

## Guidance for joint union-employer partnerships on reviewing flexible working policies

### Introduction

The NHS Staff Council, on behalf of NHS trade unions and employers, has jointly agreed revisions to Section 33 of [NHS terms and conditions of service \(TCS\) handbook](#). The improvements are designed to support a cultural change towards ensuring flexible working is available to all NHS staff.

View the [forthcoming changes and Staff Council statement](#).

The contractual changes will take effect on **13 September 2021** in England, and will support the commitments made in the [NHS People Promise](#) around moving to flexibility by default.

The new Section 33 of the NHS TCS handbook will provide for:

- a contractual right to request flexible working from day one of employment
- no limit on the number of requests and the right to make them regardless of the reason
- new requirements for centralised oversight of processes to ensure greater consistency of access to flexible working including an escalation stage for circumstances where a line manager is not initially able to agree a request
- expectation that employers will promote flexibility options at the point of recruitment and through regular staff engagement through one-to-ones, health and well-being conversations, appraisals and team discussions.

Good partnership working between unions and employers will be crucial to success and should take place at every stage including re-negotiation of policies, championing cultural change, planning and overseeing delivery and engaging staff.

Joint partnerships will recognise the challenges in delivering change in the context of staffing and service pressures that have intensified during the pandemic. However, better access to flexible working can be part of the solution by helping more staff stay in their jobs and making the NHS a more attractive place to work.

Good flexible working policies are an important component of any organisation's flexible working strategy. This guidance has been produced by the Staff Council to help local joint employer-union partnerships review and agree changes to current policies to reflect the contractual changes and the broader strategic agenda.

## Laying the groundwork

1. Jointly review your latest staff survey data on satisfaction levels around opportunities for flexible working. In England, this is covered by staff survey Q5h, you can use [the dashboard tool](#) to see the percentage of your staff who say they are satisfied plotted over time and benchmarked against other comparable organisations.
  2. Consider ways to gather feedback from staff/members in a range of locations and roles about how well the current policy and procedures are working for them, whether staff feel able to discuss flexible working with their line managers, any barriers to access and any good practice around flexible working choices.
  3. Identify areas or staff groups which you think are most likely to be excluded, have them in mind when looking at what new measures you need to put in place.
  4. Assess whether the organisation has the right expertise and knowledge to deliver innovation and ensure line managers can access high-quality advice. If there are gaps, discuss how to fill them, you can also consider setting up a steering group or change team.
  5. Agree how you will communicate to staff the changes to the policy, the cultural change around flexible working the organisation wants to achieve and the role of the joint-union employer partnership. In conjunction with the NHS Staff Council, NHS Employers has developed [enablers for change guidance](#) to support you to implement the revised flexible working policy.
1. Scope the key areas of change that will be needed to your policy and supporting paperwork like forms and staff guides – and log any knock-on effects for, and cross-references in, other associated policies.
  2. Agree the process and governance for conducting your equality impact assessment (EIA) of the changes you are proposing to make - See Appendix 1 for advice from the equality, diversity and inclusion group (EDIG) of the NHS Staff Council on conducting EIAs.
  3. Discuss how line manager briefing/training covering the policy changes and equality, diversity and inclusion obligations will be rolled out.

## Guidance for joint review of your current policy and supporting procedures

### Eligibility for the right to request flexible working

The new handbook provisions establish contractual rights over and above the statutory minimum requirements on flexible working in Employment Rights Act 1996. The new Section 33 provisions are effective from 13 September 2021 for existing staff and new starters, including temporary and permanent staff.

Key improvements set out in Section 33.5 and 33.6:

- A contractual right to make requests from day one of employment – **if your current policy requires six months' service this will need to be changed.**

- ❑ No limit on the number of requests that can be made in one time period – **if your current policy has a restriction of one per 12-month period this will need to be changed.**
- ❑ Requests can be made regardless of the reason and will be considered using the same process. Your current policy should be checked to ensure that while staff can be encouraged to think about how the effect on service delivery could be accommodated, **there is no requirement for up-front justification of the reasons for the request** and there will be support to work through these issues with their line manager.

### Description of suite of flexible working options

Section 33.10 sets out a non-exhaustive list of the types of options for flexible working that employers and trade unions should work through. Consider whether these are all cited in your local policy and what other options you can add in.

Talk through and agree a joint understanding of how each option should work, taking advice where necessary on contractual issues. Examples include:

- pay pro-rata processes
- participation in on-call duties
- service continuity and pay progression for job-sharers
- holiday pay calculations for non-standard contracts including annualised or term-time only
- bank holiday entitlements
- pension contributions and entitlements
- flexible retirement arrangements.

Capture this so it can be shared with line managers and staff to talk through – this could be in annexes or mini-guides.

Include a policy commitment to ensuring staff with a flexible working arrangement do not suffer any disadvantage or less favourable treatment.

### Employer processes for encouraging flexible working opportunities

Section 33.7 sets out that employers will need to look at how they advertise the availability of flexible working within recruitment and selection processes.

Jointly review how job roles are advertised and consider how to incorporate:

- general messaging about openness to discussions about flexible working – for example the free-to-use [happy to talk flexible working branding](#)
- reference to the day one right to request for all employees

- specific information about the main kinds of flexibility each role is open to.

Section 33.8 covers how regular discussions about flexible working can be built into ongoing line management interactions through induction, one-to-one meetings, team meetings, health and wellbeing conversations, and annual appraisals. The purpose of these are to explore the employee's needs and wishes and what options might be available to help employees think about whether they want to make a request.

Consider agreeing some core comms products to help with this – for example leaflets, intranet resources, conversation starters/frameworks. Also consider recruiting champions or change agents to spread the word.

### **Application process for staff**

Review HR processes, application forms and supporting guidance to make sure they reflect the widened eligibility and that they are available to all staff to use from day one of employment.

Ensure that flexible working rights and processes are flagged in your induction materials.

If you have a flexible working application form/e-form, review it to make sure it is:

- simple and accessible for all staff to use
- doesn't require staff to justify or make a business case up-front, but allows them to submit supporting information about reasons/service impacts for their request on an optional basis
- makes provision for staff to identify that they consider their request is a reasonable adjustment in respect of a disability – and cross-reference to your disability policy – or to flag other equality characteristics. You could also expand this to ask about whether they have a long-term condition (which they may not identify as a disability) which could include those suffering from long COVID.

Ensure that application materials promote the support that trade union reps can provide to individuals in preparing their application (Section 33.13).

### **Centralised logging and monitoring process**

The new Section 33.16 specifies that all organisations should have a central means of logging and monitoring requests. Organisations using the electronic staff record (ESR) system can make use of the flexible working functionality which can be accessed via the relevant dashboard.

For organisations using other systems, check that all requests can be logged and that a record is created within HR systems which allows progress monitoring and logging of outcomes including appeals.

The system needs to be able to generate reports broken down by staff characteristics including job role, banding, service/division/department, contract type and protected characteristics.

See Appendix 2 for advice from EDIG on monitoring and reporting.

## Stages

The new handbook provisions provide for the following stages once a flexible working request is received (Section 33.16)

1. Initial exploratory stage with the line manager.
2. Escalation stage where any unresolved requests are referred on to explore options beyond the employee's immediate role/team.
3. Decision stage where a) agreed solutions are documented and processed or b) objectively justified reasons are provided for refusing a request together with details of the appeals process.
4. Appeals stage.

Review your policy to ensure that all these stages are captured.

## Informal discussion

Consider also including in your policy a clear encouragement for staff to have informal conversations with their line manager about flexible working at any time including through one-to-ones and health and wellbeing conversations. This provides a helpful head start for when an employee does decide to make a formal request.

## Exploratory stage

When an employee makes a formal request, the line manager will need to act promptly to arrange a meeting to discuss it unless they can just agree it straight away. Ensure that your policy builds in a training programme for line managers that supports them to deal with requests in a constructive way and covers coaching and compassionate conversation skills and equality awareness.

The aim of this stage is for the line manager to work through with the member of staff what they want to achieve and to identify and evaluate options for achieving it. This could involve more than one conversation with the employee.

The policy should encourage line managers to:

- approach conversations openly and creatively

- agree with the individual whether and how any proposals are discussed with other team members.

Employees should be able to access support from their trade union including accompaniment at the meeting if desired.

Make sure that the policy supports requests being agreed at the lowest level possible. This includes a process to support managers to implement agreed solutions efficiently.

Note that the new provisions mean **the line manager is not able to decline a request at this stage**. Your policy should build in provisions for line managers to inform employees what will happen next if their request is going to be referred into the escalation stage.

### Escalation stage

This stage should be used if a line manager has not been able to reach agreement on a solution in the exploratory stage. The purpose is to check for other possible solutions including whether the form of flexibility the individual is seeking could be accommodated in a different team, location or role.

Here are some things to consider for your policy and procedures:

- how the escalation function is resourced - this could be via a central HR function or done at divisional level
- an option for line managers to get support or a second opinion to verify that a solution within the team cannot be found
- the method for line managers to make a referral – this could be a simple proforma which links to the original request which will have been centrally logged (page 7)
- the systems that will be used to identify potential openings in other teams/parts of the organisation. This may involve reviewing your current policies around which staff can be given prior consideration for vacancies and trial periods and considering extending this to staff who have made a flexible working request. This would allow a search of current vacancies or unfilled hours/shifts by working pattern, location to see if these might meet the need – either for an immediate move or for an initial trial period. This could also involve logging and matching up potential job share partners or job shift/swap arrangements
- the scope to link up with other employers in the locality to explore options across a wider footprint
- how these wider options will be communicated to and explored with the employee. Will it be through their line manager? Is a discussion with a prospective manager appropriate, could a short visit or shadowing opportunity be arranged?

- a process to encourage staff to agree an extension to timescales where this would allow a more thorough investigation of alternative options.

### **Decision stage – flexible working change agreed**

Solutions agreed after exploratory or escalation stage will need to be documented appropriately.

Check your policy and supporting procedures. These could include proformas which clearly identify:

- the provisions agreed and what is changing: for example, change to number of hours, work pattern, work location, role and/or team
- which, if any, are contractual changes which require HR and/or payroll processes
- how to log informal arrangements
- the duration of a temporary arrangement or whether it is a permanent change
- any agreed trial period – and how success of the trial will be determined
- any agreed review dates.

Consider including in your policy provision for regular discussions about how well the flexible working arrangement is working for the individual through one-to-ones and wellbeing conversations, as well as how well it's working for the team.

### **Decision stage – flexible working change declined**

Where following the escalation stage and a solution has not been found, Section 33.16 provides that written reasons which can be objectively justified must be provided along with an account of alternatives considered.

Consider how your policy could embed a check and quality assurance of reasons before any decision to refuse is implemented.

You may want to build in a specific equality check that identifies whether the individual has any protected characteristics under the Equality Act that are relevant to their flexible working request and how these have been taken into account.

For example, women continue to bear greater responsibilities for child and dependent care than men and therefore refusing an application for flexible working that relates to these responsibilities may constitute indirect discrimination if the decision cannot be objectively justified.

Written reasons should record an assessment of the potential impacts of declining the request.

## Appeals stage

Your current policy is likely to have an appeals procedure - this could be specific to the flexible working policy, or it might be the general appeals process contained within your grievance procedure.

Section 33.17 specifies that all staff have a right to be represented at appeal by a trade union representative.

Section 33.18 provides that appeals should consider process compliance and whether all options have been fully considered.

Review your current appeals process and ensure that processes are in place for those hearing the appeal to review evidence on other options considered and all relevant background information.

## Timescales

As a minimum the timescales in your policy need to incorporate the statutory requirement that a decision including any appeal process is completed within three months of the request being received – unless the employee agrees to extend this.

That means your policy will need to build in timelines for how quickly managers respond and at what point the escalation stage will kick in. It may be helpful for the policy to contain something about encouraging extensions where the escalation stage is to be used and this would enable a more thorough investigation of options.

## Oversight and monitoring

Section 33 of the TCS handbook encapsulates the commitment from employers to improve working life through enabling greater opportunities for flexible working.

This commitment needs to be borne out in the priority placed on oversight and monitoring of progress on this agenda.

Check that your policy includes measures to implement the provisions in Sections 33.20, 33.21 and 33.22 about organisational governance, oversight and review including

- regular reporting and discussion of monitoring data including equality monitoring at your joint-partnership forum
- regular reporting at board level
- inclusion in annual equality duty report
- auditing impact of flexible working on career development and progression.



You may also wish to cover reporting into any external monitoring arrangements where relevant.

See Appendix 2 for advice from EDIG on monitoring and reporting.

### **Cross-referencing to other policies**

Consider which other policies are relevant and need to be cross-referenced – these could include homeworking, flexible retirement, equality, diversity and inclusion, reasonable adjustments, health and wellbeing/phased return – as well as directorate agreements for example on-call or out-of-hours rotas.

### **Joint review**

Agree provisions for joint review of your updated policy.

## Appendix 1:

### Advice from the equality, diversity and inclusion group (EDIG) of the NHS Staff Council on conducting an equality assessment of changes to your flexible working policy

#### Outline of Public Sector Equality Duty

The Public Sector Equality Duty (PSED) sets out the main duty that all public authorities must, in the exercise of their functions, 'have due regard to the need to':

- eliminate unlawful discrimination, harassment and victimisation
- advance equality of opportunity
- foster good relations between persons who share a 'relevant protected characteristic' and persons who do not.

Further information about the PSED can be found [on the Equality and Human Rights Commission \(EHRC\) website](#).

#### Equality assessment

Assessing the impact on equality of proposed changes to policies, procedures and practices provides a good opportunity for NHS employers to make decisions that benefit their workforce and service users more equitably. An equality assessment should be a live document which is continually analysed through an agreed monitoring and review process that considers the impact of the policy, procedure or practice.

An equality assessment helps to demonstrate compliance with the PSED because it shows that:

- there is a written record of the equality considerations an employer has taken into account
- decision-making includes a consideration of the actions that would help to avoid or mitigate any negative impacts on particular protected groups
- decisions are based on evidence
- the decision-making process is more transparent.

The EHRC [sets out guidance based on case law](#) on what organisations need to do in order to have 'due regard'. Case law also suggests that it is good practice to document how decisions were reached.

The EHRC says that decision-makers need to:

- be aware of their responsibilities under the duty
- make sure they have adequate evidence (including from consultation, if appropriate) to enable them to understand the potential effects of their decisions on different people covered by the duty
- consciously and actively consider the relevant matters, in such a way that it influences decision-making
- do this before and at the time a decision is taken, not after the event
- be aware that the duty can't be delegated to third parties who are carrying out functions on their behalf.

## Carrying out an Equality Assessment

### General considerations

- The aim of an equality assessment is to pre-empt any issues and anticipate the impact that the policy could have on different groups of staff. These may be indirect and unintentional, but it is still important to recognise and address them. It is good practice to think, where possible, about how the different characteristics intersect, for example gender and ethnicity. As well as protected characteristics, in the NHS it is good practice to consider the different occupational groups for example those that work directly with patients, covering services that run 24/7, pay banding and also job location i.e community settings.
- The best time to carry out an equality assessment is as early as possible as a policy is being developed. This means that issues can be mitigated or avoided altogether and shows that policies and practices are designed to be inclusive. It also makes financial sense because it is less likely that you will need to make changes later.
- Use existing evidence for example, local staff survey data, relevant ESR reports, information from exit interviews. Also identify what evidence you need but don't have and where you might get it from.
- Think about other existing policies, advice and guidance in your trust that might aid the process and that also might need to be reviewed (such as annual leave policies, career break schemes and maternity / paternity / parental leave policies).
- Building in time for engagement and working collaboratively with people who understand the existing policy will make it easier to spot inequalities early on. Factoring in time to carry out any actions you might need to take as a result of the equality assessment is also really important.

### Equality assessing your flexible working policy

The following steps are recommended to joint negotiating committees/partnership forums as you review and update local flexible working policies.

The first step is to evaluate why the changes are being introduced and who is being impacted by the changes. This involves reviewing the equality assessment of the original policy as well as conducting a new assessment of the policy changes.

Things to consider include:

- What was the equality impact of the existing policy?
- Do you have a record of the number of flexible working applications and the outcomes of those applications (this is your baseline)?
- Have you properly assessed your baseline so that you can build in measures to your new policy to benefit groups that might currently be being disadvantaged?

The next step is your self-assessment, using any relevant local or national evidence to support this. This will allow you to assess whether there is potential for a disproportionate impact on certain groups and if that impact is positive, neutral or negative. This will then allow you to assess what you can do to reasonably reduce the risks of any inequity or disproportionality arising.

Things to consider include:

- Will the new policy lead to an increase in applications for flexible working and could this impact certain groups?
- What steps can you take to ensure processes are followed to make sure requests are dealt with equitably?
- Do the new provisions allow for flexible working applications to be made without having to justify requests or provide specific reasons?
- Is the new policy inclusive?
- Does the assessment process in the new policy recognise that some people have additional rights under the Equality Act 2010, for example those returning to work following maternity leave, those who are carers or someone making a flexible working request as a reasonable adjustment because of a disability?
- The new provisions include an additional stage that refers on requests that cannot be accommodated initially to ensure all possible solutions are explored, including across the organisation. The assessment should consider whether this creates any disparities considering protected characteristics and job roles.
- Engagement with stakeholders should be recorded as part of the assessment and any changes you have made as a result of that engagement.
- Plan to reduce the negative impacts you have identified or if you aren't planning to do this, record why and update the Equality Assessment as required. Flag if you have identified a need to update/review any linked policies or pieces of guidance and any training needs that have been identified. This may be for line managers who will be dealing with flexible working applications.
- Build in a process for continuous monitoring, reviewing and reporting.
- Once the Equality Assessment is signed off it should be published, it is a live document that needs to be kept updated and should include a commitment to continual analysis and periodic formal review.

### Useful examples

- [Consultation on modern workplaces.](#)
- [Harrogate and Rural District Clinical Commissioning Group equality impact analysis and flexible working policy](#)
- [NHS Wales equality and health impact assessment for flexible working policy](#)
- [Care inspectorate equality impact assessment for flexible working policy.](#)

## Appendix 2:

### Advice from the Equality, Diversity and Inclusion Group (EDIG) of the NHS Staff Council on monitoring and reporting on your flexible working policy

This advice covers how to ensure you have an agreed monitoring and review process that considers the impact of the policy, procedure or practice.

#### What should be monitored?

- The number of applications to work flexibly, including how many are agreed (both at the first stage and after an appeal process) and how many requests are turned down. Flexible working requests can be recorded through the NHS electronic staff record (ESR).
- The types of flexible working that are agreed/turned down as above, are certain types of flexible working agreed more often than others?
- All of this information should also be disaggregated (broken down) by protected characteristic and where possible look at how the different characteristics intersect, for example gender and ethnicity and for annual public sector equality duty (PSED) reporting on outcomes for requests to work flexibly. This evidence can also be used in annual assessments of performance in the workforce domains of the NHS equality delivery system.
- It is important to monitor access by occupational group, pay band and work locations. Through ESR it is possible to report by location such as specific wards.
- Consider looking at your data alongside other relevant monitoring, for example take up of relevant training for line managers, maternity / paternity / parental and carers leave.
- As part of a longer term review, you can monitor whether there has been any change to your local staff survey data, exit interview data, recruitment and retention, sickness absence levels, the number of jobs advertised as open to flexible working.

#### Reporting and action planning

- If through your monitoring you identify that there is inequity or disproportionality, return to the equality assessment – it is a live document.
- Identify where the inequity is and how it can be addressed, there may be training needs for line managers, the process to apply for flexible working may need to be made more accessible for certain groups. This should be through joint negotiating committees, partnership forums and relevant committees for example policy groups, EDI steering groups.
- Positive impact (compared to your baseline) should also be included in reporting for example any impact of retention and recruitment or levels of satisfaction amongst staff.
- This information should be reported as part of public sector equality duty reports which are a requirement of the general duty.
- Report on the impact of the new flexible working provisions to the organisation's board including progress towards KPIs.