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: This flowchart reflects the requirements that apply to notices received and ballots opened on or after 18 Februarv 2026.

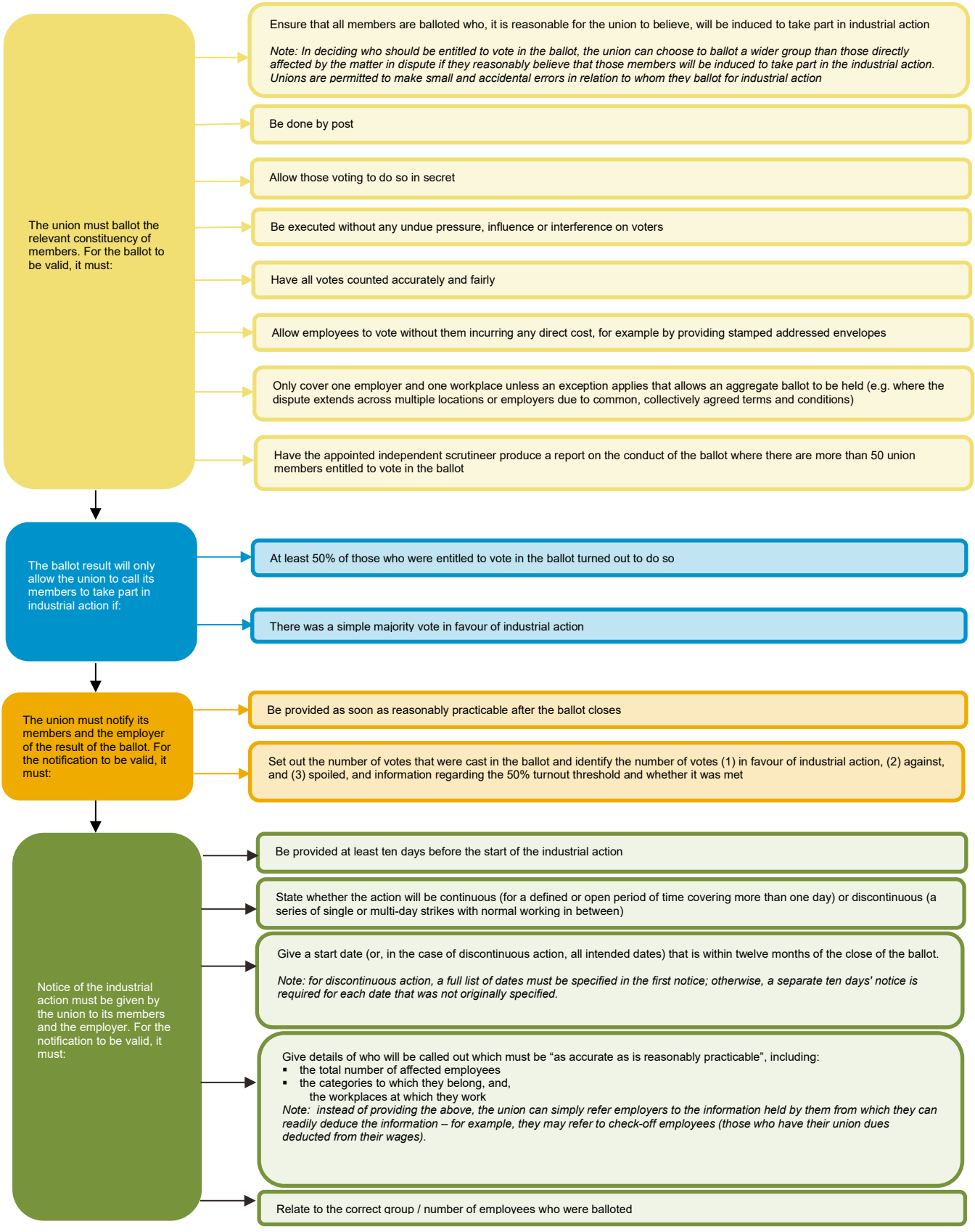
The union must notify the employer and its members of the intention to ballot. For the notice to be valid, it must:

- 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
  - A list of the workplaces at which the affected employees work
  - The total number of affected employees

  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
  - 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.*"


The union must ballot the relevant constituency of members. For the ballot to be valid, it must:
Ensure that all members are balloted who, it is reasonable for the union to believe, will be induced to take part in industrial action
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. Unions are permitted to make small and accidental errors in relation to whom they ballot for industrial action
Be done by post
Allow those voting to do so in secret
Be executed without any undue pressure, influence or interference on voters
Have all votes counted accurately and fairly
Allow employees to vote without them incurring any direct cost, for example by providing stamped addressed envelopes
Only cover one employer and one workplace unless an exception applies that allows an aggregate ballot to be held (e.g. where the dispute extends across multiple locations or employers due to common, collectively agreed terms and conditions)
Have the appointed independent scrutineer produce a report on the conduct of the ballot where there are more than 50 union members entitled to vote in the ballot
The ballot result will only allow the union to call its members to take part in industrial action if:
At least 50% of those who were entitled to vote in the ballot turned out to do so
There was a simple majority vote in favour of industrial action
The union must notify its members and the employer of the result of the ballot. For the notification to be valid, it must:
Be provided as soon as reasonably practicable after the ballot closes
Set out the number of votes that were cast in the ballot and identify the number of votes (1) in favour of industrial action, (2) against, and (3) spoiled, and information regarding the 50% turnout threshold and whether it was met
Notice of the industrial action must be given by the union to its members and the employer. For the notification to be valid, it must:
Be provided at least ten days before the start of the industrial action
State whether the action will be continuous (for a defined or open period of time covering more than one day) or discontinuous (a series of single or multi-day strikes with normal working in between)
Give a start date (or, in the case of discontinuous action, all intended dates) that is within twelve months of the close of the ballot.
Note: for discontinuous action, a full list of dates must be specified in the first notice; otherwise, a separate ten days' notice is required for each date that was not originally specified.
Give details of who will be called out which must be "as accurate as is reasonably practicable", including:
the total number of affected employees
the categories to which they belong, and,
the workplaces at which they work
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).
Relate to the correct group / number of employees who were balloted

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 sum that can be awarded in damages in a successful claim is
£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

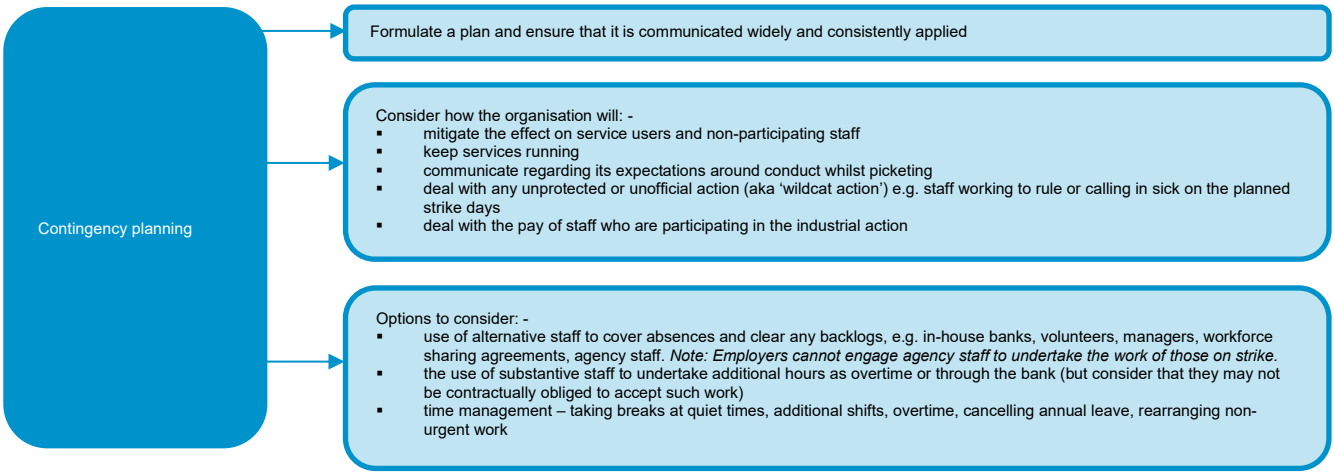
In the context of a national dispute between employees and the Government over pay, an individual employer cannot, in reality, resolve the dispute.

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

DPT Code of Practice - Industrial action ballots and notice to employers: code of practice [1]

Capsticks Solicitors LLP
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The information contained in this note is for general guidance purposes only. It should not be relied upon as a substitute for legal advice on specific facts or matters. Should you require specific legal advice or more information on how Capsticks can assist your organisation, please contact:

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[1] The March 2017 version of the *Code of Practice: Industrial action ballots and notice to employers* was revised on 5 March 2026 to reflect the changes made by the Employment Rights Act 2025 to the Trace Union and Labour Relations (Consolidation) Act 1992 on 18 February 2026, but this recommendation remains the same.