



BIRMINGHAM LAW SOCIETY

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**Response to the Department for Business, Energy
and Industrial Strategy Consultation**

**Transparency: Flexible working and family related
leave and pay policies**

October 2019



HM Government

1. Transparency: Flexible working and family related leave and pay policies

The consultation is available at: <https://www.gov.uk/government/consultations/good-work-plan-proposals-to-support-families>

The closing date for responses is: 11 October 2019

Please return completed forms to:

Team: Family-related Leave and Pay Team
Department for Business, Energy and Industrial Strategy
Postal address: 1st Floor Spur, 1 Victoria Street, Westminster, London, SE24 0DN

Tel: 020 7215 5000

Email: supportingfamiliesconsultation@beis.gov.uk

Personal / Confidential information

Please be aware that we intend to publish a summary of all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential

Comments: The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective view of its members who are specialist lawyers practising in all aspects of employment law and from all branches of the legal profession.

About You

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	Respondent type
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input checked="" type="checkbox"/>	Other (please describe). Local law society

	If you are an individual, are you:
<input type="checkbox"/>	Employed
<input type="checkbox"/>	Self-employed
<input type="checkbox"/>	Unemployed
<input type="checkbox"/>	Retired
<input type="checkbox"/>	Not looking for work
<input type="checkbox"/>	Other

	If you are an employer, how would you classify your organisation?
<input type="checkbox"/>	Private sector
<input type="checkbox"/>	Public sector
<input type="checkbox"/>	Charity/Voluntary sector
<input type="checkbox"/>	Other (please specify)

Section 1: Publishing family related leave and pay and flexible working policies

If a requirement to publish family-related leave and pay and flexible working policies was introduced, large organisations might be required to provide a link to the relevant policies on their website. As the purpose of the requirement is to achieve greater transparency, we believe that this should be the case whether their offer exceeded the statutory minima or not. Where the offer does not exceed the statutory, a simple statement should suffice.

Question 1

Do you agree that large employers (250+ employees) should publish their family related leave and pay policies on their website?

Strongly agree	<input type="checkbox"/>
Agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee is broadly supportive of such an approach, but it also cautions against the danger of a proliferation of compliance requirements, where the benefits of such requirements are untested. The Committee considers that it is desirable to monitor the effectiveness of any new requirements and, in the long term, only to maintain those requirements that provide a demonstrable benefit.

Question 2:

Do you agree that large employers (250+ employees) should publish their flexible working policies on their website?

Strongly agree	<input type="checkbox"/>
Agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee considers that the merits of any such publication will depend upon the requirements for what the flexible working policies will contain. Please see our answers to questions 5 and 6 below.

Question 3:

Do you agree that transparency of these policies will help employers to recruit and retain staff?

Strongly Agree	<input type="checkbox"/>
Agree	<input type="checkbox"/>
Neither Agree nor disagree	<input checked="" type="checkbox"/>
Disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee considers that, as things stand, there is no evidence either way as to the effectiveness of publishing such policies in helping recruitment and retention of staff. The introduction of such an approach is an opportunity to carry out research for the purposes of shaping further developments in this area. The Committee believes that there are likely to be sectors in which some types of flexible working will be difficult to implement, such as in manufacturing, because the production line requires employees to be present at work at the same time. With the skills shortage, these sectors will need other measures to improve recruitment.

Question 4:

Do you agree that, where the employer has a policy on family related leave and pay which extends the statutory minima, reworking and publishing your internal policy document on a public-facing website would not be a significant or expensive task?

Strongly agree	<input type="checkbox"/>
Agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee agrees that the vast majority of employers either will be able to easily rework an internal policy for publication on a company website, or offer no more than the statutory minimum, which again is not difficult to communicate.

Question 5:

Do you agree that, as for family related leave and pay, reworking and publishing your flexible working policy on a public-facing website would be simple and inexpensive?

Strongly agree	<input type="checkbox"/>
Agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee considers that there is likely to be a disconnect between the information that potential employees are likely to want from a flexible working policy, and the information that such a policy is likely to contain. Currently, many employers have a policy that simply sets out the procedure for applying for flexible working and no more. Many potential employees might find this uninformative. In principle, it would be possible for employers to rewrite their policies so that they include additional information but this would be time consuming, and would also need a significant cultural shift among employers about the role of such policies.

Question 6: How helpful would the following information be if it was held (and viewable) on a central database – for instance the Gender Pay Gap Reporting Portal:

	Very helpful	Quite helpful	Neither helpful nor unhelpful	Not very helpful	Not at all helpful	Don't know
A. Whether flexible working may be available from the start	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B. Approach to place, hours and times of work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
C. Approach to informal flexible working (such as later starts to accommodate health and other appointments)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D. Enhancements to different types of family related leave and pay, for example: <ul style="list-style-type: none"> • Maternity Leave and Pay; • Paternity Leave and Pay; • Adoption Leave and Pay; • Shared Parental Leave and Pay; • parental leave taken in respect of older children; • or, any other contractual enhancements to family related leave and pay. 	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

E. Please provide reasons for your answers.

Comments: The Committee is not sure that the distinction between "formal" and "informal" flexible working is a useful one. Employers often provide flexible working without a formal application but this is not limited to late starts and other temporary arrangements. For example, many employers routinely offer part-time working or home working and a formal application is typically only required where an employee asks for an arrangement that significantly differs from the typical arrangements. It

would be possible in principle for employers to indicate the arrangements that it routinely offers, so long as it is clear that it is not ruling out other options. It would not be in the spirit of the flexible working legislation for employers to say (or for the portal to imply) that certain types of flexible working will never be considered. For this reason, providing information about an "approach to place, hours and times of work" is likely to create a misleading impression of the options for flexible working.

Question 7:

To what extent do you believe that a job applicant's decision on whether to apply for a job depend on the publication of the information mentioned above?

A lot	<input type="checkbox"/>
Somewhat	<input checked="" type="checkbox"/>
Not at all	<input type="checkbox"/>

Please provide reasons for your answers

Comments: It is plausible that some job applicants, especially at the higher end of the market, will find this information helpful. The Committee is sceptical that it will make much difference for low-paid employees, who have little bargaining power in any event. However, as noted above, further testing of its benefits is also desirable.

Section 2: A requirement to report or a voluntary approach?

There are already a number of mandatory reporting regimes in place, including gender pay gap reporting (mandatory for all large businesses, i.e. those with 250+ employees). These provide incentives on businesses to take action to improve their performance, so we are mindful of introducing additional regulation without testing a voluntary approach in the first instance – particularly given the impact the reporting requirement alone appears to be having in raising the profile of these issues.

However, the potential for change to be driven by greater transparency around existing policies should also be weighed against the potential stimulus for change which an action plan might provide. Around 50% of large employers already voluntarily supplement their gender pay gap information with a narrative or an action plan, which sets out the steps they are taking to narrow the gap. It may be that a dynamic action plan is a more effective way of driving cultural change also on this issue.

Question 8:

How effective do you believe a voluntary approach to encourage greater transparency about an organisation's approach to flexible working and family related leave and pay (e.g. through the Gender Pay Gap Reporting Portal) might be in providing information about employers' policies?

Very effective	<input type="checkbox"/>
Fairly effective	<input checked="" type="checkbox"/>
Not very effective	<input type="checkbox"/>
Not at all effective	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer.

Comments: The Committee believes that a voluntary approach is actually more informative to applicants than an approach of compulsion. Simply by choosing to provide this information voluntarily, employers demonstrate that they are serious about family-friendly policies. Where flexible working is difficult to accommodate, employers will be reluctant to say so, for fear of exposing themselves to litigation, and so there is a limit to how informative they will be able to be about their policies.

Question 9: How effective do you believe creating a facility on the Gender Pay Gap Reporting Portal on GOV.UK to record details about an organisation's policies on flexible working and family related leave and pay would be:

	Very effective	Fairly effective	Not very effective	Not at all effective	Don't know
A. To provide a central point of information for employees or prospective employees?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B. To let employers record the information as a part of the annual cycle of Gender Pay Gap Reporting?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please provide reasons for your answer

Comments: If such information is provided, it would be useful to make it available so that it can be read alongside Gender Pay Gap information, to provide more context.

Question 10:

How effective do you believe it might be to encourage employers to set out how they are using greater transparency about their employment policies as part of their gender pay gap action plans?

Very effective	<input type="checkbox"/>
Fairly effective	<input checked="" type="checkbox"/>
Not very effective	<input type="checkbox"/>
Not at all effective	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer

Comments: The Committee considers that this would provide such encouragement if the government adopts a voluntary approach. Many employers would be likely to make use of such transparency in their action plans. However, if compulsion is adopted, it will create the impression that employers are providing transparency only because they are required to do so, rather than because they are serious about trying to tackle the gender pay gap.

Question 11:

Do you agree that it would make sense to enforce a reporting requirement of this kind in the same way as gender pay gap reporting (i.e. a requirement to provide this information as part of the gender pay gap reporting process)?

Strongly agree	<input type="checkbox"/>
Agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please provide reasons for your answer

Comments: The Committee considers that such enforcement would make the information provided less informative to applicants and that a voluntary approach is to be preferred, for all of the reasons stated elsewhere in this response. The other advantage of a voluntary approach is that it allows for the testing of the benefits of such transparency, and allows for the resolution of unforeseen problems arising when employers try to set out their policies.

Section 3: A requirement to say whether jobs may be open to flexible working in an advert

If employers were to be required to say in a job advert whether flexible working was available, there would be a need to strike a balance between what information it was practical to provide, and what a candidate would find helpful.

Question 12:

Thinking about the balance between what it is practical to provide in a short job advert and what is useful to a candidate, which of the following is the best option (please select one)?

A simple statement (such as "Happy to Talk Flexible Working")	<input type="checkbox"/>
A short statement covering the organisation's approach to place, hours and times (e.g. "core hours") of work	<input type="checkbox"/>
A simple statement and a link to a published policy	<input checked="" type="checkbox"/>
A short statement covering the organisation's approach to place, hours and times of work and a link to a published policy	<input type="checkbox"/>
Other	<input type="checkbox"/>

If Other, please set out below

Comments: [Click here to enter text.](#)

Please provide reasons for your answer

Comments: The Committee cautions against an approach where the advert states precisely which forms of flexible working are available and, therefore, by extension, which forms of flexible working are not. This is not consistent with the legislation requiring consideration of all types of flexible working for all roles. It is possible that, even where an employee wants a type of flexible working that the employer has not considered before, it turns out to be possible for the employer to accommodate this.

Question 13: If a requirement was introduced to state in job adverts whether flexible working may be available or not:

A. Who might the enforcement power sit with? Please describe.

Comments: The Committee considers that a separate enforcement body is not required. The information provided in job adverts is something that Employment Tribunals can take into account in considering claims related to flexible working.

B. What should be the process for reporting a breach? Please describe.

Comments: Whilst a claim for breach should sit with the Tribunal it should not be a stand-alone claim but rather be brought within existing flexible working legislation.

C. What should be the penalty for a breach? Please describe.

Comments: The usual penalties for a claim related to flexible working will apply, but the Employment Tribunal will be able to take the contents of the advert into account.

Question 14:

If a requirement to provide a link to your flexible working policy on the gender pay gap reporting portal was introduced, do you agree that it would be helpful also to ask employers to record whether they had advertised jobs as open to flexible working?

Strongly agree	<input type="checkbox"/>
Agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>

Don't know	<input type="checkbox"/>
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Please provide reasons for your answer

Comments: The Committee believes that this information would be useful if the government takes a voluntary approach to advertisements, because applicants would be able to see if the employer is serious about flexible working. Ironically, it would be much less informative if the government were to take an approach of compulsion, because no employer would say that it is not open to flexible working for fear of opening itself up to litigation. Therefore, all employers will say that they are open to flexible working, and applicants would not know what inference to draw from this.

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BEIS we carry out our research on many different topics and consultations, and your views are valuable to us. Would you be happy for us to contact you again from time to time either for research or about other consultations?

Yes

No