

Strikes (Minimum Service Levels) Bill

House of Lords, Report stage, 26 April 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.

This briefing sets out NHS Providers' overall position on the Bill and our view on amendments relating to the obligation on employers to issue a work notice (amendment 3) and to unfair dismissal (amendment 4*). Our briefings for the Lords committee debates can be found [here](#) and [here](#).

The Strikes Bill – NHS Providers view

- 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.
- More than 531,000 appointments have been rescheduled due to industrial action since last December and the four-day strike by junior doctors has led to the biggest disruption for patients yet, with just over 201,000 appointments having to be rescheduled. Trust leaders want what's best for patients and staff. The huge number of rescheduled operations and appointments will keep climbing unless the government sits down with unions to find a way to prevent more strikes.
- 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 get around the table to seek a resolution and avert further escalation and disruption to patient care. We would ask for the government to accept the suggestion that ACAS should act as a mediator in the junior doctors' dispute.
- 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. This is a

significant risk, given that at the last count, the service already has over 124,000 vacancies and is struggling to meet demand.

- There is also a risk that the imposition of minimum service levels may encourage unions to take more action short of strikes, such as working to rule. This presents the NHS with further challenges and is more difficult to manage than strike action.
- We are also concerned about the pace at which this legislation has been drafted and is expected to pass through Parliament given the potential impact and the complexity of the context in which these new powers would be exerted.

Unfair dismissal

Amendment number 4*

Schedule: minimum service levels for certain services

Member's explanatory statement

This amendment would prevent failure to comply with a work notice from being regarded as a breach of contract or constituting lawful grounds for dismissal or any other detriment.

NHS Providers' view

We welcome this amendment which retains workers' automatic protection from unfair dismissal. We believe its removal would undermine the goodwill that is vital to negotiating successful local derogations, which would still be necessary to undertake in the event that the Bill passes.

There is a clear risk that compelling trust leaders to implement government-determined minimum service levels through the issuing of a work notice will have a negative impact on the relationship between staff, trust leadership and local trade union representatives. 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.

The damage to local relations will be compounded by the fact that the Bill would also remove automatic protection from unfair dismissal for any employee who takes part in a strike contrary to a valid work notice. We anticipate that asking trusts to enforce work notices with the threat of dismissal will damage relations and the goodwill that is crucial to successful local derogation negotiations. Under those arrangements, trusts are able to request staff are called off the picket line in specifically agreed circumstances, though staff retain the individual right to strike. Trusts also have other

mechanisms at their disposal to ensure 'life and limb' cover during periods of strike action, including the option to invoke a section 240 the Trade Union and Labour Relations (Consolidation) Act 1992. Section 240 makes it an offence to take industrial action in the knowledge or belief that human life will be endangered or serious bodily injury caused.

The unintended consequences of removing this protection also need to be considered – for example, staff may feel compelled to call in sick en masse, or unions will be more likely to run action short of strikes such as work to rule, as an alternative to facing dismissal. This would of course seriously undermine efforts to provide safe levels of care.

Employers' obligation to issue a work notice

Amendment number 3

Schedule: minimum service levels for certain services

Member's explanatory statement

This new clause is intended to make clear that the decision to issue a work notice is entirely within the employer's discretion. The employer is therefore under no obligation to give a work notice and, if the employer determines that they will not give a work notice, the employer is under no liability to anyone and the decision cannot be challenged in court.

NHS Providers' view

We welcome this amendment because it would provide much needed clarity for our members that there is no legal obligation to implement the minimum standards set out in the Bill, unless the employer decides to implement a work notice.

During committee debates on the Bill the government made the case that the Bill has no effect unless the employer does something. That needs to be crystal clear on the face of the Bill. When asked for clarification during committee debates the minister said that under the Bill 'it is a statutory discretion and not a statutory duty for employers as to whether to issue a work notice. It is a matter for the employer to consider any contractual or other legal obligations it has in taking this decision.' (*Strikes (Minimum Services Levels) Bill HL Deb 23 March 2023*).

With the threat of legal action ever present, trusts leaders are likely to feel compelled to issue a work notice, even if they are successfully negotiating local derogations with trade unions. The issuing of a work notice is likely to undermine that process and will have a negative impact on the relationship

between staff, trust leadership and local trade union representatives. This amendment removes that risk by making it clear its entirely within the employer's discretion to issue a notice and removes the threat of legal action.