



Law Society  
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# Consultation Response

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

October 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's consultation on measures to address one-sided flexibility. We have the following comments to put forward for consideration.

## Consultation Questions

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**Question 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.

**Question 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?**

Not applicable.

**Question 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?**

We consider that what is 'reasonable notice' of work schedules will vary as between different sectors and/or types of work. Creating a 'one size fits all' minimum period of notice could cause difficulties where that

period simply does not fit business needs. It could also encourage employers who can reasonably give greater notice of work schedules to simply meet minimum standards.

Further, it would not be appropriate to require reasonable notice of work schedules to be given to all workers regardless of how their working hours are organised. Which working hour patterns should require reasonable notice is considered below in our response to Question 8.

For workers with working patterns that do give rise to the need for further protection, we would suggest that:

- any statutory duty should be to give 'reasonable notice' of work schedules;
- there should be a 'baseline notice' period of one or two weeks. This baseline should not be an option for employers in respect of whom a longer period of notice would be reasonable. Therefore, statutory language should ensure that 'reasonable notice' of work schedules should be given and that one or two weeks is set as the minimum notice that an employment tribunal may consider to be reasonable.
- when assessing what period is reasonable, an employer should be required to have regard to a list of non-exhaustive factors outlined in statute. We suggest that these factors may include the following:
  1. the nature of the work carried out,
  2. historic resourcing requirements (for example, workforces might have predictable future resourcing requirements based on past resourcing requirements),
  3. known, or reasonably anticipated, future resourcing demands (for example, known sales campaigns, targeted business growth and known new business wins),
  4. the size and resources of the employer (for example, producing rotas can be a complex and time-consuming task. A large business with dedicated rostering staff and software can produce work schedules more efficiently than a smaller business), and
  5. historic workforce absence rates.
- employers should be required to outline in writing to workers what notice of work schedules will be given and why it considers such period to be reasonable;
- a worker could bring an employment tribunal claim arguing that notice given is not reasonable;
- an employment tribunal could set a reasonable notice period and award a penalty in respect of failure to give reasonable notice (proposed penalties are discussed at our response to Question 12).

The requirement to give reasonable notice should not prevent work being accepted by a worker in certain circumstances where such notice cannot be given. This might be regarded as an 'unexpected circumstance exception'. For example, this might arise if there is unexpected absence and cover is required or if there is an unexpected spike or downturn in demand. It would be difficult to exhaustively define in statute what circumstances might be excluded from the scope of reasonable notice provisions. Therefore, we suggest that the right to reasonable notice should not apply where the employer acts reasonably in not providing such notice. The reasons for excluding reasonable notice should be communicated to affected workers at the same time as the affected work schedule. This may mean that

workers could still be required to work at short notice on occasion but this provision would hopefully provide some accountability from the employer for such eventualities and so limit such instances.

We have considered whether there should be an ability to opt out of this statutory protection in the same way as a worker can opt out of the maximum 48 hour working week. However, whilst this might deprive some employers and workers of flexibility, we consider this very likely to undermine the policy objectives of any new legislation.

There should be a statutory right not to be subjected to a detriment for not carrying out work where reasonable notice should have, but has not, been given.

Statute should render void any contractual clause that seeks to require a worker to carry out work where reasonable notice of the work schedule should have, but has not, been given.

We would also note that consideration will need to be given to the definition of a 'work schedule'. We can envisage difficulties with annualised hours arrangements where a work schedule for a year may be issued by employers. It may be better to exclude work schedules beyond a certain duration.

#### **Question 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?**

In relation to how existing practices might change, we foresee that employers would see rostering as a higher priority task and would:

- carry out work scheduling further in advance of shift patterns;
- consider software to assist with scheduling or allocate more staff time to scheduling; and
- carry out a more detailed analysis of workforce resourcing so that rotas when issued are unlikely to be subject to last minute changes.

From an employee perspective the new rules may reduce their flexibility and may give rise to employees being in breach of contract if they refuse to honour a notice once issued.

**Question 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?**

- **Guaranteed from the start of someone's employment**
- **An individual needs to work for a certain amount of time before becoming eligible. If so, how long?**

**Please explain your answer.**

The right to reasonable notice should be from the start of someone's employment. However, there should be a minimum qualifying period to enforce that right of three months' service.

This is because a worker may not be able to properly judge whether the notice they are being given is in fact reasonable in the context of the business they are working in until they have worked in that business for a nominal period.

**Question 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?**

- **Government should set a single notice period that applies across all employers**
- **Certain employers / sectors should be allowed some degree of flexibility.**

**Please explain your answer.**

See our answer to Question 4 above. In short, there should be a baseline notice period of one or two weeks. This baseline should not be an option for employers in respect of whom a longer period of notice would be reasonable. Therefore, statutory language should ensure that 'reasonable notice' of work schedules should be given and that one or two weeks is set as the minimum notice that an employment tribunal may consider to be reasonable.

We consider that it would be appropriate for certain employers or sectors or types of work to be exempt from any baseline notice period and that this might work in a similar way to those exceptions in the Working Time Regulations 1998. Which employers, sectors, or types of work should have flexibility would require further consultation and representations to be made from such employers.

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

As explained in more detail above, we believe that one or two weeks’ notice of work schedules would be an appropriate baseline.

As the suggested baseline is fairly short, we do not think that flexibility to the general baseline (where needed) should be achieved by having tiers of differing baselines.

Where sectors or types of work require greater flexibility we suggest that relevant employers should simply be required to provide ‘reasonable notice’ but without a baseline.

### **Question 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?**

Please see our comments above relating to:

- unexpected circumstances (Question 3); and
- certain employers or sectors or types of work (Question 6 and Question 7).

It seems unlikely that all workers should benefit from a right to reasonable notice of work schedules regardless of how their working hours are organised. Any such new legislation should specify which working patterns give rise to this new right. For example, it should include shift workers and workers with no normal working hours. However, it may not need to apply to workers with normal working hours which never change (at least in relation to those working hours that never change).

The consultation has not specifically asked how voluntary and compulsory overtime should be addressed. Excluding overtime could give rise to creative means of avoiding any new rights introduced. It seems likely that compulsory overtime (guaranteed and non-guaranteed) should be subject to minimum reasonable notice requirements at least in some circumstances (although we would anticipate that by its very nature overtime may fall into the category of ‘unexpected circumstances’). Alternatively it may be acceptable for voluntary overtime to be excluded.

Proposals in this regard should be the subject of further consultation.

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

The mechanism of giving notice to workers should be at the employer's discretion.

The duty to keep records should mirror the NMW obligation to keep "sufficient records" to show compliance.

**Question 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.

**Question 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?**

Statutory guidance should include:

- clear explanations as to the scope of the legislation (which workers are and are not included);
- advice to employers as to what timescales might be reasonable for different settings and sectors;
- more detail on the factors that will be taken into account when assessing whether notice given is reasonable;
- guidance on circumstances where reasonable notice does not need to be given (when it normally would to certain workers); and
- appropriate hypothetical examples should also be given where possible to illustrate the guidance and give employment tribunals with no previous case law to rely upon a starting point in their analysis of the new right.

**Question 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)?**

There should be a penalty based on a multiple of the worker's actual hourly rate (we suggest a multiple of three). This penalty should be aligned with the shift cancellation penalty discussed below. It should be payable regardless of whether the worker actually works the shift.

Whilst such a penalty would be enforceable by an employment tribunal, we suggest that government guidance should encourage employers to make such payments automatically if they fail to give reasonable notice.

It would be open to an employer to defend any such claim on the grounds that the notice given was reasonable; or there were unexpected circumstances or the work falls within an exempted sector or type of work.

**Question 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.

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

Not applicable.

**Question 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.

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

Not applicable.

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

Not applicable.

**Question 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.

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

Not applicable.

**Question 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?**

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

We suggest a multiple of the worker's actual hourly rate would be appropriate (perhaps three times). This is because:

- this proposal would help avoid employers tending towards scheduling short shifts to reduce the impact of penalties; and
- linking the multiplier to the worker's actual hourly rate (as opposed to the NMW) would ensure a fair penalty for workers who earn more than the NMW.

**Question 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)?**

We believe that a minimum cut off point for shift cancellation could undermine the obligation to give reasonable notice of a shift.

For example, to avoid giving proper thought to workforce needs in good time, employers could simply give reasonable notice of shifts it could potentially need covered (knowing full well there is a strong likelihood of it being cancelled). If the need for the shift does not materialise closer to the relevant time, the employer could simply cancel it within the minimum cut off point.

Therefore, we suggest that the penalty for shift cancellation should:

- be aligned with the penalty for not giving reasonable notice of a shift; and

- apply to any cancellation after the deadline for giving reasonable notice of the shift has passed.

There should be a similar "unexpected circumstance exception" as outlined above in relation to shift cancellations

**Question 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.

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

**Yes – all employers should be expected to pay compensation**

**No – NOT all employers should be expected to pay compensation**

**Please explain your answer.**

Yes – all employers should be expected to pay compensation

While the financial burden of penalties will be greater on smaller employers and, perhaps certain operators in the third sector, poor employment practices are likely to exist in these sectors in the same way as all others. In any event, the impact of cancelled shifts on workers will be the same.

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

We consider all workers earning up to a certain threshold should be entitled to reasonable notice of shifts and should be entitled to receive compensation for cancelled shifts. The threshold would be based on average weekly earnings over a reference period. The protection should be primarily for the low paid.

**Question 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?**

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

**Please explain your answer.**

An individual needs to work for a certain amount of time before becoming eligible.

We suggest a period of three months' service for the following reasons. This is because, as noted above at Question 21, we believe that the trigger points and penalties for (1) failing to give reasonable notice, and (2) cancelling a shift should be aligned.

A period of three months would allow a new recruit to judge what a reasonable period for giving notice of work schedules would be in their particular work environment.

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

Limiting the scope of reform to groups that are most likely to experience one-sided flexibility could still leave significant numbers outwith that demographic without protection. Indeed, it may encourage creativity by employers to devise working patterns that narrowly avoid being caught by the scope of any legislation.

We suggest that employers are required to notify workers of their statutory rights in respect of reasonable notice and shift cancellation.

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

Within their own workforces, employers could raise the profile of the task of creating rotas. This is because rota creation may be unnecessarily delayed by some line managers instead of being prioritised as a management task to be done well in advance. Rota creation could be centralised by workers specially trained in the task rather than left to individual line managers. New software could reduce the complexity of the task.

Industry bodies and regulators could also establish focus groups to make industry specific recommendations.



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