

EXPLANATORY MEMORANDUM TO
THE IMPORTANT PUBLIC SERVICES (HEALTH) REGULATIONS 2017
2017 No. 132

THE IMPORTANT PUBLIC SERVICES (EDUCATION) REGULATIONS 2017
2017 No. 133

THE IMPORTANT PUBLIC SERVICES (FIRE) REGULATIONS 2017
2017 No. 134

THE IMPORTANT PUBLIC SERVICES (TRANSPORT) REGULATIONS 2017
2017 No. 135

AND

THE IMPORTANT PUBLIC SERVICES (BORDER SECURITY) REGULATIONS
2017
2017 No. 136

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Section 226(2B) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), as amended by the Trade Union Act 2016, introduces a 40% threshold of support that must be satisfied in ballots for industrial action in important public services. This instrument specifies the important public services in the health, education, fire, transport and border security sectors.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

- 4.1 The 1992 Act sets out Britain's industrial relations framework. The Trade Union Act 2016 amends the 1992 Act and introduces two new voting thresholds in respect of industrial action ballots. Section 226(2)(a)(ia) introduces a turnout threshold. It requires that in all ballots for industrial action, at least 50% of the trade union members entitled to vote must do so in order for the ballot to be valid.
- 4.2 Section 226(2B) of the 1992 Act, sets out a 40% threshold of support that must be satisfied in ballots for industrial action in important public services. Section 226(2D) gives the Secretary of State the power to specify which services are in scope by statutory instrument before the provision can come into force.
- 4.3 Under section 226(2E) the 40% threshold may only apply to ballots for industrial action in important public services in the fire, health, education, transport, border security and nuclear decommissioning sectors.
- 4.4 This instrument sets out for the first time which important public services in the health, education, fire, transport and border security sectors will be specified in relation to the 40% threshold.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is Great Britain.
- 5.2 The territorial application of this instrument is Great Britain.

6. European Convention on Human Rights

- 6.1 The Minister of State for Business, Energy and Industrial Strategy has made the following statement regarding Human Rights:

“In my view the provisions of:-

- The Important Public Services (Health) Regulations 2017;
- The Important Public Services (Education) Regulations 2017;
- The Important Public Services (Fire) Regulations 2017;
- The Important Public Services (Transport) Regulations 2017; and
- The Important Public Services (Border Security) Regulations 2017

are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Strike action can cause significant disruption to millions of people who rely on the services affected, and who are third parties to the industrial dispute. The Trade Union Act 2016 introduced thresholds for industrial action ballots to ensure that strike action should only ever be the result of a clear, positive decision of union members. The 50% threshold therefore requires all ballots to have the turnout of at least 50% of eligible union members.
- 7.2 In addition, there are some public services in which strike action could have widespread and serious consequences for the public. For example, strikes in Border

Force could threaten the safety of the public, and strikes in the transport sector could prevent thousands of people from going to work or travelling to important appointments. The 40% threshold therefore requires all ballots in important public services to have the support of at least 40% of eligible union members before industrial action can go ahead. This ensures that strike action with such wide-ranging and disproportionate effects can only proceed if it has a strong mandate from union members. These measures are based on proposals contained in the manifesto on which the Conservative Party was elected in the General Election in May 2015.

- 7.3 Around 58% of recent strike ballots in important public services and 45% of recent strike ballots in other services did not attain a turnout of at least 50%¹. In 2014, a strike in the education sector was held on the support of just 22% of their members. This closed approximately 21% of schools, and media reports suggested 1 million children were affected – a future strike of the same magnitude could impact 800,000 working households and could lose the economy 600,000 working days.
- 7.4 The thresholds will restore a level of democratic legitimacy to industrial action ballots, ensuring that the public have confidence that any disruption they face as a result of strike action has a strong democratic mandate from union members. Strike action will only be able to go ahead where there is a strong mandate from union members, which will rebalance the interests of union members with those of the wider public.
- 7.5 The Government has carefully considered the available evidence of the impact of strike action in the six sectors, and specified services where strike action can have the most significant impact on the public.

Health

- 7.6 In the health sector, the specified services have been focused on emergency, urgent and critical healthcare services as this is where reduced staffing levels can have the most immediate impact on the lives and safety of patients and the public. The NHS assists over 1 million patients in England every 24 hours, and is heavily relied upon by the population across Britain for emergency care, so any delays in accessing care as a result of strike action can have severe consequences for a significant number of people. While contingency arrangements are often put in place during industrial action to maintain service levels, these are voluntary in nature and it is self-evident that there is an increased risk during strike action. Adequate cover may also be difficult to maintain for more than 24 hours.

Education

- 7.7 In the education sector, the specified services have been focused on teaching services delivered by teachers and persons appointed to fulfil the role of a head teacher to pupils of the compulsory school age. This reflects the importance of these years for children's education, and the disproportionate impact on learning that strike action can have, particularly if it takes place over a prolonged period, as well as on working parents. As the system is state-funded, if institutions are closed in the short-term as the result of a strike then there are no alternative options available for children.

Fire

¹ Based on a sample of ballots 150 ballots held between August 2010 and December 2015, which were covered in the media – see Trade Union Bill Impact Assessment

- 7.8 In the fire sector, the specified services have been focused on firefighting services, including the coordination of emergency response. The Government's aim was to protect the public against the risk of life and injury, and these services are critical to ensuring that incidents are dealt with effectively to protect the public. The reduced availability of appropriately trained staff during strike action inevitably makes it more difficult to maintain high standards of service, and it is self-evident that there are increased risks during strike action.

Transport

- 7.9 In the transport sector, the specified services have been focused on passenger services across key modes of travel, as strike action in these areas can have an immediate adverse impact on the public's travel needs, and often no alternative options are available. Strike action in passenger bus and railway services and air traffic control services are likely to have a significant impact on a significant number of people's ability to go to work, school and important appointments. Strike action in airport and port security services are critical to operations and can potentially bring an airport or port to a standstill.

Border security

- 7.10 In the border security sector, the specified services have been focused on border control functions for the control of entry and exit of people and goods into and from the UK. These services are central to the carrying out of checks and to prevent illicit commodities from entering the country, and any disruption to these services has the potential to result in significant risks to public safety as it increases the pressure on the Border Force to manage potential threats to border security.

Consolidation

- 7.11 There are no immediate plans to consolidate the regulations.

8. Consultation outcome

- 8.1 The Government consulted on which services should be specified as 'important public services' under the 40% threshold. This ran for eight weeks and closed on 9 September 2015. A total of 205 responses were submitted by private individuals, trade unions, public services providers, law firms and representatives of the legal profession, and employers.
- 8.2 The Government issued its response to the consultation on 21 January 2016, which is available on the gov.uk website. Respondents were invited to provide evidence on the impact of industrial action in key public sectors, and comment on which services should be specified under the 40% threshold and how the threshold should operate in practice. This enabled the Government to refine the list of important public services.
- 8.3 In addition, many respondents expressed concerns that the 40% threshold would capture ancillary workers who are engaged in activities that support the provision of an important public service. In light of this, the Government responded by removing the broad reference to ancillary workers in the Trade Union Act.
- 8.4 As the initial consultation was partly over the summer, skeleton regulations were made available as part of the Government response, and stakeholders and members of the public were invited to provide further comments on the text. The Government

considered these comments and made a number of changes to the regulations to clarify the drafting.

- 8.5 The Government also undertook further engagement with stakeholders, including trade unions, business groups and employment lawyers in July/August 2016, on the draft guidance to accompany this instrument (see section 9), in order to ensure its workability. It held a series of meetings with the TUC on 27 June and 28 July, the latter of which was a roundtable with affiliated trade unions. The Government received 23 written submissions as part of this engagement process, which it considered and further refined the guidance.

9. Guidance

- 9.1 The Government will publish guidance on gov.uk to assist unions and employers when they are assessing whether a ballot should be conducted under the 40% threshold.
- 9.2 The link to the guidance will be circulated to interested parties.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is considered to be low, with a net benefit to business. This is because the 40% threshold will only affect trade unions with members who deliver important public services. In such cases, the direct costs will involve familiarisation costs to understand the legislation, including obtaining legal advice, and a small ongoing cost to assess the applicability of the 40% threshold to future ballots. The Department has assessed the 40% threshold to impact on 54 trade unions whose members deliver important public services, and their employers. It estimates a total transition cost of £187,479, with annual ongoing costs of £5,480.²
- 10.2 The impact on the public sector is likely to a reduction in industrial action and any ensuing disruption and consequences for the wider public, as relevant ballots must meet the threshold before they are valid. The Department has assessed that the 40% threshold will have a net direct annual benefit of £715,120 in terms of the value of economic output saved as a result of the reduction in the number of working hours lost due to industrial action in important public services.³
- 10.3 An Impact Assessment, which received a green fit-for-purpose opinion from the Regulatory Policy Committee, was submitted with this memorandum and is published on the gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

12. Monitoring & review

- 12.1 The important public services have been specified on the basis of the available evidence of the impact of strike action. The Government will monitor further evidence on the impact of strike action in these services and other services within the

² Impact Assessment: The Industrial Action (Important Public Services) Regulations 2017

³ Impact Assessment: The Industrial Action (Important Public Services) Regulations 2017

specified sectors. If this demonstrates that the impacts have shifted in significance, then the Government may consider this and review this instrument accordingly.

13. Contact

- 13.1 Xinru Li at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 2078 or email: xinru.li@beis.gov.uk can answer any queries regarding the instrument.