



BIRMINGHAM LAW SOCIETY
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**Response to the Department of Business, Energy and
Industrial Strategy and Low Pay Commission
Consultation**

**Good Work Plan: one-sided flexibility - addressing
unfair flexible working practices**

October 2019

The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective view of its members who are specialist lawyers practising in all aspects of employment law and from all branches of the legal profession.

1. If you are an employer or worker, what notice (if any), do you / your workers receive of your / their work? Does this vary by different types of work or worker?

Not applicable

2. How are work schedules currently organised or planned, and how are they currently recorded? Are you aware of best practice examples where work schedules are organised or recorded particularly well?1.

Not applicable.

3. What would you define as 'reasonable notice' of work schedules? Does this vary between different types of work or contexts? And what working hours should be in scope?

Not applicable.

4. What impact (if any) would the introduction of the right to a reasonable notice of work schedules have on you (or those you represent)? How would existing practices change?

Not applicable.

5. In your view, should the right to a reasonable notice of work schedules be something that is guaranteed from the start of someone's employment, or should an individual need to work for a certain amount of time before becoming eligible?

o Guaranteed from the start of someone's employment

o An individual needs to work for a certain amount of time before becoming eligible. If so, how long?

Please explain your answer.

The Committee believe the right to a reasonable notice of work schedules should be guaranteed from the start of someone's employment

All employees suffer the effects of one-sided flexibility regardless of length of service. If the employer is scheduling for employees with a certain amount of continuity of service, it should be able to plan for all.

6. In your view, should Government set a single notice period for work schedules which applies across all employers, or should certain employers / sectors be allowed some degree of flexibility from the “baseline” notice period set by Government? Which employers / sectors (if any) should be allowed some degree of flexibility?
- o Government should set a single notice period that applies across all employers
 - o Certain employers / sectors should be allowed some degree of flexibility

Please explain your answer.

Not applicable. The Committee anticipate that employers in different sectors will make their own representations.

7. What would be an appropriate “baseline” notice period and degree of flexibility to you? How would this impact you, or those you represent?

Not applicable

8. In your view, are there any instances where reasonable notice of a work schedule would not need to be given? If so, for which workers / types of work?

Demand is not always easy to predict for smaller employers especially in restaurants and bars. A low margin employer faced with paying staff where there is little or no demand on a particular day or part of the day may mean the difference between a viable business and one which goes into insolvency.

9. How do you think a reasonable notice of a work schedule would be recorded?

Not applicable

10. What impact, if any, would the requirement of recording work schedules have on you (or those you represent) and how you organise work?

Not applicable

11. If Government were to introduce the right to a reasonable notice of work schedule, what would be most useful for employers within statutory guidance?

The Committee believe that clear guidance will be needed on the applicable notice for each sector, what constitutes delivery of effective notice, guidance on whether there are any circumstances where exceptions do not breach the requirement. Clear guidance will be needed on the penalty and the impact on the penalty of a worker accepting the work despite no reasonable notice.

12. What would an appropriate penalty be in the event of non-compliance (when workers are not given reasonable notice of their work schedule, and / or if it is not recorded correctly)?

The Committee believe that a single offence of not providing reasonable notice should not lead to a penalty. The Committee suggests legislation provides for workers using an internal complaints procedure with the right to an external complaint only if the problem has not been resolved through the internal route or the employer continues to be a persistent offender. The Committee believes that the appropriate penalty should relate to inconvenience suffered by the worker (% of pay available to the worker of the shifts on offer for example or perhaps it would mirror the compensation offered to workers where shifts are cancelled), but also easy to calculate (i.e. be fixed) so that if the employer acknowledges it's failing it has the opportunity to circumvent external proceedings by paying the penalty.

The Committee believe the penalty for failing to record the giving of notice (whether or not the reasonable and correct notice was given) should be subject to a different penal formula based on degree of failure.

13. Are shifts or hours of work cancelled by the employer at short notice in your workplace, or in the workplaces of those you represent? Why? Are reasons provided to workers? Are these hours then replaced?

Yes – shifts or hours of work are cancelled at short notice

No – shifts or hours of work are NOT cancelled at short notice

Please explain your answer.

Not applicable.

14. How often are shifts or hours of work cancelled by the employer at short notice?

Not applicable.

15. What notice, if any, is provided by the employer before the shift or hours of work are cancelled? Does this vary at all?

Not applicable

16. Do you/workers receive compensation if shifts or hours of work are cancelled? If so, what compensation is provided?

Yes – I / workers receive compensation if shifts or hours of work are cancelled

No – I / workers DO NOT receive compensation if shifts or hours of work are cancelled

Please explain your answer.

Not applicable

17. Does this compensation vary by different types of work/worker? If so, how does this vary?

- o Yes – compensation varies
- o No – compensation DOES NOT vary

Please explain your answer.

Not applicable

18. Are you aware of any best practice examples from other areas of industry where workers receive compensation for shifts or hours of work which are cancelled?

Not applicable.

19. What impacts, both positive and negative, would this proposed policy have on you (or those you represent) (if any)?

Shifts financial burden back to the employer, or more evenly shares the cost between worker and employer.

20. Noting the three proposed options put forward by the LPC, if compensation were introduced for shifts or hours which are cancelled at short notice, what would you consider to be a 'fair' amount of compensation?

- o The value of the shift in question
- o The worker's appropriate NMW rate multiplied by their scheduled number of hours that have been cancelled
- o A multiple of the worker's appropriate NMW rate. If so, what multiple?
- o Other. If so, please specify

The Committee favour a multiple of the workers appropriate NMW, allowing for a sharing of the financial burden and not encouraging the employer to notify short shifts. 3 as a multiplier seems reasonable (and is used in other jurisdictions).

21. If compensation were introduced, what should be the cut-off point at which employers have to give their workers notice of a cancelled shift or hours (after which workers would become eligible for compensation)?

The Committee anticipate that logically the cut-off point would relate the requirement for reasonable notice and would therefore be sector specific. Therefore if reasonable notice of work pattern is 3 days, cancellation within 36 hours (half the time) would logically trigger the right to compensation.

22. If Government were to implement a policy where the notice period for cancelling shifts or hours of work was longer than the amount of time you suggest above, what impact (if any) would this have on you (or those you represent)?

Not applicable.

23. Should all types of employer, across all sectors, be expected to pay compensation?

- o Yes – all employers should be expected to pay compensation
- o No – NOT all employers should be expected to pay compensation

Please explain your answer.

The Committee anticipates that certain sectors may be able to justify being an exception (possibly emergency services?) but believes that the impact on all workers is the same and thus allowable exceptions should be minimised.

24. Which workers, if any, should be exempt from receiving compensation?

Accepting that there are practical difficulties of administering or verifying each case, the Committee thinks consideration should be given to exempting from the right to compensation those workers who are able to mitigate the losses they suffered as a result of the late shift cancellation.

25. In your view, should workers become eligible for compensation from the start of their employment, or should they become eligible after a certain amount of time?

- o Guaranteed from the start of someone's employment
- o An individual needs to work for a certain amount of time before becoming eligible

Please explain your answer.

The Committee believes that workers should be eligible for compensation as a day one right as the impact of cancellation is felt equally regardless of continuity.

26. How should a policy to provide compensation for short notice shift cancellations be designed to best target workers who experience one-sided flexibility?

The Committee believes that the compensation scheme should be compensatory not penal, therefore benefitting only those workers who have suffered financial hardship as a result of employer action.

27. What could employers/employer representatives do to share best practice and drive change through their workforce and industry?

The Committee doubt the effectiveness of guidelines and think a voluntary regime is unlikely to produce any change to current practices.

