

Respond to Acas consultation on the predictable working pattern Code of Practice

Use this document to respond to our [consultation on the draft Acas Code of Practice on handling requests for a predictable working pattern](#), if you're not able to use the [online response form](#).

Please email your response to consultations@acas.org.uk

If you need to submit your response in another way, email workplacepolicy@acas.org.uk to request an alternative format.

To make your submission as helpful as possible to Acas, please:

- read the [draft Code](#) and the [consultation document](#) in full before responding
- keep your response concise and to the point – we suggest a limit of 500 words for each question

Consultation closes: 11:59pm on 17 January 2024

Your details

1. Your name (required):

Carole Broughton, Policy Specialist

2. Your email address (required):

policy@homecareassociation.org.uk

3. In what capacity are you responding to this consultation?
(required)

Employer

Employer representative organisation, employer association
or industry association

Trade union or other employee representative organisation

Other organisation – please describe: _____

About your organisation

1. Your organisation's name (required):

Homecare Association Ltd

2. How many people does your organisation employ? Note:
This is the number of people working in the whole organisation.

Sole trader (0 employees)

- 0 to 9
- 10 to 49
- 50 to 249
- More than 250
- Don't know

3. How would you classify your organisation?

- Mainly seeking to make a profit
- A public sector organisation
- A social enterprise
- A charity, advocacy, voluntary or third sector organisation
- Don't know

4. If you are an employer representative organisation, employer association or industry association, approximately how many organisations do you represent?

We are the UK's only membership body exclusively for homecare providers. We currently have c. 2,200 member organisations, representing about one-third of registered regular domiciliary care providers, including nearly all the largest players (who between them employ a high proportion of the regulated homecare workforce) and nearly 1200 SMEs. Our members encompass the full diversity of the regulated market: from small to large; predominantly state-funded to predominantly private-pay funded; generalist to specialist; and from start-ups to mature businesses.

5. If you are a trade union or other employee representative organisation, approximately how many individual members do you represent?

N/A

Consultation questions

We suggest a limit of 500 words for each question.

Question 1 of 12

Should the Code be split into 2 sections: one dedicated to requests to employers, and another to requests to agencies or hirers?

- Yes
- No
- Don't know

Please explain the reasoning for your answer.

It is simpler and clearer for the two types of request to be separated.

Question 2 of 12

Is the term 'worker(s)' and its associated meaning under the 2 separate sections of the Code sufficiently easy to understand?

- Yes
- No
- Don't know

If you answered 'yes' or 'don't know', please explain the reasoning for your answer.

N/A

If you answered 'no', how should the Code differentiate between (a) employees and workers who are not agency workers and (b) agency workers?

We are content with the draft Code's differentiation between (a) employees and workers who are not agency workers and (b) agency workers.

However, we consider it confusing to use the term 'worker(s)' in both Section A and Section B of the draft Code.

Please explain the reasoning for your answer, and where appropriate, please include any suitable alternative terminology that you would like to see.

We suggest it would be clearer if Section B used the term "agency worker (s)", rather than the term 'worker(s)' used in Section A, to avoid any confusion.

Question 3 of 12

Please set out any specific areas of the Code that you feel would benefit from further clarification.

Please include your reasoning and suggestions for improvement.

1.The wording in paragraph 8 is confusing: "To make a statutory request, a worker must have worked for the employer at least once in the month in the period before the 26 weeks leading up to the day of the request". Similar wording is used in paragraphs 46 and 47, so all three paragraphs should be clearer.

2.In relation to agency workers and fixed term contracts, paragraph 48 says: "An assignment with a hirer for 12 months or less is one type of working pattern which lacks predictability. In this case, a worker may make a statutory request to their agency to have an assignment with the same hirer for more than 12 months, provided all the criteria in paragraphs 45 and 46 apply." The concern is this is likely to apply to all agency workers.

3.The draft Code should provide more detail about the circumstances in which it could be said that the working pattern lacks predictability.

We recently conducted a survey of member organisations to help us respond to this consultation, which received 49 responses.

We asked our membership if they agreed that there should be more detail about the circumstances in which it could be said that the working pattern lacks predictability. 82.50% replied yes. 5.0% replied no, and 12.50% were unsure. Some comments from our members were:

'Any guidance needs to be crystal clear and unambiguous - else it will open the floodgates to spurious requests that will not succeed.'

'Definitely - it stands to reason!'

'How can ACAS determine what working patterns are acceptable? We are a care business and operate 24 hours, 7 days a week. Nobody wants to work evenings or weekends. However, we do require everyone to do their fair share. Otherwise, we have no business.'

'We need to know more as we are dealing with people'.

4. If the contract does not set out specific hours but the employee is working the same shifts every week, what would be the impact and would this be a circumstance where there is a lack of predictability in relation to hours of work or times worked? In other words, does this give the worker the right to request a change to a more predictable working pattern?

5. The draft Code says the employer's procedure should set out the information to be included in the request. However, some employers may choose not to have their own written procedure, and simply rely on the legislation and the ACAS Code – this is likely to be the case for the smaller employers. If the Code requires that the employers' procedure set out the information to be included in the requests, it effectively makes it a requirement for employers to have their own procedure or otherwise they will be non-compliant. We don't think such a requirement should be placed on employers.

Question 4 of 12

Does the Foreword to the Code set the right tone in encouraging responsible and fair use of flexible contracts, while summarising the key principles of good practice included in the Code?

- Yes
- No
- Don't know

Please explain the reasoning for your answer.

Our member organisations consider it is important for the draft Code to recognise that some people prefer a zero hours contract or to be an agency worker. They like the freedom to arrange their hours of work to fit around caring and other responsibilities.

However, we are concerned about the use of the term 'flexible contracts' in the draft Code as it is similar to the existing 'flexible working' provisions, which are different in law.

Question 5 of 12

Should the Code include a section on protections from detriment and dismissal?

- Yes
- No
- Don't know

If you answered 'no' or 'don't know', please include your reasoning.

N/A

If you answered 'yes', should the example of ceasing or reducing hours, as a direct response to making a request for a predictable working pattern, be included in the Code? Or should this be included in the non-statutory guidance instead?

- The Code
- The non-statutory guidance
- Neither the Code nor the non-statutory guidance
- Don't know

Please explain your reasoning.

It is clearer if this example is in the Code, as it explains the meaning of 'detriment' in paragraph 42.

If you answered 'yes', please set out any other examples of detriment you would like to see included in either the Code or non-statutory guidance.

We do not have any other examples to add. The examples in paragraph 42 are the most likely scenarios.

Question 6 of 12

What are the advantages and disadvantages of the Code recommending that workers should be allowed to be accompanied at meetings to discuss a request for a predictable working pattern?

Please include your reasoning.

We note there is no statutory requirement for workers to be allowed to be accompanied at meetings to discuss a request for a predictable working pattern under the relevant regulations, so in this respect the draft Code is going beyond what is required in law.

We are concerned that allowing people to be accompanied could delay the process, but can see merit in consistency between different policies and procedures. We note there is a similar provision in the flexible working Code.

In our survey of our member organisations, of those who replied, 36.58% were very unconcerned or unconcerned that workers will be allowed under the draft Code to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union at meetings to discuss a request for a predictable working pattern. Some of the reasons given were:

'I have never had an issue with anyone being accompanied. So long as you are professional and understand the aspect

you are talking about. You can always adjourn to get more information if needed.'

'I would rather employees were well advised than making guesses themselves'.

However, 26.83% of member organisations who responded to our survey were concerned or very concerned by this provision. Some of the reasons given were:

'Complicating these processes only makes it difficult to conduct the business and strain relationships with employees'.

'I am concerned that the trade union official or representative will not have a good enough understanding of how homecare works to be able to add value in these meetings, they will of course support and represent the care worker but will not understand the impact on the vulnerable customers we look after.'

36.59% of members who replied to our survey were neither concerned nor unconcerned, so there wasn't a definitive view on this topic.

Question 7 of 12

What is your opinion on the Code recommending the same categories of companion as those that are allowed in discipline and grievance meetings?

Please include your reasoning.

Subject to our reply in Question 6 above, we can see merit in consistency between different policies and procedures, so procedures for predictable terms applications, flexible working applications and disciplinary and grievance procedures are aligned.

In our sector, which is not unionised to any great extent, it is likely to be a colleague who accompanies the worker, if they decide they wish to be accompanied.

Question 8 of 12

For agency workers, what are the practical considerations around the Code recommending that a companion may be a fellow worker from the agency, hirer or both?

Please include your reasoning.

We consider there may be practical issues concerning the scheduling of meetings, and the hirer having information about the companion and whether they do in fact work for the agency.

If the agency worker, who is the companion, works for another homecare organisation, there could be confidentiality issues.

In our survey, our member organisations expressed concern about logistical challenges with multiple staff unavailable to work, and the impact on capacity and working relationships.

Question 9 of 12

Should the Code recommend that employers, agencies and hirers provide any additional information which is reasonable to help explain why a request has been rejected?

- Yes
- No
- Don't know

Please explain the reasoning for your answer.

We note that providing additional information does not feature in the current flexible working Code, but it does in the draft flexible working Code published on 11 January 2024, so presumably the intention is consistency.

In our member survey, 56.1 % were very concerned or concerned about needing to provide additional information, with 21.95% neither concerned nor unconcerned and only 21.95% unconcerned or very unconcerned. Reasons given were:

'Likely to interfere with confidential client information.'

'Obviously, there is a business reason why predictable terms are difficult to guarantee. I am only concerned about the additional administrative burden this may cause. I am not sure what additional information we are referring to.'

'We have more than enough work without having to make detailed responses to staff about why I cannot insist that a client has a call at a time they do not want, because the care worker wants to work specific hours.'

We therefore conclude that, although providing additional information would be best practice and transparency may assist the employer in the long run, we think there should be no recommendation for this in the Code and it should be up to individual employers to manage it how they feel appropriate.

Question 10 of 12

What are the advantages and disadvantages of the Code stipulating that, wherever possible, an appeal should be handled by a manager not previously involved with a request?

Please include your reasoning.

We note that this provision is not in the current flexible working Code but is in the draft flexible working Code published on 11 January 2024, so presumably the intention is consistency.

We acknowledge that the Employment Tribunal may take whether an appeal is be handled by a manager not previously involved with a request into account when evaluating the fairness of the decision, so it may be sensible for the Code to suggest it.

Our survey of member organisations did reveal that members thought there might be practical issues for smaller organisations. Replies included:

'Small businesses may not have more than 1 line manager to accommodate this.'

'The appeal should be done then higher up. However, if you are a small provider then you have no room to find other people. Again, it is all about the running cost of a business and not everyone understand that.'

'This can be very hard to achieve for small businesses'.

'This is a big distraction for us at this time when we are still trying to stabilise. A small business like ours only has one manager.'

'This will likely place more costs on small providers as it will quickly render HR steps requiring external (expensive) advisers. There may not be many managers able to deal with these types of requests in normal operations.'

One member suggested:

'Using a peer network might be helpful for small organisations'.

Question 11 of 12

Should the Code include a section about the right to request flexible working?

- Yes
- No
- Don't know

If you answered 'no' or 'don't know', please explain the reasoning for your answer.

We did not get a clear answer from our member survey on this point, with concerns about interpretation, and whether it was a good or bad thing to include this section. 30.95% of respondents thought it would be very helpful or helpful, and 21.43% thought it would be unhelpful or very unhelpful, with 33.33% neither helpful or unhelpful and 14.29% undecided.

This indecision from respondents may be because the flexible working provisions are only rarely used in the homecare sector by workers, as around 43% of the domiciliary care workforce in England are employed on zero-hours contracts (source: 2022/23 Skills for Care <https://www.skillsforcare.org.uk/Adult-Social-Care-Workforce-Data/Workforce-intelligence/documents/State-of-the-adult-social-care-sector/Summary-of-domiciliary-care-services-2023.pdf>), and so already have a high degree of flexibility in their work.

However, the legal view we have obtained is that predictable hours requests and flexible working requests are in some respects opposite rights, and so we are unclear why ACAS are trying to cover both sets of rights in the draft Code. This could cause confusion for both workers and employers.

If you answered 'yes', do you believe that paragraphs 14 to 16 in the draft Code provide sufficiently clear guidance on the interaction between the 2 rights?

- Yes
- No
- Don't know

Please explain the reasoning for your answer.

N/A

Question 12 of 12

Please set out any other areas that you feel should be included in the Code or non-statutory guidance.

Please include your reasoning.

We refer to our reply in Question 3.

From comments received from our members, it is implicit that many are worried whether using a 'genuine business reason', under the Employment Rights Act 1996, to reject a request for a predictable working pattern would be sufficient to ensure they can continue to provide care.

The background is:

- [Homecare helps almost a million older and disabled people each year to live safely and well at home, with nearly half a million adults receiving long-term homecare, funded by local authorities in England.](#)
- [850,000 people are employed in homecare across the UK.](#)
- [There are 1.5 million visits to people in their own homes every day across the UK.](#)
- Around 70% of homecare is purchased by the state, either by local authorities or by Integrated Care Boards.

Homecare is commonly purchased in blocks of 'contact time' workers spend providing care, and in many cases literally 'by the minute'. The fees paid to homecare providers therefore omit travel and waiting time, and the costs of any 'bank' staff. Because commissioners frequently pay inadequate rates, providers have little room to improve pay and conditions and

meet extra costs associated with guaranteed hours or fixed term contracts.

Annually, we calculate the minimum amount required to ensure a legally compliant pay rate for careworkers (excluding any enhancements for unsocial hours working), travel time, mileage, and wage-related on-costs, and the minimum cost of running a care business which complies with quality requirements at a financially sustainable level. We call this our Minimum Price for Homecare.

In 2023/4 this amount was £25.95 per hour - source: <https://www.homecareassociation.org.uk/resource/minimum-price-for-homecare-2023-24.html>. Last year the average fee paid by local authorities was £19.01 per hour.

Comments from members included:

'As usual, this "one size fits all" approach by organisations so removed from operational practice and the nuances of the homecare sector, will create an unworkable and financially unsustainable situation for employers. It will result in substantially increasing the cost and reducing the quality of homecare provision (as employers will inevitably have to compromise quality to reduce costs) which is already unaffordable for a great many public and private consumers of care.'

'Homecare care hours are highly fluctuating due to clients going away to hospitals or passing away. Because the

demand side is never predictable any fixed commitments to employees can break the business.'

'Organising the workforce patterns are already extremely difficult to manage as care needs are changing weekly and are unpredictable.'

'The business relies on flexibility not fixed rotas, it would be cataclysmic for the ability of the company to cover client needs.'

'The very nature of providing care work for individuals living at home defines that it is not predictable and hence is impossible to manage.'

'The work is not predictable, so how can our staff working hours be predictable.'

The Code and non-statutory guidance should therefore address these concerns, by providing practical examples of a 'genuine business reason' to reassure employers operating in the homecare sector that they can continue providing care with the degree of flexibility required to meet people's individual care needs.

Members were also concerned that if employers gave guaranteed/fixed hours to staff, if requested, staff would not understand that they then couldn't ask for the same flexibility they are currently accustomed to, when carrying out zero hours work.



Send your response

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