

Flexible working consultation

NHS Employers' response

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Overview

NHS Employers is the employers' organisation for the NHS in England. We help employers to develop a sustainable workforce, improve staff experience and be the best employers they can be.

Our response to the consultation on proposals to 'making flexible working the default' is based on collective views, feedback and suggestions received from employers in the NHS following a recent period of negotiation in which changes to the NHS terms and conditions of service were agreed in partnership with trade unions. These changes were implemented on 13 September 2021.

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Context

The [NHS People Plan](#) published in July 2020, committed the NHS to become a modern and model employer by building on the changes seen through the COVID-19 pandemic to deliver improved flexible working practices.

In 2020, NHS England and Improvement (NHSEI) commissioned the NHS Staff Council to review the flexible working provisions available in the NHS from a terms and conditions perspective. In March 2021, the NHS Staff Council reached agreement to amend the flexible working framework provisions in the NHS terms and conditions of service (NHS TCS) handbook - [Section 33 \(England and Wales\)](#).

These subsequently came into effect on the 13 September 2021 for England and Wales, with Scotland and Northern Ireland intending to implement these amendments in the near future.

These changes follow the [NHS People Promise strand which supports flexible working](#):

We work flexibly

We do not have to sacrifice our family, our friends or our interests for work.

We have predictable and flexible working patterns – and, if we do need to take time off, we are supported to do so.

Improving flexible working practices is one way to demonstrate our commitment and value to our staff and supports retention, specifically, in stemming the loss of established NHS staff to third party providers or out of the NHS entirely. This is particularly relevant

when supporting the current government's manifesto to deliver 50,000 more nurses by 2025.

A copy of the revised contractual provisions is included at Annex A.

Flexible working provisions within the NHS

Contractual day one right

Flexible working became a contractual day one right from 13 September 2021 for staff who are directly employed under the NHS TCS (see paragraph 33.5).

33.5 All NHS employees covered by this section and who are employed by an organisation listed in [Annex 1](#) have the contractual right to request flexible working from day one of employment.

This provision also extends to the medical workforce via:

- Schedule 14 of the [2016 junior doctor contract](#) for doctors in training
- Schedule 17 of the [specialist doctor](#) and [specialty doctor](#) contract.

Whilst there is no contractual entitlement for the consultant workforce, the expectation is that NHS employers will not treat certain staff groups differently. Therefore, when using the principles of [Section 33 \(England & Wales\)](#) to develop their own local policies, we expect that all staff will be provided with the same contractual rights to flexible working.

Frequency of requests

The revised contractual provisions enable employees to submit more than one request per year regardless of the reason for them (see paragraph 33.6).

- 33.6 Employees can make more than one flexible working request per year and can do so regardless of the reasons for them. This does not preclude other statutory or handbook entitlements where flexible working may be relevant.

Employer consideration of requests

As part of the contractual amendments, more emphasis was placed on employers when considering requests (see paragraphs 33.14 – 33.16). Through local negotiations, local policies will need to include three stages:

- i. **exploratory stage:** where options to reach a mutually agreeable outcome are discussed with the employee
- ii. **escalation stage:** where, following full exploration, further options beyond the employee's immediate team could be mutually agreed
- iii. **final stage:**
 - for agreed requests the outcome will be confirmed, and documentation will outline the implementation arrangements, including timeframe, duration, review and permanence of the change,
 - for requests that cannot be supported the employee will receive written justification for this, including detail of the alternatives that were considered and the details of the appeals process.

The aim is to support managers to look beyond their immediate team's needs in order to explore whether flexible working request can be supported in the wider organisation, even if it is not practicable to do so with a specific team to support and retain staff wherever possible.

Monitoring

To be able to demonstrate the effectiveness of the amended contractual provisions and an inclusive approach, NHS employers are required to monitor their data in relation to flexible working requests and outcomes (further information on this can be found at paragraph 33.19 to 33.22 of [Section 33 of the NHS TCS handbook](#)). The intention is to ensure that any unintended impacts can be identified and addressed, specifically in relation to access, career development and progression as well as from an equality perspective.

Views from NHS employers

There are three areas within the government consultation that are not covered by the recent changes to the NHS contractual provisions and the views of employers in relation to these are set out below.

1. Do the business reasons for rejecting a flexible working request remain valid?

We would agree that the eight business reasons for rejecting a flexible working request remain relevant when deciding whether a request is workable in the context of meeting business needs.

The experiences and circumstances of COVID-19 have propelled many NHS staff to adopt flexible working practices (informally and formally) as a direct consequence of the pandemic. This has been achieved despite previous misgivings whilst still being able to maintain the delivery of a quality service. However, it should be recognised that not all roles in the NHS easily lend themselves to certain flexible working requests, for example, a nurse in A&E or a surgeon. The NHS Staff Council is planning further work to look at how we can increase the flexible working options available to staff who deliver 24/7 front line services while balancing these against the business needs and will be sharing good practice examples.

2. Should the current statutory framework be amended in relation to the speed at which employers respond to flexible working requests?

The consultation seeks views on more exhaustive measures that could be adopted in relation to the approvals process, for example reviewing flexible working options that may exist outside of an individual's immediate team.

Whilst this is the correct approach, and one that has been adopted in the NHS as part of the revised contractual provisions, reducing the time that employers must respond risks requests not being given the due consideration they require and therefore, inadvertently increase the number of requests that are unnecessarily declined.

To ensure, as far as reasonably practical, requests can be accommodated, we feel the current response timeframe should remain as it is. This will also provide employing organisations time to consider any backfill arrangements where these may be required.

3. Are employers aware that under the legislation a time-limited request to flexible working can be made?

Yes, employers in the NHS are aware of temporary arrangements that already exist for time-limited flexible working requests, such as following a period of extended sickness which support an individual to return to work. Similarly, there are examples where staff require short term flexibility to provide short term caring needs before ending the agreement and returning to their substantive arrangements.

Conclusion

Given the recent work in the NHS to implement revised contractual changes to support flexible working requests, it is our view that the NHS is ahead in many areas identified within this consultation, particularly in relation to providing a day one right to request flexible working and we would be happy to share our experience of this change in due course to support cross-sector learning.

For the areas which were not covered by the recent changes in the NHS but are highlighted in the flexible working consultation, we would recommend that the statutory framework arrangements remain unchanged for the reasons set out above.

Further information

For more information about the work in this letter, please contact the Employment Relations team at NHS Employers.

Email: EmploymentRelationsSupport@nhsemployers.org

Ring: 0113 306 3000

Annex A - Section 33: Balancing work and personal life

General

33.1 A positive work/life balance benefits both NHS employees through improved health and wellbeing, and employers because staff are more productive and satisfied at work. Employers should have a strategic response, ensuring policies which support and promote a work/life balance are agreed in partnership.

33.2. Key to achieving work life balance is the provision and availability of flexible working opportunities accompanied by policies which support managers to take the time to understand what each person needs. Flexible working is part of a wider commitment by the NHS to improve the quality of working life. It also supports the retention of existing staff including those returning to work after family-related leave.

Aim of flexible working arrangements

33.3 In order to meet the evolving needs of patients, the NHS needs to be able to attract, recruit and retain a diverse workforce. Individual working needs are variable, and where possible we need working practices which ensure staff can work in a manner that best suits

their personal needs and preferences Having appropriate working arrangements which are adaptable and flexible both to employees and employers will ensure that we will continue to have the workforce we need to deliver excellent patient care for the future.

33.4 The following national principles have been established to support employing organisations develop their local policies.

Right to request flexible working

33.5 All NHS employees covered by this section and who are employed by an organisation listed in Annex 1 have the contractual right to request flexible working from day one of employment.

33.6 Employees can make more than one flexible working request per year and can do so regardless of the reasons for them. This does not preclude other statutory or handbook entitlements where flexible working may be relevant.

33.7 When advertising any job, employing organisations will need to consider how they promote the right to request flexibility from day one and the availability of flexible working options.

33.8 To support a positive culture of flexible working, employers will need to consider how they support and encourage open conversations about flexible working. Examples of opportunities to talk about flexible working include at one-to-one line management / supervision meetings, team/departmental meetings, as part of wellbeing conversations, or as part of recruitment, induction, and annual appraisal processes.

33.9 Local flexible working policies developed in partnership will need to ensure equality of access to flexible working, as far as practicable, regardless of role, shift pattern, team or pay band.

Flexible working options

33.10 Employers and trade unions should work through local partnership arrangements to develop and communicate options for flexible working including, but not limited to, the following:

- Fixed working patterns to give certainty over hours worked and/or location
- Part-time working (any number of hours under 37.5)
- Flexi-time around core hours including staggered start and finish times
- Compressed/elongated hours to allow work to be condensed or stretched in a regular pattern or over a specific time period, such as seasonal working
- Average hours working patterns to allow a set number of hours to be averaged out over an agreed reference period e.g., annualised; bi-annualised; quarterly; monthly
- Term-time working
- Job-share
- Flexible retirement
- Team self-rostering
- Homeworking for some or all of the working pattern

33.11 Employers will need to consider how these options are communicated to all staff at recruitment, induction, and in regular one-to-one meetings.

Applications for flexible working

33.12 Employers and trade unions should work in partnership to agree arrangements for considering applications for flexible working in a fair and consistent manner.

33.13 The standardised process should:

- cover all requests and incorporate the provisions for doing so, including the timescales set out in the statutory requirements.
- encourage applicants to identify if their request is to facilitate a reasonable adjustment for a disability as set out in the Equality Act 2010.
- promote the support that trade union representatives can provide to individuals in completing their application.

Employer consideration of requests

33.14 Employers will need to ensure that all requests are treated with due consideration, including any equality implications, and with an emphasis on exploring and mutually agreeing solutions.

33.15 Local partnerships should agree an appropriate policy process and supportive guidance for line managers which sets out how flexible working requests are managed.

33.16 Local policy processes should include:

- An initial exploratory stage with the employee to look at all the options for reaching a mutually agreeable outcome
- Where – following full exploration – requests have not been agreed, an escalation stage to see if there are any further options beyond the immediate team within the organisation that could be mutually agreed

- A final stage which
 - for agreed solutions will confirm and document with the employee agreed implementation arrangements to include timeframe and duration or permanence of the change and any review dates if applicable
 - for requests that have not been agreed will provide objectively justified and specific written reasons, including alternatives considered, together with details of the appeals process

All policies should be supported by:

- A central means for logging and monitoring requests for flexible working.
- Appropriate training, clear supporting materials and ready access to advice for line managers.

Appeals

33.17 Employers and trade unions should work in partnership to agree arrangements for a standard appeal process which is accessible to all staff. Employees have the right to be represented by a trade union representative in the appeal meeting.

33.18 Considerations for those hearing appeals would include:

- whether the local process had been appropriately followed
- whether all appropriate options had been fully considered

Oversight and monitoring

33.19 Policies and processes agreed to support flexible working should be subject to an Equality Impact Assessment.

33.20 Organisations should ensure that data relating to applications for flexible working and outcomes of decisions are recorded and regularly reported through the usual joint partnership and governance structures. This information should be included in an organisation's published annual statutory public sector duty reports. The published information should demonstrate outcomes for flexible working applications disaggregated by each protected characteristic of the Equality Act 2010. In addition, organisations should consider reporting outcomes by occupational group and also by department.

33.21 The results should be used for regular joint review and revision where necessary of policies and procedures to ensure continuing effectiveness and equity of access.

33.22 Over time, organisations should also assess the data on flexible working to identify any unintended impact of flexible working on career development and progression.

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