

Industrial action



► **Inside**

What is industrial action?

Is industrial action lawful or unlawful?

When is industrial action protected?

When can industrial action be challenged?

What can be done in practice... if the action is protected?

What can be done in practice... if the action is not protected?

Contingency planning

On the horizon... is there a right to strike?



Economically turbulent times resulting from coronavirus have seen an increase in trade unions' membership and an increase in them 'flexing their muscles' by threatening industrial action over adverse changes in the workplace for their members. This Inbrief outlines the law in this area and gives employers practical tips for responding to and avoiding conflicts.

What is industrial action?

Industrial action is not defined in statute but, as a general guide, amounts to concerted action taken to put pressure on an employer. It includes strikes and actions short of a strike such as picketing, work-to-rule, go-slow and a ban on call-out. Whether actual or threatened, industrial action can be disruptive and costly. Employers, however, are not powerless. There are many ways either to challenge industrial action or to minimise its impact.

Is industrial action lawful or unlawful?

When threatened with industrial action, an employer can reap rewards by seeking to establish whether or not it is lawful. Nearly all industrial action is potentially unlawful as it usually involves employees breaching their employment contracts. The breach could be of an express term (e.g. employees on strike would breach an express term which required a 9-5 working day), or a less obvious "implied" term (e.g. refusing to work overtime could breach an implied term not to operate contractual terms to frustrate an employer's business). Unions, by calling for industrial action, will in turn be acting unlawfully by inducing employees to breach their contracts.

However, both unions and the employees who participate in industrial action can gain extensive protection against liability if they can show that the action has been called in compliance with a complex statutory balloting and notification regime. For the employer, identifying shortcomings can provide useful bargaining chips in union negotiations, and even a basis on which to stop the action in Court.

When is industrial action protected?

Industrial action is protected if the union has endorsed/authorised the action (and has not effectively repudiated it), and:

- ▶ it is in contemplation or furtherance of a narrowly defined trade dispute
- ▶ the only reason why it is unlawful is because the action is a tort (i.e. a legal wrong) that:
 - induces another to break a contract (which is not an employment contract with an employer who is not party to the trade dispute), or interferes or induces another to interfere with its performance, or;
 - consists in threatening that a contract (which is not an employment contract with an employer who is not party to the trade dispute) will be broken, its performance interfered with, or to induce another to break the contract or interfere with its performance
- ▶ if it amounts to an agreement, the agreement is to do or bring about something which itself would not be actionable in tort
- ▶ if the action is picketing, it takes place at or near the picket's place of work (or, in the case of a union official only, at or near the place of work of an accompanying union member whom the official represents) and is for the purpose only of peacefully obtaining or communicating information, or persuading others to work or abstain from working
- ▶ the reason for the action is not the employment of (or failure to discriminate against) a non-union member or a dismissal connected with unofficial action



- ▶ it is not for the purposes of requiring that work is done by union members (or non-members) only, or that suppliers recognise, negotiate or consult with a union, or refusing to deal with suppliers/prospective suppliers on union membership grounds

The union's acts will only be protected if, in addition, it has correctly balloted for the industrial action, and given proper notice to relevant employers, following statutory procedures.

When can industrial action be challenged?

Industrial action can be challenged if it fails to meet the above conditions.

Shortcomings in balloting and notification procedures have historically provided the most fruitful source of legal challenges to industrial action. Although recent judicial decisions have generally become more "union friendly" – suggesting that Courts will only grant an injunction to stop industrial action on the basis of shortcomings in the constituency balloted by the union if they are satisfied that the union has acted in bad faith – it still remains beneficial to scrutinise the legislation and assess whether the union has complied, especially since the Trade Union Act 2016 imposed yet further obligations on unions. A non-exhaustive list of potential defects includes:

- ▶ Balloting members in circumstances where the union knows those individuals cannot possibly be induced to strike (e.g. because the union has information in its possession showing that they will have left employment before the first date of any strike action).
- ▶ Conversely, excluding from the ballot members who will be included in the strike call.
- ▶ Failing to provide sufficiently detailed or specific information to the employer about the employees who are to be balloted and induced to strike.
- ▶ Failing to notify the employer and those balloted of the result as soon as reasonably practicable after it is communicated (and failing to provide certain categories of information about the result).

Moreover, industrial action is rarely standalone and may lead to illegal behaviour which leads to the loss of protected status. Picketing is a common example of action which can easily lead to trespass, harassment or assault. A breach of contract can itself be a criminal offence if done wilfully and maliciously knowing that serious injury, or danger to human life are probable consequences.

Encouraging others to participate can amount to criminal behaviour where it involves persistently following someone, or hiding someone's tools, clothes or other property.

Various other unprotected torts may be committed in connection with industrial action, ranging from inducing breaches of a statutory duty to defamation, and it can pay to be aware of these. Unions are increasingly pursuing campaigns which go beyond traditional forms of industrial action, such as media and social media campaigns, supply-chain targeted action, think-tanks, letter-writing and demonstrations, and it is often in this context that torts may be committed.

What can be done in practice... if the action is protected?

- ▶ **Withhold pay:** where employees have breached their contract, employers can withhold pay. The amount withheld should be a reasonable reflection of the work

lost / damages caused. Employers should give advance notice of why and how deductions are being made. Unless a contractual provision holds otherwise (and dependent on the employee's normal working week and how they are paid), an employer will usually be able to deduct 1/260 of a full time worker's annual salary for every strike day (but care is needed over this calculation after a Supreme Court decision in 2017). Watch out for employees who obtain sick notes or are absent for other reasons who could claim unlawful deductions from wages.

- ▶ **Refuse to accept partial performance:** if employees fail to fully perform their contract, employers can adopt an 'all or nothing' approach by refusing to accept partial performance. The key is to make it clear to workers that if they attend work, they are expected to complete all their duties, and any partial performance of work is on a voluntary basis, for which no payment will be made. Implied acceptance of partial performance, e.g. managers giving out instructions, should be avoided.
- ▶ **Dismissal:** dismissal should be a last resort given the risks of tribunal claims and damage to industrial relations. Where the action is protected, dismissal will be unfair if the reason is the industrial action, and the dismissal takes place during a period of 12 weeks from the date the employee started participation in the industrial action (or longer if a lock-out has taken place (see below) or the employee stopped action before the 12-week period ended). If the employee continues the industrial action for the 12-week period, the employer must take certain procedural steps to resolve the dispute.



- ▶ **Lock-out:** for example, if the complete closure of a certain factory or office is required for health and safety reasons. A key risk is that non-participating employees may claim this amounts to a breach of the employer's obligations, especially as whether there has been a lock-out is always a question of fact having regard to all the circumstances.

What can be done in practice... if the action is not protected?

- ▶ **Injunctions:** the most immediate course of action is usually an "interlocutory injunction" (a temporary order that industrial action should stop / must not take place), pending a full hearing at which the court will decide whether or not it is lawful. Cases very rarely reach a full hearing, which means the initial hearing is likely to serve as the effective final determination of the matter.
- ▶ **Damages:** where industrial action is unlawful, as well as from employees, employers may claim damages from the union, limited to a statutory maximum (currently £1,000,000, depending on the number of union members).
- ▶ **Dismissal:** where industrial action is "unofficial" (i.e. employees are members of a union which has not endorsed/authorised the action, or has repudiated it), employees have no right to claim unfair dismissal unless the principal reason for the dismissal was related to certain protected matters such as jury service, family, health and safety, working time, employee representative, protected disclosure and/ or flexible working cases. If the industrial action is official, but not protected, then dismissals which take place during a lock-out or industrial action and do not relate to time off for dependants or the above protected matters, can only be found to be unfair if the employee is re-engaged within three months, and/or the employer has not dismissed all relevant workers.

Contingency planning

When industrial action is threatened, employers should consider:

- ▶ **Temporary staff:** Since July 2022, it has been possible for agencies to supply agency workers to cover for workers on strike or covering for those on strike. However, there is still a need for considerable care here, as using agency workers might risk inflaming the underlying dispute, as well as raise questions such as whether health & safety can be properly maintained.
- ▶ **Risk assessment:** Assess whether working conditions will be safe (e.g. can machinery be operated safely if staff refuse to work overtime or safety-critical staff go on strike?).
- ▶ **Record-keeping:** Payroll need to know which employees' pay should be withheld. Records may be useful later because industrial action can affect employees' statutory rights, such as unfair dismissal, maternity and sick pay. Record-keeping must comply with data protection rules, which afford special protection to union membership, and care should be taken to avoid any list amounting to a "prohibited list" for the purposes of the Blacklisting Regulations.

- ▶ **PR:** Speed is of the essence. People often believe the first version of events they hear, which may not always present both sides of the story! Internally, a checklist setting out the employer's position, employee' key rights and possible consequences of industrial action, enclosing key guidance (e.g. the picketing code of practice), may be appropriate.
- ▶ **Seeking resolution to negotiation:** Ultimately, legal tools will normally only provide bargaining power; very rarely do they prompt a complete climbdown on the union's part. It is important to remain open to exploring conciliation and mediation services, via ACAS, or following methods prescribed by collective agreements.

On the horizon... is there a right to strike?

No court order can force anyone to work, although, as mentioned above, an employee may commit a criminal offence if they withdrawal their labour despite knowing that that will endanger life or cause serious bodily injury. However, in limited circumstances, unions and employers can enter into an enforceable agreement that no industrial action will take place or that none will take place until after certain dispute resolution processes have been followed (such as attending talks at ACAS).

Unions are also increasingly entering the fray on the question of whether legislation in the UK goes far enough to enshrine a "right to strike". The recent law on minimum service levels for certain public sector workers is being scrapped by the Labour government, and it remains to be seen whether there will be further changes in this area.



For more information on this subject please contact:



Colin Leckey
Partner

+44 (0)20 7074 8086
colin.leckey@lewissilkin.com



David Hopper
Partner

+44 (0)20 7074 8280
david.hopper@lewissilkin.com