

The Chartered Institute of Building (CIOB)

submission to

The Department for Business & Trade

on the consultation

Retained EU Employment Law: Consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations

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Introduction

The Chartered Institute of Building (CIOB) is the world's largest and most influential professional body for construction management and leadership. We have a Royal Charter to promote the science and practice of building and construction for the benefit of society, and we have been doing that since 1834. Our members work worldwide in the development, conservation and improvement of the built environment. We accredit university degrees, educational courses and training. Our professional and vocational qualifications are a mark of the highest levels of competence and professionalism, providing assurance to clients and other professionals procuring built assets.

CIOB is responding to this consultation in respect of the employment landscape and requirements of the construction industry. The construction industry is a notable source of employment in the UK, with 6.5% of the UK workforce employed in the construction sector as defined by the ONSⁱ. However, it also has distinguished employment needs compared to many other sectors of employment, due to a range of features of the industry such as a reliance on subcontractors and agency workers.

Our views have been informed by CIOB members that work in construction management, as well as legal representatives who have an interest in the construction sector.

Full response

1. Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?

We strongly disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers, as this change would remove one of the few existing measures for protecting workers' rights under the Working Time Regulations.

In addition to the vital protection of employees' work-life balance and wider health, the restrictions put in place by the Working Time Regulations are essential to protecting wellbeing in industries with heightened health and safety risks.

In the construction industry overwork and inadequate rest can lead to serious and potentially fatal accidents. In 2022-23, the construction sector accounted for 45 fatal injuries at work in Great Britain – significantly more than any other sectorⁱⁱ. There are a number of inherent risks involved with construction work. For example, working at height presents significant safety risk to workers in the sector, with falls from height representing the most common cause of fatal accidents at work in Great Britainⁱⁱⁱ.

The removal of record-keeping requirements under the Working Time Regulations is contrary to the protection of workers' safety wellbeing. These regulations are routinely broken across many industries already, and removing record-keeping requirements would only serve to enable these regulations to be broken further. This could have particularly serious consequences for those working in construction.

CIOB is of the view that, at a minimum, industries with higher health and safety risk should continue to have record-keeping requirements under the Working Time Regulations.

2. How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?

CIOB believes that the record-keeping requirement under the Working Time Regulations is an essential protection for both employees and businesses. For businesses, having a sufficient and accurate paper trail is the only meaningful defence they can use in the case of disputes. Record-keeping requirements are also an essential tool for protecting workers by encouraging compliance with the regulations. The removal of record-keeping requirements, the main existing enforcement measure, is only likely to worsen protections for workers by reducing the accountability for businesses to comply with the regulations.

However, record-keeping requirements alone are not robust in enforcing workers' rights, as the Working Time Regulations are broken routinely across a range of industries despite the current requirements. To better promote workers' rights under the Working Time Regulations, the Government can build on record-keeping requirements and improve the opportunities available for workers to challenge violations of their rights to adequate rest.

3. What is your experience of record keeping under the Working Time Regulations? Beyond the proposal above, how, if at all, do you think they could be improved?

Our response to this question is based on the broader experience of CIOB members as opposed to that of CIOB specifically. The Government could explore options for better enforcement of the Working Time Regulations to build on record-keeping requirements. For example, the Government could work to better inform workers of their rights under the Working Time Regulations and better empower them to challenge violations of these rights.

The Government could take steps to better enforce restrictions on working time in construction sector and similar industries, where there are significant safety risks associated with insufficient rest from work. In addition, the Government should focus enforcement efforts on industries where workers may be more vulnerable to exploitation, such as sectors like construction that have a high proportion of migrant workers.

9. Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?

We would agree that a single statutory leave entitlement would be an intuitive change to make it easier for businesses in calculating annual leave.

12. What rate do you think holiday pay should be paid at?

We believe that workers should be entitled to normal pay for the full 5.6 weeks of statutory leave entitlement, and that normal pay should include overtime, commission and bonuses where they are routinely included in an employee's pay. As many workers will work overtime regularly each month or may have commission as a key aspect of their remuneration for work, the inclusion of these factors in the calculation of holiday pay would ensure that employees are fairly and rewarded for their work contributions. Not including factors such as overtime in the calculation of holiday pay would financially disincentivise employees from taking leave and could encourage them to work greater amounts of overtime.

13. Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?

We would strongly disagree with allowing businesses the option for employees to accrue their annual leave entitlement by pay period. This change would not necessarily make it easier for employers to calculate annual leave, and it would decrease the flexibility for workers in choosing when they can take their annual leave in their first year of employment.

15. Do you think that rolled-up holiday pay should be introduced?

We agree that rolled-up holiday pay should be introduced as a formal option for employers in relation to all workers. We agree that this option for paying holiday pay to employees with irregular working patterns is much more straightforward and less burdensome for businesses across all industries, including construction. It also ensures that workers are paid for their annual leave entitlement in full proportion to the hours they work and fairly rewarded for working overtime.

17. Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

We would not, in principle, object to allowing companies with less than 50 employees the option to directly consult employees in a transfer where there is not already an elected representative. However, the benefits are unclear of this change as the time taken to consult up to 50 employees directly may mean it is more straightforward to elect a representative in these cases regardless. If increasing the threshold to 50 employees, the Government should review the consultation requirements to ensure that they are still fully robust in protecting workers in cases where a greater number of workers are consulted directly rather than through a representative.

It has been noted by industry experts that this change may have limited impact on the construction sector, for which it is less common to have TUPE transfers involving a company with less than 50 employees where there is not an elected representative in place.

18. Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

We would support this proposal to allow employers the flexibility to opt for direct consultation rather than through an elected representative where less than 10 employees are transferring. This change may be beneficial to companies in speeding up the consultation process by removing the need to elect a representative where there are only a small number of employees to consult on the transfer. It has been noted by industry experts that this proposal is more likely to impact to the construction sector, where there are a range of situations where there may be a TUPE transfer of less than 10 employees, such as TUPE transfers related to service provision changes.

19. What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?

We would foresee the proposed changes to have a limited impact on construction businesses, as the option to consult employees directly in a transfer would only apply in a small proportion of cases where the transfer falls under the proposed threshold number of employees where are not already representatives in place, and the business decides it is beneficial to consult directly rather than elect a representative. Whilst providing the option for direct consultation rather than through an elected representative may speed up the process without the need for an election process, the time required to consult all employees directly may only make this route for consultation worthwhile in cases where there are a small number of affected employees.

20. What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved? Please explain your answer.

The Government should consider the application of the TUPE regulations to industries like construction where there are more complex and dynamic employment patterns, due to the reliance on agency workers and frequency of contract changes.

For example, construction companies are still required to inform employees in a transfer on their use of agency workers, even though this information is usually irrelevant to the transfer. This is an administratively burdensome for construction companies.

Furthermore, the Government could also consider whether there is a need for fixing a specific date for transfer in the TUPE consultation process. This requirement is at a disadvantage to the construction industry, where transfer dates are often impacted by the uncertainty of external factors such as delays to project timelines.

ⁱ [EMP13: Employment by industry - Office for National Statistics \(ons.gov.uk\)](https://ons.gov.uk)

ⁱⁱ [Statistics - Work-related fatal injuries in Great Britain \(hse.gov.uk\)](https://hse.gov.uk)

ⁱⁱⁱ [HSE Workplace Fatal Injuries 2022 Report - Heightsafe \(heightsafesystems.com\)](https://heightsafesystems.com)