

## **Pay and contract FAQs during concurrent strike action by junior doctors and consultants**

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NHS organisations will be preparing for the next round of Consultant strikes (19-20 September and 2-4 October) and junior doctor strikes (20-22 September and 2-4 October). For the first time, there will be concurrent strike action by both groups on 20 September and then again from 2-4 October, which, inevitably, will put NHS organisations under significant pressure.

With the British Medical Association (BMA) announcing that junior doctors will be providing Christmas Day cover on 20 September, we have set out some FAQs to assist with preparations.

### **Q.1 What does Christmas Day cover look like for junior doctors?**

Organisations should be establishing, through a review of the levels of cover in place on Christmas Day 2022 for each specialty, the numbers of junior doctors required to attend the workplace/be on call on 20 September and 2-4 October.

Organisations can use junior doctors' existing rota patterns to determine who is due to work the shifts that form a Christmas Day staffing model in each specialty. If there are multiple shifts across doctors' rota patterns that have the same start and finish times on a day of concurrent strike action and only a proportion of those shifts form a Christmas Day staffing model, it is reasonable for an employer to communicate whom it expects to attend. Employers should allocate the Christmas Day cover to the doctors across the days of concurrent action as fairly as reasonably possible.

Where junior doctor staffing arrangements have changed within specialties since last Christmas, an organisation will need to establish minimum junior doctor staffing levels and then communicate which of those currently rostered to work will be expected to attend on 20 September/2-4 October.

### **Q.2 What do we do if those selected to provide Christmas Day cover refuse to do so because they want to take strike action?**

The BMA has indicated that its members will provide Christmas Day cover and we consider that it is reasonable for an organisation to establish in advance who that cover shall be provided by in the interests of contingency planning to ensure patient safety. Where an individual refuses to work where they have been selected to do so on 20 September/2-4 October in order that they can take strike action, we recommend that organisations stipulate that any swap that takes place is the responsibility of the doctor who has been designated to work in order to maintain patient safety.

### **Q.3 What if we cannot get the junior doctors to agree the levels of staffing for Christmas Day cover or confirmation of who will provide that cover?**

In the first instance, it will be necessary to consider what elective services must be closed to establish whether the movement of junior doctors within an organisation is possible (bearing in mind a junior doctor's skills and expertise) to enable safe services to run in specialties where setting Christmas Day cover is proving problematic.

Where you are unable to reach agreement with your local BMA representatives regarding urgent services, we recommend that this matter is escalated using the criteria set out at Appendix 1 of the NHS England/BMA joint letter on the junior doctor and consultant strike: <https://www.england.nhs.uk/long-read/planning-for-junior-doctor-and-consultant-industrial-action/>

Further information on making requests for derogations during strike action can be found at Appendix 2 of the NHSE/BMA joint letter.

Organisations must bear in mind that temporary workers can no longer be provided by employment businesses to carry out the work of those who are taking strike action in line with Regulation 7 of the Conduct Regulations [[High Court ruling on supply of agency workers during industrial action](#)].

#### **Q.4 What do we do if someone is offering to cover part of their shift only and wants to strike for the remainder?**

This would constitute an offer of partial performance of the consultant or junior doctor's contractual duties which the employer can either accept or reject. Further information on partial performance can be found [[Industrial action guidance, resources and FAQs](#)].

If a consultant or junior doctor is required to provide Christmas Day cover and is taking strike action, they will be withdrawing labour and pay can be withheld. Where they offer to work offsite on-call during industrial action as an alternative, it will be for the organisation to decide whether it wishes to accept partial performance of the contract – the organisation is not obliged to do so, and the consultant/junior doctor cannot demand that they work in such a way.

Where partial performance is not accepted, a day's pay can be deducted (even if the offsite on-call is carried out provided the rejection of the offer is made very clear by the employer in advance). Alternatively, some organisations may take the view that they wish to accept the offer of offsite on-call work and will either:

- deduct a day's pay in recognition of the withdrawal of labour from the resident shift which the consultant/junior doctor was scheduled to work, but will make a payment in respect of non-resident on-call work (which will be subject to local negotiation); or
- deduct no pay at all in recognition of the fact that the individual will be working and may be required to attend on site in case of an emergency.

These will all be decisions to be made at a local level depending on the needs of the service.

We recommend that decisions on the acceptance or rejection of offers of partial performance are documented and are consistent within an organisation. Clearly, the impact on patient safety will be the principal concern when considering this matter but organisations must bear in mind that inconsistency between staffing groups could be the basis for challenge by those who consider themselves to be disadvantaged.