

# Scottish Procurement

## Scottish Procurement Policy Note

SPPN 6/2021

Date 24 September 2021



Scottish Government  
Riaghaltas na h-Alba  
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## Implementation of Fair Work First in Scottish Public Procurement: UPDATE

### Purpose

1. Fair Work First has been expanded from 5 elements to 7 elements. This Scottish Procurement Policy Note (SPPN) explains the change and how it can be implemented in procurement processes.
2. This policy note supersedes advice contained in SPPN 3/2021 – Implementation of Fair Work First in Scottish Public Procurement, which was published on 15 March 2021, and has now been withdrawn.
3. SPPN 3/2021 advised public bodies to implement Fair Work First in new procurement processes from 1 April 2021. Since then, Ministers have announced the expansion of Fair Work First to include 2 new elements. This expansion is in response to challenges faced in the labour market. The new elements seek **to promote flexible and family friendly working practices** and **oppose the use of fire and rehire practices**.
4. Ministers wrote to public sector leaders on 10 September 2021 setting out their expectations for public bodies to lead the way and to start to implement the expanded Fair Work First criteria through their employment practices, relevant grants funding and public contracts.
5. Public bodies are now advised to start an incremental approach to implementing the expanded Fair Work First in new procurement processes from 31 October 2021, with a view to having fully developed internal procedures so that Fair Work First is incorporated in all relevant procurement processes in financial year 2022/23, in line with the ask of your sector in the letters of 10 September.
6. The content of this SPPN is not legal advice and should not be construed as such. Public bodies are advised to seek their own legal advice in relation to any questions and issues they may have.

### Key Points

- Fair Work is central to achieving the Scottish Government’s priority for sustainable and inclusive growth, and as we transition out of the COVID-19 pandemic and into a period of economic recovery and renewal, Fair Work is more important than ever and must be at the heart of employment practices, funding and procurements.
- In August 2021 Ministers announced the expansion of Fair Work First to include two new elements designed to tackle specific labour market issues.
- Fair Work First asks businesses bidding for a public contract to commit to adopting the following:
  - appropriate channels for effective voice, such as trade union recognition;
  - investment in workforce development;
  - no inappropriate use of zero hours contracts;
  - action to tackle the gender pay gap and create a more diverse and inclusive workplace;
  - providing fair pay for workers (for example, [payment of the real Living Wage](#));
  - offer flexible and family friendly working practices for all workers from day one of employment; and
  - oppose the use of fire and rehire practices.
- This policy note sets out Fair Work First and how public bodies should apply it in procurement processes. Annex A contains an updated example Fair Work First criterion that can be used in relevant procurement processes to be evaluated alongside other relevant criteria. This question replaces the example criterion contained in [Statutory Guidance](#) and SPPN 3/2021.
- The existing suite of Fair Work in Procurement guidance, including the [Statutory Guidance](#) and [Best Practice Guidance](#) and the [Toolkit](#), are still relevant and will be updated to reflect the focus on Fair Work First.

### **Applying Fair Work First**

7. Scottish public bodies have been addressing Fair Work in procurement since the introduction of [Statutory Guidance](#) in October 2015.
8. Public bodies should apply the expanded Fair Work First criteria in all procurement processes, where relevant and proportionate to do so. Fair Work First will be relevant where the way the workforce are engaged will impact on the way the contract is performed. This will be particularly relevant in service and works contracts, where the workforce make a significant contribution to the way the contract is delivered. In goods contracts Fair Work First may also be relevant.

### **Evaluating Fair Work First**

9. Those wishing to bid for public contracts are expected to commit to adopting Fair Work First in their performance of the contract. It is important to recognise that the way in which each bidder adopts Fair Work First will differ on a case-by-case basis.
10. When evaluating a bidder's response, consideration should be given to the bidder's context and evaluators should be mindful that responses from bidders will vary. Bidders will adopt different policies and practices to implement Fair Work First. Factors which can influence a bidder's approach to adopting Fair Work First can include, but are not limited to, the bidder's size, its status, the sector it operates in and the contract which it is bidding for. Evaluators must take into account the complete package of practices a bidder offers in their commitment to adopting Fair Work First, and the impact that this complete package can have on the way the contract is performed.
11. Updated [Fair Work First Guidance](#) has been published to support the implementation of Fair Work First. The guidance supports those bidding for, and those awarding, public contracts. The guidance includes good practice examples of what each of the Fair Work First elements mean in practice, helping to guide organisations in their approach. The examples are not prescriptive nor exhaustive and have been extracted in Annex B.

### **Monitoring Fair Work First in procurement**

12. As part of the contract management and monitoring process, contractors may be asked to provide evidence that they are adopting Fair Work First, in line with their tender response.
13. In addition, and in line with the updated [Fair Work First Guidance](#), contractors that have committed to adopting Fair Work First in the delivery of the contract should be asked to include a short statement on their own website highlighting their commitment to Fair Work First for those workers engaged in the delivery of the contract. The statement should be agreed jointly with an appropriate workplace representative.
14. For 2021/22 and 2022/23 annual reporting requirements, public bodies are reminded to collect information and establish monitoring arrangements to enable the reporting of Fair Work First within regulated procurements, see [SPPN 4/2021](#).

### **Action required**

15. Public bodies are advised to start an incremental approach to implementing the expanded Fair Work First in new procurement processes from 31 October 2021, with a view to having fully developed internal procedures so that Fair Work First is incorporated in all relevant procurement processes in financial year 2022/23, in line with the ask of your sector in the letters of 10 September.

## **Dissemination**

16. Please bring this SPPN to the attention of all relevant staff, this can include customers, end-users of a procurement and other relevant stakeholders who may have an impact over the decisions made in a procurement.

## **Further information**

17. For further information about sources of support and guidance please see Annex C.

## **Contact**

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## Fair Work First – Example Invitation to Tender question

**Note: the contents, and inclusion, of this example Fair Work First question should be considered on a case by case basis and be adapted to take account of your organisation, the particular circumstances surrounding the goods, works or services being procured and to reflect how Fair Work First is relevant to the subject matter of the contract**

The Scottish Public Sector is committed to the delivery of high quality public services, and recognises that this is critically dependent on a workforce which is well-rewarded, well-motivated, well-led, has access to appropriate opportunities for training and development, is diverse and inclusive, and can influence decision making. These factors are also important for workforce recruitment and retention, and thus continuity of service delivery.

Public bodies in Scotland are committed to applying [Fair Work First](#) in their own organisation and in publicly funded supply chains.

[Fair Work First](#) is the Scottish Government's policy for driving good quality and fair work in Scotland. Through this approach, the Scottish Government, and its public sector partners, are asking bidders to describe how they are committed to adopting Fair Work First:

- appropriate channels for effective voice, such as trade union recognition;
- investment in workforce development;
- no inappropriate use of zero hours contracts;
- action to tackle the gender pay gap and create a more diverse and inclusive workplace;
- providing fair pay for workers (for example, [payment of the real Living Wage](#));
- offer flexible and family friendly working practices for all workers from day one of employment; and
- oppose the use of fire and rehire practices.

In order to ensure the highest standards of service quality we expect suppliers to commit to adopting Fair Work First in the delivery of this contract as part of a fair and equitable employment and reward package as a route to progressing towards wider fair work practices set out in the [Fair Work Framework](#).

### ***Fair Work First (xx%)***

**Q** - Please describe and demonstrate how you will commit to adopting [Fair Work First](#) for workers (including any agency or sub-contractor workers) engaged in the delivery of this contract. This should include current and planned actions that show how you will embed these practices during the lifetime of this contract. Answers should include tangible and measurable examples and should also describe how you will report on, and demonstrate progress, to the contracting authority during the lifetime of the contract.

Good answers will reassure evaluators that your company is committed to adopting [Fair Work First](#) and to progressing towards wider fair work practices set out in the [Fair Work Framework](#) for the workers engaged in the delivery of this contract and those in the supply chain working on this contract.

Answers need not be constrained to, or be reflective of, any examples given alongside this question.

**Note : Questions can**

- *identify any examples of how Fair Work First is relevant to the contract, for example, investing in workforce development through specifically focused health and safety training if relevant to a particular construction contract. See [the Fair Work First Guidance](#) for further examples*
- *identify any wider fair work practices that might be particularly specific and relevant to the contract. See the [Fair Work Framework](#).*

## FAIR WORK FIRST: WHAT IT MEANS IN PRACTICE

[Fair Work First Guidance](#) was published on 24 September 2021, to support its implementation. The guidance supports those bidding for and those awarding public contracts and it provides good practice examples of what each of the 7 elements of Fair Work First mean, in practice, helping to guide organisations in their approach.

The examples below, have been extracted from this guidance and are neither prescriptive, nor exhaustive.

In considering how Fair Work First can be applied in relation to those workers involved in delivering a public contract, account should be taken of an organisation's context. This will include the type of organisation, its size and sector, as well as how much progress has already been made in adopting fairer work practices. The approach should be progressive, relevant and proportionate.

### Appropriate channels for effective voice, such as trade union recognition

#### What This Means

Effective voice is much more than having a communication channel available within an organisation. It requires a safe environment where dialogue and challenge are central to the organisational culture, are dealt with constructively, and where worker views are sought out, listened to and acted upon, and can make a difference.

Effective voice requires workers, employers and trade unions or worker representative groups to work in partnership to make sure the right decisions are made to ensure workers are treated fairly and equitably. The co-determination of working practices is key to delivering all of the dimensions of Fair Work effectively.

#### Outcomes

Effective voice channels improve information sharing and problem solving, encourage innovation, support cross-learning and can resolve conflict. Effective voice through trade unions can lead to the development of effective HR policy in relation to pay, working time, holiday arrangements, training, health and safety and flexible working that delivers positive outcomes for workers and for employers. While recognising that systems of collective bargaining differ widely internationally, there is evidence<sup>1</sup> that countries with higher rates of trade union membership and collective bargaining coverage experience high employment rates, strong productivity growth and rate well on international indices of competitiveness and innovation.

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<sup>1</sup> Bryson, A and Forth, J (2015) 'The UK's Productivity Puzzle' <https://www.niesr.ac.uk/publications/uks-productivity-puzzle-1>  
OECD (2018), 'Good Jobs For All In A Changing World Of Work: The OECD Jobs Strategy' <https://www.oecd.org/mcm/documents/C-MIN-2018-7-EN.pdf>



## **Good practice examples**

### **Unions**

- Involving trade union/employee representatives in key governance and decision-making structures.
- Recognising trade unions for the purpose of collective bargaining and encouraging membership, where this is the workforce's preferred route, and providing appropriate facility time for supporting regular engagement between union/s and members.
- Constructive dialogue between the employer, workers and where appropriate a relevant trade union/s to address workplace issues or disputes, e.g. absence management, grievance, health & safety.

### **Structures and surveys**

- Regular surveys are carried out to understand worker views, including how well they feel effective voice is facilitated in the organisation, and are involved in agreeing and progressing improvement action.
- Formal and informal arrangements are in place through which meaningful individual and collective dialogue take place, including one-to-ones between workers and management, appraisal/feedback processes, team/organisation meetings;
- Appropriate collective consultation and a clear route for resolving issues at both individual and collective levels, such as through a grievance or collective disputes procedure.
- The organisation promotes a strong culture of openness and transparency and encourages acceptance of different viewpoints.

### **Interpersonal**

- Regular supportive contact is offered through one-to-one conversations with managers.
- Workers' experiences are used to influence organisational policy and practice, e.g. how their terms & conditions affect them and any barriers women and minority ethnic and disabled people may be experiencing.
- Worker representation on boards is sought and welcomed.

### **Conflict Resolution**

- Dealing with issues/concerns which have been formally raised fairly in a timely and constructive manner and which promotes confidence that, whatever the outcome, fair processes have supported fair resolution.
- Appropriate measures are in place to support dignity in the workplace and implement zero tolerance of workplace bullying and other forms of abuse and harassment.

## Investment in workforce development

### What This Means

Effective workforce development involves employers providing opportunities for their staff at all levels of the organisation and should be a shared responsibility and shared commitment between the employer and workers. Everyone should be able to engage in lifelong learning.

### Outcomes

Organisations that invest in the skills of their workforce can generally expect their workers to add more value, provide a better service, [achieve higher levels of productivity](#) and be more resilient and responsive to change.

Talent management is crucial, even when labour markets are in flux. Talented job seekers are more likely to apply for roles in organisations that are committed to developing their people for current and future roles. Fair Work should therefore be built into an employer's recruitment and retention processes.

Investment in workforce development can also build a more engaged and fulfilled staff; and equal access to training is important in advancing equality at work and closing pay gaps. When people can continue to learn and develop, and use their skills and talents to add value, they gain a greater sense of control over their work and scope to make a difference. This helps build their confidence and self-belief, improving individual and organisational wellbeing.

### Good practice examples

- Learning & development is integrated in the organisation's strategic planning and workers and management jointly identify development needs and priorities, ensuring both individual and organisational needs are met.
- Regular equality and diversity training is provided for all staff.
- Learning & development opportunities are provided, and regularly reviewed, to help build the organisation's resilience and responsiveness to change.
- Managers have development discussions with individuals and teams and prioritise this as part of operational activity.
- Workforce Development Plans and Succession Management Plans are in place.
- Formal and informal learning is offered across the workforce, relating to people's particular role and wider development.
- The organisation is committed to providing [apprenticeships](#).
- The organisation is committed to supporting the [Young Person's Guarantee](#).
- Staff are supported to keep their professional qualifications up-to-date.
- The organisation has an appropriate charter mark achievement such as [IiP](#) or [EFQM](#).
- The organisation invests in and utilises the skills and knowledge of union equality, learning and other workplace representatives and resources.
- Constructive engagement with union learning reps and Scottish Union Learning activities.

- Carbon literacy training is provided for all staff.

## No inappropriate use of zero-hours contracts

### What this means

Although there is no legal definition of a zero-hours contract, in the context of Fair Work, such a contract is one which does not guarantee any work to the individual and does not set out a minimum number of hours (whether ongoing or for a set period).

An employer is likely to be using a zero-hours contract inappropriately if:

- it offers a worker a regular pattern of work or regular number of hours but offer only a casual/zero-hours contract;
- a worker has had no say in the zero-hours contract and actually *wants* a contract of employment guaranteeing a minimum number of hours;
- it puts pressure on a worker to accept the terms of a zero-hours contract (where challenged) in order to keep their job;
- there is an expectation that workers will accept all hours offered but no reciprocal expectation that the employer will guarantee hours of work.

It is only right that workers are in jobs that can provide secure, consistent contracts and pay, at least, a real Living Wage. However, in addition to payment of the real Living Wage, the number and frequency work hours is important. That is why The Scottish Living Hours Accreditation Scheme has been launched, which recognises that in addition to payment of the real Living Wage, the number and frequency work hours are critical to tackling in-work poverty.

Those employers using zero-hours contracts should be able to credibly explain their exceptional circumstance which leads to them using such contracts and the steps they are taking to review their business model to eliminate these circumstances.

### Outcomes

All workers should be able to plan for their work and life, to know when and for how long they will be required to work, and how much they can expect to earn from week to week. This is key to reducing in-work poverty, which disproportionately affects women. It can also alleviate uncertainty, anxiety and stress, helping to support workers' positive mental health and wellbeing.

As well as being the best option for individuals, the use of secure contracts can benefit the employer. For example, the employer is likely to be regarded as being fair and an employer of choice, which can help with recruitment and retention. Equally, a worker who has a secure contract is likely to be more committed to the organisation and its objectives, which can boost their motivation and productivity.

### Good practice examples

- All staff are employed on open-ended or fixed term contracts with confirmed hours and work pattern.

- All staff have a contract which accurately reflects the hours worked, guarantees a fair minimum number of hours per week and does not involve compulsory overtime.
- Staff get reasonable notice of shifts – at least 4 weeks ahead of time, and are paid for cancelled shifts within this period.
- Core and flexible staff resources are reviewed at least annually to determine if any staff on a zero-hours or minimum-hours contract can be moved to a permanent or fixed-term contract with a fixed number of hours and/or a regular pattern.
- Zero-hours contracts are not used to the detriment of workers with protected characteristics and where this is happening, the organisation is taking remedial action.
- Zero-hours contracts are not used to fill actual longer-term vacancies.
- There is a clear, published policy and process to enable someone to request a move from a zero-hour contract with guaranteed and set hours.
- Gained or working to gain Living Hours Accreditation.

## Action to tackle the gender pay gap and create a more diverse and inclusive workplace

### What this means

Fair Work expects employers to go beyond their legal obligations under the [Equality Act 2010](#), enhancing the protections for workers on the basis of their [age](#), [disability](#), [gender reassignment](#), [marriage and civil partnership](#), [pregnancy and maternity](#), [race](#), [religion and belief](#), [sex](#), and, [sexual orientation](#).

The [gender pay gap](#) exists because women earn significantly less than men over their careers. As women are still regarded as the primary care giver, their work choices can be limited to typically lower-paid and part-time roles. This also limits their opportunities to progress in the same way men can, which dilutes diversity at senior management levels. The [Close your pay gap toolkit](#) provides a range of guidance and advice to help employers calculate their gender pay gap and identify actions to reduce it.

Employment can play a major part in addressing racial inequality. The gap in employment rate for the minority ethnic population in Scotland is consistently and persistently high. Through fair working practice, minority ethnic workers will be able to access and sustain employment commensurate with their skills, experience and/or employment goals and in working environments that are diverse and inclusive. Employers should use the [Minority Ethnic Recruitment Toolkit](#) to improve the diversity of their workforce by recruiting more people from minority ethnic backgrounds.

Disabled people also experience discrimination and a lack of access to opportunity. We need to ensure our workplaces are not designed or operating in ways that can create barriers and exclude disabled people. Fair and equal access, and the provision of appropriate support, can greatly improve disabled people's chances,

enabling access to jobs, job retention and career progression. Information about employment issues for disabled people is available from Inclusion Scotland through [We Can Work](#) and from [Scottish Union of Supported Employment \(SUSE\)](#).

Flexible working options are also of huge importance in supporting progression in employment for all of these groups, and you may wish to refer to the advice in family friendly and flexible working practices criteria section of this guidance for examples of good practices, and the benefits to employers and workers in adopting such practices.

## **Outcomes**

By taking action on the gender pay gap and to improve diversity and inclusion, an employer can tap into a rich source of available talent and potential. This makes good business sense and enables people to build a career now and for the future. It can also highlight current practice and areas for change and intervention, helping to create a culture of equality and diversity in the workplace and benefiting workers and employers alike, such as:

### **For employers**

- Increasing diversity and the gender balance in leadership roles leads to better decision making, improved performance and higher profitability across the organisation.
- Positive relationships and diverse teams can generate creativity and innovation, helping to improve productivity, profits and business growth.
- Workforce diversity helps organisations to better understand and meet the needs of a diverse customer base; this can give them a competitive advantage in attracting a wider pool of customers who see themselves reflected in the workforce composition.

### **For workers**

- Simple improvements to the workplace environment and practice convey a positive message about the organisational culture employers wish to create, and help ensure workers feel supported and valued.
- Workers' mental health and wellbeing can improve if their employer introduces practices that support a good work-life balance or systems to tackle bullying and harassment.
- The importance and value of cultural diversity can be improved through equality and diversity training and other positive action.

### **Good practice examples**

- Recruitment, retention and promotion processes prevent bias and barriers, e.g. 'blind' recruitment; providing any additional support/adjustments at interviews; diversity in interview panels; exit interviews are used to understand why a person is leaving.
- Workers have opportunities to influence the organisation's approach to workplace equality, including by sharing their own experiences.
- The organisation gathers data to understand its workforce diversity and has a plan in place to address under-representation.

- Governance structures are gender balanced and the organisation is working to ensure parity for minority ethnic, disabled and younger people.
- Workplace adjustments are made for disabled staff who need it, e.g. Access to Work.
- Flexible working is encouraged across the organisation, subject to business need.
- [Enhanced maternity, parental and adoption leave](#) and pay are available for all staff, and staff are supported to return to work through keep in touch days and refresher courses.
- Everyone has equal access to appropriate learning & development opportunities.
- All staff have opportunities to discuss their support needs with management.
- There are clear career pathways for women, with support for those returning to work after a career break and to help minority ethnic, disabled and older workers to progress.
- The organisation is a recognised [Carer Positive](#) employer.
- Employers are able to provide safe spaces for workers to express their concerns and raise issues and where workers are confident that their concerns are dealt with appropriately by trained personnel.
- Employers promote and support mentally healthy workplaces where mental health and wellbeing is meaningfully discussed and where stigma and discrimination is addressed.

## Payment of the real Living Wage

### What this means

The Scottish Government promotes payment of the real Living Wage as the minimum rate for everyone in paid work; this is distinct from the statutory National Living Wage and National Minimum Wage which are set by the UK Government. The real Living Wage is a voluntary hourly pay rate based on what families need for an acceptable living standard. The rate is calculated by the Resolution Foundation and overseen by the independent Living Wage Commission; it is reviewed annually to reflect the cost of living, and the rate is announced each November. Building on the strength of the real Living Wage movement, the Scottish Living Hours Accreditation Scheme recognises that in addition to payment of the real Living Wage, the number and frequency work hours are critical to tackling in-work poverty. Businesses looking for certification must meet three criteria for accreditation; payment of the real Living Wage, providing a contract reflecting accurate hours worked and a guaranteed minimum of 16 hours a week (unless the worker requests otherwise) and ensure at least 4 weeks' notice of shifts and guaranteed payment if shifts are cancelled within this period

Payment of the real Living Wage should not be used to limit pay rates, and where sectorally bargained rates have been agreed these should be applied provided they are not below the real Living Wage.

## Outcomes

Enabling people to earn a decent income will help them to have a decent standard of living and is the best way of tackling poverty. Low wages are a prime cause of in-work poverty, along with the increased use of zero-hours contracts and other precarious practices.

[Research](#) from the Living Wage Foundation shows that 93% of Living Wage Businesses have benefited since accrediting. 86% of their respondents said it has improved the reputation of their organisation and 75% said it has increased motivation and retention rates of employees. They also reported a 25% drop in absenteeism. Paying the real Living Wage can help businesses attract new workers and skills: the Living Wage Foundation also reported that 93% of students want to work for employers who pay at least the real Living Wage. Currently, two-thirds of workers earning below the real Living Wage are women – by paying the real Living Wage an organisation can reduce their pay gap significantly.

Payment of the real Living Wage can make a material difference to workers and their families, enabling them to access greater opportunities, with less need for worry about affordability.

## Good practice examples

- Having an agreed pay structure which means the whole workforce is paid at least the real Living Wage;
- The organisation is recognised as a [Living Wage Accredited Employer](#) or an All Time Service Provider;
- Applying the pay rates collectively bargained between the relevant employer and trade union negotiating body;
- Apprentices are paid at least the real Living Wage rate throughout their apprenticeship.
- The organisation is part of a local partnership working towards [Living Wage Place](#) recognition.
- The employer is actively reviewing the pay structures and developing an incremental plan for paying all staff at least the real Living Wage.

Note: \* those involved in procurements should refer to the Statutory Guidance, Best Practice guidance and toolkit to understand how to consider fair pay for workers, which can include payment of the real Living Wage, in the procurement process.

## Offer flexible and family friendly working practices for all workers from day one of employment

### What this means

Flexible working and family friendly working practices take many forms including, but not limited to, part-time work and job share, flexitime, compressed hours, term-time,

staggered hours, and working remotely and from home<sup>2</sup>. It is an important aspect of Fair Work and recognises that being able to balance work with other commitments enables workers to participate and contribute more fully and productively in the workplace whilst protecting their wellbeing and improving job satisfaction.

Genuine flexibility helps to make work possible for people who might otherwise be unable to access, re-enter and sustain employment; creates more diverse and inclusive workplaces and provides greater opportunity and security for workers. Flexible working will vary from employer to employer and not all jobs in all sectors or within an organisation will lend themselves to the same type or level of flexibility; equally, workers' needs will vary. There is no one-size-fits-all approach and flexible working practices need to work for the individual, the team and the employer.

Flexible working should be adopted as a positive practice and never used to weaken contractual terms or impose new unwanted working practices. When considering introducing new ways of working employers should always consult with workers, and where present trade union or other worker representatives, to ensure both the worker's and employer's perspectives are properly considered and any unintended consequences are avoided. The needs of employers and workers are likely to change over time and regular review of policy and practice will ensure appropriate provision is in place.

## Outcomes

### For employers

Employers who offer flexible and family friendly working practices attract diverse talent, have happier, more engaged workers and increased productivity<sup>3</sup>. Sixty-seven percent of senior Scottish business leaders who offer flexible working say it has a positive impact on productivity; 70% say it helps worker loyalty and 66% noted reduced sickness and absenteeism<sup>4</sup>. It also helps minimise the loss of valued, skilled workers and the resulting recruitment and upskilling challenges. Offering flexibility allows employers to proactively support workplace equality and tap into an under-utilised talent pool which can help them be competitive, improve their reputation, and attract top new talent and customers<sup>5</sup>.

A range of resources to support employers to adopt flexible working is available, including through [Flexibility Works](#), the [Enterprise Agencies and CIPD](#). Timewise also have guidance for [line managers](#) and [employees](#), as well as how to [hire flexibly](#).

### For workers

People who can access flexible and family friendly working practices are better able to harmonise their work and life commitments. This can help them feel more enthusiastic and fulfilled and enable them to develop their skills<sup>6</sup>; it is good for mental health and

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<sup>2</sup>[What is flexible working? | Flexibility Works](#)

<sup>3</sup> <https://www.flexibilityworks.org/research/>

<sup>4</sup> <https://www.flexibilityworks.org/research/>

<sup>5</sup> [What motivates employers to improve their shared parental leave and pay offers UK Gov.](#)

<sup>6</sup> <https://www.cipd.co.uk/knowledge/work/trends/goodwork/working-lives-scotland>

overall wellbeing. Flexibility in hours and location can be invaluable for those with caring commitments or preparing for retirement; disabled people or those who experience periods of poor health and people balancing multiple roles or interests. It is of particular benefit to women who are often the primary carer in a household. Flexibility and enhancing parental leave and pay provision can help support women to fully participate in employment and aid their career progression; it can also increase opportunities for workers to share caring responsibilities more evenly by, for example, utilising shared parental leave.

### **Good practice examples**

- Organisational policies and practice are in place to support flexible and family working, developed collaboratively by the employer, workers and, where present, trade union or other worker representative, and are regularly reviewed.
- Jobs are designed around business outcomes not based on fixed locations or times to provide flexibility.
- Flexible working and family friendly policies are highlighted in job adverts.
- Employers and workers have constructive conversations about requests for flexibility. Trial periods or pilots are used to test workable solutions for the individual, team and employer.
- Managers get appropriate training and support to enable them to effectively manage individuals who work flexibly.
- Flexible and family friendly options are available at all levels in the organisation and for all staff – not just women or mothers, and to encourage fathers or partners to share caring responsibilities
- Flexible working is offered as a temporary arrangement to accommodate particular circumstances with review points agreed at the outset by the employer and the worker.
- Learning and development is arranged to accommodate different flexible working arrangements and, where practicable, technology is used to facilitate access.
- Flexible and family friendly options are available at all levels in the organisation and for all staff – not just women or mothers, and to encourage fathers or partners to share caring responsibilities
- Enhanced provision is available to support workers with families, such as more tailored maternity, adoption, and shared parental leave and pay.
- Systems and protocols, such as IT equipment and digital diaries, are used to facilitate effective work practices, enabling remote workers to participate alongside their site-based colleagues.
- Meetings are arranged at times that enable workers to attend (in person, by phone or virtually) so everyone can contribute and feel included.
- Effective use of flexible and family friendly practice is modelled from the top down.
- Employers develop and maintain a home and other remote working policy with consideration given for workers with protected characteristics and suitable provision to support workers' mental health and overall wellbeing.
- Working from home and other remote working is not monitored by invasive worker monitoring software.
- Employers, workers and, where present, union or other worker representative, collaborate to agree an approach to flexible and out-of-hours working, with clear

boundaries between work and non-work time - enabling workers to disconnect outside working hours.

- Employers with international connections provide flexibility on hours to manage time differences.

## Oppose the use of fire and rehire practice

### What this means

There is no legal definition of Fire and Rehire practices. 'Fire and rehire' is the terminology currently most used to describe the practice of 'dismissal and re-engagement'. It is described by [ACAS](#) as one option that may be available to an employer seeking to effect changes to employees' contractual terms; it involves dismissing employees and immediately re-engaging them on a new contract with new terms, with the new terms issued to commence on the day following the termination date of the current contract, in circumstances where the employees' agreement to the changes has not been obtained. The term is also used to refer to employers holding out the prospect of dismissal and re-engagement to employees or their representatives during negotiations about changing terms and conditions.

We recognise that the vast majority of employers consult and reach agreement when they have to consider making changes to contracts and will only consider using fire and rehire practice as an exceptional and pressing business necessity.

However, whilst fire and rehire practice may not in all circumstances be contrary to employment legislation, the Scottish Government's position is that such practice does not align with the principles and expected practice of Fair Work.

Therefore, an employer wishing to access public sector grants or other funding or to deliver a public contract in Scotland will be expected to commit to not using fire and rehire practice; and this will be considered as part of the award decision and form a condition for the delivery of the grant or public contract. It would then be monitored appropriately within the relevant contract or grant management arrangements. In addition, if an employer subsequently uses fire and rehire practice during the life of a grant, the continuation of the grant may be reconsidered and this may also be taken into account in the consideration of any future grant funding requests, where relevant and proportionate.

Scottish Ministers have written to chief officers of public sector organisations to advise them that this new criterion has been introduced and that they should apply it along with the other Fair Work First criteria. Further guidance on the application of Fair Work First criteria in grants, other funding and contracts is contained in the 'How the guidance should be used' section of this guidance.

### What is Fire and Rehire

An employer is likely to be using fire and rehire practice if they use dismissal and re-engagement for the purpose of diminishing terms and conditions as described

above. Employers should not use the threat of dismissal and/or redundancy in order to pressurise staff into accepting changes to terms and conditions.

### **The benefits of an alternative approach**

Under Fair Work principles and the good practice adopted by organisations of all sizes across Scotland, an employer should - from the start of the process - ensure that workers' voice is fully considered through full and meaningful consultation, and including the relevant union/s if present, or other appropriate employee representative. The employer should also fully consider all alternatives, drawing on support available from [the Scottish Government and its agencies](#), [ACAS](#), [CIPD](#) and other relevant parties.

Where an employer engages constructively with staff to reach voluntary agreement on contractual changes, there are benefits to both employees and the employer, such as:

#### **For employers:**

- In avoiding a dismissal and re-engaging process, the employer can retain skills, motivated staff and protect positive relationships with staff and unions.
- They can reduce risk of employment-related litigation and the significant legal and potential damages costs this could bring, along with the time, resource and potential disruption of engaging with the process.
- They can avoid the considerable time and cost associated with replacing personnel who do not accept the new terms and any subsequent training.

#### **For employees:**

- They can continue to be employed under terms and conditions they have agreed to, giving them the security of employment and earnings.
- They have a voice in the workplace and feel engaged in decision-making.
- They have an ongoing sense of respect, security and fulfilment which contributes to their overall wellbeing.

## Where can I go for more information

In addition to the information and example question provided in this policy note please consider these additional documents:

- [Fair Work First Guidance](#) which can be used by buyers and bidders to help understand how to consider Fair Work First in the procurement process and what it means.
- [Statutory Guidance](#) and [Best Practice Guidance](#) and accompanying [toolkit](#) are in the process of being updated to include Fair Work First.
- The Scottish Government's [Fair Work Action Plan](#), which sets out the Scottish Government's strategic approach to achieving the Fair Work vision by 2025.
- Buyers may wish to point suppliers towards the [Fair Work Employer Support Tool](#) which has been designed to help employers create new and improved workplace practices by assessing and benchmarking their workplace practices against the dimensions of Fair Work.
- [Fair Work within the COVID-19 crisis and beyond](#) and [Coronavirus \(COVID-19\): fair work statement](#) (19 July 2020).