

Flexible Working

The Right to Request Flexible Working

- *A Guide for Employers*



Equality Commission

FOR NORTHERN IRELAND

NOTE ON THIS PUBLICATION

This guide was originally published in 2010 and reflected the law at that time in relation to the *right to request flexible working arrangements* under *Article 112F of the Employment Rights (NI) Order 1996*.

That particular employment right was amended in April 2015 when it was extended to all employees with 26 weeks continuous employment service with their employers.¹ Now there is no longer a need, as there was previously, for an eligible employee to show that they are a carer of a child or disabled person and that they desire an adjustment to their working arrangements to deal with those caring needs. Requests may now be made for any reason.

This revised guidance takes account of this legal change.

¹ The amendment was made by *Section 19, Work and Families Act (NI) 2015*.

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1.0 WHAT IS FLEXIBLE WORKING?

- 1.1 Flexible working is the provision of a range of different working arrangements which may allow employees to change the length, location or duration of their working hours. The kinds of arrangements that employees may request include part-time working, job-sharing, school term-time working, working from home, or perhaps some combination of these.
- 1.2 There are a number of reasons for making flexible working requests which include; caring responsibilities, disability, retirement planning and the desire to prioritise other aspects of one's life.

2. ADDRESSING ATTITUDES

- 2.1 Creating an appropriate working environment is important if employees are to feel confident and comfortable in asking for flexible working. Employees need to feel that their request will be considered in a serious and objective manner and that it will not impact negatively on their employment.
- 2.2 To encourage positive attitudes towards flexible working, the Commission recommends that employers begin by adopting a flexible working policy and procedure. This will help employers to manage requests for flexible working whilst also encouraging employees to consider making requests.
- 2.3 A copy of the Commission's [template flexible working policy](#) and procedure can be downloaded from the Commission's website.

3. WHY IS IT IMPORTANT TO TAKE FLEXIBLE WORKING SERIOUSLY?

- 3.1 By giving serious and genuine consideration to your employees' requests for flexible working, you can greatly reduce your exposure to claims of unlawful direct and indirect discrimination particularly in relation to sex, disability and race.
- 3.2 For example, a policy of rejecting all requests for flexible working could be regarded as indirect discrimination on the grounds of sex or race. Such a policy is more likely to unfairly disadvantage women than men on the basis that women still assume the bulk of family caring responsibilities and therefore are more likely to request flexible working arrangements than male employees. In terms of race, a policy of rejecting all requests for flexible working could also be regarded as indirect discrimination on the

basis that certain racial or ethnic groups are more likely to require flexible working arrangements in order to practice their religious beliefs or avail of extended leave to visit family in other parts of the world.

- 3.3 Likewise, a policy of rejecting all requests for flexible working is likely to be considered as a contravention of the Disability Discrimination Act 1995 and its reasonable adjustment duty. Refer to Section 6 of this document.
- 3.4 On the other hand, a policy of only granting the requests of women employees, most probably based on the perception that only women will require time off in respect of caring responsibilities, is likely to be considered as direct discrimination on the grounds of sex, i.e. direct discrimination against male employees.
- 3.5 In terms of employment law, by giving serious and genuine consideration to your employees' requests for flexible working, you can greatly reduce your exposure to claims of a breach of the *right to request flexible working arrangements* that comes from *Article 112F, of the Employment Rights (NI) Order 1996*.
- 3.6 Finally, by encouraging employees to request and adopt flexible working, employers are facilitating their employees in balancing the various commitments in their lives. This in turn is likely to result in a more content workforce and possibly greater productivity and profitability. In addition, such workplaces often create positive reputational benefits for the employer, amongst their existing and potential customer base.

4. GETTING STARTED IN 6 STEPS

- 4.1 The task of complying with the network of legal rights relating to flexible working is best achieved if employers and managers understand their responsibilities, are willing to fulfil them and go about making decisions in a reasoned, fair and consistent way. We strongly recommend that employers take the following steps to enable this to happen.

Step 1

- 4.2 **Develop an equal opportunities policy** which declares that you are committed to promoting equality of opportunity in employment for all persons. Download a copy of the Commission's [template equal opportunities policy](#) (*word doc*)

Step 2

- 4.3 **Develop a flexible working policy and procedure** which declares that you are committed to providing flexible working arrangements and fair and non-discriminatory treatment to those employees who use them, or wish to use them. The document should set out your procedure for considering

employees' requests for flexible working arrangements and for implementing the decisions that you make. The procedure should also meet minimum statutory requirements. Download a copy of the Commission's [template flexible working policy and procedure](#) (*pdf*)

Step 3

- 4.4 **Inform employees about the policy and procedure** by including them in the employees' handbook, or on the workplace intranet or noticeboard.

Step 4

- 4.5 **Provide training to your managers/decision-makers** so that they understand your legal responsibilities and their own responsibilities under the relevant policies and procedures.

Step 5

- 4.6 **Review recruitment and selection procedures** to ensure that when a new job is being developed that the possibility of it being done under a flexible working arrangement is considered.

Step 6

- 4.7 **Monitor and periodically review the operation** of your flexible working policy and procedure – for example once every three years.

5. CONSIDERING INDIVIDUAL REQUESTS FOR FLEXIBLE WORKING

Disability-related flexible working needs

- 5.1 When you are considering flexible working issues that relate to a disabled employee's needs (i.e. when complying with the reasonable adjustment duty under the *Disability Discrimination Act 1995*), you should have regard to section 6 of this document.

All other flexible working requests

- 5.2 The following recommendations relate to all other requests for flexible working. The recommendations are additional to the six "getting started" steps outlined in Section 4 and should be used when you are considering individual requests for flexible working arrangements.
- 5.3 These "*do's and don'ts*" are not merely recommendations of good practice – several are legal requirements and have been discussed in Section 3 of this document.

5.4 “Do’s”

- follow the flexible working policy and procedure that you have established and keep a written record of the decision-making process.
- apply the policy and procedure consistently and fairly to all employees who apply for flexible working arrangements.
- consider requests at the appropriate time, i.e. when a request is made and within the time-limits set down within the policy and procedure, and do not leave it until after a grievance or complaint is lodged. Where time limits cannot be adhered to, ensure that this is communicated to the employee.
- keep an open mind and give serious and genuine consideration to the employee’s request.
- before rejecting any proposal made by an employee, consider any alternative arrangements that may be wholly or partially suitable too and discuss that with the employee.²
- when weighing up the various factors and options-
 - check that the information upon which the decision will be based is factually correct;³
 - give more weight to those options that are genuinely essential for the operation of the business compared to those that are merely convenient or desirable;
 - give more weight to those options that are likely to have no, or less, adverse impact on the employee compared to those that are merely convenient or desirable to the business.

5.5 “Don’ts”

- don’t start the process with a closed mind towards the employee’s request and suggestions.

² Even if you cannot grant an employee’s request in full, arrangements which partially satisfy the request may have a less discriminatory or adverse impact on the employee and may be easier to justify than stricter, more inflexible arrangements.

³ For example, if you are worried that a part-time working proposal may lead to some gaps in service coverage during particular hours of the day, you should check or test to confirm that this will be so rather than rely on a presumption.

- don't refuse to consider a request for flexible working arrangements solely because the employee does not yet have sufficient length-of-service to satisfy any relevant statutory eligibility criteria that may apply.
- don't assume that because a particular option is more convenient or desirable for the business that it is necessary.
- don't treat cost or expense as the sole deciding factor, although, you may consider the relative financial costs of various options, listed at point 5.8, when reaching your decision.
- don't discriminate directly against employees on any of the statutory anti-discrimination grounds; i.e. do not reject any requests on the grounds of an applicant's sex, religious or similar philosophical belief, political opinion, race, sexual orientation, age or because they are disabled. Refer to Section 3 of this document.
- Don't discriminate indirectly against employees on any of the statutory anti-discrimination grounds. Refer to Section 3 of this document.

5.6 There is no exhaustive list of business-related or other lawful factors that you might take into account when balancing your own needs or aims against those of an employee, but they might include the ones listed below. The following are especially relevant to the *Article 112F right to request flexible working arrangements* because a refusal to grant the employee's request must be shown to be for one of the following reasons:

- **detrimental effect on ability to meet customer demand**

Tip for decision-makers: when considering the impact on the business of a proposed flexible working arrangement, it may sometimes help to trial a proposed arrangement for a fixed period to see if it is sustainable over the longer term.

- **inability to re-organise work among existing staff**

Tip for decision-makers: take account of the skills and potential of other employees and consider whether other employees could acquire new skills with some appropriate training.

- **inability to recruit additional staff**

Tip for decision-makers: compare the cost of recruiting additional staff against the potential cost of losing the employee who is making the request.

- **detrimental impact on quality**

- **detrimental impact on performance**

Tip for decision-makers: examine the likely impact on the performance of individuals, the team and the organisation.

- **insufficiency of work during periods the employee proposes to work**

Tip for decision-makers: look at patterns of work and what the organisation's business needs are during each hour of the working day and consider what impact reduced cover might have at the times the employee has requested a reduction or variation of working hours.

- **planned structural changes**

Tip for decision-makers: examine whether there are any opportunities to make the business more effective through flexible working.

- **the burden of additional costs**

Tip for decision-makers: reflect on the proposal's less obvious savings, such as the potential for reducing overheads by allowing some employees to work from home or to achieve a more balanced coverage of service.

The need for careful consideration

5.7 As the list of "*do's and don'ts*" indicate it will not be enough for you simply to give one of the above reasons to justify the refusal of a flexible working request. You should always remember that an employee may have a right to complain to an industrial tribunal and in that forum your reasons will be closely scrutinised to test, whether, depending on the nature of the complaint, they are based on correct facts and/or whether they are unlawfully discriminatory and/or objectively justified.

6. DISABLED EMPLOYEES AND FLEXIBLE WORKING

- 6.1 The provision of flexible working arrangements for employees is often seen as a “family-friendly” issue based on the assumption that it is largely women with children who require and request flexible working. However, as has been noted, there are a wide range of reasons why employees with different backgrounds and needs may require flexible working.
- 6.2 Clearly, there are circumstances in which disabled employees may require flexible working arrangements and where their employers may be under a duty to provide them. This duty is imposed on employers by the *Disability Discrimination Act 1995*. Where the duty applies, a failure to comply with it is an act of unlawful disability discrimination against the disabled employee concerned. In such situations, you, as their employer, will be under a *duty to make reasonable adjustments*, meaning that you must take such steps that are reasonable in the circumstances to eliminate the disadvantage that the disabled employee is under.
- 6.3 The duty envisages, for example, that, depending on what is reasonable in the circumstances, you might alter a disabled employee’s working hours, place of work or allow him or her to take time-off for relevant medical treatment. Therefore, the duty to make reasonable adjustments is also in effect a duty to provide (reasonable) flexible working arrangements for disabled employees who need them.
- 6.4 The best source of information and guidance about the *Disability Discrimination Act* and the reasonable adjustment duty is the [Disability Code of Practice for Employers](#), which may be downloaded from our website.
- 6.5 For the purposes of illustration, the Code of Practice cites the following examples of situations where the duty to make reasonable adjustments might arise and indicates the kinds of flexible working arrangements that might be appropriate solutions-

An employer allows a person who has become disabled more time off during work than would be allowed to non-disabled employees to enable him to have rehabilitation training. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

Disability Code of Practice in Employment page 85

Allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability...[or] permitting part time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

Disability Code of Practice in Employment page 85

A disabled employee has been absent from work as a result of depression. Neither the employee nor his doctor is able to suggest any adjustments that could be made. Nevertheless, the employer should still consider whether any adjustments, such as working from home for a time or working less hours, would be reasonable.

Disability Code of Practice in Employment page 92

USEFUL PUBLICATIONS

Publications by the Equality Commission

The following publications are available to download, free-of-charge, from the Equality Commission's website: www.equalityni.org

- [A Unified Guide to Promoting Equal Opportunities in Employment](#)
- [Disability Code of Practice – Employment and Occupation](#)
- Template Employer policies on [equal opportunities](#) and [flexible working](#)

Publications by the Labour Relations Agency

The following publications are available to download, free-of-charge, from the Agency's website: www.lra.org.uk

- Information Note No.3: Holidays and holiday pay
- Information Note No.11: Time off – Rights and responsibilities
- Shared Parental Leave – a Good Practice Guide for Employers
- Shared Parental Leave Policy (model policy)

Publications by Invest NI

The *NI Business Info* website provided by Invest NI is a free online publication which offers practical guidance on a range of matters of interest to businesses, such as employment matters, including flexible working, plus other matters such as tax, the environment, health and safety, grants and many other topics. The website may be found at-

Homepage: www.nibusinessinfo.co.uk

Employment page: www.nibusinessinfo.co.uk/employment

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