



**Congress submission to the DCEDIY Public Consultation on
Flexible Working**

June 2021

Irish Congress of Trade Unions

31/32 Parnell Square

Dublin 1

www.ictu.ie

Introduction:

Congress welcomes this opportunity to respond to the above consultation on flexible working.

We note that the findings of the consultation will be used to develop a policy framework that is responsive to the changing business environment, promotes better work-life balance and supports labour market participation for parents and carers through family-friendly work practices.

We note that this consultation is being undertaken to seek views from employers, employees and the wider public on:

- the issues that are most important for them in terms of flexible working, the types of flexible working arrangements currently in place and the changes that they wish to see;
- the potential impact of changes in technology, the workplace, the family and society on the types of flexible working arrangements available to, or sought by, employees;
- the changing nature of flexible working arrangements in light of the pandemic;
- the potential obstacles that may exist for small, medium and large employers when facilitating flexible working arrangements for employees as well as the potential administrative impact;
- the success factors that will help the Government and businesses to develop flexible working options that suit employees and employers.

We note that flexible working options may include:

- starting or finishing work at differing times
- working compressed hours
- having access to flexi-time
- being able to work remotely
- access to part-time or shared working options

Workers seeking to balance family and work responsibilities also have access to a range of statutory family leave entitlements. These statutory entitlements are:

- Parental leave which is available for the parents of children under 12 (or 16 if the children have disabilities);
- Maternity leave for a mother at the time of her child's birth;
- Paternity leave for a father before a child is 6 months;
- Parent's leave for a parent within the first two years of a child's life;
- Adoptive leave for a parent when adopting a child;
- Carer's leave for those undertaking caring responsibilities for those who require care.

Finally, we note the questions that you have addressed towards Trade unions and supply our responses below:

1. What is the current position on flexible working arrangements for your members?

Developments in technology have made it possible for many jobs to be performed outside of an employer's premises. However, it took a pandemic to fully awaken us to the potential for remote working.

This year, tens of thousands of businesses moved their staff to work remotely from home to help slow the spread of the coronavirus. For the

vast majority of workers this was their first experience of working from home, and many have expressed an interest to continue remote working on a permanent basis.

Working from home can really improve workers' work-life balance, make them happier and more productive. However, unlike workers across the EU, in the UK and Northern Ireland, Irish workers have no legal right to flexible working arrangements, such as flexi-time, part-time hours, job-share and working from home. Under current law flexible and remote working is solely at the employer's discretion.

The Second Annual National Remote Working Survey¹ published in April 2021 gathered responses from over 6,400 employees examining their experience of remote working one year after lockdown and is a useful barometer of workers views in this regard. The survey found that, among those who could work remotely, 95% were in favour of working remotely on an on-going basis to some extent. The majority of those, 53%, said they would like to work remotely several times a week, 32% said they would like to work fully remotely and 10% several times a month. Those who would like to work fully remotely (32%) has increased substantially from the first national survey conducted by the NUI Galway and the Western Development Commission team in April 2020 when it was 12% in the immediate aftermath of the lockdown.

The overwhelming majority (95%) is a significant increase from the 83% who wanted to continue to work remotely for some or all of the time in the 2020 survey. Conversely, only 5% indicated that they did not wish to

¹ <http://whitakerinstitute.ie/project/remote-working-during-covid-19-irelands-national-survey/>

work remotely to any extent – a drop from 16% who gave that response a year ago. The number of respondents working fully remotely fell from 87% in April 2020 to 75% at the end of April 2021 as there was more of a mix of onsite and remote (20%) in the latest survey.

Interestingly, in the context of work-life balance, 51% of respondents said that they work more hours when they work remotely compared to working onsite while 45% say they work the same hours. It is clear from these results that the appetite for fully remote or hybrid working is the preference of the vast majority of respondents.

Unions reps find that access to flexible and remote working arrangements is difficult, with members waiting weeks and even months for a response from their employer.

Currently only parents returning from parental leave have a statutory right to request flexible working for a set period of time. Under the Parental Leave Act, the employer must respond to the request within four weeks.

The EU Directive on Work-Life Balance will give carers and parents with children up to eight years old a right to request flexible and remote working by 2022. Congress has been to the fore in calling on Government to go beyond the minimum requirements of the Directive and to extend the right to all workers, bringing us into line with other wealthy European countries.

In relation to access to family leaves, our members welcome the availability of the various leaves and the recent improvements in relation to the addition of the 3 extra weeks of parents leave and parents benefit. We also welcome that the period in which the leave can be taken is extended to the first two years after the birth or adoptive placement of a child.

While welcome, it is important to point out that the EU WLB Directive, to be transposed by summer 2022, requires this to rise to 9 weeks.

However, commenting on the fact that 50% of fathers are not availing of the paid two weeks away from work provided by paternity leave, the Minister has expressed his disappointment at the relatively low rate of take up and hinted at the cultural reasons for this. Undoubtedly there are such issues at play but it is also a fact that research widely shows that compensation is key for the uptake of family-related leaves, especially for lower income families and men.

Paternity and Parents' leave are both paid at a rate of €245 per week by the State. A recent spending review by DPER entitled, "Focused Policy Assessment: Paid Parents' Leave Scheme", found that no salary top ups are paid for the new scheme in the public service. It also pointed to survey evidence from Ibec which suggests that fewer companies will offer salary top ups in the private sector. The assessment goes on to state that: "the scheme does not address the existing disparity in leave entitlements or the low uptake rate of paternity leave. As such it is unlikely to support families in the more equal sharing of care responsibilities or address women's underrepresentation in the labour market".

With average weekly net earnings in the private sector over 2.5 times the SIF payment (€642 compared to €245 per week), unless an employer provides a salary-top, and there is no legal requirement on employers to do so, the average family will experience a big drop in their household income if both parents avail of maternity and paternity leave on top of the added expense a new baby brings.

It is also a matter of concern for unions that DPER has signalled no intention to top up the payment for public employees. These are issues that will have to be dealt with as part of the transposition process.

Breastfeeding breaks

Currently, under Irish law, women who are breastfeeding are entitled to time off or a reduction in working hours to breastfeed their baby, up until the child is 26 weeks of age. This time can be used in several different ways:

- You can breastfeed during these breaks if your child is being cared for nearby
- Your childminder can bring your baby to the workplace at your break times
- You can express and store breast milk during these breaks if your employer provides a suitable room for this
- If there are no facilities for breastfeeding or expressing at work, you can reduce your working hours by one hour each day (per eight-hour working day) without loss of pay (e.g. by starting an hour later or leaving an hour earlier)

Provision of these breaks until the child is 26 weeks old is the nationally mandated minimum. The exception is the Civil Service and education

sector where trade unions successfully negotiated an entitlement to lactation breaks for female employees up until their child's 2nd birthday, to bring it into line with Department of Health's best evidence-based recommendations for breastfeeding².

Transposition of the EU Work-Life Balance Directive provide an opportunity to extend the entitlement to lactation breaks until at least the infant's second birthday. This is provided for in an Action of the National Strategy for Women and Girls: Action 2.18 "Extend provision for breastfeeding breaks under employment legislation".

We welcome the recent announcement by Minister O'Gorman that he intends to push to extend breastfeeding breaks for mothers from six months to two years after giving birth. He will do so by seeking to amend the Maternity Protection (Amendment) Act 2004 in order to extend the period where mothers can avail of breastfeeding breaks to a period of two years, or 104 weeks after the birth of the baby.

Carer's Leave

Many carers cannot manage to remain in employment due to caring responsibilities. The EU Directive aims to address this challenge by introducing the "right to carers' leave of five working days per year, per worker". However, no compensation is mandatory for carers' leave. Congress believes that without a payment or an allowance there cannot be an effective use of this right by workers with caring responsibilities.

² <https://www2.hse.ie/babies-and-toddlers/breastfeeding/>

Family carers are the main source of care provision for those in need of care due to a long-term illness, disability or frailty living in the community.

- Approximately 4.1% of the Irish population are carers (CSO 2016).
- 54.6% of carers are in the labour force (CSO, 2016).
- 61% of carers are female.
- An ageing population will mean increased demand for care will soon exceed supply.
- Consequently, balancing work with care obligations will become an increasingly important health, social and economic issue.

While there are existing entitlements in the Carer's Leave Act 2001, Congress requests improved arrangements for carers seeking to reconcile work with caring responsibilities, which would enable them to remain in touch with the labour market to the greatest extent possible. This should include a payment to avoid it remaining an option for the better off only.

The importance of helping family carers to sustain their attachment to the labour force (even if it is on a part-time basis) is beneficial for employers, family carers, the people they care for and wider society. The needs of family carers are very diverse and in order to be effective, flexible working arrangements need to be as varied as possible. There is also a need to increase employers' awareness of rights and entitlements (including carers leave)

The impact of caring on carers' pensions, particularly for women, is also an issue for our affiliates – the current legislation states that none of his or her rights or obligations related to the employment shall be affected

by availing of carer's leave other than the right to remuneration, and superannuation benefits.

The data³ reveal that Ireland has the third highest rate of unpaid work for both women and men, and that the gap between men and women, at 15 hours per week, places Ireland very far down the league table within the EU28.

The current system clearly disadvantages more women than it does men and we would argue that more men might take these forms of leave if the periods out of the workforce could be reckoned for superannuation purposes.

This is obviously a live issue in the context of the ongoing discussion around reform of Article 41.2 of the Constitution. Congress welcomes the recommendations of the Citizen's Assembly on changes to Carers Allowance, respite and pensions for family carers.

Paid domestic violence leave

Congress has previously submitted detailed views on this matter and believes that it will make a considerable contribution in terms of enabling victims of domestic violence to remain in work and also to attend to important matters related to the abuse they experience, including: medical visits, attending and preparing for a number of criminal and civil legal proceedings, counseling for themselves or their children, looking for a new home, relocating, changing children's school, visiting specialist

³ https://www.ihrec.ie/app/uploads/2019/07/Caring-and-Unpaid-Work-in-Ireland_Final.pdf

domestic violence services. Unions have also negotiated workplace policies in this regard, including in Eir, An Post and Danske Bank.

2. Which actions would you like to see introduced by Government to improve the range of flexible working arrangements available to your members?

Congress would like to see the following measures being introduced:

In line with the general Social Dialogue commitments in the PFG we request that trade unions must be consulted and involved in the process of transposing the Directive into national law and to:

- Amend the Parent's Leave and Benefit Act by summer 2022 to give effect to the required increase from 5 weeks to 9 weeks per parent;
- Support all working parents to take family leave and the more equal sharing of care within families, make family benefits be paid as a percentage of earnings.
- Legislate for a right for all workers to request flexible working

In relation to the latter, in the UK, since 2014, a request for flexible and remote working arrangements can only be turned down for one of eight statutory 'business reasons.' However, Congress affiliated unions in Northern Ireland and our sister trade union federation in the UK, the TUC, found the breadth of the eight reasons gives employers an almost unfettered ability to justify a refusal. New guidance to be published by

the UK government's flexible working taskforce in the coming weeks is expected to strengthen flexible working rights. Similarly, from last year, workers in Finland have the right to decide where they work for at least half of their contracted hours and to independently decide on when - the time and the day, they do their work, within agreed limits.

Ireland has long been a laggard on workers' rights to work flexibly. Congress believes that flexible working should become the default position and available to all workers, in all but the most exceptional of circumstances. Importantly, a request must never be refused on any of the nine grounds prohibited under the Equality Act e.g. because of the worker's age or family status, etc.

Before refusing a request, employers must be required to meet with the worker and their representative to discuss options and look for an arrangement that will work for everyone. If the request is ultimately turned down, the right to scrutinise and challenge an employers' reason for rejecting the request must not be optional. Employers must be required to consider appeals to requests. So far as is reasonably practicable, the appeal should *not* be conducted by those involved in the initial rejection of the request. The legislation must also give workers' the right to refer it to the WRC.

It is standard practice in collective agreements on flexible working arrangements that workers can exercise their right to request as soon as they have completed their probation period. However, for many workers flexible and remote working is not just an optional 'nice to have' perk of the job. Access to flexible arrangements is vital to be able to enter employment or remain in the workplace. Congress therefore

recommends that the legislation requires employers to publish flexible and remote working options in job adverts and gives the new postholder the right to take up the advertised flexibility from day one.

Congress believes that flexible working should become the default position. A significant barrier to pay parity is a lack of flexible work arrangements. Restricting opportunities to work flexibly beyond the point of hire, limits people's, mostly women, ability to enter employment or traps them in low-paid, part-time or insecure work as they try to find the flexibility they need to balance work with other aspect of their lives. This perpetuates gender inequalities in the workplace and exacerbates the gender pay gap.

Furthermore, as well as offering benefits to workers across the workforce to achieve a work-life balance, normalising flexible working would be a catalyst for promoting greater gender equality within families by giving both parents greater control over how they share caring.

Giving new postholders the right to take up advertised flexibility from day one of employment would also help to address some of the barriers people with a disability face accessing employment.

This one simple step will increase the talent pool from which employers can recruit, and the diversity of those candidates.

It is not uncommon in other jurisdictions with a statutory right to request flexible working for workers to be limited to one flexi-work request in a set time frame, locking them out from further requests for a period if they are rejected. This is in stark contrast to the flexibility demanded by

employers', with sometimes weekly variations in working hours needing to be accommodated by workers.

Congress also requests Government to:

1. progress a statutory right to paid domestic violence leave;
2. Introduce a legislative right to breastfeeding breaks until a child reaches two years old;
3. Implement the recommendations of the Citizen's Assembly on carers by:
 - Reforming Carers' Allowance by:
 - (a) Increasing the level of the income disregard.
 - (b) Reimbursing the costs associated with caring.
 - (c) Increasing the ceiling on the number of hours in paid work outside the home.
 - (d) Providing access to State employment and training programmes.
 - developing an individualised pension solution for carers to ensure they have an adequate income once they reach retirement age.
 - Improving respite provision for carers by:

- (a) Increasing the level of the Carers' Support Grant in the next Budget and keeping it under review to ensure it keeps pace with other increases in social protection payments.
- (b) Providing adequate access to a range of respite services to meet individual needs.

We also believe that any new system of Carer's Leave should include:

- 10 days' paid carer's leave for all workers
- ensure the notice period required to take leave is proportionate to the amount of leave being taken, with no notice required for leave that is of three days or less
- allow carers to self-certify (for a period of up to 10 days) to take the leave
- pay carer's leave as a percentage of earnings

4. Provide for a statutory annual entitlement of up to 10 days' domestic violence paid leave as per our recent submission)

3. Which actions would you like to see introduced by employers to enable your members to have access to flexible working arrangements?

Congress would like to see a provision inserted in the legislation that employers must have a policy on flexible working which can be inspected by employees and the Workplace Relations Commission. This type of provision is already in use. For example, Section 20 of the Safety, Health and Welfare at Work Act 2005 requires employers to prepare, or cause to be prepared, a written "safety statement" and a

copy of a safety statement, or relevant extract of it, shall be kept available for inspection.

Congress also recommends that all employers be required to publish their flexible working and family related leave policies no matter the size of the organisation on their website. Greater transparency benefits both prospective and existing employees.

The information should be published in a way that is easy to access and understand. One straightforward way of ensuring ease of access for job applicants would be to include a web link to the remote working and other relevant policies in job adverts. For current staff steps could include information being posted on a company intranet, on staff notice boards or included in company newsletters. This information should be emphasised during any induction process and sent to new starters along with employment contract and written statement of terms and conditions. Congress also recommends employers should also be required to send this information to representatives of a recognised trade union.

In addition, Congress recommends the replication of the UK government's flexible working taskforce 'happy to talk flexible working' initiative – a strapline for employers to include in job adverts, on careers website and through any recruitment agencies they use to show they are ready to discuss flexible working arrangements.



Trade unions have been negotiating workplace policies on all of these issues for many years and we would urge employers to enter such negotiations in good faith and to work proactively on the development of policies that enable employees to reconcile work and family life.

It is important to also note that reconciliation policies must not be considered as benefits for women or parents only but rather as a deeper change in employment policies and functioning of businesses, from which all employees, regardless of their gender and family status, as well as employers can benefit. Good work-life balance has a positive impact on the well-being of workers. It can also contribute to achieving major policy goals such as stimulating employment (especially among women and older workers) and sustainable growth; promoting children and youth development; and achieving gender equality.

In relation to remote working, an employer is responsible for providing a working environment that is safe and without risk to their workers' health and wellbeing. This duty of care extends to locations other than the employer's premises, including a worker's home when working remotely.

An employer is also responsible for providing, installing and maintaining the tools workers need to do their job, and any specialised equipment to prevent a work-related injury, such as a suitable desk and chair.

Congress has led the way in highlighting how the current methods for reimbursing expenses are not fit for purpose. Remote workers must not be left to carry the cost of doing business, whether in the form of higher utility bills, the cost of providing and maintain equipment, or the daily desk charge at a digital hub. Congress acknowledges the subsequent

commitment in the National Remote Working Strategy to review the available financial supports for remote workers and their employers, ahead of Budget 2022.

Workers' hard-won rights must be preserved when working remotely. Congress and trade union reps around the country will ensure that any attempt to dilute workers' rights will be vigorously resisted.

4. Are there penalties for employees who access flexible working arrangements?

There are some potential pitfalls to consider:

Danger of feminisation

In our evidence to the Citizens' Assembly, we outlined our concerns that limitations on flexible working rights limits people's, mostly women, ability to enter employment or traps them in low-paid, part-time or insecure work as they try to find the flexibility they need to balance work with caring. This perpetuates gender inequalities in the workplace and exacerbates the gender pay gap. However, limiting this right to carers and parents also risks the expected shift to more flexible working becoming highly feminised, which could have negative consequences for women's career progression. Research from the US shows remote workers are at risk of being overlooked for training and promotional opportunities compared to their office-based colleagues. This is found to happen more frequently when their manager does not work remotely.

Potential abuse of monitoring

Employers do have an entitlement to monitor the activity of the employee to the extent necessary to verify the compliance of labour obligations and duties. Trust is crucial for remote working arrangements to be effective. Employers, remote workers and their office-based colleagues need to trust each other that work will be completed in a timely and effective manner and that productivity does not suffer because of remote working.

Congress is keen to ensure that all monitoring must be necessary, legitimate and proportionate to workers' right to privacy. An employer's ICT policy must clearly make workers aware of any monitoring and must set out why monitoring may take place, the nature of the monitoring, how information will be used and who will have access to it. Covert surveillance is only permitted in extreme cases, such as if there are grounds to suspect criminal activity or serious malpractice, and only for a limited period.

Congress is concerned by the general trend towards the use of AI-powered technologies and software products by employers for a variety of purposes, including candidate selection, performance evaluation (who gets a bonus/ promoted), redundancy decisions etc. AI-driven technology used to monitor employee activity while working from home can count the number of mouse clicks, keystrokes, emails in an hour, record time spent on social media sites, and take photographic 'timecards' every 10 minutes via a webcam. In the recently published EU draft regulations on the use of AI applications AI systems used in employment, worker management, and access to platform work were classed as high-risk.

Employers are required by law to keep a record of the hours worked by all staff. This information includes starting and finishing times, rest breaks, daily breaks and weekly breaks. Trade unions were to the fore in highlighting the blurring of the boundaries between professional and private lives, the need for a right to disconnect and we played an active role in developing the new WRC Code of Practice⁴. Congress is however concerned that some employers will use their obligations under the Organisation of Working Time Act as justification to introduce technology to surveil remote workers beyond regulatory compliance. The power imbalance between workers and employers, especially in non-unionised workplaces, allows management to force the use of invasive monitoring technologies with little resistance - if a worker wants to get or keep a job, they tend to agree to things they wouldn't otherwise be comfortable with. Congress calls for clear guidance around how employers can safely monitor and record remote workers' working time. The mechanisms permitted for use by employers must be proportionate and not breach workers' right to privacy.

Congress further recommends social dialogue on regulating the use of AI in the labour market. Although GDPR contains a number of transparency provisions, they don't help a worker who has been discriminated against by an algorithm. Rights must keep pace with technological change in the new world of work.

⁴ https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf