

EXPLANATORY MEMORANDUM TO

THE ACAS CODE OF PRACTICE ON REQUESTS FOR FLEXIBLE WORKING

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Advisory, Conciliation and Arbitration Service (Acas) and is laid before Parliament by Command of His Majesty.
- 1.2 This explanatory memorandum is for The Acas Code of Practice on Requests for Flexible Working (“the Code”).

2. Purpose of the instrument

- 2.1 The Code is issued under section 200 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the “1992 Act”). Its purpose is to provide practical guidance to employers and employees on the statutory right to request flexible working provided for under the Employment Rights Act 1996 (as amended by the Employment Relations (Flexible Working) Act 2023 (“the 2023 Act”), and the Flexible Working Regulations 2014 (as amended by the Flexible Working (Amendment) Regulations 2023 (“the 2023 Regulations”)).

3. Matters of special interest to Parliament

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Great Britain.
- 4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

- 5.1 The Minister for Enterprise, Markets and Small Business, Kevin Hollinrake MP, has made the following statement regarding Human Rights: “In my view the provisions of the Acas Code of Practice on Requests for Flexible Working are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Once it is commenced, the 2023 Act will make changes to the flexible working provisions in the Employment Rights Act 1996 to:
 - introduce a new 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 shall consider the statutory request) from three months to two months; and
 - remove the existing requirement that the employee must explain what effect, if any, the change applied for would have on the employer and how that effect might be dealt with.

- 6.2 Alongside the 2023 Act, the 2023 Regulations make changes to the Flexible Working Regulations 2014 by making the right to request flexible working apply from day one of employment (by removing the existing 26-week qualifying period).
- 6.3 The Code updates the current Acas Code of Practice on handling in a reasonable manner requests to work flexibly, issued in 2014 (“the existing Code”).
- 6.4 The Code imposes no legal obligations and failure to observe it does not by itself make any person liable to legal proceedings. However, under section 207 of the 1992 Act, any provisions of the Code are admissible in evidence and taken into account in proceedings before any court or employment tribunal where the court or tribunal considers them relevant.
- 6.5 In compliance with section 200(1) of the 1992 Act, Acas prepared and published in draft the Code and considered representations about it. Under section 200(2), Acas transmitted a draft of the Code to the Secretary of State. The Secretary of State approved the Code to be laid in Parliament.
- 6.6 If the draft Code is approved by Parliament, the Code shall be issued in the form of that draft and the Secretary of State shall bring the Code into effect on a day specified in an order made by statutory instrument, which is subject to the made negative procedure.

7. Policy background

What is being done and why?

- 7.1 The legislative changes introduced by the 2023 Act and the 2023 Regulations require revisions to the existing Code. Evolving social and technological developments in relation to flexible working since the publication of the existing Code in 2014 also offer the opportunity for a review of the existing Code to ensure it is fit for purpose for the modern workplace.
- 7.2 The aim of the Code is to provide employers and employees with a clear explanation of the law on the right to request flexible working, alongside good practice advice on handling requests in a reasonable manner.
- 7.3 Acas issued a public consultation on a draft Code of Practice on 12 July 2023¹. The consultation comprised five sections:

Section A: Review of the existing Code – the consultation sought views on Acas’s rationale for updating the existing Code.

Section B: Foreword – the consultation explained the addition of a new draft Foreword to the Code. This is not part of the Code itself.

Section C: Legal terminology – Acas sought views on:

- a section on the new legal requirement on an employer to consult an employee
- a new good practice recommendation that a meeting should be offered even in cases where an employer is intending to accept a request (departing from the position set out in the existing Code which states that a meeting is not needed where an employer intends to accept a request)

¹ <https://www.acas.org.uk/about-us/acas-consultations/code-of-practice-flexible-working-requests-2023>

- a section setting out the protections for employees from detriment and dismissal as provided for by the Employment Rights Act 1996

Section D: Procedural guidance within the Code – recognising the potential to enhance the existing Code to provide greater guidance on various aspects of the procedure involved in the reasonable handling of requests.7.4

Section E: The statutory right to request a predictable work pattern – the consultation asked whether the Code should include a section on the interaction of the right to request flexible working with the forthcoming new and separate right to request a predictable work pattern being introduced by the Workers (Predictable Terms and Conditions) Bill (now Act).

7.4 Changes were made to the draft Code following the consultation and these are summarised below in paragraph 10.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Code does not consolidate any legislation.

10. Consultation outcome

10.1 The Acas consultation was open for 8 weeks from 12 July until 6 September 2023 and received 162 responses (100 from individuals sharing both professional and personal views and 62 from organisations, primarily consisting of employers and trade unions).

10.2 There was strong consensus from respondents on the draft Code across a number of areas, including that 77% of respondents agreed that Acas should reconsider the overall good practice principles in the existing Code (Section A).

10.3 91% of respondents agreed that the Code should provide guidance on consulting with employees about a request (Section C). In response to the consultation, the Code now explains further that if the original request cannot be accepted in full, the employer and employee should discuss, for example, any potential modifications to the original request.

10.4 While the majority of respondents expressed support for Acas’s proposal to recommend offering an employee a meeting even when the employer plans to accept their request (Section C), some respondents also emphasised the view that such meetings should be optional as they may not always be needed. The Code therefore now sets out that an employer and employee may mutually agree that such a discussion is not necessary.

10.5 Respondents expressed a wide range of views in respect of accompaniment and extending the categories of companions allowed at meetings to discuss flexible working (Section D). The Code provides the option of accompaniment at these meetings by these categories of companion, however it makes clear that there is no statutory right of accompaniment.

10.6 Respondents expressed general support for the Code to recommend that, where possible, larger organisations should appoint a different manager to handle an appeal

in larger organisations (Section D). On further consideration by Acas, the reference to “larger organisations” has been removed and the Code now recommends that appeals should be handled in this way “wherever possible”.

- 10.7 As the Workers (Predictable Terms and Conditions) Act is not expected to come into force until autumn 2024, the Code does not presently include a section on the right to request a predictable work pattern (Section E).
- 10.8 All other areas proposed in the draft Code included in Acas’s public consultation remain in the Code, with some further drafting changes to these made following consideration of consultation responses.
- 10.9 The Code has been designed to provide clarity to employers and employees on making and handling requests for flexible working. With the new day one right, the Code will apply to every employee and employer. The tone and positioning of the Code also signals that the starting position should be to consider what may be possible.

11. Guidance

- 11.1 The Code sets out statutory guidance. Acas will also produce non-statutory guidance to accompany the Code. Both the Code and the associated non-statutory guidance will be freely available on the Acas website (www.acas.org.uk).

12. Impact

- 12.1 There is no public expenditure required to fund the changes being introduced through this statutory instrument.
- 12.2 The Code reflects the legislation. There are in place Impact Assessments which capture the costs and benefits of the legislation. The Impact Assessment is available to view on the following:

<https://www.legislation.gov.uk/ukxi/2023/1328/impacts>

- 12.3 In developing the Code Acas has separately conducted a full Equality Impact Assessment which identifies no likely negative impacts.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No special measures apply to small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of the Code is to consider how statutory flexible working requests operate in practice following the Code’s implementation. This will include consideration of Acas’s operational data in relation to statutory flexible working requests, including data from its helpline, website, training provision and disputes resolution services.

15. Contact

- 15.1 Simone Cheng at Acas (email: workplacepolicy@acas.org.uk; phone: 0330 109 3283), can be contacted with any queries regarding the instrument.

- 15.2 Jayne McCann, Deputy Director for Participation at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Enterprise, Markets and Small Business, Kevin Hollinrake MP, at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.