

EMPLOYMENT RELATIONS (FLEXIBLE WORKING) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Employment Relations (Flexible Working) Bill as brought from the House of Commons on 27 February 2023 (HL Bill 107).

- These Explanatory Notes have been prepared by the Department for Business and Trade with the consent of Baroness Taylor of Bolton, the Member in charge of the Bill, in order to assist the reader in understanding the Bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The Bill makes amendments to the provisions in part 8A (sections 80F and 80G) of the Employment Rights Act 1996 to:
 - introduce a requirement for employers to consult with the employee before rejecting their flexible working request;
 - allow an employee to make two statutory requests in any 12-month period (rather than the current one request);
 - reduce the decision period within which an employer is required to administer the statutory request from three months to two months; and
 - remove the requirement that the employee must explain in the statutory request what effect the change would have on the employer and how that might be dealt with.

Policy background

- 2 In 2003, legislation came into force which provided employed parents, and certain other carers, of children under the age of 6 (or disabled children under 18), with 26 weeks of continuous service (with their employer), a statutory right to request a flexible working arrangement – for example a change to their work location, working hours and/or associated working pattern. This was extended to carers of adults (2006) and children under 17 (2009).
- 3 In 2014, as part of the Children and Families Act 2014, the right to request flexible working was extended to all employees with 26 weeks continuous service. The statutory framework is intended to:
 - provide employees with access to contractual flexible working;
 - help employees to better reconcile their work and non-work lives; and
 - help employers to secure the business benefits of flexible working.
- 4 In September 2021, the Government published a Post Implementation Review of the 2014 Flexible Working Regulations¹. This found that the majority of employees (80%) and employers (96%) report availability of flexible working at their workplace. The Review also found that in 83% of workplaces, where a request had been made, the request was granted. However, the Review also found that flexible working take-up has remained broadly flat since 2014 (an all-economy average of 59%) – as well as highlighting differences in reported take-up and availability across sectors, occupations, gender and size of workplace.
- 5 In the same month (September 2021), the Government published a consultation on proposals to encourage a better dialogue about flexible working opportunities, to increase the frequency of requests and to speed up the administrative process.
- 6 In December 2022, the Government published its response to the consultation². This committed to making changes to the statutory right to request flexible working, an employment right under Part VIIIA of the Employment Rights Act 1996. The Employment Relations (Flexible Working) Bill gives effect to several of these changes.

¹ Post Implementation Review of 2014 Regulations: <https://www.legislation.gov.uk/uksi/2014/1398/resources/made>

² Government consultation on Flexible Working: <https://www.gov.uk/government/consultations/making-flexible-working-the-default>

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Legal background

- 7 The statutory right to request Flexible Working is an employment right under Part VIIIA of the Employment Rights Act 1996.
- 8 Section 80F of the Employment Rights Act 1996 sets out the statutory right to request contract variation (Flexible Working).
- 9 Additional details of the right to request Flexible Working are set out in the Flexible Working Regulations 2014 (the “FW Regulations”).

Territorial extent and application

- 10 Employment law is reserved for Scotland and Wales but devolved to Northern Ireland. It will be for the Northern Ireland Assembly to decide whether similar provisions should apply in Northern Ireland.
- 11 The clauses extend and apply to Great Britain.
- 12 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of the Employment Relations (Flexible Working) Bill

- 13 Clause 1 of the Bill amends the flexible working provisions in the Employment Rights Act 1996.
- 14 Clause 2 provides a new power to enable the Secretary of State to commence clause 1 by regulations.

Clause 1: Amendments to the statutory right to request contract variation

- 15 Clause 1 amends sections 80F and 80G of the Employment Rights Act 1996.
- 16 Section 80F(2) currently sets out the required content of a statutory request for flexible working. The Bill amends subsection (2) to remove the requirement under section 80F(2)(c) to “explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with”.
- 17 Section 80F(4) currently provides that if an employee has made a statutory request for flexible working, they may not make a further request to the same employer before the end of the period of 12 months beginning with the date on which the previous request was made. Section 80F(4) is substituted with a new subsection (4) that allows two requests within any 12-month period. In addition, this new subsection prevents an employee from making concurrent requests. That is, an employee may not make a statutory request to their employer if another such request to the same employer is proceeding. The concepts of “proceeding” and “concluded” requests for the purposes of the provision are defined in new subsections (4A) and (4B) accordingly.
- 18 Section 80G(1) currently sets out an employer’s duties in relation to a request made by an employee under section 80F. Subsection (1) is amended to insert a new requirement that employers “shall not refuse the application unless the employee has been consulted about the application”. An employee may make a complaint to an employment tribunal if their employer does not consult with them prior to rejecting their statutory request for flexible working, in line with the existing enforcement process set out in section 80H of the Employment Rights Act 1996.
- 19 Section 80G(1B)(a) currently sets out a decision period applicable to a request made by an employee under section 80F. Subsection (1B)(a) is amended to reduce the maximum response time from three months to two months.

Clause 2: Commencement

- 20 Clause 2 provides a power enabling the Secretary of State to commence clause 1 by regulations.

Commencement

- 21 Clause 2 provides that Clause 1 will come into force on a date determined by the Secretary of State after Royal Assent.

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Financial implications of the Bill

- 22 The Government expect the cost to business from these measures to come in below £2 million annually, made up of familiarisation and administrative costs. A key reason why the Government expect the business cost to be low is that an employer will still have the right to reject flexible working requests on grounds of extra cost. It is therefore assumed that when requests are accepted, the expected benefits outweigh the costs.
- 23 The Impact Assessment considered Exchequer costs (resulting from any associated increase in the number of Employment Tribunals) to be negligible. The measures included in the bill are designed to encourage better dialogue between employees and employers which may play a role in reducing disputes between the two parties. Further information is provided in the Impact Assessment.

Parliamentary approval for financial costs or for charges imposed

- 24 Parliamentary approval for financial costs or charges is not required.

Compatibility with the European Convention on Human Rights

- 25 This Bill is considered to be compatible with Convention rights. It does not change the eligibility requirements for requesting flexible working and therefore does not bring any new individuals into scope. As such the Department's view is that the Bill does not introduce any element of discrimination contrary to Article 14.
- 26 Changes to existing legislation made by the Bill are focused on the administrative aspects of making a statutory request for flexible working, with the intention of making the process more responsive and efficient for both employees and employers. The Department's view is that this will continue to support the right to request flexible working to be exercised compatibly with the Convention rights.

Related documents

- 27 The following documents are relevant to the Bill and can be read at the stated locations:
 - Impact Assessment (on the Parliamentary Bills page³)

³ Impact Assessment – Employment Relations (Flexible Working) Bill: <https://bills.parliament.uk/bills/3198/publications>

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Annex A – Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	Yes	No	No	No	Yes	No
Clause 2	Yes	Yes	Yes	No	No	No	Yes	No

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