SQUIRE PATTON BOGGS

Local Connections. Global Influence.

The Employment Rights Act 2025: UK Government Issues New Wave of Consultations

The government has recently issued five new consultations in connection with the following aspects of the Employment Rights Act (ERA) 2025:

- Fire and rehire
- Flexible working
- Tipping
- Statutory trade union recognition
- The agency work regulatory framework

We highlight the key points to be aware of below. The consultations on fire and rehire and flexible working are likely to be of most interest to employers.

Consultation: Fire and Rehire – Changes to Expenses, Benefits and Shift Patterns

Closing Date: 1 April 2026

Key Points: The ERA 2025 will place strict limitations on the ability of employers to make changes to terms and conditions of employment via the "dismissal and reengagement" (or "fire and rehire") route. Under the Act, employers will only be able to make certain changes to terms and conditions in this manner ("restricted variations") if they can demonstrate financial difficulties such that the need to make the changes in contractual terms was therefore effectively unavoidable.

Restricted variations are defined in the ERA 2025 and cover various changes to terms and conditions, including reductions in any sums payable to an employee in connection with their employment, as well as changes to certain shift patterns. On 4 February 2026, the government issued a consultation on (i) which expenses and benefits in kind should be excluded from the scope of the restricted variation of reductions to pay; and (ii) whether there are any types of changes to shift patterns that should be protected as a restricted variation. The government says the aim of the consultation is to protect employees from negative changes to their employment contracts, while still letting businesses adapt when needed. There is sadly little or nothing in the ERA 2025 to suggest that the latter half of that is true.

In terms of expenses and benefits, the government is considering two options: (i) excluding all expenses and benefits or payments in kind; and (ii) excluding all expenses and benefits in kind apart from certain types of share scheme, travel expenses and accommodation. In relation to the latter, the government is seeking views as to which types of share schemes, travel expenses and accommodation expenses would have the character of pay, such that their removal or reduction would have a severely detrimental impact on employees and should therefore be included as a restricted variation.

The good news for employers is that the government's preference is option (i), namely that all expenses and benefits in kind will be excluded. In other words, these could be reduced or removed by an employer through a dismissal and reengagement process, without triggering the automatic unfair dismissal provisions. In practice, many contracts/policies already give employers the ability to make changes to benefits in kind and this existing flexibility will not be impacted by these changes. These new provisions will only apply should an employer opt to go down the fire and rehire or "fire and replace" route – not something that an employer will undertake lightly in any event (and even less so going forward!). But if it does feel it necessary to take this step, a carve-out for benefits in kind will be helpful. We would encourage employers to respond to this consultation on that basis to ensure the government is persuaded that this is the right approach to take.

In terms of changes to shift patterns, as these can vary significantly depending on the sector, the type of work done and between businesses, the government acknowledges that attempting to specify restricted variations in relation to shifts is going to be very difficult. For example, it may not be possible to identify common restrictions that are applicable to all situations without causing greater confusion among employers and employees. Furthermore, some employees benefit from the possibility of changing their shifts because, for example, they may be able to get higher rates of pay for changing their hours. Again, it has identified two options: (i) only a narrow category of shift changes (changes from day to night working (or vice versa) and weekday to weekend working (or vice versa) would be restricted variations to allow employers the necessary flexibility to make the majority of shift pattern changes through dismissal and reengagement where necessary; and (ii) excluding all types of shift pattern changes such that none of them would be a restricted variation for these purposes. The government's stated preference here is for option (i), namely a narrow list of shift changes that would amount to a restricted variation.

Responses to this consultation will inform the future regulations. The government has confirmed that it will also be updating the statutory Code of Practice on Dismissal and Re-engagement to reflect the changes to fire and rehire, and it will be consulting on these changes later this year.

Consultation: Improving Access to Flexible Working

Closing Date: 30 April 2026

Key Points: The ERA 2025 will amend employers' duties in relation to flexible working requests to provide expressly that employers may only refuse such requests if they consider that one of the existing eight business grounds for refusal apply and (new bit) "it is reasonable for the employer to refuse the application on that ground or those grounds". If an employer refuses a flexible working request, it will be required to include in its decision to the employee its grounds for refusing the application and an explanation as to why it considers it is reasonable to refuse the application on that basis. The government's stated aim of these changes is to make it more likely that flexible working requests are accepted, presumably in part by increasing the effective burden on the employer to demonstrate why that should not happen.

New regulations are also to follow on the steps an employer must take to comply with the existing requirement in the ERA 1996 to "consult" with an employee before refusing any flexible working application. A key aim of this latest consultation is to seek views on what those steps should be. It also seeks feedback on how the changes to flexible working that were introduced back in 2024 are affecting employers and employees, in particular the requirement to consult employees if the employer is considering rejecting a request.

The government's proposed new statutory process will require an employer that is considering rejecting a flexible working request to (i) meet with the employee – such a meeting to take place within six weeks of a request being made; (ii) clarify with the employee whether they want the proposed request to be considered as a reasonable adjustment in accordance with the Equality Act 2010; (iii) explain why it would not be feasible to accommodate the request and consider whether there might be ways to navigate these challenges and accommodate the request; and (iv) consider whether there are feasible alternative arrangements. Employers will also be required to communicate not only the outcome of the meeting in writing but also, separately, the outcome of the request.

At this point, it feels as if we are going back twenty years to when the law was much more rigid about the process that employers should follow when handling flexible working requests (such steps were largely scrapped in 2014 and the focus instead was on handling requests in a "reasonable manner"), save that this consultation appears to be even more prescriptive about what must take place. Most employers likely already take the steps outlined above before rejecting any flexible working requests, but there will be a need to have a closer focus on process going forward to avoid inadvertent breaches. Again, this may be an excess of enthusiasm for trade-union-like process, or it may be a deliberate ploy to make rejecting flexible working applications just too much trouble, and hang the later consequences.

Remember – there will be no change to the monetary penalty for failing to comply with these provisions, which will remain at eight weeks' pay (subject to the statutory cap on a week's pay).

In the consultation document, the government also refers to the new "reasonableness" test that will be introduced when considering the lawfulness of any rejected flexible working requests. Apparently, this will be different from other statutory tests used in employment law and will simply be "considered against the eight business reasons for rejecting a flexible working request". Once the changes are finalised, Acas will "consider" revising its Code of Practice on Requests for Flexible Working to include specific guidance for employers on this new test.

Consultation: Strengthening the Law on Tipping

Closing Date: 1 April 2026

Key Points: Any business in the hospitality, leisure or services sector will be aware of the obligations in relation to tips and gratuities that came into force on 1 October 2024. Alongside an obligation to ensure that any tips, gratuities and service charges paid by customers are allocated to workers on a "fair and transparent" basis if tips are paid on more than an occasional and exceptional basis, employers are obliged to have a written policy in place setting out how the employer ensures that all tips are dealt with in accordance with the new obligations, including how it allocates tips between workers at the place of business.

The ERA 2025 introduces a new obligation on employers to consult "before producing the first version of a written policy". Consultation must take place either with trade union representatives, elected employee representatives or the workers themselves. Employers must also review such policies at least once every three years, and such representatives must be consulted as part of every review of the policy. Furthermore, employers will have to prepare a summary of the views expressed in the consultation available in anonymised form to all workers of the employer at the place of business.

This consultation seeks views on these new consultation and review requirements. The government also welcomes feedback on how the existing tipping legislation is working in practice, to identify where improvements could be made, etc.

Consultation: Recognition Code of Practice and e-Balloting Unfair Practices

Closing Date: 1 April 2026

Key Points: The ERA 2025 makes a number of changes to the statutory trade union recognition process that should make it easier (and certainly simpler) for trade unions to obtain recognition. Before these changes come into effect, the government needs to update the existing statutory Code of Practice on Access and Unfair Practices (which deals with a union's access to workers during recognition or derecognition ballots and avoiding unfair practices when campaigning during this period) to reflect the legislative changes. The government has redrafted the code and is now seeking views on these changes before it is finalised and brought into effect. It is also seeking views on the government's proposals to legislate for new unfair practices to prevent interference in electronic recognition and derecognition ballots.

Consultation: Modernising the Agency Work Regulatory Framework

Closing Date: 1 May 2026

Key Points: The government is concerned about tax and employment rights noncompliance by umbrella companies. Umbrella companies are employment intermediaries that employ workers on behalf of agencies and end-user clients. The government's aim is to ensure that people who work through an umbrella company have rights and protections comparable to their counterparts who work directly through an employment agency (as currently defined). The ERA 2025 includes umbrella companies within the definition of an "employment business" in the Employment Agencies Act 1973 to ensure they can be regulated by the government through the Conduct of Employment Agencies and Employment Businesses Regulations 2003. This consultation seeks views on how the regulatory framework should be adapted to account for the activities of umbrella companies and what broader changes should be considered in order to modernise the rules. Depending on the responses to this consultation, the government may run a second consultation seeking views on more detailed proposals to streamline and simplify the regulatory framework.

The government is also interested in views on whether the Agency Workers Regulations 2010 remain relevant and fit for purpose in light of how they will interact with the measures contained in the ERA 2025, e.g. the fact that hirers will be obliged to offer agency workers a guaranteed-hours contract after a specified period (still to be determined).

Contacts

Charles Frost
Partner, Birmingham
T +44 121 222 3224
E charlie.frost@squirepb.com

Annabel Mace
Partner, London
T +44 20 7655 1487
E annabel.mace@squirepb.com

Andrew Stones
Partner, Leeds
T +44 113 284 7375
E andrew.stones@squirepb.com

Miriam Lampert
Partner, London
T +44 20 7655 1371
E miriam.lampert@squirepb.com

Ramez Moussa
Partner, Birmingham
T +44 121 222 3346
E ramez.moussa@squirepb.com

Alison Treliving
Partner, Manchester
T +44 161 830 5327
E alison.treliving@squirepb.com

Matthew Lewis
Partner, Leeds
T +44 113 284 7525
E matthew.lewis@squirepb.com

Caroline Noblet
Partner, London
T +44 20 7655 1473
E caroline.noblet@squirepb.com

David Whincup
Partner, London
T +44 20 7655 1132
E david.whincup@squirepb.com

Janette Lucas
Partner, London
T +44 20 7655 1553
E janette.lucas@squirepb.com

James Pike
Partner, Manchester
T +44 161 830 5084
E james.pike@squirepb.com

SQUIRE PATTON BOGGS

squirepattonboggs.com

70382/02/26