


Hybrid working: The right to flexible working and how to make it work for public sector employers

06 September 2024  Kerren Daly

This article was first published by [The MJ](#)

After new flexible working guidelines came into force, Kerren Daly explains how this applies to public sector workers.

The Cabinet Office, under the Conservatives, tasked departments across government with ensuring their offices return to full occupancy following the lifting of work from home restrictions introduced during the Covid-19 pandemic.

Leading the way in a return to pre-lockdown arrangements was the Civil Service, and its requirement for office working permeated into the wider public sector.

The reality, however, is that most of the public sector has not returned to pre-lockdown working ways of working, while new legislation has empowered employees.

Legal implications for employers to consider span contractual, the right to request flexible working, reasonable adjustments for staff with a disability and remote working.

Contractual law

An employment contract will likely state that the position is on premise-based.

Lockdown was unique and not meant to provide a permanent change to contracts of employment.

The reality is it changed the mindset of many workers, with an expectation that employers will be flexible, particularly in the public sector. This expectation has translated into most public sector employers agreeing to hybrid working, with many staff viewing this as a benefit.

However, we are learning that remote working has disadvantages, not just for the employee but also for the employer and its service users.

Remote working can create an environment of isolation and silos that have an impact on culture, team building, collaboration, the ability to learn from others 'on the job' and services to the public.

There is also an ongoing debate about best value and whether public money is being used effectively in cases where public sector employees work from home.

Right to request flexible working

The right to request flexible working is now a day one right since the implementation of the Employment Relations (Flexible Working) Act 2023 in April this year.

The starting position when considering a request is to consider the contract, which is likely to include an express or implied right to hybrid working.

The problem we see in the public sector is that employees are making flexible working requests **in addition** to hybrid working.

The question for the employer is whether the hybrid policy requires minimum workplace attendance.

If it does, can it be justified? Does the minimum workplace attendance apply to all roles across the organisation? These questions must be answered to enable you to respond to flexible working requests consistently.

Reasonable adjustments for those with a disability

Employers have a duty to consider and implement all reasonable adjustments to enable those with a disability to perform their duties. The expectation is that the public sector can, and will, be more accommodating given its commitment to equality, diversity and inclusion.

Some advice in this area includes:

- Do not get hung up on the question of whether the employee falls within the definition of disabled (or not) if they have genuine health related issues.
- Do challenge, using logic, when an employee was capable before lockdown and now asserts that the only way they can work is from home, by asking what has changed.
- Provide clear instructions to occupational health and challenge reports that are inadequate or do not answer your questions.
- Consider “reasonable” in respect of its impact on the services, users, business, colleagues and their supervisor.
- Put in a period of review – if it does not help them to do their job, then it is not a reasonable adjustment.
- Do not mix up reasonable adjustment requests with flexible working requests and vice-versa. If a request is health-related, then the flexible working request process is inadequate and the process is potentially too fast given you are likely to need medical and occupational health advice.

Remote working

There are challenges to making remote working effective for the employer. How to manage the issues and challenges are often overlooked.

These include health and safety obligations, tax, insurance, expenses, data security and privacy, performance management, and training and development.

Other considerations include the “home” location, core hours, as well as impacts to the individual's health and wellbeing, their team, wider organisation and service quality.

The unintended consequences of the new way of working?

Arguably we now have a three-tier workforce in the public sector – frontline workers either in the office or field, hybrid workers and fully remote workers.

The latter could include technical or specialist roles, such as in data, IT or digital, which don't require office attendance.

The objective now should be to regularly review the benefits, challenges and cost of hybrid and remote working.

Anecdotal evidence is not sufficient – we need to treat this in a more scientific way and analyse the facts.

Until we have facts, no public sector employer can say with any confidence that the new ways of working are cost-effective and deliver best value.

Key contact

Kerren Daly

Partner



kerren.daly@brownejacobson.com

+44 (0)330 045 2115

Related expertise

Data protection and privacy

Employment

Health and safety

Public contracts, projects and funding

Public law