EXPLANATORY MEMORANDUM TO

THE CODE OF PRACTICE (REASONABLE STEPS FOR TRADE UNIONS) ORDER 2023

2023 No. 1333

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

1.3 This explanatory memorandum is for The Code of Practice (Reasonable Steps for Trade Unions) Order 2023 (the "Order").

2. Purpose of the instrument

2.1 The Order is made under section 204(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"). Its purpose is to bring into effect the Code of Practice on Reasonable Steps to be taken by a Trade Union (minimum service levels) (the "Code") on 8th December 2023.

2.2 The Code was laid in draft before both Houses of Parliament on 13th November 2023 and approved by a resolution of the House of Commons on 28th November 2023 and by a resolution of the House of Lords on 6th December 2023. The Code provides practical guidance for the purpose of promoting the improvement of industrial relations, in relation to the "reasonable steps" to be taken by a trade union in order to comply with section 234E of the 1992 Act (inserted by the Strikes (Minimum Service Levels) Act 2023 ("the 2023 Act")).

2.3 See paragraph 6 below which sets out the relevant legislation in more detail.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

Departure from the "21 day rule" in respect of the Order to bring the Code into effect.

3.1 Under section 204(3) and (4) of the 1992 Act, the Order, which is subject to the made negative procedure, is required to bring the Code into effect, once the Code is approved by Parliament.

3.2 The Department would like to take this opportunity to bring Parliament's attention to the intended departure from the "21 day rule" in respect of the Order.

The procedure for issuing the Code and bringing it into effect

3.3 The statutory procedure for issuing the Code and bringing it into effect is set out in section 204 of the 1992 Act.

3.4 Under section 204(1), the Secretary of State, after consultation with the Advisory, Conciliation and Arbitration Service (ACAS), prepared and published a draft of the Code.

3.5 Under section 204(1), the Secretary of State considered representations made to them about the draft Code and modified the draft accordingly.

3.6 The public consultation on the draft Code (as a result of which those representations were made) was launched on 25th August 2023 and closed on 6th October 2023. A response was published by the Department on 13th November 2023.

3.7 Under section 204(2), the Secretary of State laid the draft Code before both Houses of Parliament on 13th November 2023 and it was approved by a resolution of the House of Commons on 28th November 2023 and by a resolution of the House of Lords on 6th December 2023. The Secretary of State is now issuing the Code in the form of that draft.

3.8 Under section 204(3), a Code issued under this section shall come into effect on such day as the Secretary of State may by order appoint. Such order is to be made by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament (section 204(4)).

3.9 Under section 204(3), the Order, which is subject to the made negative procedure, is therefore required to bring the Code into effect, once the Code is approved by Parliament.

3.10 It is a convention that statutory instruments using the made negative procedure do not come into force within 21 days of being laid in Parliament. However, the Order to bring the Code into effect under section 204(3) of the 1992 Act will come into force a day after it is laid. The Order will therefore not comply with the "21 day rule". The Order is being laid in Parliament on 7th December 2023 and it is to come into force on 8th December 2023, bringing the Code into effect on 8th December 2023.

3.11 The Department believes this is justified on the following grounds:

(a) Firstly, in its response to the consultation on the draft Code published on 13th November 2023, the Department made it public that it expects to bring the Code into effect in mid - December 2023, in time for it to take effect alongside the first set of minimum service level regulations (made under section 234B of the 1992 Act) as they come into force.[1] This was, in effect, a notice period of just under four weeks. It is considered that relevant stakeholders, in particular trade unions, have therefore been given sufficient notice of when the Code is expected to come into effect if approved by Parliament.

(b) Trade unions, and other stakeholders, have been consulted in the preparation of the Code. The consultation on the draft Code was launched on 25th August 2023, giving them further notice of its potential contents in plenty of time before it is brought into effect via the Order.

(c) Parliament, as well as trade unions and other stakeholders, will have been able to see the finalised draft of the Code as laid in Parliament from when it was laid on 13th November 2023. This form of the Code could either have been approved or rejected by Parliament. The Order itself merely brings the Code into effect from the stated date and does not otherwise contain any substantive material.

[1] Government response to Minimum Service Levels: Code of Practice on 'reasonable steps' consultation (see page 4). Available at: https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps

(d) For these reasons, the Department believes trade unions and other stakeholders have been given sufficient notice of the contents of the Code, and sufficient time to prepare, before it was expected to come into effect.

(e) Secondly, non-compliance with the "21 day rule" is justified by urgent policy reasons. It is the Department's intention for the Code to come into effect before the first regulations providing for minimum service levels come into force under section 234B of the 1992 Act. This sequencing ensures trade unions are provided with practical guidance on the "reasonable steps" they should take to comply with section 234E of the 1992 Act before minimum service levels are implemented.

(f) The Department considers it cannot wait an additional 21 days for the Code to come into effect, which would delay minimum service levels being implemented, on the grounds this would delay further the balance which minimal service levels can bring to the impact strikes can have on the lives and livelihoods of the general public The Department believes that this needs to be addressed via this legislation on an urgent basis.

(g) Ministers committed to issue a Code of Practice under section 203 of the Act at a relatively late stage of the passage of the 2023 Act through Parliament. The 2023 Act obtained Royal Assent on 20th July 2023 and the Department could not reasonably have published its consultation on the Code before 25th August 2023. The Department considered that six weeks was the minimum reasonable period which stakeholders should have to comment on the draft of the Code. The consultation closed on 6th October 2023. Many lengthy detailed representations were made on the draft Code and, having taken these into account, the Department made some significant changes to the draft of the Code laid before Parliament. In the light of this, the Department could not reasonably have published its Response to the consultation and laid the draft Code before Parliament before 13th November 2023. Finally, the Department is laying the Order at the earliest opportunity following the approval of the draft Code in Parliament.

4. Extent and Territorial Application

4.1 The extent of the Order (that is, the jurisdiction(s) which the Order forms part of the law of) is England and Wales and Scotland.

4.2 The territorial application of the Order (that is, where the Order produces a practical effect) is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 As the Order is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The 2023 Act amends the 1992 Act so that minimum service levels can be applied during strikes in services within six key sectors. These are:

a. Health services

b. Fire and rescue services

c. Education services

d. Transport services

e. Decommissioning of nuclear installations and management of radioactive waste and spent fuel

f. Border security

6.2 Minimum service levels are provided for via regulations made by the Secretary of State under section 234B of the 1992 Act, specifying the minimum service levels and the service(s) they apply to.

6.3 The 1992 Act provides that, where a trade union gives an employer a notice of strike action under section 234A, which relates to services specified in regulations, the employer may issue a work notice identifying persons who are required to work and the work they are required to carry out during the strike to secure minimum levels of service. Where an employer decides to issue a work notice, that notice must be issued to the trade union a minimum of 7 calendar days prior to the strike day unless a later day is agreed with that trade union. Once issued, the work notice can be varied up to 4 calendar days prior to the strike day, unless a later day is agreed with the trade union.

6.4 Once a work notice has been given to a trade union in accordance with section 234C of the 1992 Act, that union must take "reasonable steps" to ensure that all members of that union who are identified within the work notice comply with the notice. This will enable that union to maintain statutory protection from certain proceedings in tort brought by the employer in relation to an act done by the union to induce a person to take part, or to continue to take part, in a strike. Such proceedings could include the employer seeking damages from the union or an injunction to prevent the strike action taking place.

6.5 If a trade union fails to take reasonable steps, this would mean that the strike is not protected under section 219 of the 1992 Act, so an employee taking part in that strike, who was induced to strike by that union, would lose automatic protection from unfair dismissal under section 238A of the 1992 Act (regardless of whether they were identified in a work notice or not). This aligns with other requirements in the 1992 Act, such as balloting requirements.

6.6 The purpose of the Code is to provide guidance for trade unions on what reasonable steps should be taken by unions in relation to this obligation. The Code is therefore intended for use by trade unions which give notice of strike action relating to services specified in such regulations. Employers and trade union members operating or working in such services may also want to familiarise themselves with the Code.

6.7 The Code imposes no legal obligations and failure to observe it does not by itself make any person liable to legal proceedings. But under section 207 of the 1992 Act, any provisions of the Code are admissible in evidence and taken into account in proceedings before any court or employment tribunal where the court or tribunal considers them relevant.

6.8 Paragraphs 3.3 to 3.9 above set out the statutory procedure under section 204 of the 1992 Act which was complied with by the Secretary of State in issuing the Code and making this Order.

7. Policy background

What is being done and why?

7.1 The Code provides practical guidance for trade unions on what reasonable steps should be taken by trade unions to meet the legal requirement under section 234E of the 1992 Act.

7.2 In addition to clarifying how unions can meet this legal requirement, the Code will provide clarity to employers and union members on what to expect leading up to and on the day of strike action, where a work notice has been given to secure a minimum service level. It will also help provide a greater level of assurance that trade union members who have been required to work as part of a work notice will be encouraged to do so by the trade union and therefore increase the likelihood minimum service levels will be achieved.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 The Order does not consolidate any legislation.

10. Consultation outcome

10.1 The Department issued a public consultation on a draft Code of Practice on 25th August 2023. In response to the views expressed by consultees, the Department made a number of changes to the draft Code to ensure the Code balances the objectives and benefits of the 2023 Act with the potential burdens of undertaking the reasonable steps whilst providing a clear route for trade unions to maintain their protections during strike action.

10.2 The Department published a response to the consultation on 13th November 2023.[2]

11. Guidance

11.1 There is no guidance in respect of the Order. In respect of the Code, this is itself guidance. Relevant stakeholders are referred to the content of the Code as this provides the guidance on "reasonable steps".

12. Impact

12.1 The impact on business, charities or voluntary bodies is dependent on the minimum service levels set for specific services and the level of strike action that takes place in these services. These impacts are assessed as part of the overall impacts for individual minimum service levels set under the 1992 Act.

[2] Government response to Minimum Service Levels: Code of Practice on 'reasonable steps' consultation. Available at: https://www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps

12.2 There is no, or no significant, direct impact on the public sector. This is because the Code clarifies requirements on trade unions rather than the public sector organisations covered by the minimum service levels.

12.3 A full impact assessment has not been prepared for this Order or the Code because impacts on trade unions and other relevant bodies have been considered in the impact assessment produced in relation to the 2023 Act.[3] The impacts of minimum service levels are also considered in any impact assessments for regulations made under section 234B of the 1992 Act for specific services.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This is not relevant for the Order. The approach to monitoring of the Code is to consider how minimum service levels operate when strikes take place, and the extent to which enforcement activity is undertaken to ensure the Code is followed.

14.2 The Order and the Code do not include statutory review clauses.

15. Contact

15.1 Victoria Judd at the Department for Business and Trade, email Victoria.judd@businessandtrade.gov.uk can be contacted with any queries regarding the Order.

15.2 James Stevens, Deputy Director for Employment Rights and Enforcement, at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Hollinrake, Parliamentary Under Secretary of State at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.

[3] The Impact Assessment for the 2023 Act dated 21 February 2023 can be found here https://bills.parliament.uk/bills/3396/publications