

**EXPLANATORY MEMORANDUM TO**  
**THE FLEXIBLE WORKING (AMENDMENT) REGULATIONS 2023**  
**2023 No. 1328**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

**2. Purpose of the instrument**

- 2.1 The Statutory Instrument revokes regulation 3 of the Flexible Working Regulations (2014/1398). Regulation 3 requires an employee to have been continually employed for a period of at least 26 weeks to be entitled to make a flexible working request.
- 2.2 This Statutory Instrument intends to remove this requirement so that an employee is entitled to make a flexible working request from the first day of employment.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

**4. Extent and Territorial Application**

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is that employment law is reserved for Scotland and Wales but devolved to Northern Ireland. It will be for the Northern Ireland Assembly to decide whether similar provisions should apply in Northern Ireland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is that the amendment to the Flexible Working Regulations will therefore extend and apply to 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 Flexible Working (Amendment) Regulations 2023 are compatible with the Convention rights.”

**6. Legislative Context**

- 6.1 The Flexible Working Regulations 2014 are being amended through the powers conferred under the Employment Rights Act (1996).
- 6.2 Currently, an employee may only make a flexible working request after 26 weeks of service.
- 6.3 The Secretary of State makes the Regulations in exercise of the powers conferred by section 80F and section 236(5) of the Employment Rights Act 1996<sup>1</sup>.

---

<sup>1</sup> <https://www.legislation.gov.uk/uksi/2014/1398/made#f00001>

- 6.4 This confers upon the Secretary of State, the power to revoke regulation 3 of the Flexible Working Regulations (2014)
- 6.5 This commitment to making the Right to Request Flexible Working apply from day one of employment (by removing the existing 26-week qualifying period) will bring an estimated 2.2 million more employees in scope of the entitlement.
- 6.6 Alongside this Statutory Instrument, two more changes to legislation will take place:
- 6.7 Commencement Regulations will be made to bring the Employment Relations (Flexible Working) Act 2023 (the 2023 Act) which received Royal Assent on 20 July fully into force. The 2023 Act makes 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 administers 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.
- 6.8 The measures will be supported by a statutory Code of Practice. This Code has been drafted by the Advisory, Conciliation and Arbitration Service (Acas).

## 7. Policy background

### *What is being done and why?*

- 7.1 In 2003, legislation came into force which provided employed parents, and certain other carers, of children under the age of 6 (or disabled children under 18) with 26-weeks of continuous service with their employer a statutory right to request a flexible working arrangement – for example a change to their work location, working hours and/or associated working pattern. This was then extended to carers of adults (2006) and children under 17 (2009).

### *Explanations*

#### What did any law do before the changes to be made by this instrument?

- 7.2 In 2014, as part of the Children and Families Act, the right to request flexible working was extended to all employees with 26 weeks continuous service. The statutory framework is intended to:
- provide employees with access to contractual flexible working;
  - help employees to better reconcile their work and non-work lives; and
  - help employers to secure the business benefits of flexible working.

#### Why is it being changed?

- 7.3 In September 2021, the Government published a Post Implementation Review of the 2014 Flexible Working Regulations. This found that the majority of employees (80%) and employers (96%) report availability of flexible working at their workplace.

What will it now do?

- 7.4 The Review also found that in 83% of workplaces, where a request had been made, the request was granted. However, the Review also found that flexible working take-up has remained broadly flat since 2014 (an all-economy average of 59%) – as well as highlighting differences in reported take-up and availability across sectors, occupations, gender and size of workplace.

**8. European Union Withdrawal and Future Relationship**

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

**9. Consolidation**

- 9.1 This instrument won't amend another instrument and so we don't intend to consolidate the legislation.

**10. Consultation outcome**

- 10.1 A consultation was published in 2019 to make flexible working “the default”, following a 2019 Conservative manifesto commitment. This stated, “*we will encourage flexible working and consult on making it the default unless employers have good reasons not to*”.
- 10.2 This consultation was published in September 2021 and ran until December 2021, receiving over 1,600 responses.
- 10.3 91% of respondents expressed support for the removal of the 26-week qualifying period for the right to request flexible working.
- 10.4 The government published the response in December 2022. This committed to the Flexible Working Act measures outlined in section 6 above as well as committing to making the right to request flexible working a ‘day 1 right’.  
<https://www.gov.uk/government/consultations/making-flexible-working-the-default>

**11. Guidance**

- 11.1 Guidance will be published on gov.uk in January 2024.

**12. Impact**

- 12.1 There is no public expenditure required to fund the changes being introduced through this statutory instrument.
- 12.2 We expect the cost to business from these proposals to come in below £2 million annually, made up of some initial familiarisation costs and ongoing administrative costs.
- 12.3 A key reason why we expect the business cost to be low is that an employer will still have the right to reject flexible working requests on grounds of extra cost. It is therefore assumed that when requests are accepted, the expected benefits outweigh the costs.
- 12.4 The impact on business, charities or voluntary bodies is that they will need to understand the new Regulations and put processes in place to allow employees to request flexible working from the first day of their employment.

12.5 The impact on the public sector is that they will need to understand the new Regulations and put processes in place to allow employees to request flexible working from the first day of their employment.

12.6 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

### **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 this legislation is that once the Regulations come into force the Department will monitor and review the effect of the measures.

14.2 The instrument does not include a statutory review clause. The Minister for Enterprise, Markets and Small Business, Kevin Hollinrake MP, has made the following statement:

“Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that to make provision for a statutory review in these instruments would be disproportionate taking into account the economic impact of the regulatory provision and would, therefore, be inappropriate.”

### **15. Contact**

15.1 Alex McGee at the Department for Business and Trade, Telephone: 07751 748093 or email: labourmarketparticipation@businessandtrade.gov.uk 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.