Guidance on flexible working for the NHS

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Contents

Introduction 3
Guidance on flexible working for the NHS 4
The NHS Staff Council’s Equality and Diversity Group has reviewed the advice within the national terms and conditions handbook and developed supplementary guidance on good practice in flexible working.

This provides some advice for managers on good practice in terms of accommodating the needs of carers.
The aim of this guidance is to outline the statutory rules which give employees with caring responsibilities for children or specified adults the right to have a request for flexible working considered, and the responsibilities on employers when responding to such requests.

A. Legal requirement


Under these rules, employees with caring responsibilities who have at least 26 weeks’ continuous service are entitled to make a written request for flexible working: that is to request changes to hours of work, times of work and the location of work. The right is designed to give employees the opportunity to adopt working arrangements that help them to balance their commitments at work with their need to care for a child or an adult.

In practice this may mean:

- part-time working, term-time working or home working
- adjusting the start and finish times of work
- adopting a particular shift pattern or extended hours on some days with time off on others.

Employers have a duty to consider a request for flexible working arrangements within specified timescales, and can refuse only on one of the following business-related grounds:

- the burden of additional costs – the employer will consider if it will cost more to replace the hours of work e.g. agency cost
- detrimental effect of the ability to meet customer demand
- inability to reorganise work amongst existing staff; or to fill the hours
- detrimental impact on quality; e.g. continuity of care, skill mix
- detrimental impact on performance; e.g. ability to retain clinical skills
- insufficiency of work during the periods the employees propose to work
- planned structural changes.

When a flexible work request is agreed, staff should be given written confirmation of a contractual change to their terms and conditions of employment.
B. Agenda for Change

Section 34 of the Agenda for Change terms and conditions of service handbook relates to flexible working and places a duty on employers to allow flexible working arrangements to be open to all staff. See: www.nhsemployers.org/SiteCollectionDocuments/AfC_tc_of_service_handbook_fb.pdf

C. Good practice for the NHS

In considering the formulation, production, review and implementation of any flexible working policy, employers should note that possible indirect discrimination could take place by refusing such a request. For example, if the policy states that requests will only be accepted for a particular situation that benefits non-disabled staff more than disabled staff, disabled staff may be able to argue that the policy indirectly discriminates against them. Good workforce data will be essential in assessing the potential impact of any policy drawn up.

Employers should be minded that although a flexible working request can be refused under the statutory rules, such a refusal may still be indirectly discriminatory if the employer is unable to show that the refusal to accept the application was justified as a proportionate means of achieving a legitimate aim.

It is good practice for employers to use a set of objective criteria to appropriately consider any formal request and for these criteria to be used uniformly across the whole organisation’s workforce. This will help mitigate against indirect discrimination claims.

Such objective criteria may be linked to the permitted grounds for refusal listed above, but it is good practice to assume any role can be done flexibly providing it is not to the detriment of the business. All advertised vacancies should include reference to the consideration of flexible working options.

Here are some additional questions an employer might ask itself in the pursuance of good practice around flexible working requests:

- Do we genuinely consider applications for flexible working on a case by case basis – balancing the needs of the organisation and service delivery with staff wishes?
- Do we engage widely within a team where a request has been made to include all staff views in the decision making process?
- Do we focus on outputs rather than inputs?
- Do we make flexible working a team approach – empowering teams to find their own solutions to flexible work requests (this may also help to manage expectations around possibilities and ensure ownership and support of the solution adopted)?
• Do we make flexible working available to staff in line with legislative requirements as well as those returning from maternity leave, staff with caring commitments, i.e. child/adult dependants, or as part of reasonable adjustments for employees with disability?

• Do we consider contractual issues such as working hours, breaks, health and safety and annual leave?

• Do we have an internal appeals process as part of our flexible working policy to allow staff to raise their concerns, if any, to the next level of management, for flexible working requests?

NHS organisations are advised to consider developing their own policy to cover flexible working and the policy needs to be reviewed on a regular basis to ensure it continues to be fit for purpose. Decisions should be put in writing and monitoring of the uptake of flexible work should be monitored by protected characteristics. Where certain groups are under-represented, e.g. faith groups and older workers, steps should be taken to ensure opportunities are promoted to those groups.

D. Future changes

In November 2012, the Government confirmed that, from 2014, it will:

• extend the right to request flexible working to all employees (currently available to employees with children under the age of 17 or caring responsibilities for an adult dependant), while retaining the 26-week eligibility period for making requests

• replace the right to request flexible working procedure with a duty on employers to deal with requests in a "reasonable" manner, and within a "reasonable" period of time; and

• create a statutory code of practice (to be produced by ACAS) to give guidance on dealing with flexible working requests, including explaining the meaning of "reasonable", how to prioritise competing requests and how to handle requests to make temporary changes to working patterns.

E. Further information

1. Direct.gov:  
www.direct.gov.uk/enemployment/employees/workinghoursandtimeoff/dg_10029491

2. Opportunity Now:  

3. EHRC:  
www.equalityhumanrights.com/advice-and-guidance/working-better/a-managers-guide-to-flexible-working/

4. ACAS:  

6. NHS Employers: [www.nhsemployers.org/PlanningYourWorkforce/Flexible-workforce/employmentpractice/Pages/Flexible%20working.aspx](http://www.nhsemployers.org/PlanningYourWorkforce/Flexible-workforce/employmentpractice/Pages/Flexible%20working.aspx)