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Coronavirus (COVID-19): Flexible working measures for returning to the workplace

Understand the legal and practical considerations that are involved in introducing staggered shifts or working hours

One of the proposed measures for allowing employees to safely return to the workplace is to introduce staggered shifts or hours. This would reduce the likelihood of large numbers of people travelling at peak times and therefore, hopefully, reduce the risk of COVID-19 infection.

Below we've outlined some of legal and practical considerations that are involved in introducing staggered shifts or working hours.

What are staggered shifts or hours?

The [Government defines staggered hours](#) as when 'an employee has different start, finish and break times from other workers.'

A [staggered hours system](#) may allow workers some discretion, within prescribed limits, in fixing the time when they start and finish work. However, once those times have been chosen or agreed with the employer, they remain unchanged, making them different from flexitime working.

How can staggered shifts support a safe and effective return to the workplace?

Staggered shifts or hours can help ease congestion on public transport and traffic at certain peak hours, as well as large groups of people arriving and leaving organisations at

the end of the day. Staggering employees' lunch breaks can also help prevent large groups from gathering in rest areas or in queues at local shops/ lunch providers.

However, such approaches need to be accompanied by social distancing measures and high standards of hygiene and regular cleaning/ disinfecting to help support health and safety at work. You can find more information on this on the [Government website](#).

For workplaces where it is vital that workers work closely together, Defence Secretary Ben Wallace has suggested that PPE and coronavirus testing could be used to make people feel safe (as [reported by the BBC on 4 May](#)). We are awaiting official Government guidance so employers should check the [Government website](#) for the latest information.

What legal rights do employees have surrounding shifts?

Employees have rights arising from their contract which affect working patterns. In addition, there are statutory rights such as those under the working time, flexible working and anti-discrimination legislation. The best approach to take to make changes to employee working arrangements is always to agree those changes with employees. If shift patterns are needed employers should explain all relevant matters, in this case issues and concerns arising from the COVID-19 pandemic, the likely period of the changes (assuming they are temporary), the benefits to the workforce and discuss any employees' concerns.

If employers are planning to make permanent changes to shifts and working hours, they will need to follow the rules governing making contractual changes.

Employers who attempt unilateral changes to employees' contracts without agreement will be in breach of contract. An employer can make a change ('variation') to an employment contract if:

- the employee agrees to the change
- the employee's representatives agree to the change (for example, a trade union).

Such changes could include a change to working hours. If an employee's contract normally involves changing shift patterns, the contract may set out the minimum number of hours that the employee is required to work. Employers may be able to change those shift patterns, provided that the employee is still being asked to work their agreed number of hours and there is no discrimination in the new patterns.

Flexibility clauses

Some contracts contain clauses that purport to allow changes (usually called 'flexibility clauses'). A clause which mentions changing times, hours and days of work encourages employees to think the changes are permissible and may make it easier for employers to make changes. However, not all flexibility clauses give employers a legal ability to make

unilateral changes. Whilst a necessary mobility clause, for example, may be effective, flexibility must always be in accordance with mutual trust and confidence.

It is risky for any employer to simply vary a contract even if there are specific flexibility clauses which seem to give an employer the power to make the change. Employers need to be reasonable in the changes they make in using flexibility clauses and case law suggests that tribunals narrowly interpret what such clauses allow. Employers should also take care not to discriminate against certain individuals or groups of employees. For more information on making a contractual change see the [advice on the Acas website](#).

Employers should also remember the rules governing working hours, flexibility clauses night workers and rest breaks when making any changes (even if temporary) to shifts and working hours. More information is available on our [Working hours and time off work factsheet](#).

Discrimination

As, statistically, women are the main childcare providers, imposition of new working patterns may be indirect discrimination. This occurs when an employer implements a working practice, such as a change to shift patterns, which has a detrimental impact on a particular female employee and women in general as the main carers.

The employer has to be able to objectively justify its practice by showing that it has a legitimate business aim and that it couldn't achieve its aim in a less discriminatory way. Remember that normal discrimination laws apply during the pandemic and so employers should not discriminate in the working patterns they adopt. As a result of government advice, the employer should be able to show a legitimate aim of taking care of employee's health to justify changing working hours but the employer will need to show there was not a better way of achieving that aim. Employers should think about whether the employee has to work that particular shift pattern to achieve the business aim.

Employers need to keep electronic or paper records which justifies its need to change shift patterns in relation to that employee in that particular way. If there is a less discriminatory way of arranging things, then the new shift pattern is likely to be indirect sex discrimination.

How might staggered shifts work in practice?

Staggered shifts or hours should enable staff to continue to operate both effectively and where possible at a safe distance (more than 2 metres) from one another.

The Government guidance suggests that from a practical perspective businesses could consider:

- Splitting staff into teams with alternate days working from home, or splitting across a day and night shift.
- As far as possible, where staff are split into teams, fixing these splits (cohorting), so that where contact is unavoidable, this happens between the same individuals.
- Spreading out standard processes, so that only one team needs to be on the premises to complete a task at a given time.
- Where it is possible to remain 2 metres apart, using signage such as floor markings to facilitate compliance, particularly in the most crowded areas. This includes entry points to buildings, toilets and communal break areas where queues may form.

It would also be helpful to:

- Stagger breaks and lunch breaks
- Avoid the use of hot-desking where possible to reduce the risk of infection
- Position workers facing away from each other where possible, again to reduce the risk of infection.

Good practice: things to consider

Communication

- Clearly explain to employees the rationale behind introducing staggered shifts or hours and how they can help to make them a success.
- Ensure that the business's social distancing measures are effectively communicated to all staff.
- Confirm any agreed changes (even if temporary) to hours or pay in writing.

Ask for feedback, provide support and review

- Ask employees for feedback about how staggered shifts or hours might work best.
- Take people's personal circumstances into consideration when agreeing staggered shifts or hours.
- Get line managers behind the new ways of working and actively supporting employees who are being asked to work in a new way.
- Review your approach to staggered working on a regular basis and make changes based on lessons learnt and feedback.

Ensure high standards of hygiene and social distancing

- Ensure frequent cleaning and disinfecting of objects and surfaces that are touched regularly, using your standard cleaning products and particularly at the end and beginning of shifts.
- Keep doors open wherever possible to reduce the number of things staff need to

touch.

- Consider the use of social distancing marshals or rewards for those complying with social distancing rules.

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