

Minimum Service Levels introduced for ambulance, rail, and border security

15 December 2023

The Strikes (Minimum Service Levels) Act 2023

The Strikes (Minimum Service Levels) Act 2023 ("Act") came into force in July 2023 and allows for minimum service levels (MSLs) to be made in relation to health, transport, education, fire and rescue and border security. Upon receipt of a strike notice from a Trade Union an employer in these affected sectors, following consultation with the Trade Union, can serve a "works notice" naming the workers that are required to work and the work that they are required to carry out to ensure that the minimum service level is maintained during the strike. The Trade Union must then take "reasonable steps" to ensure that any workers named in the works notice comply and attend work during the strike. If the Trade Union fail to do so, they will lose their immunity from liability meaning the employer could seek an interim injunction to restrain the strike or claim damages if it has gone ahead. Further, the strike will not be protected meaning that employees taking part will lose their automatic unfair dismissal protection (although the dismissal could still be unfair in any event). Equally, any workers who chose not to comply with the works notice will lose their automatic protection from dismissal.

Minimum Service Level Regulations

The MSLs for each sector are set out in separate regulations accompanying the Act. Following consultation earlier in the year, regulations have now come into force which provide for MSLs in the ambulance service, rail service and border security. There are no regulations at present providing for MSLs in education or fire and rescue.

In summary, the regulations currently in force provide for the following MSLs:

Ambulance service:

- Calls (including healthcare professional and inter-facility transfer services) to be answered and triaged, and for all that are life-threatening or where there is no reasonable clinical alternative to receive a response as they usually would on a non-strike day.
- For non-emergency patient transport services, requests for transport to be answered and triaged, and transportation provided to patients for whom there is no reasonable clinical alternative as if the strike were not taking place.

Although the regulations apply to England, Scotland and Wales, relevant services are defined as NHS ambulance service providers in England (which are named in the regulations) and the Patient Transport Service: England. Therefore, the regulations only apply in England (as responsibility for the operation of these services in Scotland and Wales lies with the devolved administrations).

Rail services:

- For train operation services, the equivalent of 40% of the operator's timetabled services during the strike.
- For heavy rail infrastructure services (such as signalling and track operation), priority routes operating between 6.00 am and 10.00 pm (which are listed in a Schedule to the regulations), including certain infrastructure within a 5-mile radius of the listed priority routes.
- For light rail services (e.g., trams, underground and metro), 40% of that system's timetabled services for the relevant strike day.

The regulations apply to England, Wales and Scotland and apply to any strike that takes place after 8 December 2023. This is the case even if the notice of the strike was given previously or if the date of the strike ballot was on or before the Strikes Act came into force.

Border security:

- Border services to be provided at a level that means they are no less effective than if a strike were not taking place.
- Such passport services as are necessary in the interests of national security to be provided as they would be if the strike were not taking place

The regulations apply to England, Scotland and Wales.

Code of Practice on “Reasonable Steps”

In addition to the regulations, the Department for Business and Trade have also published the a Code of Practice on reasonable steps Trade Unions should take to ensure their members comply with a works notice.

What does the new legislation mean for employers?

The new regulations give ambulance, rail, and border control employers, who are in receipt of a strike notice from a Trade Union, the ability to require workers to work on a strike day thus minimising disruption. However, there is no statutory obligation on an employer to issue a works notice. Guidance published by the government suggests that the employer should consider a range of factors such as its existing legal duties and obligations to provide the service and whether the MSL could be achieved by other means such as voluntary agreement with the Trade Union.

If an employer does wish to issue a works notice, they should first consult with the Trade Union, and take account of any views expressed about the number of workers required and the work to be included. The employer will then need to issue a works notice identifying which worker will be required to work during the strike and the work which they will be required to undertake. The work notice must not identify more workers than are "reasonably necessary" to meet the minimum service requirement. Following the issuing of the works notice, the Guidance suggests that the employer should notify each worker identified to help workers understand what is expected of them and help the employer provide the MSL.

As the new legislation only applies in respect of strikes and not action short of a strike, it remains to be seen whether future ballots for industrial action will be for action short of a strike, such as work to rule or an overtime ban. If this is the case it may prove more difficult for employers to contingency plan as such action typically lasts longer than strike action and can be more disruptive.

Further, concerns have been expressed by the Joint Committee on Human Rights regarding whether the consultations on MSLs were insufficient to meet International Labour Organisation standards or to be compatible with Article 11 of the ECHR. Equally, Labour have pledged to repeal these laws in the event they win the next general election. Therefore, the new laws could potentially be short lived.

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