Will employees really be given the right to work from home forever?

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In the last few weeks the press has reported that employees

are to be given the legal right to work from home forever. How realistic is this? In this briefing, we explain the proposals for reforming flexible working laws and what this might mean for employers.

It's true to say that most workers have indicated an appetite for some degree of permanent homeworking, even when the pandemic has passed. A survey of staff working at 500 financial services firms in the City found that 70% felt that homeworking through the pandemic was a positive experience since it allowed them to avoid the daily commute and gave them more time for leisure pursuits and family. Another survey of working parents found that 15% wanted to continue with permanent homeworking and 55% wanted a hybrid form of working but with no more than three days in the office per week.

Recent press reports suggest that the Government agrees with them and plans to give employees the legal right to work from home forever. But just how realistic are these reports? The old adage "don't believe everything you read in the papers" springs to mind. Although proposals to shake up flexible working are afoot, it's unlikely that this will mean wholesale homeworking. Indeed, the Prime Minister's official spokesperson is reported to have said this month: "It's important to stress that there are no plans to make working from home the default or introduce a legal right to work from home". In this briefing we look at what has actually been proposed and when any changes are likely to come into force.

What are the proposed changes?

The Government does intend to change the law to make flexible working a "Day 1" employment right and the default position for all job roles, save where an employer had a good reason not to allow it. We don't know much more than this about the proposal, but it seems that the idea is to shift the burden from employees having to persuade the employer to accept flexible working for their roles, to the employer having to

justify why it cannot be allowed.

It's not yet clear how employers will be able to do this. It's possible that they will be able to rely on the same or similar grounds that justify a refusal of a flexible working request under the current regime, namely:

- it would cost too much;
- inability to reorganise the work among other staff;
- inability to recruit more staff;
- negative effect on quality;
- negative effect on the business' ability to meet customer demand;
- negative effect on performance;
- not enough work for the employee to do when the employee has requested to work; and/or
- planned changes to the business, for example, plans to reorganise or change the business and the request will not fit with these plans

If so, it should be relatively easy for an employer to justify not allowing flexible working, including permanent homeworking. That said, where an employee has been working effectively from home for a long period of time, then this may be more difficult.

We also don't yet know what, if any, employment rights will be available to employees where an employer failed to comply with the new law. Under the current regime, employees can bring claims for failure to comply with the flexible working request process, but compensation is limited to a maximum of eight weeks' pay (and capped at £4,532).

In order to recover meaningful compensation, employees usually have to bring other claims such as indirect sex discrimination or constructive unfair dismissal. Although a recent case has made things easier for women complaining that working patterns are indirectly discriminatory, it remains the case that

pursuing such claims in the Employment Tribunal is not something that most employees will wish to do.

When are the proposed changes going to come into force?

The Queen's Speech in 2019 outlined plans for a new Employment Bill which would deliver the changes outlined above. However, the onslaught of the coronavirus pandemic meant that the Bill was not brought forward in 2020.

Two years later, the Bill has still not materialised and the 2021 Queen's Speech delivered on 11 May 2021 also made no mention of it. Nevertheless, the Government has said it is still committed to bringing forward the Employment Bill "when Parliamentary time allows". In its response to the Women and Equalities Committee report on the gendered impact of COVID 19, the Government said it remains committed to the proposals but will hold a public consultation before making any changes.

That consultation has yet to be published. Assuming it is published in or around July 2021 and runs for three months, we are unlikely to know the Government's final position until late 2021. Legislation would then need to be passed in Parliament, meaning that the law will almost certainly not change this year.

Separately, on 30 June 2021, Tulip Siddiq MP will introduce a 10 Minute Rule Bill in Parliament which provides that flexible working becomes a Day 1 employment right available for all job roles and that all forms of flexible working should be listed in job advertisements. Although this Bill will not become law, it helps keep the pressure up on the Government to follow through with its commitments.

What should employers do now?

Most employees will be asked to return to the office before this change comes into force (if it ever does). Remember that under the existing regime, a returning employee may (if

eligible) make a flexible working request, which could include a request for permanent homeworking.

Where an employee has been working from home throughout the pandemic, then this could make it more difficult to refuse such a request. Employers will need to assess whether there are legitimate grounds for refusing such a request, for example, if the quality of the employer's product or service has deteriorated or the employee's performance has dipped.

However, the reality is that many employers are tackling the issue of flexibility head on and voluntarily introducing some form of hybrid working, which is likely to suit the majority of employees and quite possibly achieve savings for employers. In short, working practices are evolving, but the gloomy predictions of empty offices and deserted cities are unlikely to come to pass and certainly not as a result of legislation in the near future.

If you would like to discuss your approach to flexible working please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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