Putting the brakes on strike action
The Trade Union Act
Executive summary

Industrial action is unlawful unless the organising trade union complies with statutory requirements such as balloting conditions. The Trade Union Act changed the rules governing ballots by introducing a new threshold for voter turnout, with an additional higher support threshold applying in important public services including health, education, fire, transport and border security services. The government’s aim is to ensure that, “strike action only ever takes place on the basis of clear and representative mandates.”

The Act goes further by tightening the supervision of picketing, providing for longer advance notice of strikes and the re-balloting of ongoing disputes. It also changes the ballot paper, introduces new public sector check-off arrangements, scrutinises public sector facility time and extends the role of the Certification Officer (a form of regulator for trade unions).

Most (but not all) of the Act’s changes to industrial action applied to ballots opening on or after 1 March 2017 while the Certification Officer, facility time reporting and check-off provisions have a phased implementation during 2017 and 2018. The balloting changes are anticipated to result in more focused, and possibly fewer, ballots to ensure that the new thresholds are met and may lead to alternative forms of protest where a minority harbour strong grievances. Employers relying on the Act, such as to seek an injunction to stop an unlawful strike, should be aware that unions may challenge some of the changes on human rights grounds. The Welsh government is also disputing the application of some of the Act’s changes to Welsh devolved services.
How industrial action law has changed under the Act

The Act introduced the following changes to industrial action:

- the mandatory contents of the voting paper have been expanded to include a summary of the dispute, the period(s) within which action(s) is expected to take place and the type of industrial action short of a strike, where relevant
- in all ballots, at least 50% of those entitled to vote must do so and a simple majority of those votes must be in favour of action (eg if 100 members are balloted, at least 50 must vote, of which 26 or more must vote yes for a valid mandate)
- in ballots related to important public services (‘IPS’ – see further below), at least 40% of those entitled to vote must vote in favour of the action. This is in addition to the above 50% turnout threshold and simple majority requirement (eg if 100 members are balloted, at least 50 must vote and at least 40 vote yes). Reflecting trade union concerns, a ‘reasonable belief’ defence exists to reduce the risk of litigation over the exact make-up of mixed workforces and whether the support threshold was triggered
- the requirement that the union informs the employer and its members of the ballot results, including numbers voting ‘yes’ and ‘no’, has been expanded to include whether the new thresholds have been met
- a doubling of the minimum notice of industrial action to 14 days (or seven days if both parties agree)
- the requirement that some industrial action must take place within four to eight weeks of the ballot has been repealed. The Act provides that a ballot mandate expires after six months, or up to nine months if both sides agree, providing a finite window for negotiation and possible strikes before re-balloting would be necessary
- the supervision of lawful picketing, organised or supported by a trade union, has been tightened. Specifically, the requirement that a union must appoint a picket supervisor, who is identifiable when present at the picketing location, and must provide the picket supervisor with a letter stating that the picketing is approved by the union. The supervisor, who must be a union official or member, must be familiar with the Code and the union or supervisor must take reasonable steps to give the police his/her name, contact details and the picketing location. During the picketing, the supervisor must be present or readily contactable and able to attend at short notice. If requested by the employer, the supervisor must produce the union approval letter
- where a union ballots for, or organises, industrial action during the year, it is required to include information about the action on its annual return to the Certification Officer

In addition, the Act requires the government to conduct an independent review of electronic balloting for strike ballots. The review commenced last year and is due to report by December 2017. However, there is no legal commitment to its introduction. Further, the government announced a repeal of the ban on employers hiring agency staff to provide cover during strikes. This change is not part of the Act and there is no further news on timing.

All the above changes to industrial action law apply to ballots opening on or after 1 March 2017 with some exceptions. The picketing changes and two weeks’ notice apply generally from 1 March, while annual returns must contain strike information commencing with the 2018 return.
The ballot thresholds in practice:

Is this an IPS ballot*?

No. Ballot needs:
- 50% minimum turnout
- simple majority of votes

Yes. IPS ballot needs:
- 50% minimum turnout
- 40% minimum support
- simple majority of votes

* IPS ballot = where the majority of those entitled to vote are normally engaged in the provision of important public services

The definition of important public services

The highest thresholds (minimum 50% turnout and 40% support, as well as a simple majority) apply where a majority of those balloted are normally engaged in the provision of important public services. Private sector union members are included in the threshold if they are delivering such services.

The government has introduced regulations providing further detail on those services deemed IPS within the fire, border security, transport, health and education services. BEIS guidance has also been published. In broad terms, the IPS regulations include the following:

- teaching and other services provided by teachers and head teachers for children of compulsory school age at a school, a 16-19 academy or a further education institution (fee paying services are excluded)
- certain border control services in respect of the entry and exit of people and goods to and from the UK, sea patrols and the collection and dissemination of related intelligence by a Border Force officer
- firefighting services, including dealing with calls for help and organising their response
- hospital A&E, high-dependency units and intensive care services, psychiatric and obstetric and midwifery services for conditions which require immediate attention in order to prevent serious injury, serious illness or loss of life, emergency ambulance services (which are further defined). Where these services are provided in a private hospital or by a private ambulance service, they are not an IPS
- London local bus services, passenger rail, tube and tramway services including maintenance and some network and station services, civil air traffic control services, airport and port security services (which are further defined). Services starting and ending outside GB are excluded

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### Industrial action timeline:
the Trade Union Act compared to the ‘old’ law

<table>
<thead>
<tr>
<th>Old law</th>
<th>New law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seven days before opening date of ballot: notice of ballot to be received by employer from trade union</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Three days before opening date: sample voting paper to be received from trade union</td>
<td>Voting paper content has changed to contain more information about the dispute and the action</td>
</tr>
<tr>
<td>Ballot opening date: first voting papers sent to affected employees</td>
<td>Unchanged</td>
</tr>
<tr>
<td>The voting period (which is one week for 1st class post or two weeks for 2nd class post)</td>
<td>Unchanged (NB. Government is reviewing electronic balloting)</td>
</tr>
<tr>
<td>As soon as reasonably practicable after date of ballot*: notification of result to members and employers by trade union based on simple majority of those voting</td>
<td>The result depends on a simple majority as before, plus turnout and, potentially, support thresholds (see above). The notification of result must contain additional threshold information</td>
</tr>
<tr>
<td>Seven days after notification to employer of result: earliest date for commencement of industrial action if the trade union has also given at least seven days’ notice of the commencement of the industrial action</td>
<td>Notice has doubled to 14 days (unless both parties agree to seven days)</td>
</tr>
<tr>
<td>Four weeks beginning with the date of ballot*: Last date for commencement of industrial action (unless extended by agreement or court order)</td>
<td>This is repealed and the ballot mandate lasts for six months beginning with the date of ballot (or up to nine months if both parties agree)</td>
</tr>
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</table>

* The date of ballot: this is the final date upon which votes may be received and counted by trade union
Other changes under the Act, including facility time and check-off

Key employment changes include:

– public sector employers and some in the private sector (i.e. those with functions of a public nature and mainly public funded) with at least one trade union official will be required to publish facility time information, such as the amount spent on paid time off for union duties and activities. This change will not be introduced until further regulations, including defining which employers are included, have been made.

– the Act provides for the possibility of future regulations capping the amount and cost of public sector facility time, should a particular employer’s facility time be a cause for concern. The government has stated that it would only act after three years’ information has been published and after the employer has been informed of the government’s concerns and given time to respond.

– public sector employers (and some private sector employers as above) will only be able to make check-off deductions if the worker can pay subscriptions by other means (such as direct debit) and the union makes reasonable payments towards the employer’s costs for the deductions.

– the Act introduces new powers for the Certification Officer (CO) to investigate, require the disclosure of documents and take enforcement action, including a new power to impose financial penalties against trade unions for breaches of their statutory duties. Previously, the CO could act in response to a complaint from a trade union member about alleged breaches (with some exceptions). The CO will therefore be able to act upon, for example, third party information without having to rely on a member to act. Regulations will specify the financial penalties but they will be subject to a £20,000 maximum. There will be changes to the annual returns filed by unions with the CO, including a requirement to set out details of any industrial action taken. Finally, regulations will be introduced requiring trade unions and employers’ associations to pay a levy to the CO by way of contribution to its costs. These CO changes are not expected to be implemented until 2018.

Comment

Balloting

The ballot changes represent a significant shift from the previous position where ballots could be carried by a simple majority of those voting. They may limit strikes to disputes over which the workforce has a genuine, deep grievance. However, the changes may result in more union members voting and, therefore, if there is a ‘yes’ vote for industrial action, a stronger union mandate.

Unions may ballot less, wary of not meeting the thresholds, and will be more tactical about defining the constituency for the ballot. For example, more localised ballots or balloting only members working in key grades. Mixed workforces, where some are identified as delivering important public services, will be difficult for a union. Similarly, affected employers are looking to the government for clarity over which roles are subject to the 40% threshold.

More unions may organise protests or corporate campaigns, to apply alternative forms of pressure on an employer to achieve their objectives. Alternatively, workers might express their grievances in other ways, such as collectively refusing to volunteer for overtime, which can have a dramatic impact on businesses which depend heavily on overtime. Some unions have also stated that they will fight the balloting and other changes under the Act in the courts on human rights grounds.

In addition, the Welsh government has introduced draft legislation which, amongst other proposals, seeks to dis-apply the 40% threshold in relation to devolved Welsh public authorities. As such, the UK and Welsh governments are on a collision course in relation to legislative competence in this area and this may have to be resolved in the courts.

Check-off and facility time

While the check-off ban has gone, the changes still require affected employers to make arrangements to recover costs from their trade unions. Some charities, housing associations and similar employers, where they carry out public functions and receive public funding including possibly some private sector companies providing public transport and other public services, will also be concerned to understand more clearly from the government whether they fall under the facility time and check-off changes.

Reporting on facility time has proved controversial and will continue to be opposed by some employers who see it as an unwarranted interference in their employee relations. It also remains to be seen whether it will be resisted by the devolved administrations, to the extent that it covers devolved services.
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