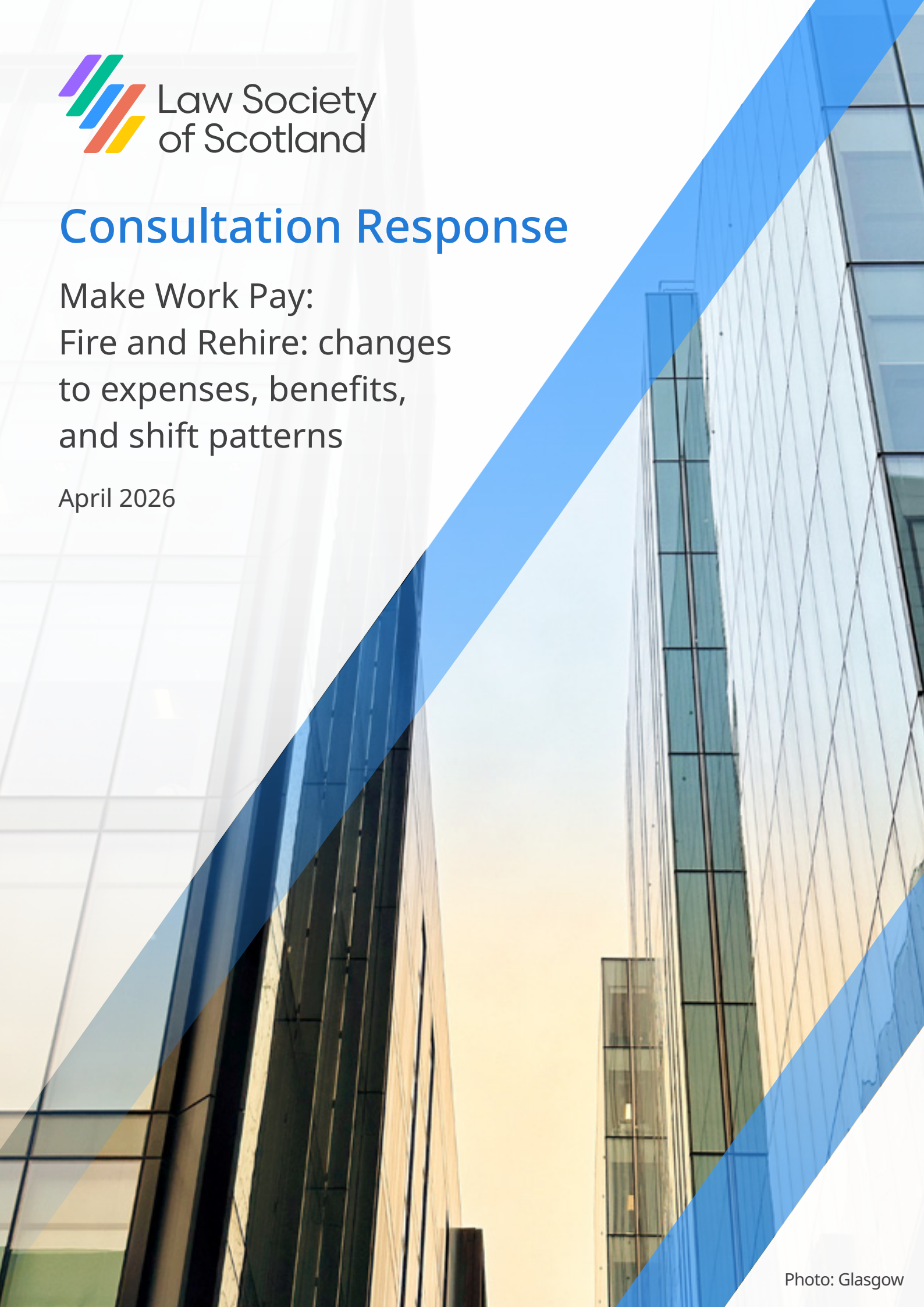
Law Society of Scotland

Consultation Response

Make Work Pay: Fire and Rehire: changes to expenses, benefits, and shift patterns

April 2026



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Introduction

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Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Make Work Pay: Fire and Rehire: changes to expenses, benefits, and shift patterns.[1] The sub-committee has the following comments to put forward for consideration.

[1] Fire and Rehire: changes to expenses, benefits, and shift patterns

Consultation Questions

Section 1: Expenses and Benefits or Payments in kind

Question 1- Which of the following options regarding expenses and benefits in kind protections do you agree with?

Option 1: All expenses and benefits in kind should be excluded from the restricted variation of sums payable to an employee in connection with the employment (and therefore not be subject to higher protections from fire and rehire)

Option 2: Certain expenses and benefits in kind should be protected from the restricted variation of sums payable to an employee in connection with the employment (and therefore subject to higher protections from fire and rehire)

[ ] None of the above

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

We consider that certain payments made by employers to employees require an element of flexibility to operate effectively. This commonly includes expenses policies and procedures, as well as benefits in kind. Restricting an employer's ability to manage these payments in a commercial and pragmatic manner by placing them within the category of restricted variations, thereby significantly limiting an employer's capacity to amend them, risks undermining the ability of employers to effectively respond to social and technological developments.

Benefits in kind are often shaped by wider social factors for example, gym memberships, health and insurance policies etc. If such benefits were to fall within the category of restricted variations there is a risk of a two tier, or indeed multi-tier, workforce developing whereby employees receive differing benefits depending on their date of recruitment and the benefits available at that time. This creates difficulties commercially and practically, and may build animosity within the workforce.

We would suggest there is sufficient existing protection within the current legal framework alongside the addition of new section 104J of the Employment Rights Act 1996 (ERA 1996), which applies to variations that do not fall within the restricted category.

Question 2- If the government were to pursue option 2, which expenses and benefits in kind should be protected (and therefore subject to higher protections from fire and rehire)? (Select all that apply)

[ ] Mileage

[ ] Other travel expenses incurred in performance of duties, not including commuting

[ ] Accommodation expenses incurred in performance of duties

[ ] Long term accommodation offered as a benefit in kind

[ ] Share scheme and ownership arrangements

[ ] Other expenses and benefits in kind should be protected (please expand below)

[X] Don't know

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

As above under Question 1, we are of the view option 1 should be pursued.

Question 3- If share schemes were to be protected, which types should be in scope of the restricted variation of sums payable for these purposes (and therefore subject to higher protections from fire and rehire)?

[ ] Direct share allocations

[ ] Participation in schemes which allow employees to buy shares from a company reserve

[ ] None should be included in scope

[X] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

As above under Question 1, we are of the view option 1 should be pursued.

Question 4- In your view, how common is it for expenses and benefits in kind to be part of core contractual terms (without a contract variation clause that would allow the employer to change these terms)?

[ ] Very common

[ ] Common

[ ] Occasionally

[ ] Rarely

[ ] Very Rarely

[ ] Never

[ ] Don't know

[X] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

We would suggest that whether the provision forms part of the core contractual terms will depend on the provision in question for example, whether it relates to expenses or to a specific type of benefit, as well as the sector.

In our experience, where expenses clauses appear in contracts of employment, they typically provide for contractual reimbursement of reasonable expenses wholly and properly incurred during the employee's duties. However, the detail of and procedure for the reimbursement will ordinarily be contained in a non-contractual policy, which will usually state that it may be amended from time to time. Therefore, while part of the provision may be a core term, the detail will retain an element of flexibility in a non-contractual policy. Although this is common, it is not always the case.

Benefit in kind clauses, as the consultation document identifies, are wide-ranging and varied in nature. It is therefore more difficult to establish a generalised position.

However, pursuant to section 1(4)(da) of the ERA 1996, employees commencing employment on or after 6 April 2020 must receive a statement of terms and conditions that includes particulars of any benefits provided, subject to certain exemptions. Therefore, it would be common for benefits, including non-contractual benefits, to be identified in the employment contract. Provided such benefits are stated to be non-contractual, the fact they may be in the contract does not mean a variation would not be possible.

For many insured benefits in particular, employer advisers commonly recommend that the terms of the benefits be subject to scheme rules, which may be amended from time to time. In addition, benefit provisions when contained in the contract of employment may frequently, though not invariably, be subject to the right of the employer to replace, amend or withdraw the benefit on reasonable notice to the employee.

Question 5- In your view, which expenses and benefits in kind are commonly part of core contractual terms (not including those which can be changed via a contract variation clause that would allow the employer to change these terms)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Examples of provisions that are commonly part of core contractual terms include:

General expense provisions. These can be found in the contract and may form part of the core contractual terms although the detail of this is often found in a linked policy that would (normally) be stated to be non-contractual. (See response to question 4 above.)

Relocation expenses clause. Commonly relocation expense provisions are used when an employee is being hired as part of the recruitment exercise and are often utilised immediately by the employee when they will be expending large sums of money to relocate. Generally, therefore, we would expect these clauses to form part of a core contractual term, not subject to variation. This reflects the fact that they are designed to address immediate, upfront financial commitments, rather than to regulate an ongoing arrangement where employer flexibility may be required.

Share scheme participation. The basic right to participate in a share scheme may amount to a core contractual entitlement, particularly in certain sectors, such as financial services. However, the detail surrounding participation, entitlement and related payments are often found within a separate policy which retains a significant degree of flexibility.

Question 6- In your view, how important are expenses and benefits in kind, which are granted in employment contracts to employees?

[ ] Very Important

[X] Important

[ ] Moderately Important

[ ] Slightly Important

[ ] Not Important

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Any clause that provides an employee with a benefit, payment or mechanism for reimbursement is important to an employee. The requirement under section 1 of the ERA 1996 for such benefits to be narrated within the section 1 statement of terms and conditions, as noted in our response to question 4, demonstrates the recognition that these are important provisions.

Although important, such provisions can still be subject to flexibility. In practice, expenses provisions are frequently amended to reflect changes to internal reimbursement procedures or to address evolving organisational, social or cultural circumstances. For example, a number of employers revised their expenses policies in response to the increasing prevalence of home and hybrid working during the pandemic.

Question 7- In your view, how common is it, specifically, for share schemes to be part of contractual terms without a contract variation clause that would allow the employer to change these terms?

[ ] Very common

[ ] Common

[X] Occasionally

[ ] Rarely

[ ] Very Rarely

[ ] Never

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

In our experience, clauses relating to share scheme participation may well be in the contract (and there may be a contractual right to participate). As we state above, section 1 of ERA 1996 requires employers to give employees a specified list of terms of employment, including any remuneration and benefits (even where non-contractual), at the outset of employment in a single document. As such, share plans should be referenced in the section 1 statement (normally the contract of employment), although this is by no means always the case.

However, these are generally strongly caveated by provisions allowing for an element of variation or the detail is otherwise found in a non-contractual policy outside the contract of employment. Indeed, well advised employers would be told to retain significant flexibility regarding any share plan participation they offer and not enter into binding commitments that they may not be able to honour in future for reasons quite possibly out of its control. The level of variation within any given share scheme itself can very much vary. (See also response to question 5.)

Question 8- In your view, how important are share schemes, where these form part of the employment contract, to employees?

[ ] Very Important

[ ] Important

[ ] Moderately Important

[ ] Slightly Important

[ ] Not Important

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

As above, any clause creating a benefit for the employee is important. Certainly, in specific sectors, like the finance sector, an employee's right to share scheme participation is a crucial part of their financial package. However, we would say that excluding these from the restricted variation provisions (as proposed under option 1) on balance is sensible for the following reasons:

- Protections are still available for the employee (and indeed are being bolstered by new section 104J, ERA 1996).
- Those employees who benefit most from such clauses are perhaps those who are not likely to be the most at most risk of fire and rehire. (We note from

review of the options assessment that there is limited evidence on the characteristics of those subject to fire and rehire practices, nevertheless a 2021 TUC online poll suggests fire and rehire practices affect more vulnerable workers (young, lower socio-economic groups, and ethnic minorities)[2].

Question 9- In your opinion, what would be the impact on employees of excluding all expenses and benefits in kind from the automatic unfair dismissal protections of the fire and rehire measure?

This would mean that employers would be able to dismiss employees to remove contractual entitlements to expenses and benefits in kind, without triggering an automatic unfair dismissal. However, ordinary unfair dismissal protections would still apply, as explained in the consultation document.

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

A degree of flexibility would be retained for the employer to respond to changes that in some cases would be outside its control, for example third-party insurer changes.

There would still be protections available for the employee, for example, ordinary unfair dismissal protection; new section 104J, ERA 1996; collective consultation requirements in cases of 20 or more employees and the enhanced protective award of up to 180 days' actual pay; along with a possible uplift in compensation of up to 25% for breaches of the fire and rehire code of practice.

Statistically, there are quite low levels of fire and rehire cases based on expenses and benefits in kind. (One quarter of cases relating to pay included expenses and/or benefits in kind based on DBT fire and rehire information, page 27 options assessment.) This is in context of relatively low level of fire and rehire cases generally (125,000 employee affected, table 8, page 13 options assessment)[3].

Question 10- In your opinion, what would be the impact on employers of including travel expenses, accommodation expenses and share scheme expenses in scope of the restricted variation for sums payable (and therefore subject to higher protections from fire and rehire)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

[2] Fire and rehire: options assessment page 15
[3] Fire and rehire: options assessment page 27

There would be potentially significant difficulties in amending these provisions. Even in cases of what would seem to be minor procedural updates for expenses, these would be prohibited unless financial difficulty can be demonstrated.

Employers would not be able to amend in response to cultural, social or legal changes without their being a linked variation clause.

Employers may be less likely to offer these provisions unless they had to. For example, instead of offering share scheme participation, employees may be more inclined to offer participation in an alternative benefit that isn't subject to the restricted variation provisions.

We would note that in respect of agricultural employees in Scotland an accommodation offset is provided for in the Agricultural Wages (Scotland) Order (current order No.73, Article 21[4]). Any provision in respect of restricted variations which included accommodation expenses would need to take into account the relevant Order and any annual updates. This would ensure agricultural employers in Scotland could enforce changes under the Order without breaching the proposed provisions on restricted variations.

Question 11- Do you believe that the proposals discussed in this consultation relating to expenses and benefits in kind will have an impact on individuals with a protected characteristic under the Equality Act 2010?

Protected characteristics under the Act are disability, gender reassignment, age, pregnancy and maternity, race, marriage and civil partnership, sex, sexual orientation and religion or belief.

[ ] Yes

[ ] No

[X] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

We are not aware of any evidence pointing to an equality impact in this regard.

Possibly it could be said that those in receipt of benefits in kind, in particular share scheme benefits, and indeed expenses, may be argued to be in middle to higher pay brackets, rather than lower pay. As such protecting share schemes in

[4] Agricultural Wages (Scotland) Order (No. 73) 2026, Article 21. Available at: https://www.gov.scot/.../agricultural-wages-scotland-order-no-73-2026.pdf

particular as a restricted variation may be more likely to protect those of a higher socio-economic standing. However, we would emphasise that this is a generalised assumption and evidence would be needed to back this up.

Question 12- Where you have identified potential negative impacts in your response to question 11, are there ways to mitigate these?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

N/A

Question 13- Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Litigation surrounding carve-out terminology. Likely any carve outs, whether pursued by option 1 or option 2 or another option, may result in litigation to tease out the extent of the carve out from the restricted variation provisions.

For example, provisions or clauses relating to Change of Control (broadly providing that where there is a change of control of the employing company the employee will be entitled to an element of compensation which could, for example, include enhanced notice, or a lump sum payment, or possibly shares) – would these be caught by the proposed benefits in kind exclusion? No doubt it will depend on the wording of clause in any case and be grounds for litigation.

Changes required by law / legal developments. What if changes are required by law (for example, expenses policies were changed when the Bribery Act 2010 came into force, share scheme policies may be subject to changes because of tax legislation or possibly for listed companies under the UK Listing Rules)? If these aren't carved out from restricted variations, what ability does the employer have to enforce a change that is required by legislation given the unfair dismissal (if it came to that) would be automatic with no ability to assess reasonableness of a dismissal?

Section 2: Shift Patterns

Question 14 - Which of the following options regarding shift changes do you agree with?

[ ] Option 1 - Only include the proposed narrow list of shift changes (day-night, night-day, weekday-weekend, and weekend-weekday)?

[X] Option 2 - No types of shift pattern changes are in scope of the restricted variation of the timing or duration of a shift.

[ ] Other types of shift pattern changes should be protected as a restricted variation

[ ] None of the above

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

The reasons for the view that shift patterns be out of scope of restricted variations are set out in our response to question 17.

Question 15 - Do you agree with the proposed definition of night-time working (any time 11pm-6am)?

[X] Yes

[ ] No

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

The Employment Rights Act 2025 will introduce significant change for employers as it is implemented throughout 2026 and 2027. In view of that, it would not seem appropriate to introduce any further complexity unless necessary. Adopting the same definition of night working (any time from 11pm to 6am) avoids any unnecessary complexity and ensures consistency across employment legislation and regulations.

Question 16 - If answered no, don't know or other to question 15, what do you think the definition of night-time working should be?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

N/A

Question 17 - Do you agree that changes from weekday to weekend and weekend to weekday shifts should be included in this list of protected shift changes?

[ ] Yes both

[ ] Weekday to weekend only

[ ] Weekend to weekday only

[X] Neither

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

We have set out the limitations of having a narrow list of protections below in the responses to questions 23 and 24.

Including only one or other of the proposed changes as restricted variations will not, in our view, mitigate any equality impacts because other changes (for example, moving a weekday 9- 5 shift to early morning or back shifts which would not be caught) are just as likely to have equality impacts. We do not, however, have evidence to support the extent of any such effects.

Including any of the proposed variations as restricted variations will almost certainly reduce the degree of flexibility that employers have to make changes to their business which would allow them to adapt to changes in their sector; demand; or economic forces. It may become harder for employers to secure agreement to changes without incentivising employee through enhanced terms and conditions, which may have cost implications for employers and have a detrimental impact on their ability to operate effectively. There could be unintended consequences i.e. some employers ceasing to operate/trade (or operate in the UK where they have the opportunity to operate in other less regulated jurisdictions) leading to redundancies and job losses.

A number of measures will be introduced by the Employment Rights Act 2025 including

- strengthening of employee voice through simplification of trade union recognition and employee trade union rights,
- doubling the protective award available in collective redundancies (which includes dismissals for refusing to agree to changes to terms and conditions of employment),
- removal of the compensation cap in unfair dismissal claims (accepting that many affected by changes to shift patterns may not reach the current compensation cap in an unfair dismissal claim),
- longer time limits for lodging claim.

It may be that there is sufficient protection for employees through the introduction of changes to pay and number of working hours as restricted variations without adding shift changes to the list of restricted variations. Those measures may be sufficient to redress the balance between the bargaining power of employees and employers (one of the stated aims of the proposals).

Question 18 - Do you agree that changes from day to night and night to day shifts should be included in this list of protected shift changes?

[ ] Yes both

[ ] Day to night only

[ ] Night to day only

[X] Neither

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

For the reasons already set out in response to Question 17.

Question 19 – Do you think that the government should consider whether there are certain kinds of changes to contractual availability windows which should be protected from being changed through fire and rehire?

[ ] Yes

[X] No

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

For the reasons already set out in response to Question 17.

Question 20 – If you answered yes to question 19, which changes to contractual availability windows should be protected?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

N/A

Question 21 – In your opinion, how common is it for shift patterns (specific days and times) to be specified in employment contracts or as a contractual term?

[ ] Very common

[ ] Common

[X] Occasionally

[ ] Rarely

[ ] Very Rarely

[ ] Never

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

In many sectors, contracts specify either: (a) a broad band of hours (or average hours), (b) core days of work, or (c) a requirement to work shifts in accordance with rota arrangements. The detailed shift pattern is often then delivered through rostering practice and policy, rather than fixed contract terms.

That said, it remains common for contracts to contain some contractual anchoring, such as a statement that the employee will work "such shifts as are rostered", or

that night/weekend working forms part of the role. In those circumstances, the contractual term may be more about the framework than the exact pattern.

It is more likely that contracts specify precise days and times where work is inherently stable (for example, office-based roles), and less likely where the business model relies on variable demand and therefore requires rostering flexibility (for example, hospitality, care, transport, and certain manufacturing operations).

Question 22 – In your opinion, how common is it for there to be a flexibility clause in an employment contract that would allow the employer to change an employee's shift patterns without the employee's agreement?

[ ] Very common

[X] Common

[ ] Occasionally

[ ] Rarely

[ ] Very Rarely

[ ] Never

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Flexibility clauses are frequently used in shift-based environments. They are often drafted in general terms (for example, allowing shift changes to meet business need, or requiring employees to work different shifts on reasonable notice).

However, the practical effect of such clauses depends heavily on drafting and context. Advisers frequently caution that employers must exercise such clauses reasonably and consistently, and that very broad clauses can be difficult to rely upon where the employer seeks to impose a change that is fundamental in its impact.

There is also a distinction between clauses that genuinely permit re-rostering within an agreed shift system, and clauses that are so wide that they resemble an attempt to reserve unilateral control over core terms. The latter may create legal and employee-relations risk even under the current framework.

Question 23 – What would the impact on employees be of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

The principal benefit for employees would be that the proposals would capture changes that are often the most disruptive in practice, particularly where they interact with caring responsibilities, transport, and health arrangements. The consultation itself recognises that changes from day to night, and weekday to weekend, can have an impact on workers' lives.

The limitation, in our analysis, is that other changes can be highly disruptive without falling within the narrow categories. For example, alterations to start and finish times (without moving into "night" as defined) may still make childcare or other responsibilities unworkable. Similarly, changes to rotating shift systems, split shifts, or availability windows could in practice be as onerous as the protected categories.

A narrow list may therefore result in a perceived mismatch between the severity of impact and the availability of the automatic protection. Employees affected by changes just outside the protected list may still be forced to choose between accepting the change and risking dismissal, with their remedy falling back on ordinary unfair dismissal arguments rather than automatic unfair dismissal.

That said, ordinary unfair dismissal protections, and the requirement for a fair process, remain relevant. The key issue is therefore whether the narrow list strikes the correct balance between protecting employees from the most serious unilateral changes, while avoiding an over-broad regime that makes routine scheduling adjustments unduly risky for employers.

Question 24 – What would be the impact on employers of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Employers would face boundary questions, particularly in relation to whether a change introduces a new requirement to work at night or at weekends, rather than merely altering the distribution of existing night or weekend work. The consultation anticipates that distinguishing between these categories may be important.

There is also a risk that a narrow list could shift disputes away from the substance of fairness and towards arguments about categorisation. The more clearly the categories and definitions are framed, the lower the risk of such disputes.

We recognise that employers would retain operational flexibility for many non-extreme changes (for example, modest changes to start and finish times within day working, or changes within existing weekend working arrangements). That is important for sectors where demand patterns fluctuate.

Question 25 – In your opinion, are there any concerns or risks you think should be considered with protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

[X] Yes

[ ] No

[ ] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

We believe there are some significant risks to be mindful of.

The first risk is 'categorisation litigation', with parties disputing whether a change is properly characterised as introducing night or weekend work, or merely adjusting existing night or weekend arrangements. This in itself will drive up time, expense and delay in the Employment Tribunal process for the parties and the Tribunal service.

The second risk is avoidance behaviour, whereby changes might be designed or staged to fall just outside the protected categories while still having a substantial impact on employees.

The third risk is inconsistent outcomes across workforces, particularly where employers have historically used differing contractual wording for similar roles. That may create practical difficulty and employee relations issues, including the perception of unfairness.

Finally, there is a risk that too rigid a definition fails to accommodate sector-specific realities. The consultation itself notes the breadth of shift patterns and the difficulty of creating rules that fit all arrangements.

Question 26 – Do you believe that the proposals discussed in this consultation relating to shift changes will have an impact on individuals with a protected characteristic under the Equality Act 2010?

Protected characteristics under the Act are disability, gender reassignment, age, pregnancy and maternity, race, marriage and civil partnership, sex, sexual orientation and religion or belief.

[ ] Yes

[ ] No

[X] Don't know

[ ] Other (please expand below)

[ ] Prefer not to say

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

It is uncontroversial to state that shift changes can disproportionately affect some groups, for example those with caring responsibilities, some disabled workers requiring stable routines or specific travel arrangements, and those whose observance or health needs are sensitive to working time patterns.

We have answered "don't know" as we are not aware of robust evidence quantifying how the proposed protected categories would affect those groups in practice, nor whether the net effect of the proposals would be to reduce disadvantage or simply to change the forum in which disputes are resolved (automatic unfair dismissal versus ordinary unfair dismissal).

The position is therefore best stated cautiously: there is a plausible potential for differential impact, but further evidence would be required to reach a confident view.

Question 27 – Where you have identified potential negative impacts in your response to question 26, are there ways to mitigate these?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

Clear statutory guidance would be the most proportionate mitigation. It should address how employers should approach consultation, and how decision-makers should assess fairness where shift changes create particular difficulty for individuals who may be disadvantaged by the change.

Guidance could also usefully address the interaction between shift-change protections and existing regimes affecting working time, night work and weekend working. This consultation itself identifies the need to consider interplay with existing protections.

We note the Equality and Human Rights Commission's Statutory Code includes practical examples in guidance. We suggest the Code could be updated to include practical examples in guidance illustrating the difference between: (a) introducing new night/weekend requirements, and (b) changing the distribution of existing night/weekend work, and how employers can reduce risk by offering mitigation measures (for example transitional arrangements or alternative roles) where feasible.

Question 28 – Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

Please explain your answer below and where appropriate provide any additional evidence which helps to support your point.

The consultation appropriately recognises the challenge of designing a regime that both protects employees from the most serious unilateral changes and allows businesses to adapt to operational need.

If the regime is expanded beyond a narrow list, there is a material risk of increased litigation and uncertainty, with disputes turning on fine distinctions about contractual drafting and classification rather than on the substance of whether the employer acted reasonably.

If, conversely, the list is kept narrow, guidance becomes more important to ensure that tribunals and parties apply a consistent approach to fairness in ordinary unfair dismissal claims arising from non-restricted variations.

In our view, the better course is to maintain a narrow category of restricted shift changes, ensure definitions are as clear as possible, and support the system with practical guidance that encourages early consultation and the exploration of alternatives before dismissal and re-engagement is contemplated.

For further information, please contact:

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