Consultation launched on flexible working reform

[et_pb_section fb_built="1" _builder_version="3.0.100" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||" global_module="2165" saved_tabs="all" global_colors_info="{}"][et_pb_row _builder_version="4.7.4" min_height="66.4px" custom_padding="50px||||false|false" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="3.25" custom_padding="|||" global_colors_info="{}" custom_padding__hover="|||"][et_pb_text _builder_version="4.7.4" _dynamic_attributes="content" text_font="|700|||||||" text_font_size="27px" background_layout="dark" custom_margin="0px|||" custom_padding="0px|||" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF90aXRsZSIsInNldHRpbmdzIjp7ImJlZm9yZSI6IiIsImFmdGVyIjoiIn19@[/et_pb_text][et_pb_text _builder_version="4.7.4" _dynamic_attributes="content" _module_preset="default" background_layout="dark" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF9kYXRlIiwic2V0dGluZ3MiOnsiYmVmb3JlIjoiIiwiYWZ0ZXIiOiIiLCJkYXRlX2Zvcm1hdCI6ImRlZmF1bHQiLCJjdXN0b21fZGF0ZV9mb3JtYXQiOiIifX0=@[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" admin_label="section" _builder_version="3.22.3" global_colors_info="{}"][et_pb_row admin_label="row" _builder_version="4.7.4" background_size="initial" background_position="top_left" background_repeat="repeat" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="3.25" custom_padding="|||" global_colors_info="{}" custom_padding__hover="|||"][et_pb_text _builder_version="4.10.7" text_orientation="justified"

hover_enabled="0" use_border_color="off" global_colors_info="{}" sticky_enabled="0"]

The Government has published a consultation seeking views on proposals to expand and improve the flexible working framework. In this briefing, we look at the proposals for reform, as well as the changes that the Government has declined to take forward. The consultation closes on 1 December 2021.

What is the consultation about?

The Government's 2019 manifesto committed to consult on making flexible working arrangements the default save where employers had good reasons not to permit them. On 23 September 2021, the Government published a consultation entitled "Making Flexible Working the Default", setting out its proposals for change.

The consultation opens with the statement that "A world class approach to flexible working is a key part of the Government's ambition to build back better". It highlights how the COVID-19 pandemic has shown us that things can be done differently in the workplace when we have to. The Consultation says we have had our eyes opened to what is possible, and we must seize the moment to make flexible working in all its forms part of "business DNA".

These grand statements suggest that radical and substantial proposals for legislative reform will follow. However, the reality is somewhat more modest, with the emphasis placed on cultural rather than legislative change. Because the proposed changes are so modest, below, we first outline what is not changing and then what the proposals for reform actually entail.

What will not be changing?

Employees will not have the right to be granted a flexible

working arrangement

Despite the 2019 manifesto commitment – and the name of the Consultation – the proposals do not propose to give employees a right to have a flexible working arrangement. The Government considered whether this would be the right way to make flexible working the default but concluded that there were too many moving parts for this to be achievable in a practical or sensible way. The Consultation points to the wide range of different roles and ways of working within them, the multiple forms of flexible working, the broad range of individual needs and the wide range of business models as barriers to a "one size fits all" right to flexible working.

Instead, the Government wants to encourage better discussions about flexible working between employees and employers. The Consultation proposals are aimed at "rebalancing" the current flexible working framework to support discussions about what may be possible.

Employers will not be required to publish their flexible working policies

The Government's July 2019 consultation, Good Work Plan – Proposals to Support Families, contained proposals for large employers (i.e. those with 250+ employees) to publish their flexible working policies. The Consultation explains that the responses received to the earlier consultation demonstrate that it is important for employers to be able to adapt their flexible working policies to specific workplace scenarios at different times. Furthermore, there were concerns about what information should be published, meaning that "policy" would have had to be defined in legislation. It is said that this would create a rigid approach, contrary to the wider policy aim of wishing to encourage conversations between employees and employers.

With these points in mind, and the fact that businesses are

still taking stock of which working practices will be effective after the pandemic, the Government has decided not to require employers to publish their flexible working policies.

Employers will not be required to state in job advertisements whether flexible working is available

In addition, employers will not be required to specify in job advertisements whether flexible working is available (and in what form) for a particular job role. However, the Government believes that its proposal to make the right to request flexible working a "Day 1" employment right will help to deliver cultural change which, in turn, could lead to employers providing this information in job advertisements on a voluntary basis.

What are the proposals for reform?

The Consultation seeks views on the following five proposals for reform:

Proposal 1 – Should the right to request flexible working become a "Day 1" employment right?

Currently, employees must have 26 weeks' continuous service with their employer before they can make a flexible working request. The 26-week threshold was introduced to reduce the burden on employers of administering such requests. However, a previous review of the flexible working legislation did not find evidence that dealing with requests placed an unreasonable costs burden on employers.

The Government believes that the qualification period works against the aim of making flexible working the default and reinforces the perception that it is something an employee must earn or receive as a "perk". The proposal is to remove the 26-week threshold and make the right a "Day 1" employment right. This would expand flexible working rights to a further

2.2 million employees. The Government also believes that this reform would help to nudge certain behaviours from employers, namely, considering flexible working early in the job design and recruitment processes.

Proposal 2 – Are all of the eight business reasons for refusing a flexible working request still valid?

Currently, an employer may refuse a flexible working request for one of eight business reasons set out in the flexible working legislation. These are:

- Extra costs that will be a burden on the business.
- The work cannot be reorganised among other staff.
- People cannot be recruited to do the work.
- Flexible working will negatively affect quality.
- Flexible working will negatively affect performance.
- The ability to meet customer demand will be negatively affected.
- There is a lack of work to do during the proposed working times.
- The business is planning structural changes.

The Government is content that the current list does not present a disproportionate barrier to flexible working and it does not see a case for fundamentally changing them. However, it is recognised that things have changed since flexible working was first introduced and so views are sought on whether these eight reasons remain reasonable.

Proposal 3 – Should employers have to show that they have considered alternatives when rejecting a flexible working request?

Currently, employers who wish to refuse a flexible working request must provide the reason or reasons for refusal (see above). There is no obligation for them to consider alternative solutions.

The Government wishes to ensure that the law supports informed discussions between employees and employers, including whether, and how, different types of flexible working arrangements could be accommodated. Therefore, the Consultation seeks views on how practical it is to ask employers to consider alternatives and explain this when rejecting a flexible working request. It is hoped that building in such a requirement will influence organisational norms among businesses that have not fully considered the opportunities for flexible working.

Proposal 4 – Should employees be able to make more than one request per year and should the time period for employers to respond to requests be changed?

Currently, employees are able to make one flexible working request per year. Once a request is made, an employer has three months to consider whether the request can be accommodated and provide a response.

The Consultation seeks views on allowing employees to make more than one request per year. The Government's view is that it would allow the framework to be more responsive to changes in an individual's personal circumstances. The Consultation asks whether there should be a cap on the number of requests that may be made per year – suggesting two, three, more than three or none.

In terms of the employer's timeframe for response, the Government considers the current three month period to be the right one but seeks views on whether change is needed. The Consultation suggests alternative periods – the lowest of which is under two weeks.

Proposal 5 – How can employees be encouraged to make requests for temporary changes where needed?

The current flexible working framework already provides for temporary arrangements to be agreed. However, the Government

believes this is underutilised and seeks views on what would encourage employees to make requests to support temporary life changes (e.g. settling a child into school or an elderly parent into a care home).

Is there anything else to know?

Aside from the proposals for legislative reform, the Consultation outlines further work to be undertaken to help make flexible working the default:

Inviting the Flexible Working Taskforce to consider how to move on from Covid 19 and make the most of the lessons learned

The "Flexible Working Taskforce" is a partnership across business groups, trade unions, charities and Government departments. The Government has asked the Taskforce to take forward what has been learned about working practices throughout the pandemic and develop advice to support new ways of working. Initially, the Taskforce will focus on the location aspect of flexible working, in particular hybrid working. Thereafter, it will move on to provide wider advice on best practice around all aspects of flexible working. The Consultation does not specify when the Taskforce's advice will be published.

Call for Evidence to be launched on how to secure a flexible working friendly culture across and within organisations

The Government's view is that flexible working extends beyond requesting contractual changes to terms and conditions: it is also about getting the organisational culture right. With that in mind, the Government plans to launch a separate Call for Evidence looking at the sorts of extra flexibility people need and how "ad hoc flexibility" can be supported. The Consultation does not specify when the Call for Evidence will be published.

What steps should employers take now?

Employers wishing to submit their views on the Consultation questions can do so online here. The Consultation closes on 1 December 2021.

It is not yet clear when the Government will publish a response, but it is unlikely to be before Spring 2022, meaning that the timeframe for legislative change is likely to be the latter half of 2022 (at the earliest). Accordingly, there are no immediate steps for employers to take. However, given the shift towards hybrid working caused by the pandemic, now is a good time to take stock of the general approach to flexible working and how it might change in future as many employers will already be doing.

In particular, if the right to request is made a Day 1 right, then it would be sensible to assume that the question will be raised in job interviews. Therefore, some preliminary thought should be given to whether flexible working arrangements are workable. Thought should also be given to whether to ask the question of job candidates proactively (on the basis that it is better to understand whether a request is likely to be made in future than to be taken by surprise). Of course, care must be taken to ask this question, and respond to the answer given, in a non-discriminatory way.

Consideration should also be given to the management of internal flexible working processes. If the right is expanded, and employees are also given the right to make multiple requests per year, then employers will have more requests to deal with (and potentially less time to respond to them). Employers should ensure that processes are streamlined and that sufficient resources are allocated to dealing with incoming requests efficiently.

Making Flexible Working the Default

If you would like to discuss the issues raised in this article please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or

your usual BDBF contact.

[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="3.26.6" global_colors_info="{}"][et_pb_row _builder_version="3.26.6" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="3.26.6" global_colors_info="{}"][/et_pb_column][/et_pb_row][/et_pb_section]