start of their employment and will enable a transparent dialogue between the employer and employee at the start of the relationship.

The current qualification/waiting period is artificial. While employees in certain protected groups might have protection under discrimination law, if an employee's circumstances are such that they require a flexible working arrangement their job mobility and career progression could be curtailed if they do not have this right to request from day one. This will be for the benefit of the labour market and bringing forward this discussion at the start of the employment relationship is more likely to drive change.

2 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 Answered

Whether the eight business reasons for refusing a Request all remain valid

3 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

If you answered yes, please give reasons for your answer:

The current business reasons give employers sufficient basis on which to decline a request and to determine whether that step is justified. They provide adequate flexibility for the employer.

However, limiting the discussion to the 8 reasons, narrows the dialogue to these limited factors and focuses the employer's decision on those reasons. We therefore welcome the proposal to expand the dialogue by requiring employers to suggest (or at least have a process for the employer to consider) alternatives with the employee.

If you answered no, please state which reasons from the list (see 'Reasons for refusing a flexible working request' above) are no longer valid and why:

Requiring employers to suggest alternatives, where possible

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

Agree

Please give reasons for your answer.:

We welcome any proposal that will enable a dialogue between employer and employee. In our experience the current process can be unnecessarily adversarial because it encourages employers to reach a yes/no decision without a real discussion with the employee, beyond the relevant business reason. That said, most of our employer clients would have that discussion anyway. In practice employers and employees tend to be reasonable and reach a practical compromise if the employer is not able to meet the employee's initial request.

Careful consideration will, however, need to be given to the process for this - it needs to be flexible, and encourage an open dialogue. There may be more than one alternative and a balance will need to be struck between the additional burden on employers if they are required to suggest an alternative(s) (this should, for example, be determined by reasonableness and not an exhaustive requirement), and the number of alternatives to be considered.

There will also need to be careful consideration of the extent of this requirement as it will not always be feasible for the employer to grant a request or propose a reasonable alternative. The consultation paper uses the term "if possible" to limit the employer's obligation. That is a blunt standard. Guidance would be required to determine how that is interpreted and an alternative standard (for example "where reasonably practicable in all the circumstances") or ability to objectively justify the employer's inability to offer an alternative, should be considered.

5 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

Please give reasons for your answer:

In practice we think this will not place an additional burden on employers because most employers will do this already.

However, a requirement to set out a "single alternative flexible working arrangement" is too prescriptive and unlikely to promote a proper discussion about the possible alternative.

Any additional time is likely to depend on how prescriptive the proposed process is.

6 If you answered yes to question 5, would this requirement have an effect on the time taken by employers to handle a request?

Not Answered

Time taken by employers to handle a request:

The Administrative process underpinning the Right to Request flexible working

7 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

Please give reasons for your answer:

If a dialogue is encouraged at the start of the employment relationship and addressed properly at that time there should be no need to revisit this within a year bar any significant changes in the employee's circumstances. We would, however, suggest that an exclusion or other provision is made to give the employee an opportunity to make a request within the year if there is such a change.

It does take time for employers to consider requests and it would be unduly burdensome to remove the current waiting period without a change in the employee's circumstances.

8 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:

The three month period can lead to uncertainty and employers rarely, if ever, need that length of time to consider the request (even if it might take them longer to be able to implement a change in certain circumstances). We believe that 2 months is sufficient to enable a proper dialogue.

9 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?

Other, please specify

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

If the original request is considered properly (and the employer is obliged to take the employee's representations into account - similar to listening to the employee in a redundancy or other dismissal process) there should be no need to revisit the request within a year, absent any significant change in the employee's circumstances (for example life events such as returning from parental leave or a change in caring responsibilities).

10 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?

More than two months, less than three months

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

See Q 8.

Requesting a temporary arrangement

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

Yes

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

Provide examples of what would encourage employees to make time-limited requests to work flexibly:

In our experience employees often have short term changes in circumstances (such as family illness, bereavement, young children and difficulty with childcare) but assume that the request to work flexibly will result in a permanent change.

More transparency about the employer's process and the ability to make such requests might encourage employees to make them. Having a clear policy

and protection against detriment for making (and implementing) such a request would assist.

Additional actions: beyond the current framework for flexible working

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

Suggestions for call for evidence: