

# Employment & Workforce Survey 2021: A Focus on Flexibility

How the pandemic has affected working arrangements, in particular how it has increased the need for flexibility.

13 December 2021

For many employers, the pandemic has brought a whole new focus to what flexible working really can look like – with employers and employees alike having to react and adapt to different ways of working. For some employers, there has been a return to pre-pandemic “normal” – but for many others, over 18 months later, the workplace still looks very different with significantly higher levels of homeworking than ever seen before.

A report by the Office for National Statistics published in April 2021, [Homeworking hours, rewards and opportunities in the UK: 2011 to 2020](#), showed an increase in homeworking of 9.4%, compared to 2019. Several surveys conducted during the pandemic show a continuing appetite from employees wishing work from home for all or part of their working time on a longer-term basis.

Although our survey indicated that 100% homeworking for all staff may not be particularly desired amongst staff and/or feasible for many employers, over three quarters of those responding offered some degree of homeworking to some or all of their staff. For those who were unable to offer homeworking, comments included indicate that this was simply due to the nature of the employer – for example, schools or care homes where the vast majority of staff are needed on site.

However, despite the high numbers of responders offering homeworking, around two thirds of responders had no plans to change or reduce their premises/work space – suggesting either a considerable degree of on-premises working still taking place, or employers wishing to keep any extra space arising as a result of homeworking to allow for a degree of social distancing.

## Flexible working

Employers with roles which can feasibly be carried out from home may see an increasing number of flexible working requests (see below for more on this) with employees wishing to put on contractual footing their working location(s). For employers who are happy to accommodate such requests, consideration will need to be given to how this will work in practice, including creating or updating a homeworking policy and assessing health and safety risks.

Further the ONS report referred to above indicates that there may be other inequalities which (advertently or inadvertently) follow an increase in homeworking – for example, the report indicates that those mainly working at home were less likely to be paid a bonus and less likely to be promoted, despite working higher levels of unpaid overtime and with lower sickness absence rates. Employers may therefore need to give greater consideration as to how homeworking is culturally viewed within their organisation to avoid unfair practices from continuing or developing.

Homeworking aside, there are other types of flexible working arrangements which may also be on the increase. In addition to working from home, many employees needed to flex their working hours during the pandemic, particularly to accommodate caring responsibilities. Others may have enjoyed being able to take part in other activities during what would have been their usual “commuting” time. Employers may therefore see a rise in requests to work at differing times, or for reduced periods.

Whilst pay was ranked by those who responded most highly in terms of importance to staff retention (with just under three quarters of responders ranking this first), flexibility over hours came in second place picking up 20% of the remaining vote. It also picked up the greatest share of the second ranking slot – with over a third of the second place votes cast.

# Current legal framework

The right to request flexible working has been around for many years but was initially a right limited to those caring for children, before being extended to those with wider care responsibilities. In June 2014, it was extended further to include all qualifying employees, regardless of their reason for seeking flexible working. Employees with at least 26 weeks' continuous employment can make a request for flexible working and employers then have 3 months to consider the request and notify the employee of the outcome (including dealing with any appeal). Employers must deal with the application in a reasonable manner and may only refuse a request for one of the eight reasons set out in the legislation:

- the burden of additional costs;
- a detrimental effect on the ability to meet customer demand;
- an inability to reorganise work amongst existing staff;
- an inability to recruit additional staff;
- a detrimental impact on quality;
- a detrimental impact on performance;
- insufficient work for the periods the employee proposes to work; and
- a planned structural change.

Only one request can be made under the statutory scheme within a 12-month period.

## Flexible working and the “childcare disparity”

In the case of Thompson v Scancrown Limited t/a Manors, the Claimant, a female employed as a sales manager by the Respondent, an estate agent, made a flexible working request on her return from maternity leave, asking to work a 4 rather than 5-day week, and to finish at 5pm rather than 6 pm to allow her to get to her child's nursery which closed at 6 pm. Her request was refused, with her employer relying on five of the eight statutory reasons for refusal but without substantial explanation as to why they applied. Her flexible working appeal was also rejected.

The Claimant pursued a number of separate claims in the Employment Tribunal, relating to matters significantly wider than simply her flexible working request; these wider claims were unsuccessful. However, her claim of indirect sex discrimination in respect of the refusal to allow flexible working was upheld by the Tribunal.

The Tribunal (in a judgment dated 4 May 2021) was willing to accept that notwithstanding 'encouraging shifts' in societal attitudes, it was still the case that mothers are more likely to carry primary responsibility for children than fathers meaning that as a group women suffer a greater disadvantage. (This view has more recently been reinforced by the Employment Appeal Tribunal in Dobson v North Cumbria Integrated Care NHS Foundation Trust, in which it held that the 'childcare disparity' still exists in 2021.)

Having established that the Claimant was at a disadvantage, the Tribunal went on to consider justification, and whether the reasons for refusal were proportionate to achieving a legitimate aim – here, maintaining successful relations with customers. The Tribunal concluded that they were not, and the Claimant's indirect discrimination claim was upheld.

The Tribunal's remedy judgment dated 24 August 2021, confirms that the Claimant was awarded just shy of £185,000 in respect of her indirect discrimination claim.

## Government Consultation

In September 2021, the Government launched a Consultation on potential changes to the statutory flexible working regime. Whilst this consultation is called “Making flexible working the default”, the consultation does not, on the face of it, go this far. Although a review of the currently statutory grounds for refusal is included as part of the consultation, the accompanying text indicates that the Government does not see the current statutory grounds as presenting a disproportionate barrier or that there is any need for fundamental change. Instead, the focus is on widening the right to apply from day one, and potentially tweaking the process to allow more requests to be made and/or to shorten the time for dealing with them. Other areas included in the consultation (considering alternatives and temporary adjustments) are matters that are already encouraged by Acas when considering requests or fall within the existing scheme. This consultation closed on 1 December 2021 and the Government's response is awaited.

## The NHS – a step ahead

Ahead of the Consultation referred to above, on 13 September 2021, changes to section 33 of the NHS Terms and Conditions of Service Handbook came into effect, giving increased rights to request flexible working to all staff covered by those terms within England and Wales.

The new section 33 gives all NHS employees in England and Wales covered by section 33:

- the right to request flexible working from day one; and
- the right to make more than one request a year (regardless of the reason for the request).

Although the phrase “more than one request” is used in the section 33 wording, the [Joint Statement on behalf of the NHS Staff Counsel](#) confirms that this is intended to mean that there is “no limit” on the number of applications that can be made.

## A four-day week?

Another area which appears to be gaining some traction – or at least press reports – is the notion of a four-day working week. At the Labour party conference in 2019, a proposed drop from 37 hours to 32 hours work with no loss in pay, implemented over a 10-year period was put forward. Trials of a four-day week in Iceland between 2015 and 2019 were heralded as an [overwhelming success](#), and a one month trial by Microsoft in Japan in August 2019 was reported to [increase productivity by 40%](#). Trials were proposed in both New Zealand (2020) and Spain (2021), and in September 2021, the Scottish Government announced a £10 million pilot scheme to trial a 4-day working week. Since then, a number of UK employers have hit the headlines with announcements of moving to a four-day working week.

## Leave for carers

The Government has also published its [Response](#) to proposals for unpaid leave for carers. These proposals, when implemented, would give the right to take one (working) week’s unpaid leave per year for the purpose of caring for a dependant with long-term care needs. This right will apply to all employees from day one and leave will be able to be taken flexibly – from half a day up to one week.

Legislation in respect of leave for carers will be introduced “when parliamentary time allows”. However, the Response does indicate that it will be brought forward “alongside other measures”, including those in respect of flexible working. Given that the flexible working proposals are still at the consultation stage, it may be a little while before statutory leave for carers is introduced.

If you would like discuss the impact of any of the issues raised above on your organisation, please feel free to contact [Dawn Loble](#).

## Contact

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