

# Employment

## Is Flexible Working the Way of the Future?

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### Summary

*This September will see Britain recommence its fight to stop Europe making it difficult for our employees to work more than 48 hours per week. The Working Time Regulations 1998 set out exceptions to the limiting 48-hour working week. Many employers rely on one of the main exceptions within those Regulations and argue that their senior executives work 'autonomously' and can therefore work as many hours as they want. What will happen if this loophole closes? What if Europe refuses to allow us to ask our middle management and junior staff to sign a document in which they 'opt out' of the 48-hour working week? Should employers start to focus less on potential loopholes in the law and more on a business strategy to work smarter? The law currently restricts the right to request flexible working to working parents or those with ageing relatives. Sometimes such a request can stall or, at worst, end careers, resulting in an unnecessary loss of talent. Flexible working can instil loyalty in workers and improve staff morale. Remote working can provide the employer with access to new markets and invariably delivers a better and extended service for clients. A high percentage of office space is not utilised. Transport strikes and the imminent Olympics will take its toll on London's commuters and on the environment. Employers should think imaginatively and consider extending the right to work both flexibly and remotely to more of its employees.*

In a recent speech to the Demos think-tank,<sup>1</sup> Deputy Prime Minister, Nick Clegg, said that the UK Government wanted to examine the option of extending flexible working beyond mothers and fathers. He talked about extending flexible leave to grandparents or close family friends in order to make it "much more common – a cultural norm".

The law currently restricts the right to request flexible working to parents with children under 17 (or 18 if the child is disabled) or to carers. Sometimes such a request can stall or, at worst, end careers. It is often sensible for working parents to mention at interview stage that they want to work flexibly, whether it is working four days a week, asking for a job share partner or leaving on a certain number of days to collect children from school. Refusing these requests can result in an unnecessary loss of talent. An employer is fully entitled to refuse such a request on the basis of a "genuine business ground" such as the negative effect on customer demand, quality or performance or due to the effect on existing staff.

As we have read many times before, flexible working can instil greater loyalty in workers and improve staff morale. This is often seen by management as a "nice" employee relations exercise and something that firmly falls within the remit of human resources. Yet, true change should come from

management. There are many positive business advantages of flexible/remote working and the real-life examples detailed below illustrate the benefits. Now is the time to consider extending the option of flexible working beyond the current legal remit.

Remote working does not mean working from a kitchen table surrounded by noisy children and builders. It means working anywhere that is not the firm's physical office assisted by the use of skype, facetime and video conferencing to discuss matters with colleagues and clients. Employers often argue that they cannot be certain their employees are working hard. I remember one of my former colleagues saying that he likes to have his employees where he can see the working. There is an element of trust in every employment relationship. Unproductive people will find ways to procrastinate irrespective of whether they are remote working or gossiping with colleagues in the office or visiting inappropriate websites. These issues should be managed through appropriate HR procedures.

Remote working provides an employer with access to new markets. If your employee wants to spend a couple of hours after school with their child to assist them with their homework or coach a sports team every Wednesday afternoon or pursue a passion for music by giving regular piano recitals, then why not let them take the afternoon off work and reach your American client market for four hours that evening? This can deliver a better and extended service for clients in our age of amazing technological advancement.

Remote working can also have an enormous benefit in reducing sick days. According to a study of 24,000 IBM staff worldwide, employees who worked flexibly were able to work an additional 19 hours a week before they experienced the same levels of stress as those who did not work flexibly.<sup>2</sup> Reducing current levels of sickness is key for any employer and the positive effects of flexible and remote working could therefore result in a win-win situation.

The upcoming Olympics will bring passion and excitement to London and the whole of the UK as well as its own set of employment challenges. Client demands will not cease whilst Bolt runs the 100-metre race. Some employers plan to ask employees what they want from the Olympics. Treat them as grown ups and reach an understanding that they can, for example, watch certain races if they would want to do so as long as clients, suppliers and colleagues are unaffected and hours worked are at target levels. There are many positive side effects that can arise from the Olympics, such as client and supplier bonding events or a team building event with a communal screen at the office.

Employers are being encouraged by the Department for Transport<sup>3</sup> to manage the impact of an extra one million passengers hitting our busy transport systems over the Olympic fortnight. Staggering hours and working from home are obvious solutions to enable customers and clients to be serviced when they need immediate assistance rather than making them wait for staff to travel an extra hour to reach a desk in an office.

Why stop when Britain's athletes parade (we hope!) their gold medals at the closing ceremony? Instead of returning to business as usual, why not embrace the flexibility in the

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<sup>1</sup> <http://www.demos.co.uk/>; and <http://www.bbc.co.uk/news/uk-politics-1220407>.

<sup>2</sup> <http://www.telegraph.co.uk/health/healthnews/7803246/Home-working-allows-employees-to-clock-up-an-extra-couple-of-days-of-work-a-week.html>.

<sup>3</sup> <http://www.dft.gov.uk/news/press-releases/dft-press-20110803>.

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workplace that might have been inspired by the employment challenges brought about by the Olympics?

Remote working can manage the increasing high percentage of office space that employers fail to utilise. Companies, like BT, allow its staff to vary their hours for a range of different reasons. This has resulted in the need for less office space and BT claims to have saved £500 million.<sup>4</sup> Remote working frees up this space and reduces what is often considered to be “dead commuting time” especially when individuals need to change their mode of transportation a number of times in one journey in order to reach their office.

How about the environmental impact? Twenty two per cent of UK domestic carbon emissions are from traffic.<sup>5</sup> The government is currently considering legislation to reduce parking spaces at work with Nottingham leading the way and imposing a “Workplace Parking Levy”. With the ongoing focus on reducing carbon emission, remote working is a pragmatic solution and is certain to impress employees and shareholders.

The Government has re-commenced the fight to prevent Europe from making it difficult for our employees to work less than 48 hours per week. Trade unions and employer organisations (collectively called “the social partners”) are trying to reach an agreement on ‘working time’ issues by September 2012.

Currently, the UK’s Working Time Regulations 1998 which implement the European Working Time Directive (the “Regulations”) set out permitted exceptions to the prohibition on working more than 48 hours per week. Many employers rely on the commonly used exception that senior executives and senior employees work “autonomously” and as a result they can work as many hours as they want. This exception is used throughout the EU, especially in France and Italy. It is likely that this exemption will be retained but many employment practitioners often query whether some of their clients’ senior employees really do work ‘autonomously’.

<sup>4</sup> [http://www.btconferencing.co.uk/case-studies/the-conference-powered-agile-enterprise\\_en-gb.pdf](http://www.btconferencing.co.uk/case-studies/the-conference-powered-agile-enterprise_en-gb.pdf)

<sup>5</sup> <http://www.greenpeace.org.uk/climate/solutions>.

The main debate in Europe relating to the Regulations is whether or not Europe will allow the UK to continue asking middle management and junior staff to sign a document, often attached to an employment contract, in which they agree to “opt out” of the 48-hour working week. Although it is often hard to exceed the 48-hour working week (as it applies over a rolling 17 week reference period), the fundamental aim of the restriction is to protect workers from the health and safety consequences of overworking.

Even if a worker has agreed to “opt out”, he/she cannot be required to work excessively long hours if this would create a risk to his or her own health and safety. Employers are under a duty to protect their workers’ health and safety and whilst many working time policies seek to place the onus on the employee stating that they should not put their own health and safety at risk, it is for the employer to monitor and manage this issue. Under the Regulations, if an employee agrees to “opt out” of the 48-hour working week then the law currently states that the employer need only retain updated records of the names of those employees.

Rather than rely on this stringent 48-hour working week or lose sleep over the health and safety liabilities that might arise if these hours are exceeded, trade unions are urging employers to focus less on potential loopholes and to consider offering more employees the right to work flexibly and remotely.

Meeting customers, clients and colleagues face-to-face is hard to beat and should always be encouraged.

There may be other perfectly sound business reasons for an employer to reject a request for flexible working including:

- additional cost;
- detrimental impact on quality or performance ; or
- planned structural charges.

However, all employers, whether large or small, should think imaginatively. A strategic business decision that is led by members of management who want to embrace the benefits of ever-changing technology could change the workforce of the future.