



Home / Resources

Guide

Share

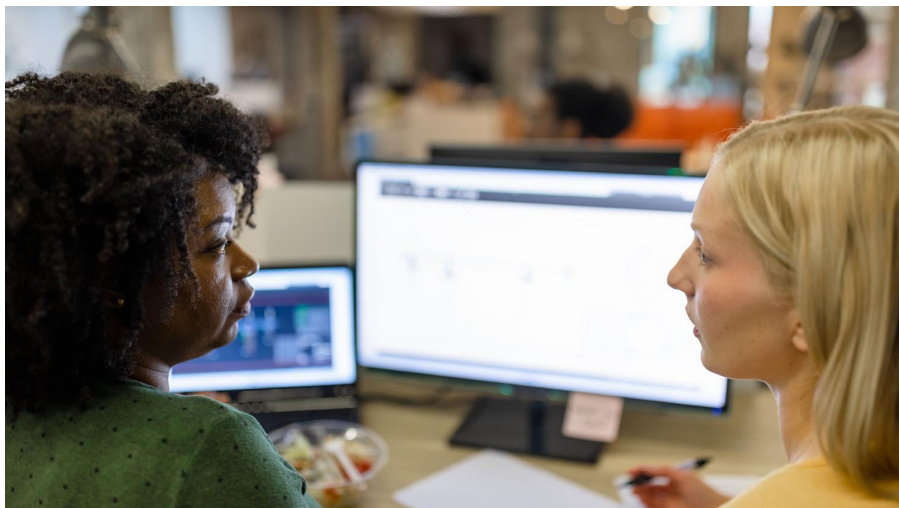


# Managing industrial action - A guide for managers

A guide to assist NHS employers in England in managing the legal, practical and operational risks presented by the threat of industrial dispute.

13 December 2022

Search term



## Chapters

- 1. Introduction
- 2. Section 1 - Industrial action and picketing
- 3. Section 2 - Partnership working, derogations and health and wellbeing
- 4. Section 3 - Contingency planning
- 5. Section 4 - Other conditions of service issues
- 6. Further resources

## Introduction

With the assistance of Capsticks, this guidance has been drafted by NHS Employers to assist employers in the NHS in managing the legal, practical and operational risks presented by the threat of industrial disputes and is written to support line managers. It should be read in conjunction with the resources we have produced on industrial action.

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



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

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



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



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



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.

NHS England have 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.

Refer to NHS England's [derogations 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



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





[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.

## Joining the picket line whilst on annual leave

Staff can join the picket line during annual leave and providing they comply with the legislation; they will be picketing lawfully and should continue to receive holiday pay as there is no requirement that staff must be striking to join the picket line.

However, where staff associate with and/or take part in the strike action on a holiday day, they will not be entitled to holiday 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 industrial action. For members of 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 FAQs for further



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





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.

**Suggested citation**

NHS Employers (2022),  
Managing industrial  
action - A guide for  
managers.

**COPY TO  
CLIPBOARD**

## Further resources

ACAS booklet - [Trade union representation in the workplace.](#)

NHS Employers' [industrial action resources.](#)

Confirmed [industrial action strike days.](#)

Theme	<a href="#">Employment standards and regulation</a>			
Keywords	<a href="#">Agenda for change</a>	<a href="#">Industrial action</a>	<a href="#">Line management</a>	<a href="#">Strikes</a>
Publisher	NHS Employers			

Share



## Related content

