

Briefing



Minimum service levels during strikes

Introduction

The right to strike in the UK is being threatened by a draconian new [law](#).

Government ministers can now decide that a certain minimum level of service should be provided during strike action in Great Britain.

If a strike is called, an employer could then name individuals who must attend work even if those people democratically supported the action.

Unions that fall foul of the complex legislation could face huge claims for damages against them. Individuals could lose their right to automatic protection from unfair dismissal from taking part in strike action and risk being sacked.

The TUC and its affiliated unions have vigorously opposed these measures. We believe they are unworkable, risk damaging workplace relations and are contrary to the UK's international commitments.

This law is clearly intended to undermine the ability of trade unions to take effective strike action and has been introduced in the face of widespread criticism in the UK and from overseas.

The TUC will not rest until it is repealed. Join our campaign [here](#).

What does the law say?

A [law](#) has been passed that allows minimum service levels (MSL) to be imposed during strike action in services within six broad sectors: health, education, fire and rescue, transport, border security, and nuclear decommissioning and radioactive waste management services.

This would mean some workers being told to attend work even when the workforce has democratically voted for strike action.

There will be two key stages to the implementation of an MSL.

- A Secretary of State has to table, and Parliament has to approve, regulations setting out a minimum service level for a particular service within one of those sectors. This has happened for the [ambulance service](#), [passenger rail](#), [border security](#) and [fire and rescue services](#). The government has said that it wants to impose MSLs on the fire service, hospital services, schools and universities. However, at the time of writing, no regulations had been submitted to parliament.
- Once those regulations are in place, an employer may – but doesn't have to – issue a work notice naming the workers required and the duties they must undertake to fulfil that minimum service.

A statutory [code of practice](#), which can be taken into account in any court case, sets out the steps the government believes unions should take to comply with the law.

How will a minimum service be defined?

Minimum service levels are defined differently in different sectors.

So far we know the details for the [ambulance service](#), [passenger rail](#), [border security and the fire and rescue service](#). These have confirmed – as unions warned – that MSLs will mean many workers will be completely denied their right to strike to defend their pay and conditions. See below for more information of regulations affecting these particular services.

If ministers want to impose minimum service levels in other services, they have to get further regulations passed by Parliament.

But it will be up to employers, not the government to enforce these, by issuing a work notice to trade unions setting out the names of those who should come into work and the work they should carry out.

Is an employer obliged to issue work notices?

The legislation is very clear that issuing a work notice is at the discretion of an employer.

This was confirmed by ministers in parliament.

However some employers might assert they could be subject to a legal challenge if they don't issue a work notice or that they would be acting in breach of contract. Unions are likely to want to interrogate that rationale very carefully given the legislation makes clear it is an employer's choice whether to serve the work notice or not.

ACTION

Employers should be reminded that they do not have to issue work notices. In some sectors voluntary arrangements for life-and-limb cover have typically been pursued.

The Department for Health and Social Care has told trusts that in the ambulance service they can use existing life and limb cover arrangements if they can satisfy themselves these match MSL requirements and therefore not use work notices.

Employers could be reminded of the onerous nature of the MSL regime including the need for consultation and shift patterns to be worked out. Their efforts might be better directed at resolving the dispute.

They could also be reminded of the legal risks they face. The law places obligations on them including conducting a consultation, providing a work notice seven days before the dispute and not naming too many workers in order to meet the MSL. A union might seek to legally challenge a work notice if an employer breaches these requirements.

Union reps and activists should work with their national and regional offices on devising the best strategies for deterring employers from issuing work notices.

When will a worker be told if they are named in a work notice?

The expectation is that an employer will contact workers to tell them that they are named in a work notice. The guidance states that an employer can do this at any stage up to the day before the strike. And there is no legal obligation for them to do so unless they want to later discipline those who fail to obey the work notice.

However, in the case of union members, the union must be consulted (see below).

After the consultation the union has to be sent the work notice seven days before action takes place and is then required to contact members to tell them they have been identified in the work notice (see below).

According to the legislation a union is under a duty to take “reasonable steps” to ensure its members comply with a work notice. A related [code of practice](#) states that this will involve sending emails or letters to its members – but not others - named on a work notice

Will workers be consulted about a work notice?

The employer has to consult with the trade union involved. But the employer doesn't have to agree arrangements with the union and no timescales are set out in legislation. However, consultation should take place between the union giving notice of action (at least 14 days before the strike) and the deadline for a union to be given a work notice (seven days before the strike).

ACTION

One of the few obligations the law places on employers is to consult with unions before issuing a work notice.

They must “have regard to any views” expressed by the union.

Guidance produced for employers, while not legally binding, says that “the employer should share the consultation initially in a written format, and preferably electronically”.

The guidance also says that: “The employer should keep a record of their interaction with the trade union, including the rationale for how they have responded to any trade union views. Employers should respond to any views given by the trade union during the consultation before or at the same time as they give the work notice to the trade union.”

Let your union's regional or head office know if the employer is not meeting their obligations.

When will a union be given the work notice?

The employer has to provide the union with a work notice seven days before the strike starts and can amend it up to four days before (including weekends and public holidays).

In this time the union will be required to match those named on the work notice with their own membership list.

Once the union has identified its members, the law says it should issue each of them with a ‘compliance notice’ advising them not to strike during the periods when they are required to work.

The statutory code of practice states that the compliance notice should be sent electronically, where possible, and there are detailed requirements on the information the notice should contain.

In a national dispute a work notice could include hundreds of thousands of people. It must then contact the relevant members by email or post.

ACTION

The employer has to provide a work notice seven days before any action and can amend it up to four days before.

Let your regional or head office know if the employer has failed to do this.

Does a worker named in a work notice have to attend work?

The law doesn't give the employer or the government the power to force someone to go to work. But it does remove from someone named on a work notice the automatic protection from unfair dismissal that those on strike usually enjoy. So, someone who doesn't attend could be disciplined or even dismissed if they take strike action.

Does anything happen to a union?

A union could be sued for damages if it is deemed not to have taken "reasonable steps" to get members to comply with a work notice. The law was recently changed to raise to £1 million the cap for damages relating to unlawful industrial action for some unions. This is a largely untested part of the law so it is unclear exactly how the courts would apply it. The employer may also apply for an injunction to stop the industrial action going ahead as part of this claim.

What are the reasonable steps that a union must take?

A code of practice published by the government has indicated that "reasonable steps" include sending letters and emails to those named on a work notice, and for picket supervisors to ensure that people on work notices are not dissuaded by pickets from going to work if they identify themselves as being named on the work notice.

Can an employer add anyone they like to a work notice?

The law says that employers “must not identify more persons than are reasonably necessary” to fulfil a minimum service level.

They must also not take into account whether someone is a union member, has taken part in union activities or had issues raised on their behalf by a union.

The TUC remains hugely concerned that this gives limited protection in reality to union activists, in particular, being targeted for work notices.

ACTION

1. Targeting of trade unionists

The law is clear that employers must not take into consideration a worker’s trade union membership or related activities when identifying which employees to name in the work notice. This includes whether or not:

- a worker is a member of a trade union or a particular trade union, including a particular branch or particular section of a trade union
- a worker has taken part in activities of a trade union. This includes strike action.
- a worker has made use of trade union services
- a trade union has raised a matter with the employer on behalf of a worker (with or without the worker’s consent)
- a worker has consented to a trade union raising a matter with the employer on their behalf.

An individual who believes they are being unfairly targeted by being named in a work notice should seek advice from their union’s head or regional office about the challenging this behaviour such as making a [subject access request](#) to the employer to gather evidence. This is a request for copies of your personal information being held by the employer.

2. Too many workers

Employers should not name more workers than are reasonably necessary to secure the minimum service level.

This minimum service level might be different to normal service levels, depending on the regulations governing their sector.

However, employers are allowed to make some assumptions about fluctuating demand, and sick leave. This should be “evidence-based”.

Monitor the numbers being added to work notices and inform your union’s regional or head office if you believe employers are bringing in too many workers.

What about picketing?

The code of practice on “reasonable steps” says a picket supervisor should “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”.

With the exception of workers who have told those picketing that they were named in a work notice, the picket may seek to persuade other workers to strike.

Minimum service regulations already passed into law

Ambulance and Patient Transport Services

This applies to England only.

For ambulance services:

The MSL is that:

- emergency calls are answered and triaged as they would be on a non-strike day
- a response is provided to calls about people with a life-threatening condition or illness
- a response is provided to people for whom there is 'no reasonable clinical alternative to clinical assistance' being provided at the scene or by transporting to a healthcare facility.

Requests for a response from a health care professional

The MSL is that:

- requests are answered and triaged as they would be if there was no strike.
- a response is provided to:
 - requests about people with a life-threatening condition or illness
 - people for whom there is 'no reasonable clinical alternative' to clinical assistance.

Inter-Facility Transfer (IFT) services

The MSL is that:

- requests are answered and triaged as they would be if there was no strike.
- a response is provided to:
 - requests about people with a life-threatening condition or illness
 - people for whom there is no reasonable clinical alternative to the provision of IFT services.

Non-Emergency Patient Transfer Service

The MSL for the Non-Emergency Patient Transfer Service is that:

- requests are answered and triaged as they would be if there was no strike.
- transport is provided:
 - to those for whom there is 'no reasonable clinical alternative
 - where the request was made before the strike day and agreed

Passenger rail

There are three different categories of MSL in passenger rail:

Category A, train operation services

The MSL is the provision of train operation services necessary to operate the equivalent of 40 per cent of the timetabled services during the strike’.

Category B - infrastructure services, including maintenance, control of train movements and operation of communications systems

The MSL is the provision of infrastructure services on specified priority routes, and certain parts of the network with five miles of a priority route between 6am and 10pm.

Category C – light rail services, such as trams, London Underground and Docklands Light Railway

The MSL is the provision of light rail services necessary to operate the equivalent of 40 per cent of timetabled services.

This regulation does not set out the proportion of workers who would be required to deliver services of these levels.

Border security

The MSL for border services is that, on each day of the strike, border services are ‘no less effective than they would be if the strike were not taking place on that day’.

The MSL for passport services is that, on each day of the strike, ‘such of those services as are necessary in the interests of national security’ are provided as they would be if the strike were not taking place on that day.

Fire and rescue

This applies to England only.

The MSL for control room services is that that calls are answered and assessed; responses summoned, and management provided as it would be on a non-strike day.

The MSL for emergency incident response is that 73 per cent of Fire and Rescue Authority appliances and vehicles are available and a response provided to emergency incidents as on a non-strike day.

The MSL for fire safety is that fire safety services are provided as normal where there is no “reasonable alternative” and that requests for services are answered as they would be on a non-strike day.