The following question and answer briefing aims to provide guidance to employers in the NHS on managing the legal and practical issues presented by the threat of industrial action.

We would stress that early engagement with local staff side representatives and open discussions remain a key element in successfully resolving issues before they escalate. In the NHS, continued good partnership working and effective engagement through well-established routes, such as joint negotiating committees, can help resolve disputes.

When there is a risk of industrial action, the priority for employers in the NHS will be to ensure that any disruption does not put patient welfare or safety at risk.

We would not usually insert section numbers of statutes in our information to employers but as this is a technical area of law, where the challenges which employers can bring arise out of breaches of the Trade Union and Labour Relations [Consolidation] Act 1992 (TULRCA), this information might be useful to you in the event of a specific challenge.

Trade dispute with employer

1. Can an employer resist any industrial action on the basis a dispute is not “with the employer” and is a political dispute with the Government regarding national pay?

There is a potential argument that a dispute is with the Government and not with the employer but we do not feel that employers have a strong argument on this point, having taken Counsel’s advice on this issue at the time of previous industrial action over the Government’s proposed pension reforms. In effect, it could be argued either way and until tested, the courts’ approach remains uncertain on this point.

The unions could rely on section 244(2) TULRCA 1992 which states that a dispute between a Minister of the Crown and any workers shall, notwithstanding that he is not the employer of those workers, be treated as a dispute between those workers and their employer if the dispute relates to matters which:

a. have been referred for consideration by a joint body on which, by virtue or provisions made by or under any enactment, he is represented or

b. cannot be settled without him exercising a power conferred on him by or under an enactment.

In the light of Counsel’s previous advice we do not think we have a strong argument which will succeed on this point.
Emergency life saving care

2. Can the requirement to provide emergency/life saving care be used to prevent strike action being taken?

Potentially, yes. Section 240 TULRCA 1992 states that a person commits an offence who wilfully and maliciously breaks a contract of services or hiring, knowing or having reasonable cause to believe that the probable consequences of his doing so, either alone or in combination with others, will be to endanger human life or cause serious bodily injury or to expose valuable property, whether real or personal to destruction or serious injury (section 240 (1)(a) and (b)).

Discussions with the relevant union(s) or a protocol for industrial action could deal with the union’s proposed response to arrangements for critical and emergency care. However, in previous industrial action some unions expressed a reluctance to engage with employers to produce a protocol for industrial action or indicated that they could not set out proposals until the outcome of the ballot is known.

One strategy to be considered here would be to discuss informally with the unions how they consider they will comply with the section 240 requirements in respect of critical and emergency care during strike action. Unions may reply that they cannot give proposals before the outcome of any ballot. Once the outcome of the ballot is known and if a strike is to occur, then we would suggest using a more formal written approach to this.

3. Can we argue that all patient-focused areas should be exempt from industrial action?

In the past, some union branches have raised the issue of exemptions with NHS employers. Employers do not have a right to insist that certain areas of the workplace should be exempt from industrial action under TULRCA but it appears that exemptions tend to form part of the discussions between unions and employers in the run up to industrial action.

Section 240, which is referred to above, makes it a criminal offence for a person to strike or take other industrial action if to do so is likely to endanger human life. We understand that the subject of exemptions has been raised as a result of this liability.

Unison’s handbook refers to the fact that branches should be prepared to grant exemptions where there would otherwise be a direct danger to life and limb of any person, such as in the emergency services. It goes on to state that exemptions should not be based on the administrative convenience to the employers and exemptions will not be necessary where management make their own arrangements, such as deploying workers prepared to break the industrial action.

Discussions should be initiated with unions to the extent that this matter has not already arisen. Whilst it is difficult to predict where the greatest staff shortages will be in relation to each department (given that it is not only union members but also non-union members who may take part in industrial action), it is recommended that employers identify which departments they need to indicate to the unions should be exempt from industrial action. We believe that it is unlikely
that a union will agree that all patient-focused areas will be exempt. However, it is clear that areas such as critical care, A&E, maternity, dialysis, pharmacy and radiology should all be included within the exemptions.

**Dealing with anomalies in ballot notices and requests for information**

4. Where the unions tell the employer that they will be balloting “all members employed by your organisation paying subscriptions by DOCAS” from which you will be able to deduce the numbers, categories and workplaces of the employees concerned, can they do this without providing anything more?

Yes. Section 226A(2)(b) provides that the unions can provide either the list of numbers, categories and workplaces of the employees, or simply refer employers to the information held by them from which they can readily deduce the information.

5. Where the ballot notice includes a list of members described as “non-DOCAS membership” and there are anomalies or inaccuracies in that information (i.e. “workers who do not work at the organisation” or “unknown” categories of worker or workplaces) what should an employer do, and what are the factors a court will consider in granting an injunction?

The unions have to provide information which is as accurate as reasonably practicable. Employers should consider what information the union is likely to have in their possession and whether they feel that the unions could have provided more comprehensive information and what evidence the employer has to support this assertion. For example, what information does the employer provide periodically to the unions which would enable them to provide more accurate information?

The Code of Practice on Industrial Action Ballots and Notices to Employers (http://www.bis.gov.uk/files/file18013.pdf) recommends that it would be good industrial relations practice for an employer who believes the notice he has received does not contain sufficient information to comply with the statutory requirements, to raise this with the union promptly before pursuing the matter in the courts.

Employers should also be aware of s232B which deals with the effect of small or accidental failures in regard to the ballot itself and provides that any failures may be disregarded if it is, or if they taken together, are, ‘accidental and on a scale which is unlikely to affect the result of the ballot’.

In considering this the courts have previously upheld an injunction restraining industrial action where the union balloted 91 members and of those, 25 voted in favour of strike, 17 against strike and 49 abstained. It was subsequently discovered that a further 25 members had not received the ballot papers and were not given a chance to vote. The court considered that this number was too significant a number to be disregarded and allowed an injunction.
In each case where a ballot notice has been served it will be important to assess the numbers of employees being balloted and the impact of the scale of error on the outcome of the ballot.

In view of the cost of pursuing injunctive proceedings, as recommended by the Code of Practice, we would advise that clarity is sought initially where there are errors or inaccuracies which either do not comply with the legal requirements or which makes contingency planning difficult.

If an injunction is requested the courts will look at whether the union’s efforts in providing the information were reasonable or unreasonable. Until the case of *London Midlands v Serco*, courts were prepared to intervene in such circumstances and there was little appetite to allow unions to hide behind an inaccurate database.

However, following this case, if unions are doing the best they can to provide information, even where they have negligently or carelessly maintained data, doing the best they can is likely to be sufficient. There is no duty on the union to keep an up-to-date database. If the employer is being deliberately misled by the union where it is believed that they hold information, this position can be challenged more robustly. Employers should be aware that the threshold to show that the information is ‘deliberately vague’ is a high one which will require good quality evidence and for those reasons obtaining an injunction in these circumstances can be difficult particularly where the margin of error is on a small scale.

6. **We hold information which appears to be more accurate than the information in the union’s possession – should we share this with the union and how should the trust respond to unions request for information?**

NHS organisations should be clear that any sharing of information with the unions is in breach of the Data Protection Act 1998 (DPA), as assisting with a request from a union about its members does not fall within the “necessity” category of the DPA. Similarly, as the employer is effectively helping the union to fulfil its legal obligations under TULRCA, it is difficult for the employer to rely upon the exemption that disclosure is to comply with a legal obligation.

There is nothing in any ACAS or other authoritative guidance which suggests that an employer ought to disclose or check off information in connection with such a ballot.

Unless there is clear consent for this information to be released to the unions, consent needs to be obtained. In practice this should not be difficult for the unions to facilitate.

If the employer has better quality information and sends a document in electronic format which holds accurate information regarding workplaces and categories, and the union is provided with this following service of the ballot notice, the union should then go through this to update/correct the information in the strike notice, in the event of the ballot supporting strike action. If they do not carry out a further filtering process in readiness for service of the strike notice, the employer can say that the union has not made reasonable attempts to make the strike notice as
accurate as they could, even though the employer has provided the better quality data. This can put the employer in a stronger position to challenge the unions initially in a letter before action which indicates the extent of the union’s failures. If this does not receive an adequate response, you may have grounds for an injunction and should obtain legal advice on your position.

Data Protection Act issues aside, providing better information may help you to plan for industrial action. Where the union fails to ensure that strike notices are as accurate as the information which you have provided to them, you are likely to have better grounds for challenging a failure to meet the legal requirements.

7. Can the unions ballot members who are not due to work on the day of action which is identified?

Yes. In London Underground Ltd v ASLEF [2011] the ballot asked members whether they were in favour of industrial action on Boxing Day. Members who were not due to work on Boxing Day were balloted and London Underground argued that ASLEF could not have reasonably believed that such members would be induced to take part in the strike and therefore the ballot was defective. The High Court disagreed. The wording of section 227 of TULCRA refers to the entitlement to vote in the ballot being given to all those who will be induced to ‘take part’ in the action. The ballot is not required to be limited to those persons who will be induced to withdraw their labour in breach of contract. The judge referred to the Bolton Roadways case (see below in “Who is Participating”) where it was established that someone who is on holiday or sick leave is capable of taking part in a strike.

8. How accurate do the unions need to be in terms of who they send ballot papers to?

Under section 230(2), so far as is reasonably practicable every person entitled to vote in the ballot must have a voting paper sent to him and be given an opportunity to vote. In terms of the conduct of the ballot so far as is reasonably practicable voting should be in secret and the votes fairly and accurately counted. Section 230(4) goes on to state that any inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot.

There have been a number of cases recently which have looked at whether unions have complied with their duties in organising a ballot.

In British Airways v Unite, Unite sent ballot papers to employees who were due to leave employment under a voluntary redundancy scheme. It was held that Unite had not taken reasonable steps to exclude these people from the ballot and therefore the ballot was defective and an injunction was granted.

In the recent case of Balfour Beatty Services Limited v Unite, the High Court found that the unions are not required to take all steps that are reasonably practicable to ensure the accuracy of the balloting constituency. Instead union officials can exercise their own judgement. In addition, in this case it was found that ‘accidental’ means no more than unintentional – it does not require the failure to be caused by some occurrence outside the union’s control.
The current case law appears to seek to strike a balance with regard to small accidental errors. However, if there are defects in the balloting process which have a genuine and material impact on the outcome, the ballot will still be open to challenge.

**Votes – aggregating and separate sites**

9. **Is it possible to aggregate votes across the NHS in determining whether to strike and how would that work?**

Under section 228 TULRCA, there should be separate ballots for those union members entitled to vote at each workplace. "Workplace" is defined in section 228(4)(a) as "the single set of premises at or from which the person works". Case law suggests that "premises" is wide enough to cover different units or departments that are contained in the same building or situated at the same location. It would not be wide enough to cover all of an employer’s sites within a particular area. When separate workplace ballots are held the majority has to answer yes at each workplace to support industrial action.

However, s228A provides that there can be a single ballot if:

— the workplace of each member entitled to vote in the ballot is the workplace of at least one member of the union who is affected by the dispute (228A[2]);

— entitlement to vote is given to all union members at those sites whose union reasonably believes have a common occupation, and are employed by a particular employer or by any number of particular employers with whom the union is in dispute. For example, a union could ballot in one single ballot all porters or all nurses (228A[3]); or

— entitlement to vote is given to all members of the union who are employed by a particular employer or by any number of particular employers with whom the union is in dispute (but no others) (228A[4])

The last exception will only apply where the union ballots all its members across the different employers. In terms of section 228A[3], if the union ballots its porter members at two employers but not at all of the employers where porter members are employed, a single ballot will need to be held at each employer.

For example, when ballots were held regarding changes to the NHS Pension Scheme, the trade dispute between the workers and their employers was the same in that it related to workers’ pensions across the NHS. To the extent that the entitlement to vote was given to all members of the union (under section 228A[4]) or to all members of the union which have an occupation of a particular kind at different employers (under section 228A[3]), and the union was in dispute with those employers, under section 228A the ballot was able to be aggregated.

10. **Can non-balloting unions also call their members out on strike in sympathy and gain immunity from inducing a breach of contract by relying on the fact that they have the same “trade dispute”?**

No. They will effectively be inducing their members unlawfully to go out on strike, which means that they do not have immunity from breach of contract.
Tactically, employers will need to be watchful for evidence of inducement (literature being circulated etc) and this might prove difficult to obtain in advance of any day of strike. If members of non-balloting unions ask about their degree of protection and what their position is then the employer should advise them to talk to their unions. Although employees who do spontaneously take strike action are running the risk of dismissal because their immunity protection is limited, dismissal for striking is a highly hazardous issue and this should be avoided. We suggest that organisations take legal advice before proceeding with a dismissal on these grounds.

11. What happens if members at a particular site vote against the strike? Presumably that site will not be protected and they could not then come out in sympathy with those members who have voted for strike action at another site?

Where a vote has not been aggregated, this is correct as it would be secondary action.

In cases where a union has aggregated the vote across a number of workplaces and the majority is in favour of industrial action, it is lawful for the union to organise industrial action in any such workplace even if members at a particular workplace have voted against strike action.

**Notice of result of ballot and calling out**

12. Does the union need to inform the employer of the result of a ballot notice and/or that the union is calling industrial action? How would this obligation be affected if the ballot notice is aggregated?

As soon as reasonably practicable after holding the ballot, the union must take such steps as are reasonably necessary to ensure that every relevant employer is informed of the result of the ballot, giving the same information as it is required to give under section 231 to the persons entitled to vote, i.e. the total number of votes cast, the numbers of “Yes” and “No” votes and the number of spoiled voting papers.

The ballot ceases to be effective within four weeks of the close of the ballot (unless extended by agreement for eight weeks) and expires at midnight on the final day.

“Relevant employer” means any employer who it is reasonable for the employer to believe was the employer of any persons entitled to vote at the time of the ballot (s231A(2)). Where a union ballots members employed by different employers, the union must supply the information to each of the employers concerned. If the union fails to do so, the industrial action will not be regarded as having the support of a ballot in relation to that particular employer. A union may, therefore, still call on its members to take action where the employer of those members was informed of the ballot result, even if other employers were not informed.
13. How much notice does a union need to give the employer, for it to be classed as legal industrial action – specifically in relation to notice to strike? What information does the union need to give the employer when calling employees out on strike?

Unions must take such steps as are reasonably necessary to ensure that any affected employer receives within the “appropriate period” a “relevant notice” covering the proposed industrial action. “Appropriate period” is the period starting with the day on which the union informs the relevant employers of the ballot result, and ending with the 7th day before the (first) day of action. The notice must be received by any employer who it is reasonable for the union to believe is the employer of an affected employee (s 234A(2)).

A “relevant notice” must contain essentially the same information as in the ballot notice (under section 226A) regarding categories of employees and their workplaces, together with figures showing the total number of employees, the number of employees in each category, and the number in each workplace. However, the relevant notice differs from the ballot notice in that it must give this information in respect of the “affected employees”, who are those who the union reasonably believes will be induced to take part in the action. Therefore, it is possible that a greater number of employees will need to be included in the relevant notice than in the ballot notice as there may well be employees who will be induced to take part in the strike who were not entitled to vote or who are not even union members.

One thing for employers to consider is whether there are differences between the ballot notice and relevant notice in terms of the personnel. If, for instance, a re-organisation has taken place which means that personnel were included in the ballot notice who are to be made redundant, the ballot procedures may be open to challenge.

14. Is there a long stop date for the effectiveness of a ballot? If unions want to call members out on dates in addition to those already given are they required to hold a new ballot? Does it make any difference whether the action is ‘continuous’ or ‘discontinuous’?

Under section 234, a ballot is ‘effective’ for the periods specified – i.e. four weeks or eight weeks with the agreement of the employer (or the special provisions where there are intervening court proceedings). Section 233(3)(b) states that the industrial action must begin within this effective period. However, there does not appear to be any long stop date for continuous or discontinuous action. The only requirement is that the employer is given at least seven days’ notice of the action, so in the case of discontinuous action, either a full list of dates needs to be specified at the outset, or a separate seven days’ notice is required for each date that was not originally specified.

If continuous industrial action is suspended by agreement between the employer and the unions and when the suspension date and the recommencement date are also agreed, no further notice is required to recommence the continuous action. In addition no further notice is required if the action has been interrupted by a court order. However, in any other circumstances, a further period of notice must be given before the continuous action is resumed.
If additional dates for strike action are proposed, the main basis on which they could be challenged by employers is whether the industrial action is the “same industrial action”. If different workers/workplaces are involved, or the dispute has changed in some way, then a fresh ballot will be needed. There is no case law on this point but it seems likely that it will be more difficult for a union to argue that a strike date 12 months after the ballot will be the same industrial action, as the dispute is likely to have moved on in some way.

**Injunctive proceedings**

15. On the basis that an injunction is seen as a last resort and we try to work with the unions to get clarifications, please clarify the ‘cut-off date’ (i.e. the date by which we can challenge any breach of requirements) and the basis for that?

There is no cut-off date but the Code of Practice advises employers to raise any challenge about breaches of the requirements promptly. You may challenge the breach of requirements at any point following service of the ballot notice or the notice of strike action, but in the latter case, clearly the sooner the better to ensure that you have time to send a letter before action and if necessary, pursue an application for an injunction.

16. What are the practicalities of bringing injunction proceedings?

Each employer must apply for its own injunction and if there are similarities in the issues being challenged by a number of NHS bodies, it would be wise for trusts to consider making financial contingencies for proceedings and considering with legal advisers how this can be managed in the most cost efficient way (e.g. pooling of a budget for some organisations to take up particular challenges).

Each employer would need to support their application with witness evidence regarding the alleged breach of procedure.

**Contingency planning**

17. If the trust’s payroll department holds the names of employees for whom deductions are made regarding union subscriptions, can the trust use this information to identify members of staff for the purpose of better contingency planning? If it does use this information, would it amount to a breach of the DPA?

Information as to whether a person is a member of a trade union is sensitive personal data under the DPA. The conditions for processing such data lawfully include that explicit consent to processing having been given by the data subject (the employee). Agreement and notification by an individual to allow the employer to deduct union subscriptions from salary would not on its own be sufficient for the employer to rely upon to justify the disclosure of information to the union. In the event of a request, we recommend that each employer should check the terms of any consent to see whether wider disclosure is permitted. If not, further consent is required.
There are other statutory conditions which allow the processing of sensitive personal data. These include where disclosure is necessary for the purpose of performing any legal obligation imposed by law on the employer. However, it is difficult to see how an employer could sustain an argument that they were complying with a legal obligation when there is no obligation on the employer under TULRCA to provide information - that duty falls upon the unions not the employer.

18. Could we send an email to staff persuading them not to strike or take action short of a strike?

Staff can be contacted to try and discourage them from taking part in industrial action but the language used by employers should be measured and conciliatory.

In trying to persuade people not to take action, employers may wish to consider the following:

— expanding on the bigger picture, for example the reputational and financial damage to the organisation (and inconvenience to its service users and patients) if the strike goes ahead, with attendant adverse consequences for future pay and employment prospects

— explaining that if employees are opposed to the strike, it is important they use their vote and therefore ensure the strike is not approved by default on a low turnout. Supporters of the strike are generally more likely to vote than those opposed

— reminding employees (but not in a confrontational fashion) that they will not be paid while they take part in a strike.

19. Can volunteer personnel be legally requested and/or offer to help keep a service running during industrial action by substantive personnel (if skills and training are appropriate)?

NHS organisations faced with industrial action will sometimes want to consider reorganising or bringing new staff in to deal with the shortage of employees owing to the industrial action.

There is only one legal restriction on the way in which employers approach this situation and that is under paragraph 7 the Conduct of Employment Agencies and Employment Businesses Regulations 2003 which prevent an employment business from supplying the employer with agency workers to perform the duties normally performed by a worker taking part in a strike or other industrial action.

According to these Regulations, this restriction is imposed only on the employment business, not the employer although there has been commentary that the employer may be liable for aiding and abetting the offence.

“Employment business” under the Regulations means an employment business under section 13(1) and (3) of the Employment Agencies Act 1973 which is “the business of supplying persons in the employment of the person carrying on the business to act for and under the control of other persons in any capacity”. This definition is sufficiently vague that it could include any NHS organisation supplying staff to others.
In the 1973 Act the definition of employment business contains exceptions under section 13(7) and as originally enacted an exception was included for any agency for the supply of nurses under the Nurses Agencies Act 1957. However, this section was repealed by the Care Standards Act 2000. The result is that nurses agencies will fall within the definition of employment agencies and businesses for the purpose of the Regulations.

It is open to employers to use in-house banks and volunteer personnel to cover staff absences due to strike action. Using locums will not be unlawful unless they are supplied through an employment business for the purpose of doing the work that would have otherwise have been performed by those taking action.

20. **Can we ask employees if they intend to take industrial action?**

There is no objection to asking staff in advance whether or not they intend to strike, although they will not be obliged to answer or may change their mind at the last minute. The request should be made as widely as possible given that both union members and non-union members may strike or take action short of a strike (see below).

**Picketing**

21. **Is there a maximum number of picketers permitted?**

Under section 220, picketing (which will attract immunity from liability for the industrial action torts conferred by section 219) will be lawful where it is undertaken at or near (not on) the place of work by:

a. a worker of the employer,

b. an ex-worker of the employer who has been dismissed in connection with the trade dispute, or

c. a trade union official accompanying someone under (a) or (b).

The purpose of picketing can only be to obtain or communicate information, or to persuade any person to work/abstain from working. In addition, picketing must be done peacefully (with no threatening or intimidating behaviour).

Section 220 makes no reference to the number of pickets allowed on a picket-line. The reference to “peacefully” means that large numbers of pickets can make a picket line intimidating which is why the Code of Practice on picketing ([http://www.bis.gov.uk/files/file23914.pdf](http://www.bis.gov.uk/files/file23914.pdf)) states that there should be a maximum of six pickets at each entrance/exit of a workplace.

The Code of Practice does not make it unlawful to have more than six pickets at the picket line nor is less than six a guarantee of lawfulness. The Code of Practice is instead a guide to the number of people that should not intimidate others trying to attend work and cross the picket line. Courts will usually try and limit a picket-line to six.
22. Are picketers allowed to have supporters with them?

Unless an individual falls within the three categories identified above, they will not be lawfully picketing. A “supporter” who does not fall within the scope of section 220 would have no legal right to remain at or near the employer’s entrances/exits. They could therefore be moved on by police and are potentially committing a civil or criminal offence. There is no tort or crime of unlawful picketing. Instead there is a loss of statutory protection from the industrial torts under section 219 and pickets leave themselves exposed under other torts and criminal offences. Whether an offence actually takes place will of course depend on what happens on the picket line.

Strike action – pay

23. An employer can withhold pay for any day on which the employee takes part in a strike. In the case of a ‘day of action’, what is the definition of a day?

Employees who participate in industrial action will be in breach of their employment contract in failing to perform their duties. Trusts are not obliged to pay employees during the time they are taking part in industrial action.

There is no statutory definition of ‘day of action’ but it is safe to assume that the day in question commences at midnight and runs for 24 hours.

24. Does this mean 24 hours or the individual’s contracted working hours or overtime?

If the contract specifies normal working hours and pay is calculated by the hour, then the deduction will be determined by reference to the hours lost. For example the deduction for a shift worker will simply be for the hours of their shift which fall within the strike day. The employee should then be paid for the hours of the shift which do not fall within the strike day.

On the other hand, if the employees are paid a salary, then this is deemed to accrue from day to day, and this means calendar day, not working day (section 2, Apportionment Act 1870) which is 1/365th of the annual salary for every strike day. This leaves a potential shortfall for the employee.

However, if the contract indicates a contrary intention, the Apportionment Act can be disapplied. If so, it may not be difficult to argue for a more realistic deduction based on the number of working (not calendar) days in a year. In *Cooper and others v Isle of Wight College* [2008], the High Court considered that “where there is a definition of a normal working week in the contract and a contractual entitlement to holiday pay”, this would indicate an intention to disapply the Apportionment Act and so “the salary payable whether expressed annually or otherwise or whenever paid should be apportioned over the days of the normal working week throughout the year”.

A claim for unlawful deductions in relation to wages which have been withdrawn for taking part in industrial action cannot be brought in the tribunal and should instead be brought in the county courts which carries a greater risk in terms of costs.
25. How is an employee’s pay affected if their shift falls partly within and partly outside the day of strike action, with the result that they only work part of their shift?

Again, to some extent this may depend on whether the employee’s pay is calculated by the hour, or whether they are paid a salary that accrues from day to day. However, if the employee’s shift runs from, say 7pm-7am, with the strike starting at midnight, they may be entitled to pay in respect of a proportion of the day for which they work. If, however, that same employee is due to work again at 7pm that evening, they will presumably not start their shift until midnight, so they will in fact have missed an entire day’s work, and therefore lose a full day’s pay.

The issues are broadly the same as discussed above.

The employer may wish to argue that only working part of an employee’s shift equates to partial performance of his/her contract. If an employer warns employees in advance that part performance will not be acceptable and they continue to work only part of the shift, the employer may accept the breach of contract and deduct pay for the entire shift. This would not involve physically removing them from the premises but they would need to be told that partial performance is not acceptable and that any work they do would be voluntary. This may well inflame a situation as it would amount to a “lock out” by the employer and would not assist in maintaining service levels. Employees would need to be informed in advance that part performance would not be acceptable.

Who is participating?

26. Can non-union employees take part in industrial action?

TULRCA makes no distinction between union members who have been balloted and non-union members in terms of the protection given to those who participate in industrial action.

An employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike.

Section 237 deals with unofficial action. It is important to note that the same industrial action can be official for one employee and unofficial for another – what is important is to identify whether 237(2) applies to a particular employee. Section 237(2) states that a strike or other industrial action will be unofficial in relation to an employee unless:

a. he is a member of a trade union and the action is authorised or endorsed by the union;

b. he is not a member of a trade union, but there are among those taking part in the industrial action, members of a trade union by which the action has been authorised or endorsed.
For members of unions, the action will not be unofficial if they take part in it under section 237(2)(a) if their unions will have endorsed the action. Similarly for non-union members who take part in industrial action the action will not be unofficial provided members of a union that has properly balloted and voted in favour of industrial action are among those taking part in the action. This means that if their employers move to dismiss them, they will be exposed to claims of unfair dismissal.

However, the result of section 237(2) appears to be that employees who are members of unions which have not authorised or endorsed the action will be taking part in unofficial action if they go out on strike. If they are taking part in unofficial action, they will not have the right to complain of unfair dismissal to an employment tribunal if their employer dismisses them. In our view members of unballoted unions do not gain protection simply because they are members of a trade union.

Whether a union has endorsed or authorised an act is a question of fact but it is a separate matter from whether they have balloted about the industrial action. If a union endorses or authorises industrial action but has not balloted its members about this, it will lose its immunity under section 219 from inducing breach of contract. Unions that have not balloted but who endorse or authorise the action and, as a result, their members go out on strike, would lose their immunity.

27. If someone was on planned annual leave during the period of any industrial action, will this remain as annual leave and be paid under normal arrangements?

In terms of pre-booked annual leave, it would ordinarily be advisable for this to remain and be paid as such, even if it coincides with industrial action as long as the employee does nothing which is consistent with associating with the strike or taking part.

To illustrate this, in the case of Hulse and anor v E Hillier and Son (Engineering) Ltd an employee had a day’s holiday booked for a day which was subsequently selected for strike action. On the day itself he contacted management to check that the holiday was still available to him and then went to work to collect some tools. He spoke to workers on the picket line. It was found that this action did not mean that he had associated himself with the workers. Instead he had made a positive decision to take holiday rather than join the strike.

However, under the Boltons Roadways Ltd v Edwards and ors case [see below] an employee who is not contractually required to work because of holidays or sickness can still be viewed as taking part in a strike if he or she associates him or herself with the strike. Whether employers withhold pay in relation to staff who have holiday booked during a day that is selected for industrial action will depend on whether there is any evidence that the employee has been taking part in the industrial action in advance of the day or on the day itself.

In terms of annual leave requests which are submitted in the run up to a strike day and which will coincide with it, there is nothing to prevent an employer from taking a policy decision that such requests will be refused using the argument that the industrial action will cause staffing issues within the organisation and therefore no further annual leave can be approved for that day.
If an employee is absent without permission during a period of industrial action, it is legitimate to ask them if they were on strike on 30 November for the purposes of establishing whether pay should be withheld. Unless there is evidence to the contrary, it would be acceptable to assume that the employee is participating in strike action and that their pay should be withheld.

28. Does this advice change in relation to sick leave?

No – the key issue is whether the employee has taken part in the action or indicated a prior intention to do so, even if they are off work ill. To illustrate the case law approach to this issue, in Hindle Gears Ltd v McGinty and others, the EAT held that an employee who had been off sick and had presented certificates to that effect since well before a particular strike date began was not participating in the action. In this case it was held that the employee attending work for the purpose of handing in his medical certificate who spends some time with pickets could not be said to be participating in the industrial action.

On the other hand, an employee who has been taking part in the action, or indicated an intention to do so, is likely to be held to be still taking part even if he or she happens to be too ill to work. In Bolton Roadways v Edwards and others the EAT held that an employee was taking part in industrial action even though he phoned in sick on the morning of the strike. The tribunal had found that he was taking part because, before falling sick, he had actively associated himself with the action, offering support and advice to a group of pickets. The EAT held that the fact that the employer did not know of these activities was irrelevant.

29. How can this process be managed? Will their GP give medical certification for one day when the current process is self certification for seven days? – and if they do, should we expect staff to take extra time off to get the medical certificate? This will also get complicated if the strike day is in the middle of a period of self certificated leave?

Employers may wish to introduce new arrangements for reporting sickness on the first day of absence if this coincides with the first day of industrial action. Employers may consider introducing a requirement that any period of absence during industrial action should be supported by a doctor’s certificate [as an exception to the practice of allowing self certification for the first seven days of sickness] or that such an employee must report to a nominated occupational health advisor.

Such a policy should be introduced in advance of any dispute so that employees have notice of this requirement. Employers who are facing difficulty on this issue may consider offering to pay for any charge made by the doctor for a medical certificate to ensure that the change in the sickness reporting arrangements are seen to be fair and reasonable in the circumstances.

It is legitimate to ask employees if they were on strike for the purposes of establishing whether pay should be withheld.

For those employees who have commenced a period of self certification prior to strike action, unless there is evidence to the contrary, in line with the McGinty case above, it is recommended that they should not be assumed to be participating in strike action.
Taking action as a result of industrial action

30. Employers want to offer overtime following industrial action in order to clear backlogs but do not want to offer it to anyone who took industrial action, on the basis that this would in effect be paying them for taking action. Can they do this?

TULRCA provides protection against unfair dismissal for those taking part in official strike action (section 238A). TULRCA also provides protection against detriment and dismissal for workers in relation to union membership or activities (sections 146 and 152). TULRCA does not, however, contain a separate provision which offers protection against any detriment short of dismissal which is taken by an employer because a worker has participated in industrial action.

Refusing to offer overtime to a worker who has taken industrial action may be viewed by the relevant employee as a detriment in that they are being put at a disadvantage. The question arises whether doing so falls under section 146 and constitutes union activities. Again, TULRCA does not contain a definition of union activities.

Section 146(1) states that a worker has the right not to be subjected to any detriment by his employer for the sole or main purpose of penalising him from taking part in the activities of an independent trade union at an appropriate time.

The definition of “appropriate time” (outside working hours or at a time where the employer agrees to taking part in the union activities) causes difficulties for those who take part in the strike and as a result it is unlikely that those taking part in the action will benefit from section 146.

There is an EAT case which has looked at the issue of whether industrial action falls under section 146. In *London Borough of Islington v Hutchings* [2001] it was submitted that there is a clear distinction between that which falls within the description of ‘trade union activity’ and that which falls within the description of ‘participating in industrial action’. The EAT found that merely participating in industrial action, as a trade union member, cannot of itself, fall within the provisions of section 146.

The result of the above is that employees who are not offered overtime because they were taking part in the strike will not have a remedy as far as their statutory rights are concerned.

There will be the usual problems about constructive dismissal (but we would query whether a worker will really argue that refusal of an overtime shift constitutes a repudiatory breach of their employment contract) and in addition Article 11 of the ECHR could come into play. There is an argument that TULRCA is inconsistent with Article 11 of the ECHR in failing to provide protection from detriment for taking part in a strike. The European Court of Human Rights has determined that other national legislation which permits the imposition of a detriment for exercising the right to strike is an impermissible impediment and amounts to an unjustified breach of Article 11. There is always, therefore, a chance (albeit a slim one) that those employees who are not offered overtime challenge their employing body on the basis of Article 11.
**Action short of a strike**

31. **What other action could the unions take instead of a strike?**

A strike is defined as any concerted stoppage of work but industrial action can take many other forms, for example, go slows, work to rule or a ban on overtime. ‘Action short of a strike’ is a term used to cover industrial action which does not constitute a stoppage but where work is affected in some way. For example, in the industrial action called by the BMA in June 2012, it was proposed by them that doctors attended their usual place of work but non-urgent procedures would be cancelled with doctors undertaking emergency work only.

Unions are not obliged to inform employers of what form any action short of a strike will take, although in practice they will often do so.

32. **If staff provide partial performance of their duties, will there be a breach of contract?**

This depends on their contract of employment. An employee whose contract states that they are employed to carry out emergency work only would not be in breach of their contract of employment if they attended work and continued to provide emergency care. That being the case, no pay should be withheld.

However, where an employee’s role and responsibilities include the provision of non-urgent care such as routine appointments, ward rounds, supervision of trainee doctors or other staff, taking such action would constitute a withdrawal of co-operation and a breach of contract. This is because the employee will only be partially performing their contract.

Whether the action breaches the employee’s contract of employment has an effect on whether pay can be deducted by their employer (see below).

When employers receive notice from the unions of proposed action short of a strike, it will be essential to review rotas in order to establish which employees will be, or will be likely to be, in breach of their contract and which will not.

**Action short of a strike – withholding of pay**

33. **If the employee is taking part in action short of a strike, can pay be withheld?**

Where the employee is in breach of contract in taking part in action short of a strike, this raises the possibility of making a deduction from pay for the period during which the employee is not performing his/her duties by taking part in the action.

The first question is whether the employer wants to accept partial performance by the employee. An option usually available to employers faced with this scenario is to make clear that it will not accept partial performance and that employees should not attend work - this is known as a lock out. However, the risk, of course, for employers in the healthcare sector in refusing to accept partial performance in this way is that patient safety and care could be further compromised.
Employees themselves will be conscious of any duties they may have under relevant codes of conduct and should also be aware of the criminal offence which can be committed by an employee under section 240 in terms of endangering life. One option for employers is to make clear that whilst employees may attend work, partial performance will not be accepted and that any work undertaken will be voluntary. However such an approach will no doubt be controversial and be likely to lead to industrial relations difficulties. To the extent that employees are present at work in order to provide emergency care, we suggest that they should receive an element of pay commensurate with work in fact carried out. On this basis, rather than paying a full day’s salary for what will effectively be work in breach of contract for many employees, employers should consider making a deduction from pay for partial performance.

34. How much pay should be withheld for partial performance?

There is no set method for calculating a deduction in respect of partial performance of a contract of employment. In the healthcare sector where the loss attributable to partial performance is difficult to quantify, this is particularly problematic.

There are no reported healthcare cases on this issue but there are two teaching cases which are of assistance in trying to quantify the cost of loss of an employee’s service. In the first, Royle v Trafford Borough Council [1984] a teacher refused to take on a further five pupils to a class of 31. The employer withheld salary for a period of six months because of this refusal and Mr Royle brought a claim in the High Court. The court held that the employer was entitled to his salary for six months but less a deduction of 5/36ths which the court considered to be just in respect of his refusal to take on the additional students.

In Sim v Rotherham Metropolitan District Council [1986] the employer set-off part of teachers’ wages where they had refused to cover for colleagues. The court ruled that the teachers had a contractual duty to behave professionally, and to refuse to cover was to behave unprofessionally and therefore in breach of contract. The set-off was proportionate to the time they would have spent covering colleagues.

The roles which are undertaken by those employees who choose to take action short of a strike will vary enormously. Attributing a cost to each part of each employee’s role is clearly unworkable from an administrative point of view. Instead we suggest that a protocol should be agreed in advance with local union/JNC representatives as to how the deductions will be calculated.

We recommend that the starting point should be rotas overall, to try and establish the percentage of time spent on work other than urgent/emergency work in an average day per rota, rather than having to look at each individual job plan. An average deduction could then be made from the salary due to staff in respect of the usual duties which they will not carry out on the rota.

This may not prove feasible and so a more uniform approach (e.g. making a deduction of 20% from the salaries of all who take action) might be considered. Such an approach is not immune from challenge. Employers will be in the best position to defend a legal challenge, if the deduction generally reflects the extent of the partial performance.
Employers should also be mindful of the practical difficulties associated with requiring changes to payroll and the possible financial penalties that might be imposed by external payroll providers.

35. Could employees challenge a partial deduction of salary in the courts?

An employee would not be able to bring a claim for unlawful deduction of wages, in the Employment Tribunal. This is because there is an exception under section 14 of the Employment Rights Act 1996, in respect of deductions made on account of an employee taking part in a strike or other industrial action. However, employees could bring claims for breach of contract in respect of unpaid salary in the High Court or county court.

36. What steps should be taken in the event of proposed action short of a strike?

We would recommend that employers commence negotiations locally with union representatives to agree a protocol on how to deal with any action. It will be important to try to agree the following points:

- Which departments and rotas will be affected.
- What constitutes emergency/urgent care in particular in respect of such areas as oncology and maternity.
- What is expected of staff due to work.
- How the deduction from pay will be calculated.
- How holidays and sickness will be dealt with.

Immunity

37. The unions appear to believe that the immunities associated with a legal ballot provide legal protection against any action taken by the regulatory bodies for health professionals. Is this correct?

The protection offered to employees who take part in official industrial action is in relation to dismissal by their employer in that the employee can bring a claim for unfair dismissal. TULRCA does not confer protection on an employee for action taken by his/her regulatory body. If regulatory bodies threaten or take action where an employee is lawfully striking, it is difficult to see how the regulatory body can take action against the employee. However, where there is a breach of contract, for example, an unreasonable refusal to carry out working duties normally expected of the employee, which leads to endangerment of life or injury to a patient, this may put the decision to take action by a regulatory body in a different light.
38. If the ballot papers invite support for strike action only, does immunity apply only to strike action and not to any action short of a strike?

Immunity under section 219 only applies where the requirement for a ballot has been complied with and under section 226 it states that industrial action shall be regarded as having support of a ballot only if the majority of those voting in the ballot answer “yes” to industrial action of the kind to which the act of inducement relates. Therefore, if a union were to try to call out members to take part in action short of strike action where the ballot only refers to strike action, then the action will not have a lawful mandate and the risk for them will be that the lose their immunity under section 219.

Days of action or protest

39. Does TULRCA apply to days of protest?

There is no statutory definition of industrial action. However, protests similar to those held on 5 June 2014, which may involve rallies and demonstrations at lunchtime, recruitment drives and local publicity and social media activities, do not fall within the provisions of TULRCA. In certain circumstances these could lead to a breach of other obligations owed to trusts, however.

40. Will employees be committing a breach of contract by participating in a demonstration?

Employees will not necessarily be in breach of contract by participating in the day of action, providing that they do so at a time when they should not be performing their duties. If employees are taking unauthorised absence in order to participate in the activities, then trusts will be entitled to take disciplinary action against such employees in accordance with the usual policies and procedures. Employees may also breach other duties they owe to the employer if, for example, they cause disruption to patient care or to other services, or if property is damaged, or if they encourage other employees to commit such acts. Employers may be able to take disciplinary action against individual employees for misconduct, by reference to existing policies. It does not appear, however, that the planned activities are intended or likely to disrupt patient services or interfere with employees’ normal duties and therefore employees are unlikely to be in breach of their contracts of employment or committing other acts of misconduct.

41. Is there any legal liability for unions who are encouraging their members to participate in the day of action?

If the unions are encouraging employees to commit actions that are in breach of their contracts of employment [see above], then they will be committing the tort of inducing or procuring a breach of contract. Trusts would then have an action in damages against the relevant unions although they would need to show that they had suffered some financial loss as a result of the unions’ actions. In certain circumstances it may be possible to obtain an injunction to prevent the continuation or threat of procuring a breach of contract.
Where there is no breach of contract on the part of the employees, then there is no offence committed by the unions, however.

42. Can an employer prevent union representatives/others from entering their premises in order to demonstrate?

Entering onto another’s land without permission, or failing to leave when permission has been withdrawn, amounts to the tort of trespass. In theory therefore trusts can prevent anyone from entering onto their property, or can ask people to leave at any time.

Remedies for the tort of trespass include damages (although if there is no damage to property then such damages would be negligible) and/or an injunction to prevent further acts of trespass. In practice, trusts are unlikely to want to pursue such an action unless there is damage caused to property or where the activities cause an interruption to services and patient care.
NHS Employers

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- recruitment and planning the workforce
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