

EMPLOYMENT

Striking a Balance: *How to handle requests for flexible and remote working*

The eagerly anticipated [Code of Practice for Employers and Employees on the Right to Request Flexible Working and Remote Working](#) (the **Code**) was published on 7 March 2024, bringing the rights to request flexible and remote working finally into effect. The rights are contained in the [Work Life Balance and Miscellaneous Provisions Act 2023](#) (the **Act**).¹

In accordance with the Act, the Code is required to be taken into account in four key areas of remote working requests and, in respect of flexible working requests, employers are required to have regard to the Code in the termination of a flexible working arrangement.

9 MIN READ

¹ Our previous briefings on the Act are available [here](#), [here](#) and [here](#).

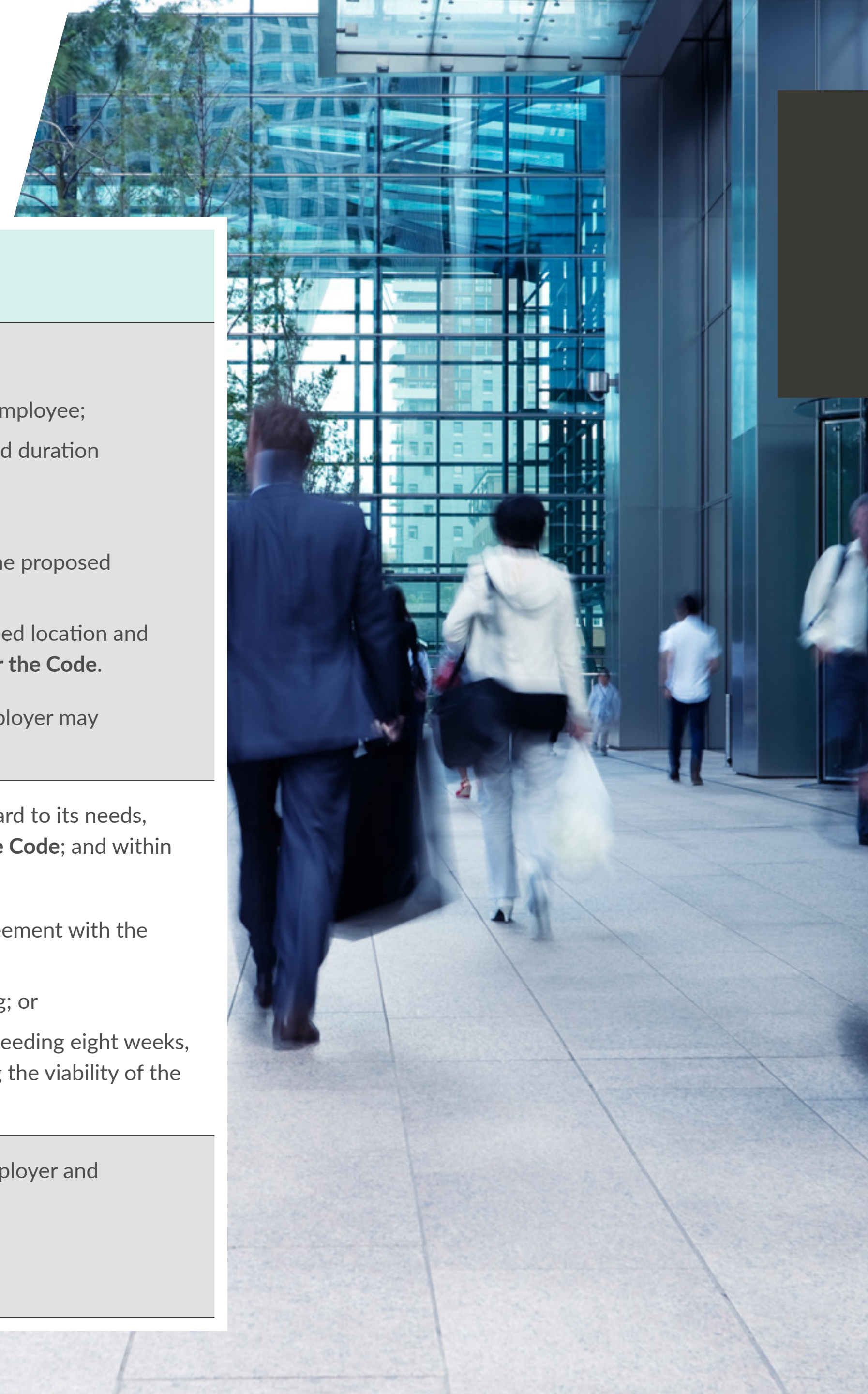
The purpose of the Code is to provide guidance to employers and employees. It also aims to support employers in objective, fair and reasonable decision making. It is worth noting at the outset that there is nothing to prevent employers from having remote or flexible working policies that are more favourable to employees than their rights under the Act.

The statutory procedures in respect of both flexible and remote working requests are similar, but there are some key differences, including the points at which employers are required to have regard to the Code. In the table below we have set out what employers really need to know when it comes to considering both flexible and remote working requests.



	Flexible working	Remote working
What is it?	An employee's working hours or patterns are adjusted, including by way of remote working, flexible working schedules, or reduced working hours.	Some, or all, of the employee's work is carried out at a place other than the employer's place of business, without change to the employee's working hours or duties.
Who can request it?	<p>An employee who is a parent, or acting in loco parentis to a child under 12² (or 16 if the child has a disability or long-term illness) for the purpose of providing care to that child; or</p> <p>An employee who is, or will be, providing personal care or support to their child, spouse, civil partner, cohabitant, parent or grandparent, sibling, or a person residing in their household and who is in need of significant care or support for a serious medical reason.</p>	All employees.
Is there a length of service requirement?	While the employee can make a request from the first day of employment, they must have six months' service before the arrangement commences.	While the employee can make a request from the first day of employment, they must have six months' service before the arrangement commences.

² In the case of adoption, where the child is aged between 10 and 12 on the date of the adoption order, not later than the period of two years from that date.



Flexible working

Remote working

The request process

The request must:

- i. be in writing (may be online) and signed by the employee;
- ii. specify the form of arrangement, the date of commencement and duration requested; and
- iii. be submitted no later than eight weeks before the proposed commencement.

Employees are encouraged to include supporting details, such as a birth certificate in respect of a child, with their application.

An employee must furnish any information the employer may reasonably require.

The request must:

- i. be in writing (may be online) and signed by the employee;
- ii. specify the days, the date of commencement; and duration requested;
- iii. the reasons for the request; and
- iv. be submitted no later than eight weeks before the proposed commencement.

The request must also include details of the proposed location and information on the suitability of the location, **as per the Code**.

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The response process

An employer must consider the request having regard to its needs and those of the employee; and within four weeks either:

- i. approve the request and enter into a signed agreement with the employee;
- ii. refuse the request and provide reasons in writing; or
- iii. extend the four-week period by a period not exceeding eight weeks, where the employer is having difficulty assessing the viability of the request.

An employer must consider the request having regard to its needs, those of the employee **and the requirements of the Code**; and within four weeks either:

- i. approve the request and enter into a signed agreement with the employee;
- ii. refuse the request and provide reasons in writing; or
- iii. extend the four-week period by a period not exceeding eight weeks, where the employer is having difficulty assessing the viability of the request.

Changing the arrangement

Changes may be agreed in writing between the employer and employee.

If an approved arrangement has not yet commenced and the employee becomes ill and unable to undertake the care, it may be postponed.

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Flexible working

Remote working

Early termination by the employer where there is a 'substantial adverse effect' on the business

Prior to a notice of termination, the employer must give notice in writing of its intention to terminate, including the grounds, and give the employee seven days to make representations, which shall be considered by the employer.

If the employer is satisfied that the arrangement is having a substantial adverse effect on the operation of their business, it may terminate the arrangement giving four weeks' notice in writing, including reasons for the termination, having considered its needs, the employee's needs **and the requirements of the Code**.

According to the Code an employer should consider if their reasons for terminating the arrangement are objective, fair and reasonable. The grounds for the decision should be set out in a clear manner and the employer should consider any representations from the employee in an objective, fair and reasonable manner. If an employer decides to proceed with terminating, the parties should consider whether any alternative arrangement may be feasible.

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Early termination by the employee

An employee may request early termination in writing, setting out the reasons and the proposed date. The employer must consider it having regard to its and the employee's needs and respond within four weeks either (i) approving the request; (ii) refusing with reasons; or (iii) proposing an alternative date.

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The Code states that the employer should consider any legal obligations owed by either party. This could be, for example, obligations under health and safety law.



Flexible working

Remote working

Abuse of arrangement

Where an employer has reasonable grounds for believing *the arrangement is not being used for the purpose for which it was approved*, the employer may terminate the arrangement in writing giving reasons and at least seven days' notice.

Where an employer proposes to terminate in this manner the employer must give notice of its intention, including the grounds, and seven days within which the employee may make representations for consideration by the employer.

Where an employer has reasonable grounds for believing *that an employee is not fulfilling all the requirements of their role*, it may terminate the arrangement in writing, giving reasons and at least seven days' notice.

Where an employer proposes to terminate in this manner the employer must give notice of its intention, including the grounds, and seven days within which the employee may make representations for consideration by the employer.

Raising a concern

Internal resolution is encouraged e.g., by way of the grievance procedure.

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Making a complaint

An employee may make a complaint to the WRC within six months of the date of the alleged breach. This period may be extended to 12 months if there is reasonable cause.

The WRC can only examine the process, and not the merits, relating to the employer's decision. This means that, while the WRC will require strict compliance with the procedures outlined in the Act, it cannot substitute its views for those of the employer in its decision making. The WRC may direct the employer to comply with specific sections of the Act and/or award compensation not exceeding *twenty weeks'* remuneration.

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Record keeping

Records of approved arrangements must be kept for three years. Failure to do so could result in a fine of up to €2,500.

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Remote working requests: particular considerations

A particular feature of a remote working request is that it needs to contain information on the suitability of the proposed location. The Code outlines the areas in which information must be included, where relevant, such as the suitability of the workstation, the distance of the proposed remote workplace to the employer's place of business; compliance with privacy, data protection; health and safety; and adequate and secure internet connectivity.

From a health and safety perspective, employers should ensure compliance with the [Health and Safety Authority's guidance and checklist](#).

When considering a remote working request, the Code outlines that an employer may consider both (i) the suitability of the role and (ii) the suitability of the employee in an objective, fair and reasonable manner.



In reviewing whether a role is suitable, the Code provides a list of questions, such as whether any of the duties can be undertaken remotely and whether there are technological solutions to mitigate issues arising from remote working.

In terms of the suitability of the employee, the Code provides some very useful guidance. Questions to consider include:

- Does the employee have the necessary IT skills?
- Do they require minimal supervision?
- Have they met the performance standards and requirements of the role?
- Are they involved in an ongoing disciplinary process or is there a live record of disciplinary action?

- Does the employee understand the need to demonstrate flexibility when required to attend on-site outside of their agreed arrangement in order to meet business needs?
- Has the employee maintained a satisfactory attendance record and complied with the company's attendance policy?
- Does the employee need to be on-site for learning, development or mentoring purposes?
- Does the employee need to be on-site to collaborate with colleagues in a team environment in a face-to-face setting?

The questions in the Code around the suitability of the employee are helpful and reinforce considerations many employers will already have had in mind when considering requests up until now.

A work-life balance policy

It is acknowledged in the Code that workplaces differ and there is no standard policy when it comes to work-life balance (flexible and remote working). While all workplaces will likely be conducive to a certain level of flexible working, it is acknowledged that not all workplaces will be conducive to remote working.

The Code contains guidance on matters to include in a work-life balance (flexible and remote working) policy. Importantly, it suggests the policy outline that requests for flexible or remote working will be agreed on a case-by-case basis and agreeing to or refusing one request will not set a precedent or create a right for another employee. This is a very useful provision in a policy. However, it is vital that employers bear in mind the nine discriminatory grounds e.g. gender, family status, age etc. in the Employment Equality Acts when considering requests and take steps to avoid any direct or indirect discrimination in the way requests are handled.

Other noteworthy aspects in the Code include that the policy may build in a trial period in respect of remote/flexible working arrangements. We expect many employers considering more permanent flexible or remote working requests will insist on a trial period first to ensure that the arrangement works in practice.

Next steps

While a breach of the Code is not an offense per se, adherence to the Code will be taken into account by the WRC (or Labour Court) in the event of a claim in respect of a breach of the Act. This means that in the areas where the employer must have regard to the Code, it is important that employers can demonstrate they have had regard to the best practice guidance contained in the Code.

There are many considerations that go into operating a successful system for managing requests for flexible and remote working and the guidance in the Code is useful. A lot of employers will already have flexible and remote working policies in place. These should now be reviewed to ensure they are in line with the requirements of the Act and take account of the guidance in the Code.



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Resources



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