

EXPLANATORY MEMORANDUM TO
THE STRIKES (MINIMUM SERVICE LEVELS: PASSENGER RAILWAY SERVICES) REGULATIONS 2023

2023 No. 1335

1. Introduction

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

2. Purpose of the instrument

- 2.1 The purpose of the instrument is to reduce the impact of rail strike action on the ability of passengers to access their places of work and essential services, and the negative impacts on the wider economy, by setting minimum service levels (MSLs) for passenger rail during strikes. The intention is that the instrument will lead to an improved and a more consistent level of service for passengers during rail strikes where work notices are issued by employers to secure MSLs.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) in which the instrument forms part of the law) is England and Wales, and Scotland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, and Scotland.

5. European Convention on Human Rights

- 5.1 The Minister of State for Rail and HS2, Huw Merriman MP, has made the following statement regarding Human Rights:

“In my view the provisions of The Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is made under the powers in the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), as amended by the Strikes (Minimum Service Levels) Act 2023 (“the 2023 Act”). This instrument introduces minimum levels of service for specified services within a passenger rail context. The 2023 Act was passed on 20th July 2023 and enables the Government to introduce MSLs in a range of sectors, including transport. Where minimum service regulations have been made, the 2023 Act gives employers the power to issue a work notice to a trade union, in relation to any strike in the relevant service where they have received a notice of strike under section 234A of the 1992 Act.

- 6.2 A work notice is a notice in writing telling a trade union that the minimum levels of service, as provided for in these minimum service Regulations, are to apply in relation to a particular strike. It sets out the number of workers reasonably required and the work that needs to be done to deliver the minimum level of service as set out in the Regulations for the relevant service. The work notice is therefore the mechanism by which the MSLs set out in the Regulations apply to the provision of services for a strike day.
- 6.3 Where a work notice has been issued by a relevant employer in compliance with the requirements of the 2023 Act, a trade union is under an obligation to take reasonable steps to ensure that their members who are named in a work notice comply with the requirements of that work notice. If a union fails to do so, its protection under the 1992 Act against legal action in tort is lost. Where an employee fails to comply with a work notice, they will also lose their automatic protection from unfair dismissal under the 1992 Act, provided the employer has notified them that they are named in a work notice and of their requirement to work.

7. Policy background

What is being done and why?

- 7.1 Public transport is critical for the everyday lives of citizens in Great Britain. The transport system supports all sectors of the economy and is a crucial enabler for economic growth. Rail is an important public transport mode, as it enables passengers to make vital journeys, such as commuting to work or to access essential services.
- 7.2 Strike action on the passenger rail network can lead to disproportionate disruption to millions of people who rely on rail services. A survey conducted by the Department for Transport (the Department) in 2022¹ found that most rail users' journeys were impacted by strike action with some passengers reporting an adverse financial impact as a result. A hard copy of this document can be viewed at Great Minster House, 33 Horseferry Road, London SW1P 2AA. The Department's records show that from June 2022 to August 2023, there were 38 days of strike action affecting train operators and/or infrastructure managers, and this had a negative impact on rail users.
- 7.3 Strike action usually takes place when there is a dispute between the employee and the employer, where the dispute cannot be resolved by other means. It is intended to cause disruption to the employer, and in some cases the wider economy. However, strike action in the rail sector affects ordinary rail users who are not party to the dispute. In December 2022, a report by the Centre for Economic and Business Research² estimated that rail strikes between June 2022 and January 2023 would result in a loss of UK economic output of around £500m due to people outside of the rail sector not being able to work. Several sectors, including the hospitality sector, have reported loss of revenue directly from the impact of rail strike action.
- 7.4 Government intervention is intended to mitigate disproportionate impacts of strike disruption on the railway on rail users and the wider economy. While the rail industry has put in place contingency plans to run a limited number of services during previous strike action, the level of service they can deliver varies. Setting MSLs for passenger rail services will provide an important tool for employers to be able to deliver an

¹ [Rail strikes: understanding the impact on passengers - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/rail-strikes-understanding-the-impact-on-passengers)

² [Eight months of strike action to have cost the UK economy at least £1.7bn, adding to existing recessionary pressures - CEBR](https://www.cebr.co.uk/insights/economic-impact-of-rail-strikes)

overall improvement on the service levels typically seen during strike periods and provide passengers with more certainty and consistency. This is intended to mitigate the adverse impacts of passenger rail strike action on users' access to their places of work and to essential services, and the impact on the wider economy, whilst balancing this with the ability of workers to take strike action.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.5 The 2023 Act was introduced to amend the 1992 Act in order to enable the relevant Secretary of State to make regulations that set MSLs during strikes in a range of sectors, including transport. Before the 2023 Act, neither the 1992 Act nor any other legislation enabled the setting of MSLs in any sector on a strike day.

What will it now do?

- 7.6 This instrument represents the first use of the power provided by section 234B of the 1992 Act, which was inserted as an amendment by paragraph 2 of the Schedule to the 2023 Act, for the Secretary of State to specify relevant transport services in regulations and to set MSLs corresponding to these services.
- 7.7 This instrument seeks to improve the ability of the public to make essential rail journeys, including accessing work, education, and healthcare, and to limit disproportionate economic impacts, whilst balancing this with workers' ability to take strike action.
- 7.8 Regulation 1 provides that this instrument comes into force on the day after it is made, or the time immediately after the relevant Code of Practice comes into force if this happens later. See paragraph 11.1 for further detail on the Code of Practice. Regulation 1 also includes a retrospective provision so as to enable the instrument to have effect in relation to any strike that takes place on or after the day on which the instrument comes into force, even if the corresponding notice of strike under section 234A of the 1992 Act was given on or before the coming into force of this instrument or the date of the ballot in respect of the relevant strike was on or before 20th July 2023, which is the date on which the 2023 Act came into force.
- 7.9 Regulation 2 of this instrument defines technical words and phrases used in the instrument. In particular, it identifies the services which are relevant for the purposes of issuing a work notice. This regulation would assist an employer to understand whether or not the services they undertake, and to which the strike notice they have received relates, are in scope of this instrument. The relevant passenger railway services covered by this instrument are defined to include "infrastructure services" and "train operation services". The term "light rail services" is also defined. The meaning of these defined services is further explained below.
- 7.10 "Train operation services" are services for the carriage of passengers by railway (and refuelling of trains) undertaken by the train operating companies who provide passenger services:
- a) under franchise agreements awarded by the Secretary of State or Welsh or Scottish Government;
 - b) as an operator of last resort in England, Scotland or Wales;
 - c) under agreements with a passenger transport executive or local transport authority; or

- d) under agreements with Transport for London (or their subsidiaries).
- 7.11 “Train operation services” therefore does not include open access operators and chartered services, or any sub-contractors of the train operating companies.
- 7.12 “Infrastructure services” are the following services provided by an infrastructure manager:
- a) reactive maintenance of any part of the network;
 - b) the exercise of day-to-day control over train movements over or along any track comprised in the network;
 - c) the operation and/or reactive maintenance of a railway signalling system or of any other railway communication equipment;
 - d) the operation and/or reactive maintenance of railway crossings, including level crossings, overbridges, underbridges and tunnels;
 - e) the control of electrical conductor rails or overhead lines, of any supports for such rails or lines, and of any electrical substations or power connections used or to be used in connection with those rails or lines, and the provision of electrical power by such rails or lines;
 - f) the provision and/or operation of services for the response to, and resolution of incidents on or about the railway including services for the recovery or repair of locomotives or other rolling stock in connection with any accident, malfunction or mechanical or electrical failure;
 - g) the provision and/or operation of services for keeping track free from, or serviceable notwithstanding, obstruction (whether by snow, ice, water, fallen leaves or any other natural or artificial obstacle or hindrance) or for removing any such obstruction;
 - h) the provision, operation and/or reactive maintenance of any plant, equipment or machinery used in carrying on any of the activities specified in paragraphs (a) to (g);
 - i) services used for the reactive maintenance and/or stabling of rolling stock used in carrying on any of the activities specified in sub-paragraphs (a) to (h).
- 7.13 “Infrastructure manager” means infrastructure managers of network services as defined in the Rail Access Regulations³ as well as persons who deliver all those network services on behalf of the infrastructure manager. Infrastructure services in these Regulations therefore does not include sub-contractors who only deliver some of these services on behalf of the infrastructure manager. “Reactive maintenance” means maintenance which is necessary to ensure the availability, provision or operation of the relevant infrastructure being referred to (e.g. network, rolling stock etc.). This would not include planned/scheduled maintenance. Construction of infrastructure is also not included in scope.
- 7.14 “Light rail services” are train operation services and infrastructure services both explained above (and ‘train’ and ‘railway’ in these Regulations includes trams and tramways) but relate to the following light rail systems: Blackpool Tramway, Docklands Light Railway, Edinburgh Trams, Glasgow Subway, London Trams, London Underground, Manchester Metrolink, Nottingham Express Transit, Sheffield Supertram, Tyne & Wear Metro, and West Midlands Metro.
- 7.15 A number of other services are excluded from this instrument and therefore will not be subject to MSLs. These are train operation services for heritage, museum or tourist

³ Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

railway services and train operation services that start or terminate outside Great Britain (i.e. international train operation services).

- 7.16 Regulation 3 of this instrument provides which categories the relevant services are grouped into, to which the MSLs will apply. The categories of services specified are Category A: train operation services (excluding light rail services), Category B: infrastructure services (excluding light rail services) and Category C: light rail services. These terms are defined in regulation 2 of the instrument (and explained above).
- 7.17 Regulation 4 of this instrument specifies the MSL for train operation services as the provision of the train operation services necessary to operate the equivalent of 40% of the timetabled service operating during the period of a strike. “Timetabled service” is defined for the purposes of this regulation as each origin station to destination station train journey listed for the relevant operator in the National Rail Timetable. The MSL is calculated as 40% of the equivalent of those timetabled services which means 40% of the total number of train journeys as listed in the National Rail Timetable for that operator on the strike day(s) must be planned to be operated. Those planned train journeys must be between any of the same origin and destination stations as the train journeys listed in the National Rail Timetable from which the 40% was derived. However, whilst the National Rail Timetable also lists precisely what time each of those train journeys depart and arrive at each station on its journey including the destination, the reference to ‘the equivalent of’ within the regulation means that the services planned to be run by the operator as part of the 40% need not be at precisely the same times or stop at precisely the same intervening stops as the train journeys listed within the National Rail Timetable. This regulation also refers to the calculation of the 40% of timetabled services where a network or station is available to operate such a service. Where the network or origin/destination stations are not available, operators can shorten the train journey so it is planned to run between a different origin station and/or destination station provided these revised stations are along the same train journey as the original origin station to destination station train journey.
- 7.18 Regulation 5 of this instrument specifies the MSL for infrastructure services to be the operation during the period of a strike of those infrastructure services, only between the hours of 6.00am and 10.00pm and on priority routes, which are defined in regulation 5 and include those routes set out in the Schedule to this instrument and the Channel Tunnel Rail Link. In addition to the priority routes, the MSL also applies (during the period of a strike between the hours of 6.00am and 10.00pm) to any part of the network which is within a 5-mile radius of the priority routes and which is a loop, siding or a line which connects the priority routes to freight terminals, or stabling facilities or depots used for rolling stock or for plant, equipment and machinery used in providing the other infrastructure services.
- 7.19 Regulation 6 of this instrument specifies the MSL for light rail services as the provision of the train operation services and infrastructure services (as defined in regulation 2) necessary to operate the equivalent of 40% of the timetabled services during the period of a strike for the relevant light rail system. “Timetabled services” is defined for the purposes of this regulation as the number of trains listed in the operator’s published timetable. The MSL is calculated as 40% of the number of “timetabled services” by reference to the most recently published timetable for the light rail system concerned that was available on the day the strike notice was given. The MSL is not specified as the services listed in the timetable, it is instead to run a

set number of services which is derived from the timetable. Where a light rail system has different timetables for different lines of that system, the reference to timetable means all those timetables together. The operator's published timetable also lists the times, origin and destination stations and stops along the way. However, the reference to 'the equivalent of' within the regulation means that the services planned to be run by the operator as part of the 40% need not be at precisely the same times or have the same origin, destination or intervening stops as the service listed within the operators timetable.

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 This instrument does not consolidate any legislation.

10. Consultation outcome

- 10.1 The Department for Transport ran a public consultation on the most appropriate approach for delivering MSLs for passenger rail services⁴. A hard copy of this document can be viewed at Great Minster House, 33 Horseferry Road, London SW1P 2AA. The consultation ran for twelve weeks and closed on 15th May 2023. The Welsh language version of the consultation ran alongside this. A total of 78 responses were submitted by members of the public and organisations such as trade unions, transport operators, local authorities, and rail freight operators.
- 10.2 Respondents were invited to provide evidence on the impact of strike action on passenger rail services, and comment on the Department's proposal for implementing MSLs. This enabled the Department to take into account these views in its development of the policy and decisions on the minimum level of service in passenger rail.
- 10.3 The Department for Transport also undertook further consultation with stakeholders including trade unions and employers across the rail industry on the proposed approach. This enabled stakeholders to provide more targeted input, and also to fill gaps in the public consultation responses. Engagement was carried out with stakeholders from May to October 2023. The Department considered the outcome of this as part of the development of the policy, with the policy framework being amended in light of feedback on the operational viability of proposals, and further information on existing strike-day practice in industry.
- 10.4 The Department for Transport has published a response to the public consultation and its further consultation with stakeholders⁵. A hard copy of this document can be viewed at Great Minster House, 33 Horseferry Road, London SW1P 2AA.

11. Guidance

- 11.1 The Government has brought forward a statutory Code of Practice on the reasonable steps that a union must take to ensure that all members of the union who are identified in the work notice comply with the notice. The Code came into force on 8 December

⁴ [Minimum Service Levels for Passenger Rail \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁵ [Minimum service levels for passenger rail during strike action - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

2023. This instrument came into force on the same day in line with Regulation 1 (See paragraph 7.8).

- 11.2 The Government has published guidance on gov.uk to assist employers and unions in developing work notices that are consistent with the requirements of the Regulations. This guidance is non-statutory.
- 11.3 In addition, the Department for Transport has published further guidance to support implementation of these Regulations, specific to the passenger rail sector. A hard copy of this document will be available to be viewed at Great Minster House, 33 Horseferry Road, London SW1P 2AA. This guidance is non-statutory.

12. Impact Assessment

- 12.1 The Impact Assessment was not published at the time of laying. In line with due process, a draft of the Impact Assessment was submitted to the independent Regulatory Policy Committee (RPC) which reviews all qualifying Impact Assessments and publishes an opinion to support parliamentary scrutiny. The Department for Transport was issued with an Initial Review Notice on 1 November by the RPC. An updated Impact Assessment was submitted to the RPC on 7 December. The Impact Assessment was published on 4 December without an opinion from the RPC, this was so that Parliament would have opportunity for scrutiny before approving the Regulations. On 20 December the RPC issued its opinion and rated the Impact Assessment as fit for purpose.
- 12.2 The Impact Assessment sets out in detail an assessment of the positive and negative impacts on different parties affected by this instrument. The impacts of this instrument can be briefly summarised as set out below.
- 12.3 Train operators and infrastructure managers who are in scope of the Regulations within this instrument, as set out in paragraphs 7.10-7.14, will be impacted in different ways should they choose to issue work notices. The development of working timetables, issuing of work notices and related activities will impose familiarisation and administration costs following the implementation of the policy.
- 12.4 Trade unions will be impacted where work notices are issued as they may face a reduction in their bargaining power and will be required to undertake new functions such as taking reasonable steps to ensure that members who are served a work notice, attend work. This will impose some familiarisation and administration costs to these organisations.
- 12.5 Some sectors of the economy, such as leisure and hospitality, have reported that they have faced high volumes of cancellations as a result of passenger rail strikes. Passenger rail strikes have impacted the ability of people to work, resulting in economic impacts on businesses and the economy. However, with more services running on strike days as a result of this instrument, these adverse effects will likely be reduced to some extent.
- 12.6 The public sector will be impacted in different ways, ranging from improved access to work for public sector workers on strike days, to improved finance of the railways through additional revenue during strike days, and potential taxation benefits from a higher level of economic activity.

13. Regulating small business

- 13.1 The legislation does not exclude activities that are undertaken by small businesses. It is anticipated that the Regulations will primarily impact larger businesses. Trade unions will be affected, some of which may be small businesses. However, it is not possible to exempt small businesses and unions without affecting the ability to achieve the policy objectives. Furthermore, the Department for Transport is unable to mitigate the effects of this policy on these unions, because this policy directly impacts the activity of unions, and the policy could not be delivered if exemptions or mitigations were granted to certain unions. This is because doing so would threaten the deliverability of the defined MSLs. The impact on small, micro, and medium businesses (which are not themselves unions) is already mitigated to a certain extent due to the fact that work notices are discretionary only; and so these businesses will have as much time as they desire to familiarise themselves with the legislation, and can then choose whether to issue a work notice or not to deliver an MSL in the event of any strike action. We do not anticipate material negative impacts for small businesses within the operational supply chains for rail.

14. Monitoring & review

- 14.1 It is intended that the policy will be reviewed internally by the Department for Transport after five years. However, if an event triggers a need for this evaluation to be conducted earlier, then this will be undertaken as soon as is practically feasible. Such triggers may include the need to learn lessons on implementation to inform whether the powers provided by the legislation are sufficient and effective or whether they require any amendments, or for any other reason such as other studies or analyses that show some divergence between the policy intention and the emerging outcomes.
- 14.2 Data is currently collected during strike action and on the adjacent days of strikes. We will continue to build on this evidence base so that a dataset of the impact of MSLs can be analysed. This monitoring of data is undertaken by the Department.
- 14.3 Additional monitoring of data will be required with the introduction of the policy. This will include data from other Government departments such as the Office for National Statistics (on retail transactions, or the impact on the hospitality sector). For rail, the Department also requires templated information to be provided by train operating companies, light rail operators or relevant devolved administrations, and from Network Rail and other rail partners. This activity will have to continue, and work will be undertaken in order to build a database of information from these sources which are relevant to establishing the impacts of this instrument. The Department works closely with employers and other stakeholders in the rail industry to monitor information such as financial information as to the cost impacts during strikes, passenger usage levels, and labour force data (absences etc). The quality of this information will need to be tested. Other monitoring data will be available to assess the impact on other modes, using reporting information from wider transport sectors.

15. Contact

- 15.1 Jessie Wellington at the Department for Transport can be contacted with any queries regarding the instrument at Jessie.Wellington@dft.gov.uk.
- 15.2 George Kenyon, Deputy Director for the Minimum Service Levels Team, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Huw Merriman MP, Minister of State at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.