



Section 4 - Other conditions of service issues

Time off rights

There is no right to time off for trade union representatives taking part in industrial action. Where trade union officials are acting in their official capacity in relation to a dispute, for example, representing members who are taking action, unpaid time off should be permitted. The amount of time off and occasions which are taken by representatives must be reasonable in all the circumstances. Employers should consult the ACAS Code of Practice on time off for trade union duties and activities. A union official who is participating in the dispute will not be entitled to time off, even if he/she acts as a liaison point in negotiations. Please see [Capsticks FAQs for further detail](#).

Sickness payment during industrial action

Generally, staff who participate in or associate with the industrial action, resulting in a breach of contract, are not entitled to receive sick pay.

The key issue to determine before withholding sick pay is whether the staff are taking part in the action or indicated a prior intention to do so, even if they have reported that they are too ill to work on the day of action. It is legitimate to ask staff if

they were on strike for the purposes of establishing whether pay should be withheld. For those members of staff who have commenced a period of self-certification prior to strike action, unless there is evidence to the contrary, it is recommended that they should not be assumed to be participating in strike action if they remain absent on the day of a strike.

In advance of any strike action, organisations may wish to introduce new arrangements for reporting sickness on the first day of absence and/or 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, if this coincides with the first day of industrial action. This is a matter for individual organisations to determine.

Entitlement to accrued benefits during industrial action

Staff are not entitled to be paid for any period during which they are on strike (as they are not willing to work). Days on strike are non-pensionable and no pension contributions should be deducted. They should be recorded as 'disallowed days' when the pension data returns are being made to the NHS Pensions Agency.

No pension service credit will accrue for the period. This means that employers are not obliged to make any employer pension contribution

payments for the strike days as no pensionable pay will have been paid. However, employees who are active members of the NHS Pension Scheme can purchase additional pension if they wish to do so. Please refer to [NHS Business Service Authorities website](#) for detail.

Actions whilst on annual leave

Joining the picket line whilst on annual leave

Staff can spend time on the picket line during annual leave and providing they comply with the legislation; they will be picketing lawfully. There is no requirement that staff must be striking to join the picket line and organisations should not assume that all staff on annual leave who are seen on or near the picket line are in fact taking part in strike action.

Strike action whilst on annual leave

Staff taking part in strike action whilst on annual leave will not be entitled to holiday pay and employers could instead withhold pay. Employers will need to consider carefully the evidence they have that the member of staff has in fact taken part in or associated with the strike action. This could include evidence from the period in the lead up to the day of action, the employee's behaviour whilst on the picket line and/or whether the employee is advising or directing others on the day of action.

Managing pre-booked annual leave during strike action

Regarding staff who have booked or commenced a period of annual leave prior to strike action, unless there is evidence to the contrary, it is recommended that they should not be assumed to be participating in strike action. Please see [Capsticks FAQ for further detail](#).

Joining the picket line whilst on a break

Staff who are not on strike can join the picket line. Staff who join the picket line during breaks will not be striking by doing so as they are willing and able to work when scheduled to do so and their break time is their 'own time', not working time. If breaks are paid, no pay should be deducted for the time spent on the picket line as the individual is not on strike.

Continuity of employment

Any time spent on strike does not count towards the individual's period of continuous employment, but it does not break continuity of employment which is preserved. Given that most staff will be taking part in discontinuous action over a matter of days (not months/weeks), this is unlikely to impact upon their employment rights or contractual entitlements (such as annual leave). However, employers should still keep an accurate record of those who do strike in order to enable those calculations to be made where needed.

Safety

Staff who take any form of industrial action still have an overriding legal responsibility for the health and safety of themselves and people at work as they remain an employee. Any member of staff who through their action during a dispute endangers themselves, colleagues, or patients should be subject to the normal safety rules, which operate within a provider unit or authority and should be subject to disciplinary action for any breach of those rules.

Pay and pension implications

Individuals who take part in extended periods of industrial action in their final year of pensionable service may face a financial detriment. Staff should speak to their employers for advice on how this may impact them. Additionally, in such cases, it may be possible that the unions will agree that such individuals are exempt from taking part in the industrial action

Withholding pay for any day on which members of staff take part in a strike

The contractual right to be paid is dependent upon the member of staff being ready and willing to work. Staff are therefore not entitled to be paid for any period during which they are on strike. Please see [Capsticks FAQs for further detail](#).

Effect of industrial action on statutory and contractual employment rights

Options for use of agency workers (change to legislation)

There is no longer any legal restriction on the way in which employers approach this situation. The ban on the use of agency staff during strike action to perform the duties normally performed by a worker taking part in a strike or other industrial action was removed on 21 July 2022.

It is open to organisations to use in-house banks, volunteer personnel, existing staff moving into areas outside their specialty, the use of management staff and/or possibly workforce sharing agreements with other organisations to cover staff absences due to strike action.

Where organisations are planning to move workers or engage temporary workers to deal with staff shortages, one important point to consider is the skill set of the individual. You will need to ensure that they can perform the role in

question and that they are undertaking tasks within the scope of their contract of employment, unless staff agree to a short-term variation to terms of employment for the purposes of covering staff shortages during industrial action. To ensure the health and safety of patients and other staff, we recommend that, in addition to the usual recruitment and safeguarding checks, a workers skill base is established, and a risk assessment carried out to ensure that they are competent.

Reallocation of duties of striking staff to non-striking staff

Managers may consider non-striking staff to cover essential work, shifts, or be moved to other locations to cover striking staff. However, any requests to do this would need to be reasonable, taking into account the work concerned and the capability and qualifications required to undertake the work. It is important that managers take a reasonable approach to redeployment and implement changes by agreement wherever possible. Any decision to enforce changes should be taken with care, even where the flexibility in the contracts allow it, as to do so unreasonably may amount to a breach of contract.