TUC
Changing the world of work for good

Code of practice on "reasonable steps"

TUC response to draft statutory code of practice.

October 2023

Introduction

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions. We support unions to grow and thrive, and we stand up for everyone who works for a living.

The right to strike is a fundamental British liberty that is a vital part of ensuring a fair balance of power in the workplace. It is protected by the Human Rights Act 1998, Article 11 of the European Convention on Human Rights (ECHR), the International Labour Organisation's Convention 87 and Article 6(4) of the European Social Charter. It is therefore a core part of the UK's international commitments.

While taking industrial action is a last resort for workers seeking to bring an employer to the table for meaningful negotiation, workers' ability to withdraw their labour underpins the successful resolution of many disputes before strike action has taken place.

Therefore, the TUC strongly opposes the introduction of minimum service levels. We believe that the regime initiated by the Strikes (Minimum Service Levels) Act 2023 is draconian, unnecessary and unworkable. As we have consistently set out, ministers should reconsider plans to introduce minimum service regulations which would serve only to undermine constructive industrial relations.

Ministers already know that the introduction of minimum service levels could lead to prolonged and more frequent disputes: a government impact assessment warned of this risk.[1]

The government's own analysis also warns that minimum service levels could result in lower wages for workers.[2]

Extraordinarily, the draft statutory code of practice makes an already flawed piece of legislation even worse. The proposed requirements it sets out make this legislation even more likely to exacerbate conflict in the workplace.

It also seeks to significantly impinge even further on workers' right to take strike action to defend their pay and conditions, which the government is committed to as part of the international obligations highlighted above. When added to the UK's existing

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[1] Department for Transport (22 October 2022). *Transport Strikes (Minimum Service Levels) Bill Impact Assessment* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112717/transport-strikes-minimum-service-levels-bill-impact-assessment.pdf

[2] See, for example: Home Office and Border Force (11 August 2023). *Impact Assessment: minimum service levels (MSL) border security consultation* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178248/Signed_MSL_Border_Security_Impact_Assessment.pdf

restrictive regime and extremely limited protection for those taking industrial action, this places the UK well outside the mainstream of comparable countries.[3]

In some areas the draft statutory code lacks clarity; in others it is inaccurate; and it seeks to impose significant new duties on trade unions well beyond the scope of the Act, rather than provide guidance about the law.

This matters enormously because the consequences for those subject to this legislation could be severe. For unions it could mean injunctions or payment of damages. Workers could lose their jobs. Meanwhile, existing disputes will take longer to resolve and new disputes could emerge over the application of work notices.

We are extremely alarmed by the attempt to use the statutory code to regulate trade union activity well beyond the scope of the Strikes Act. In effect it is seeking to restrict the right to strike and other trade union activity by the back door: not in an open and transparent way. It includes detailed requirements on the operation of pickets, a subject not mentioned in the Strikes Act and governed by separate legislation. It also includes regulation of the way that trade unions, which are independent democratic organisations, communicate with members. Again, there is nothing in the underlying legislation allowing for regulation of communication with members.

Paragraphs six to eight of the code, which explain its legal status, should be rewritten. There is no reason for readers of this code to be guided to the Code of Practice on Industrial Action Ballots and Notice to Employers and the Code of Practice on Picketing. These are separate subjects unaffected by the Strikes Act. In this section, the draft code oversteps the line in seeking to guide the courts, which is not the role of the government, rather than explain the law.

The TUC also believes that it is unacceptable that the government has sought to treat trade unions and employers so differently. Ministers want to impose a statutory code in relation to a trade union's duties under the Strikes Act. However, where employers have significant statutory duties, such as in relation to consultation and ensuring that no more staff than are necessary are subject to a work notice, this is outlined in proposed non-statutory guidance.

On top of this we are dismayed by the manner with which the government has sought to engage with social partners on this issue. Just six weeks have been allowed for unions and others to respond to the consultation on this code.[4] This is half the standard 12-week consultation period.[5] Meanwhile, a separate consultation on draft guidance relating to the compiling of work notices is even shorter: running from August 24 until

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[3] Bogg, Alan L. (April 2023), *The Right to Strike, Minimum Service Levels, and European Values* http://dx.doi.org/10.2139/ssrn.4410323

[4] Department for Business and Trade (August 2023). *Minimum service levels: Code of Practice on reasonable steps* www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps

[5] HM Government (July 2008). *Code of Practice on Consultation*

September 29. This is at odds with the request of the International Labour Organisation's committee on the application of standards that the government "improve consultation of the social partners on legislation of relevance to them".

The code requires unions to:

- identify their members on the work notice
- issue a "compliance notice" to those members "encouraging" them to comply
- send an "information notice" to the wider membership stating that a work notice has been issued and how that will affect the strike
- instruct picket supervisors to take "reasonable endeavours" to ensure members named in the work notice are not encouraged to take strike action
- take steps not to undermine any of those steps and to correct actions by union officials and members that do.

This paper will deal with each of these areas in turn.

Identification of members

The TUC has long warned that the Strikes Act is unworkable. The code of practice does nothing to improve this and indeed adds extra layers of complexity and ambiguity. It also seeks to effectively legislate on trade union data standards via the back door.

The code seeks to impose the requirement that: "Prior to any ballot for industrial action, the union should have ensured that its membership data is accurate and up to date." This is excessively onerous and inconsistent with case law relating to balloting. This has established that membership information should be "reasonably accurate". After all, unions' membership lists are changing every day as members join, leave, change jobs and move house and it can take time for them to inform their union. It would be absurd and excessive for different standards to apply to different elements of the industrial action process. It is unacceptable for the government to attempt to use this code to change the law relating to requirements on trade union data.

The Strikes Act mandates extremely tight deadlines for identification of members in work notices. Employers only have to provide a work notice seven days before action starts and can amend it up to the end of the fourth day before action. In effect this would leave unions with just three days to reach members. This period can contain weekends and public holidays.

A dispute could involve hundreds of thousands of members and hundreds of workplaces. Identifying members on this scale would be an enormous undertaking. It is not at all clear how a union is expected to differentiate between members with the same name for example or indeed be certain that someone is a member or non-member.

Certainly, any delay in processing a work notice could therefore be highly significant.

Where members do not have email addresses, or have not shared these with the union, the union is expected to rely on sending information via the postal service. The code does not recognise this challenge.

Paragraph 20 states: "If a trade union does not identify its members within the work notice, or reasonably believes it has not done so, then they should take other steps as are reasonable to ensure they reach their affected membership to ensure that the overall requirement on the trade union is met." It is unclear what is meant by this paragraph, in which circumstances unions would be entitled to not fulfil the communication requirements of the code, and what alternative steps would be regarded as fulfilling that duty.

"Encouraging" individual members to comply

The code's stipulations regarding the communications with those union members named on work notices are unreasonable, misleading and complex. It would make it even harder for union members to exercise their right to strike because it would open up more grounds for employers to seek to legally challenge action. And most fundamentally, it violates unions' freedom of association for government to seek to dictate the content of its communications with members.

The code requires unions to convey an inappropriate message that could undermine the collective endeavour of industrial action. In some cases, the code's proposals are also legally inaccurate.

It is not at all clear why these duties regarding communication should be placed on trade unions at all, rather than the employer. They are far better placed to do so given the routine communication they have with their own workers.

The greater the complexity of the demands on trade unions, the greater the chance of inadvertent errors and therefore an employer legal challenge to the planned action. The code contains in paragraph 25 nine separate pieces of information that unions should contain in a compliance notice sent to those named in a work notice "clearly and conspicuously". This includes telling a worker who is named in a work notice that they "must carry out the work during the strike or lose the protection against dismissal" and also "that the union encourages the member to carry out the work as required by the work notice and not to strike except to any extent that would not contravene the notice from the employer". The code even includes sample text for communications with those on work notices and all workplace members. This is utterly excessive. The state should have no role in dictating the language with which a union communicates with its workers. Yet, the supply of a template will almost certainly lead some employers to seek to legally challenge unions where they have used alternative language.

The code fails to explain legal issues with necessary accuracy. It states, in paragraph 25d(ii) that unions are advised to tell members that they should receive from the employer a statement that the member is "an identified worker" who "must comply with the notice given to the union". But there is no obligation under the Act for an

employer to communicate with workers named on a work notice. They need only do so if they want to keep open the option of dismissing them for not attending work. It is inexplicable that the expectation of communicating with those named on a work notice is placed not with their employer, who will hold their contact details and information, but (should they have one) with their trade union.

This makes it particularly absurd that the template notice in Annexe A says that a union should "encourage" the members who they have identified on a work notice to contact their employer if they haven't received a note from them. But it is not obligatory for an employer to communicate in this way. More importantly, it is not for a union to remind employers of the need to communicate with their own employees. It is for an employer to ensure that the communications are made, if that is what it wishes to do.

In addition, it is not the case that workers "must comply" with a work notice. This Act gives neither the employer nor the government the power to compel people to work. Rather, the law states that a worker who has been notified by the employer that they are named in the work notice may be dismissed, and be denied the automatic right not to be unfairly dismissed for taking part in the strike. The draft code does not highlight that a worker who was dismissed might still be able to bring an unfair dismissal complaint under the general law. Therefore, the code and the template letter are misleading in their current form.

More widely, the compliance notice's drafting around dismissal contravenes commitments given by ministers as the legislation passed through parliament. The template requires the union to warn a member that "you could also be dismissed as a result" of not following the work notice. Yet this contradicts ministerial comments on the issue of workers being disciplined for not following work notices. For example, Minister Kevin Hollinrake told the House of Commons in May: "The reality is that nobody will be sacked as a result of the legislation. There are other disciplinary measures that can take place."[6] If the minister is correct then unions should not be required to tell members something that will not happen.

The tone of the communications required are also inappropriate and would serve only to undermine a union's efforts to implement an effective strike. For example, the draft states that the union should "encourage" a member named on a work notice to follow it. This is echoed in the template compliance notice in Annex A which states that [Name of union] encourages you to comply with the work notice…" A trade union's role is to represent members effectively and, where necessary, coordinate industrial action. While the Act places certain legal obligations regarding work notices on trade unions, it oversteps the mark to suggest that compliance with the law requires a union to say that it "encourages" members to comply with work notices.

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[6] Strikes (Minimum Service Levels) Bill Volume 733: debated on Monday 22 May 2023 https://hansard.parliament.uk/commons/2023-05-22/debates/DE7D768F-2624-49B7-A053-2A644CD0B2CE/Strikes(MinimumServiceLevels)Bill

The compliance notice template in Annex A also fails to give workers the complete picture. It states that "the work required of you should be work which you normally do or work which you are capable of doing and is within your contract of employment." It provides no guidance to the worker as to their rights if an employer seeks to deploy them in unfamiliar or inappropriate roles.

Indeed, the code of practice and the template letter omits a lot of information given in the non-statutory guidance on work notices targeted primarily at employers. In particular, it excludes information on some of the protections given to workers against unfair treatment by employers.

Therefore, if the government does proceed with publishing the code, the sample letter should emphasise the following:

- The work notice cannot override an employment contract or other contract with a worker. For example, if an individual is not contracted to work on a Sunday, the work notice cannot override that agreement.
- Employers must not take into consideration a worker's trade union membership or related activities when creating the work notice.
- An employer should not include more workers than necessary in a work notice.
- An employer should not take into consideration whether they think a worker is likely to take strike action.
- The expectation of an appeals process for those unfairly included in a work notice and the ability to take out a grievance.
- Where a work notice contravenes the law, it can be challenged in court.

Communications to the wider membership

There is nothing in the Strikes Act that requires unions to communicate with the wider union membership involved in a strike. This proposal is therefore an additional, unnecessary step and would make bad legislation even worse. It is clearly designed to have a chilling effect on all trade unionists taking part in the strike and therefore is an additional interference with the right to strike.

In particular, as argued above, we think it is contrary to rights to freedom of association that the government would seek to dictate the content of its communications with members, including those not subject to a work notice.

It would be a huge extra drain on union time and resources and provide another avenue for employer challenge to the industrial action.

On top of this, the right to strike is fundamental. Requiring unions to communicate with members in this way could undermine their ability to build collective support for industrial action.

The proposed text repeats the legal errors set out above and requires the union again to mention its "encouragement" of members to follow a work notice. This is again beyond the requirements of the legislation.

It is entirely unclear why those not named in a work notice would need to receive such information.

Paragraph 32 stating that members should contact their employer if they are uncertain of whether they are required to work under the work notice is absurd. It is for employers to ensure that they have contacted those named in a work notice if this is what they wish to do.

Picketing

The Strikes Act is silent on pickets. There was very little discussion of the role of picketing during the legislation's parliamentary passage. Picketing is, indeed, covered by different legislation and another code of practice.

Yet, the government seems intent on expanding the impact of the legislation by the back door by including detailed provisions for the role of the picket supervisor, in particular.

The way this has been drafted completely undermines the role of a picket, whose job is to persuade workers to adhere to the strike.

The requirements are a gross imposition on a trade union which should not be expected to police this oppressive legislation on the behalf of an employer. A union's role is to defend the interests of its members.

It is unacceptable to suggest that the picket supervisors should "encourage" a worker on a work notice to attend work. The aim of a picket is to encourage compliance with a strike, yet the picket supervisor is expected to undertake duties well beyond ensuring that a worker named in a work notice simply isn't hindered in going to work.

Those named in work notices can show their letters from the union or employer or "may simply wish to state orally that they are required by a work notice to work at that time". This would make it hard for unions to use pickets to encourage compliance with a strike. Provisions which would suggest unions support anyone to cross a picket line who verbally states that they are named on a work notice go significantly beyond preventing hindrance of anyone named in a work notice. More widely, the code says that the picket supervisor should *encourage* any such worker to attend work and not to take strike action which would be inconsistent with the work notice. These requirements place picket supervisors in an extremely difficult position. Practically, it is hard to see how the picket supervisor could be expected to ensure this behaviour across a picket line, when the key activity of all those picketing the employer will be to discourage fellow workers from crossing the line. In our view, the legislation does not have implications for behaviour on picket lines and it is not reasonable to place requirements on picket supervisors to attempt to enforce minimum service levels.

It is not at all clear that the government has considered the case of Ezelin v France, where the European Court of Human Rights found that it was an infringement of a lawyer's rights under Article 11 of the ECHR to require him to disassociate himself from

a demonstration. Yet, this code seeks to require workers named on work notices to disassociate themselves from pickets.[7]

The code also brings in added layers of uncertainty. For example, "the picketing supervisors (if present) or another union official member" are to "use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line". It will presumably be up to courts to define what reasonable endeavours entail. The code also ignores the fact that non-members could be among those named on a work notice but would otherwise be entitled to take strike action. Those on the picket line, including the picket supervisor, will most likely not have information about which members and, certainly which non-members, have been named on a picket. So it will be impossible to identify who should and should not be persuaded to stay away from work. Alternatively, if unions are expected to share details of those named on work notices with picket supervisors, then this raises crucial issues about the handling of special category data.

Likewise stating that "the fact that such members are crossing a picket line to comply with a work notice should be respected" is unclear. The guidance does not indicate what form this respect is to take.

Assurance

This section is used to add even greater levels of uncertainty and complexity.

The aim of these provisions seems simply to be to seek to persuade a union to pull its punches in its communications. This could undermine the effectiveness of a strike.

Data protection

As we stated in our response to the consultation on non-statutory guidance on work notices, the TUC is deeply concerned that so little consideration has been given to protection of trade union data and personal data more widely.

We wish to bring the department's attention to this issue again in this consultation response because it is of such fundamental importance given the history of trade union members suffering detriment, such as being blacklisted. It should have been treated much more seriously at an earlier stage. The Strikes Act itself contains very little information about data protection aside from a passing mention in section 234D. We consider that employers' use of work notices may involve unlawful data processing.

The problem is embedded in the minimum service regime. It is implicit in the policy that the personal data of individuals will need to be shared and held by unions and employers during the creation and monitoring of work notices, which creates

[7] Ezelin v France (26 April 1991) App No 11800/85 https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-57675%22]}

subsequent risk to individuals and may be unlawful. In particular there is no recognition of the opportunities that implementation of work notices provides for inference of someone's trade union membership status.

The department appears to guide employers in the separate draft work notice guidance that the lawful basis for processing personal data is "legal obligation". The legal obligation basis under UK GDPR Article 6.1.(c) provides a lawful basis only where "processing is necessary for **compliance with a legal obligation to which the controller is subject**". Yet there is no obligation on any employer to issue a work notice under the Trade Union and Labour Relations Consolidation Act 1992. The new Section 234C states that "an employer **may** give a work notice" where minimum service regulations have been made regarding a service. As currently drafted, the guidance could mislead employers into interpreting that the Act requires them to issue a work notice where it does not. Since the Act does not impose any legal obligation on the employer to issue a work notice, Article 6.1.(c) does not provide the employer with a lawful basis for processing personal data in relation to a work notice.

And there are uncertainties for trade unions. The code states that "As part of the reasonable steps, the union should instruct the picketing supervisor (if present) or another union official or member to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line at times when they are required by the work notice to work." It is unclear how this can be achieved without the union sharing data from the work notice with the picketing supervisor. And this would involve special category data with its particular protections.

We have set out additional data protection concerns in our response to the work notice guidelines.

Ultimately, there is no way to ameliorate the data protection risk. This should have been acknowledged when the policy was devised.