


Government launch consultation on minimum service levels for hospitals

27 November 2023  Gemma Lynch

The Government has recently passed the Strikes (Minimum Service Levels) Act 2023 which allows regulations to be made which set minimum service levels ('MSL') during strike action in a number of specified services. Consultation has already taken place within the fire and ambulance sector regarding minimum service levels and the Government has now launched a further consultation on introducing MSL regulations for hospitals.

The Government propose that most essential and time-critical hospital services should be covered by MSL regulations. This would mean that hospitals would treat people who require urgent or emergency treatment in hospital and people who are receiving hospital care and are not yet well enough or able to be discharged, during the period of industrial action as they would on a non-strike day. It is also proposed that all the relevant supporting services run by hospitals would also need to be provided to ensure that the minimum level of service could operate safely and effectively. Examples of these supporting services include theatres, catering and cleaning, discharge support, mortuary services, pathology, information and communications technology (ICT) support, estates and patient transport. The consultation recognises that some of these support services may be outsourced or provided by third parties and therefore seeks views on whether non-NHS employers should also be included in the regulations.

At present, when strike action is called, hospital employers negotiate with trade unions and seek "derogations". These derogations permit certain staff members or groups of staff to be exempt from the action in order to provide a certain level of cover for priority health services which are necessary to protect life and health. For example, during the recent consultants strike a derogation was agreed that permitted consultants to provide "Christmas Day" cover.

If MSL regulations are implemented they would enable hospital employers to issue work notices to some doctors and nurses (and potentially support staff including those not employed direct by the NHS as outlined above) requiring them to work during strikes. The Trade Union would also be under a duty to take "reasonable steps" to ensure that union members comply with the terms of the works notice (a [separate consultation](#) is ongoing in regarding a draft Code of Practice setting out what will be considered reasonable steps). Failure to comply with a work notice would result in an employee losing their protection for automatically unfair dismissal. If the Trade Union fail to take all reasonable steps to ensure their members comply with the works notice, they will lose their immunity in tort in relation to the action meaning the employer may be able to apply for an interim injunction to restrain the action or claim damages if the strike has gone ahead.

This consultation aims to inform decisions on:

- whether hospital services should be covered and, if so,
- which hospital services,
- the appropriate minimum service levels required, and
- whether any health services outside hospitals should be included.

NHS organisations and unions are also asked about the amount of time and cost that has been incurred preparing for strike action since December 2022 and what if any difference the introduction of a MSL would make.

The consultation remains open until 11:59 pm on 14 November 2023. [Read a copy of the consultation](#) and instructions on how to respond.

Key contact

Gemma Lynch

Legal Director

Gemma.Lynch@brownejacobson.com

+44 (0)330 045 2631