EVERSHEDS SUTHERLAND

The Employment Rights Bill

Trade unions and industrial relations

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As the Employment Rights Bill progressed through Parliament, attention centred on day one unfair dismissal rights in particular. However, the Bill's changes to collective employment law, including trade union and employer rights and duties, are also significant – for both unionised and non-unionised employers. In this briefing we focus on the industrial relations measures in the Bill (for an update on the collective redundancy changes, read our update, and on dismissal and reengagement – "fire and rehire", read our update). To keep abreast of developments across the Bill and timescales for implementation, read our tracker.

Right of access

The Bill introduces a new right for trade unions to access workplaces and makes changes to statutory recognition (see further below). Strategically, these major changes are linked and should be viewed holistically: access facilitates member recruitment by a trade union with the aim of gaining either voluntary, or if this is not possible, statutory recognition under a simplified legal process with reduced thresholds and legal hurdles.

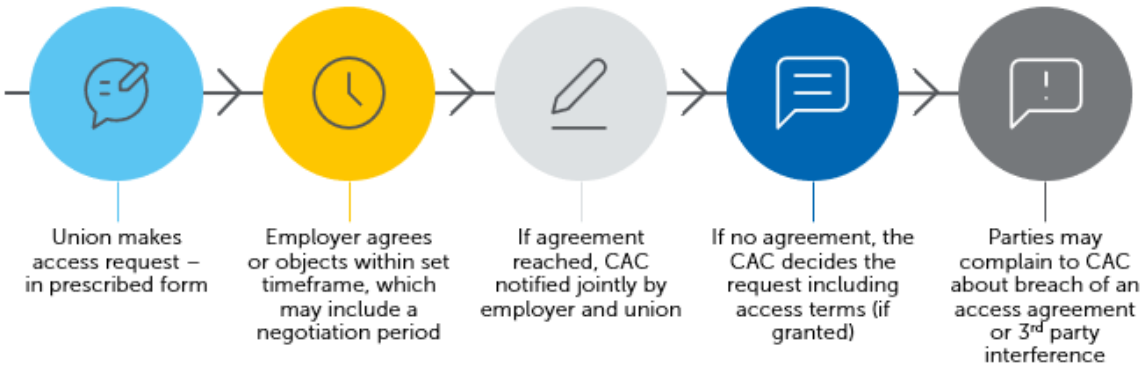
The new access procedure provides for independent unions to request workplace access (which includes physical access and/or the ability to communicate with workers) and negotiate workplace access agreements with employers, with the process enforced by the Central Arbitration Committee (CAC). It is proposed to exclude employers with fewer than 21 workers from the new statutory access right (while not preventing voluntary arrangements).

The Bill provides that the right to communicate with workers includes communication by any means (subject to data protection legislation, as appropriate). The government states that it includes a "digital right of access" and gives the example of allowing union-related updates to be posted on an employer's intranet page. The scope and precise details of digital access will be defined in regulations, following a consultation which is currently open, closing 18 December 2025.

The purpose of access is defined: to allow union officials to meet, support, represent, recruit or organise workers or to facilitate collective bargaining (not for organising industrial action).

In the event of employer non-compliance on more than one occasion, a financial penalty may be ordered by the CAC. The consultation proposes an initial maximum £75,000 fine, and up to £150,000 for repeated breaches, together with a list of factors to be considered when determining any fine. Implementation is expected in October 2026.

Obtaining workplace access: process in overview



A new Code of Practice on Trade Union Right of Access (not yet published) will encourage parties to use standard request and response templates. Timescales will apply to the process, including a proposed five working days for the employer to respond to the union's request for access, 15 working days to negotiate the terms of an agreement and 25 working days (from the access request) to apply to the CAC. Where the CAC is involved in determining access, the consultation proposes a minimum of five working days between their decision and initial access taking place and that such agreements will expire after two years.

There will be a "fast track" route in certain circumstances, reflecting government concerns over the potential length of the application process. This may apply, for example, to an application made by a union for an access agreement conforming with the terms of a "model agreement". The consultation

seeks views on model terms and proposes two: the inclusion of weekly access and at least two working days' notice before access.

It should be noted that there is a presumption that, once requested, a union will be granted access. Under the "access principles" in the Bill, employers are expected to take reasonable steps to facilitate access by officials, should only refuse access entirely where it is reasonable in all the circumstances to do so and union officials should be able to exercise their access rights in any manner that does not unreasonably interfere with the employer's business. Where the union's request for access is consistent with the model agreement, the CAC is more likely to consider that access should be granted.

The government proposes that where an employer already recognises an independent trade union to negotiate on behalf of the group of workers in question, the CAC should *consider* that a reasonable basis on which to refuse access (although it is not *required* to refuse on this ground). This leaves open the option for a trade union to seek access when another trade union is already recognised (although it will need to convince the CAC that it would be unreasonable to refuse their application). It will also be possible for a recognised trade union to seek access to other workers (who are not already subject to the recognition agreement with the employer) with a view to expanding their overall recognition arrangements with that employer.

Practical implications
As currently drafted, there are concerns that this new access process is administratively burdensome, anticipates short timescales for employers to respond and fails to take sufficient account of different types of workplaces and operational considerations for employers. Key details are also currently missing and it is hoped that they will be clarified to minimise the risk of disputes. For example, how employers should respond to multiple requests (from potentially competing unions) and repeated requests (from the same union). In addition, the Bill currently provides that an access agreement may not be revoked or varied by the employer without the union's agreement and after the CAC has been jointly notified. There is also currently no ability for the CAC to revoke an access agreement.

Unionised employers should review any existing access arrangements (checking for differences when compared to the new right) and assess the IR risks of a new trade union seeking access or an incumbent trade union seeking to expand their recognition arrangements. All employers should prepare ahead of the new access right being implemented (potentially in October 2026), including conducting a health check of current employee relations and engagement, reviewing their IR strategy, training managers in the new right and identifying any key issues arising from having third parties accessing a workplace (health and safety, regulatory requirements, data privacy, confidentiality, liability etc).

Changes to statutory recognition
The Bill makes many procedural and substantive changes to the current legal procedure which applies when a union seeks statutory recognition. For example, they include:

- deleting an initial admissibility test which a union must currently meet (the requirement for evidence that the majority of workers in the bargaining unit would be likely to support the union conducting collective bargaining on their behalf)
- providing for regulations to relax the remaining admissibility test by dropping the current requirement that the union has at least 10% membership in the proposed bargaining unit to a lower percentage of 2% - 10% (exact figure to be decided). Until regulations make this change, the 10% test remains
- removing the condition, when workers vote in a recognition ballot, that recognition must be supported by at least 40% of all the workers in the bargaining unit, such that a union would only need to secure a simple majority of just those voting to obtain recognition
- amending the access and unfair practice rules, including: applying them at an earlier point (when the CAC accepts the application), lowering the test for determining unfair practices and extending the time limit which applies for making a complaint, and amending the timetable for negotiations on access
- assessing the number of workers in a bargaining unit at the point at which the CAC receives the application - that number may go down subsequently, but not up. Only those workers who were engaged on the date the application was received by the CAC, and remain engaged, would be counted for the purposes of the 10% membership threshold, and would be entitled to vote in any ballot
- recognising a non-independent union, after an independent union requested voluntary recognition, will, in some circumstances, no longer "block" an application for statutory

recognition from the independent union (timelines apply). As a result, if the necessary tests are met, the employer may be required by the CAC to recognise the independent union, as well as the non-independent union (unless the employer terminates its relationship with the latter)

The government is also committed to introducing electronic balloting for statutory ballots. Implementation of both electronic balloting and the statutory recognition changes is expected in April 2026, following a further consultation to follow.

Practical implications
The extensive changes will make it easier, quicker and cheaper for trade unions to apply for recognition and to win a recognition ballot, potentially with low membership levels in the bargaining unit. This outcome may present IR challenges for employers. For example, some employees may question its legitimacy where recognition is built on slim foundations. Encouraging all employees to participate in recognition ballots will be an important consideration where this may be a risk. In addition, easing the requirements, as outlined above, may result in unions seeking recognition for larger bargaining units, with lower levels of membership, than has previously been the case, reversing the trend over recent decades.

More broadly, an anticipated increase in recognition requests, together with the easier process, may persuade some employers to proactively and voluntarily engage with preferred union partners, ahead of any statutory recognition request. This would provide greater certainty regarding recognition arrangements (although note the final bullet point above on timing, if recognising a non-independent union) and bargaining units than simply waiting for a statutory request from the "first mover" out of any number of unions which might have members within the workforce.

Employers should review their engagement strategy, including assessing existing employee relations and union relationships, monitoring for changes, addressing engagement concerns and evaluating a range of engagement channels, including staff forums. The strategy should also consider how the business would respond in the event of a statutory recognition application, reflecting the limited timescales afforded to employers once an application is lodged, and evaluate voluntary recognition arrangements, if appropriate. Upskilling HR and managers on engaging with unions in a changing legal landscape is recommended before the changes are implemented.

Industrial action amendments
In relation to industrial action, the Bill will:

- repeal the 2023 minimum service levels (MSL) legislation
- repeal the 50% turnout threshold and 40% support in important public services requirement in ballots. It will revert to simple majority voting. However, two different commencement dates will apply. The 40% support requirement in important public services will be repealed two months after the Bill receives Royal Assent whereas the 50% threshold will be removed once electronic balloting is made available to trade unions. The government has committed to making e-balloting an option from April 2026
- repeal the 2016 picketing supervision provisions
- reduce the information a union must include on the ballot notice. Specifically, the ballot notice will no longer need to contain: the number of employees in each category being balloted and at each workplace concerned, leaving only the lists of each and the total number of employees concerned. The requirement to explain how the figures were calculated will also go. The following will also no longer be required in the voting paper: a summary of the matter in dispute; the type of action short of a strike (where appropriate); and the period or periods within which industrial action is expected to take place
- reduce the information provided by the union to members with the ballot result: the number of individuals who were entitled to vote in the ballot will no longer be listed. Separately to the Bill, the government will recommend the use of email, over first class post, to inform employers and members of the ballot outcome (the Code of Practice will be updated)
- reduce advance notice of industrial action from 14 to 10 days. The information contained in the notice will also reduce, with the requirement that it contains the number of affected employees in each category listed being removed
- extend the expiry of the ballot mandate for industrial action from six to 12 months
- introduce protection against detriment for taking part in industrial action (addressing the "gap" in protection identified in the recent *Mercer* case law – read our update). When in force, a worker will have the right not to be subject to certain detriments (further details to follow in regulations) by their employer, with the sole or main purpose of preventing or deterring the

worker from taking protected industrial action, or penalising then for doing so. The rules on automatic unfair dismissals for protected industrial action are also strengthened (employees will no longer only be protected during a 12 week protected period)

In terms of timing, the MSL repeal takes effect upon Royal Assent and most, not all, other industrial action changes outlined above following two months later (these include: extending the ballot mandate, reducing advance notice, repealing the picketing supervision provisions and reducing the information in the voting paper and ballot notice). The government must act through regulations to implement the remaining industrial action provisions in the Bill (expected in 2026 and 2027), with protections against detriment for taking action planned for October 2026.

Practical implications
In summary, these procedural changes will make it easier and cheaper for unions to organise strikes. The changes will also reduce union risks when they do so: there will be a reduced responsibility for the action of pickets, and, by simplifying the ballot and notification rules, the government has a stated aim of narrowing the scope of employer litigation challenges.

The changes will present employers with increased operational challenges and legal risks. For example:

- reducing the information provided in the ballot notice and results, on the voting paper and the strike notice, together with reducing advance notice to 10 days, will affect the employer's ability to contingency plan
- once the changes are implemented, lawful industrial action will require a simple majority of members who respond to a ballot to vote in favour, with no requirement for any level of turnout. Repealing the 50% turnout threshold, coupled with the introduction of electronic balloting, makes it easier to secure a successful ballot for action, particularly in 'important public services' where the 40% minimum support requirement will also no longer apply
- doubling the six month ballot mandate to twelve months will reduce the need for unions to fund and organise re-ballots. This will lower the cost of strikes for unions, particularly when electronic balloting is made available, together with the recommendation of email communications (instead of post), and may result in longer-running disputes
- introducing protection against detriment for workers and employees taking official and protected industrial action, to penalise them or to deter them from taking part, will increase employer legal risks. Care will need to be taken to ensure that any employer actions, or omissions, are not capable of being interpreted as being for the "sole or main purpose of preventing or deterring the worker from taking protected industrial action, or penalising the worker for doing so". Regulations will provide more detail on prescribed detriments. They are not expected to include deducting pay for strike action, but could include incentivising other workers not to take part, some disciplinary action and withdrawing benefits from strikers

Employers should audit IR strategy and dispute resolution procedures to ensure that they are fit for purpose and review existing relationships with relevant unions and workers, with a view to building an effective and strong IR framework in readiness for these changes. Employers should also review their strike contingency plans now, so they can implement them swiftly in the event of industrial action occurring. Remember, unions can ballot for, and call upon workers to take part, even if their employer does not recognise the (or any other) union. Therefore it is important that <u>all</u> employers plan for the potential of industrial action.

<u>Other changes to individual rights and protections</u>

Time off rights
Changes will be introduced to the existing rights for an official of a recognised trade union to take paid time off during their working hours to carry out trade union duties and for a union learning representative to take paid time off, as follows:

- currently, an employer shall permit a recognised union official to take time off during working hours for the purpose of carrying out their duties (including negotiations, relevant training and more). The amount of time, the occasions and any conditions are those that are reasonable in all the circumstances having regard to the Acas code of practice. Similarly, a union learning representative is permitted to take time off during working hours for their duties (including providing information on, and arranging, training) with a reasonableness test also applying to that time off

- the Bill extends these rights by requiring that, when requested, an employer must provide access to such accommodation and other facilities (e.g. office/internet, etc) as is reasonable having regard to the Acas code. As a result, it becomes a right to time off *and* facilities
- a new right for trade union equality representatives to paid time off and facilities is also being introduced in order that they may promote workplace equality, arrange training, provide advice or support and more. As with learning representatives, conditions apply, including that the union confirms that the employee is a trained equality representative
- another change shifts the burden of proof to the employer in the event that an employee claims a breach of the right to time off (but not of the right to facilities) – i.e. it will be for the employer to show that the time off which the employee proposed was not reasonable. This will apply to time off claims by union officials, learning representatives and the new equality representatives
- the Acas code will be updated to reflect all the above changes. The government plans to bring these changes into effect in October 2026

Blacklisting
Protection against blacklisting, where information is compiled on individuals concerning their trade union membership and activities with a view to that information being used by employers or employment agencies to discriminate against them, will also be strengthened under the Bill and subsequent regulations. For example, the Bill provides for amending regulations to extend the blacklisting prohibition to include third parties compiling lists, not just employers or employment agencies, and to lists that are not prepared for the purposes of discrimination, but are subsequently used for that. A consultation is expected on taking the new powers forward winter/early 2026 and the regulations are expected before implementation in 2027.

Duty to inform: right to statement of trade union rights
The Bill also introduces a new duty on employers to inform new workers of their right to join a trade union at the same time as they provide a written statement of employment particulars, and to inform all workers of this right on a regular basis. Currently, a failure to provide written particulars as required risks a successful tribunal claim, with compensation of between two and four weeks' capped pay. A consultation (closes December 2025) sets out further details, including the form and frequency. For example, its preference is for employers to provide a government-provided standard statement, adding only any workplace specific details, at the start of employment and annually for existing workers (where it is provided directly, as opposed to indirect methods such as on a notice board or intranet). The new duty is anticipated to take effect in October 2026.

Public sector check-off and facility time
The Bill repeals the restrictions on relevant public sector employers making check-off deductions from their workers' wages in respect of trade union subscriptions (i.e. the requirement that check-off was only allowed if workers could pay their subscriptions by other means and the union makes reasonable payments to the employer in respect of the making of the deductions). It also repeals the power to require relevant public sector employers to publish facility time and related information for union representatives.

Practical implications
Employers with existing time off arrangements will need to review policies, and how they are implemented locally by managers, and make changes to incorporate facilities and equality representatives, as appropriate.

The government states that existing time off agreements are "often insufficient" resulting in employees using "significant amounts of their own time". Shifting the tribunal burden onto the employer is intended to correct this "by establishing a presumption that the employee's view on what is considered reasonable time off is reasonable in all the circumstances" having regard to the Acas code. Employers will need to raise awareness among those managing time off in the workplace, including the need to show that time off was not reasonable, in the event of a refusal.

Our credentials

The Eversheds Sutherland Labor team is the largest, dedicated team of industrial relations lawyers. This means that we have unrivalled experience and understanding of the full spectrum of industrial relations issues affecting our clients and ensures we have sufficient bench strength with necessary expertise at all levels to take on the most demanding mandates.

We have extensive experience in helping clients manage relationships and engagement with staff forums/associations and works councils, inform, consult and negotiate with trade unions on pay and

terms and conditions, navigate and resolve collective disputes (including to challenge unlawful industrial action, pickets and protests) and manage union access and recognition requests. Our Labor lawyers frequently work on cross-border and transnational matters, regularly defend individual and collective trade union related claims and applications brought in the civil courts, employment tribunals, and the Central Arbitration Committee (CAC), and are experienced advocates before the CAC.

We also host an Annual Labour Relations Conference (now running for over 20 years and to our knowledge the only conference of its type) and offer Industrial Relations Masterclass training, amongst other industrial relations focused events.

Our Band 1 ranking in Chambers & Partners as well as our recent Labour Relations Management Team of the Year award at the 2024 International Employment Lawyer awards are a reflection of the team's reputation and trusted adviser status.

Contacts

Thomas Player
Partner

T: +44 29 2047 7574
M: +44 786 768 2110
thomasplayer@
eversheds-sutherland.com

Clare Ward
Partner

T: +44 115 931 7604
M: +44 782 793 9382
clareward@
eversheds-sutherland.com

Emma Humphreys
Partner

T: +44 207 919 0787
M: +44 755 756 5955
emmahumphreys@
eversheds-sutherland.com

Stephen Chegwin
Partner

T: +44 161 831 8249
M: +44 781 065 6787
stephenchegwin@
eversheds-sutherland.com

Chris Mordue
Partner

T: +44 113 200 4856
M: +44 738 754 4154
chrismordue@
eversheds-sutherland.com

eversheds-sutherland.com