

**Title:** Minimum Service Levels in the event of strikes: hospital services in NHS Hospitals

**IA No:** 9615

**RPC Reference No:**

**Lead department or agency:** Department of Health and Social Care.

**Other departments or agencies:**

Department for Business and Trade (DBT), Home Office (HO), Department for Transport (DfT), Cabinet Office (CO) and HM Treasury (HMT).

Impact Assessment (IA)

**Date:** 03/10/2023

**Stage:** Development/Options

**Source of intervention:** Domestic

**Type of measure:** Consultation on secondary legislation

**Contact for enquiries:**  
hospitalmslconsultation@dhsc.gov.uk

**Summary: Intervention and Options**

**RPC Opinion: RPC Opinion Status**

**Cost of Preferred (or more likely) Option (in 2019 prices)**

Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
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**What is the problem under consideration? Why is government action or intervention necessary?**

Industrial action poses a significant risk to the smooth functioning of hospital services leaving patients in need of emergency, urgent and time-critical care particularly vulnerable to service disruptions. When strikes are called, the NHS does all it can to protect essential services. Unions have sometimes helped by voluntarily agreeing to some members attending work. These agreements are known as 'derogations'. In some instances, unions have supported voluntary derogations and have agreed them in good time but in other instances these were only agreed once the strike started or were not agreed at all, putting patient safety at risk. Therefore, the Government is consulting on a proposal to introduce minimum service levels (MSLs) in hospitals, to mitigate the negative impacts of strikes on the public while continuing to enable workers to exercise their ability to strike.

**What are the policy objectives of the action or intervention and the intended effects?**

**Objective:** The policy intention through introducing MSLs in hospital services is to protect life and health by ensuring patients who need emergency or urgent treatment in hospital or patients who are receiving hospital care and are not yet well enough or able to be discharged receive this during strike action, as well as providing certainty, clarity and consistency in the level of health care services during strike action.

**Intended effects:** The intention is MSLs will help to protect the ability of workers to strike while ensuring the lives and health of the public is protected. MSLs will help enable a more consistent level of service and certainty in planning across hospital services. This would minimise circumstances in which patients are not able to receive treatment, or patient safety is put at risk.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

**Option 0:** 'No change' counterfactual: the existing system of putting in place mitigations and employers seeking to agree voluntary derogations with unions would continue in hospital services without legislative intervention.

**Option 1:** Implement MSLs via regulations for NHS health services, to supplement voluntary derogations.

**MSLS IN EVENT OF STRIKE ACTION: HOSPITAL SERVICES - IMPACT ASSESSMENT**

Will the policy be reviewed? It **will** be reviewed.

If applicable, set review date: **N/A**

Is this measure likely to impact on international trade and investment?				<b>No</b>
	<b>Micro</b> No	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded: <b>N/A</b>	Non-traded: <b>N/A</b>

***I have read the Impact Assessment, and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible:  
SELECT SIGNATORY

Date:

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Summary: Analysis & Evidence

Policy Option 1

Description: Minimum Service Levels in the event of strike action: Hospital Services

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Can only be quantified on a single illustrative strike day basis due to lack of robust evidence and uncertainty around frequency of use of MSLs.

Employers

- Familiarisation costs (direct)
- Administrative Burden (direct)

Trade unions

- Familiarisation costs (direct)
- Administrative costs (direct)

Other key non-monetised costs by 'main affected groups'

Trade unions: Loss of collective bargaining power

Employees: Limitation on the ability to strike

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Not quantified due to lack of robust evidence and uncertainty of frequency and use of MSLs.

Employers

- Savings in the cost of mitigations including saved management time associated with putting in place mitigations, saved overtime costs or enhanced payments to staff providing cover for striking colleagues.

Other key non-monetised benefits by 'main affected groups'

- Patients: Greater level of care for those needing emergency, urgent and time critical care during strikes
- Employers: Increased level of certainty about continuation of NHS time-critical services.

## MSLS IN EVENT OF STRIKE ACTION: HOSPITAL SERVICES - IMPACT ASSESSMENT

Key assumptions/sensitivities/risks	Discount rate
<ul style="list-style-type: none"> <li>• Sensitivities: Differences in provision in NHS hospitals and circumstances strike to strike means that there may variation as to whether costs associated with MSLS are higher or lower than current costs associated with mitigations and voluntary derogations during strike action. We are seeking further information regarding costs via the consultation.</li> </ul>	

### BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	Score for Business Impact Target (qualifying provisions only) £m:						
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%; padding: 5px;">Costs:</td> <td style="width: 33%; padding: 5px;">Benefits:</td> <td style="width: 33%; padding: 5px;">Net:</td> </tr> <tr> <td style="height: 20px;"></td> <td></td> <td></td> </tr> </table>	Costs:	Benefits:	Net:				
Costs:	Benefits:	Net:					

## Evidence Base

### 1. Problem under consideration and rationale for intervention

#### *Issue being addressed*

Patients are at the heart of healthcare services, and their wellbeing, safety and continuity of care is a government priority, including during industrial action. In normal circumstances, every hospital patient expects to receive timely and quality healthcare services, whether they are attending a routine check-up, managing a chronic condition, seeking urgent care or requiring specialised treatment. Industrial action poses a significant risk to the smooth functioning of these services, potentially leading to harmful delays, restricted access to essential care and an increased burden on staff and resources. Patients in need of emergency care, urgent procedures and other time-critical treatment, are particularly vulnerable to service disruptions. These conditions often require immediate intervention or uninterrupted attention to prevent serious complications or even death, meaning that reliability of this kind of service is critically important at all times. Continuity of care is also essential for people who are already receiving hospital care and are not yet well enough or able to be discharged

The ability to strike is an important part of industrial relations in the UK. However, protecting the ability to strike needs to be balanced with the obligation to protect the lives and health of the public.

Therefore, the UK Government is consulting on a proposal to introduce minimum service levels (MSLs) in hospitals, to protect the lives and health of the public while continuing to enable workers to exercise their ability to strike.

#### *Current or future harms being tackled*

We have gathered evidence about the impact that industrial action has had on NHS hospital-based services since December 2022. This evidence shows that strike action has both been hugely disruptive, and at times significantly increased the risk of compromising patient safety. Despite organisations working hard to mitigate the impacts of all strike action, to date nearly 1.01 million appointments have been rescheduled due to strike action since December 2022.

In addition, there were 22 critical incidents declared due to industrial action. In 2 instances, some critical care patients and gynaecology patients had to be moved to other hospitals due to insufficient staffing numbers. Some urgent cancer surgery and chemotherapy appointments had to be rescheduled and some urgent surgery on trauma patients could not go ahead. Minor injury units, urgent treatment centres and one emergency department were closed. Under the proposed MSLs we would expect that such incidents, cancellations and closures could be avoided. This is in addition to the cancellation of planned surgery and routine appointments which were not urgent or life-threatening. While there were reduced waiting times in emergency departments during some of the strikes, this was in

part because other parts of the NHS offered a significantly reduced service, or no service at all, on strike days.

While under the MSL appointments may still need to be cancelled, the emergency and urgent appointments would be expected to go ahead, and the greater certainty would mean that early decisions can be made about the appointments that need to be rescheduled.

### ***What sectors or markets could be affected?***

The MSL regulations would cover almost all NHS Trusts and Health Boards and may include other NHS organisations, private or independent providers or companies where they directly deliver NHS hospital services as covered by the MSL or provide support services vital to the delivery of those NHS services. Where services are subcontracted or commissioned NHS Trusts or Health Boards may not employ all the staff who are essential to the care provided by hospitals. As only the organisation that employs a member of staff who may strike can issue a work notice, the proposal for a Hospital MSL may also need to cover organisations that provide services on behalf of hospitals. We are seeking views on which types of employer could be specified by any regulations introduced as part of the consultation.

In England, there are a total of 202 NHS Trusts<sup>1</sup> providing NHS services<sup>2</sup>. Of these, all but 2 provide one or more of the following types of hospital – general acute, specialist acute, mixed services site, mental health hospital, learning disability hospital, community hospital or other in-patient beds. Wales has 3 NHS Trusts and 7 Health Boards responsible for health services, including hospitals. Scotland has 14 regional Health Boards which run hospitals.

Less robust data is available on non-core NHS organisations. In England, around £12.6 billion (approximately 7% of NHS budget)<sup>3</sup> is spent on independent sector providers (private and third sector), although majority of this is likely to be on elective planned activity and so would not be covered by the proposed MSL.

The proposal does not impact on healthcare services offered in the community or people's homes by the NHS. Later, if it becomes clear that strike action is impacting the risks to life and life-changing harm for patients who need to receive healthcare in community settings, the government may consider MSLs for further health services and would consult on any further proposals.

There are 15 main unions who represent staff who work in NHS hospital services. These are listed in Table 1 below. Membership figures provided are as reported by the union in

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<sup>1</sup> Estates Returns Information Collection 2021/22 (published October 2022)

<sup>2</sup> Proposals for Minimum Service Levels for Ambulance Services have been consulted on separately, and are therefore out of scope for this proposal.

<sup>3</sup> Calculated as proportion of NHS E Revenue budget, Table 53, [HC 1043 – Department of Health and Social Care Annual Report and Accounts 2021-22 \(publishing.service.gov.uk\)](#)

the latest AR21 return submitted to the Certification Officer and published on gov.uk.<sup>4</sup> Membership figures are for Great Britain and include all members, not just those who work in NHS hospital services.

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<sup>4</sup> <https://www.gov.uk/government/publications/public-list-of-active-trade-unions-official-list-and-schedule/trade-unions-the-current-list-and-schedule#official-list-of-trade-unions>



**Table 1: Trade Unions who may be impacted by the policy**

<b>Union</b>	<b>Membership</b>	<b>Data from</b>
British Association of Occupational Therapists	33,501	30 September 2022
British Dental Association	14,805	30 September 2022
British Dietetic Association	9,154	28 February 2022
British Medical Association	162,488	31 December 2022
British Orthoptic Society Trade Union (BOSTU)	1,115	31 December 2022
Federation of Clinical Scientists (Association of Clinical Biochemistry and Laboratory Medicine)	1,206	31 December 2021
GMB	559,953	31 December 2022
Hospital Consultants and Specialists Association	2,989	30 September 2022
Royal College of Podiatry	9,013	31 December 2022
Royal College of Nursing	517,612	31 December 2022
Royal College of Midwives	48,209	31 December 2021
The Royal Society of Radiographers	31,623	30 September 2022
The Chartered Society of Physiotherapy	57,557	31 December 2020
Unison	1,331,264	31 December 2022
Unite	1,171,186	31 December 2020

***Why government intervention is justified***

When strikes are called, the NHS does all it can to protect essential services. In some instances, unions have supported this through voluntary derogations that have been agreed in good time. However, in other services where derogations were agreed shortly before the strike started, some staff did not attend work when employers had understood they would do, and patient safety was put at risk while situations were resolved, urgent appointments have been cancelled on the day, wards closed unexpectedly, and emergency care was compromised.

As such, experience has demonstrated that there is a risk of harm to hospital patients through relying solely on voluntary derogations, which depend on the goodwill of unions and individual staff, especially where a union will not agree derogations. The potential risk of harm to life and life-changing impact for patients would be increased further if separate

trade unions chose to call more than one professional group to take industrial action at the same time e.g., doctors and nurses.

It is because of the risk of harm and the uncertainty of relying on goodwill to maintain hospital services, that the government feels that a legislative intervention at national level is a necessary and proportionate option. This is why the government has launched a consultation on whether and at what level to put in place statutory minimum service levels for Hospitals.

## **2. Rationale and evidence to justify the level of analysis used in the IA (proportionality approach)**

The Strikes (Minimum Service Levels) 2023 Act establishes a broad framework for the introduction of statutory MSLS in the event of strikes and their operation. The intended impacts through introducing MSLS in hospital services is that hospitals will treat people who require urgent or emergency treatment in hospital and people who are receiving hospital care and are not yet well enough or able to be discharged, during the period of industrial action as they would on a non-strike day. This would achieve a greater level of care as well as certainty, clarity and consistency in the level of hospital services provided to protect life and health during strike action.

There is low confidence and high uncertainty in the evidence base to robustly monetise impacts. We have therefore taken a largely narrative approach in the assessment and provided illustrative costs based on assumptions per strike mandate or action where feasible. Many of the more significant impacts, both positive and negative, on employee relations are more difficult to assess and, in some cases, more subjective so are discussed qualitatively.

## **3. Description of options considered**

### ***The options***

**Option 0:** 'No change' counterfactual: the existing system of putting in place mitigations and employers seeking to agree voluntary derogations with unions would continue in hospital services without legislative intervention.

**Option 1:** Implement a MSL via regulations for NHS hospital services, to supplement voluntary derogations.

Option 1 would ensure that employers of staff in hospitals could issue a work notice requiring an individual to work through strike action, in order for the level of service set out in the MSL to continue. It would be for employers to decide if issuing a work notice was necessary depending on the circumstances of the strike, including if the union agrees to voluntary derogations in advance of the strike.

### ***How MSLS will work***

The Strikes (Minimum Service Levels) Act 2023 includes powers for the Secretary of State to set MSLS in regulations. The Act aims to limit the impacts of strike action on the lives and livelihoods of the public and to ensure balance between the ability of unions and their members to strike with the rights of the wider public to be able to access key services during strikes.

The introduction of MSL legislation is designed to enable people to continue to travel to their place of work, access education and healthcare, and go about their daily lives during strikes, while balancing this against the ability to strike. Where MSLS are applied, there should be a more consistent level of service for the public from strike to strike, as well as minimising the circumstances in which there are no services at all. This will help protect the public and guard against disproportionate risks to lives and livelihoods.

For health services the primary aim of MSL regulations is the protection of life and health.

### ***Work notices***

Where MSL regulations are in place, and where a trade union gives notice of strike action to an employer which provides a relevant service (as specified in the regulations), the employer can issue a notice (known as a 'work notice') to specify the persons required to work and the work they must carry out to secure that the MSL for that strike period.

Workers who are named in a work notice can lose their automatic right to protection for unfair dismissal if they choose to go on strike.

Where a valid work notice is given to the trade union(s), the union(s) have a duty to take reasonable steps to ensure that all members of the union who are identified on the work notice comply with the notice. Failing to take reasonable steps would lead to the union losing their protection from liability in court.

In order for a work notice to be valid it must be issued in accordance with section 234C of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended). This includes that the work notice must not identify more persons than are reasonably necessary to provide the level of service set out in the MSL regulations, and that the employer must consult with the union and have regard to their views on the number of people to be identified and the work to be specified before issuing a work notice.

In addition, workers who go on strike despite being named in a work notice will not lose automatic unfair dismissal protection if the employer fails to give them written notice of the requirement for them to work, the work they are required to do on the strike day, and notice that they are required to comply with the work notice.

### ***Proposed MSLS for hospital services***

We are currently consulting on the proposal for MSL regulations be introduced for hospital services and the level be set so that hospitals will treat people who require urgent or

emergency treatment in hospital and people who are receiving hospital care and are not yet well enough or able to be discharged, during the period of industrial action as they would on a non-strike day. This would mean the following sets of patients could expect to be treated as they would on a non-strike day:

- in-patients already receiving hospital care
- existing patients requiring urgent elective treatment that would normally be delivered during the period of industrial action (for example, people on priority 1 or priority 2 elective surgery lists (surgery that is required within 72 hours for priority 1, or 4 weeks for priority 2), people requiring dialysis, transplant patients where a potential donor match is identified, elective caesarean or induction of labour)
- existing patients who could or will need emergency, critical or urgent assessment, diagnostics or treatment in hospital (for example, cancer or cardiac diagnostics and treatment, but not, for example, routine knee or hip replacement)
- new patients presenting to hospital that require unplanned assessment, diagnostics and/or treatment in hospital (for example, people presenting to emergency departments, people in active labour)

As part of the consultation, we are seeking views on the specific aspects of the proposal, and as such the level of the MSL, if introduced, may be amended in light of information gathered during the consultation period.

### ***Geographical scope***

The act applies to Great Britain. The Act enables the UK Government to apply MSLs to key sectors across Great Britain, including health services. In some cases, this will affect employers operating services where responsibility for those services is devolved to the Scottish or Welsh governments. This assessment therefore covers the potential impacts of MSLs for hospital services across Great Britain

As part of the development of minimum service levels and the consultations that are legally required to inform these, the government will seek the views of the Scottish Government and the Welsh Government on the geographical scope of the regulations - recognising that in some cases application of minimum service levels could affect employers operating services that are devolved. As employment law is devolved for Northern Ireland, it is for the Northern Ireland Assembly to assess whether to introduce legislation that would allow for minimum services levels to be set in the event of strikes.

## **4. Policy objective**

### ***Intended outcomes***

- Protection against risks to life caused by strike action in NHS hospital services.

- Protection against the risk of life-changing harm caused by strike action in NHS hospitals
- Greater consistency of NHS hospital provision during strike action to protect equity of access
- Increased certainty of hospital staffing levels to enable forward planning for managers, staff, patients and their families.

### **5. Summary and preferred option with description of implementation plan**

We are consulting on the proposal to introduce MSL regulations for hospital services. This will inform decisions on if, and if so what level, of MSL could be set for hospital services.

The option of a Hospital MSL would be enabled through regulations brought forward under the powers provided to the Secretary of State for Health and Social Care in the Strikes (Minimum Service Levels) Act 2023.

The Act provides amendments to the Trade Union and Labour Relations (Consolidation) Act 1992<sup>5</sup> to:

- establish powers for the government to make regulations to set minimum service levels in certain services within key sectors, such as healthcare, fire and rescue, and transport services. As set out in the Act, the government must consult before it brings forward regulations for Parliament's approval;
- enable employers within specified services to issue work notices to roster the workforce required to secure the minimum service level on a strike day;
- add a new obligation for unions to take reasonable steps (outlined in the draft code of practice<sup>6</sup>) to ensure compliance with work notices to the list of requirements necessary for the union's strike action to be protected from liability in tort, where minimum service levels have been made.

Providers of NHS hospital services will take the decision about whether to utilise this power to issue a Work Notice in advance of any strike affecting that service. The Work Notice will list those staff who are required to work during the strike action to maintain a Minimum Service Level in that hospital. This will ensure that the necessary hospital services are available when needed by relevant patients.

The arrangements will come into effect once regulations have been laid, if a decision is taken to proceed following the consultation.

Operation and enforcement of the new arrangements will be the responsibility of NHS employers who provide hospital services and their sub-contractors, should those organisations be included in the scope of the MSL.

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<sup>5</sup> <https://www.legislation.gov.uk/ukpga/1992/52/contents>

<sup>6</sup> <https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps>

As an employer can only issue a work notice, the obligations for unions to take reasonable steps and the loss of unfair dismissal protection for individuals who do not comply with a work notice only apply once regulations are in place; there is no scope for experimentation, piloting or trialling. The non-legislative alternative in the form of voluntary derogations, has not always been reliable and depends on the goodwill of unions and individual workers hence why we are now consulting on introduction of a legislative option.

### **6. Monetised and non-monetised costs and benefits of each option (including administrative burden)**

This section describes the potential costs and benefits that may arise because of the proposal in comparison to the counterfactual option. The impacts are discussed as narrative assessment with some estimates of potential scale of impacts where possible given the large degree of uncertainty over the occurrence, frequency and scale of strike action e.g., could be regional or national and involve single or multiple unions. These uncertainties also mean that assessing the impacts of the policy over a standard 10-year appraisals period is difficult, so instead we have considered impacts, where quantified, as costs 'per strike day'.

We have focussed on impacts to NHS hospital services, which are primarily provided by NHS trusts and health boards. There may also be impacts for other organisations who provide subcontracted services to NHS hospitals or who are commissioned to provide NHS hospital services, including diagnostics, where this provision is for emergency, urgent or time-critical care (i.e. within the level of the MSL). We assume there are 224 NHS employers in scope (comprising of 200 NHS Trusts in England, 7 Health Boards and 3 Health Trusts in Wales and 14 regional Health Board in Scotland), 15 unions in line with those represented in NHS Staff Council in England. We assume national and regional union representation in line with 7 NHS England regions, Scotland and Wales for the purposes of assessing impacts to unions. Given the varied and local nature of NHS services, we are proposing that local NHS trusts, health boards, and their commissioners are best placed to determine precisely how services should operate and the number of staff needed in order to provide the minimum level of service set out in previous section.

#### **Non-Monetised costs**

It is expected that key organisations (unions and employers in scope) would be required to familiarise themselves with the legislation and any relevant guidance produced to support the policy and incur on going, administrative costs in complying with work notices and reasonable steps.

The Department for Business and Trade (DBT) are developing a statutory Code of Practice on the reasonable steps unions must take to ensure that all their members identified within a work notice comply with that notice using existing powers under Section

203 of the Trade Union and Labour Relations (Consolidation) Act 1992. DBT's consultation on this Code of Practice is now open<sup>7</sup>.

We cover familiarisation and administrative monetised costs to trade unions and employers in scope of policy in turn below. However, these costs only represent a small proportion of total expected impacts from this policy. Other more significant impacts around loss of right to strike, loss of union bargaining power, loss of voluntary goodwill of employees, and increased action short of strike are not monetised but discussed qualitatively.

## 7. Familiarisation costs (*one off set up costs*)

### Trade Unions

It is expected that trade unions would have to familiarise themselves with the legislation and any relevant guidance including changes to Rule Books<sup>8</sup> and privacy notices produced to support the policy. We assume that regional level union and national level officials per union will need to become familiar with the legislation and in the absence of clear evidence to cost the impact of this, take an assumptions-based approach. For purposes of the initial assessment, we assume 2 national officials and 2 regional officials (per NHS England region, Scotland and Wales) for each union will be required, although in practice some unions may have more or less depending on their size.

We assume that senior officials would take between a day (8 hours) and four days (32 hours) with a best estimate of two days (of 16 hours), to familiarise themselves with the proposed policy. This is a doubling of assumptions set out in the ambulance MSL consultation<sup>9</sup> and reflects additional time burdens due to work notices and reasonable steps.

Estimates from the Annual Survey of Hours and Earnings (ASHE)<sup>10</sup> suggest that the median hourly wage of a General Secretary or a senior union official is £30.83<sup>11</sup>. These values are then uplifted by 17.9%<sup>12</sup> to cover the non-wage labour costs. Given that, the hourly labour cost of union officials is estimated at £36.35<sup>13</sup> and based on assuming 2 national officials and 2 regional officials (per NHS England region plus Scotland and Wales per union covered by NHS Staff Council, we estimate the familiarisation cost to be between £90,000 and £350,000 with a central estimate of **£175,000**.

### Table 2 Familiarisation costs unions

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<sup>7</sup> [Minimum service levels: Code of Practice on reasonable steps - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-reasonable-steps)

<sup>8</sup> Union rule books set out how unions are governed and outline the rights and responsibilities of members.

<sup>9</sup> [Strikes \(minimum service levels\) consultation: ambulance services in England, Scotland and Wales - impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/consultations/minimum-service-levels-ambulance-services-in-england-scotland-and-wales-impact-assessment)

<sup>10</sup> ASHE (2022) Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2022

<sup>11</sup> We use the median wage of Functional manager and directors n.e.c as a proxy for a General Secretary or union senior official wage (SOC 1139).

<sup>12</sup> <https://www.gov.uk/government/publications/strikes-minimum-services-levels-bill-2023>

<sup>13</sup> ASHE (2022) Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2022

Role	Number of Officials <sup>14</sup>	Median Hour Pay (Uplifted)	Time Taken (Hours)	Number of Unions	Total (nearest 000)
General Secretary or a senior union official	20	£36.35	16	15	£175

*Legal Advice to Unions Familiarisation costs*

We also expect that unions would seek legal advice on the regulations as part of the familiarisation process. Using the assumptions set out in the Impact Assessment for the Strikes (Minimum Service Levels) Bill by DBT, this gives a cost of £7,500, we assume that this would double given additional requirements for unions to understand their legal responsibility with regards to complying with work notice and so take 16 hours with an estimated cost of **£15,000**.

**The total familiarisation cost to unions including legal costs is estimated at around £190,000.**

**NHS employers**

Employers will need to enforce MSLS into practice operationally if there are strike days affecting them. They would therefore need to familiarise themselves with the legislation.

We assume a chief executive or senior official, a HR manager or director, an operations manager or director and a legal professional from the management team in each employer in scope will be required to familiarise themselves with the legislation.

There are 234 NHS employers in scope comprising of 210 NHS providers in scope in England, 7 Health Boards, 3 Trusts in Wales and 14 Health Boards in Scotland. We assume familiarisation would require 16 hours of chief executive and board level time, 16 hours of senior HR managers, 48 hours of operational managers and 16 hours of legal professionals' time.

The average hourly wage rates, excluding overtime but adjusted for estimated related labour costs are set out in **Table 3** below.

**Table 3:** Hourly median wages and labour costs for employer management team occupations

Occupation	Average hourly labour costs (includes employers' on- costs)	Basis of hourly rate estimate
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<sup>14</sup> Assumes 2 national officials and 2 regional officials per NHS England region, Scotland and Wales per union.



Chief executives and board level	£100.83 <sup>15</sup>	Senior Salaries Review Board Report 2022
Senior HR/clinical managers	£55.44	Agenda for Change Band 8c
Operational/rota managers	£23.63	Agenda for Change Band 5
Legal professionals	£39.19	Agenda for Change Band 8a

**Table 4 Familiarisation costs employers**

Role	Number of Officials <sup>16</sup>	Average hourly labour costs (includes employers' on- costs) £	Time Taken (Hours)	Total (nearest 000)
Chief executives and board level	234	100.83 <sup>17</sup>	16	378
Senior HR managers	234	55.44	16	208
Operational	234	23.63	48	265
Legal professionals	234	39.19	16	147

Across the NHS employers in scope therefore total familiarisation costs of **£1 million**.

### Administrative costs

In addition to the familiarisation costs, it is expected that there will be on-going administrative costs to unions and employers on strike days if MSLs are used with regards to reasonable steps and work notices. Overall, we expect the administrative costs of MSLs to be greater than any costs associated with agreeing derogations. We are seeking further views on this via the consultation.

### Trade Unions – (*reasonable steps*)

Government has committed to producing a statutory code of practice on reasonable steps unions must take to ensure that all their members identified within a work notice comply

<sup>15</sup> Hourly equivalent of £140,531: CP 494 – Forty-Third Annual Report on Senior Salaries 2021 – July 2021 paragraph 6.109

<sup>16</sup> Assumes 2 national officials and 2 regional officials per NHS England region, Scotland and Wales per union.

<sup>17</sup> Hourly equivalent of £140,531: CP 494 – Forty-Third Annual Report on Senior Salaries 2021 – July 2021 paragraph 6.109

with that notice. The draft Code is being publicly consulted on and therefore subject to change<sup>18</sup>. Due to the uncertainty of what the final guidance (the Code of Practice) will require in terms of these steps, we have adopted a high-level approach to estimating costs of reasonable steps. We are also asking unions about the time commitment of taking reasonable steps as part of the consultation. We consider there to be three general additional administrative costs to unions associated with reasonable steps:

- **Processing and issuing a communication** (referred to as compliance notice) to individual members of the union identified on a work notice.
- **Communications to all members** of the unions which the union believes it has induced or may induce to take strike action. This notice outlines, for the benefit of all members who receive it, that a work notice has been given to the union, and that some members are required to work.
- **Picket supervisors** to have a role in not encouraging members identified in the work notice to strike. Picket supervisors will be instructed by the union to take reasonable endeavours to ensure that union members who are identified in the work notice, and who identify themselves at the picket of this, will not be encouraged by those on the picket to take strike action.

### *Processing and communication of a compliance work notice to individual members of the union and the information notice to all members*

Once the work notice has been issued by the employer to the relevant unions, it is expected that the unions will need to communicate the effects of the notice to their members, including those members identified in the work notice. This may involve notifying members that they have been identified in a work notice and will be required to work on a strike day.

It is assumed that this notification would be sent electronically due to time constraints ahead of strike action and for ease of record keeping. We would expect unions to already have the necessary contact information to hand and the operational capability to deliver such notification, for example, via email. We assume for our analysis that all unions would deliver this notification electronically, given that:

- a. when signing up to become a union member, there is a requirement to provide an email address and other contact details e.g., phone number, home address.
- b. unions already use electronic means to communicate with members.
- c. section 24(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 is a statutory duty that requires a union to maintain the names and addresses of its members.

We assume that it would take a day for a union official to process the work notice and information notice and then notify the relevant members and that this will be done at a

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<sup>18</sup> [Minimum service levels: Code of Practice on reasonable steps - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps)

regional level i.e., per NHS E region, Scotland and Wales. Estimates from the Annual Survey of Hours and Earnings (ASHE)<sup>19</sup> suggest that the median hourly wage for ‘Officers of non-governmental organisations’ is £13.43. We then uplift this value by 17.9%<sup>20</sup> to £15.83 to account for non-wage labour costs. For the purpose of creating an estimate we have assumed that all unions could be issued with a work notice. It is very unlikely that all unions will be taking strike action at the same time.

**Table 5:** Costs to Unions of processing work notices

Role	Number of Officials <sup>21</sup>	Median Hour Pay (Uplifted)	Time Taken (Hours)	Number of Unions	Total (nearest 000)
Officers of non-governmental organisation	9	£15.83	8	15	£17

#### *Encouraging compliance with a work notice*

There will be steps for unions to take to encourage compliance from workers with a work notice. Because the duty to take reasonable steps to ensure all members of the union who are identified in the work notice comply with the notice will likely extend to the picket, we expect there will be additional costs for unions and picket supervisors to help understand their role and the means in which they can help to encourage compliance from workers. We expect that any additional requirements will not substantially add to a picket supervisor’s existing role, and some may be covered in familiarisation costs discussed above. We have not been able to ascertain from stakeholder engagement or existing available evidence who typically acts as a picket supervisor. Therefore, we reflect the potential cost as the median hourly wage of all professional occupations, given the occupational profession of a picket supervisor could vary significantly.

We assume it would take one hour in total for a picket supervisor to familiarise themselves with the additional requirements for their role. This is based on the picket supervisor reading and understanding the new requirements individually before potentially discussing their role further with the union official(s) for any clarification. Estimates from the Annual Survey of Hours and Earnings (ASHE)<sup>22</sup> suggest that the median hourly wage for ‘Professional occupations’ is £22.19. We then uplift this value by 17.9% to £26.16 to account for non-wage labour costs.

In addition, we assume this cost would decrease over time, as wherever new strike action occurs, it is likely that more picket supervisors would become accustomed to the additional

<sup>19</sup> ASHE (2022) Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2022

<sup>20</sup> Estimated from latest ONS Index of Labour Costs per Hour publication

<sup>21</sup> Assumes 1 per ambulance service provider

<sup>22</sup> ASHE (2022) Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2022

requirements for their role, hence potentially reducing the number of individuals (acting as picket supervisors) that would need to familiarise themselves.

**Table 6:** Costs to Unions of encouraging compliance

Role	Number of Officials	Median Hour Pay (Uplifted)	Time Taken (Hours)	Number of Unions	Total (nearest 000)
Picket supervisor	9	£26.16	1	15	£4

Where an employer follows the requirements set out in section 234C of the Trade Union and Labour Relations (Consolidation) Act 1992 to issue a valid work notice to the trade union(s), the union(s) have a duty to take reasonable steps to ensure that all members of the union who are identified on the work notice comply with the notice. Failing to take reasonable steps would lead to the union losing their protection from liability in tort.

This could result in employers seeking court action to request an injunction be brought against the strike to stop it from taking place or to seek damages.

Based on illustrative assumptions the administrative costs for unions are in the region of £21,000 per strike shift. If the assumptions of time taken are doubled so it would take 2 days to process work notices and 2 hours to ensure compliance, then costs would also double to £42,000.

### **NHS employers (work notices)**

It is for the employers to decide which of its workers are identified in the notice to provide the minimum level of service, but this can include any type of worker who is reasonably necessary (which, for example, could include full time and part time staff and on-call staff) where the employer is contractually permitted to require the staff to carry out the relevant work. It would be for employers to decide if issuing a work notice was necessary depending on the circumstances of the strike, including if the union agrees to voluntary derogations in advance of the strike.

The costs associated with issuing of work notices will depend upon how this approach compares with the counterfactual option. Engagement with stakeholders for the *consultation on minimum service levels in the event of strike action: ambulance services*<sup>23</sup> suggested the issuing of work notices could be challenging and time-consuming as this process could involve consulting with a number of unions about the number of workers to be identified and the work to be specified before issuing a work notice, communicating with workers, who may disagree with being named or query whether they are / are not named, updating rosters which may not align with strike action, and/or updating privacy notices. We are seeking views on the costs of issuing a work notice from employers delivering hospital services as part of the consultation.

<sup>23</sup> [Minimum service levels in event of strike action: ambulance services - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

Further it is possible that strike mandates will extend over months and within a mandate, strikes can be called for single or multiple days. It is further likely that each strike day could require several work notices to be issued (separate ones for each shift) and therefore different individuals would be named on different work notices for a period of strike action.

We assume that the higher the MSL level, then the less challenging it is likely to be to issue work notices because the level of service will be similar to a non-strike day. In the absence of clear stakeholder intelligence of the time and resources required, an illustrative estimate of administrative costs could be in the **region of £3million**<sup>24</sup>

### **Enforcement costs – consequences of non-compliance**

A work notice is valid if it is given in accordance with section 234C of the Trade Union and Labour Relations (Consolidation) Act 1992. The union is then under an obligation to take reasonable steps to ensure that all of its members who are named on a valid work notice comply with the notice.

If the work notice is validly given by the employer to the union, unions who do not take reasonable steps to ensure that their own members who are identified on the work notice comply with the work notice will lose their protection under the Act from damages claims by the employer or could be subject to an injunction to prevent the strike from taking place (as a result of liability in tort). Furthermore, employers may incur costs related to dealing with any disciplinary matters in the event of non-compliance by staff of work notices. The costs that could be incurred by the employers will be specific to their disciplinary processes so cannot be quantified however these costs could include administrative and legal costs for processing these cases and going through any employment tribunal proceedings. We can assume that most workers will comply with a notice, given that failure to do so may incur disciplinary action.

Employees who are specified on the work notice but take part in the strike contrary to that work notice will lose their automatic protection from unfair dismissal for industrial action, provided they were notified by the employer in writing of the requirement for them to work, of the work they were required to do on the strike day, and that they were required to comply with the work notice.

### **Unions – impacts on bargaining power**

The health and care sector are heavily unionised compared with other sectors, with around 38% union members compared with UK average of 22.3% in 2022<sup>25</sup>. Union membership within the NHS is higher for some professional groups. Impacts of MSLs on the bargaining power of unions and workers is difficult to determine. However, if the proposed policy were to change the balance between unions and employers, this may reduce the value that workers derive from being part of a union. The introduction of minimum service levels

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<sup>24</sup> Illustrative calculation assuming 4 clinical managers (4 hours each) and 40 rota managers (8 hours each) per 1,000 staff plus 234 Chief Executives (2 hours) involved in issuing work notices. Using wage rates set out in Table 3

<sup>25</sup> [Trade union statistics 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/trade-union-statistics-2022)

could adversely affect trade unions' negotiating power. This is likely to have impacts on union membership as it could make it less attractive to be represented by a union.

### **Employees and wider workforce**

There are several benefits to workers from being part of a union. One of these benefits is that unions help counterbalance the bargaining power that employers have over their staff. Union collective bargaining may lead to improved terms and conditions, including increased pay deals, which can have impacts on staff morale and motivation and thus service quality. If introducing MSLs changes the balance between unions and employers, this could lead to potential reductions in future pay or working conditions for hospital staff. What is also not clear is how an equivalent voluntary derogation option, (the status quo) also impacts on the balance between unions and employers, leading to an impact on pay and conditions.

On the other hand, MSLs could mean fewer instances of pay being withdrawn on the basis of striking.

For employees in scope, we think the overall impact on bargaining power although uncertain is likely to be minimal given a significant amount of planned activity would not be covered by the MSL, and so would still face disruption. Employees named on a work notice are likely to be those who would also be expected to work in the status quo (Option 0) and so would receive a wage under both Option 0 and Option 1. So, the potential for any reduced benefits from union membership in a MSL options are limited.

The likelihood of an individual being named in a work notice will depend on their profession, specialist skills, working pattern and the area of hospital services that they work and the number colleagues who do the same or similar role. It is possible that some specialist workers may be named each time a work notice is issued for a strike day where they were normally rotated to work. Conversely some staff may never be named in a work notice. The impact on any individual's ability to strike will therefore vary.

### **Benefits**

The introduction of MSL legislation is designed to enable people to continue to access healthcare, while balancing this against the ability to strike. Under the proposal (Option 1), during industrial action the following sets of patients could expect to be treated in the same way as they would on a non-strike day:

- in-patients already receiving hospital care
- existing patients requiring urgent elective treatment that would normally be delivered during the period of industrial action (for example: people on priority 1 or priority 2 elective surgery lists (surgery that is required within 72 hours for priority 1, or 4 weeks for priority 2), people requiring dialysis, transplant patients where a potential donor match is identified, elective caesarean or induction of labour)

- existing patients who could or will need emergency, critical or urgent assessment, diagnostics or treatment in hospital, (for example, cancer or cardiac diagnostics and treatment, but not for example routine knee or hip replacement)
- new patients presenting to hospital that require unplanned assessment, diagnostics and/or treatment in hospital, (for example, people presenting to emergency departments, people in active labour).

This would be a higher level of service than has been provided during some recent strikes, for example during simultaneous strikes by consultants and doctors in training a ‘Christmas Day’ level of service was provided, which led to some time-critical treatments such as dialysis and cancer surgery, being postponed.

## Summary of impacts

MSL legislation is designed to enable people to continue to receive healthcare services on strike days, while balancing this against the ability of workers to strike. Where MSLs are applied, there should be a higher and more consistent level of service for the public from strike to strike. This will help protect the public and guard against disproportionate risks to lives and health.

There are of course wider considerations: in a health context, and wider economic context, the longer-term impacts of the policy (both positive and negative) on employee relations are more difficult to assess and in some cases are more subjective.

**Table 7:** Costs and benefits of the impacts associated with MSLs for certain groups<sup>26</sup>

Group	Costs	Benefits
NHS hospital services provider (employers)	<b>Non-monetised:</b> familiarisation costs (work notices)  admin costs (work notices)	<b>Non-monetised:</b> Greater certainty, greater consistency between services, potential for higher level of service in some areas
Businesses – out of scope	n/a (unions only impacted – see below)	n/a (unions only impacted – see below)
Service users	n/a	<b>Non-monetised:</b> Reduced negative impact of strikes on health of individuals (direct)

<sup>26</sup> Costs and benefits not monetised due to lack of robust evidence and uncertainty around frequency of use of MSLs

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		Certainty, consistency, assurance of levels of service delivery.
Unions	<p><b>Non- monetised:</b> familiarisation costs (work notices/reasonable steps)</p> <p>admin costs (complying with work notices, reasonable steps) –</p> <p>reduced bargaining power</p>	<b>Non-monetised:</b>
Workers	<p><b>Non- monetised:</b></p> <p>Loss in utility<sup>27</sup> resulting from the restricted ability to take strike action.</p>	<p><b>Non-monetised:</b></p> <p>Certainty over status of working on a strike day including receiving an income<sup>28</sup></p>
Wider impacts	<p>Changing nature and frequency of industrial action including action short of strike</p>	<p>Wider health benefits leading to economic benefits – (indirect)</p>

<sup>27</sup>Utility loss due to reduced ability to express dis-satisfaction through strike action, and negative impact on workforce terms and conditions in the future

<sup>28</sup> Workers may prefer to be on strike but under voluntary derogations they may also be expected to be available to work if needed. Under a MSL option, the likelihood of striking would be more certain



## 8.Risks

Risk	Detail
Damage to Employer-Trade Union Relations	<p>Implementing MSLs in the could increase tensions between unions and health service employers. This may result in more adverse impacts in the long term, such as an increased frequency of strikes for each dispute, including action in areas not covered by the MSL<sup>29</sup>. However, this is highly uncertain and MSLs could improve relations in the longer term. Strikes themselves are influenced by a range of factors, such as the nature of the dispute, the level of support for strikes from union members and the ability of employers and unions to reach a settlement. It is therefore not possible to predict with any certainty that strikes will increase as result of this policy. Additionally, it is also possible that in some cases, MSLs could lead to settlements between unions and employers being reached more quickly than they may otherwise would have.</p>
Action Short of Strike (ASOS)	<p>The legislation does not cover action short of striking (ASOS) or industrial action that isn't a strike.<sup>30,31</sup> ASOS may be more likely where a full strike is restricted by MSLs.</p>
Compliance with Work Notices	<p>One risk is that where MSLs are in place, some of those who are named in the work notice to deliver the service will not turn up for work. This would impact the level of service provision. This risk already exists within Option 0 as staff may not turn up to or return to work as agreed under the voluntary derogations. Employees who are specified on the work notice but take part in the strike contrary to that work notice will lose their automatic protection from unfair dismissal for industrial action, provided they were notified by the employer in writing of the requirement for them to work, of the work they were required to do on the strike day, and that they were required to comply with the work notice.</p>

<sup>29</sup> Strikes bill: Unions criticise plans as unworkable: <https://www.bbc.co.uk/news/uk-64219016>

<sup>30</sup> TUC "this Bill will prolong disputes and poison industrial relations – leading to more strikes" [Union movement vows to fight anti-strike Bill | LRD](#)

<sup>31</sup> RMT unions might have to resort to novel methods such as extensive overtime bans and work to rule.

## **9. Wider impacts (consider the impacts of your proposals) - PSED, geographical**

We have considered the public sector equality duty and have published a separate PSED assessment <https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-hospital-services>

- We have considered the requirements of the Family Test in relation to this policy and are content that there will not be any impact on family relationships stemming from the implementation of Hospital MSLs.
- The Justice Impact Test (JIT) is a new test developed by MoJ which requires an assessment of the likely impact that the policy will have on the Courts and Tribunal Service. Based on the information in the JIT (completed by DBT), MoJ consider that the impact of MSL proposals on the Justice System is likely to be minimal. We will need to reconsider our position following the consultation.

## **10. Monitoring and Evaluation**

It is important to note that this legislation will only impact the delivery of services during strike periods and will not have any bearing on the regular operations of hospital services. The ability to effectively monitor the policy's implementation and the attainment of its objectives is, therefore, largely dependent on the occurrence and frequency of strikes in the future.

Following any introduction of MSL regulations for hospital services, in the event of a strike, we will continue to work with NHS England to monitor the impact of strikes, such as critical incidents and cancelled appointments. This will include considering the usage of the legislation with respect to work notices and the reasonable steps taken by employers and unions to comply with the legislation. NHS England will also oversee monitoring of service levels during strike periods. Given the large number of variables between instances of strike action, such as the union(s) involved, the numbers of individuals who choose to strike, the employers affected and the demands on the service at the time of the strike, it is unlikely to be possible to draw direct comparisons between the impact of strikes before and after MSL legislation is introduced.