

Making flexible working the default: UCU response to BEIS consultation *December 2021*

The University and College Union (UCU) represents over 130,000 academics, lecturers, trainers, instructors, researchers, managers, administrators, computer staff, librarians and postgraduates in universities, colleges, prisons, adult education and training organisations across the UK.

UCU welcomes the opportunity to respond to the Department for Business, Enterprise and Industrial Strategy's flexible working consultation.

In 2020, UCU signed up to the **#FlexTheUK** campaign headed up by Working Families, joining together in a call to make flexible working the rule, not the exception. We want to encourage employers and the government to harness the increases in productivity, talent attraction, and diversity that flexible working will bring to the UK economy long after COVID-19 has run its course. As part of the **#FlexTheUK** campaign, we have been calling for:

- Employers to design and advertise jobs as flexible, and actively encourage flexible working as a way to support working parents and enhance wellbeing.
- Government to bring forward their new Employment Bill in 2022 and include a duty on employers to make jobs flexible unless there is a business case not to; and take action against insecure employment practices.

Consultation questions

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

Strongly agree.

Please give reasons for your answer

An ability to request from day one will encourage a greater pool of people to apply for vacancies and normalise flexible working. The biggest problem with the current legislation and the proposals, however, is that it assumes an equal balance of power between employer and employee. We of course know this is not true, but the imbalance of power is compounded for staff on precarious contracts. 46% of universities and 60% of colleges use zero hours contracts to deliver teaching. 68% of research staff in higher education are on fixed term contracts, with many more dependent on short-term funding for continued employment. See also UCU reports:

“Second class academic citizens – the dehumanising effects of casualization in higher education”:

https://www.ucu.org.uk/media/10681/second_class_academic_citizens/pdf/secondclassacademiccitizens and “Counting the cost of casualisation in higher education - key findings from a UCU survey in 2019” <https://www.ucu.org.uk/media/10336/Counting-the-costs-of-casualisation-in-higher-education-Jun->

In general, staff on precarious contracts would benefit from the Right to Request Flexible Working on day 1. Currently those with 26 weeks continuous service would be allowed to request flexible working, which disproportionality excludes a significant number of staff on casualised contracts. Even those who may have been working for the same employer over long periods of time, but have not built up legal continuity of service due to breaks in service during the year.

Employers should be required to publicise these rights and the process of requesting (including their commitment to work out alternative arrangements if a request is refused and rights to temporary flexible working) to employees from day 1. It should not fall to prospective workers to have to raise this at interview or on the first day of their job.

The consultation states that it ‘seems wholly appropriate that the starting point [for flexible working] should be an employee request’. TUC research and the government’s own research¹ 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 post implementation review of flexible working regulation also highlights that the right request model has failed to meaningfully increase levels of flexible working to date.

Employers must also emphasise though that workers should not be pressured into flexible working and commit to providing workers who are unable to work flexibly with an equitable, stable work environment — this is also crucial for casualised staff who may face housing insecurity or live in spaces unsuitable for flexible working.

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.

We want to challenge the following reasons for rejecting a flexible working request:

¹ <https://www.tuc.org.uk/sites/default/files/2021-10/Report.pdf>

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

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

²<https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancyand-maternity-discrimination-research-findings>

- The work cannot be reorganised among other staff
- people cannot be recruited to do the work

This should have to be tested via a recruitment/offer of more hours process before an employer can use this as an excuse.

- flexible working will negatively affect quality
- flexible working will negatively affect performance
- the business' ability to meet customer demand will be negatively affected

The pandemic has demonstrated that this is nonsense in the overwhelming majority of cases.

- the business is planning structural changes.

Considering flexible working requests in the context of restructures could save jobs (an obligation under consultation regulations).

Any argument that "extra costs that will be a burden on the business" is something we also want to challenge. It's been demonstrated repeatedly that workers bear the costs of flexible and home working, and employers should actually be expected to take this into account and to pay for, for example, Wi-Fi/broadband costs.

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.

Please give reasons for your answer.

This means a request will lead to a conversation, and a potential to find a workable solution for everyone. Currently the ability of employers to just say no means no compromise can be found. This should also be tied to quicker responses to requests, which will also help improve dialogue on requests.

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.

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.

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. 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. Someone might be a parent, request flexible working, and be rejected, then become ill several months later and need to request flexible working on that basis.

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 an organisation. 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.

As has been highlighted previously, if an employer has assessed which types of flexibility are possible within a particular role 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, for the same reason as set out in question 1, we believe that the employer's reply must be expedited. 3 months to reply can already be 1/3-1/2 way through a casualised contract, for example, which would disincentivise casualised staff from making these arrangements.

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. A long wait time can force 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.

Removing the limits on the number of requests and granting flexibility in all but exceptional circumstances would 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?

We suggest a maximum of 4 weeks.

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 set up a meeting within 2 weeks of receiving the response. A final decision in writing with explanation should be communicated to the worker within 2 weeks of the meeting. Therefore, the whole process would take a maximum of 4 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.

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.

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

UCU would welcome a call for evidence on 'ad hoc' and informal flexible working. 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 and also include examples of international approaches which facilitate informal flexibility, including legislative approaches.

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. Some workers may want informal flexible working, but 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.