



Department for  
Business & Trade

## Consultation: Code of Practice on ‘reasonable steps’ in relation to Minimum Service Levels

The Government is consulting to gather views on the draft Statutory Code of Practice on the reasonable steps a union must take in relation to minimum service levels, in line with the statutory requirement to publish a draft of the Code, and consider any representations made in response, under section 204 of the Trade Union and Labour Relations (Consolidation) Act 1992.

You can find the draft Statutory Code of Practice and associated consultation document at: <https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps>

The consultation will remain open for 6 weeks, closing on 6 October. This form will assist in collating answers to the consultation.

We welcome responses from any interested party, and would particularly encourage employers and trade unions to respond. Please send any completed forms, or any related queries, to [minimumservicelevels@businessandtrade.gov.uk](mailto:minimumservicelevels@businessandtrade.gov.uk).

We will analyse all submissions, and take the views expressed into account before publishing a government response and final version of the Code in due course.

### Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request. We will process your personal data in accordance with all applicable data protection laws. See our privacy policy [for more detail](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names of organisations that responded, but not people’s personal names, addresses or other contact details.

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**Organisation (if replying on behalf of an organisation)**

**BMA (British Medical Association)**

**Organisation Description**

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

**BMA position**

The draft Code of Practice sets out the “reasonable” steps unions will be required to take in helping ensure members comply with work notices. Throughout the passage of the Strikes (Minimum Service Levels) Act 2023, the BMA raised concerns that this requirement, which unions will have a duty to comply with under the threat of loss of immunity and damages awards of up to £1m, will force unions to act in a way that undermines their responsibility to represent their members. We do not believe it is “reasonable” to expect unions to take any steps that would undermine legitimate strike action for which they will have passed a high threshold to have a lawful mandate.

We recognise the need for clarity over what this duty will mean in practice for unions. However, the draft Code of Practice does not achieve that and presents issues for unions over how they will be able to practically implement the proposals. Most critically, it appears to overreach the duties as set out in the Strikes Act – for example, by requiring unions to contact all members in relation to work notices, not only those named in one; and by requiring steps to be taken in relation to picketing. The provisions relating to picketing are also inconsistent with the existing sections 220-220A Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULRCA’), and impose an obligation to ‘disassociate’, which has been found to amount to an unjustifiable interference with rights under Article 11 of the European Convention by the European Court of Human Rights (see the ECtHR Case, *Eselin* referred to below)

The BMA remains strongly opposed to the imposition of both minimum service levels (MSLs) and work notices on the basis that:

- **They are unnecessary, given that ‘life and limb’ protections already exist in the Trade Union and Labour Relations (Consolidation) Act 1992.**
- **The BMA provides for voluntary arrangements to be put in place during strike action to ensure the safety of patients.**
- **The Secretary of State has significant powers to define MSLs through regulations, and employers to set work notices, with minimal requirement for consultation and no**

- requirement for agreement with trade unions.** This risks thresholds for MSLs being set that undermine legitimate strike action. It is also contrary to the approach taken by most European countries that have minimum service levels legislation - In 85% of European countries that have legislated for minimum service levels, this includes a requirement for an agreement between trade unions and employers. BMA understands there are only four countries where a minimum service level is set without an expectation of an agreement between the trade union and the employers – Romania, Serbia, France and Spain.<sup>1</sup>
- **The mechanisms for implementing MSLs contained in the Act breach the UK’s responsibilities under international human rights laws and conventions to which the UK is a signatory.** These include ILO Convention 87 on Freedom of Association and Protection of the Right to Organise, the European Social Charter and Article 11 of the European Convention on Human Rights. As the ILO’s Committee of Experts and Committee on Freedom of Association have consistently held:
    - o the requirements for a minimum service must be limited to operations strictly necessary to meet the basic needs of the population or the minimum requirements of the service;
    - o workers and their organisations must be given the opportunity to participate in defining the minimum service, including as to the number of workers required to achieve the minimum service. That ‘participation’ must take the form of ‘negotiation’;
    - o in the event of disagreement as to the minimum service, or the number of workers required to achieve it, the matter is to be resolved by an independent authority (not the government department or the employer)<sup>2</sup>
  - None of these measures or protections are accommodated in the Act.
  - The UK already has some of the toughest trade union laws in Europe. The proposals would further limit legitimate trade union activities and risk undermining workers’ right to strike.
  - **The imposition of MSLs and work notices risk leading to greater tensions between NHS trust leaders, their staff and unions without addressing the underlying issues that are causing healthcare workers to take strike action.** This concern is shared by both unions and organisations representing NHS management, including NHS Providers and NHS Confederation, who have said that the current system works well and local agreements and arrangements between employers and unions work “much better” than a legal framework that “could potentially make things more difficult rather than easier”.<sup>3</sup> NHS Providers Deputy Chief Executive Saffron Cordery repeated these concerns in response to the launch of the Government consultation on MSLs in hospital settings, warning that it “risks worsening industrial relations”, and fails to “address any of the issues underlying current strike action”.<sup>4</sup>
  - **Employees will lose their protection from dismissal if they participate in strike action contrary to a work notice.** Despite Ministers repeatedly stating<sup>5</sup> that the Strikes Act would not result in nurses, doctors and other key workers being sacked, the work notice makes clear that this is a threat, and the draft Code of Practice goes further by requiring unions to inform all members of this risk.
  - There is also significant risk of abuse by employers in terms of the numbers and identities of employees to be included in the work notice. Work notices must not identify more persons than are reasonably necessary for the purpose of providing the MSL. Employers must

<sup>1</sup> <https://ukandeu.ac.uk/where-does-the-strikes-bill-put-the-uk-relative-to-other-european-countries/>

<sup>2</sup> See also [Federation of Offshore Workers v Norway Application 38190/97](#).

<sup>3</sup> Matthew Taylor, Chief Executive, NHS Confederation, and Sir Julian Hartley, Chief Executive, NHS Providers [Oral evidence to Health and Social Care Committee, 09.05.23](#)

<sup>4</sup> NHS Providers, Press Release: NHS Providers responds to new consultation on minimum service levels in hospitals, 19.09.23

<sup>5</sup> Lord Callanan, House of Lords Second Reading of the Strikes (Minimum Service Levels) Bill, Tuesday 21<sup>st</sup> February

not have regard to trade union membership, nor the raising of issues on a person's behalf by a trade union, when identifying persons for inclusion on the work notice. Yet the Act contains no mechanism for ensuring that these obligations are met by employers. A worker who is dismissed would have to wait until the determination of their complaint for unfair dismissal for an assessment of whether the work notice was valid. The NHS is already experiencing a workforce crisis making the allowance to the NHS of the power to dismiss staff particularly concerning.

- The opportunity for abuse by employers in identifying trade union representatives in a work notice calls seriously into question the United Kingdom's obligation 'to ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their member's interests'.<sup>6</sup>
- In the case of individuals other than trade union representatives, unfair dismissal protection will be lost not only by those named in the work notice who do not comply with it, but also by employees not subject to the work notice who are dismissed because the union has failed to take reasonable steps to ensure that its members who are identified on it comply. The sanction of making a dismissal potentially fair on this scale is disproportionate.
- **Trade Unions will be required to act in a way that would undermine their own industrial action and responsibility to represent their members** by being forced to take "reasonable steps" to ensure their members comply with these notices, or face fines of up to £1m.
- **Proposals for MSLs fail to address any of the issues underlying current strike action**, in particular, pay erosion that is resulting in doctors leaving the NHS for better paid jobs at home and abroad. Instead of curtailing doctors' right to take part in legitimate strike action under threat of dismissal, the Government should drop its opposition to negotiating a new pay deal and get round the table with doctors with a credible offer.
- **Instead of focusing on strike days, the Government should be taking action to ensure the NHS is safely staffed 365 days a year.**
- Ensuring patient safety in the long-term is one of the reasons doctors are striking, as they struggle to cope with working in an increasingly understaffed and under-resourced NHS. Yet the Government has failed to take the action needed to ensure patient safety on non-strike days and address what the Health and Social Care Select Committee has described as the "greatest workforce crisis" facing the NHS and social care.

### The provisions in relation to picketing

There is a particular issue in relation to picketing and the steps the union is recommended to take in the draft Code of Practice. These include taking positive steps 'to ensure they reach their membership to ensure that the overall requirements of the trade union are met' (paragraph 20) and 'instructing the picket supervisor (if present) or another union official or member to use reasonable endeavours to avoid, so far as reasonably practicable, trying to persuade members who are identified in the work notice not to cross the picket line at times when they are required to work' (paragraph 35).

There has been some statutory regulation of picketing as part of industrial action since the Conspiracy and Protection of Property Act 1895 created various criminal offences where there had been violence or intimidation, and included an immunity limited to tort. Lawful and peaceful pickets have been held not to be tortious by the courts since *Ward Lock and Co Ltd v Operative Printers Assistants Society* (1906) 22 TLR 327, approved by the Court of Appeal in *Fowler v Kibble* [1922] 1 Ch 487

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<sup>6</sup> See *Palomo Sanchez v Spain* [2011] ECHR 1319.

More fundamentally, since 1906 there had been an immunity in primary legislation which protected as “lawful” peaceful picketing. The existing structure of the picketing legislation contained in sections 220-220A TULRCA, and on which the Code of Practice on Picketing gives guidance, adopts a carefully calibrated system of granting immunity in certain situations and then clawing back liability in various circumstances. Immunity is granted to workers picketing at or near their own place of work (and to officials attending at or near the place of work of a member whom they are accompanying and whom they represent). That immunity extends, for example, to secondary action (where the person induced not to cross the picket line is employed by a different employer) provided that the picket’s employer is party to the dispute. But liability is clawed back if, for example, a person induced not to cross the picket line is a member of the same union as the picket, and has not been balloted.

In each picketing situation, there is a set of rules which determines whom the picket can induce not to cross the picket line, whilst retaining immunity, and whom they cannot. The draft Code of Practice envisages the Strikes Act as creating a further circumstance in which the union is required not to encourage a person not to cross a picket line – i.e. where that person is identified in a work notice. The BMA strongly contests whether the creation of that further circumstance is appropriate or legitimate for the reasons it has already given. In any event, no such stringent guidelines as those contained in paragraph 25 of the draft Code of Practice in relation to workers identified in a work notice (instructing the picket supervisor or other official or member to use reasonable endeavours etc.) have ever been included in the Code of Practice on Picketing in relation to other circumstances where pickets would lose their immunity.

There is good reason why such guidance has not been included in the Code of Practice on Picketing. The draft Code of Practice in effect requires pickets and picket supervisors to disassociate themselves from persons who are identified in the work notice, and requires employees identified in the work notice to disassociate themselves from pickets and picket supervisors. A requirement to disassociate from a protest has been found by the European Court of Human Rights to fail to protect rights under Article 10 and 11 of the European Convention. The threat of disciplinary sanctions against a professional who attends a peaceful gathering or protest outside the location which is most relevant to the issue which is the subject of the protest, and who does not ‘disassociate’ themselves is disproportionate. The European Court of Human Rights requires that contracting states protect the rights of professionals to share their beliefs publicly<sup>7</sup>. That right is given additional and particular protection by sections 200- 220A TULRCA, without the limitations now sought to be imposed by the draft Code of Practice.

It is essential that rights within the scope of Article 11 are given appropriate protection. As the Grand Chamber of the European Court of Human Rights held in a judgment delivered on 26 September 2023:

‘The Court considers that acts which appear on their face to come within the scope of Article 11 of the Convention and which do not incite violence or otherwise reject the foundations of a democratic society should benefit from a presumption of legality (compare for example in the context of Article 5 of the Convention....). That being said, it is open to the domestic authorities to rebut this presumption in a given case.’<sup>8</sup>

This principle of a presumption of legality and therefore protection for the union and individuals exercising rights within the scope of Article 11, and a requirement for no threat of enforcement, should be an essential cornerstone of the draft Code of Practice.

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<sup>7</sup> See Ezelin v France Application no. 11800/85, see in particular paragraphs 52 and 53.

<sup>8</sup> See Yüksel Yalcinkaya v Türkiye Application no. 15669/20, judgement delivered 26 September 2023.

### Question 1

Paragraphs 15 to 20 of the Code set out the first proposed reasonable step, 'identification of members'. Is there anything else, or alternatives, unions could do prior to or immediately after receiving a work notice to facilitate the following steps?

The BMA does not believe unions should be required to identify members that are subject to work notices due to the interference of this duty with our responsibility to represent our members. This is a clear example of the draft Code of Practice seeking to 'overreach' the requirements of the Act, which make no reference to the union being required to identify the members identified on the work notice.

The extent of the union's obligation should also be viewed in the context of (i) the employer being in a better position to give relevant notices to individuals identified on the work notice; and (ii) it being a pre-requisite for loss of unfair dismissal protection that such an individual is given by the employer (a) notice in writing of the work specified in the work notice as required to be carried out; and (b) a statement, under 238A TULRCA, that they are an identified worker in relation to the strike and must comply with the work notice<sup>9</sup>.

We are further concerned at the limited time trade unions will have to put any processes in place. Under the proposals, unions will be required to start identifying members "as soon as reasonably practical" after receiving a work notice. Given that a work notice may be received just 7 days before strike action and amended as late as 4 days prior to any action, unions will have very little time to meet this step. The scope for variation could also result in unions having to duplicate work at a time when staff resources will already be incredibly stretched.

Whilst the Code of Practice states that "Unions may wish to engage in advance with employers to agree how work notices can be designed to help the union efficiently identify union members", there is no requirement for employers to agree their process for issuing work notices with unions. The Strikes Act also sets out that any MSL regulations will apply to ongoing disputes, meaning there could be very limited time for the design or development of this process.

These time constraints that will be out of the unions' power to control could result in a failure to identify all members subject to a work notice. Considering the risk of non-compliance with the duty could be an award of damages of up to £1m, this could be very costly for the union.

### Question 2

Paragraphs 21 to 28 of the Code set out the second proposed reasonable step, 'encouraging individual members to comply with a work notice'. Does this step (and the draft template at Annex A of the consultation document) contain sufficient information to help workers identified in the work notice comply with the work notice and not to strike? Or are there alternatives to this step for unions to take to encourage individual members to comply with a work notice?

Insofar as the requirements of paragraphs 21 to 28 seek to impose, or suggest, obligations which are not set out in the Act, this amounts to 'overreaching'. Examples include:

- The inferential suggestion in paragraph 22(a) that unions should send the compliance notice once it is clear that the work notice will not be subject to variation; and
- The requirement in paragraph 25 for compliance notices to address union members individually by name.

<sup>9</sup> See section 238A(9)(b)

Annex A includes reference to the risk of disciplinary action or dismissal if employees fail to adhere to a work notice, a draconian measure which will inevitably scare individuals from taking part in legitimate strike action. This is despite the Government having repeatedly said that the legislation will not result in key workers being sacked. Directing unions to reinforce the threat of this, as a consequence of failure to comply with a notice among their members, is excessive and could increase the risk of employers using work notices as an opportunity for intimidation. Neither employees nor unions should be put in this position.

Employers should be required to be open and honest with their employees over the potential risks of non-compliance, including avenues available to them to appeal a notice.

### Question 3

Paragraphs 29 to 33 of the Code set out the third proposed reasonable step, 'communications to the wider membership'. Do you agree or disagree that it is reasonable for unions to communicate with all members who are being encouraged by the union to strike, both to reinforce messages to members identified in a work notice and to explain, for the benefit of a broader group of members who may be involved in the strike, how the strike will be affected where a work notice is given by the employer?

Paragraphs 29 to 33 of the Code risk overreaching the requirements of the Strikes Act by seeming to create legal obligations not provided for in the Act. The BMA strongly disagrees that it is reasonable for unions to use communications to all members to reinforce messages to members identified in work notices. Section 234E of the Strikes Act only requires that a union take "reasonable steps" to ensure that all members of the union who are identified in the work notice comply with the notice. This requirement is specific and limited to members identified in a work notice.

In requiring unions to communicate with all members encouraging compliance with work notices, the Code of Practice therefore appears to be placing requirements on unions that go well beyond the requirement in the legislation. This also infringes the requirement for a presumption of legality on the part of the union, as recently confirmed by the Grand Chamber of the European Court of Human Rights<sup>10</sup>.

### Question 4

Does step three, 'communications to the wider membership' (and the draft template at Annex B of the consultation document) contain sufficient information to inform the wider membership on the implications of a work notice for them?

The BMA strongly opposes requiring unions to communicate with the wider membership on the issuing of work notice, on the basis that this appears to overreach legal provisions set out by the Strikes Act. Annex B reinforces our concerns by requiring unions to set out the consequences of failing to comply with a work notice and encouraging them to ignore communications enticing members to strike.

Given that work notices should not have an implication for employees not named in them, it is inappropriate to expect unions to write to the wider membership in relation to this. Far from helping inform members, it risks confusing them and instilling fear among people who have not been named in a work notice.

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<sup>10</sup> See note 8.

There is a real risk that recipients of the information notice who are not identified on the work notice will think that the effect of the information notice is that they are being instructed by their trade union not to participate in industrial action, under threat of possible disciplinary action or dismissal by their employer. Use of an information notice therefore is likely to weaken the effectiveness of any industrial action.

The statement at paragraph f of paragraph 31 that 'the union encourages them to carry out the work as required by the work notice...', even though it is qualified by reference to the requirements of the work notice, is misleading and runs the risk of being interpreted by the recipient as meaning that they are being instructed to carry out the work described in the work notice. The practical effect of paragraphs f and g is also that the work notice would have to be shared with the wider membership. If that is not the case, then members of 'the wider membership' will not be able to confirm whether their participation in the strike could contravene the work notice, and they would be less likely to take part in the strike action. A requirement to reveal the work notice to the 'wider membership' would also amount to unlawful data processing.

### Question 5

Paragraphs 34 to 40 of the Code set out the fourth proposed reasonable step on 'picketing'. Is there anything else that could be done on the picket line to ensure a minimum service level is met?

As described in this response, the measures in the draft Code of Practice are already unjustified and excessive. No further measures can be justified.

### Question 6

Is there anything else picketing supervisors can do as part of step four, 'picketing', to encourage members identified in a work notice to comply?

Please see above the BMA's general observations concerning picketing.

The draft Code of Practice requires that picket supervisors take "reasonable endeavours" to ensure that union members who are identified in the work and who identify themselves as such at the picket are not encouraged by members of the picket line to strike. It also requires picket supervisors to encourage such workers not to take strike action and comply with the work notice.

In practice, this will require picket line supervisors to police who is attending a picket line, which further undermines the core responsibility of a trade union to represent its membership and risks interference with lawful union activity.

It may be difficult in practice to identify people who have been issued with a work notice or prove that supervisors took steps to encourage employers to comply with a notice. The risk of not running picket lines in a way that's seen to adhere with the Code of Practice could act as a deterrent from carrying out the long-established function of a picket line of encouraging people to support a strike, a right protected under Article 11 of the European Convention.

### Question 7

Are there any other actions that the Code could list under step five, 'assurance', that unions should not take in order to not undermine the other reasonable steps?



There is no warrant for the inclusion of measures to prevent the undermining of steps taken by the union. This is another example of 'overreaching'.

### **Question 8**

Are there any further or alternative steps that should be included within the Code which will be useful and appropriate for trade unions to take in order to meet the requirement to take reasonable steps?

The Code of Practice states that "actions taken to undermine the steps could include, for example, sending communications to members (including those identified in a work notice) to induce them to strike". This again appears to overreach what is required by the Strikes Act by suggesting that communications to any members encouraging them to strike could result in unions losing protections from liability in tort.

The Union is already required to contact members identified in a work notice including setting out that they should ignore wider communications inducing them to strike. This should be sufficient to ensure the union has met their statutory duty.

### **Question 9**

Will the Code help trade unions to meet the requirement to take reasonable steps as per Section 234E of the Act? If not, why is that the case?

Please see the BMA's position set out at the start of this response.

The Code of Practice does not provide necessary reassurance to unions over adhering with the requirement to take reasonable steps as set out in Section 234E of the Act. In part, this is due to the Code of Practice being constrained by unreasonable provisions of the Strikes Act. These include the unrealistic and impractically short timeframe unions will have for both developing processes for communicating work notices, and for identifying members named and issuing communications relating to work notices.

It also creates further practicality questions for unions in terms of issuing communications to all members and mitigating any confusion caused to members not identified in work notices.

### **Question 10**

Does the Code strike an appropriate balance between the reasonable steps being proportionate in encouraging members to comply with a work notice, whilst balancing this with the ability to take strike action?

The BMA strongly believes the Code does not strike an appropriate balance between proportionality and balancing the importance of upholding the right to strike.

As repeatedly argued, the Government's proposals for MSLs restrict the right to strike by undermining the role of unions to represent their members and handing the SoS powers to set MSLs through secondary regulations with no requirement for agreement with trade unions.

Rather than providing reassurance on how this might work in practice, the Code goes further and overreaches the Strikes Act, for example by requiring unions to contact all members in relation to

work notices, not only those named in one, and by requiring picket lines to further police compliance.

**Question 11**

Do you have any other comments about the draft Code?

Please see the BMA's position set out at the start of this response.

The role of a union is to represent their membership, who will have passed a high threshold to vote in favour of strike action. The BMA firmly believes it is unreasonable to expect unions to take any steps to encourage its members to adhere with a strike notice, directly undermining the core role of a union.

Rather than allaying our concerns, the draft Code aggravates these by overreaching the duties as set out in the Strikes Act; (a) with a requirement for unions to reinforce messaging around work notices to all members; (b) providing no protection to employees from intimidation; (c) requiring unions to reinforce threats that non-compliance will result in dismissal; and (d) requiring picket supervisors to police attendance at picket lines.

Thank you for taking part in this consultation. Please send all replies to [minimumservicelevels@businessandtrade.gov.uk](mailto:minimumservicelevels@businessandtrade.gov.uk)