

### About the BMA

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives. This response is made on behalf of our members, and of the wider medical profession, to address the significant issues present within the proposed legislation.

### BMA position

The BMA has significant concerns over the work notice guidance, as drafted. It fails to provide necessary strengthening of the minimal consultation requirements provided for by the Strikes (Minimum Service Levels) Act or to address gaps in vital protections for employees and trade unions.

As written, the guidance risks overreaching the requirements of the Strikes Act by seeming to create legal obligations not provided for in the Act. It encourages employers to proactively issue work notices rather than seeing this as a last resort, and fails to give due prominence to the requirement for an employer to consider whether there is a reasonable alternative to issuing a work notice in order to comply with the Data Protection Act.

The guidance also fails to address how processes for consulting on, and determining, the workers to be identified in the work notice, and informing both the trade union and the individuals concerned, can be workable with minimal time for, or guidance on, the development of these. Equally, there are sections of the work notice that are unclear and may confuse employees. Considering the potentially extremely serious consequences for employees if they fail to comply with a work notice, any scope for confusion must be addressed.

The BMA continues to oppose the introduction of MSLs and work notices on the basis that:

- **Proposals for MSLs present an unlawful and unjustified interference with internationally recognised labour standards to which the UK is a signatory.**
- **They are unnecessary given ‘life and limb’ protections already exist in the Trade Union and Labour Relations (Consolidation) Act 1992.** These current arrangements allow for rapid and effective localised responses to agree derogations during industrial action.
- **The Secretary of State has significant powers to define MSLs through regulations, and employers to set work notices, with minimal requirement for consultation and no requirement for agreement with trade unions.** This risks thresholds for MSLs being set that undermine legitimate strike action. It is also contrary to the approach taken by most European countries that have minimum service levels legislation - in 85% of European countries that have legislated for minimum service levels, this includes a requirement for an agreement between trade unions and employers.<sup>1</sup>
- **The imposition of MSLs and work notices risks leading to greater tensions between NHS trust leaders, their staff and unions without addressing the underlying issues that are causing the healthcare worker to take strike action.** This concern is shared by both unions and organisations representing NHS management, including NHS Providers and NHS Confederation, who have said that the current system works well and local agreements and arrangements between employers and unions work “much better” than a legal framework

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<sup>1</sup> <https://ukandeu.ac.uk/where-does-the-strikes-bill-put-the-uk-relative-to-other-european-countries/>

that “could potentially make things more difficult rather than easier”.<sup>2</sup> NHS Providers repeated these concerns in response to the launch of the Government consultation on MSLs in hospital settings, warning that it “risks worsening industrial relations” and fails to “address any of the issues underlying current strike action”.<sup>3</sup>

- **Employees will lose their protection from dismissal if they participate in strike action contrary to a work notice.** Despite Ministers repeatedly stating<sup>4</sup> that the Strikes Act would not result in nurses, doctors and other key workers being sacked, the work notice makes clear that this is a threat, and the code of practice goes further by requiring unions to inform all members of this risk. The NHS is already experiencing a workforce crisis, making the power to dismiss staff particularly concerning.
- **Trade Unions will be required to act in a way that would undermine their own industrial action and responsibility to represent their members** by being forced to take “reasonable steps” to ensure their members comply with these notices, or face fines of up to £1m.
- **Proposals for MSLs fail to address any of the issues underlying current strike action**, in particular, pay erosion that is resulting in doctors leaving the NHS for better paid jobs at home and abroad. Instead of curtailing doctors’ right to take part in legitimate strike action under threat of dismissal, the Government should drop its opposition to negotiating a new pay deal and get round the table with doctors with a credible offer.
- **Instead of focusing on strike days, the Government should be taking action to ensure the NHS is safely staffed 365 days a year.** Ensuring patient safety in the long-term is one of the reasons doctors are striking, as they cope with working in an increasingly understaffed and under-resourced NHS. Yet, the Government has failed to take the action needed to ensure patient safety on non-strike days and address what the Health and Social Care Select Committee has described as the “greatest workforce crisis” facing the NHS and social care.

In reviewing the work notice guidance, we have considered the questions posed by the Department for Business and Trade: whether anything in the guidance is unclear or does not make sense and whether there is anything else we would expect to be covered by the guidance.

The following sections address key areas of concern, but overall, the draft guidance fails to allay any of the BMA’s concerns over the imposition of MSLs and work notices. Instead, it has confirmed our view that the proposals will result in non-compliance with the UK’s international obligations; fail to provide for fair consultation; put employees at risk of intimidation; will have the effect of increasing the divide between workers, their employers and unions; and are unworkable.

### **Compliance with international human rights obligations**

Throughout the passage of the Strikes Bill, the BMA, alongside other unions, legal experts and Parliament’s own Joint Committee on Human Rights,<sup>5</sup> warned that the lack of a requirement for meaningful consultation and agreement with trade unions over both minimum service levels and work notices risked interference with Article 11 of the International Labour Organisation (ILO) by not meeting the standards set by the ILO’s Committee of Experts and Committee on Freedom of

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<sup>2</sup>Matthew Taylor, Chief Executive, NHS Confederation, and Sir Julian Hartley, Chief Executive, NHS Providers [Oral evidence to Health and Social Care Committee, 09.05.23](#)

<sup>3</sup> NHS Providers, Press Release: NHS Providers responds to new consultation on minimum service levels in hospitals, 19.09.23

<sup>4</sup> Lord Callanan, House of Lords Second Reading of the Strikes (Minimum Service Levels) Bill, Tuesday 21<sup>st</sup> February

<sup>5</sup> Joint Committee on Human Rights, [Legislative Scrutiny: Strikes \(Minimum Service Levels\) Bill 2022-23](#), 6 March 2023

Association. Most important of these is that setting the minimum service level, and the number of workers required to achieve it, should be reached with the participation of trade unions, and, if agreement cannot be reached, by resolution by an independent body. The MSLs Act (i) does not provide for adequate union involvement, as recognised by the ILO's supervisory bodies; and (ii) does not provide for resolution of disagreement over minimum service levels and/or numbers to provide the minimum service levels by an independent body.

This is also a departure from the approach taken by many European countries with minimum service levels where disputes are typically decided through collective negotiations and agreement and subject to independent arbitration, where necessary. In 85% of European countries that have legislated for minimum service levels, this includes a requirement for an agreement between trade unions and employers. There are only four countries where a minimum service level is set without an expectation of an agreement between the trade union and the employers – Romania, Serbia, France and Spain.

Processes concerning the work notice should comply with international obligations, and in particular the reports of the ILO's Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations. This should mean the full participation of the BMA in determining the number of workers, and work to be specified, in order to comply with the MSL, and for such matters to be resolved by an appropriate independent body in the event of disagreement. The guidance fails to provide any strengthening of the Act in this regard and instead reaffirms the limited scope for consultation and agreement with unions.

#### **Fair consultation**

The Strikes Act enables employers to submit what might be a lengthy and excessive work notice as little as seven days before strike action is due to take place, and is only required to consult with the union and "have regard to" anything it might say. Not only does this enable very limited time for any consultation, but employers could also then ignore the views of the union or vary the notice up to 4 days prior to strike action. The provision for consultation in this regard is therefore ultimately meaningless and the guidance only states that the employer "may" want to keep a record of this interaction. Such wording shows the Government's complete disregard for trade unions and an individual's right to take part in legitimate trade union activity.

Stronger involvement from trade unions is essential and, regardless of the limitations of the Strikes Act, the guidance should make this clear. It should also be a requirement for a record of this consultation to be kept and published to ensure transparency and scrutiny over the process.

We are further concerned that the guidance states that "If the trade union does not respond to the consultation by a date and time reasonably set by the employer, the employer can continue to issue the work notice." This undermines any requirement for consultation as an employer could give very little time for consultation, meaning the union may be unable to meet the timeframe to respond or respond adequately. Although the guidance states "by a date and time reasonably set by the employer" there is no guidance on what might be considered reasonable.

The guidance encourages employers to design a written policy and process for preparing a work notice well in advance of any strike action, recognising that there might not be much time ahead of a union calling action for this take place. This would also need full consultation with unions for it to be designed in a fair way, which there is currently no recognition of in the guidance.

The guidance only states that the process “should” be designed in a fair way, but this must be a requirement. It should also set out measures for consultation and agreement with unions and full transparency of the process followed and any objections raised. Whilst we recognise this is due to a requirement for a fair process not being set out in the legislation, the weakness of the guidance in this respect further demonstrates how problematic the Government’s proposals for MSLs are.

It is essential that fair consultation principles be observed, including consultation taking place at a stage when proposals are formative, and in sufficient time, and the BMA’s response being fully taken into account in the final decision.

### Protection against intimidation and abuse

There is significant risk of abuse and intimidation from employers when identifying people to work that is not adequately addressed by either the Strikes Act or the proposed work notice guidance.

The lack of a requirement to ensure a fair process is followed, for meaningful consultation with unions in identifying workers, or for transparency over how decisions are made is extremely troubling.

The guidance stipulates factors that employers “may” want to consider when deciding workers to identify in a work notice. This falls short of ensuring a robust, fair process is followed when identifying workers and fails to highlight factors that would be important to consider. These include:

- The areas in which workers are required
- The type of worker or seniority of worker required
- Previous shifts of workers leading up to the strike date (e.g. workers who have worked night shifts or long hours should be avoided)

Certain cohorts of doctors, such as SAS, International Medical Graduate (IMG) and locally employed doctors may be more likely to be targeted in work notices and at risk of bullying and pressures to work.

The medical profession is highly diverse and, recent data shows, increasingly reliant on IMG doctors. Currently, ethnic minority doctors make up over two fifths (42%) of all licensed doctors and account for almost two thirds (64%) of new joiners. As seen by complaints raised during recent strike action, there is a risk of IMG doctors being wrongfully pressured not to take strike action or risk their visa status.<sup>6</sup>

SAS doctors who may be likely to be named in work notices are disproportionately likely to be ethnic minorities or IMGs. SAS doctors already face high levels of bullying and unsupportive work environments, and this could be exacerbated if they were subject to work notices in strike situations. Equally, Locally Employed Doctors might be under increased pressure to work on strike days due to the lack of a national contract.

There is a further risk of employees being deterred from making clear their beliefs and support for strike action due to threat of disciplinary procedure or dismissal. The legislation states that employers must not take into consideration factors including trade union membership or whether a worker has made use of trade union services when deciding who should be named in a work notice. However, there is no guidance on how this would be done fairly and no requirement for transparency

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<sup>6</sup> BBC News, London NHS trust criticised after warning to striking staff on visas, 4<sup>th</sup> April 2023

over how decisions are made. If employers can target specific individuals there is significant risk that this will be politicised and abused, for example, if union leaders are issued work notices to undermine their ability to represent their membership. As a minimum there should be guidance developed on what would constitute a fair process that includes consultation and agreement with unions, as well as the publication of any decisions. An anonymised process for selecting people to be named in a work notice could help avoid the targeting of certain individuals and should be encouraged by the guidance.

Whilst there is provision for an employee to appeal a work notice, there would be very little time between the notice being issued and the strike date for an appeal to take place. Requiring this to be done through conversation with the employer may also deter employees from making an appeal.

If it is not the Government's intention to enable employers to target specific employees then it is equally unclear why substitution is so strongly discouraged in the guidance, given that this would not interfere with the ability to meet MSL requirements.

The guidance suggests that in setting work notices employers might want to consider "levels of attendance during any previous strike action". This could result in far higher service levels being provided for given that levels of attendance can fluctuate significantly. This would similarly be the case if levels of sickness absence are lower than expected, yet the guidance makes no provision for employees returning to strike if not needed to provide minimum service levels.

To help protect against abuse by employers there must be a requirement that a work notice not be used as an opportunity for intimidation. The guidance states that members who fail to comply with a work notice will lose their protection from unfair dismissal, re-enforcing this draconian measure which demonstrates the Government's intention to scare individuals from taking part in legitimate strike action. Although it states that "we encourage employers to be fair and reasonable when considering whether to proceed with disciplinary action and the appropriate form this should take", this should be strengthened to reflect repeated promises Ministers made during the passage of the Strikes Act that it is "not about the sacking of key workers".<sup>7</sup> This intention should be clearly stipulated within the guidance. For the purposes of transparency and to help avoid abuse by employers, there should also be a requirement for employers to explain to an employee why they have been named in a work notice.

### **Preferences work notices over voluntary arrangements**

As written, the guidance fails to give due prominence to the fact that an employer is not required to give a work notice to comply with a minimum service level. This is established in Section 234C(1) of the Act: "Where minimum service regulations have been made as respects a relevant service, an employer may give a work notice to a trade union."

The guidance currently states that employers may consider "whether they can achieve the minimum service level without issuing a work notice", this should be a requirement before any work notice is considered. In line with the current approach towards strike action in the NHS, there should also be a duty on employers to consider if other members of staff who are not on strike could undertake the job before they issue work notices.

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<sup>7</sup> Lord Callanan, House of Lords Second Reading of the Strikes (Minimum Service Levels) Bill, Tuesday 21<sup>st</sup> February

Current arrangements for voluntary agreements between trade unions and employers are sufficient to provide necessary cover for essential services on strike days and are the preference of both unions and organisations representing NHS employers and managers.<sup>8</sup> Speaking to the Health and Social Care Committee earlier this year, both NHS Confederation and NHS Providers argued that current arrangements work well and warned about the impact of the legislation on industrial relations.<sup>9</sup> More recently, these concerns were repeated by NHS Providers' Deputy Chief Executive, Saffron Cordery, in response to the launch of the Government consultation on MSLs in hospital settings, warning that it "risks worsening industrial relations" and fails to "address any of the issues underlying current strike action".<sup>10</sup>

During recent strike action, derogation requests are subject to a national process which has been agreed by both the BMA and NHS England, despite the Secretary of State making untrue claims that the BMA rejected 17 locally agreed derogation requests as justification for bringing forward the introduction of MSLs. Urgent and emergency services have continued to be delivered either through Christmas Day cover or other doctors stepping in to provide cover for their colleagues, and over six months of striking have passed with no major patient safety issues reported.

The statement within the guidance that "there is no statutory duty on the employer to issue a work notice" is then undermined and confused by the addition that "the employer should consider any contractual, public law or other legal obligations that it has when taking the decision whether to issue a work notice or not". The BMA is responding to the Government's consultation on MSLs for hospital services and will provide a detailed response to the proposed levels of service required in that response. However, as we raised during the passage of the Strikes Act in Parliament, the significant powers for the Secretary of State to define MSLs with no requirement for agreement from trade unions risks levels being set that undermine legitimate strike action. It also risks employers being forced to issue a work notice against their will, undermining their preference for a locally agreed solution established through consultation with a union.

### Data protection

The guidance's failure to give due prominence to non-requirement is of equal importance when it comes to data protection principles: an employer is required to consider whether there is a reasonable alternative to issuing a work notice in order to comply with the Data Protection Act – a principle that should not be hidden away in the final two pages of the draft guidance.

It is vital that employees' data is protected in the issuing of work notices, but the lack of detail within both the legislation and the guidance on how personal data should be processed and managed leaves scope for breaches occurring.

The guidance states that Trusts will send work notices through to unions, but there is no further information on how these will be sent. If via regular email, it must be confirmed that it is safe for personal data to be sent in this way.

There should also be clear guidance on how long employers should be allowed to retain data on work notices for. The guidance currently states that employers may wish to keep records of work notices for a limited period in accordance with UK Data Protection requirements, but that "this

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<sup>8</sup> [Oral evidence to Health and Social Care Committee, 09.05.23](#)

<sup>9</sup> Matthew Taylor, Chief Executive, NHS Confederation, and Sir Julian Hartley, Chief Executive, NHS Providers [Oral evidence to Health and Social Care Committee, 09.05.23](#)

<sup>10</sup> NHS Providers, Press Release: NHS Providers responds to new consultation on minimum service levels in hospitals, 19.09.23

would need to be balanced against holding the data no longer than is necessary". It is not clear whether this should be weeks, months or years.

Trade unions and employers may have very limited time to set up systems for dealing with work notices before they need to be enacted, further increasing the risk of problems and data protection concerns. This is an unnecessary risk when both unions and employers have argued that current systems are preferable to the issuing of work notices.

### **Unworkable**

The guidance fails to address how processes for consulting on, and determining, the workers to be identified in the work notice and informing both the trade union and the individuals concerned can be workable with minimal time for, or guidance on, the development of these.

The guidance states that employees should be notified as soon as reasonably practicable after a work notice is issued, but there is no indication of what a reasonable timeframe might look like. Various system errors could result in failure to adequately notify an employee of a work notice, the risk of which is increased due to the speed under which employers and unions will need to set up systems for notifying employees and members respectively and lack of a robust process agreed with employee representatives.

The timetable for issuing what might be a lengthy and excessive work notice is only a week prior to action taking place, enabling very little time to notify employees and ensure they are aware they are subject to a work notice. The scope for variation up to 4 days prior to strike action is further troubling. This would result in even less time for employees to be notified and risks creating confusion among employees who were previously named in, or have now been added to, a work notice, increasing the risk to the individual of breaching a notice. Considering the consequences of non-compliance with a work notice include the threat of dismissal, it is vital that any scope for confusion is minimised.