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Department for
Business & Trade

DRAFT CODE OF PRACTICE

Issued by the Secretary of State under section 203
of the Trade Union and Labour Relations
(Consolidation) Act 1992

On Reasonable Steps to be taken by a Trade Union (Minimum
Service Levels)

Presented to Parliament pursuant to Section 204(2) of the
Trade Union and Labour Relations (Consolidation) Act 1992

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Introduction

1. The Strikes (Minimum Service Levels) Act 2023 amends the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) so that minimum service levels can be applied during strikes in services within six key sectors. These are:
 - a. Health services
 - b. Fire and rescue services
 - c. Education services
 - d. Transport services
 - e. Decommissioning of nuclear installations and management of radioactive waste and spent fuel
 - f. Border security
2. Minimum service levels are provided for via regulations made by the Secretary of State under section 234B of the Act, specifying the minimum service levels and the service(s) they apply to.
3. The Act provides that, where a trade union gives an employer a notice of strike action under section 234A, which relates to services specified in regulations, the employer may issue a work notice identifying persons who are required to work and the work they are required to carry out during the strike to secure minimum levels of service. Where an employer decides to issue a work notice, that notice must be issued to the trade union a minimum of 7 calendar days prior to the strike day unless a later day is agreed with that trade union. Once issued, the work notice can be varied up to 4 calendar days prior to the strike day, unless a later day is agreed with the trade union.
4. Once a work notice has been given to a trade union in accordance with section 234C of the Act, that union must take “reasonable steps” to ensure that all members of that union who are identified within the work notice comply with the notice. This will enable that union to maintain statutory protection from proceedings in tort brought by the employer in relation to an act done by the union to induce a person to take part, or to continue to take part, in a strike. Such proceedings could include the employer seeking damages from the union or an injunction to prevent the strike action taking place.
5. The purpose of this Code of Practice is to provide practical guidance for trade unions on what reasonable steps should be taken by unions in relation to this obligation, in order to promote the improvement of industrial relations. The Code is therefore intended for use by trade unions which give notice of strike action relating to services specified in such regulations. Employers and trade union members operating or working in such services may also want to familiarise themselves with the Code.

6. This Code should be considered alongside the Code of Practice on Industrial Action Ballots and Notice to Employers¹ and the Code of Practice on Picketing². Workers and trade union members may also wish to familiarise themselves with Government guidance on Industrial Action and the Law³, which explains important aspects of taking industrial action, and with Government guidance for employers, trade unions and workers on issuing work notices under minimum service legislation. For the avoidance of doubt, neither of those other Codes of Practice, nor the guidance documents are incorporated into this Code of Practice.
7. This Code imposes no legal obligations and failure to observe it does not by itself make any person liable to legal proceedings. But under section 207 of the Act, any provisions of the Code are admissible in evidence and taken into account in proceedings before any court or employment tribunal where the court or tribunal considers them relevant.
8. Where this Code states that a trade union “must” do, or not do, something, this indicates that the union is subject to a legal requirement in that respect. Where this Code states that a trade union “should” do, or not do, something, this indicates a recommendation under this Code, which is intended to be admissible in evidence and taken into account as stated in paragraph 7 above (this does not affect the generality of what is stated in paragraph 7).
9. In this Code ‘worker’ refers to both employees and other workers. We refer specifically to employees in relation to unfair dismissal protections. Further information about employment status can be found at <https://www.gov.uk/employment-status>
10. The legal framework within which this Code operates is explained in the text. While every effort has been made to ensure that explanations included in the Code are accurate, only the courts can give authoritative interpretation of the law. This Code is issued by the Secretary of State under section 203 of the Act and comes into force on [date].

The requirement to take reasonable steps

11. The requirement for a union to take reasonable steps applies where one or more of that union’s members are identified in a work notice. The union does not therefore have to take reasonable steps in relation to workers identified in the work notice who are not members of that union. Nor is the union restricted from

¹ <https://www.gov.uk/government/publications/code-of-practice-industrial-action-ballots-and-notice-to-employers--2>

² <https://www.gov.uk/government/publications/code-of-practice-picketing>

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249807/10-923-industrial-action-and-the-law.pdf

continuing to call upon its members who are not identified in the work notice to strike.

12. The requirement to take reasonable steps to ensure compliance with the work notice by a union's members does not mean that the union is required to ensure a minimum service level is achieved or to take any steps which lie outside the union's powers, such as forcing its members to work or supervising their work.
13. If a trade union fails to take reasonable steps, this would mean that the strike is not protected under section 219 of the Act, so an employee taking part in that strike, who was induced to strike by that union, would lose automatic protection from unfair dismissal under section 238A of the Act (regardless of whether they were identified in a work notice or not). This aligns with other requirements in the Act, such as balloting requirements.

Recommended 'reasonable steps'

14. The steps outlined below should be considered by trade unions seeking to satisfy the requirement to take reasonable steps. Trade unions should take each of these steps to help ensure their statutory protection from liability in tort and the automatic protection of employees from unfair dismissal are maintained. Trade unions are not restricted from, and indeed should consider, taking additional or different steps if it is reasonable to do so. They should satisfy themselves that, both individually and cumulatively, the steps taken are reasonable to ensure that their members comply with the work notice. Ultimately it is for the courts to decide whether the steps taken were sufficient.
15. To help maintain statutory protection from liability in tort and the automatic protection of employees from unfair dismissal, a trade union should not decide to disregard the reasonable steps recommended by this Code, or any different reasonable steps, merely on the basis that the steps could lead to a reduction of the impact of the strike called by the trade union.

Step 1: identification of members

16. A work notice given to the union by the employer will identify the workers, and the work required, to secure the minimum service level. The trade union should identify those workers who are its members in a work notice.
17. Section 24 of the Act requires that a union keeps its membership register as accurate and up to date as reasonably practicable. Such actions will help with identifying those of its members identified in a work notice. As the work notice may, depending on the employer and the associated minimum service level,

include a significant number of workers, the trade union will need to consider who is best placed within the union to identify their members on the work notice.

18. Unions may wish to engage in advance with employers on how work notices can be designed to help the union efficiently identify union members. This could for example be to include mutually held information, such as job title or place of work. When engaging with employers, unions should not disclose to employers any information about who their members are. Employers must also ensure that the work notice does not include any special category data⁴, including a person's union membership status.
19. Unions should begin identifying their members who are subject to the work notice as soon as reasonably practical after receiving a work notice, to allow for sufficient time to complete the remaining steps recommended by this Code before the strike action.
20. Work notices may also, after having been given, be varied by employers in certain circumstances (please see section 234C of the Act). Trade unions should review any varied work notice to identify whether any of their members have been removed or added to the work notice. The union must take reasonable steps regarding any members which have been added to a varied work notice. The union may wish to inform members who have been removed from the work notice to disregard any earlier communications or other reasonable steps which the union may have taken to encourage them to comply with the work notice.
21. A failure by the union to identify a small number of their members, and therefore missing these members from subsequent steps, may not constitute a failure in carrying out the overall obligation to take reasonable steps, as long as the union made a reasonable attempt to identify such members. This would be for a Court to determine based on the facts of each case.

Step 2: encouraging individual members to comply with a work notice

22. Once a union has identified its members, it should issue each of those members with an individual communication or notice to advise them not to strike during the periods in which they are required by the work notice to work, as well as to encourage them to comply with the work notice. We refer to this communication as a "compliance notice" within this Code.
23. The union should send the compliance notice before the strike action. It would be reasonable for a union to send the compliance notice either:

⁴ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-is-special-category-data/>

- a. once it is clear that the work notice will not be subject to variation by the employer - either because the last day on which the employer can vary the work notice without the union's agreement has passed or because the employer has notified the union in writing that it will not vary the work notice; or
- b. before it is clear whether the work notice will be varied by the employer.

24. In the event that a trade union receives a varied work notice at any time before the strike day, the trade union should review that work notice to assess whether the members identified in the work notice are different (please see paragraph 20). A trade union should then send the compliance notice to those members identified in the work notice or any additional members who have been identified (depending on which approach is taken as set out in paragraph 23) as soon as reasonably practicable after receiving the varied work notice from the employer.

25. The compliance notice should be sent by electronic means, such as email, where possible. If this is not possible or if the union is aware that any member will be unlikely to access electronic communications before the relevant strike date, the compliance notice should be sent by first class post. This will help ensure that all members who have been identified in the work notice are sufficiently aware of what is required of them on the day of the strike, as well as being aware of the potential consequences for them if they do not comply.

26. The compliance notice should address the union member individually by name, stating clearly and conspicuously:

- a. the dates of the strike to which it relates,
- b. that the law allows the member's employer to give the union a work notice identifying the persons required to work during the strike and specifying the work required to be carried out by them during the strike,
- c. that the employer has given a work notice to the union identifying the member as a person required to work during the strike and specifying the work they are required to carry out,
- d. that the member should receive from the employer (either in the same or in separate communications from the employer):
 - i. notice of the work that the member is required to carry out during the strike under the work notice given to the union, and
 - ii. a statement that the member is an identified worker in relation to the strike and must comply with the work notice given to the union,
- e. that if the member receives both of those from the employer the member must carry out the work during the strike or could be subject to disciplinary proceedings which could include dismissal,
- f. that the union encourages the member to carry out the work as required by the work notice and not to strike except to any extent that

would not contravene the notice from the employer (for example, a worker may be required to work only part of the strike day),

- g. that any communications, including verbal or written communications, from the union encouraging people to strike during the period in which the member has been identified in the work notice should be disregarded by the member, and
- h. that the union will ensure that any picket supervisor will use reasonable endeavours to ensure that, if the member indicates to the picketers or the picket supervisor (by showing the communication from the union or by other means) that the member is required to work during the strike, the picketers do not seek to persuade the member to withdraw their labour (please see Step 3: Picketing for more information).

27. A template compliance notice is included in ANNEX A. Unions are recommended to use this pro forma template. However, unions are not restricted from amending the template and may choose to tailor its language, provided that the overall substance and effect of the notice remain the same as stated above.

28. Where the union has previously called a particular worker out on strike, in advance of that worker being identified in the work notice, this would not in itself amount to a failure to take reasonable steps. However, the union should as soon as is reasonably practicable make clear to that worker that the call to strike no longer applies. This could be done as part of or alongside the compliance notice above.

29. Unions may also wish to engage with the identified members on an individual or group basis to reinforce the messages within the compliance notice, as well as clarify any questions from members, especially in relation to their rights and protections.

30. Communications could be sent by a person specified in the earlier strike ballot paper as a person authorised to call union members out on strike or by another suitably authorised official or committee of the union. It is likely to be reasonable for the communication to be sent by different local officials, rather than by a single national official or committee, if that is more efficient for the union, and provided those sending it are all suitably authorised. Unions may wish to consider the persons within the union who are most likely to increase the prospects of the worker complying with the work notice when determining the best person to send any communications, including the compliance notice.

31. Where the union takes steps to send promptly the compliance notice to members identified in the work notice, an accidental failure to reach a small number of identified members is unlikely to be a failure to take reasonable steps. This would be for a court to determine based on the facts of each case.

Step 3: picketing

32. Ahead of any picketing which the union organises or encourages its members to take part in, the union must appoint a picket supervisor (please see section 220A of the Act). More information on picketing requirements can be found in the Code of Practice on Picketing⁵.
33. As part of the reasonable steps, the union should instruct the picket supervisor (if present) or another union official or member to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line at times when they are required by the work notice to work. This could be achieved by explaining to members on a picket line that some union members have been identified in a work notice and are required to work notwithstanding the strike and that members who are picketing should not encourage these union members not to cross the picket line.
34. Unions are not required to notify the picket supervisor of the names of union members identified in the work notice. Additionally, there is no requirement for the picket supervisor or other picketers to ask workers approaching the picket line whether they are identified in a work notice.
35. Union members who have been identified in a work notice can take steps to inform the picket that they have been identified in a work notice. This could be achieved simply by stating orally that they are required by a work notice to work at that time. Alternatively, if they wish to, the union member could show the picket the compliance notice issued by the union or the notification from the employer stating they are required to work as part of the work notice. There is no requirement on a union member to identify their trade union membership to the picket.
36. If a union member decides not to comply with the work notice, and reasonable steps (including those recommended in this Code) have been taken by the trade union, then it is expected that the union would have nevertheless met its requirement to take reasonable steps under the Act. However, the union member could lose any automatic protection from unfair dismissal under section 238A of the Act and they could be subject to disciplinary action by their employer.
37. With the exception of workers who have explained to the picket in some way that they have been identified in a work notice and they are a member of the union, the picket may induce other workers to strike (in accordance with the Act and the Code of Practice on Picketing).

⁵ <https://www.gov.uk/government/publications/code-of-practice-picketing>

Step 4: assurance

38. Once a work notice is received by the union, the union should ensure that they do not do other things which undermine the steps they take to meet the reasonable steps requirement.
39. Actions taken to undermine the steps could include for example, communicating with members whom the union knows are identified in a work notice to induce them to strike. Where the trade union becomes aware of such actions to undermine the steps, the union should take swift action to correct any actions of union officials or members which seek to undermine the steps the union has taken or will take to comply with the requirement in section 234E of the Act. Actions which undermine these steps may risk trade unions losing their statutory protection from liability in tort and employees losing their automatic protection from unfair dismissal.
40. Unions should also use reasonable endeavours to tailor their inducement and encouragement to strike to workers not identified in the work notice. That tailoring could, for example, be achieved by including wording within general communications to members about the strike to clearly state that members who have been identified in the work notice should comply with that notice and should disregard any inducement to strike at any time when the work notice requires them to work.

Annex A – Proposed ‘compliance notice’ template

“Dear [Name of Member],

[Name of union] has called a strike affecting [name of employer] on [strike date or period]. This is in relation to [insert brief reference to trade dispute].

The law provides [name of employer] with the ability to require workers to attend work on a strike day to achieve a minimum service level. This requirement is given by a ‘work notice’, which identifies the workers and the work to be carried out by them on the day of the strike.

[Name of employer] has given [name of union] a work notice requiring you to work on [strike date or dates].

You may already have received a written communication notifying you that you are identified in the work notice from [name of employer], stating that you are required to work on [strike date or dates] and that you are required to carry out certain work on [that day/those days]. If you have not already received that communication, we encourage you to speak to [name of employer] so that they can provide confirmation to you.

[Name of union] encourages you to comply with the work notice, to attend your place of work and undertake the work that is required of you, as specified in the written communication from [name of employer]. The work required of you should be work which you normally do or work which you are capable of doing and is within your contract of employment.

[Name of union] advises you not to strike on [strike date or dates] at any time when you are required by the work notice to work. You should ignore any call to strike on [strike date or dates] at any such time, whether from [name of union] or any other person. This includes previous or future calls to strike on [that day / those dates].

Once you have been notified by [name of employer] that you have been identified on a work notice and of the work you must carry out, if you fail to comply with that work notice, you may be subject to disciplinary proceedings by [name of employer] and you could also be dismissed as a result.

In the event that you are only required to work during part of the strike day (this will be specified by the communication from [name of employer]) you are able to take protected strike action for the period in which you are not required to work.

Please be aware that [name of union] will be instructing picket supervisors to use reasonable endeavours to ensure that picketers do not seek to persuade you to withdraw your labour at a time when you are required to work by a work notice. If you come across a picket on your way to your place of work, we encourage you to notify the picket that you are required by the work notice to work at that time. If you wish, you can do this by showing the picket supervisor this communication [or by another method stated here].

If you have any questions about this notice, please contact [name and contact details of trade union official] as soon as possible.

If you have any questions relating to the work you must carry out, [name of union] encourages you to contact [name of employer].

Yours sincerely,

[Name of Authorised Official or Committee] On behalf of [Name of Union]