Royal College of Nursing response to Make Work Pay: protection from detriments for taking industrial action

About the Royal College of Nursing

With a membership of over half a million registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector.

The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.

Q1. Do you support prohibiting all detriments for taking industrial action? [Yes]

The RCN supports prohibiting all detriments imposed for the sole or main purpose of penalising, preventing or deterring workers from taking protected industrial action. This is the clearest way to close the legal gap highlighted by the Supreme Court in Mercer, where UK law was found to provide insufficient protection against sanctions short of dismissal for lawful strike participation.

The IER has long argued that UK workers have lacked meaningful protection where employers take action short of dismissal during disputes, undermining the practical ability to exercise the right to strike.

For nursing staff, industrial action is always a last resort and is undertaken within tight legal constraints and with patient safety planning embedded in practice. A comprehensive prohibition is proportionate as it targets retaliatory treatment, not legitimate workforce management or safety planning, and it reduces fear of victimisation that can impact lawful collective action.

A list approach risks loopholes and constant updating, enabling new forms of retaliation not recognised in regulations. In a health context, clarity and confidence matter for staff wellbeing and retention, and for constructive resolution of disputes that ultimately affect patient care.

Q2. What benefits might come from prohibiting all detriments for taking industrial action?

A full prohibition would provide clear, comprehensive protection for nursing staff and other health and care workers from retaliatory treatment intended to deter lawful industrial action.

For the RCN, the principal benefit is confidence; if staff know they cannot be victimised for lawful industrial action, disputes are more likely to be managed through orderly processes and resolution is more achievable. This matters in health and care, where safe staffing pressures are persistent and workforce voice is integral to service quality.

A broad prohibition is also future-proof because it avoids the risk that employers shift to other detriments not listed in regulations (removing training, blocking rotation opportunities, or excluding staff from team development) while claiming compliance.

Finally, it supports good industrial relations by encouraging employers to focus on negotiation rather than deterrence tactics. That aligns with the health unions' wider emphasis on resolving disputes through meaningful engagement rather than coercive legal mechanisms.

Q3. What concerns or challenges do you see from prohibiting all detriments for taking industrial action?

The RCN recognises implementation challenges, principally around clarity and consistency in how "detriment" is interpreted across workplaces and tribunals. The consultation notes detriment is broadly defined in case law as "disadvantage," which can cover a wide range of actions and omissions. Employers may worry about routine operational decisions being challenged if they occur close to industrial action, so guidance will be important to reduce unnecessary litigation.

However, these concerns are manageable because the legislation applies only where the employer's sole or main purpose is to penalise, prevent or deter protected industrial action. The consultation also makes clear that disciplinary action for genuine misconduct during industrial action (e.g., harassment, criminal damage, serious confidentiality breaches) would not be prohibited where the purpose is genuine misconduct management rather than deterrence of lawful industrial action.

A further challenge is ensuring the regulations are communicated effectively in health and care settings where line managers may be unfamiliar with industrial relations law. The RCN is calling for statutory guidance and training materials, co-designed with unions and employers, to embed lawful, fair practice.

Q4. How might prohibiting all detriments for taking industrial action influence employers' ability to manage workplace disputes and industrial action?

Prohibiting retaliatory detriments would encourage employers to manage disputes through good faith negotiation, workforce engagement and safe contingency planning, rather than punitive measures. This supports healthier industrial relations and can shorten disputes, which is particularly important in health and care services where disruption has patient consequences.

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Q5. Would this option have an impact on industrial relations? [Positive impact]

A prohibition on all detriments is likely to improve industrial relations by reducing fear of retaliation and building confidence that lawful collective action will not lead to targeted punishment.

In health and care sectors, trust and psychological safety are essential for retention and for raising concerns about staffing and patient safety. When staff believe they may be penalised for collective action, industrial relations may deteriorate and rather than resolve the issue staff may disengage, or exit the workforce, with negative impacts on pay, terms and conditions for workers and ultimately employment conditions worsening or falling behind other workforces impacting on recruitment and retention of staff, furthering shortages and destabilizing the workforce rather than protecting services.

A broad prohibition also reduces the scope for grey area tactics, such as withholding training, blocking progression, or selectively applying performance management, used to deter union activity. That clarity can improve day-to-day workplace relations by setting a clear boundary that disputes should be resolved through negotiation, rather than intimidation.

Ensuring parity of protection across sectors (public/private) supports coherence and fairness, which the consultation identifies as a key advantage of Option A.

Section 2 – Options for Secondary Legislation (Option B)

Q6. Do you support creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action? [No]

The RCN does not support a closed list of prohibited detriments because it risks leaving gaps and is unlikely to keep pace with evolving workplace practices. The consultation itself recognises future-proofing as an issue, and it may be impossible to foresee every detriment, creating unintended consequences where harmful retaliation falls outside the list.

From a nursing perspective, retaliation can be subtle and cumulative and may not be captured in a static schedule and a list approach risks becoming a "checklist for avoidance," rather than a deterrent to retaliation.

The IER's wider critique of UK trade union law is that, historically, restrictions and gaps have weakened effective protection of collective rights. In health settings, where staff already take industrial action reluctantly, the law should clearly discourage retaliation and promote resolution, as opposed to creating potential for further dispute.

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Q7. What benefits might come from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

The RCN recognises that a list could offer some limited surface-level clarity by specifying certain prohibited acts; this might help some employers and staff understand minimum standards quickly. It may also narrow the range of potential claims, addressing employer concerns about defending disputes over routine decisions that are unrelated to industrial action.

However, the RCN emphasises that these benefits are limited and depend entirely on how comprehensive, flexible, and regularly updated the list is. The experience across trade union rights debates is that narrow legal mechanisms can generate new forms of avoidance rather than improving industrial relations. Health unions have repeatedly argued that heavy-handed or overly technical frameworks risk escalating tensions rather than resolving underlying issues.

A list might deliver limited administrative simplicity, it is less likely to deliver durable protection or improved industrial relations compared with a principled prohibition aligned to the broad concept of detriment already used elsewhere in employment law.

Q8. What concerns or challenges do you see from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

The RCN's primary concern is that a list is inherently under-inclusive and therefore risks normalising retaliation that falls outside the specified items. The consultation acknowledges workplace environments evolve, meaning new or indirect detriments may emerge that the list does not capture, requiring frequent updates and increasing complexity.

This is particularly problematic in health and care where detriments may be subtle (e.g., blocked rotations, reduced CPD access, adverse shift allocations, exclusion from clinical development) but materially damaging to morale, income, careers and retention.

There is also legal risk. The consultation notes uncertainty about where a lawful line could be drawn while remaining compatible with Article 11 ECHR, which means an under-protective list may invite challenge.

Differential practice between sectors could persist, undermining fairness and increasing confusion for multi-employer NHS, independent health, and the adult social care systems.

Q9. Which types of detriments do you believe should be included in the prohibited list? Please explain why.

If the government proceeds with a list, the RCN would urge it to be broad and principles-based, covering both direct and indirect disadvantages that could deter participation in protected industrial action.

At a minimum, it should include: suspension, disciplinary warnings/sanctions, withholding contractual or discretionary benefits, denial of training/CPD, blocking promotion or progression opportunities, bullying/harassment, and unfair performance management connected to industrial action.

The list should also cover detriments by omission, such as deliberately refusing normal training access, ignoring applications for internal roles, or withholding references, because the consultation notes detriments can arise from action or deliberate failure to act. In health and care, career development and training access are essential to workforce sustainability and retaliation through these channels is particularly harmful.

Q10. Which types of detriments do you believe should not be included in the prohibited list? Please explain why.

Withholding pay for time not worked during strike action is a long-established legal principle and the consultation is not seeking to change it. Similarly, lawful deductions relating to partial performance during action short of a strike would remain outside scope, as proposed. Clear exclusion here avoids confusion and maintains the established industrial relations framework. However, this must not be a blanket approach at the whim of an employer but based on an actual/agreed calculation of the value of work not done.

The RCN also recognises that employers must retain the ability to address genuine misconduct occurring during industrial action, harassment, violence, criminal damage, serious confidentiality breaches, where the purpose of action is genuine misconduct management rather than deterring industrial action.

In health and care, patient safety and professional standards remain essential. The Nursing and Midwifery Council (NMC) makes clear that nurses and midwives have the right to take lawful industrial action, while professional standards continue to apply this underlines why misconduct and safety-related processes remain legitimate when genuinely directed to safety or conduct.

Actions aimed at unions rather than individuals are outside the scope of s.236A as drafted, and should not be conflated with worker detriments in these regulations.

Q11. Would this option have an impact on workers' willingness to participate in industrial action? [Negative impact]

A list approach would likely reduce willingness to participate because it may be perceived as leaving lawful space for employers to impose retaliatory measures not explicitly include on a 'prohibited list'. The consultation recognises that lists can be circumvented via unlisted or newly devised detriments and may require frequent updating.

That uncertainty creates a chilling effect, especially in health and care sectors where staff already view industrial action as a last resort and where professional anxiety about repercussions can be high. Health unions' experience in opposing minimum service level

regimes also shows that restrictive or coercive frameworks can increase tension rather than building confidence.

If government chooses a list, it should be explicitly non-exhaustive or framed around broad categories to minimise effects, but this essentially moves back toward the logic of prohibiting all detriments.

Q12. Would this option impact employers' ability to manage disputes and industrial action?

A list might offer employers some procedural certainty by narrowing the range of actions that could trigger claims, which the consultation notes may reduce burdens associated with defending disputes about unrelated business decisions. In complex NHS, independent health, and social care environments, employers may welcome clearer bright lines about prohibited behaviour.

However, the RCN is concerned that a list would ultimately harm dispute resolution by incentivising tactical behaviour, by shifting retaliation into unlisted forms rather than encouraging negotiation and genuine dispute resolution. This risks worsening trust and prolonging disputes. Health unions' experience of opposing minimum service level regimes reflects this dynamic, where governments or employers reach for coercive tools rather than meaningful engagement, tensions rise and industrial relations deteriorate.

Operationally, a list could also be harder to administer over time, requiring updates and training as new forms of detriment emerge, increasing compliance complexity for large health and care employers. The consultation flags the risk that a list becomes outdated as workplaces evolve.

Employers can manage industrial action effectively through planning and negotiation, without needing any space for retaliation. For these reasons, the RCN considers Option A more likely to support stable, constructive industrial relations.

Section 3 – Awards for failing to comply with ACAS Code of Practice

Q13. Should claims made under Section 236A of TULRCA be added to Schedule A2, meaning that an employment tribunal can adjust an award by up to 25% where the employer or employee unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures? [Yes]

In health and care, disputes are best resolved through fair, transparent processes and collective negotiation with the trade unions. An uplift mechanism encourages employers to handle grievances and disciplinary matters properly rather than using informal or retaliatory measures during high-tension periods. The RCN bottom line is that employers should not discipline staff for striking and that protections for workers must be practical and enforceable.

The measure also incentivises workers to engage in appropriate procedures, supporting orderly resolution and reducing the risk of escalation. Given the high stakes in health and care services, where staff wellbeing and patient or service user experience are intertwined, it is vital that processes surrounding industrial action-related detriment are handled in line with best practice standards.