

# STRIKES (MINIMUM SERVICE LEVELS) BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Strikes (Minimum Service Levels) Bill as brought from the House of Commons on 31 January 2023 (HL Bill 97).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Bill enables the implementation of minimum service levels (MSLs) in certain services during periods of strike action. The Bill amends the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) to:
  - restrict the protection of trade unions under the 1992 Act from legal action in respect of strikes relating to certain services and the automatic protection of employees from unfair dismissal where provision has been made for minimum levels of service (MSLs). The services will be prescribed by regulations, following consultation; and
  - enable employers to issue work notices to require the minimum service levels to be delivered for particular strikes in specified services.

## Policy background

- 2 The Bill is intended to expand upon a commitment made in the Conservative Party’s manifesto for the 2019 general election to require that a minimum service operates during transport strikes, by enabling the Government to regulate for minimum service levels in a range of sectors as outlined in paragraph 15.
- 3 Minimum service levels will be implemented via regulations, as provided for in this Bill, in specific services. The Government will consult on these regulations before they are made.
- 4 This Bill and subsequent regulations are designed to enable employers to require enough workers to work so as to ensure minimum service levels are delivered during strikes within relevant services.

## Legal background

- 5 The current legislation relating to industrial action is set out in the 1992 Act, Part 5 in particular.
- 6 By organising industrial action, trade unions may become liable in tort (a civil wrong that occurs when someone causes a person to suffer loss or harm, for which the courts can provide a remedy in law, such as damages or an injunction to compel or prevent certain conduct). Where a trade union induces workers to take industrial action which amounts to a breach of their employment contract, the union may commit the tort of inducing breach of contract. Part 5 of the 1992 Act provides immunity for unions from such tortious liability provided the union follows the rules regarding the calling and conduct of strikes. It also protects employees participating in the strike for a certain period from being dismissed for breach of their contract of employment by reason of that participation. Both these protections can be lost if a strike is not undertaken in accordance with the rules.
- 7 The 1992 Act will continue to be the main Act dealing with rules regarding the calling and conduct of strikes, and this Act inserts new provisions into the 1992 Act.

## Territorial extent and application

- 8 The Bill forms part of the law of England and Wales and Scotland, as set out in Clause 4. The provisions of the Bill extend and apply to Great Britain. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament or Senedd Cymru without the consent of the legislature concerned.
- 9 The matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament or Senedd Cymru, and no legislative consent motion is being sought in relation to any provision of the Bill. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.
- 10 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

# Commentary on provisions of Bill

## Clause 1 and the Schedule: minimum service levels for certain strikes

- 11 Clause 1 introduces the Schedule, which amends Part 5 and other provisions of the 1992 Act. Part 5 of the 1992 Act makes provision relating to industrial action, including the conditions that must be met in order for strike action to be protected from tort proceedings.

## Bill Schedule Part 1: Amendments to Part 5 of the 1992 Act: Minimum Service levels

### Paragraphs 1 to 2

- 12 These paragraphs add the need for a union to take reasonable steps to ensure compliance by its members with a work notice in relation to minimum service levels to the list of requirements necessary for a strike to be protected from liability in tort. They insert new sections 234B, 234C, 234D, 234E, 234F and 234G to the 1992 Act. The meaning of “strike” is explained in paragraph 30 below and work notices are further explained in paragraphs 16 to 23.

### New section 234B: Power of Secretary of State to specify minimum service levels

- 13 Subsection (1) of this new section provides a power for the Secretary of State to make regulations providing for levels of service where there are strikes in relevant services, which are defined as “minimum service regulations”.
- 14 Subsection (2) provides that minimum service regulations may apply to strikes that take place on any day after they come into force, even if notice of the strike was given on or before that day, or the ballot in respect of the strike was on or before the day on which this Bill comes into force. This means that the regulations may apply to all such strikes, regardless of when employers are notified of the strike.
- 15 Subsection (3) provides for a further power for the Secretary of State to specify in regulations the relevant services for which minimum service level regulations may be made. This power to make regulations specifying relevant services is limited to the categories of services listed in Subsection (4) namely:
  - Health services;
  - Fire and rescue services;
  - Education services;
  - Transport services;
  - Decommissioning of nuclear installations and management of radioactive waste and spent fuel;
  - Border security.

### New section 234C: Work notices relating to minimum service levels

- 16 This new section establishes how work notices are to operate. Work notices are the mechanism that puts minimum service levels into practice for particular strikes in relevant services. The work notice may be given by the employer to the trade union and will identify

the people required to work to secure that the levels of service set out in the minimum service regulations are provided on a strike day.

- 17 Subsection (1) gives the employer the right to give a work notice to a union in relation to any strike which relates to the relevant service, where minimum service regulations have been made, and where the union has notified that strike to the employer in accordance with the existing rules on giving notice of a strike.
- 18 Subsection (2) explains that a work notice is to be a notice in writing telling the union that the levels of services, as provided for in the minimum service regulations, are to apply in relation to a strike. The work notice is therefore the mechanism by which the minimum service levels set out in the regulations apply to the provision of services for a strike day.
- 19 Subsection (3) requires the notice to be given to the union that has served the strike notice, in the period between receipt of that strike notice and 7 days before the relevant day of the strike (or later if this is agreed by the union).
- 20 Subsections (4) and (5) prescribe what the contents of a work notice should be. It must identify the people who are required to work during the strike, and the work they must do. It must not list more people than are reasonably necessary to provide the levels of service set out in the minimum service regulations.
- 21 Subsection (6) makes clear that the employer must have no regard to whether someone is a union member or not a union member (or a particular union member) in identifying the people in the work notice.
- 22 Subsection (7) requires the employer to consult the union about the number of people to be identified in the work notice and the work they must do and have regard to any views expressed by the union before issuing the work notice to that union. Subsection (8) allows the employer to vary a work notice before the end of the 4<sup>th</sup> day before the relevant day of the strike (or later if this is agreed by the union). Subsection (9) requires the employer to consult the union again, on the same matters as referred to above, before making such a variation.
- 23 Subsection (10) specifies that where a strike takes place over a number of days (whether continuously or discontinuously) each day of the strike is to be treated as a separate strike date. This enables employers to issue individual work notices for individual strike dates even if the strike as a whole runs for multiple days.

#### **New section 234D: Work notices: disclosure of information**

- 24 This new section provides that, where it is necessary to name individuals in work notices, this will not be a breach of confidence owed by the employer or of any other restrictions on disclosing information. The employer must adhere to data protection legislation but the obligations regarding the giving of work notices in this section are to be taken into account when assessing the obligations under that legislation.

#### **New section 234E: No protection if union fails to take reasonable steps**

- 25 This new section provides that the union's protection from tort proceedings (see paragraph 6) is removed if: minimum service regulations are in place in relation to a relevant service; an employer to whom the minimum service regulations applies issues a work notice in accordance with the procedures in the Bill; and the union fails to take reasonable steps to ensure that members of the union who are identified in the work notice comply with the work notice. Such compliance by union members would mean not participating in the strike on strike days when those members are required by the work notice to work.

- 26 If an employer does seek damages against a union in relation to a failure by the union to take reasonable steps to ensure a valid work notice is complied with by its members, subsection (2) requires that any damages awarded by the courts may only cover losses incurred as a result of the union failing to comply with the obligation in section 234E(1)(b) to take reasonable steps. In other words, damages may not extend to losses that would have been suffered by the employer anyway.

### **New section 234F: Regulations: consultation and supplementary**

- 27 Subsection (1) requires that consultation takes place prior to regulations being made under section 234B. Subsection (2) explains certain types of provisions those regulations may contain. Subsection (5) makes it clear that consultation required by subsection (1) may take place prior to, as well as after, the passing of the Act.
- 28 Subsections (3) and (4) provide that these regulations are subject to the affirmative procedure and require the approval of both Houses of Parliament before they are made.

### **New section 234G: Interpretation of terms relating to minimum service levels**

- 29 This section sets out the meaning of various defined terms used in the Act including that:
- a. Minimum service regulations are defined in section 234B(1);
  - b. Relevant services are defined in section 234B(3); and
  - c. A work notice is defined in section 234C(2).
- 30 Subsection (2) makes clear that the meaning of ‘strike’ where used in sections 234B to 234F, does not include overtime bans and call-out bans and that such bans constitute action short of a strike for the purposes of minimum service levels. This aligns with the same definition used for the purposes of a ballot on industrial action, as referenced by s229(2A) of the 1992 Act.

## **Bill Schedule part 2: Related amendments to the 1992 Act**

- 31 This part of the Bill’s schedule makes a number of technical amendments to the 1992 Act to ensure the new requirements regarding minimum service regulations and work notices are applied to the law around industrial action more broadly, in particular whether certain strikes are protected against liability for the union or not (see paragraph 4 of the Schedule). This also includes that unions must make clear in their notice of industrial action (under section 234A) whether the action is a strike (as defined in paragraph 30 above).
- 32 This part also makes clear that that there is no automatic protection from unfair dismissal for an employee who is identified in a valid work notice but participates in the strike contrary to that work notice, provided that their employer has (before the strike day) given the employee notice of the work specified in the work notice that they are required to carry out on the strike day and a statement that they must comply with that work notice.

## **Other clauses in the Bill**

### **Clause 2: Meaning of “the 1992 Act”**

- 33 This clause is self-explanatory.

### **Clause 3: Power to make consequential provision**

- 34 This clause allows the Secretary of State to make consequential amendments by affirmative regulations as regards amendments to primary legislation (i.e. an Act) and to make consequential amendments to any other legislation by regulations subject to annulment by a resolution of either House of Parliament in accordance with the negative procedure.

#### Clause 4: Extent

35 This clause is self-explanatory.

#### Clause 5: Commencement

36 See paragraph 38 below.

#### Clause 6: Short title

37 This clause is self-explanatory.



## Commencement

38 All clauses within the bill come into force on Royal Assent.

## Financial implications of the Bill

39 There will be implications in regards to the preparation of the regulations conferred to Secretaries of State by this Bill, in addition to implications for employers and unions in the development and issuing of the work notice (see paragraphs 16 – 23). Full details of the financial implications of the Bill are set out in the Impact Assessment.

## Parliamentary approval for financial costs or for charges imposed

40 The House of Commons passed a money resolution on 16 January 2023 to cover expenditure in respect of the Secretary of State in preparing regulations under the Bill.

## Compatibility with the European Convention on Human Rights

41 Section 19 of the Human Rights Act requires a Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the Bill with the Convention Rights (as defined by section 1 of that Act). Lord Callanan, the Parliamentary Under Secretary of State, has made the following statement: “In my view, the provisions of the Strikes (Minimum Service Levels) Bill are compatible with the Convention rights.”

42 The Government has published a separate memorandum on ECHR issues with an assessment of compatibility of the Bill’s provisions with the Convention rights. This memorandum is available on the Government website.

## Environment Act 2021: Section 20

43 Section 234B(3) and (4) of the new Schedule to the 1992 Act includes the power to specify services within the category of decommissioning of nuclear installations and management of radioactive waste and spent fuel.

44 The Government considers that this provision is “environmental law” within the meaning of section 46 of the Environment Act 2021, as it is mainly concerned with “environmental protection”, which is defined in section 45 as including “the protection of the natural environment from the effects of human activity”). Lord Callanan, the Parliamentary Under Secretary of State, is satisfied that this provision would not have the effect of reducing the level of environmental protection afforded by existing environmental law, and has made a statement under s.20(2)(a) and (3) of the Environment Act 2021 to that effect.

## Annex A – Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of Senedd Cymru?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	Yes	No	No	No	Yes	No
Schedule	Yes	Yes	Yes	No	No	No	Yes	No
Clause 3	Yes	Yes	Yes	No	No	No	Yes	No
Clause 4	Yes	Yes	Yes	No	No	No	Yes	No
Clause 5	Yes	Yes	Yes	No	No	No	Yes	No
Clause 6	Yes	Yes	Yes	No	No	No	Yes	No



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