SQUIRE PATTON BOGGS

COVID-19: The Future World of Work

FAQs on Returning to the Workplace (UK)

UK – 22 April 2021

The COVID-19 pandemic and the last 13 months' lockdown have not changed the law as it relates to flexible working. Nonetheless, employers contemplating the reality of a large-scale return to the workplace (RTW) will find themselves in new territory over the next three to six months. The sheer number of employees involved, the dangerous medical background, issues around vaccines, and the emotional/mental health and PR stakes are all at a different level from any previous point. In addition, decisions must be made in the context of a whole load of legally irrelevant but still clearly related issues around future floor-space requirements, social distancing obligations and more empirical evidence of whether working from home (WFH) works or not than employers have ever had before.

By now, many employees WFH in the lockdown will have made quite firm decisions around how they wish to operate going forward. Some will have decided that there is nothing in their lives quite like their family and, for that reason, they wish to extend their WFH indefinitely. Others, on probably very similar grounds, will want to get back to the office as soon as they can. One way or another, we think that employers can expect a significant upswing in flexible working requests starting more or less at the moment the government relaxes its "WFH if you can" guidance. At present, that is scheduled for 21 June – it may be later, but is very unlikely to be earlier.

In these frequently asked questions, we look at some of the most likely practical questions to arise as that new territory is negotiated, perhaps best starting with some introductory reassurance:

- As above, there is no new law for you to deal with here.
- You cannot expect to please all your people all the time – indeed, you already know that you cannot please some of your people any of the time.
- Honest errors of judgement may be made on all sides, tempers may run hot and grievances may be brought. None of this necessarily indicates that anything has gone wrong.
- The burden on you as employer is to be reasonable, not perfect. So long as your responses to issues arising in the course of returning your staff to the workplace are patient, measured and fall "within the range of reasonable responses", you should stay out of most legal difficulty, even if the employee or the employment tribunal would have preferred it done differently. If you can keep your head while all around are losing theirs, there is nothing to be too concerned about in this process.

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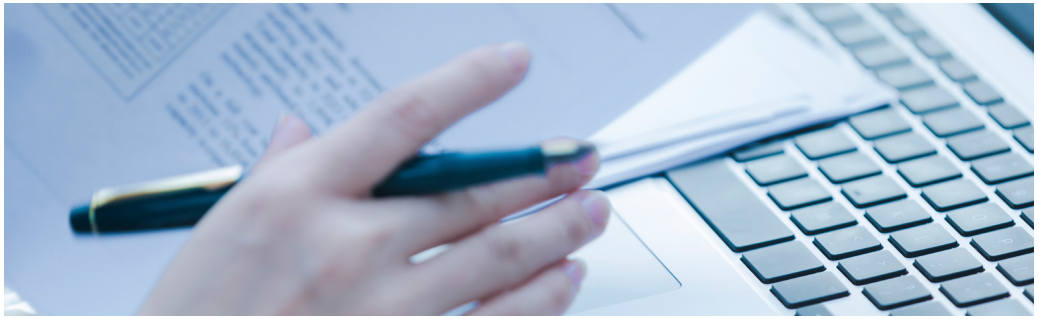
1. Should I insist on dealing with WFH applications through our formal flexible working policy?

Remember that even though it may not be expressed as such or be made with the statutory scheme in mind, any request by the employee to work from home to any greater extent than pre-pandemic is, at its heart, a flexible working request, so should be considered against the statutory feasibility test in section 80G (1)(b) Employment Rights Act 1996. The refusal of such a request, whether made under the statutory scheme or more informally, is also likely to (be alleged to) count as a provision, criterion or practice for indirect discrimination purposes, requiring that refusal to be justified. In both cases, the key issue remains whether the arrangement proposed by the employee will work for you or not, and if not, can you show why not.

The obvious difficulty in saying now that a permanent WFH arrangement will not work is that this may come as news to an employee who has been doing it for more than a year without prior complaint from you. The burden is squarely on the employer to demonstrate why the arrangement requested will not work. This is, therefore, the time to be very clear, both in your own head and with the employee, as to what has changed (or is expected to change) to make that which was viable no longer so. Is it that specific and demonstrable operational issues have arisen (even though you did not mention them); that you have lived with second-best while you had no choice, but now you do; that WFH while everyone else was doing so sort of worked, but it will not when everyone else is back in the office; or that the reopening of the economy requires all hands on deck in a way not needed over the past 12 months?

The question for the employer is whether it has gone through the right thought processes and engagement with the employee – whether it has used a particular procedure or not is less important as a matter of substance. However, do note that if you do choose to push people down the formal route, there are both pros and cons. The pro is that once heard and rejected, the employee cannot make another formal application for a year (but that is actually only a pro if you would use that legal defence to stop an employee making an entirely viable request that might be in both their and your own best interests before then). The con is that a claim for up to eight weeks' pay may lie if you get the process wrong, even if the outcome of the request were clearly the right one.



2. Homeworking has gone broadly OK for us – should I risk rocking the boat by seeking to formalise it now?

This all began as absence from the workplace mandated by the government and fear of death in about equal measure, so there may understandably have been little attention paid to the legal or contractual niceties at the outset. Once those external drivers are wound down, however, employers will need to get back to those details pretty promptly, and not just let inertia leave them saddled with arrangements that were adequate in a crisis, but are not those they would have insisted upon in "peacetime". We strongly recommend starting to formalise your agreed WFH arrangements as soon as possible. Here are some practical considerations:

- There is no need to go through the full formal flexible working application process if you can see immediately that the request can be granted. However, if you have any doubts or unresolved questions about whether it will work on a longer-term basis, it is much better to do so. The discipline of the process will force you to engage with the employee (and them with you) and then to marshal your thoughts in a formal way, making your decision much less vulnerable to later attack. Small cautionary note – the flexible working rules are very procedure-based and it is no defence to an alleged failure to comply with them that it would have made no difference if you had.
- There could be all sorts of legal arguments around whether WFH arrangements imposed by lockdown have already become contractual through custom and practice [spoiler alert – probably not yet, because the employer has had little choice, but they will do so pretty quickly once the obligation to WFH where you can is lifted], but that should not stop you seeking to vary them as part of making them more permanent. Have a hard think – you might have muddled by during lockdown, but if you were approaching the question from cold without the pandemic context, what extra/different conditions would you have laid down? What requirements to visit the office when it is open again, what more regular reporting or supervisory obligations, what quality controls or success criteria? As when entering certain other new relationships, it is a case of speak now or forever hold your peace.
- Seeking a formal trial period might seem rather churlish after many months of doing without one, but it is not an unreasonable request if there have been problems over that period or if WFH on an extended basis imposes new disciplines or obligations that were not required during lockdown. The more material the new condition(s), the better the case for a trial period.
- Who pays the bills? In some respects, homeworking will increase employees' bills – power, WiFi, water, council tax, insurance, etc. However, it will cut their costs too – no travelling, no shop-bought lunches or fancy coffees, less dry-cleaning of work clothes, and so on. There is no law here and probably no one really thought about it when there was no choice in the matter, but (a) especially when WFH is at the employee's request, the employer has no obligation to meet those extra costs; and (b) whatever you agree, write it down.

- Where this arrangement is now to be more than a short-term expedient, consider your responsibility for the employees' health and safety. The Health and Safety at Work Act imposes an overall duty to ensure, so far as reasonably practicable, the health and safety of your employees. These obligations apply irrespective of the employee's working base. Therefore, the limitation of section 2(2)(d) to workplaces "under the employer's control" does not nearly let you off the hook altogether. Your agreement to WFH on an extended basis must, consequently be conditional on your being satisfied that the employee can do it without undue risk, physical or mental. Neither party will probably want a physical inspection of their home office at this time, but you could do much worse than require employees to complete and return one of your usual workplace risk assessment forms and to confirm, as part of their written WFH agreement, that they are content with their working environment. It is not the employer's obligation to stump up for special desks or chairs for homeworking (except, potentially, where it is a reasonable adjustment). If you do so anyway, ensure that your WFH agreement records this, plus the employee's obligations to look after the kit you provide and return it to you on the ending of the arrangement. Keep an eye on the tax position of acquisitions for the employee, which you do not get back if they leave.
- Easy to say, maybe, but do not agree to flexible working requests just for the sake of a quiet life. It is possible to unwind those that prove unsuccessful in practice, but usually only with a great deal of reciprocal ill-will and finger-pointing as to whose fault it is that it did not work. If it is your considered view (i.e. after proper consultation through the formal flexible working application process or something akin to it) that the arrangement sought by the employee will not work longer term even though nothing actually catastrophic happened over the lockdown, do not grant it. All you have to do, he said lightly, is explain, in as much detail as you can, why what was sort of OK for some months when you had no choice would not be viable longer term. If you find yourself unable to do so, that is probably a sign that you should grant it.
- Of course, there is a but. First, where the WFH application is based on a disability, remember the need to make reasonable adjustments, meaning a level of obligation on you to find a way to make it work that goes beyond what would normally apply. Second, more generally, bear in mind the possibility that in the short term, the tribunals will consider, at some more or less subconscious level, that employers have an obligation not to place the whole burden of coming successfully back to work upon their employees. If we assume that most litigated WFH issues will be around mere degrees of inefficiency, rather than it clearly being a non-starter, the employment tribunal may well expect the employer to put up with arrangements that cause it some pain too, not just the employee.
- How to start that conversation – wait for the employee to ask for WFH on a full- or part-time basis, or proactively contact all those currently WFH (or on furlough, though their case will be weaker) and ask about their intentions? The problem with the former is that you will not know about who wants what until the point where you expected them all back in the office, and that the status quo (their being at home) for once favours the employee, not the employer. The issue with the latter is that you may lead people to believe they have options you may not be able to offer. There is, again, no law here, but it may be that the position can be flushed out gradually if you start an early process of communications with your staff about what you are doing to keep them safe in the office and when you are thinking of calling them back. The longer the notice you can give, the greater the chance that they will reach out to you in time enough that you can deal with their application before their intended return date. Keep in mind that the three-month period often linked to the flexible working process is a maximum, not a minimum – there is no reason why you cannot deal with an application within just a few weeks if you wish.

3. Does granting some level of WFH require me to issue new contracts?

No, but some record of the agreement is appropriate. The fact remains that permanent WFH is a change in terms and conditions even if the employee has been remote working for the last year. At present, their contract probably says that their normal place of work is the office. That term has effectively been superseded by the temporary variation imposed by the pandemic, i.e. that for so long as they have to WFH (while government guidance is to do so), that is OK. We do not see that emergency condition automatically lasting beyond the point where your employee can lawfully return to the office, maybe as soon as June. At that stage, their proper place of work becomes the office again, and remaining away from it after that requires your consent.

You will, therefore, need somewhere to recognise that change at least. Section 1(4)(h) Employment Rights Act 1996 requires the employer to state, in writing, the employee's place of work or any "other places where he is required or permitted to work", and section 4 requires any change to that to be communicated, in writing, within a month.

However, the real issue with an informal acceptance of homeworking is that you do not have any real control over what the employee will say the agreement between you actually was, particularly around the edges. Even if their duties are fundamentally the same, extended WFH generates administrative and management consequences for both you and your employee, which it is far better to have nailed down at the outset. The "outset" for these purposes is the point where you could have required the employee to return to the office (the end of WFH guidance from the government) but are willing not to do so.

For example, how often does the employee have to come in? For what purposes? On what sort of notice? Who pays for their travel? How do you get your kit back if they leave? Who pays if WFH impacts their home insurance or council tax? How are you going to measure their input and output if you cannot actually see them at work? What obligations do they have not to allow interference by family members with their work or IT equipment? Are you going to revisit their duties to make it easier to accommodate WFH, and does that have any knock-on effects on pay or reporting lines? These are just the little practical issues that employers tend to take as read or not think about at all, but the reality is that they do need to be expressly agreed – no term will be implied into an employment contract about such things merely because it would be sensible or you think, especially through rose-tinted hindsight, that it should be obvious.

There is no need for a whole new written contract, but you could do a great deal worse than a simple sign-and-return letter or email setting out a full list of the additional conditions or provisos on which you agreed to the WFH. Have a hard think about this first, since if anything is missing that you later decide is important, you may not then have the ability to add it without being in breach of contract. We do not recommend allowing WFH arrangements to become contractual through a handshake or simple inertia.

4. Does granting one homeworking request set a precedent for others?

Assuming that allowing employee A to WFH did not lead any important wheels to fall off, does this mean that his/her colleague B, doing the same job and seeking the same arrangement, must necessarily get a green light also? Yes and no, but mostly no.

A's success means that you cannot argue that, at a "principle" level, the role cannot be performed remotely. But that is not the end of the matter. If external circumstances (customer demand, technology, overall staffing levels, etc.) have changed, that may alter the equation for B. It might be that while you can function with one of a team of five at home, once you get to two or beyond, the office support structure seems to break down. Maybe A is a real star who you know will go out of their way to make the arrangement work, while B is a minimum-effort clock watcher. For reasons as yet unexplored, the eight permissible reasons for declining a flexible working request do not include that the employee in question is known only to work when cornered. Therefore, you would have to rely instead on an anticipated detrimental impact on quality or performance. If you have objective evidence of this probability through prior performance management measures or patchy appraisal reviews for B, you should be on reasonable ground in declining. Otherwise, the precedent set by A means that you may be safer to agree, but expressly subject to a trial period long enough to give B a chance to live down to your expectations.

5. I have two live flexible working applications that are inter-dependent. I can grant one, but not both. Which do I go with?

With one exception, the application you received first. That is an objective method of selection and not easily open to allegations of discrimination (see below).

The one exception is where you believe the later application to amount to a request for reasonable adjustments by an employee who is disabled. It is the nature of your obligations to make such adjustments that some disappointment or inconvenience may be occasioned to other employees. Therefore, you would then be entitled, or probably required, to grant that one in preference. However, note this will only be the case where the first request is still undecided – if it has already been agreed and so becomes contractual, you are under no obligation to unwind it to accommodate the disabled employee. In addition, this duty only applies where granting the homeworking would help reduce the disadvantage to that employee caused by their disability. If it has no impact on that but they just fancy more time at home, that priority is lost.

6. Should I ask why each employee wants to work from home?

Acas says that employers should "take an employee's personal circumstances into account" when making their decisions, but other than in respect of potential reasonable adjustments, this is potentially very dangerous ground. Bear in mind that the employee is not obliged to give any particular reason for making the request, and there is nothing in the eight permissible grounds for rejection relating directly to the personal circumstances of the individual. They all concern the impact on the business, not the employee. Therefore, it cannot be intended that the employee's motivation is a legally necessary consideration. If you ask for reasons nonetheless, it will be assumed that you do so for a purpose, i.e. that the answer will, in some way, be relevant to your decision. The problem with taking those circumstances into account is that employers will necessarily find themselves making difficult judgements on matters easily converted into discrimination allegations. Why is my seeking time working at home to look after elderly parents less compelling than her doing so for childcare? Why is my fear of contracting COVID-19 on the train any less pressing than his? And so on. Remember that positive discrimination is still discrimination.

By all means add a box to your flexible working application form to tick if the employee seeks the arrangement as a reasonable adjustment, but otherwise (and fully accepting that it sounds a little mechanical and uncaring) you are legally just much better off not knowing.

7. If you have done a trial period, should you always give the reason why it failed?

Yes, absolutely. If you do not, the employee may take the view that you had really intended to say no all along but simply lacked the guts to do so at the time of the request. That might indicate pre-determination and, hence, a failure to follow the flexible working rules. An unwillingness to explain will also inevitably suggest that your reasoning is too thin and feeble to be exposed to daylight, or that it is not really valid at all, just an unvoiced fear of creating a precedent or the view that almost everyone agrees with but no one can prove, i.e. that maximising collegiality, teamwork and productivity to the good of the business often requires more than virtual contact.

But even better than stating at the end of a trial period why it failed is also stating it at the beginning, i.e. making clear from the start the indicators of success or failure of the trial to be relied on by the business. If you highlight them at the outset and build them expressly into your written agreement to the WFH arrangement, reliance on them at the end will be much easier.

8. Does WFH include working from your home country if you are not from the UK?

In the very early days of the flexible working regime, a client's employee asked if she could WFH. "Oh, yes, where is that, then?" "Lagos", she said, and everyone just fell about laughing. Skip forward over a decade, however, and advances in technology have made viable working arrangements that would have been completely unthinkable then. However, even if from the IT perspective you can no longer distinguish Lagos from Godalming, that is not the only question.

Working outside the jurisdiction can create significant regulatory issues in some industries (potentially more so after Brexit) but can also generate some really cracking income tax and social security burdens for both the employer and the employee. The employee may acquire additional protections against dismissal or limits on working hours through the application of local law, and the employer may find that the employee's long-term presence in their home country is treated as creating a permanent establishment there for corporation tax purposes. We have done an international report on this very topic – if you are interested, please contact us.

One of the grounds on which a flexible working application can be refused is the burden of additional costs, so working from your home overseas on anything but a very temporary basis is something employers should be seen to investigate in good faith and with an open mind (the rules require it) but can generally refuse. However, if the employee takes steps to mitigate those additional costs, for example by accepting a lesser salary to offset them, agrees (if it matters to the job) to respect UK working hours despite any time differences, etc., and is willing to make their flexible working application for a short and finite period only, there is nothing in the law preventing the employer from agreeing to this if all else stacks up.

9. Where employees are unable to come into work for childcare reasons, what are my duties to provide them with work suitable to be done from home?

The starting point to this answer is that as a matter of black-and-white law, there are no such duties. Put bluntly, the employee's domestic position and the tension that may create with their work is for them to resolve.

However, that is much too simplistic an approach in practice. Before any adverse action is taken against that employee, whether that is suspension of pay, disciplinary sanction or even dismissal, the employer will need to be seen to have considered how that situation could be avoided.

As the employer, you will need to start by understanding the extent of the issue – how long are the childcare obligations going to last? Is it for the foreseeable, or just a few weeks until a relative or friend is able to stand in? Is it all-day or just at pick-up/drop-off times? Is it just that someone must be in the house to avoid the neighbours reporting them for child abandonment or that the employee will have to be hands-on from hour to hour?

Depending on the circumstances, you might agree that the employee takes some leave, out of holidays if paid, or otherwise unpaid. You could look at your vacancy list to see if that includes any role for which they might be suitable and which could be performed from home. Maybe you could offer them a role that is less senior but could more easily be done compatibly with childcare and as an interim measure agree a reduced salary rate with them to do it – there is no obligation that the employee's salary must be maintained if the only means of preserving their employment is via their agreeing to take a more junior job.

Alternatively, you could consider whether it would be appropriate to swap their duties with those of another employee for a period. You would have to be very careful that this was done only by agreement with the other employee (or as a minimum through the legitimate exercise of a flexibility cause in their contract), since otherwise you would be straight into constructive dismissal territory. Any such swap would need to be carefully documented so that both employees knew it to be temporary only, and that they understood the position should it be necessary, for example, to make that role redundant and who would be exposed – the employee whose job it normally was, or the one who was holding the parcel when the music stopped?

Separately, you would need to consider whether the role in question could be done not just from home, but also from home for childcare purposes. Having very young children in the house requires the employee to be permanently on DefCon-4. Believing that they can focus adequately upon their work with one ear open for the noise of things breaking, hysterical crying or ominous silences may stretch the credulity of some employers. However, while you are entitled to ask the employee if they are confident that their work and childcare responsibilities are not incompatible, it is probably best not to make that decision for them. Instead, you should offer the role on a trial basis terminable by either side but by reference to pre-agreed success criteria like any other flexible working application (which is essentially what this is).

If and when the employer has considered the options, ideally in consultation with the employee, but there remains nothing which can be offered to them that does not cause material prejudice to the business or other employees, that is the limit of its responsibilities. In the end, all other avenues exhausted, the employer will be entitled to dismiss an employee who cannot perform a useful role because of long-term childcare commitments (or any other care commitment, whether vulnerable, elderly, etc.).

However, there are two other considerations to bear in mind. First, the employer's decision that a particular role cannot be done from home will count as a provision, criterion or practice for indirect discrimination purposes (probably still more so if the reason for that decision is expressly linked to the parallel childcare obligation). Therefore, above and beyond the need to show that you acted reasonably for unfair dismissal purposes, that stance will need to be justifiable.

Second, the unconscious sympathies of the employment tribunal in these circumstances will almost inevitably be with the employee even at the best of times, which clearly these are not. Therefore, it will pay the employer to be seen to treat a conflict between children and work as a joint problem to be addressed together, and not just an issue of the employee's own making that they must sort out themselves, or else.

10. Where employees have not been vaccinated, but still need to come into the office, can we require them to have a rapid COVID-19 test before they come on-site?

Guidance from the Department of Health and Social Care makes cogent arguments for workforce COVID-19 testing, as it will "identify more positive cases … and ensure that those infected isolate". As a result, "we want as many employers as possible to sign up to regularly test their employees." The guidance confirms that running employee testing programmes is voluntary, but notes at the same time that doing so "can provide confidence to workers and customers in the workplace, helping to protect and enable business continuity", thereby tacitly helping employers to establish that a requirement to be tested is a reasonable and business-relevant request with obvious potential consequences for the employee's job if they refuse, especially assuming that (i) the testing is administered by someone trained and (to cater for religious and other sensitivities) by someone of the same sex if required, and (ii) they are paid at least the National Minimum Wage for the time it takes to do the test and get a result.

The department's guidance recommends Lateral Flow Tests (LFTs) as the way forward, with these requiring very little training to operate and producing a result without the need for laboratory assessment within 30 minutes. It says that pregnancy tests are the best-known form of LFT, so please do check the packet before use. For those paid at or around the National Minimum Wage, remember that the 30 minutes will count as working time if you insist on the test. The guidance recommends a minimum of two tests per employee per week, though you could probably relax that if the employee spent very little time with others. Employers can currently get the test kits free from the government, so the direct cost to the business is in time rather than money.

It is not relevant that testing may not be 100% accurate or effective. Your health and safety duties as employer are to reduce those risks to their lowest practicable level, not to eliminate them. A request for employees to take one of the government-issued tests is the equivalent of requiring them to use safety guards on machines that may otherwise fling out sparks or shrapnel of some sort and injure others.
No one would argue that was not reasonable, even though the employee might be tempted to take a more cavalier attitude on the grounds that the statistical risk is small and the procedure irksome. Given that the tests are free and the official advice is very much in favour, it would seem unlikely that an employer could say that it has done all it could to reduce those risks unless it implements a fairly rigorous testing regime.

In the end, we believe that the weight of informed medical opinion, encouragement from the government and the virulence and potential gravity of COVID-19 not just for the employee in question, but also for colleagues and customers will together tilt the balance of inconvenience between employer and employee off its normal axis. Where the protection of public health against a clear and present danger is concerned, it is our view that the interests of the individual must necessarily be subordinated to those of the majority to a much greater extent than usual. Remember, also, the duty on employees under the Health & Safety at Work Act to cooperate with the reasonable requests of the employer so that it may comply with its own obligations. As a result, and subject to the usual prior procedural requirements if disciplinary action becomes necessary, the dismissal or unpaid suspension of an unvaccinated employee for refusal to take a COVID-19 test could well be fair.

11. What if some of my employees feel commuting puts them at risk or they decline to return on the grounds that they are "vulnerable" but do not provide any evidence in support?

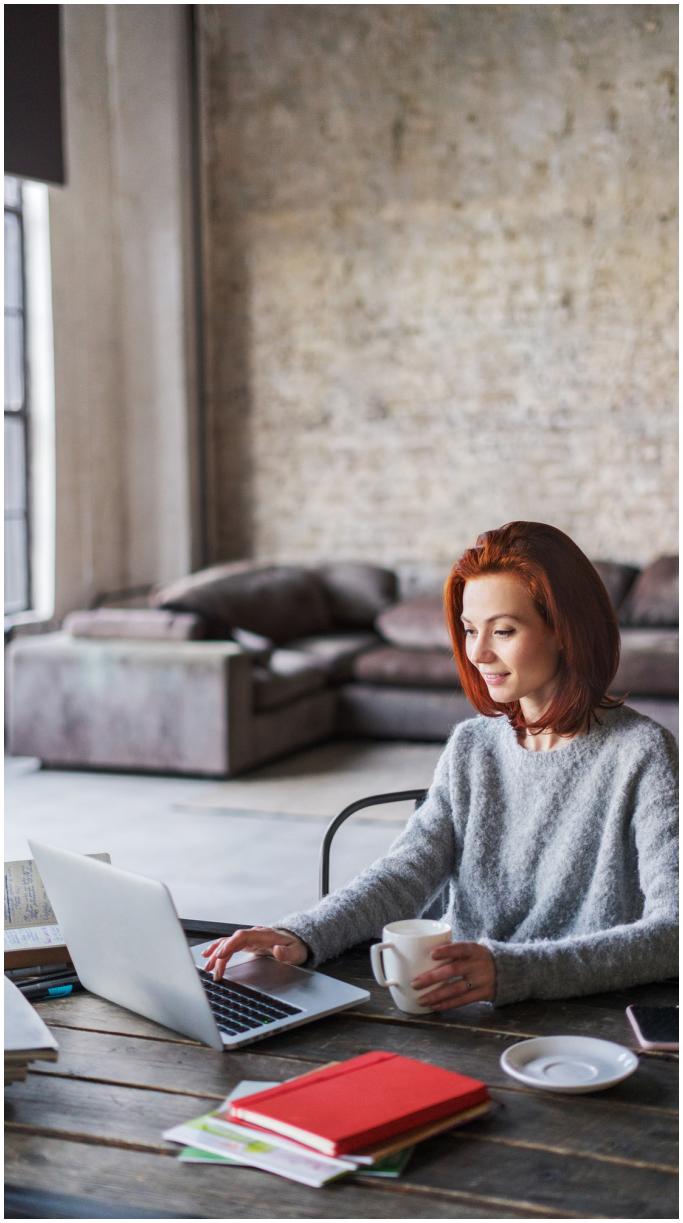
These two questions have their answer in the same basic issue – is it practicable for the employee to work from home, where that is assessed by reference to the eight reasons in s80G(1)(b) Employment Rights Act 1996 for which it is lawful to decline a flexible working request? If it is, that is what they should be allowed to do. Remember that a request to WFH is essentially a flexible working application at heart and that the flexible working regime does not require the employee to have a good, objectively reasonable or even truthful basis for their application. Indeed, as a rule, the employer will be better off not asking why WFH is requested, since that implies that it will be taking the answer into account in its decision. That gets it into some very unattractive value judgements about the respective merits of its employees' reasons, fraught with discrimination risk, where the only legitimate judgement is actually on the strength of its own reasons to say yea or nay (or maybe – nothing wrong with an agreed trial period here, if it is in any doubt).

The converse is also true. If by the nature of your employee's work it is not practicable for them to do it from home, you can and should refuse, and the legitimacy and urgency of their reasons is, again, largely immaterial.

Both those positions must be seen through the prism of government advice to "WFH if you can" until 21 June at the earliest. At present, there is almost certainly a material gap between what counts as "if you can" for these purposes and what would entitle the employer to refuse a flexible working application in more normal times. In particular, "if you can" is a much lower bar for the employee and will entail an employer putting up with some level of adverse impact on customer service, output, quality, etc., which the flexible working regime would not require. Therefore, the hurdle of impracticability that the employer needs to apply in both these circumstances will very likely become easier to get over from June.

That is obviously true not just legally, but also cosmetically. Until June, you are technically flying in the face of government advice. That makes it harder to make a case that the return is necessary, but also the PR consequences if you do insist and the employee becomes ill or dies as a result (or alleged result – mere matters of actual causation will not trouble the jury in the Court of Public Opinion) will be much worse. After June, however, the government will find it hard to maintain the advice to stay off public transport while at the same time encouraging people back to work in otherwise flat-lining city centres. Therefore, from June or thereabouts, while your employee may still be anxious about commuting, that anxiety will no longer have government backing, so their arguments for WFH on that basis will become much weaker.

What about your employee who says they are medically vulnerable but will not provide the evidence? It should be very easy to obtain if they do not have it already. If that is the reason they rely upon, they should sensibly expect that their employer might want to verify it, even if they did not actually need a reason at all to justify a request to continue to WFH. This takes us to a question for another time – is lying to your employer still gross misconduct even though you had no need to do so and it is not just entitled but, in most cases, obliged to ignore it anyway? If, after you have explained your stance, the employee still fails to provide the evidence requested or to return to work, it would be hard to escape the conclusion that dismissal or suspension without pay would be reasonable responses.



12. Do we need a RTW policy?

Yes and no. You do need to approach the many individual questions bound up in the RTW process in a manner that is measured and consistent as far as practicable. Unexplained discrepancies in treatment of employees are fertile ground for grievances, extended absences and sniffy letters from lawyers. However, you also need to recognise, as employer, that individual circumstances require individual consideration, even if not necessarily individual solutions. Therefore, a written "Policy Capital P", which becomes an objective in its own right, can quickly do more harm than good, even if it is notionally stated to be non-contractual.

Any policy you develop will, therefore, need to be elastic in its language, setting out your intended approach only in broad principles. Things to think about for inclusion in such a document might include:

- How you are going to manage the transition from emergency measure to permanence in terms of new contracts, formalised WFH arrangements, hybrid working, revisions to terms, trial periods, etc. By *ad hoc* individual agreement between employee and line manager, or forcing all applications for anything different through your usual central flexible working procedures?
- What will be the appropriate channel for the inevitable employee complaints about your physical COVID-19-secure precautions? Should they go to HR in the first instance, or to facilities?
- What provision do you offer for those who find their first experience for a year of being in a room with anyone other than their family and cat all a bit much to cope with mentally? Is this a matter for HR, your EAP or OH, or do you direct them towards a simple adult chat with their line manager in the first instance?
- What will your stance usually be towards those who decline to return to work on the basis that public transport remains a high-risk environment, or who insist on an unacceptably short day in order to avoid it in rush hour? Disciplinary action? Unpaid suspension? Dismissal? It may be helpful to engage in a little pre-emptive expectation management, indicating that you will not normally accept this as a valid excuse once government guidance to WFH where one can is rescinded.
- How will you decide who comes back and when? If you still have a substantial number of staff on furlough, when will you aim to tell them that they have a future with you or not?
- How far will you (or have you) set out to agree RTO measures with recognised trade unions or staff representatives?

There are few definitively right or wrong answers to any of these questions. Where you do express a view or proposed approach, do not be afraid to revisit it and reissue your policy if experience or external developments in the pandemic (new variants, etc.) prove it mistaken. In uncertain and scary times, your employees will appreciate a clear and timely picture of the company's current thinking on these issues, even if they may then vigorously disagree or seek exceptions from it. The worst thing you can do is leave them in the dark and then make seemingly arbitrary decisions about RTW matters out of the blue and without any relatable framework or structure.

13. Should I incentivise my employees to get vaccinated?

No. This option is not referred to as necessary, or even desirable, in government or Acas guidance on the vaccination process. There are probably three main reasons for this:

- First, denying the incentive to those who are medically unable to get vaccinated (e.g. the immunocompromised) might amount to disability discrimination, and the more meaningful the incentive, the stronger that argument.
- The general view is that people should not need incentivising to do something that is so obviously sensible for both their own health and that of their co-workers and the general public. Even though the Acas and Department of Health guidance does not mention direct incentives, both stress the importance of employers "encouraging" their staff to be vaccinated. Acas refers to the vaccination not being made mandatory "in most cases" but is clearly willing to contemplate the possibility that, in some circumstances, an employer could fairly refuse re-entry to the workplace or even dismiss an employee who refused to be vaccinated without good reason.
- There are good arguments under the UK health and safety legislation that the employee is, in any case, under a direct obligation at law to have the vaccination if the employer requests him/her to do so as part of its own anti-virus precautions (medical exceptions aside).

Although cool on the question of positive incentives, Acas and the Department of Health do suggest that employers should remove obstacles to vaccinations where possible. That would include providing paid time off to be vaccinated, full salary rather than any lesser sick pay amount for the duration of any adverse reaction to the vaccination, and not including vaccine-related absences in your sickness monitoring and intervention processes. The first of those is clearly right, but it would be hard to recommend the second or third as a matter of course, as they are clearly both open to considerable abuse.

If the overall cost of a vaccination incentive programme is to be bearable, the value of the incentive per employee must presumably be relatively limited. If the employee's yes-no decision really turns on such a limited incentive, the reality is that he/she has no good reason for refusing it, and so should be required to undertake it anyway. None of the traditional anti-vax beliefs can be so genuinely held if they are overturned by a little bit of money or an extra half day's holiday.