Strike action and deduction of pay

This note has been prepared, with the assistance of DAC Beachcroft LLP, to provide practical guidance for NHS employers as to how the issue of pay may be dealt with during industrial action. This guidance is not intended to be a substitute for definitive legal advice: employers should seek their own specialist legal advice on any contentious issues concerning pay. Employers will want to try and reach agreement with trade unions on deductions.

Legal background

An employee who participates in a strike will be in breach of contract in refusing to carry out work that he or she is contractually obliged to do. The employer is entitled to respond by withholding pay for the corresponding period.

An employee who considers that their pay has been improperly deducted can bring employment tribunal proceedings for unauthorised deductions from wages and/or breach of contract. Rarely, an employee might respond to an unlawful deduction of pay by resigning and claiming constructive dismissal.

Calculating how much pay to deduct will usually be a straightforward matter for salaried or hourly paid staff whose pay does not vary from day to day, and who have simply lost a single day’s work (or a number of days) due to the strike.

For many employees in the NHS however, the position on pay will be less straightforward in relation to strike days. For example:

- staff who work night shifts, part of which will fall within the strike day
- staff whose daily hours of work are averaged over a period of time, such that the hours which will be lost to the strike are not certain
- staff who claim time off in lieu of banked time
- staff who are rostered to be on call on the day of action
- staff who report in sick on a strike day, or who continue to be on sick leave on that day
- staff who request urgent annual leave or dependent leave to look after children because their schools are closed
- how are strike days dealt with in relation to pension?
- how will time lost to the strike be dealt with when calculating overtime entitlement?
In dealing with these issues, employers may consider the following guidance:

| Salaried staff | • Annual salaries for full-time staff who are paid under Agenda for Change are apportioned on the basis set out in section 7 of the AfC Handbook. On that basis:
| | o For monthly paid staff, pay should be deducted at the rate of 1/30 of a month’s pay (for strike days in November: the sum depends on the number of days in the month)
| | o For weekly paid staff, pay should be deducted at the rate of 1/7 of a week’s pay.
| | • Section 7 does not apply expressly to part-time staff, whose contracts may define their working week by reference to specific working days. For example, a part-time worker’s contract might specify that they would work three days per week, or 156 days per year. If so, their employer may either deduct pay at the rate of 1/156 of annual pay or adopt the section 7 approach, pro-rated appropriately, in the interests of consistency between full-time and part-time staff.
| | • In many cases, the interaction of part-time and flexible hours may be complex. A simplified and easily-understood approach will be to calculate an effective hourly rate as follows:
| | - \[
| \text{Annual salary} \]
| | - \[
| \text{Weekly hours} \times 52.1429
| | • This value could be used to calculate the appropriate deduction by reference to the number of hours the employee was rostered to work on the strike day.
| | • It is recommended that employers consult locally over their approach to deductions, although the final decision will be the employer’s. The mechanism should be, so far as possible, consistent, non-discriminatory and workable within the capabilities of the electronic payroll system.
| Hourly paid staff | • Pay should be deducted on the basis of the number of hours lost due to strike action.
| Night shifts | • Night shifts are likely to be interrupted by a strike day and employers should seek to agree a local policy with the unions for dealing with this issue. In principle employers are entitled to inform all night shift staff that they will not accept, or pay for, part-shifts: staff should either work a full shift or not attend work at all.
| | • If that approach creates practical problems, agreement might be reached on the basis of part-payment for part-shifts or exemptions from strike action for key shift workers.
| Staff with flexible or banked hours | • Some staff work under a system in which their daily hours of work are flexed on an annual (or shorter) basis. Other staff may ‘bank’ time and claim days off in lieu of accrued time. Some of these staff may wish to treat the strike day as a non-working or ‘lieu day’ in order to retain pay.
| | • If the employer’s agreement is required before staff can take a paid day off then employers will be within their rights to withhold that agreement and
insist that those workers attend work on a strike day. If they do not attend, they can then be treated as being on strike and pay can be deducted at the usual daily rate.

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<th>Staff on call</th>
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<td>• The precise way in which pay will be affected for on-call staff will depend on the terms of employers’ local on-call arrangements. The following guidance will apply in most cases.</td>
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<td>• Staff who are rostered to be off work but on call on a strike day, and who do not attend work when called upon, should be regarded as participating in the strike, unless there is evidence of another reason for their failure to attend. They will lose only the pay that they would have earned if they had attended work in response to the call. In most cases on-call staff will be used to cover emergencies and these staff are likely to be part of the contingency plans.</td>
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<th>Sickness absence</th>
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<td>• Employers may adopt the policy that absence which begins on or after the day on which strike action was announced will not be paid unless there is satisfactory evidence of genuine sickness, such as a GP’s note.</td>
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<td>• Return to work interviews should be conducted in all cases of reported sickness absence on and around the strike day and evidence of sickness should be requested. The decision as to whether or not an employee should receive sick pay can then be taken on a case by case basis.</td>
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<td>• Employers who are not satisfied that an employee is genuinely absent because of sickness may choose to withhold sick pay. However that decision may be open to legal challenge by the employee.</td>
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<td>• It should be noted that employees and unions may argue that it is not reasonable or practicable for employers to insist on a GP’s note from employees, as a condition of the employee receiving pay on the strike day.</td>
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<td>• Staff who are on long-term sick leave over the strike day should be treated for pay purposes as if their sick leave continues on that day, unless they indicate that they wish to be treated as if they are on strike.</td>
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<th>Urgent holiday requests and time off for dependents</th>
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<td>• Employers can adopt the policy that absence to cover for childcare during school closure on 30 November will not amount to exceptional circumstances in which paid leave will be granted.</td>
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<td>• Staff should instead be urged to plan alternative childcare arrangements well in advance, on the basis that many schools are likely to close on a national day of action. Staff for whom that is not possible should be encouraged to discuss their difficulty with their manager.</td>
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<td>• Requests for paid annual leave for exceptional and unavoidable childcare reasons should be dealt with by managers on their individual merits.</td>
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<th>Pensions</th>
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<td>• A day on which a member of the NHS Pension Scheme is absent on strike is a ‘disallowed day’ for pension purposes therefore no pension contributions can be collected and the period can not count as pensionable membership for benefit purposes.</td>
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<td>• There is no facility for the employee to make up the lost pension contributions in such circumstances.</td>
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<td>• Organisations will need to make a note of all pension scheme members</td>
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who have participated in the strike so that any disallowed days can be taken into account in their individual member records. For organisations using ESR the ESR User Notice UN1500 sets out advice to employers entering absences relating to industrial action. Non ESR organisations will need to ensure that this information is captured in their annual returns to NHS Pensions by completing form SD55, available from Pensions Online (POL).

| **Overtime** | • Under section 3 of Agenda for Change, staff are entitled to overtime rates when their worked hours exceed their standard hours (i.e. 37.5 hours for a full time employee).
• Time lost to a strike will count as time not worked. For example: a full time employee who strikes for a full day should be required to make up 7.5 hours at plain time rates in that week before overtime rates begin to apply.
• This general rule will be subject to any local rules or agreements which displace the standard position under AfC. |
NHS Employers
The NHS Employers organisation is the voice of employers in the NHS, supporting them to put patients first. Our vision is to be the authoritative voice of workforce leaders, experts in HR, negotiating fairly to get the best deal for patients.

We help employers make sense of current and emerging healthcare issues to ensure that their voice is front and centre of health policy and practice. We keep them up to date with the latest workforce thinking and expert opinion, providing practical advice and information, and generating opportunities to network and share knowledge and best practice.

We work with employers in the NHS to reflect their views and act on their behalf in four priority areas:

• pay and negotiations
• recruitment and planning the workforce
• healthy and productive workplaces
• employment policy and practice.

The NHS Employers organisation is part of the NHS Confederation.

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