

EXPLANATORY MEMORANDUM TO

DRAFT CODE OF PRACTICE: ACCESS AND UNFAIR PRACTICES DURING THE RECOGNITION AND DERECOGNITION PROCESS

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

2. Declaration

- 2.1 Kate Dearden, Parliamentary Under-Secretary of State for Employment Rights and Consumer Protection at the Department for Business and Trade (DBT) confirms that this Explanatory Memorandum meets the required standard.
- 2.2 James Silcox, Deputy Director for Trade Union and Collective Rights, at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Laurence Evans at the Department for Business and Trade can be contacted by email at the following address with any queries regarding the instrument:
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Part One: Explanation, and context, of the Code of Practice

4. Overview of the Code of Practice

What does the legislation do?

- 4.1 The Employment Rights Act 2025 (“the 2025 Act”) makes several changes to the statutory trade union recognition process. These include changes to primary legislative provisions in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) in relation to access and unfair practices during the trade union recognition and derecognition process. This draft Code of Practice has been revised from the 2005 version of the Code to ensure that all parties, including employers, workers and unions, understand how these changes affect them. The Code is not mandatory, but seeks to advise employers and unions on how they can comply with the revised legal requirements in the 2025 Act. The Code is admissible in employment tribunal proceedings and therefore can have some legal effect.

Where does the Code of Practice extend to, and apply?

- 4.2 The extent of this Code of Practice (that is, the jurisdiction(s) in which the Code of Practice may have legal effect) is England and Wales, and Scotland.
- 4.3 The territorial application of this Code of Practice (that is, where the Code of Practice produces a practical effect) is England and Wales, and Scotland.

5. Policy Context

What is being done and why?

- 5.1 The Government's Plan to Make Work Pay included a commitment to simplify the trade union recognition process. The 2025 Act updates the legal framework around statutory trade union recognition so that workers have a meaningful right to organise through trade unions.
- 5.2 The 2025 Act amends Schedule A1 to the 1992 Act in relation to access and unfair practices in the recognition and derecognition process by extending the legislation on access and unfair practices during the recognition and derecognition process to apply from the point where the Central Arbitration Committee (CAC) accepts a trade union application. It also requires the parties to seek to negotiate an access agreement. If no agreement is reached, then this is determined by the CAC.
- 5.3 The 2025 Act sets a timetable for negotiations on access – upon notification that the CAC has accepted an application, the union has 5 working days to request access, indicating what type of access it is seeking. There then normally follows a 15 working days negotiation period between the employer and the union to seek to agree an access agreement. This period can be extended if both parties agree. If no agreement is reached, the CAC will have 10 working days to determine a reasonable access agreement. The CAC may extend this period, giving reasons in writing for doing so.
- 5.4 The 2025 Act also allows for 5 working days after the close of the recognition ballot for complaints to be submitted to the CAC where an unfair practice is alleged. It also changes the test for determining such complaints by only requiring the CAC to consider whether an unfair practice has occurred without having to determine the effect it may have had.
- 5.5 The structure and content of the draft Code reflect the above changes brought about by the 2025 Act. DBT has also taken the opportunity to bring it up to date with changes in digital communications and the Code now provides significantly more detailed guidance in this area, including guidance on digital access.
- 5.6 In line with the Government's aim to provide earlier and more frequent access to unions in the recognition process, the Code increases the suggested access meetings' frequency to once every 5 working days, and the suggested minimum length of these access meetings is also increased to 45 minutes.

What was the previous policy, how is this different?

- 5.7 Previously, the 2005 version of the Code of Practice on access and unfair practices only applied to the recognition (or derecognition) ballot phase. This was because unions could not obtain access to the workforce to make their case for recognition until the recognition ballot phase: i.e., the CAC would notify the parties of its intention to hold a ballot at which point there would follow a 10 working day period where the parties could request for the ballot to be postponed. In practice, the parties would also seek to agree access arrangements during this time. However, there was no clear legislative timetable in relation to negotiations on agreeing access and there was no requirement for the parties to seek to agree to an access agreement. This could lead to delays in the recognition process, something the changes in the 2025 Act set out to solve.
- 5.8 Where parties wished to submit an unfair practice complaint, they would do this at the point when the unfair practice was alleged, but no later than 1 day after the close of

the recognition ballot. This led to instances where parties missed the deadline. Furthermore, for an unfair practice complaint to be upheld, the CAC had to be satisfied not only that the alleged unfair practice had occurred, but also that it had affected the outcome of a recognition ballot. This second test was hard to establish, resulting in the CAC refusing unfair practices complaints.

- 5.9 The Code, dated 2005, previously suggested that the frequency of access meetings during the ballot phase should be once every 10 working days, with a minimum time of 30 minutes. It also provided limited guidance on digital access or digital communications, as this was less prevalent at that time.

6. Legislative and Legal Context

How has the law changed?

- 6.1 Paragraphs 5.2 to 5.4 of this Explanatory Memorandum set out the legislative changes in the 2025 Act in relation to access and unfair practices provisions during the recognition and derecognition process. These will come into force once Parliamentary approval has been obtained for the Code, which is intended to come into effect alongside the legislative changes.
- 6.2 Under section 203(2) of the 1992 Act the Secretary of State may from time to time revise the whole or any part of a Code of Practice issued by him and issue that revised Code. In pursuance of section 204(1) of the 1992 Act, the Secretary of State, after consultation with the Advisory, Conciliation and Arbitration Service, prepared and published the draft Code of Practice on Access and Unfair Practices during the Recognition and Derecognition Process.
- 6.3 In pursuance of section 204(1) of the 1992 Act, the Secretary of State considered representations made to him about the draft Code and modified the draft accordingly. In pursuance of section 204(2) of the 1992 Act, the Secretary of State has now laid the draft Code before both Houses of Parliament.
- 6.4 The Code reflects the changes made in the 2025 Act. The Code also sets the suggested minimum frequency of access meetings to once every 5 working days, and sets a suggested minimum time for access meetings to 45 minutes. The Code has been drafted so that frequency and length of access meetings can be interpreted flexibly by the parties.
- 6.5 The Code also provides substantially more guidance on digital communications, including digital access.

Why was this approach taken to change the law?

- 6.6 The Code has been changed to reflect the changes in the 2025 Act to the access and unfair practices provisions in the statutory recognition process.
- 6.7 The Code itself imposes no legal obligations and failure to observe it does not in itself render anyone liable to legal proceedings. But section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that any provisions of this Code are admissible in evidence and are to be taken into account in proceedings before any court, tribunal or the CAC where they consider them relevant.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 Policy on changes to the statutory trade union recognition scheme, including changes in relation to access and unfair practices, was settled in the 2025 Act. DBT ran a public consultation on a draft revised Code from 4 February to 1 April 2026. The consultation sought views from respondents on whether the revised Code and structure reflected accurately the changes in the 2025 Act.
- 7.2 DBT also sought views on whether the Code reflected appropriately increased use of digital communications in workplaces; whether the role of the CAC was adequately explained in the draft Code; whether there was sufficient information in the Code in relation to the access agreement; whether there was sufficient guidance in relation to the area of unfair practices, and what suggestions respondents might have in relation to further areas of guidance on access or unfair practices during the recognition process.
- 7.3 During the consultation period, DBT also held roundtable meetings with trade unions and business representative organisations. This ensured that the consultation captured insight not only through formal submissions but also through deeper qualitative engagement with those most directly affected by the trade union recognition and derecognition process.
- 7.4 We received over 920 responses to the consultation, over 80% of which were from employers and their representative organisations. The remainder (15%) were from individuals, trade unions (2%) and charity and interest groups (1%).
- 7.5 Though respondents recognised that the Code and its structure accurately reflected the changes in the 2025 Act, respondents felt that further revisions were required to ensure the Code was proportionate, clear and workable in practice. They felt that the Code did not reflect the increased use of digital communications in workplaces, did not adequately explain the role of the CAC, and that there was not sufficient information in relation to the proposed elements for an access agreement and on unfair practices.
- 7.6 Unions were broadly in favour of the proposed changes to the Code. They welcomed the proposed increased frequency and duration of access meetings but were concerned that access meetings should be implemented flexibly.
- 7.7 Employers and their representative organisations felt the proposed increase in frequency and length of access meetings would lead to greater costs and that there was insufficient information on employer obligations in relation to digital access.
- 7.8 In response, DBT has amended the Code to try to aid clarity and support practical use as far as possible. We have sought to address concerns from employers, and unions, for example by providing more guidance on digital access and clarifying that the frequency of access meetings should be implemented flexibly.
- 7.9 In relation to the frequency and length of access meetings, having considered responses to the consultation, DBT concluded that the Code should provide for the suggested frequency of access meetings to be once every 5 working days and the suggested minimum meeting length to be 45 minutes. This is in line with the Government's commitment to level the playing field by providing earlier and more frequent access for unions during the statutory recognition and derecognition process.

8. Applicable Guidance

- 8.1 In addition to the Code, which provides statutory guidance, DBT will update guidance on the statutory recognition scheme on GOV.UK and keep under review whether further non-statutory guidance is necessary. The CAC has updated its guides to the parties. These will be published once Parliament has approved the Code and it, as well as all the remaining reforms in the 2025 Act to the statutory recognition process, have come into force or effect.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been prepared for this Code of Practice because the Code is only statutory guidance. The law in relation to statutory recognition is set out in Schedule A1 to the 1992 Act as amended by the 2025 Act, for which a 2025 Act Enactment Impact Assessment has already been published at the following web address: <https://assets.publishing.service.gov.uk/media/695d3ebfd1c076f787e7399/employment-rights-act-2025-economic-analysis.pdf> This covers the legislative changes in the 2025 Act as a whole, including the legislative changes to the statutory recognition scheme.

Impact on businesses, charities and voluntary bodies

- 9.2 There is no, or no significant, impact on business, charities or voluntary bodies because the Code provides statutory guidance to the changes in the 2025 Act.
- 9.3 The Code does not impact small or micro businesses as it is statutory guidance and does not impose new legislative requirements on them. Furthermore, micro businesses are not in scope of the statutory recognition scheme as this only applies where the employer employs at least 21 workers.
- 9.4 There is no, or no significant, impact on the public sector because the Code provides statutory guidance to the legislative changes in the 2025 Act.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 DBT will consider whether any further updates to the Code are required alongside revisions in due course to reflect phase two implementation of e-balloting in relation to recognition and de-recognition ballots.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Parliamentary Under-Secretary of State for Employment Rights and Consumer Protection at the Department for Business and Trade has made the following statement regarding Human Rights:

“In my view the provisions of the draft Code of Practice on access and unfair practices during the recognition and derecognition process are compatible with the Convention rights.”

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).