October 2023

Unite submission to the Department for Business and Trade:

Consultation on the Code of Practice on Reasonable Steps

Introduction

This submission is made by Unite, the UK's leading trade union. Unite represents and organises over one million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government and the not for profit sector.

Unite represents hundreds of thousands of workers in the sectors targeted in the Strikes (Minimum Service Levels) Act and related regulations.

Unite is firmly opposed to the introduction of minimum service levels in any sector during strikes. The Strikes (Minimum Services Levels) Act imposes severe and undemocratic restrictions on the right of workers to organise collectively and strike to defend and improve their jobs, pay and conditions. The legislation is draconian and unworkable. Trade unions are required by employers, with the authority of the state, to act in ways designed to undermine their own strikes. Failure to comply would expose workers and trade unions to excessive and disproportionate sanctions.

The right to strike is a hallmark of any democratic society. It is a fundamental human right which is protected by the UK Human Rights Act, the European Convention on Human Rights, the European Social Charter and UN treaties and ILO Conventions. The TUC recently submitted a complaint to the ILO Committee of Experts outlining how minimum service levels would flout international and human rights standards.[1]

Strike action is a matter of last resort but is often necessary to bring employers to the negotiating table. The introduction of minimum service levels is likely to make it harder to resolve disputes. The government's own impact assessments have repeatedly acknowledged the introduction of minimum service levels would lead to aggravated and prolonged disputes.

Unite is appalled by the draft Code of Practice which seeks to impose excessive and onerous restrictions and administrative burdens on trade unions via the back door. In our opinion the draft Code represents a serious overreach by Government Ministers.

The additional and unjustified regulations include:

- The requirement for unions to communicate individually with the wider membership, other than those listed in an employer's work notice.
- The regulation of picketing and in particular the actions of picket supervisors
- Additional regulation of the nature and accuracy of membership data held by trade unions.

[1] https://www.tuc.org.uk/research-analysis/reports/tuc-submission-ceacr

These requirements do not appear to have *any* basis in legislation and/or they conflict with other legal requirements. The government had the opportunity to introduce amendments on these issues when the Strikes (Minimum Service Levels) Bill was being debated – but chose not to do so. Instead, the government is seeking to circumvent Parliament and to introduce restrictions on the right to strike, without proper legislative or regulatory scrutiny.

Unite is also deeply concerned that the Government is seeking in the Code of Practice:

- To require trade unions to take on the role of employers, in directing members as to the work they are 'required' to undertake on strike days.
- To regulate the form and content of trade union communications with our members.
- To impose an obligation on trade unions to encourage their members to reveal their special category trade union membership data.
- To impose costly, onerous and completely impracticable administrative burdens on unions, failure to comply with which can result in excessive sanctions for unions and our members.
- To displace the role of courts and tribunals in interpreting and applying the law.

The Code would mean that trade unions could be required by employers, acting with the authority of the state, to undermine its own strike action.

The Code of Practice exposes the government's real intention when introducing the minimum service level regulations – that is to impose an effective ban on the right to strike on key sectors, to impose unjustified and disproportionate regulations and sanctions on trade unions and their members and to interfere in the internal activities of free, democratic trade unions.

In doing so the government are seeking to circumvent Parliament and proper regulatory scrutiny by sneaking excessive regulations through the back door. Unite is also dismayed that the government has failed to engage in genuine consultation with trade unions on the draft Code, having reduced the normal 12 weeks consultation period to 6 weeks. This is despite the ILO's repeated warning to the UK Government about the need for genuine engagement with social partners on issues relating to trade union rights.

Unite is strongly opposed to the introduction of minimum service levels. We call on the government not to implement but to repeal the legislation.

If the government decides to persist with its highly damaging proposals, the draft Code of Practice must be substantially revised.

Detailed Comments on the Code of Practice

The Code of Practice would require unions to:

- identify their members on the work notice
- issue a "compliance notice" to those members "encouraging" them to comply
- send an "information notice" to the wider membership stating that a work notice has been issued and how that will affect the strike
- instruct picket supervisors to take "reasonable endeavours" to ensure members named in the work notice are not encouraged to take strike action

- take steps not to undermine any of those steps and to correct actions by union officials and members that do.

This submission will respond to each of the areas in turn.

Introduction

Unite is concerned that the draft Code of Practice would do nothing to promote and support good industrial relations. It should encourage meaningful negotiations between employers and trade unions that might lead to the resolution of a dispute, avoiding the need for industrial action.

The Code of Practice will have statutory status – i.e. it can be considered in evidence as the courts and tribunals see fit. Paragraph 5 states that the purpose of the Code is to "provide guidance for trade unions on what reasonable steps should be taken by unions …" Unite is concerned that no equivalent statutory guidance is not provided for employers. We believe that the Code should be revised to set out employers' responsibilities under the legislation. For example, it should make clear that:

- Employers can decide whether to issue a work notice. Employers should consider whether issuing a work notice is necessary or it is possible to settle the dispute through other means and indeed whether issuing a notice may mean it is harder to resolve and may lead to prolonged and aggravated industrial action.
- Section 234C makes clear that "a work notice ***must not identify more persons*** than are reasonably necessary for the purpose of providing the levels of service under the minimum service regulations" **(*emphasis added)***. This means that employers are under a duty to minimise the numbers of workers listed in a work notice. The Code should make clear that:
    - Work notices which exceed this standard may be considered invalid and subject to legal challenge.
    - Employers must not issue a work notice where the minimum service level can be met without it.

Paragraph 6 states that this Code should be considered alongside the Code of Practice on Industrial Action Ballots and Notice to Employers and the Code of Practice on Picketing. However, parts of this draft Code are inconsistent with and exceeds the guidance in the Code on ballots and notices to employers (See comments on Step 1 below). If the government's damaging legislation progresses, it is essential that this Code is aligned with existing Codes and does not impose more onerous obligations on trade unions.

Paragraphs 7 to 9 deal with the legal status of the Code and how it might be considered by courts and tribunals. Unite is concerned that this text deviates from equivalent guidance found in the Codes on ballots and notices and picketing which provides:

> "The Code itself imposes no legal obligations and failure to observe it does not by itself render anyone liable to proceedings. But section 207 of the 1992 Act provides that any provisions of the Code are to be admissible in evidence and are to be taken into account in proceedings before any court where it considers them relevant"

This text should be used in this Code. Unite is seriously concerned that the current draft is seeking to displace the role of courts and tribunals. It is not legitimate for the government to seek to impose their interpretation or to impose additional layers of regulation on unions via a Code of Practice.

The Code should make clear throughout that only the courts and tribunal can authoritatively interpret the legislation.

The requirement to take reasonable steps

Paragraph 10 confirms that *"The union does not … have to take reasonable steps in relation to … members of that union who are not identified in the work notice."*

Step 3 on Communications to the wider membership should therefore not be included in the Code. The requirements of Step 3 are not based on legislation. Similarly, Unite believes that the inclusion of Step 4 on picketing is not justified as the Strike Act makes no mention of picketing.

Paragraph 13 goes on to imply that where unions fail to complete any or all of the steps as described in the Code, including Steps 3 and 4, they would be at risk of losing immunity for strike action. This is incorrect and misleading.

It is essential that the Code of Practice accurately reflects the wording of the Act does not seek to sneak through additional restrictions. It is therefore essential that Steps 3 and 4 are removed in their entirety from the Code.

Recommended 'Reasonable Steps'

Step 1: Identification of members

Trade unions have repeatedly warned the government's proposals are profoundly unworkable and would impose impossible duties on trade unions. Step 1 shows why these concerns were well-founded.

Paragraph 15 states that *"A work notice given to the union by the employer will identify the workers, and the work required, to secure the minimum service level".*

This a bold but unrealistic statement. The preparation of minimum service levels could involve hundreds of thousands of workers deployed in multiple workplaces and work sites, undertaking highly varied work.

The suggestion that employers will provide sufficiently detailed information to enable unions to identify each individual member is not viable. For example, it is not uncommon for two or more members in a workplace to have the same name. Reliance on a name check may therefore not be sufficient. Section 24 of the 1992 (which regulates union membership registers) confirms unions are not required to keep a record of a member's job title, branch or grade, etc – only of names and addresses.[2] Any information on job titles gathered by unions will often differ from that used by employers. So, it is likely to be very difficult to identify many members from a work notice.

The Strikes Act also imposes extremely tight deadlines for the identification of members in work notices. Employers are only required to provide a work notice 7 days before action starts and can amend it up to the end of the fourth day before action is due to start. This would leave unions with just three days to identify and then reach members. This period can contain weekends and public holidays. The expectation that unions will be able to complete the suggested steps in this time frame is simply fanciful and unreasonable. It is likely to lead to mistakes which increases the risk of legal challenges by employers.

Unite is also seriously concerned that the guidance on Step 1 is not consistent with other legislation or regulations relating to union membership data and places unreasonable duties on unions.

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2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/412221/bis-14-142-guidance-on-trade-union-register-of-members.pdf

Paragraph 16 states that "[p]rior to any ballot for industrial action, the union should have ensured that its membership data is accurate and up to date."

However, Section 24(1) of TULRCA 1992 requires a union to compile and maintain a register of members' names and addresses and, so far as is ***reasonably practicable***, to secure that the entries in the register are accurate and kept up-to-date. (***emphasis added).*** There is no duty on unions to ensure all data held is 100% accurate.

Similarly, legislation on the preparation for notices of industrial action ballots or action provides that the lists and figures which must be supplied by the union to the employer must be as accurate ***as is reasonably practicable*** in the light of the information ***in the possession of the union*** at the time.[3] In the possession of the union is defined as information which is in the possession or under the control of an officer or employee of the union. The Code of Practice on Industrial Action Ballots and Notice to Employers advises "Dependent on the precise status of the individuals concerned, information held by shop stewards or other lay representatives would probably not qualify for these purposes as being "in the union's possession"."[4] It would be unreasonable and unjustified for this Code of Practice to seek to impose more stringent data requirements than that which applies under wider trade union legislation. If the damaging MSL measures are to proceed, then Step 1 of Code of Practice must be amended in line with wider provisions of the 1992 Act and accompanying statutory guidance.

Paragraph 20 also states that *"If a trade union does not identify its members within the work notice, or reasonably believes it has not done so, then they should take such other steps as are reasonable to ensure they reach their affected membership to ensure that the overall requirement on the trade union is met."*

This is absurd and unreasonable. Unions cannot be expected to contact individuals who it did not know were union members. This would create an unlimited and unachievable duty on unions. It would also be disproportionate for a union to risk losing immunity for industrial action because they had not contacted an individual who they had no idea was their member.

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

Unite is firmly opposed to the requirements set out in Step 2 of the Code.

- Step 2 seriously interferes with the content and nature of union communications with their members and so impedes on the activities of democratic and free trade unions.
- The requirement on unions to issue compliance notices to all individuals listed on a work notice and to "encourage" each worker to attend work during strike action is a major imposition on a trade union. The clear purpose is to require a union to undermine its own strike.
- The tone of the compliance notice is also completely inappropriate. Effectively, the Code requires the union to step into the role of an employer and relinquish its role as a trade union in the run up to a strike which has been mandated by its members.
- The information which must be communicated by the union is excessively detailed and complex. Eight pieces of information must be included in the compliance notice "clearly and conspicuously". This includes telling a worker named in a work notice that they "must carry out specified work during the strike or lose the protection against dismissal". The notice

[3] Sections 226A and 234A of the 1992 Act.

[4] https://assets.publishing.service.gov.uk/media/5a7f98aaed915d74e33f766a/Code_of_Practice_on_Industrial_Action_Ballots_and_Information_to_Employers.pdf

must also state 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". Mistakes made in the communication could expose the union to disproportionate legal sanctions and could mean union members could be sacked.

- The compliance notice template requires the union tell their member they are encouraged to identify to pickets that they are a trade union member and that they are required to work by the work notice. Such identification would require the worker to disclose their trade union membership, which is special category personal data. This makes a mockery of the special protection that sensitive trade union membership data is afforded under Article 9 of UK GDPR.
- In a last insult, trade unions are required to inform members to ignore all other communications received by the union relating to the strike.
- Unite also notes that there are no statutory obligations on employers as to the text that they should use when communicating with staff. The legislation and Code is clearly weighted against trade unions.

Excessive and impracticable duties on unions

Step 2 also places excessive and impracticable duties and costs on trade unions. Disputes may involve hundreds of thousands of members in many different workplaces. Unions will be expected to cross check the names of all workers listed on multiple employers' work notices against membership records and issue compliance notices (and potentially repeat communications where employers issue varied notices) all within a maximum of 7 days. This is unreasonable and unachievable. The tasks may also need to be repeated more than once in the same dispute where the employer opts to issue different work notices over a period of continuous or discontinuous strike action.

Paragraph 24 anticipates that compliance notices may be sent by email or electronic methods. However, it also suggests that work notices may need to be sent using first class mail "if the union is aware that a member is unlikely to access electronic communications before the relevant strike date". Due to the onerous tasks involved and the likelihood that employers may vary work notices, most unions will not be in a position to issue compliance notices more than 4 days before a strike date. This may coincide with a weekend or bank holiday, holiday seasons or the Christmas period. Unions will have no idea and will not be able to evidence whether members will access emails in this period.

The use of 1st class mail would also create substantial costs for unions, running potentially into £millions, especially in larger disputes or where employers decide to issue a series of work notices throughout a dispute. It is also unrealistic to expect posted work notices will arrive within 4 days, certainly not over busy periods, such as Christmas.

Unite has repeatedly argued that the legislation is unworkable. The Code amplifies these issues and imposes excessive and unachievable duties on trade unions. We therefore believe that Step 2 should be removed from the Code.

Inaccurate information

The draft Code also fails to explain legal requirements accurately. For example, it states in paragraph 25d that unions are advised to tell members that they should receive from the employer a statement that the member is "an identified worker" who "must comply with the notice given to the union". But there is no obligation under the Act for an employer to communicate with workers named on a work notice. They need only do so if they want to retain the option of dismissing them for not attending work.

It is inexplicable that the responsibility for communicating with those named on a work notice is not placed with their employer, who solely understands the work which would be required. It is also ironic that the template notice in Annex A subsequently says that a union should "encourage" the members who they have identified on a work notice to contact their employer if they haven't received a notice from them. Any expectation to contact workers should rest with the employer.

In addition, it is not the case that workers "must comply" with a work notice. This Act gives neither the employer nor the government the power to compel people to work. Rather, the law states that a worker who has been notified by the employer that they are named in the work notice may be dismissed and will lose the automatic right not to be unfairly dismissed for taking part in the strike. The draft Code does not highlight that a worker who was dismissed might still be able to bring an unfair dismissal complaint under the general law. Therefore, the Code and the template letter are misleading in their current form.

Failure to protect workers

The compliance notice template in Annex A fails to provide full guidance for workers. It states that "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." It provides no guidance to the worker as to their rights if an employer attempts to deploy them in unfamiliar or inappropriate roles.

The template letter requires the trade union encourage the worker to reveal their special category trade union membership data in complete disregard for the additional protections that this sensitive personal data should be afforded. It provides no guidance to the worker as to any of their data protection rights.

The Code and template letter also omits important information which was included in the non-statutory guidance on work notices. This includes information on key workers' rights and protections against unfair treatment by employers. The Code should remind employers that they must respect workers' contracts and statutory rights, including those relating to data protection. It should emphasise that:

- The work notice cannot override an employment contract or other contract with a worker or workers' statutory rights, including holiday rights, parental leave rights, health and safety and trade union rights.
- An employer must not include more workers than necessary in a work notice.
- Employers must not take into consideration a worker's trade union membership or related activities when creating the work notice.
- Employers must process personal data in compliance with data protection law. They cannot seek information revealing trade union membership and, if they inadvertently obtain any data about trade union membership, they must destroy that data and not store it.
- An employer must also not take into consideration whether they think a worker is likely to take strike action.
- Workers should be afforded a right to appeal if they believe they have been inappropriately included in a work notice. They will also retain the right to raise a grievance or take legal action if their employer breaches their contractual or statutory rights.
- Where a work notice contravenes the law, it can be challenged in court.

Step 3: Communications to the wider membership

Step 3 requires unions to communicate by email or post with all members who will or might be induced to take strike action on a relevant date. There is however nothing in the Strikes Act that requires unions to communicate with the wider union membership involved in a strike.

Paragraph 10 states that *"The union does not … have to take reasonable steps in relation to … members of that union who are not identified in the work notice."* This confirms that Step 3 has no basis in law and therefore represents a significant overreach in the Code.

This proposal would also seriously interfere with unions communications with members and impose excessive costs and administrative burdens on trade unions. It would create a huge additional drain on union time and resources and would provide another avenue for employer challenge to the industrial action.

The right to strike is fundamental. A requirement on unions to communicate with the wider membership as set out in the draft Code is blatantly designed to force unions to undermine their own strikes, which has been mandated by the very members unions would be required to contact.

The proposals in this Step also repeat the legal and regulatory errors set out above. The Step also requires union to mention its "encouragement" of members to follow a work notice. This is again unacceptable and exceeds the requirements of the legislation.

It is also completely unacceptable that Paragraph 32 would require unions to advise their own members to contact their employer if they are uncertain of whether they are required to work under the work notice. Trade unions should not be expected to encourage members to consider breaking the strike which they voted for.

For these reasons, Step 3 and Annex B should be removed from the Code in their entirety.

Step 4: Picketing

Unite believes that Step 4 is a particularly outrageous aspect of the draft Code. Picketing does not feature in the Strikes Act. Nevertheless, the draft Code contains considerable requirements in this area. This represents a major overreach.

The draft Code of Practice states that unions should instruct the picketing supervisor (if present) or another union official or member to use "reasonable endeavours" to ensure that picketers avoid trying to persuade those on work notices to stay away from work. The picket supervisor is expected to explain to those on the picket line that some members have been named in a work notice. Those named in work notices can show their letters from the union or employer or "may simply wish to state orally that they are required by a work notice to work at that time".

This would make it very hard for unions to use pickets to encourage compliance with a strike. It goes significantly beyond preventing hindrance of anyone named in a work notice. The Code says that the picket supervisor should encourage any such worker to attend work and not to take strike action which would be inconsistent with the work notice. These requirements place picket supervisors in an extremely difficult position. The aim of a picket is to encourage compliance with a strike, yet the picket supervisor is expected to not only ensure that a worker named in a work notice isn't hindered in going to work but to even encourage them to attend work.

Unite is also deeply concerned that the Code suggests that a breach of these requirements could mean that a union could lose immunity for strike action and that union members could lose automatic protection from unfair dismissal for participant in strike action (see paragraph 12). This approach would be unjustified and a serious overreach for the Code. It is inconsistent with wider laws relating to picketing, as set out in section 220 of the 1992 Act. Where unlawful picketing takes place, employers may seek legal challenges and applications for injunctions or damages. However, such challenges do not mean that strike action cannot continue. Unites believes it is inconsistent for guidance on picketing to be added in this Code of Practice.

Unite is also deeply concerned that the requirements in Step 4 could undermine the protection of trade union membership data, which is special category data under data protection rules. The government provides some guidance to employers on handling such data in its non-statutory

guidance on work notices. However, this amounts to telling employers they cannot use that data when determining those named on work notices. There is no recognition of the opportunities that implementation of work notices provides for inference of someone's trade union membership status. Nor is it clear how an employer can seek to show that a union has not met its duties under the legislation to take "reasonable steps" to contact members in the way set out in the code, without seeking to establish individuals' trade union membership status? Given the history of trade union members suffering detriment, such as being blacklisted, this issue should have been treated more seriously.

Step 5: Assurances

Unite is dismayed by the inclusion of section in the Code. The Step adds additional complexity. It also represents a serious interference in union communications and their rights to freedom of expression and of association. It is designed to undermine the effectiveness of strike action.

The government has a responsibility to protect trade union's rights to freedom of association. This step should therefore be removed from the Code.

Data Protection

The Strikes Act contains very little information about data protection save for Section 234D(2) which confirms "Section 234C does not authorise a disclosure of information that would contravene the data protection legislation…".

Unite is deeply concerned that the requirements could undermine the protection of trade union membership data, which is special data category, and personal data more widely.

The draft Code merely states that: "Employers must ensure that the work notice does not include any special category data, including a person's union membership status." This is completely inadequate given the history of trade union members suffering detriment, such as being blacklisted.

There is no recognition of the opportunities that implementation of work notices provides for inference of someone's trade union membership status.

Unite has already submitted comments relating to data protection on the draft guidance to employers on handling such data. It is essential for the Code to include more robust guidance for employers.

The government should make it clear that employers cannot seek trade union data in seeking to enforce a work notice. For instance, employers have no right to demand membership data, and trade unions have no obligation to provide it, where the employer is seeking to show that someone who did not follow a work notice was a union member.

The additional requirements contained with the Code relating to the disclosure of trade union membership and/or that require the trade unions to encourage members named in work notices to reveal their trade union membership disregards the special protection that sensitive trade union membership data is afforded under Article 9 of UK GDPR.

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