By now, many employees working from home in the lockdown will have made quite firm decisions around how they wish to operate going forward. Some will have decided that there is nothing in their lives quite like their family and, for that reason, that they wish to extend their WFH indefinitely. Others, on probably very similar grounds, will want to get back to the office as a matter of some urgency.

One way or another, we think that employers can expect a significant upswing in flexible working requests starting more or less at the moment that the government relaxes its “WFH if you can” guidance.

Much has been written on the shift in the balance of power around flexible working applications. The pandemic has moved the employer’s usual starting point from “We haven’t done it before, so it probably won’t work, so no”, to “We have done it before and it broadly did work, so, well, what now?”

For present purposes, let us assume that you are not dead-set averse to allowing some further WFH on the part of your employees. This began as absence from the workplace mandated by the government and fear of death in about equal measure, so there may understandably have been little attention paid to the legal or contractual niceties at the outset. Once those external drivers are wound down, however, employers will need to get back to those details pretty promptly and not just let
inertia leave them saddled with arrangements which were adequate in a crisis, but are not those they would have insisted upon in “peacetime”. We strongly recommend starting to formalise your agreed WFH arrangements as soon as possible.

So some practical considerations:

- There is no need to go through the full formal flexible working application process if you can see immediately that the request can be granted. However, if you have any doubts or unresolved questions about whether it will work on a longer-term basis, much better to do so. The discipline of the process will force you to engage with the employee and then to marshal your thoughts in a formal way, making your decision much less vulnerable to later attack. Small cautionary note – the flexible working rules are very procedure-based and it is no defence to an alleged failure to comply with them that it would have made no difference if you had.
- There could be all sorts of legal arguments around whether WFH arrangements imposed by lockdown have already become contractual through custom and practice [Spoiler alert – probably not] but that should not stop you seeking to vary them as part of making them more permanent. Have a hard think – you might have muddled by, perforce, during lockdown but if you were approaching the question from cold without the pandemic context, what extra/different conditions would you have laid down? What requirements to visit the office when it’s open again, what more regular reporting or supervisory obligations, what quality controls or success criteria? As when entering certain other new relationships, it is a case of speak now or forever hold your peace.
- Seeking a formal trial period might seem rather churlish after several months of doing without one, but it is not an unreasonable request if there have been problems over that period or if WFH on an extended basis imposes disciplines or obligations which were not required during lockdown. The more material the new condition(s), the better the case for a trial period.
- Who pays the bills? In some respects, homeworking will increase employees’ bills – power, wi-fi, water, council tax, insurance, etc. But it will cut their costs too – no travelling, no shop-bought lunches or fancy coffees, less dry-cleaning of work clothes, and so on. There is no law here and probably no-one really thought about it when there was no choice in the matter, but (a) especially when WFH is at the employee’s request, the employer has no obligation to meet those extra costs; and (b) whatever you agree, write it down.
- Now that this arrangement is to be more than a short-term expedient, consider your responsibility for the employees’ health and safety. The Health and Safety at Work Act imposes an overall duty to ensure, so far as reasonably practicable, the health and safety of your employees. These obligations apply irrespective of the employee’s working base. Therefore the limitation of section 2(2)(d) to workplaces “under the employer’s control” does not nearly let you off the hook altogether. Your agreement to WFH on an extended basis must consequently be conditional on your being satisfied that the employee can do it without undue risk, physical or mental. Neither party will probably want a physical inspection of his home office at this time, but you could do much worse than require him to complete and return one of your usual workplace risk assessment forms and to confirm, as part of his written WFH agreement, that he is content with his
working environment. It is not the employer’s obligation to stump up for special
desks or chairs for home working (except potentially where it is a reasonable
adjustment). If you do so anyway, then ensure that your WFH agreement
records this plus the employee’s obligations to look after the kit you provide
and return it to you on the ending of the arrangement.

• Easy to say, maybe, but don’t agree to flexible working requests just for the
sake of a quiet life. It is possible to unwind those which prove unsuccessful in
practice, but usually only with a great deal of reciprocal ill-will and finger-
pointing as to whose fault it is that it didn’t work. If it is your considered view
(i.e. after proper consultation through the formal flexible working application
process) that the arrangement sought by the employee won’t work longer term
even though nothing actually catastrophic happened over the lockdown, don’t
grant it. All you have to do, he said lightly, is explain in as much detail as you
can why what was sort of OK for a few months when you had no choice would not
be viable longer term. If you find yourself unable to do so, that is probably a
sign that you should grant it.

• But, of course, there is a but. First, where the WFH application is based on a
disability, remember the need to make reasonable adjustments, meaning a level
of obligation on you to find a way to make it work which goes beyond what
would normally apply. Second, more generally, bear in mind the possibility that
in the short term the Tribunals will consider at some more or less subconscious
level that employers have an obligation not to place the whole burden of coming
successfully back to work upon their employees. If we assume that most
litigated WFH issues will be around mere degrees of inefficiency rather than its
clearly being a non-starter, the ET may well expect the employer to put up with
arrangements which cause it some pain too, not just the employee.

• How to start that conversation – wait for the employee to ask for WFH on a full
or part time basis, or proactively contact all those currently working from home
(or on furlough, though their case will be weaker) and ask about their
intentions? The problem with the former is that you won’t know about who
wants what until the point where you expected them all back in the office, and
that the status quo (their being at home) for once favours the employee, not the
employer. The issue with the latter, that you may lead people to believe that
they have options you may not be able to offer. There is again no law here, but
it may be that the position can be flushed out gradually if you start an early
process of communications with your staff about what you are doing to keep
them safe in the office and when you are thinking of calling them back. The
longer the notice you can give, the greater the chance that they will reach out
to you in time enough that you can deal with their application before their
intended return date. Keep in mind that the 3 month period often linked to the
flexible working process is a maximum, not a minimum – there is no reason why
you cannot deal with an application within just a few weeks if you wish.