

Industrial action is stepping up pace across the NHS but what does it mean for the private health sector? In the first of a three-part series on workforce, **Rebecca Pallot**, employment partner at Mills & Reeve, assesses the impact of the current wave of action and explains the significance of the Strikes (Minimum Service Levels) Bill



Industrial action and private healthcare

Disputes over pay and conditions in the NHS in England present a complex and changing picture, involving a number of different unions across several distinct occupational groups. Those groups include nurses, physiotherapists and ambulance paramedics. The most recent addition to this list was junior doctors, whose ballot in favour of industrial action was announced on 20 February.

At the heart of all these disputes lies the fact that, after a decade of stagnant wages in the public sector, the current pay settlement for most NHS staff represents a pay cut in real terms. Understaffing and the resultant effect on working conditions and workload is another reason for the current wave of strikes. Concerns about patient safety due to understaffing are also being vocalised.

Pending a resolution – which will surely arrive one day – users of the NHS are facing considerable disruption. Days lost to strikes will also increase the backlog of elective and non-urgent work, further increasing the pressure on staff.

Some staff groups at a significant number of NHS organisations have voted not to strike. While the full impact of the strikes remains to be seen, it may not be as grave or as widespread as had been feared.

Negotiations between the unions and governments are ongoing but, given the constraints on the funding available, the government perhaps has less room

for manoeuvre than it would like.

The private health sector has not seen significant industrial action among its own staff but is very likely to see indirect effects of the current strikes in the NHS. These include disruption to the delivery of services delivered under public/private health partnerships, as well as upward pressure on the salaries of clinical staff working outside the NHS. The current disruption may, however, also increase demand for private treatment funded by individuals.

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Forthcoming legislation on industrial action

It is against this background that the government has decided to legislate. The Strikes (Minimum Service Levels) Bill was published in early January 2023. It has now been passed by the House of Commons and received its

second reading in the House of Lords on 21 February. It will apply across the whole of Britain, but will not apply in Northern Ireland.

There is a lot of opposition to the Bill from unions and employee organisations because it limits the bargaining pressure which a strike can create. If the Bill becomes law in its current form, it would enable the government to pass regulations imposing minimum service levels in a number of sectors, including health. Traditionally, local agreements in the NHS between employers and the unions have been put in place so that the delivery of urgent and critical care is protected.

When the Bill was first published, the government announced that it planned to set minimum service levels for fire, ambulance and rail services, but would rely on voluntary agreements in other sectors covered by the Bill, including in the rest of the health sector but things appear to have moved on since then.

Consultation on minimum service levels for ambulance services was published on 9 February 2023. The service levels which the government plans to impose broadly reflect those which are already agreed with the unions on a voluntary basis. However, the government argues that mandatory service levels which are imposed on a national basis are more consistent and make it easier for employers to plan their response to industrial action.

Where minimum service levels are imposed, NHS employees who are directed to work but who fail to do



so would lose the protections against unfair dismissal that apply to striking workers. NHS Employers are likely to find imposing service levels – which will involve directing some union members not to strike – considerably more difficult from an employee engagement and industrial relations perspective than implementing a local agreement.

While the Bill remains unclear about which parts of the health sector will be made subject to minimum service levels, it is most likely that they will only be applied to acute NHS services like accident and emergency, cancer treatment and obstetrics. Based on the experience of the Trade Union Act 2016, which imposed additional balloting requirements for ‘important public services’, these new rules will not be applied to private health services.

It follows that for private healthcare

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providers, the importance of the Bill will lie in its impact on the NHS and the private sector's very significant interaction with the NHS. If the Bill is passed it may be that staffing issues in the NHS will have less of an effect on the ability of services to be delivered through public/private partnership working.

A key issue is whether the Bill would exacerbate the current disputes, or, as the government hopes, encourage the unions to modify their demands. Either way it will not become law in time to impact the current wave of strikes. However, the government is clearly committed to pushing the Bill through Parliament as rapidly as possible, and it is not inconceivable that the new framework will be fully in place by the summer.