

THOMPSONS TRADE UNION LAW GROUP BRIEFING

TRADE UNION ACT 2016: LEVY, FINANCIAL PENALTIES AND
OUTSTANDING CERTIFICATION OFFICER POWERS COMING
INTO FORCE ON 1 APRIL 2022



At a time when you might think that its focus ought to have been on dealing with the Omicron variant, the government found time just before Christmas to lay regulations for the implementation of almost all of the outstanding provisions of the Trade Union Act 2016. These include the requirement for the Certification Officer (CO) to impose a levy, new powers to impose financial penalties on unions, new investigatory powers and the power to consider possible breaches without receiving a complaint.

All these changes will come into force on 1 April 2022. The only major provision of the Trade Union Act which will not by then be in force will be the reserve powers in relation to curtailing facilities time in the public sector.

The CO has issued draft guidance as to how she proposes to implement these new powers. We have considered that draft guidance, on which comments or questions are sought by the CO before 11 March 2022 in a separate briefing.

I. The Trade Union (Levy Payable to the Certification Officer) Regulations 2022

The Regulations which follow a consultation with trade unions and employers from 2017 to 2019, and 'further engagement' concluding in November 2021, will require the CO to impose a levy on trade unions and employers' associations to cover her 'relevant expenses'.

'Relevant expenses' covered by the levy

'Relevant expenses' are expenses referable to the CO's functions under the Trade Union and Labour Relations (Consolidation) Act 1992, including the salaries of the CO and her assistants and expenses incurred by ACAS in providing staff, accommodation and facilities.

Excluded from 'relevant expenses' are:

- Expenses of investigation, and inspection of financial affairs;
- Costs of legal services provided to the CO, and awards of costs made against her in court proceedings; and
- Expenses incurred in dealing with entries on the lists of trade unions, or in dealing with applications for a certificate of independence.

The CO must 'aim to ensure that' the total amount levied over any three 'financial years' (1 April to 31 March) does not exceed her relevant expenses over that period.

Determination of the levy

There will be three categories of levy payable:

The 'basic levy';
The 'categorised additional levy'; and
The 'enhanced levy'.

The total levy, calculated 'having regard to relevant expenses', is to be apportioned between 'categories of relevant organisation' which are: federated trade unions, non-federated trade unions, federated employers' associations and non-federated employers' associations. But the CO may decide that whilst a proportion of the total levy is to be attributed equally between all categories (the 'basic amount'), a proportion can also be attributable to only one of those categories – most obviously non-federated trade unions (a 'categorised additional amount').

The Regulations describe eight steps for the determination of the levy:

1. Determine the 'total levy', aiming to ensure that the total amount levied over three financial years does not exceed the CO's 'relevant expenses' over that period;
2. Apportion the 'total levy' between the 'categories of relevant organisation' by reference to the functions exercised in relation to that category. If there is a proportion attributable to all such organisations, that proportion of the 'total levy' becomes the 'basic amount', with the balance being the 'additional amount', which is then allocated to each category (e.g. non-federated trade unions) as the 'categorised additional amount';
3. Divide any 'basic amount' equally between qualifying relevant organisations to arrive at the 'basic levy';
4. Divide the 'categorised additional amount' between relevant qualifying organisations in that category to arrive at the 'categorised additional levy';
5. Relevant qualifying organisations are exempted from the basic levy if it would exceed 2.5% of their 'annual income' – either taken from the most recent annual return, or estimated by the CO;
6. Relevant qualifying organisations are exempted from the categorised additional levy if the sum of the basic levy and the categorised additional levy would exceed 2.5% of their income;
7. Calculate the difference between (i) the 'total levy'; and (ii) the sums of the 'basic levies' plus the 'categorised additional levies' payable by those organisations which have not been exempted from either requirement, to arrive at the 'levy shortfall'; and
8. Divide and allocate the 'levy shortfall' between the relevant qualifying organisations not exempted from the 'basic levy' or the 'categorised additional levy', and for whom the aggregate amount of those levies plus their allocation of the 'levy shortfall' would not exceed 2.5% of their annual income, to give the 'enhanced levy'.

Payment of the levy

Notice requiring payment of the levy must be sent between 1 April of the financial year to which it relates and 30 June of the following financial year. The notice must specify the amount payable, explain how it has been calculated and give at least 30 days for payment. Unpaid levies are recoverable by the CO as a debt.

2. The Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022

Also coming into force on 1 April 2022 are the CO's new powers to impose financial penalties on trade unions or 'any other person'.

A financial penalty order can be made where the CO either makes an enforcement order, or has the power to make an enforcement order. A financial penalty order can be made without condition, or conditional on non compliance with a requirement to take specified steps.

Before making a financial penalty order, the CO must inform the person in default of the grounds on which she proposes to make an order and must give that person an opportunity to make written representations. There is a right of appeal against a financial penalty order to the Employment Appeal Tribunal on the grounds of an error of fact or law, or that the making of the order was unreasonable.

Type of Order	Amount
Minimum: all types of Order	£200
Maximum: Level 1	Less than 100,000 members: £10,000 100,000 members or more: £20,000
Secure positions not held by offenders	
Failure to comply with election requirements	
Non-compliance with restrictions on political objects	
Failure to comply with political resolutions rules	
Failure to comply with political fund rules	
Failure to provide political fund contribution information	
Maximum: Level 2	Less than 100,000 members: £5,000 100,000 members or more: £10,000
Failure to comply with membership register duties	
Maximum: Level 3	Less than 100,000 members: £2,500 100,000 members or more: £5,000
Access to accounting records	
Details of industrial action, political expenditure in return	
Breach of union rules on prescribed matters	
Failure to comply with investigatory requirements	

The maximum financial penalty which can be imposed where the person in default is an individual is £1,000.

3. Provisions coming into force on 1 April 2022

The further provisions of the Trade Union Act 2016 coming into force on 1 April 2022 are:

- the CO not being subject to Ministerial direction;
- rights of appeal from the CO's decision not being confined to points of law;
- the CO's new investigatory powers (to the extent not already in force);
- the CO being able to consider whether an organisation has breached statutory responsibilities without first receiving a complaint from a member or third party; and
- new powers of enforcement by the CO.

Providing for the CO not to be subject to Ministerial direction, and not confining rights of appeal from the CO's decisions to points of law, are intended to address concerns that the CO's procedures may not otherwise comply with the Human Rights Act.

The CO's new investigatory powers include powers to require the production of documents ('in relation to a trade union or a branch or section of a trade union') and to appoint investigators.

4. Comment

It is simply staggering that a government that has talked of 'levelling up', gave a manifesto commitment post Brexit to 'raise standards in areas like workers rights' and yet has failed to deliver a much-promised Employment Bill considers it a good use of resources to implement uncalled for extra burdens on those who seek only to represent workers and to better their working conditions all at a time that workers are suffering under pandemic conditions. This is a government led by Ministers who think that rules apply to ordinary people and trade unions, but they don't apply to themselves.

Thompsons Trade Union Law Group
February 2022