



Dec 2023

Union Briefing

From Thompsons' Trade Union Law Group

The Strikes (Minimum Service Levels) Act 2023

The Strikes (Minimum Service Levels) Act 2023 gives the Secretary of State power to make regulations setting out minimum service levels (MSLs) when unions call strikes in the following six services:

- health;
- fire and rescue;
- education;
- transport;
- decommissioning of nuclear installations and management of radioactive waste and spent fuel; and
- border security.

The government has avoided parliamentary scrutiny of what the appropriate MSL in a particular sector should be by providing for the MSLs to be set out in regulations.

Before making regulations, the Secretary of State is required to consult with such persons as they consider appropriate.

I. Work notices

Where a union serves an action notice for strike action in a service in which an MSL applies, employers will be able to serve a 'work notice' on the union.

The work notice will identify the workers the employer requires to work during the strike and specify the work they should carry out, in order to meet the requirements of the MSL.

Before giving (or varying) a work notice, an employer is required to consult the union about the number of workers to be identified and the work to be specified in the notice. The employer must have regard to any views expressed by the union.

The work notice must be served by no later than the seventh day before the strike is due to start. An employer can vary a work notice by no later than the fourth day before the strike.

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The work notice must not identify more persons than are reasonably necessary for the purpose of providing the MSL specified in the relevant regulations. In deciding which workers to identify in the work notice, the employer must not have regard to:

- trade union membership;
- whether or not the worker has taken part in trade union activities or made use of trade union services, or
- whether or not the worker has had a matter raised or has agreed to have a matter raised by a trade union.

2. Loss of protection if the union does not take reasonable steps

A union which is served with a work notice will lose the statutory protection, normally available where strike action is called in furtherance of a trade dispute following a statutory ballot if it does not take reasonable steps to ensure that all members of the union identified in the work notice comply with it.

Loss of statutory protection puts the union at risk of an application to court for an injunction to prevent strike action and/or claims for damages for losses caused to the employer by the strike action.

In addition, loss of statutory protection means that employees who take part in the strike action will lose automatic protection from unfair dismissal.



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3. Action notices

The Act requires unions, when giving an employer 14 days' notice of industrial action, to state whether the action is a strike for the purposes of section 234C TULRCA, given that the provisions do not apply to action short of a strike. For this purpose, overtime bans and call-out bans are deemed to be action short of a strike.

4. Minimum Service Level Regulations: 8 November 2023

MSL Regulations in the passenger rail transport, ambulance and border security services were laid before parliament on 8 November 2023.

In each case, the MSL Regulations come into force on the later of 'the time immediately after the Code of Practice comes into force' and the date the regulations are made in parliament. They are expected to come into force in mid-December 2023.

The regulations will apply to any strike notice which is served after the date on which they come into force.

As will be seen, the regulations set the MSLs at a level which potentially allows employers to require a significant majority of the workforce to attend work and, therefore, to undermine the effectiveness of the strike action.

For example, the MSL for 'Border Services' is 'services which are no less effective' than if the strike was not taking place.

This criterion would appear to prevent any form of strike action ensuing in that sector and seemingly amounts to an outright ban.

In the context of ambulance services, the phrase 'no reasonable clinical alternative' is highly subjective and open to different interpretations.

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Minimum Service Levels: Passenger Railway Services

The regulations apply to 'train operation services', 'infrastructure services' and 'light rail services'.

'Infrastructure services' is defined broadly to include: 'reactive maintenance of any part of a network', 'the exercise of control of day-to-day train movements', 'the operation of communication systems', 'the operation and reactive maintenance of infrastructure such as railway crossings and tunnels', 'the control of rails and overhead lines', 'the resolution of incidents on the railway' and 'the provision, operation and reactive maintenance of plant, equipment and machinery'.

'Light rail services' are listed and include trams in various cities, London Underground and Docklands Light Railway.

There are three different categories of MSL.:

Category A - train operation services - The MSL is 'the provision of the train operation services necessary to operate the equivalent of 40% of the timetabled services during the strike'.

Category B - infrastructure services - The MSL is the provision of infrastructure services between the hours of 06.00 and 22.00 on 'priority routes' (which are routes between listed stations) and certain parts of the network within a five-mile radius of a 'priority route'.

Category C - light rail services - The MSL is the provision of light rail services necessary to operate the equivalent of 40% of timetabled services.



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Minimum Service Levels: Ambulance and Patient Transport Services

The MSL for emergency ambulance services is that:

- emergency calls are answered and triaged as they would be if the strike were not taking place on that day;
- a response is organised and provided to calls about people with a life-threatening condition or illness, and
- a response is organised and provided to people for whom there is 'no reasonable clinical alternative to clinical assistance' being provided at the scene of the incident and/or by transporting the person to a healthcare facility as it would be if the strike were not taking place on that day.

The MSL for requests for a response from a health care professional, for either clinical assistance or transportation of a patient to a healthcare facility, is that:

- Requests are answered and triaged as they would be if the strike were not taking place on that day.
- A response is organised and provided to:
 1. requests about people with a life-threatening condition or illness or
 2. people for whom there is 'no reasonable clinical alternative' to clinical assistance being provided in a community setting and/or by transporting the person to a healthcare facility;

as it would be if the strike were not taking place on that day.



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The MSL for requests for Inter-Facility Transfer (IFT) services is that:

- requests are answered and triaged as they would be if the strike were not taking place on that day;
- a response is organised and provided to:
 1. requests about people with a life-threatening condition or illness and
 2. to people for whom there is no reasonable clinical alternative to the provision of IFT services

as they would be if the strike were not taking place on that day.

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

- requests for transportation are answered and triaged as they would be if the strike were not taking place on that day.
- transportation is provided:
 1. in response to such requests for 'relevant patients' (those for whom there is 'no reasonable clinical alternative') as it would be if the strike were not taking place on that day; and
 2. where the request was made before the strike day, and agreed, for a 'relevant patient' as if the strike were not taking place on that day.

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Minimum Service Level: Border Security

Border Services include the examination of persons arriving in or leaving the UK, the examination of goods being imported to or exported from the UK, and the patrol of ports and UK waters. 'Passport Services' are 'any services for or in connection with the issuing of passports and other travel documents'.

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'. As we have emphasised previously, this appears particularly restrictive of the right to strike.

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.

Again, this is a severe restriction on the ability to take effective strike action in those service areas.



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Consultation on Minimum Service Levels: Education

The Secretary of State has published a consultation on MSLs for education, which closes on 30 January 2024.

The consultation sets out two possible options, involving prioritising attendance for:

1. vulnerable children and young people, exam groups and children of critical workers; and/or
2. all pupils in primary school and priority cohorts in secondary and further education settings.

5. Revised Code of Practice: 'Reasonable Steps'

A Code of Practice on Reasonable Steps to be taken by a trade union to ensure that its members identified in a work notice comply with it was published on 13 November 2023.

The Code of Practice does not itself impose legal obligations, but any provisions of the Code are admissible in evidence and may be taken into account in court proceedings.

The steps set out in the revised Code, which was issued on 6th December 2023, are particularly severe:



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Step 1

On receipt of a work notice (or a varied work notice) from an employer, the union should identify which of the workers listed in the work notice are its members.

'A failure to identify a small number of members may not constitute a failure to take reasonable steps, 'as long as the union made a reasonable attempt to identify the members'.

Step 2

Once the union has identified its members, 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 compliance notice should be sent by electronic means, where possible. If this is not possible or if the union is aware that the member will be unlikely to access electronic communications before the strike date, then it should be sent by first-class post.

There are detailed provisions as to what the 'compliance notice' should contain.

In addition to the date of the strike, the contents should provide that:

- the law allows the members' employer to give a work notice;
- the employer has given a work notice identifying the member as a person required to work and specifying the work they are required to carry out;
- the member should receive from the employer:
- notice of the work they are required to carry out, and
- a statement that the member is an identified worker and that they must comply with the work notice;
- if the member receives both of those from the employer, the member must carry out the work or could be subject to disciplinary proceedings, which could include dismissal;
- the union 'encourages the member to carry out the work as required by the work notice';
- the member should disregard any communication from the union encouraging people to strike during the period in which the member has been identified in the work notice; and
- the union will ensure that any picket supervisor will use reasonable endeavours to ensure that, if the member identifies themselves to the pickets or the picket supervisor, the pickets will not seek to persuade the member to take part in the strike.

A template compliance notice is included at Annex A of the Code.

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Step 3

The union should instruct the picket supervisor (or another union official or member) to use reasonable endeavours to ensure that pickets avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line.

Unions are not required to notify the picket supervisor of the names of union members identified in the work notice. There is no requirement for the picket supervisor or other pickets to ask workers whether they are identified in a work notice.

With the exception of workers who have explained to the picket that they have been identified in a work notice, the picket may induce other workers to strike.

Step 4

Once the union receives a work notice, the union should ensure that it does not do other things which undermine the steps it takes to meet the reasonable steps requirement.

Unions should also use 'reasonable endeavours to tailor their encouragement to strike to workers not identified in the work notice'.

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Draft Guidance on issuing work notices

The government published non statutory guidance on 'Minimum Service Levels: issuing work notices, a guide for employers, trade unions and workers' on 16 November 2023. The guidance includes the following points:

- a work notice cannot be used to secure a MSL during other forms of industrial action, such as an overtime ban;
- employers and trade unions should consider whether a voluntary agreement covering the provision of services during strike action is appropriate and achievable to deliver MSL as an alternative to an employer issuing a work notice;
- employers should keep a record of their methodology for identifying workers and the work required for a work notice;
- there is no statutory duty on the employer to issue a work notice. However, the employer should consider any existing legal duties or obligations they may have when deciding whether to issue a work notice;
- the employer should consider whether they can achieve the MSL without issuing a work notice;
- whilst the employer does not need to agree the content of the work notice with the union as part of consultation, it should give proper consideration to the views of the union;
- the employer should share the consultation with the union initially in a written format and preferably electronically;
- The consultation should be carried out with sufficient time for the union to consider the proposed number of workers to be identified and the work to be specified and to express its views in response and for the employer to consider the response;
- the employer must consider all feedback appropriately and make any changes to the work notice it considers necessary as a result of feedback;
- the work notice should not identify whether or not any individual is a trade union member (this information is special category data);
- individual workers should not be sent the work notice as it contains other workers' personal data;
- a worker who is identified in a work notice is only required to do the work set out in the work notice;
- it is likely that employers and trade unions will need to update their privacy notice to workers in order to comply with GDPR; and
- as soon as a union has identified its members named in a work notice, the personal data of non-union members should be disposed of safely and securely as quickly as possible.

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Conclusion

Unquestionably, this pernicious legislation is aimed at undermining the ability of trade unions to take effective strike action and has been introduced in the face of widespread criticism from parliamentary committees and in the House of Lords. Unions are right to question whether it complies with international standards and whether it is lawful.

Please let us know if you would like to discuss the implications of MSLs and possible strategies.

Thompsons Solicitors Trade Union Law Group



Richard Arthur
Head of TULG Group
richardarthur@thompsons.law



Rachel Halliday
Partner
rachelhalliday@thompsons.law



Neil Todd
Partner
neiltodd@thompsons.law

For general enquiries:

Call 0800 0 224 224

Visit www.thompsonstradeunion.law

