

Pay and contract FAQs during strike action of consultants

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Q.1 What level of cover will be provided by consultants on strike days?

The BMA's guidance - [On the day of consultant industrial action \(bma.org.uk\)](https://www.bma.org.uk) – states that “You will only be expected to provide the same level of service that you would on Christmas Day.” “Most consultants will be providing an on-call only service, in the same way as they would on Christmas Day. You should remain contactable in case of emergency during the on-call period.”

Early engagement with local BMA representatives is essential to agree whether consultants will be required to attend on site as part of providing Christmas Day cover and which services will be expected to run as an on-call service only. If on site cover is part of the Christmas Day staffing model, then that is what should be in place during industrial action. This may vary between organisations.

Q.2 Will consultant activity need to be cancelled during industrial action?

This should be agreed locally at the earliest opportunity to minimise the impact on patients. This should be assessed based on what activity would usually be provided on Christmas Day as this is the level of care the BMA has agreed the consultants will provide. All non-critical activity taking place on strike days should be reviewed in order to release staff to support emergency clinical activity.

Q.3 During the period of industrial action, what can we do with non-striking consultants whose rostered resident clinics are cancelled?

A non-striking member of staff who was due to be resident for a clinic will still be available for work, even when their usual clinic is cancelled. Trusts can either:

- require consultants to attend on site but undertake different duties which are reasonably incidental to those set out in their job plan. How willing a consultant is to move will depend on their expertise and skillset and what tasks the organisation is asking them to undertake. Organisations should bear in mind that consultants, under the 2003 terms and conditions of service (TCS), may be asked to undertake the duties and responsibilities set out in the consultant's job plan and any work reasonably incidental or consequential to those duties and that there is also an implied term of adaptability in every contract. Where consultants attend on site and follow management instructions regarding any variation on the day of strikes, they should continue to receive their normal pay. Organisations may face scenarios where consultants refuse to move and adjust their duties which may become a formal issue. We recommend that advice is sought before taking any formal action.
- require consultants to remain at home but be on-call. We consider that consultants should continue to receive their normal pay for this period as they are willing and able to work, but the Trust is not asking them to attend on site.

Q.4 Where consultants will be providing “Christmas Day” on-call only cover on strike days, how will this impact upon supervision?

Consultants are responsible for the clinical and educational supervision of doctors in postgraduate training and the clinical supervision of allied health professionals and nurses – for example regarding administration of chemotherapy or dialysis. If required supervision is not possible on a strike day (either in person or remotely) then the clinical activity may need to be cancelled. In the absence of a junior doctor's usual consultant to provide supervision due to strike action, arrangements may be made with consultants who are not taking strike action to undertake additional supervisory duties. In terms of taking on additional tasks, for consultants, schedule 2, para 2 of the 2003 [Consultant Terms and Conditions \(2003 TCS\)](#), states that: “A consultant is responsible for carrying out any work related to and reasonably incidental to the duties set out in their job plan”. Organisations can take the line that additional supervision during strike action is “incidental” to the consultant's duties.

Once the level of cover to be provided on strike days has been agreed locally, and where alternative arrangements can be made with consultants who are attending on site or on-call, organisations will need to supply junior doctors with the names and contact details of the senior doctor who will hold overall responsibility on the days of industrial action.

Q.5 If 'Christmas Day' levels of cover are provided by consultants, will doctors requiring enhanced medical supervision be able to work?

Yes, but only if suitable temporary arrangements for supervision by a named deputy / deputies for the striking consultant can be put in place.

There are three levels of medical supervision (supervised, closely supervised and directly supervised) that may be put in place by the GMC to monitor a doctor's health and progress during a period of restricted practice.

We recommend that employers should ensure that any temporary clinical supervision arrangements put in place to cover strike action taken by the supervising consultant are compliant with the GMC and Medical Practice Tribunal Service's (MPTS) [Glossary for undertakings and conditions \(gmc-uk.org\)](#) and is approved by their Responsible Officer (or nominated deputy).

Employers may wish to make contact with the GMC to explore whether any agreed temporary variations to supervision during periods of industrial action by consultants are possible.

Q.6 Will consultant-led teaching, training and interviews need to be cancelled during industrial action?

NHS England Workforce, Training and Education have published an FAQ which describe their view on educational activities during strike action:

[HEE industrial action and management of-doctors in postgraduate training:](#)

“It is very likely that the majority of formal educational activities in secondary care will have to be postponed, recognising that consultants deliver much of this, and that specialty doctors and specialists (SAS doctors) are likely to be providing senior clinical cover. This includes local and regional teaching.”

Q.7 How do you treat a consultant who is undertaking SPA duties on strike day?

If SPA activity is not undertaken on site, so that attendance can be monitored, then organisations can seek to clarify with the consultant whether or not they intend to work or have worked on the strike day, in order to establish whether or not a deduction from salary

should be made. If the consultant refuses to clarify the position, action could be taken for a refusal to obey a reasonable management instruction, or the organisation could indicate that it will assume that the individual is taking strike action if the individual does not respond (and make a deduction accordingly). If that is challenged, the organisation can assess on an individual basis whether the consultant appears to have been participating in strike action or was instead working their SPA.

An organisation could ask consultants who are due to undertake SPA work on a strike day to undertake clinical duties instead, in accordance with the duty of adaptability (see Q2 of the Consultant and SAS Doctor Support FAQs).

https://www.nhsemployers.org/system/files/2023-03/Consultant-and-sas-doctor-IA-FAQs_0.pdf

Q.8 Can we ask consultants whether they will be taking industrial action?

Yes, and we would encourage employers to do so, and engage in conversations with consultants about how to ensure patient safety as soon as possible.

The general principle is that employees are not obliged to confirm to their employer whether or not they are taking strike action. However, consultants have professional obligations in accordance with the GMC's Good Medical Practice, which include, for example, making the care of the patient the doctor's first concern, treating patients considerately and working with colleagues in ways that best serve patients' interests. Accordingly, it may be necessary for a consultant to confirm whether or not they intend to strike in order to comply with those obligations (so the employer can arrange a safe level of service in their absence). Where organisations have concerns regarding whether a consultant has complied with their professional obligations in the context of industrial action, further advice should be sought as the circumstances of each case will need to be considered individually in order to decide what, if any, action is appropriate.

Q.9 Can consultants undertake private practice work during industrial action?

The key consideration regarding the issue of private practice work is whether consultants are taking part in industrial action and withdrawing labour from the NHS and then planning to undertake private practice instead, or if they will be undertaking private practice during periods where they are not scheduled to work for the NHS and this coincides with the period of industrial action.

The BMA has taken the approach that undertaking private practice where a consultant is taking part in strike action will undermine the strike effort and advised against doing so. In a Twitter post on 29 June 2023 it stated "The BMA is clear that NHS consultants planning to strike should not schedule any other work, including in private practice, when they are taking part in industrial action".

However, the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) does not prevent consultants from doing so. TULRCA defines a "strike" as any concerted stoppage of work but does not say that, in order to be considered to be taking strike action, an employee must cease all work that day, either for their employer or otherwise. Under TULRCA, it is not, therefore, unlawful for a consultant to undertake private practice work.

Organisations may have policies that expressly prevent substantively employed consultants from undertaking private practice work whilst taking industrial action (similar to policies which prohibit those on sick leave from undertaking work elsewhere). If so, it may amount to

misconduct to undertake private practice on a strike day. We recommend that employers check their local policies in this regard.

Consultants would also need to be mindful of the following four principles (stated in the DHSC code of conduct for consultants carrying out private work):

- NHS consultants and NHS employing organisations should work on a partnership basis to prevent any conflict of interest between private practice and NHS work;
- the provision of services for private patients should not prejudice the interest of NHS patients or disrupt NHS services;
- with the exception of the need to provide emergency care, agreed NHS commitments should take precedence over private work;
- NHS facilities, staff and services may only be used for private practice with the prior agreement of the NHS employer.

The [code of conduct for private practice](#) contains additional obligations relating to scheduling and best practice for arrangements. Compliance with this code is one of the criteria for pay progression.

NHS organisations which carry out on-site private services may wish to consider whether they want to refuse to permit consultants who are striking to undertake private work from those facilities. Any agreements with the consultants (such as practising privileges) and any private providers would need to be checked carefully in order to ensure that such a refusal does not breach their terms. Legal advice is recommended.

Where a consultant is not scheduled to work for the NHS for all or part of a strike day, and is scheduled to undertake private practice work, we consider that they are able to continue with the planned private work.

Q.10 How will a day's pay for consultants be calculated?

Under Schedule 20 of the [2003 TCS, section 54 of the General Whitley Council Handbook](#) applies which sets out the terms regarding the apportionment of annual salaries. Annual salaries paid monthly under the 2003 TCS are apportioned (for both full time and part time employees) for each calendar month as one-twelfth of the annual salary and for each day as the monthly sum divided by the number of days in the particular month. ESR calculates a day's pay on this calendar day basis and in accordance with the contract.

Consultant pay works in a similar way to junior doctor pay, with salary being calculated prospectively based on the number of PAs and any on-call allowances/premium time supplements. In those circumstances, the principles set out in Q1 and Q2 of the national ["pay and contract" FAQs](#) will apply.

Most organisations appear to be approaching pay deductions for industrial action on an hourly basis, even where they have the ability to deduct a whole day's pay under the contract of employment. Consequently, ESR has been reconfigured to facilitate pay deductions on an hourly basis when staff have not taken strike action for an entire day. This approach is effectively a goodwill gesture by organisations that allows them to be more generous than the contractual terms regarding apportionment of salary – it encourages striking staff to attend work on a day of action (as they are paid for hours worked) and assists organisations to maintain safe service levels.

However, organisations making pay deductions by the hour for a day of action via ESR, should ensure that this more generous approach does not inadvertently lead to a pay deduction that exceeds the employee's contractual entitlement to a calendar day's pay, that is, where staff work condensed hours and shifts which are longer than the standard hours. If this occurs, the risk would be that the organisation faces breach of contract claims.

Q.11 Can we deduct pay supplements as well as a calendar day's pay for industrial action?

This depends on which supplements are assessed prospectively, annualised and paid on a monthly basis to consultants with basic salary and which are paid retrospectively dependent on the work undertaken by a consultant in any given month or are paid annually.

Schedule 16 of the 2003 TCS deals with pay supplements and in our view the following supplements are likely to be assessed prospectively by organisations and/or be paid on a monthly basis:

- on-call availability supplement - the level of the supplement will depend on a prospective assessment of both the contribution of the consultant to the on-call rota and the category of the consultant's on-call duties. The level of the supplement paid is a percentage of full-time basis salary of between 1-8 percent.
- London Weighting Allowance in accordance with pay circulars; and
- Recruitment and retention premium as applied at a local level.

Where these payments are already accounted in the monthly amounts received by consultants and a deduction of a calendar day on ESR includes these payments, no separate deduction for the enhancement should be made where an individual takes strike action. However, where payments are made which are not averaged out and included in the annualised salary, organisations could choose to deduct these payments specifically in addition to a calendar day on the basis that they are paid by reference to actual hours worked during specific days and times and during industrial action the consultant has not worked those days/times and so should not receive the payment.

Schedule 16 also refers to clinical excellence awards, discretionary points and distinction awards. Such payments tend to be paid on an annual basis rather than being annualised and paid on a monthly basis. Whether these payments can be said to form part of a day's pay (and whether they can form part of any deduction which is made for industrial action) will depend on whether they are consolidated or non-consolidated payments. For example, local clinical excellence awards which were granted prior to 1 April 2018 are consolidated and, as such, form part of basic salary. Local clinical excellence awards paid from 1 April 2018 and onwards and non-consolidated payments which do not form part of basic salary. Our view is that non-consolidated payments should not form part of any deduction for pay for taking industrial action. Organisations may wish to consider whether they include a consolidated payment in the deduction but in our view, this will usually only be an option where the payment is also annualised and paid to an individual on a monthly basis.

Q.12 Do we approach apportionment in the same way for part time (less than full time or LTFT) staff?

Yes. As stated above, under Schedule 20 of the 2003 TCS [section 54 of the General Whitley Council Handbook](#) applies. Annual salaries paid monthly under the 2003 TCS are apportioned (for both full time and part time employees) for each calendar month as one-twelfth of the annual salary and for each odd day as the monthly sum divided by the number

of days in the particular month. Therefore, unless an organisation has varied this method at a local level so that calendar days are pro-rated for apportionment purposes for LTFT doctors, we consider that the full calendar day approach (rather than a pro rated calendar day approach) should be followed.

Q.13 Is it right to pay doctors who will be striking but are on annual leave or zero day?

During a non-working day where a doctor is not rostered to work, an individual will not be withdrawing labour and therefore no pay should be deducted. Where someone has booked annual leave, they should receive pay for annual leave even if this coincides with a day of industrial action unless an employer has evidence that the individual is associating with strike action, which could justify a deduction. For further information on the treatment of annual leave and sick leave during strike action please see [Capsticks FAQs](#).

Q.14 Will locum consultants be able to participate in industrial action?

Yes. Locum consultants employed on the 2003 TCS by an NHS employer have been balloted by the BMA and can therefore participate.

We understand that agency locum consultants have not been balloted and so are not being called out by the BMA.

Employees of an NHS employer who are not members of any union, and so will not have been balloted, will be protected against dismissal if they take part in strike action alongside the consultants who have been balloted and called out by the BMA.

Q.15 Can consultant clinical academics (CCAs) take industrial action?

A CCA's substantive employment is usually with a university and the consultant is engaged under an honorary contract in respect of any work undertaken in the NHS. We understand that CCAs who are BMA members have not been balloted by the BMA as they are not directly employed by the NHS under the 2003 TCS. As they have not been balloted, we presume that the BMA will not be inducing CCAs to take part in the industrial action and it is therefore unlikely that CCAs will take industrial action. Organisations would be able to consider taking action against CCAs under their honorary contracts if they choose to take unlawful strike action and we recommend that organisations advise CCAs to seek advice from their union where they are considering taking strike action.

Q.16 For consultants wishing to take part in strike action who don't come in during 9-5 as per their rostered shift, are they able to cover a locum shift in the evening / night shift?

The legislation does not prohibit a doctor who has withdrawn labour during his/her rostered shift from undertaking bank shifts as a locum at other times where he/she isn't rostered to work. Organisations may not want to offer bank work to striking consultants as a point of principle but use of doctors in this way is likely to be determined by an organisation's requirement to provide safe services.

Using the definitions contained within the Working Time Regulations 1998, time spent on strike can be considered a rest period. Time on strike does not count as "working time" (unless there is a collective agreement stating otherwise) as the individual is not working, not carrying out their duties and not at the employer's disposal during that period (all requirements for "working time"). A rest period is a period which is not working time, other than a rest break (the uninterrupted period of not less than 20 minutes if the worker's working time is more than six hours) or annual leave. Accordingly, if individuals are rostered

on days and strike during those periods, it is not working time (and is therefore a rest period) so the individual could then work the night shift.

Q.17 Can doctors and medical practitioners at grades below consultants cover consultant shifts?

Employers should take great care when arranging cover for consultant duties by non-consultant staff. Employers must consider skill mixes, experiences and competencies as well as determining if the appropriate level of supervision is available during any period of acting up.

Organisations will be aware that acting up to a higher grade within a unit or rotational training scheme is permissible in certain circumstances. For example, a specialist registrar judged to be within six months of the award of a Certificate of Completion of Specialist Training could act up as a locum consultant. Organisations could explore the pool of qualifying specialist registrars available during strike action for the purposes of acting up on a temporary basis as a locum consultant.

Organisations should consider the PGMDE support portal “Acting Up as a Consultant” FAQs ([PGMDE Support Portal \(hee.nhs.uk\)](https://www.hee.nhs.uk/pgmde-support-portal)) which states that *“A trainee must continue to have a named clinical and educational supervisor during their acting up period. This may be with the pre-existing supervisor or, for the duration of the acting up period, the responsibility may be transferred to another supervisor on the scheme (a decision in this respect would probably be based on locality). All supervisory arrangements must be specified in advance of post commencement and be agreed with both supervisor(s) and TPD. Whether in working hours or on-call, a trainee must have access to consultant colleagues for advice and support on clinical & legal matters at all times.”*

Q.18 What is the view of the GMC on consultants taking industrial action?

The GMC have previously shared their position regarding industrial action, providing doctors with [industrial action FAQs](#). The GMC expects any doctors choosing to take part in strike action to continue to follow the principles of their guidance, [Good medical practice](#). It highlights the importance of doctors working collaboratively with the healthcare team to keep patients safe, staying within the limits of their competence. Consultants may also wish to consider the [principles of leadership and management](#) for all doctors in discussion with employers.

Q.19 How are Additional Programmed Activities (APAs) affected by industrial action deductions?

ESR will automatically reduce payment for APAs where there are days of unpaid leave within the month and, therefore, even though a consultant works a full APA, because they have taken strike action, their pay for the APA will be reduced.

We anticipate that most organisations will want to avoid a challenge by ensuring that APAs, which are worked, are paid in full. As this is an automatic element of ESR and cannot be removed, manual calculations at a local level will be required for APAs that fall in a month during which consultants are on periods of unpaid leave for strike action.

The manual payroll calculation required to counteract a 1 APA deduction when deducting 1 day's pay is:

1 APA = 1/10th of the annual salary (basic pay plus any discretionary/distinction and pre-2018 awards payments that may apply), divided by 12 to get the monthly sum, divided by the number of days in the particular month strike action took place.

A worked example of a consultant that has 1 APA and a salary of £88,364:

$1/10^{\text{th}}$ of £88,364 = £8,836.40

$£8,836.40 \div 12 = £736.37$

$£736.37 \div 31 = £23.75$

Therefore, in this example, the consultant would need a manual payment of £23.75 per APA per strike day.

Q. 20 Can we direct non-striking consultants to undertake the work of those who are rostered to provide Christmas Day cover but refuse to do so?

Where a non-striking consultant is attending work, they can be asked to undertake different duties (including those of the striking consultant) provided such duties are reasonably incidental to those set out in the job plan of the consultant who attends work or fall within a reasonable expectation of adaptability. How willing a consultant is to move and cover the role of a striking consultant may depend on their expertise and skillset and what tasks the organisation is asking them to undertake. Where consultants attend on site and follow management instructions regarding any variation on the day of strikes, they should continue to receive their normal pay.

Any duties that consultants attending the workplace on a strike day are asked to undertake which are not reasonably incidental to their job plan, do not fall within a reasonable expectation of adaptability and/or are outside their rostered hours will be extra contractual duties, the pay rates for which should be agreed at a local level.”