

# Industrial Action and Contingency Planning

## Summary Flowchart



### The process to be followed by the unions for lawful industrial action

The industrial action will only be lawful (and provide the trade union with statutory immunity) if ALL of the following conditions of the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) have been satisfied:

**Condition 1:** There is a valid trade dispute between the worker(s) and their employer

**Condition 2:** It is being taken in contemplation or furtherance of a trade dispute which is not for a prohibited purpose and does not amount to secondary action or unlawful picketing

**Condition 3:** It is 'official' – in that it is action that the union has (or is treated as having) endorsed or authorised

**Condition 4:** It has the support of a properly-organised ballot of union members, and the union has complied with notification requirements

#### Condition 4: Notice and Ballot requirements

*Note: the Employment Rights Bill, once passed, will change some of the notice and ballot requirements. This flowchart will be updated once it is known when those changes will come into effect.*

The union must notify the employer and its members of the intention to ballot. For the notice to be valid, it must:

Be in writing

Be served on all persons whom it is reasonable for the union to believe is the employer of anyone entitled to vote.  
*Note: In deciding who should be entitled to vote in the ballot, the union can choose to ballot a wider group than those directly affected by the matter in dispute if they reasonably believe that those members will be induced to take part in the industrial action.*

Clearly state that the union intends to hold a ballot on a specific opening date

Be provided at least seven days before the opening date

Contain all of the following information, which must be as accurate as reasonably practicable:

- A list of the categories of employee to which the affected employees belong and the number of affected employees in each category
- A list of the workplaces at which the affected employees work and the number of affected employees at each workplace
- The total number of affected employees
- An explanation as to how the given numbers were arrived at.

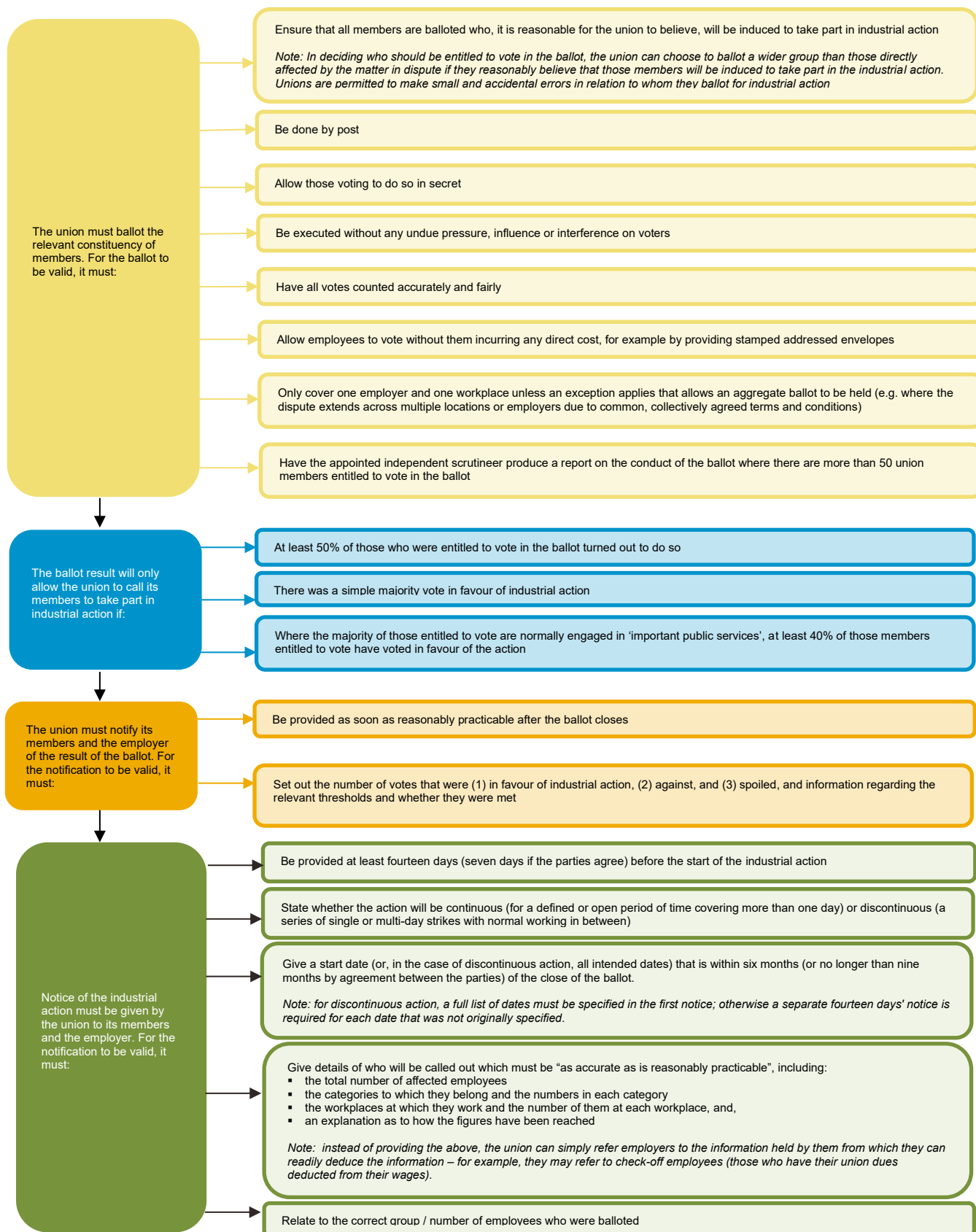
*Note: instead of providing the above, the union can simply refer employers to the information held by them from which they can readily deduce the information – for example, they may refer to check-off employees (those who have their union dues deducted from their wages).*

A sample ballot voting paper must be given by the union to the employer. For the ballot paper to be valid, it must:

Be provided no later than three days before the opening day of the ballot

Be given one of a series of numbers relevant to the ballot and specify / include all of the following:

- What action is proposed ('strike' and/or 'action short of a strike') with only 'yes' or 'no' answers
- A summary of the matters in dispute
- The period or periods within which industrial action is expected to take place
- The address to which the ballot paper must be returned
- The details of who is authorised to call on members to take part in industrial action
- The name of the appointed independent scrutineer (required where there are more than 50 union members entitled to vote in the ballot)
- The statutory warning (in full) – "If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action and, depending on the circumstances, may be unfair if it takes place later."



## Consequences for the unions of non-compliance

If the union does not comply with the above requirements, the employer can take legal action against the union on the basis that the industrial action is unlawful

### Injunction

Seek an interim injunction from the High Court to stop the unlawful industrial action taking place

Injunction is seen as a last resort

As well as showing the union had failed to comply with the balloting requirements, the employer would also need to show that damages would not be an adequate remedy and challenge any breaches promptly

### Damages

Seek to recover compensation from the union for 'an industrial tort' (for example, inducing a breach by employees of their contracts of employment). The maximum damages that can be awarded in a successful claim are:-

- £250,000 for an act that began or occurred before 21 July 2022, and
- £1million for an act that began or occurred after 21 July 2022

*Note: in the context of an industrial dispute, employers rarely seek damages, as they do not usually properly compensate the employer for the financial, reputational and other losses they suffer due to industrial action.*

## How employers can respond to / prepare for the threat of industrial action

Where 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

### Information gathering

What industrial action is being proposed – a strike (defined as 'any concerted stoppage of work') or action short of a strike (where there is no stoppage of work (e.g. work to rule, go slow, withdrawal of goodwill)?

Who is likely to participate? Remember, employees who are not members of any union can participate where members of unions which have endorsed or authorised the action at taking part. Members of unions which have not endorsed or authorised the action will not be protected against dismissal if they participate

Which services are likely to be affected?

Should staff/services be exempt (section 240) from industrial action to avoid 'endangering life' or causing 'serious bodily injury'?

### Negotiations with staff side

**In the context of a national dispute between employees and the Government over pay, an individual employer cannot, in reality, resolve the dispute.**

**However, keeping open lines of communication with unions at a local level is vital. Employers should work together with union representatives both before and during any industrial action regarding potential solutions to the dispute and ensure that national bodies are aware of the unions' approach to the dispute.**

Aim to keep things calm

Foster good relations at all levels within the union

Keep communications open

Try to reach agreement on:-

- conduct during the industrial action
- any contingency plans
- exemptions (derogations) from strike action to maintain critical patient services and protect patient safety during the period of industrial action. Section 240 will be a factor here. Section 240 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 or cause serious bodily harm. Unions risk criminal prosecution of members (although, to date, there are no known cases where the Attorney General has brought a prosecution under this section) and negative publicity for any unreasonable failure to agree exemptions.

### Communication with staff

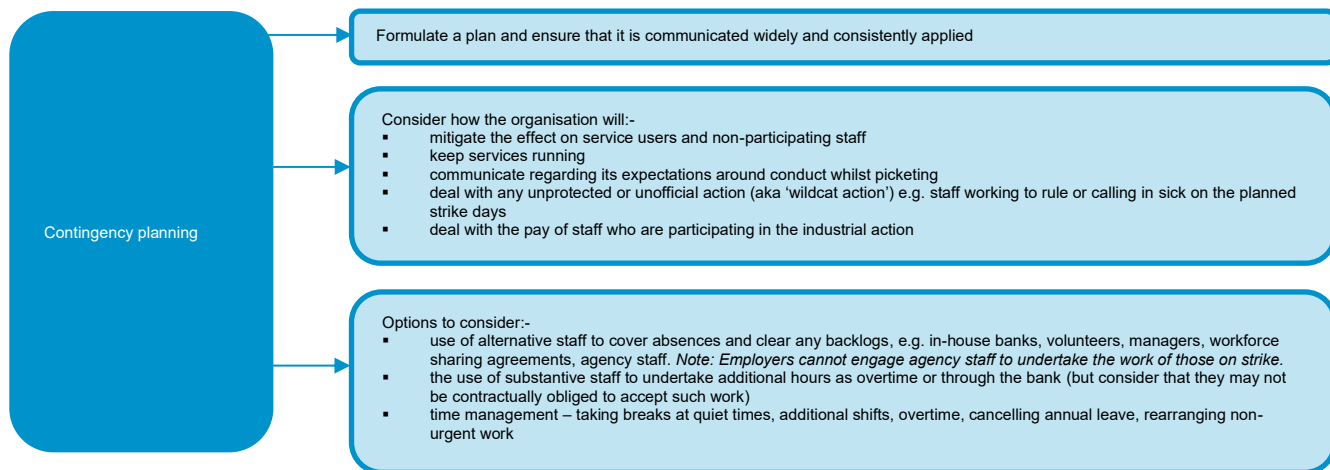
It is permitted to ask staff if they intend to participate in the industrial action but they are not obliged to answer

Requests about participation should be made as widely as possible as both union members (of unions which have endorsed or authorised the action) and those who are not members of any union can participate in the industrial action

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

Employers might consider:

- explaining the 'bigger picture' - the efforts that have been made to resolve the dispute in question and the impact any industrial action would have on patients, etc.
- reminding staff that if they are opposed to the strike, they are not obliged to participate
- reminding staff that they will not be paid for strike action
- reminding staff of the duties under their regulatory authority



## Further resources

NHS Employers guidance – [Industrial action guidance, resources and FAQs](#)

Government guidance - [Taking part in industrial action and strikes: Holding a ballot](#)

BEIS Code of Practice - [Code of Practice on Industrial Action Ballots and Information to Employers](#)

## Capsticks Solicitors LLP July 2025

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**NICOLA GREEN**  
Partner  
020 8780 6975  
07841 981757  
[nicola.green@capsticks.com](mailto:nicola.green@capsticks.com)



**PAUL MCFARLANE**  
Partner  
020 8780 4867  
07834612415  
[paul.mcfarlane@capsticks.com](mailto:paul.mcfarlane@capsticks.com)



**SIAN BOND**  
Partner  
020 8780 4720  
07968 450812  
[sian.bond@capsticks.com](mailto:sian.bond@capsticks.com)

## CAPSTICKS

[capsticks.com](https://www.capsticks.com)

## BIRMINGHAM

1 Temple Row  
Birmingham B2 5LG

T +44(0)121 230 1500  
F +44(0)121 230 1515  
DX: 13003 - Birmingham

## LEEDS

Toronto Square, Toronto Street  
Leeds LS1 2HJ

T +44(0)113 322 5560  
F +44(0)113 242 2722  
DX 713112 – Leeds Park Square

## LONDON

Wellington House  
68 Wimbledon Hill Road  
London SW19 7PA  
T +44(0)20 8780 2211  
F +44(0)20 8780 1141  
DX 300118 – Wimbledon Central

## MANCHESTER

Clarence House,  
Clarence Street  
Manchester M2 4DW,  
T +44(0)125 726 6008

## WINCHESTER

Staple House, Staple Gardens  
Winchester SO23 8SR  
T +44(0)1962 678 300  
F +44(0)1962 678 311  
DX 2532 - Winchester