

Strikes (Minimum Service Levels) Bill

House of Lords, Committee of the whole House, 23 March 2023

NHS Providers is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in England in voluntary membership, collectively accounting for £104bn of annual expenditure and employing 1.4 million staff.

Key points

- In recent months, and during a period of unprecedented pressure – with record levels of staff vacancies, care backlogs and service demand – the NHS has faced the most widespread industrial action in its history. Although progress is now being made with some unions, the prospect of further strikes still looms large.
- It is essential that a focus on legislative change does not worsen industrial relations at a time when it is imperative that the government and unions focus on resolution and averting further escalation and disruption to patient care.
- We believe that this Bill risks damaging relationships in the NHS between trust leaders and their staff, and between trust leaders and local union representatives at a particularly fraught time, without addressing any of the issues underlying current strike action or providing a useful alternative approach to managing service provision during periods of strike action.

Context

We welcome that a pay deal has been reached in principle between the government and unions representing Agenda for Change staff. This is a positive development after months of strike action which has seen widespread disruption to patient care and tens of thousands of appointments postponed. Staff still have to agree to the offer and this legislation could erode the goodwill needed for a successful conclusion. It does not address the fundamental issues underpinning the current

industrial action, and risks worsening current and future industrial relations, and potentially local relationships between trusts as employers and their staff.

This degree of impact, and the complexity of the context in which its powers would be exerted, warrant careful consideration. We are therefore further concerned about the pace at which this legislation has been drafted and is expected to pass through Parliament.

The NHS is currently facing the most widespread strike action in its history. There remains a risk of escalation with different unions and staff groups until an agreement on pay for 2022/23 is reached between government and all NHS unions. This action is taking place during a period of unprecedented pressure on the NHS, with record levels of staff vacancies, care backlogs, and service demand. It is essential that a focus on legislative change does not worsen industrial relations at a time when it is imperative that the government and unions are negotiating in good faith to seek a resolution and avert an escalation of NHS strikes.

Minimum service levels

- The Bill grants the Secretary of State powers to make “minimum service regulations” during strike action across a number of sectors, including “health services”. “Health services” are not defined in the Bill at present, which means this legislation is very broad in its scope. The Bill also fails to define what the “reasonable steps” are which unions must take to ensure their members comply with work notices.
- Minimum service levels are also not defined in the Bill and will be decided by the business secretary after consultation. It is essential to allow sufficient time for consultation to ensure local differentiations are taken into account and to ensure any nationally agreed minimum levels are helpful. We are particularly concerned that the current draft of the Bill places undue, and unfair, responsibility on trusts as employers to guarantee minimum service levels, without any of the tools to resolve the issues in hand given that NHS pay is determined nationally.
- There is also no detail about what would happen if these minimum levels are not met outside of a period of industrial action, or whose responsibility that would be.
- Minimum service levels during periods of strike action in the NHS are often collectively agreed in derogation negotiations at both local levels between union representatives and trusts, and national level between union officers and NHS England, based on population and patient needs. The enactment of this Bill, if passed, must take into account local needs, and it must clearly set out how the legislation will interact with the national and local derogations processes. It is also worth noting that local derogations are more granular and often more wider ranging than national ones.

- Existing legislation and mechanisms are already in place to ensure ‘life and limb’ cover during periods of strike action, with trusts also having the option to invoke a section 240 under existing legislation.
- Emergency cover provisions have been in place for all recent strike action in the NHS, drawn up by each trust through local planning processes and derogation negotiations with unions, drawing on local experience and expertise. This gives the ability to make decisions based on a detailed understanding of the day-to-day operational needs of their services. Trusts are able to request staff are called off the picket line in specifically agreed circumstances, though staff retain the individual right to strike. It is not clear how this Bill will interact with the individual right to strike.
- Implementing singularly defined minimum service levels at a national level would undercut both local industrial relationships and local decision making, and would not be informed by a close understanding of the needs of the local community, frontline clinical assessments or patient pathways.

Impact on relationships between trust leaders and staff

- There is a clear risk that compelling trust leaders to implement government-determined minimum service levels will have a negative impact on the relationship between staff, trust leadership and local trade union representatives. We anticipate that asking trusts to enforce this legislation would result in legal challenges from unions representing any affected staff.
- The experience of the intended introduction of a requirement for mandatory vaccination against Covid-19 is salient here. The mandate was first introduced for social care staff and later proposed for health care staff. Following significant concerns that it would drive frontline staff away from the NHS, the mandate was then revoked ahead of the planned implementation date. However, trust leaders had already begun to prepare for the introduction of a national mandate, undertaking many difficult and emotive conversations with their staff which proved challenging to retention, and to local employment relations. Our consultation [response](#) sets out more detail on this.

Legislative process

- The Bill is broad in scope and will leave the legislation open to interpretation by individual secretaries of state. The government also states that it hopes to not have to use these powers for other sectors included in the Bill, expecting them instead to reach “sensible and voluntary” agreements on delivering reasonable levels of service when there is strike action. Future governments, however, could or may wish to extend the powers to more sectors.
- We are concerned by the pace at which the Bill is progressing through Parliament and note the findings of the [Regulatory Policy Committee’s \(RPC\) impact assessment](#). The RPC found the bill

“not-fit-for-purpose and therefore red rated” and noted its receipt of an impact assessment several weeks after the Bill had been introduced to Parliament.

- We note the initial equality impact assessment and its own conclusion that another will need to be carried out following the conclusion of the consultation. The majority of NHS workforce are women (75%) and trade union membership is highest among black or black British staff (29%). Furthermore, we are concerned by a [recent report by the Joint Committee on Human Rights](#) which suggests that, in their current form, plans to impose minimum service levels on public services during strike action, are likely to be incompatible with human rights law.