

Briefing

Managing industrial action

Introduction

With the assistance of Capsticks, this guidance has been drafted by NHS Employers to assist line managers in the NHS to manage the legal, practical and operational risks presented by the threat of industrial disputes. It should be read in conjunction with the other industrial action resources.

This guidance applies only to legitimate industrial action that has been called in accordance with the statutory requirements. This guidance should be read in conjunction with the Capsticks guidance and FAQs - additional external sources of information for managers in relation to industrial action are signposted throughout this document.

During the current industrial challenges, continued partnership working and effective engagement through well-established routes, such as local joint negotiating committees and regional Social Partnership Forums, are essential to ensure that organisations can maintain dialogue with staff representatives and continue to deliver quality patient care. It is important to recognise that currently the unions are in dispute with the government, not with you as individual employers, your actions in relation to this dispute are critical in preserving good industrial relations at a local level.

There are a number of issues NHS managers need to be aware of to prepare for industrial action. This guidance covers:

- the types of industrial action
- partnership working and communicating with staff
- contingency planning in response to the threat of industrial action.

Section 1 - Industrial action and picketing

What is industrial action?

Industrial action can take many forms, the extent and impact of which will often depend on the causes and issues at stake in any particular dispute.

Industrial action may occur when trade union members are in a dispute with their employer that can't be solved through negotiations.

It involves action by staff that results in some disruption to, or impact upon, work under their contract of employment and is generally coordinated by trade unions. It can include strike action or action short of a strike.

- **Strike action** is 'any concerted stoppage of work'. This is typically thought of as a walk out or full withdrawal of labour on a set day or days. A strike takes place in response to a trade dispute.
- **Action short of strike (ASOS)** – is a term used to cover industrial action which does not constitute a stoppage, but where work is affected in some way, for example:
 - overtime ban – staff refuse to engage in overtime work. Whether this constitutes a breach of contract depends on the terms of the contract
 - work to rule – staff do no more than the minimum required by their contract of employment, for example, refusing to work longer than contracted hours. It can also see staff

following all safety or other regulations precisely and meticulously which may cause a slow down or decrease in productivity. A withdrawal of goodwill or acting in a way which breaches the implied term of faithful service in a work to rule scenario may constitute a breach of contract.

- slowdown - staff perform their duties but seek to reduce productivity or efficiency in their performance of these duties.

Who can participate in industrial action?

Any staff members can choose to participate in the planned industrial action, but they will not all be protected against dismissal. Protection is only available to those who are taking part in official strike action. Members of a union which has balloted and called out its members will be taking part in official protected action. Additionally, non-union members will be protected against dismissal for taking part in industrial action where there are also members of a union which has lawfully called out its members amongst those taking industrial action.

Staff who are members of unions which have not successfully balloted and called out their members, will be taking part in unofficial action if they go out on strike and will therefore not be protected against dismissal. Given the risk of dismissal, it is anticipated that the numbers of non-balloting union members going out on sympathy strikes is likely to be very low.

What is picketing?

Picketing is a common feature of trade disputes. Staff and their union representatives stand at or near their workplace on a day of industrial action for the purpose of exchanging

information or peacefully persuading others to abstain from some or all of their usual work. This can include colleagues and those who work at other organisations, for example, delivery drivers. Under statute, peaceful picketing under the law, is where a person in contemplation of a trade union dispute attends:

1. at or near their own place of work; or
2. if they are an official of a union, at or near the place of work of a member of the union who they are accompanying and represents, for the purpose only of peacefully obtaining or communicating information or peacefully persuading someone to work or abstain from work.

Employers have the right to refuse permission to picket on or inside any part of trust property.

Pickets cannot force people to stop and listen to them or prevent people from going to work if they want to do so. Obstruction, threats and abuse and any actual or threatened violence will often amount to criminal offences, in addition to being unlawful in the context of picketing.

Any person who joins a picket line and does not meet all of the conditions set out above, for example, attending a picket line at another organisation which is not their place of work, will not be committing an offence by merely attending. However, they will not have immunity from certain legal claims (such as inducing those crossing picket lines to breach their contracts) and may be liable for any civil wrong or criminal offence committed during the course of picketing.

Where individuals have more than one workplace, they can picket outside any premises of their employer from which the individual works or from which their work is administered.

The statutory Code of Practice on picketing provides detailed practical guidance. The code suggests that in general, no

more than six pickets should stand at the entrance or exit of a workplace. Although the code is not legally binding, its provisions are admissible as evidence in legal proceedings and courts may refer to it to decide whether or not the picket was being conducted lawfully.

Unions themselves will also have guidance for their members on taking industrial action that could be a useful source of information. The codes of conduct for some professional groups also provide information that may be helpful.

Picketing – practical issues

Employers have the right to refuse permission to picket on or inside any part of trust property. Discussions should take place with staff-side in advance of the day of action in order to agree permissions, for example, where the picket can take place, whether pickets can enter trust premises for refreshments/to use the toilets and how the pickets will conduct themselves.

Protocols for reporting and escalating concerns about unlawful conduct of the picket line, for example, the pickets are intimidating staff or service users, should be put in place in advance of any days of action.

Anyone can join a picket line and employers cannot prevent individuals from doing so. What action managers/ trusts can take (if any) in response will depend upon the individual's conduct whilst picketing and whether they retain their immunity from the legal action set out above or where members of the public/supporters join the picket line and whether they are committing a civil or criminal offence.

Staff will be picketing unlawfully if they join a picket line that is not at or near their own workplace. This does not in itself constitute an offence, but staff will lose their immunity from the legal claims referred to above.

Where staff are not taking strike action and they choose to join a picket line during their normal working hours, they will be in breach of contract and taking unauthorised leave which could be the basis of disciplinary action. Staff may, however, choose to attend picket lines at their place of work either before work, after work or during a break.

Mobile workers can picket at any of their workplaces or the place where their work is administered, for example, the trust headquarters. Provided they are the premises of their employer, they will not lose their immunity from the legal claims referred to above.

Staff do not have to be taking part in lawful industrial action, for instance, striking to join a picket line. For example they could do so in their own time if they are not due to work on a strike day.

Section 2 - Partnership working, derogations and health and wellbeing

Partnership working and communicating with staff

Partnership is essentially about employers, unions and employees working together and creating long-term positive relationships which focus on the future of business and improving working life for employees.

NHS Employers' guidance on staff engagement provides the practical information and tools required to help increase staff engagement in your organisation. Early engagement with local staff side partners and honest open discussions are a key element in successfully resolving local issues before they escalate. Unfortunately, there are occasions where partnership working breaks down and industrial action can follow.

In times of national trade disputes, local partnership arrangements are not the ones that are responsible for the dispute, nor can they resolve a national dispute. However, good partnership working and maintaining dialogue between managers and staff is needed to agree local service provision on strike days and to preserve working relationships that will be needed after the dispute has ended.

Any local response to industrial action must take account of the need to maintain patient services in the long, as well as

short term, and avoid escalation of the dispute and/or cause lasting damage to local industrial relations.

Partnership working and communicating with overseas staff

Industrial action can be different around the world, therefore overseas staff may not know what to expect from this in the UK. It is good practice to ensure clear communication is provided to international staff on what this means for them, including the wider implications and disruptions industrial action has on services and patient care.

Some helpful points for managers to consider includes:

- sharing guidance on how specific work/duties may be affected by strike action
- implications on pay and who staff need to speak to regarding concerns, for instance payroll or finance departments
- why staff are being asked to change roles. Managers should ensure conversations are taking place with affected staff and that there is an open dialogue regarding their confidence levels in being able to undertake duties/roles.
- ensuring that requests for changes to staff deployment are managed equitably
- ensuring staff are aware of the health and wellbeing and occupational health resources available to them
- being mindful that typically, international staff may not be in a union therefore they may be unaware of their rights. In such

cases managers should ensure staff are aware that they have rights and should be signposted to information provided by the organisation, trade unions and relevant international networks for details

- encouraging staff to raise issues with their manager, trade union representative, through networks or freedom to speak up guardian
- the need to ensure there is clear communications with BME staff and highlighting where staff can go for support if they experience discriminatory treatment during this period. Please see NHS England's anti-racism resource which includes guidance for nurses, midwives organisations and leaders.

Derogations

Derogations are a method of maintaining safe staffing levels on strike days by agreement and are achieved when the union and the employer agree (which could be on a national and/or local basis) that a member or service shall be exempt from taking part in industrial action. They are an informal agreement between unions and employers, and are not legally enforceable. They are typically sought in areas of greatest risk to patients if services cease or are reduced during a period of industrial action. They are agreed with unions and may lead to a service being derogated in full or partially, for example, reduced level of service during the period of industrial action.

In planning for a period of industrial action, organisations should discuss derogations with trade unions as soon as possible. This may be in the context of national guidance on derogations from the trade union.

Each union has processes in place for NHS organisations to request local derogations. These should be followed by the

organisation requesting derogations. The staffing levels on strike days in derogated areas will be agreed at employer level. Where agreement can't be reached on derogations and this creates a patient safety risk this should be escalated through emergency preparedness resilience and response (EPRR) regional teams. Unions may have escalation/appeals processes that should be followed too in these circumstances.

Union members in derogated areas can still take strike action and will be protected against dismissal if the industrial action is lawful. Non-union members who take part in legal, official industrial action at their employing organisation have the same rights as union members not to be dismissed as a result of taking action. In advance of industrial action organisations can:

- ask staff rostered to be on duty if they will be attending work. Staff do not need to confirm their attendance at work
- discuss with local trade union representatives how to cover any absences on the day of strike to ensure staffing levels are at the level agreed in derogation discussions for patient safety reasons. Absences may be due to strike action or for unplanned absence (e.g. sick leave, special leave)
- communicate to staff – ideally in partnership with local union representatives - including how staff may be contacted on the day.

If on the day of a strike staffing levels in derogated areas fall below the level agreed, employers should work with local union representatives to maintain staffing levels to protect patient safety. This may include asking some staff who are striking to return to work. It is for staff to decide if they agree to the request to return to work.

Other mitigations may include change of staff rosters, engaging temporary staff or internal redeployment of staff. Where the risk can't be mitigated, staff who refuse to work in derogated services can be advised they may be

committing a criminal offence if their strike action has the potential to cause patient harm, endanger human life or cause serious bodily injury. They should seek advice from their union in these instances.

Please note: The action referred to above would be action under section 240 of Trade Union and Labour Relations (Consolidation) Act 1992. Only the Attorney General can take action under this Act and it is understood to date no case has been brought using this legislation. To secure a conviction under this act would require a criminal level of proof.

Additionally, to further support a consistent approach to maintaining patient safety during industrial action, NHS England has set out a common approach for local discussions and provided clarity to patients and staff around service provision on days of planned industrial action through early notification and communication. They have also set the following principles that should underpin derogation discussions:

- Safety of delivery of NHS services - ensuring minimum staff levels are available to deliver emergency, immediate life, limb or organ-saving intervention.
- Safety of staff should be protected - for those working during industrial action.
- Safety of the public is maintained - ensuring appropriate staff levels are available to deliver care to the public in case of a major incident at national or local level.
- Professional regulatory advice is provided and followed.
- Life preserving services will continue - with the necessary number of professionals.
- Derogations are to be agreed locally to reflect local population and service needs.

Please refer to NHS England's [guidance for further detail](#).

Health and wellbeing

Looking after the health and wellbeing of our NHS staff has always been important and continues to be as we enter a period of industrial action. NHS leaders and managers should continue having regular and compassionate wellbeing conversations to understand how staff are feeling and how their organisation can support them. Please refer to NHS Employers [resources to support your staff](#) with their health and wellbeing.

Section 3 – Contingency planning

Contingency planning in response to the threat of industrial action.

The purpose of industrial action is to put pressure on employers (and in this case the government), with a view to resolving a dispute. The key issue for local employers in the NHS will be to ensure that any consequent disruption does not jeopardise patient welfare or safety.

In considering how to minimise the impact of industrial action, senior managers may need to conduct an analysis of the following:

- Whether the action supported by the union is lawful. Is there a valid trade dispute and have the steps taken by the union so far complied with statutory requirements?
- Whether the proposed action is likely to be limited (for example a single day of action) or lengthier and more widespread.
- The number of staff in occupational groups who have been balloted for action compared to the workforce as a whole to assess the extent of possible action and estimate its potential impact.
- Whether the proposed action will be strike action or action short of a strike. If action short of a strike, will it involve staff working less than their full contractual duties? If so, the trust

should decide whether staff participating in such action will be paid.

- The contingency plan that has been put in place to minimise the disruptive effect of the action.
- Any derogations that have been agreed with the trade unions.

Contingency planning for industrial action should cover the multiple practical and operational issues that will need to be addressed, so that essential services can be maintained while industrial action is taking place. These plans should build upon an organisations existing business continuity plan, ensuring that planning for staff shortages due to industrial relations is not undertaken in isolation.

As part of industrial action contingency planning, operational managers will also want to consider whether to redeploy staff (including bank workers and agency workers) or engage additional staff to carry out the essential tasks of staff who are participating in industrial action. This is often a complex question involving the following issues:

- Do staff who are to be redeployed have adequate training and experience to carry out the necessary tasks competently and safely?
- Is there sufficient flexibility in their contracts of employment which is wide enough to cover the new duties (that may be out of their remit) and/or any change to their place of work. If not, any enforced change may be a breach of contract.
- Would other staff be willing to cover for colleagues who are participating in industrial action?
- The potential long-term consequences for staff relations if they do provide cover for striking staff.

- The possibility that staff who have agreed to provide cover may ultimately change their minds and decline to cross picket lines.

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

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.

Further resources

- ACAS booklet - [Trade union representation in the workplace.](#)
- NHS Employers' [industrial action resources.](#)
- Confirmed [industrial action strike days.](#)
- CIPD [Guidance to working with trade unions.](#)

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