



BIRMINGHAM LAW SOCIETY
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**Response to the Make Work Pay:
TUPE Regulations Call for Evidence**

June 2026

About this response

This response is submitted on behalf of the Employment Committee of Birmingham Law Society. Birmingham Law Society is one of the largest regional law societies in England and Wales, representing the interests of lawyers and law firms across Birmingham and the West Midlands. The Employment Committee comprises practising employment lawyers drawn from across the region, with expertise spanning both contentious and non-contentious employment law, including advising employers, employees and trade unions on TUPE transfers and the associated consultation and due diligence processes.

The questions to which the Committee has chosen to respond are reproduced below, with the Committee's answers shown in underline. This is a Call for Evidence rather than a consultation on specific proposals, and the Committee's response is framed accordingly — identifying areas of difficulty in the current operation of TUPE based on members' direct experience, rather than advocating for fixed legislative solutions at this stage.

Executive Summary

The Employment Committee's response draws on its members' direct experience advising both transferors and transferees, employees and trade unions, on TUPE transfers. While the Committee considers that TUPE achieves its core purpose of protecting employees' terms and conditions on a relevant transfer, it identifies a number of areas where the current drafting, interpretation and operation of the regulations create uncertainty or difficulty for all parties.

Information and consultation (Questions 2, 3, 8, 12)

The Committee's central recommendation is for a specified minimum period — suggested at 28 days — before a transfer during which information and consultation must take place, coupled with joint and several liability between transferor and transferee for compliance. The Committee considers that the current regime allows one or both parties, most often the transferee, to treat consultation as a low priority, and that shared liability with a clear timescale would encourage more meaningful engagement by both sides.

Identifying a relevant transfer and the impact of offshoring (Questions 6, 10, 12)

The Committee identifies continuing uncertainty over when a relevant transfer occurs, particularly where it results from a series of transactions or there is a gap between the transfer and resumption of business activity. It recommends clarification to prevent the structuring of deals in a way that places employees

outside TUPE's protection. The Committee also raises the absence of any TUPE protection where work is moved offshore, and questions why employees should receive lesser protection in those circumstances.

Pensions (Questions 5, 12)

The Committee considers that pension protection under TUPE has not kept pace with the shift away from final salary schemes toward group personal pension arrangements, and that transferees can currently provide materially less valuable benefits while remaining compliant. It recommends that, where equivalency of pension provision can be achieved, it should be required.

Variation of terms and conditions — the ETO reason (Questions 16–19)

The Committee identifies the ETO reason as an area of significant uncertainty for employers and employees alike, particularly the restriction on transferors relying on it and the requirement that any ETO reason be accompanied by changes in the workforce. The Committee recommends a more flexible approach — both pre- and post-transfer — provided appropriate safeguards are in place, including due process, consultation, and access to legal advice for affected employees.

Employee Liability Information and cost (Questions 8, 10, 20–22)

The Committee recommends that the statutory requirement to provide Employee Liability Information be extended to capture non-contractual benefits, such as discretionary bonuses, which are currently liable to go undisclosed and create cost surprises for transferees post-transfer.

About you

Please indicate whether you are responding as:

- an academic
- an employer
- an employee, worker or individual
- a legal representative
- a business representative organisation or trade body
- a trade union or staff association
- a voluntary sector organisation
- **other (please specify) Birmingham Law Society Employment Law Committee**
- do not know

What sector or industry do you operate in?

- manufacturing
- construction
- wholesale and retail; repair of motor vehicles and motorcycles
- transport and storage
- accommodation and food services
- information and communication
- financial, insurance and real estate activities
- professional, scientific and technical activities
- administrative and support services
- public admin and defence; social security
- education
- human health and social work activities
- **other services (please specify) Legal Services**
- do not know

If responding as an employer, business, business owner or business representative, what is the size of your business? If responding as an individual or worker, what size workplace are you employed in?

- micro (0-9 staff)
- small (10 to 49 staff)
- medium (50 to 249 staff)
- large (250+ staff)
- other (please specify)
- do not know

Current protections offered by TUPE

Q1. To what extent do you agree or disagree that the current TUPE regulations strike the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree There are issues that could be addressed in the drafting, operation and interpretation of TUPE that would benefit each side and bring clarity for all, as described in this response to the call for evidence**
- strongly disagree
- other

Q2. To what extent do you agree or disagree that the current TUPE regulations sufficiently protect employees' employment rights when a transfer takes place? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree**
- strongly disagree
- other
- **to better protect employees the following issues should be considered:**
 - **a specified time period before the transfer during which information and consultation is required e.g. 28 days**
 - **legislate for joint and several liability for information and consultation obligations pretransfer to encourage coordinated compliance and more meaningful adherence by both transferor and transferee, and allow the Tribunal to apportion liability in the event of a successful claim, and allow the enforcement of awards through the Tribunal system**
 - **penalise failure to adhere to inform and consult obligations (remove the just and equitable valuation from current legislative wording)**
 - **the application of TUPE to off shoring – why should an employee be penalized by lesser protection by virtue of the fact that they work is being transferred overseas, obligations can still be imposed on the transferor to protect the employees in the commercial transaction**
 - **clarification of the impact of TUPE on the retention of employment by transferor**
 - **clarifying the point of time in which a transfer occurs particularly if there is**

one or more transaction or there is a delay in the resumption of commercial activities, provide better protection for those employees who fall outside of TUPE because of the orchestrated structuring of a deal to evade TUPE

- **better protection post transfer for pension rights which reflect modern day pensions practice – the pension protection currently allows transferee to choose the benefit provided and can lead to a reduced benefit for transferring employees even though equivalency is possible, defeating the overarching purpose of TUPE. Appreciating that pensions are complex and represent significant cost, where equivalency can be required it should be.**
- **reconsider whether the protection afforded to employees in insolvency situations under TUPE and caselaw is sufficient**
- **Clarification of when an ETO applies and a Transferee can change terms and conditions, which remains unclear for all parties but especially employees. Harmonisation of terms and conditions is often a good thing for all parties and should be a practice that with the correct protections in place for employees, possible to do without risk.**

Q3. To what extent do you agree or disagree that the current TUPE consultation requirements are sufficient to ensure employees are informed and consulted with when a transfer takes place? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree see above response to Q2. The current regime can lead to one or more parties (but more often the transferee) avoiding compliance. Penalising both Transferor and Transferee for non-adherence, dictating a specified time period for informing and consulting and the shared responsibility would encourage compliance by transferees and transferors. Also there are no current obligations if the transfer is off shore meaning no protection for employees**
- strongly disagree
- other

Q4. To what extent do you agree or disagree that collective agreements are sufficiently protected under a TUPE transfer? Please explain your answer.

- strongly agree
- **agree - the current protection is sufficient and practical**
- neutral
- disagree
- strongly disagree
- other

Q5. To what extent do you agree or disagree that employee pension rights are sufficiently protected under a TUPE transfer? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree - whilst pensions are complex, and the cost implications for some pension provisions are prohibitive to commercial transfers, we question whether the current pension protection is sufficient and reflects modern day pensions practices where final benefit schemes are not the norm and contribution to a group personal pension plan is. The current pension protection allows a Transferee to choose to pay less valuable benefits to transferred employees. Our view is that where equivalency can be provided, it should be protected under TUPE as other terms and conditions are.**
- strongly disagree
- other

Determining whether a 'relevant transfer' has taken place

Q6. To what extent do you believe that it is clear when a 'relevant transfer' has taken place and TUPE regulations apply? Please explain your answer.

- completely clear: no improvement required
- **mostly clear: it could be improved. An improvement would be to clarify when TUPE occurs where it arises as a result of a number of transactions or there is a gap in time between transfer of the business and the resumption of business activity to provide better protection for employees. Fragmentation of the business post transfer also causes debate over the application of TUPE - should the regulations be amended to better reflect case law in this area?**
- neutral
- mostly unclear: it should be improved
- completely unclear: it must be improved
- other

Process of a TUPE transfer

Q7. If you have previously been involved in a TUPE process, in your view, what aspects of the process worked well? Please explain your answer.

Generally the process works well when both Transferor and transferee recognise the application of TUPE and commit to adherence with the requirements and enter into meaningful consultation. Problems arise if one or more party does not acknowledge TUPE applies, when whether it applies is unclear, and when one or more party wish to make changes to the business or terms and conditions.

Q8. If you have previously been involved in a TUPE process, did you encounter any issues with the process?

- yes
- no
- other (please specify)
 - provision of information about agency staff not always relevant (of interest more to trade unions than employee reps?).
 - Employers not interested in engaging with affected employees often use confidentiality to delay informing and consulting when it could have happened at an earlier point – a specified time period i.e. 28 days prior to transfer recommended to combat this and legislating for the party's joint responsibility for a penalty
 - the inability of transferors to make changes ahead of the transfer arguably stifles commercial transactions. Amendment and clarification of the application of the ETO reason to transferors, coupled with adequate protection for employees around representation, legal advice and due process could assist to alleviate this restriction whilst also protecting employee rights.
 - Application of the ETO reason after the transfer is also often troublesome and restrictive, and not well understood by employees. Again arguably it should be open to the parties to agree changes, with adequate protection for affected employees, due process and legal representation.
 - We recommend consultation obligations extending to after transfer where changes are to be implemented.
 - It would be helpful to allow settlement of TUPE claims to allow the parties freedom to agree what changes are required to make the business viable.
 - Why must an ETO reason always be accompanied by changes in the workforce? It appears an artificial restriction on the use of this defence.
 - Hidden bonuses or other information missing from ELI – our suggestion is that the requirement for ELI should be extended to include non-contractual

benefits including bonuses and practical information like immigration status, for example.

Q9. At which stage of the transfer process did you encounter these issues? Please select all that apply.

- **after the transfer was complete**
- dealing with complications resulting from employees disagreeing with the transfer or raising a disagreement with your employer about the transfer
- **employee liability information**
- employees' redundancies
- **employees' terms and conditions after the transfer**
- employer insolvency
- **informing and consulting the employees or being informed and consulted regarding the transfer**
- **planning the transfer**
- **throughout the process**
- transferring the employees to a new business or being transferred to a new business
- other (please specify)

Q10. Which, if any, of these issues did you face during a TUPE process? Please select all that apply. Please explain your answer.

- insufficient guidance or clarity on the process
- issues with trade union recognition and collective agreements
- **lack of clarity about employees' employment rights in continued employment – note our point on the application of the ETO reason and inability to agree changes to Terms and conditions with appropriate protection in place for employees**
- **lack of clarity on identifying a 'relevant transfer' – this remains a frequent area for dispute and particularly if there is more than one transaction or a gap in business continuity**
- **lack of clarity on transferring employees' terms and conditions - ELI should be more detailed to ensure hidden costs of discretionary benefits are disclosed to the transferee**
- **lack of consultation for employees and their representatives – no set time limit for consultation can lead to it not being a priority in the planning of the transaction**
- lack of enforcement regulation if the process is not followed
- **loopholes in the existing process - note our point on fragmentation**
- practicalities are too complicated
- rules not followed or discrepancies in following rules
- the cost to businesses is too high

- other

Q11. To what extent do you agree or disagree that the TUPE process can be challenging for employers to navigate? Please explain your answer.

- strongly agree
- **agree - for the reasons and difficulties outlined**
- neutral
- disagree
- strongly disagree
- other

Q12. In your view, how do you think the TUPE process could be made more efficient for employers?

- **Providing a set timescale for informing and consulting,**
- **clarifying the information to be provided to employee representatives,**
- **clarifying and extending the ELI data to be provided,**
- **amending provisions to clarify the rights of employees retained by the transferor**
- **clarifying the point in time when TUPE occurs when there is a series of transactions or a gap in business activity**
- **clarifying which third party contracts transfer**
- **relaxing restrictions on pre transfer reorganisations, whilst providing protection for employees – due process and legal representation**
- **relaxing restrictions on changes to terms and conditions post transfer whilst providing protection for employees – consider mandating the requirement to provide post transfer consultation where the transferee proposes to change terms and conditions of employment and legal representation for employees**
- **Allowing TUPE claims to be settled to allow the parties greater flexibility**
- **clarifying the interpretation of post employment restrictive covenants after transfer**
- **clarifying the impact of insolvency**
- **Consider applying TUPE to offshoring of work.**

Q13. In your view, how do you think the TUPE process could be strengthened to provide greater protections for employees' employment rights? **This question has been answered in the response to Q2**

Current guidance and support during a TUPE transfer

Q14. In the process of undergoing TUPE, what support, if any, did you use?

- employment organisation
- employee representatives
- legal representatives
- trade union
- government
- **other – please specify n/a**

Q15. How helpful do you believe the guidance (GOV.UK and Acas) currently available on TUPE is? Please explain your answer.

- very helpful: no improvement required
- somehow helpful: it could be improved
- **neutral**
- somehow unhelpful: it should be improved
- very unhelpful: it must be improved
- other

Variation of terms and conditions of employment

Q16. To what extent do you agree or disagree that the current circumstances that an employer can change the contractual terms and conditions of an employee (e.g. ETO reasons), strikes the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree**
 - **employees rarely understand the difference between “being related to the transfer” and an ETO leading to lack of protection**
 - **the inability for transferors to use the ETO reason is highly restrictive.**
 - **requiring the ETO reason to lead to changes in the workforce also makes the ability to change terms and conditions limited**
 - **with safeguards – pre and post transfer consultation obligations, and incentives to reach agreement – agreement should be affective to change terms and conditions when justified and following an appropriate process even if detrimental to the employee**
- strongly disagree
- other

Q17. In your view, to what extent do you agree or disagree with the reasons, as outlined above, for being able to vary employment contracts (ETOs)? Please explain your answer.

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- **other – please see Q16**

Q18. To what extent do you agree or disagree that the circumstances where employers can change the contract terms and conditions of an employee (for example using ETO exemptions), following a transfer, are sufficiently clear and specific? Please explain your answer.

- strongly agree
- agree
- neutral
- **disagree – the provisions are not generally understood by either party and are restrictive of genuine consultation and agreement**
- strongly disagree

- other

Q19. If answered strongly disagree, disagree, or other to question 18, what further guidance/clarifications do you think will be most beneficial and why? Please explain your answer. **Please see Q16**

Cost and impact of a TUPE transfer

Before a transfer of ownership happens, employers should consider the costs and impact of the TUPE transfer, including employment costs.

Q20. To what extent do you agree or disagree that the overall cost of TUPE-protected transfers is too high for businesses? Please explain your answer.

- strongly agree
- **agree - where there is an inability to change terms and conditions cost could be a significant commercial constraint**
- neutral
- disagree
- strongly disagree
- other

Q21. Please provide information on the types of costs that businesses need to consider during a TUPE-protected transfer and where in the process these costs occur.

Q22. If have been through a transfer process, please provide an estimate of the total cost of the transfer for your business.

Additional considerations

Q23. In your view, have the TUPE regulations resulted in any unintended consequences for individuals with a protected characteristic under the Equality Act 2010 or different socio-economic background? Please explain your answer.

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**
- do not know
- other

Q24. Is there anything else you would like to share your reflections on, that was not covered by the previous questions?

No

**Birmingham Law Society Employment Committee
June 2026**