EXPLANATORY MEMORANDUM TO

THE PROTECTION AGAINST DETRIMENT (INDUSTRIAL ACTION) REGULATIONS 2026

2026 No. [XXXX]

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.

2. Declaration

2.1 Kate Dearden, Minister for Employment Rights and Consumer Protection at the Department for Business and Trade at the Department of Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 James Silcox, Deputy Director, Trade Union and Collective Rights at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 The trade union policy team at the Department of Business and Trade can be contacted by email at the following address with any queries regarding the instrument: tradeunionpolicy@businessandtrade.gov.uk.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Employment Rights Act 2025 (ERA 2025) introduced new section 236A into the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

4.2 This section gives powers to prevent a worker from being subjected, as an individual, to a detriment of a prescribed description where the sole or main purpose of subjecting the worker to those detriments is to penalise, prevent, or deter the worker from taking protected industrial action.

4.3 After Royal Assent of the Act, a consultation was conducted to establish whether a list of detriments or all detriments should be prohibited. Following consultation, the government decided to ban all detriments.

4.4 The Protection against Detriment (Industrial Action) Regulations 2026 provide protection from all detriments.

4.5 An exception to this is pay; in keeping with common law, this legislation retains the principle that a worker should not be paid when they have taken industrial action ("no work, no pay").

Where does the legislation extend to, and apply?

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

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

5. Policy Context

What is being done and why?

5.1 The 2024 Supreme Court *Mercer Judgement* found that current protections from detriments for trade union activity under section 146 of the Trade Union and Labour Relations Consolidation Act 1992 (TULRCA) did not extend to industrial action. The judgement also declared that legislation was incompatible with Article 11 of the ECHR; the right to free assembly.

5.2 Unionised workers in collective dispute with their employer, therefore, currently face a risk of having any detriment short of dismissal imposed on them for exercising their right to take lawful industrial action. Imposition of detriments (or threatened imposition) could lead to some workers being not willing to leverage their collective power. This means that the current legislative framework is in breach of international obligations.

5.3 The ERA 2025 addressed this by giving powers to prevent a worker from being subjected, as an individual, to a detriment of a prescribed description if the sole or main purpose of subjecting the worker to those detriments is to penalise, prevent, or deter the worker from taking protected industrial action.

5.4 This statutory instrument prohibits all detriments that an employer can subject a worker to for the sole or main purpose of penalising, preventing or deterring them from taking industrial action. This means that workers will now be protected from detriment for all trade union activity, including industrial action and UK legislation will now be compatible with Article 11.

5.1 In keeping with common law, employers will retain the ability to proportionately withhold pay from a worker who has taken industrial action.

5.2 This statutory instrument also allows for compensation awards to be adjusted by employment tribunals depending on whether an employer or employee has followed the ACAS Code of Practice on Disciplinary and Grievance Procedures when dealing with detriments for taking industrial action. If the employer had unreasonably failed to follow the Code, the amount the employer would have to pay in awards for a successful claim could be increased by up to 25%. If the employee had unreasonably failed to follow the Code, the award could be reduced by up to 25%.

What was the previous policy, how is this different?

5.3 Previous legislation did not provide workers from protection from detriments when taking industrial action. This statutory instrument prohibits all detriments that an employer can subject a worker to for the sole or main purpose of penalising, preventing or deterring them from taking industrial action.

5.4 Previous policy did not allow for the adjustments of compensation awards by employment tribunals depending on whether an employer or employee has unreasonably failed to followed the ACAS Code of Practice on Disciplinary and

Grievance Procedures when dealing with detriments for taking industrial action. This statutory instrument enables adjustments to be made.

6. Legislative and Legal Context

How has the law changed?

6.1 Section 76 of the ERA 2025 introduced section 236A into TULRCA. This section granted the Secretary of State powers to prohibit detriments of a prescribed description for the sole or main purpose of penalising, preventing or deterring a worker from taking industrial action.

6.2 Section 293(1) of TULRCA provides the power to set out in regulations what the prescribed detriments in section 236A are.

6.3 This statutory instrument sets out that all detriments are prohibited.

6.4 It has long been established, as a matter of common law, that a worker who declines to work (including by way of strike or other industrial action) is not entitled to be paid. This is sometimes referred to as the principle of "co-dependency" and can be found, for example, in the case of Miles v. Wakefield (House of Lords) [1987] AC 539. In Secretary of State for Business and Trade v. Mercer [2024] UKSC 12, the Supreme Court commented, similarly, that there is no entitlement to pay where the worker performs no work and added that a deduction of pay in such circumstances would not be a "detriment".

6.5 These Regulations do not affect that common law position, nor prevent an employer from acting in accordance with the common law to deduct pay from a worker who takes strike or other industrial action, nor subject an employer to a complaint for detriment under section 236A for making such a deduction. That position is reflected in regulation 4, which guards against any risk that might otherwise arise of an interpretation that the Regulations override or modify the common law in this respect.

6.6 Although the general principle of co-dependency can be relatively simply stated, the question of precisely how much pay may lawfully be deducted from a worker who takes strike or other industrial action can sometimes be more complex and is the subject of other case law. The common law may have further to develop in this respect and, again, these Regulations do not prevent that development. Where an employer makes a deduction of pay which is excessive and not in accordance with the common law rules, this would, in principle, be a detriment enabling the worker to bring a complaint under section 236A.

6.7 Section 207A of TULRCA provides that for certain claims, an employment tribunal can increase any award it makes to an employee by up to 25% where the employer has failed to comply with a relevant Code of Practice and that failure was unreasonable. Conversely, if a tribunal determines an employee has unreasonably failed to follow the Code, they can reduce any award by up to 25%. The relevant Code of Practice in this case would be the ACAS Code of Practice on Disciplinary and Grievance Procedures.

6.8 The Protection against Detriment Regulations 2026 uses the power under section 207A to add section 236A to the list of those claims for which it applies.

Why was this approach taken to change the law?

6.9 The changes to the ERA 2025 gave the Secretary of State powers to ban all detriments or prohibit a set of specific detriments. This statutory instrument uses these powers to

proscribe all detriments. This is necessary to give clarity as to which detriments are banned under the ERA.

7. Consultation

Summary of consultation outcome and methodology

7.1 A public consultation on the proposed changes made in the Protection against Detriment (Industrial Action) Regulations 2026 ran from the 26th February 2026 to the 23rd April 2026.

7.2 The consultation sought stakeholders' views on their preferences between two options available to prohibit detriments for industrial action in regulations. The first was to prohibit all detriments for industrial action, presented as the government's lead option in the consultation. The second was to prohibit a list of prescribed detriments.

7.3 During this consultation 72 responses were received. 43 of these responses were via an online survey and 29 were submitted in writing.

7.4 The majority of respondents were in support of prohibiting all detriments, largely due to the protection it offers workers, as well as because it avoids the risks of any list becoming outdated, being exploited by bad faith employers or being inconsistent with other definitions of detriments.

7.5 Respondents were overall supportive of adding section 236A to the list of claims for which compensation awards can be adjusted according to whether employers or employees unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance procedures.

7.6 A formal Government response was published on 23 June 2026 and at the following address https://www.gov.uk/government/consultations/make-work-pay-protection-from-detriments-for-taking-industrial-action.

8. Applicable Guidance

8.1 Gov.uk advice pages will be updated alongside the commencement of these regulations in October 2026.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because the policy impact is expected to be less than the £10m EANDCB threshold. This is due to the very low frequency of detriments currently being imposed for industrial action, the restrictions on public sector employers being able to impose detriments already and employers being unlikely to want to impose detriments due to the harmful impact on industrial relations.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on businesses, charities or voluntary bodies because of the infrequency of use of detriments.

9.3 The legislation does not have any significant impact on small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because public sector employers could not impose any detriments regardless of this legislation, due to stricter requirements to adhere to the ECHR.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is consistent with other, similar entitlements relating to trade union rights. We will monitor the take up of the entitlement and effectiveness of the legislation using stakeholder feedback.

10.2 The instrument, does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Kate Dearden MP has made the following statement: "*Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that to make provision for a statutory review in this instrument would be disproportionate taking into account the economic impact of the regulatory provision and would, therefore, be inappropriate. The Department for Business and Trade will undertake a non-statutory review of the policy in 2031 using stakeholder feedback to assess the effectiveness of the legislation and guidance*."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 The Protection against Detriment Regulations 2026 amends the primary legislation of Schedule A2 in TULRCA, which is the list of claims for which Section 207A of TULRCA, the power to adjust compensation awards, applies.

12. European Convention on Human Rights

12.1 The Minister for Employment Rights and Consumer Protection at the Department for Business and Trade has made the following statement regarding Human Rights: *"In my view the provisions of the Protection Against Detriment (Industrial Action) Regulations 2026 are compatible with the Convention rights."*

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").