

Document Title: Guidelines for Managing Industrial Action	1 of 34	Adopted Date: 12.09.2023
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# CARDIFF AND VALE UNIVERSITY HEALTH BOARD

## Guidelines for Managing Industrial Action<sup>1</sup>

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<sup>1</sup> These Guidelines contain contractual requirements and as such these elements are not discretionary and must be applied.

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## 1. Introduction

**1.1** NHS organisations in Wales should recognise that their members of staff have a right to take industrial action without it being held against them in any way.

**1.2** The need to cope successfully with industrial action remains a key challenge for many employers and managers. These guidelines have been developed to provide managers with some written advice on action they need to take and responsibilities they will have during a period of industrial action. These guidelines address key issues that may arise but are by no-means exhaustive. They also need to form part of a much wider emergency planning/contingency planning process within NHS organisations led by the civil contingencies team. Although, these guidelines are designed for use by generic managers, this wider planning process will also need to involve Executive Directors, particularly the Workforce and OD Director, Medical Director, Nurse Director, IT director and director responsible for facilities (usually the Planning director), as decisions will need to be taken as to what essential services need to be maintained, the level of staffing required to deliver these essential services, and how staff will be trained and cross cover provided.

'NHS organisations must ensure that for all functions for which they are responsible, the highest level of service to patients is maintained regardless of what may happen to clinical/nonclinical procedures or the infrastructure of facilities, on a 24 hour a day, 7 day a week basis if circumstances require this' (NHS Resilience and Business Continuity Management Guidance, WAG 2008).

The guidelines apply only to lawful industrial action that has been called in accordance with the statutory requirements. Additional external sources of information for managers in relation to Industrial Action are signposted throughout this document.

**1.3** The approach of Trade Unions participating in the strike action will be governed by their own guidance/protocols and may not accord fully with these guidelines. Where strike action is declared, one of the main aims of the Trade Unions is, within the legal framework, to maximise disruption to the employer.

**1.4** These guidelines provide general advice on managing strike action, including Action Short of a Strike (ASOS), but cannot cover every eventuality. For advice on specific situations and/or circumstances, managers should contact a senior Workforce and OD manager, who

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where appropriate can seek advice from NHS Wales Employers or legal advice.

**1.5** These guidelines should be read in conjunction with National Terms and Conditions of Service and local trade union facilities agreements.

## **2. Definitions**

### **2.1 Business Continuity Management (BCM)**

For the NHS, BCM is defined as:

- The management process that enables an organisation to identify those key services which if interrupted for any reason would have the greatest impact upon the community, the health economy and the organisation
- To identify and reduce the risks and threats to the continuation of these key services
- To develop plans which enable the organisation to recover and/or maintain core services in the shortest possible time.

Effective BCM is not only about minimising the likelihood of an event occurring but also having the ability to recover and restart if the worst happens (NHS Resilience and Business Continuity Management Guidance, WAG 2008)

### **2.2 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. This section provides details of the main types of industrial action.

### **2.3 Official industrial action**

Official industrial action is that which is authorised or endorsed by a recognised trade union. In practice, this means any industrial action which is authorised by the trade union from the outset and any industrial action which starts as unofficial but which the union later decides to endorse. A formal ballot must precede any form of official industrial action. The union is required to give the employer 7 days written notice of the intention to hold such a ballot and a copy of the ballot paper at least 3 days before. Strict requirements need to be adhered to in order for the industrial action to be lawful. Also, Trade Unions are legally bound to provide 14 days'

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notice before the industrial action is due to commence or 7 days if the parties agree.

## 2.4 Unofficial industrial action

Unofficial industrial action is that which is not authorised or endorsed by a recognised trade union. By its nature unofficial industrial action is often initiated at local or branch level in response to particular issues, although it may sometimes form part of a wider co-ordinated campaign. Such action is therefore likely to take place spontaneously or at least with little forewarning and management should therefore have a contingency plan for dealing quickly with this action should it arise. Employees participating have limited protection under current legislation should their employer take action against them.

## 2.5 Strikes

Strikes can be for a long-term continuous period (when the union has called out its members for an indefinite period); short-term (for example a one day strike, or a strike for one or two hours only); or intermittent for a discontinuous period (when strikes take place for part of the day or week on a rolling basis but normal working is resumed for the rest of the working day/week). Whatever other response may be appropriate in particular circumstances, the central principle is "that all periods where staff are on strike will be unpaid".

## 2.6 Industrial action short of a strike

There are a number of ways in which staff may take industrial action short of a strike.

### 2.6.1 Bans on overtime

Bans on overtime are a common form of industrial action. Overtime bans may be introduced to put collective pressure on management to make concessions over a particular dispute and may in certain circumstances constitute a breach of contract.

### 2.6.2 Working to rule/going slow

This can have a damaging and disruptive effect on work, whilst those engaged in such action suffer no financial loss and unions do not have to meet 'strike pay'. In areas of work where, of necessity, there are detailed instructions about the way in which a task should

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be done, working to rule offers considerable scope for disruptive action. It will be necessary for management to establish the extent to which staff are deliberately applying an over-rigid interpretation (or misinterpretation) of rules and instructions with the aim of creating maximum disruption and to consider whether this amounts to partial performance which can amount to a breach of contract.

### **2.6.3 Wilful disruption (e.g., selective working)**

It is necessary to consider whether the intention is wilfully to disrupt the employer's business or merely involves a withdrawal of goodwill. Where there is wilful intent to disrupt the organisation's business, such action could amount to a breach of contract. Selective working may be a refusal to undertake certain tasks or a refusal to operate new working procedures. Where selective working is in prospect, it may be possible to specify in advance to the staff involved the duties to be undertaken and when. Failure to comply with such instructions given in advance in some circumstances may amount to a breach of contract.

### **2.6.4 Non-co-operation with job evaluations and similar exercises**

Management may require a member of staff to be interviewed in connection with exercises such as Job Evaluations, efficiency scrutinises or the implementation of new working practices. Co-operation with management on such exercises constitutes part of a member of staff's obligations as an employee. Refusal to be interviewed may amount to a breach of an employee's contract of employment. It will be necessary for management to establish the extent to which staff are deliberately applying an over-rigid interpretation (or misinterpretation) of rules and instructions with the aim of creating maximum disruption and to consider whether this amounts to partial performance which can amount to a breach of contract.

### **2.6.5 Health, Safety and Accommodation Issues**

There may be occasions when staff take spontaneous unauthorised absence over issues relating to health, safety and accommodation. There may be overlap with the Procedure for NHS Staff to Raise Concerns/Health and Safety requirements. Consideration will need to be given to the wider picture and the relevant Raising Concerns

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and Health and Safety Policies rather than considering this guidance in isolation.

### 2.6.6 Sit-ins

In normal working circumstances, employees use their employer's premises with the employer's express or implied consent. However, if they, or indeed third parties, occupy the premises for a sit-in without the employer's position, they may become trespassers, whether or not the sit-in is in contemplation or furtherance of a trade dispute. It can be difficult in some circumstances to differentiate between workers gathering for industrial action or a gathering for legitimately exercising a statutory right such as participating in union activities.

The above is not an exhaustive list of all possible types of industrial action but covers the main forms which are likely to be encountered.

## 3. Prevention and Avoidance

### 3.1 Principles

Disputes with employees and/or their representatives, and any resulting industrial action, are potentially costly and damaging to both the service and staff. Therefore, every effort should be made by all parties involved to avoid conflict arising in the first place by working proactively in partnership with trade union colleagues. If, however, conflict does arise, procedures should be in place for resolving the source of the conflict as soon, and as amicably, as possible. This will reduce the potential financial cost of the dispute, minimise the damage done to employee relations and the reputation of the service and help maintain service continuity.

Good relations between NHS Organisations and their staff are key to creating a productive working environment. NHS Organisations should therefore seek to encourage a workplace culture that prevents conflict from arising. Failure to do so could result in disputes which, in turn, lead to tribunal claims or calls for industrial action.

### 3.2 Informing and Consulting

It is good practice for the NHS Organisations to develop regular channels for informing and consulting with their workforce and/or their representatives on employment matters and service changes or



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developments. In some circumstances, organisations are legally obliged to inform and consult.

The Organisational Change Policy for NHS Wales contains a specific section on consultation requirements (see S5 – Consultation with Staff Interests) for NHS Organisations in Wales.

### 3.3 Negotiation

In most disputes, negotiating with employees and/or or their representatives face-to-face will be the quickest, and most effective means of resolving the problem. Both parties to the dispute will know what the issues are and can look for solutions in partnership. This approach should be encouraged and exhausted as far as possible to prevent any potential dispute which could result in industrial action.

It is also important to ensure that the right people are conducting negotiations on behalf of organisations involved and that these individuals have the right skills.

In some cases, it may be appropriate to involve ACAS where a dispute exists that is not able to be resolved informally. ACAS is an independent statutory body whose role is to improve working life through better employment relations. ACAS can not only help to resolve a dispute once it arises but also can help employers and employees and/or their representatives to work together to prevent disputes arising in the first place.

### 3.4 Establishing the Legality of the Industrial Action (See flowchart appendix 2)

Trade unions are required to comply with strict balloting and notification rules in the Trade Union and Industrial Relations (Consolidation) Act 1992 (TULRCA) in order for the industrial action to be immune from legal liability, as follows: -

- The industrial action must be taken “in contemplation or furtherance of a **trade dispute**”;
- The industrial action must not be taken for a **prohibited purpose**, such as to enforce a “closed shop” or to protest at the dismissal of workers taking unofficial industrial action. Neither can it amount to secondary action or unlawful picketing;
- It must have the support of a properly organised postal **ballot** of union members. The union must ballot (and only ballot) all members who it is



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- reasonable for it to believe will be induced to take part (save for minor accidental errors);
- Before calling for industrial action, a union must have the majority support of a properly organised ballot;
  - The union must comply with a number of procedural requirements otherwise the employer will have grounds to seek an interim injunction to prevent the action going ahead (and/or seek damages) (See appendix 3).

Upon receipt of a ballot result in favour of a strike and where the NHS Organisation is aware that key procedural requirements have not been adhered to, the NHS Organisation will need to weigh up the advantages and disadvantages of applying for an injunction before a strike is actually announced. These will depend on particular circumstances – for example, the state of negotiations with the union and the possibility of the dispute being resolved before a strike is called. NHS Organisations will want to seek their own legal advice in making this decision.

There is no need to wait for a formal notice of strike to be issued, or even for the results of the ballot, if a breach of the balloting or notification rules has taken place. However, if the union's failure is an accidental minor breach of balloting or notification rules, it may still be able to remedy the defect.

Even so, the NHS Organisation will have bought itself a few extra days to make contingency plans. Before applying for an injunction, it is good practice to first seek an undertaking from the trade union not to engage in the industrial action (or to remedy any breaches first). An injunction can then be sought if the undertaking is not provided.

Any managers who become aware that a ballot for industrial action may be taking place within their organisation should advise the Director of Workforce and OD with immediate effect.

#### 4. **Business Continuity Management**

4.1 The NHS Organisation should have in place agreed processes to prepare for and manage during episodes of industrial action. Specific responsibilities for managers are outlined below. The organisation should also establish a 'command and control' process to ensure the organisation has a clear understanding of the impact of this action in each area and the actions that are being taken to maintain services, and

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support decisions in relation to the reduction of services or redeployment of staff. This process should be led by an executive director (or appropriate deputy). Dependent on the potential impact of the Industrial Action the organisation may decide to set up an urgent response group (model terms of reference are included at appendix 5) to provide direction, with membership to be determined dependent on the planned action.

The exercising of plans should be undertaken. This will ensure that everyone understands their role and provides an overall appreciation of the plan. An exercise will test the system, the plan and rehearse the staff prior to any real event.

**4.2** Managers need to have in place contingency plans in anticipation of strike and/or other industrial action that can be drawn upon once strike action is confirmed to:

- Ensure patient safety and continuity of care
- Maintain essential service delivery
- Ensure that H&S is in place for non-striking employees, service users and contractors
- Ensure, where practicable, all statutory duties are met.

**4.3** A risk assessment approach should be taken to contingency planning for industrial action using local risk assessment tools. Managers should review their services to establish which are essential and then consider the key elements that need to be in place if they are to be delivered. Those key elements then need to be assessed as to their vulnerability to strike and/or other industrial action and as to the likelihood of such action taking place. As Trade Unions are legally bound to provide at least 7 days' notice of any intention to ballot, there should be sufficient time to implement contingency plans that have been previously prepared. Managers should draw on plans that are in place in relation to other critical events e.g., severe weather or pandemic which should take into account reductions in staffing levels. A management action card is included at appendix 4.

**4.4** Such arrangements need to be sufficiently clear and understood by those who will continue to deliver essential services on strike and/or other industrial action days. Decisions on building and service opening and closing will be up to the relevant senior manager in consultation with the site managers and facilities managers.

**4.5** NHS Organisation wide communications during periods of strike action will be co-ordinated by the Organisation's Communications Team (see

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section 5). Senior managers should ensure that communications are accessible to those not on e-mail and that any service specific information is also made available to their employees. Organisational communication should be agreed through the 'command and control' process to ensure continuity of messages, recognising the impact of industrial action on public confidence and organisational reputation.

**4.6** In addition to putting in place arrangements for continued essential service delivery, managers must also establish systems to capture details of striking staff (As opposed to staff who are absent for other reasons for example sickness absence or annual leave who are not associated with or taking part in the action.) (For pay deduction purposes) and to enable responses to requests for information on the impact of strike action to be collated as quickly as possible.

## 5. Communication

**5.1** The Communications Team should establish the necessary internal and external communication channels as early as possible within the business continuity planning process. Communication should be a key element of the contingency planning / project management arrangements and regular communication briefing documents agreed and disseminated as appropriate.

**5.2** Internal communication links may include\*:

- Workforce & OD department
- Departments affected by the industrial action
- Other internal support departments, such as Estates, Facilities, IM & T,
- National / Regional / Local Trade Union Representatives
- Staff
- Patients / Service Users
- Visitors

**5.3** External communication links may include\*:

- Other Health Boards and Trusts (particularly Welsh Ambulance Service Trust)
- Police
- Local Councils
- Community Health Councils
- General Practitioners (GPs)
- Welsh Government

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- Media / National and Local Press
- External contractors

\* These lists are not exhaustive.

**5.4** All communication between the organisation and the Media / Press should be handled and approved by the Communications Team.

**5.5** The Workforce & OD department will also play a pivotal role in ensuring that communications between the relevant unions and the organisation are actively and effectively maintained. The Director of Workforce & OD should be made aware of all formal correspondence relating to industrial action from the relevant Union(s).

## **6. Exemptions from Strike Action**

**6.1** It is for the employer to make requests for exemptions. This process will be co-ordinated by Workforce and OD departments. Managers will be asked to provide full details, including wherever practicable names rather than blocks of jobs of any staff who they feel should be exempted on a "life and limb" basis. This definition should be strongly adhered to by the Trade Unions and will be the only basis on which exemptions will be considered. Workforce and OD departments should liaise with the Trade Unions and inform managers of exemption decisions as soon as possible. It is likely that the number of exemptions that the Trade Unions agree will be kept to a minimum.

**6.2** Exemption information needs to be provided in the required format and should be submitted within the timescales specified by Workforce and OD departments. Reasons as to why timescales cannot be adhered to by Service Areas should be communicated via Workforce and OD managers to the Trade Unions and responses co-ordinated.

## **7. Health & Safety**

**7.1** The Health and Safety at Work Act 1974 states that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his/her employees", and in particular that such a duty extends to:

- Provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

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- Arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- Provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of their employees;
- So far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
- Provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

**7.2** Legal responsibilities and duties on the NHS Organisation and individuals are not suspended during industrial action. There is a statutory duty to ensure safe and healthy work environments, safe working practices for those who remain in work and to ensure the health and safety of the public. A health and safety risk assessment should be carried out beforehand on all workplaces remaining open on the day(s) of strike action by an appropriate, competent person. All work activities, procedures, systems and the environment/workplace should be reviewed during and throughout the days of strike action to ensure risks to health and safety of employees and the public are reduced as far as is reasonably practicable. Suitable and sufficient risk assessments should be undertaken and recorded using the normal risk assessment form and the appropriate control measures implemented and monitored.

**7.3** Whilst it is not possible to identify all the issues which need to be considered in risk assessments across the organisation, particular attention should be paid in respect of:

- lone working,
- reduced staff levels,
- staff requiring close supervision/instruction,
- disabled people,
- young persons,
- visitors and the public,
- emergency evacuation procedures for staff and the public,

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- first aid provision,
- increased risk of violence, and
- use of plant, vehicles and equipment.

Evacuation procedures for employees and the public, including those who are disabled, should be reviewed to ensure that if needed, buildings can still be evacuated safely.

**7.4** Employees have a duty under health and safety legislation to take care of their own health and safety, and that of other people. This could include maintaining or co-operating in the maintenance of safety equipment up until the time any strike action occurs.

There is a duty on all persons, regardless of their employment status, to not intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety, or welfare.

## **8. Operational Workforce Guidance**

### **8.1 Preparation for Industrial Action Short of a Strike**

When planning and preparing for industrial action short of a strike, the principles of planning and preparation should be the same as for strike action and these guidelines should support this. However, the following should be borne in mind: -

- If employees take industrial action short of a strike which does not involve a breach of contract, they are entitled to be paid in full.
- If industrial action short of a strike is a breach of contract the employer has two options:

Demand that the participating employees comply with their contracts in full or otherwise stay away from work (and not be paid) until they are prepared to comply,

Accept partial performance and continue to pay the employees – which can in certain circumstances be subject to a deduction for partial performance.

- Employers are entitled to demand full performance and do not have to accept partial performance. If an employee is in breach of contract and the employer accepts partial performance in theory the employer may claim damages and the Courts may allow some deduction from wages.



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This is however a complex area and relevant advice should be sought from Workforce.

- If an economic loss cannot be quantified a deduction may be based on the loss of employee's services, e.g.

*Royle –v- Trafford Borough Council* - a teacher carried on teaching his existing class of 31 pupils but refused (in breach of contract) to take on a further 5 pupils. The Court held that the employer was entitled to set off 5/36th from his salary.

*Sim v Rotherham Metropolitan District Council* – a Court allowed a set off of part of teachers' wages when they had refused (in breach of contract) to cover for colleagues. Set off was proportionate to the time they would have spent covering colleagues.

A set off in respect of some types of industrial action may be difficult to quantify and it may be difficult to persuade a Court to allow a set off.

## 8.2 Pre-Strike Actions

Managers should try to identify employees' intentions as soon as possible in advance of the days of strike action in order to establish the levels of service cover that are likely to be available. However, there is no obligation on an employee to indicate either way whether they will be partaking in strike action though it is anticipated that most will respond. The ballot notice should include (not exhaustive); categories of employees/ workplaces affected and the number of employees at that workplace concerned/ number of employees concerned/ explanation of the numbers. This will not necessarily be indicative of number who will actually partake in the industrial action/strike. Although not a legal requirement, trade unions may advise management of the number of employees in each area that are affected by the industrial action. Local negotiation over exact details will need to take place. After the ballot there is an obligation to notify the result of the ballot and notice of industrial action/strike 14 days before the start date (or 7 days' notice if agreed between the parties).

## 8.3 Contractual and Pay Deductions

- 8.3.1** 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.



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**8.3.2** <sup>2</sup>It is important that employers note that, in accordance with Part 2, Section 7 of Agenda for Change, the maximum pay deduction for each strike day for salaried staff working under Agenda for Change terms is 1/365th of their annual salary if paid weekly or 1/12th of salary divided by the number of days in that calendar month rule if paid monthly.

**8.3.3** A facility has been developed to facilitate payment of time worked in the event that a staff member returns to work during a period that they are taking strike action. (See appendix 6 (excel) for payroll guidance).

**8.3.4** Organisations should be aware that under section 8 of the Employment Rights Act 1996, they are required to provide employees with an itemised pay statement at or before any time at which any payment of salary is made. Section 8(2) states that particulars should be contained of any fixed or variable deductions from the gross amount and the purposes for which the deductions are made. As such, deductions made from an employee's wages for a day of action or partial performance should be clearly set out on the payslip.

The NHS Electronic Staff Record (ESR) has introduced a new payslip message to its system that will notify employees when a deduction has been made from their pay as a result of industrial action. This message will be shown on an employee's payslip where an absence has been recorded as either 'unpaid unauthorised special' or 'unpaid unauthorised special hours', and the reason for the absence is 'industrial action'.

The payslip message will read: Pay reduced by x day(s)/hour(s) due to Industrial Action from Date A to Date B.

**8.3.5** Managers should ensure that accurate, proper and consistent administrative arrangements are in place for the recording of those participating in the industrial action, i.e., it must be clear whether their staff are taking industrial action, on sick leave, on annual leave/TOIL/ flexi leave (pre booked before the date of the strike was announced) or other legitimate absence. Pay deductions should be made from the earliest possible pay period following strike action. Information will be

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<sup>2</sup> Failure to adhere to this will result in a breach of the national terms of conditions of service.

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circulated on the deduction process and timescales. (See appendix 6 (excel) for payroll guidance).

- 8.3.6** For those employees who contribute to the NHS Pension Scheme, no pension contributions will be collected on days when they are on strike and the period cannot reckon as pensionable membership for benefit purposes. The number of days lost 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.

#### **8.4 Sickness/Annual Leave/Flexi/TOIL etc.**

- 8.4.1** Once strike action is declared, annual leave, flexi leave, TOIL etc. should not be approved (unless pre-agreed) for the day(s) of action. Unless their normal place of work is home, requests from staff to work from home on strike day(s) should also be refused. In relation to those whose normal place of work is at home, managers will need to clarify the intentions of those employees in relation to strike days. Any sickness absence which occurs on the day(s) of action may need to be accompanied by a Fit Note. Organisations and managers will need to consider the proportionality of putting such a provision in place and the impact this may have on primary care
- 8.4.2** Those on self certificated sick leave before industrial action starts should be assumed to be on sick leave, providing that a Fit Note is provided that covers the day(s) of action.
- 8.4.3** Those on flexi time who take strike action should be credited with their normal working hours for the day as they will not be paid for the day.
- 8.4.4** In terms of those on shift work, the intention of shift workers and the hours they actually work should be closely monitored.

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## 8.5 Reallocation of work to others

Managers will need to consider whether any of the work that will be disrupted by the action is essential i.e., endangers life, fulfils a statutory duty, strategically important, etc. If this work must be covered, managers should make contingency arrangements and the following options should be considered: -

### 8.5.1 Reallocating work to those not taking part in the action.

Managers should not endanger goodwill with staff not participating in industrial action. They should not ask them to perform additional duties that are either unreasonable or for which they are not competent/qualified to perform.

### 8.5.2 Reallocating work to other groups

Staff cannot be forced to perform alternative work if it conflicts with their contract of employment unless it is a reasonable request. Appropriateness of work in relation to the employee's current duties, position, skills/qualifications, etc are factors that should be taken into account. A request to undertake additional duties is more likely to be considered reasonable if the work is necessary to prevent a break of the NHS Organisation's statutory duty or is vital to service provision.

### 8.5.3 Alternative Workplace

Managers should assess the impact of the industrial action so that, if possible, alternative arrangements can be made. Once made, staff should be advised so that they clearly understand the arrangements. If possible, staff wishing to work on the strike day(s) may be asked to report to an alternative location, where reasonable alternative duties will be provided. Those attending work should report their attendance to a senior manager within the service.

## 8.6 Use of Agency Workers

It is not lawful for an employment agency to provide workers to cover work normally carried out by employees on strike. Therefore, managers should not use agency workers to cover the work of employees on strike, or to cover the work of employees who are not on strike but who are covering the work of employees who are on strike. On strike days, there is no requirement to stop using agency workers who are already working in the NHS organisation.

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## 8.6.1 Use of Temporary /Casual Staff

If essential services cannot be maintained by utilising existing staff, managers may wish to consider utilising an existing bank of casual staff. Caution will need to be exercised depending on the arrangement. N.b. the Collaborative Bank (Cwm Taf Morgannwg UHB and Swansea Bay UHB) is classified as and an “employment business” which means it would be captured by the same restrictions as agency workers supplied by an external agency, see 8.6 above).

## 8.7 During Strike Actions

### 8.7.1 Picketing

**8.7.1.1** Picketing occurs when a group of people (namely a worker, ex worker or a trade union official) gather at or near a workplace to try to communicate information to persuade others e.g., non-strikers, temps, suppliers, to take some form of industrial action. It is an indirect form of industrial action that is protected by law if it is carried out in accordance with the legislation (Trade Union and Labour Relations Consolidation Act 1992 specifically sections 219(3), 220 and 220A) but will be unlawful otherwise.

**8.7.1.2** Everyone whether in a Trade Union or not has the right to decide whether they will cross a picket line and they would not be subject to disciplinary action should they choose not to cross. Any response to union members who cross picket lines will be a matter for the Trade Union(s) to determine.

**8.7.1.3** "Peaceful" picketing has long been recognised to be a lawful activity if it meets the legislative requirements.

**8.7.1.4** The [UK Government Code of Practice](#) sets out the basic rules which must be followed if picketing is to be legally carried out.

**8.7.1.5** The only purposes of lawful picketing are to peacefully obtain or communicate information; and/or persuade a person to work or not to work. Pickets do not have the legal power, to require other people to stop, or to compel them to listen or to do what they ask them to do. A person who wants to cross a picket line and report to work must be allowed to do so. The Health & Safety of all parties must be a consideration at all times.

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**8.7.1.6** For the avoidance of doubt, it is a criminal offence for pickets to use threatening, abusive, insulting disorderly words or behaviour. Staff who are physically prevented by pickets from entering their workplace should contact their/a manager to support them in crossing the picket line or make alternative arrangements to attend work.

**8.7.1.7** The law allows pickets to seek to explain their case to those entering or leaving the picketed premises and/or ask them not to enter or leave the premises where dispute is taking place. This may be done by speaking to people, the distribution of leaflets, carrying of placards and banners putting the picket's case. In all cases such activities by pickets and those crossing the picket lines must be carried out peacefully with mutual regard for Health and Safety matters.

**8.7.1.8** Large numbers on a picket line can be intimidating and cause resentment amongst those seeking to cross that picket line. The Government's Code of Practice recommends that pickets be restricted generally to a maximum of 6 people at their own place of work.

**8.7.1.9** Picketing is only lawful if it is carried out by a person attending at or near the place of work they report to. Peripatetic staff should regard the administrative centre as their place of work.

**8.7.1.10** There are expected standards of behaviour on picket lines. At no time should activity on picket lines include:

- Unlawful threat or assault.
- Harassment (i.e., threatening or unreasonable behaviour causing fear or apprehension to those in the vicinity).
- Obstruction of a path, road, entrance or exit to premises

**8.7.1.11** NHS Organisations have a right to expect appropriate behaviour on any picket lines on or outside their property and reserve the right to take appropriate action in relation to inappropriate and unacceptable behaviour, e.g., by informing the police.

## 8.8 Closed Places of Work

Individuals not involved in the strike action should report to their normal place of work. If an individual attends their normal place of work and is

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unable to gain access i.e., the building is closed, they should contact their/a manager to gain instructions. This may include being instructed to go to another location to undertake appropriate work or if this is not possible and there is not alternative work, being sent home. In the event of the latter, this should not be seen as strike action and pay should not be deducted.

## 8.9 Reporting Arrangements

During the strike and/or industrial action, information should be collected on a daily basis in each division/locality on the numbers of staff taking action within each staff group, the impact on the Service of the action and any plans to mitigate the effect of any action over the next 24 hour period (using the form at appendix 10). The forms should then be forwarded to the Director of Workforce and OD. An organisational position should then be collated and forwarded to Welsh Government representatives (WG reporting requirements to be established).

## 8.10 Post Strike Actions

Managers will be required to notify payroll of the names and staff numbers of staff for whom pay deductions are to be made, as soon as possible before the payroll deadline using the appropriate for provided by payroll.

Risk assessments undertaken should be reviewed and updated

## 8.11 Staff Relations

Managers should identify any ongoing issues and concerns that may staff have and deal with them promptly.

Nothing should be said written or acted upon about any employee which might be taken to suggest that they will be regarded or treated less favourably in respect of employment right, working condition, or career opportunity, on account of the industrial action they took.

This should be communicated by Managers to staff and staff side colleagues.

## 8.12 Return to Work

The formal terms of the return to work are usually negotiated when the dispute is settled. In particular it will be important to restore as soon as possible the pre-existing industrial relations climate, so the return to work



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can take place without any recriminations on either side. From a management point of view, this means that an employee's job or career should not be prejudiced by the fact that they took part in the industrial action.

Those who are contractually required to work on the weekends should be expected to do so and will receive the appropriate weekend enhancements if they work irrespective of whether they took strike action. Overtime rates should only be paid to employees who have actually worked hours in excess of a full week of 37.5 hours.

### 8.13 Debrief and Lessons Learnt

A debriefing meeting should be organised as soon as possible after the industrial action. This should involve relevant staff involved, to discuss the events of the industrial action; both positive aspects and key lessons learnt which could be implemented for future planning.

Arrangements for debriefing for staff should be organised, as required.

The nature of any debrief(s) should be to identify areas for improvement in relation to procedures and systems and should not act as forums for criticising performance.

### 8.14 Data Capturing and Review

Managers should collect data on:

- Numbers of staff taking industrial action
- Number of staff not working normally due to strike action i.e., those who would not cross a picket line
- The type of action taken
- The dates/period of time the action covered
- Staff on sick leave and whether Statement of fitness to work received
- Staff on pre-booked annual leave/TOIL/flexi leave
- Staff reallocated to other areas to work
- Use of Bank staff

Managers should also collect information on the effects of the industrial action on the service provision to inform the debrief sessions

See model forms at appendix 7.



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## **Appendix 1 - Frequently Asked Questions**

**Question – If a member of staff refuses to cross a picket line, whether a trade union member or not, could he/she be disciplined by the UHB?**

**Answer** – Disciplinary action will not be taken against employees because they have refused to cross a picket line, but they should be considered to be not working normally due to strike action and the appropriate pay deducted.

**Question – Can managers reallocate the duties of striking staff to non-striking staff?**

**Answer** – Yes, non striking staff can be asked to cover essential work, shifts, or 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.

**Question – Where workplace nurseries, schools and other care establishments are closed due to strike action, will staff who are not taking industrial action, be allowed to book leave to look after their dependents who normally attend these facilities?**

**Answer** – In general staff are excluded from booking time off during days of industrial action, and therefore should make alternative arrangements for the care of their dependents. However, managers should look sympathetically at cases where staff can demonstrate that they are genuinely unable to make alternative arrangements.

**Question – Do members of the trade unions involved in the industrial action have an option to strike or not, and if they decide against can the trade unions take disciplinary action?**

**Answer** – It is up to individuals to decide whether they will take strike action or not. Any response to union members crossing a picket line will be a matter for the Trade Unions to determine.

**Question – Should staff be allowed to work from home on the strike day?**

**Answer** – For those whose normal place of work is their home or those who practice hybrid working, they will be allowed to work from home, but managers will need to establish whether they intend to strike or not and arrange pay deductions accordingly. Ad hoc or periodic home working should not be allowed during strike days because this could create more difficulties in

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maintaining services already being curtailed by the industrial action. However, where staff are sent home because it is not possible to gain access to their own or an alternative workplace, then they could be asked to work from home where this is possible.

**Question – What should staff do who are intending to be at college on a study day on a day of strike action?**

**Answer** – Staff should discuss the issue with their line manager. If there is a shortage of staff in the department, managers may need to request that staff do not attend college but attend the workplace to cover duties.

**Question – What should staff do who have booked annual leave prior to the notification of a day of strike action and now wish to change in order to participate in the strike action?**

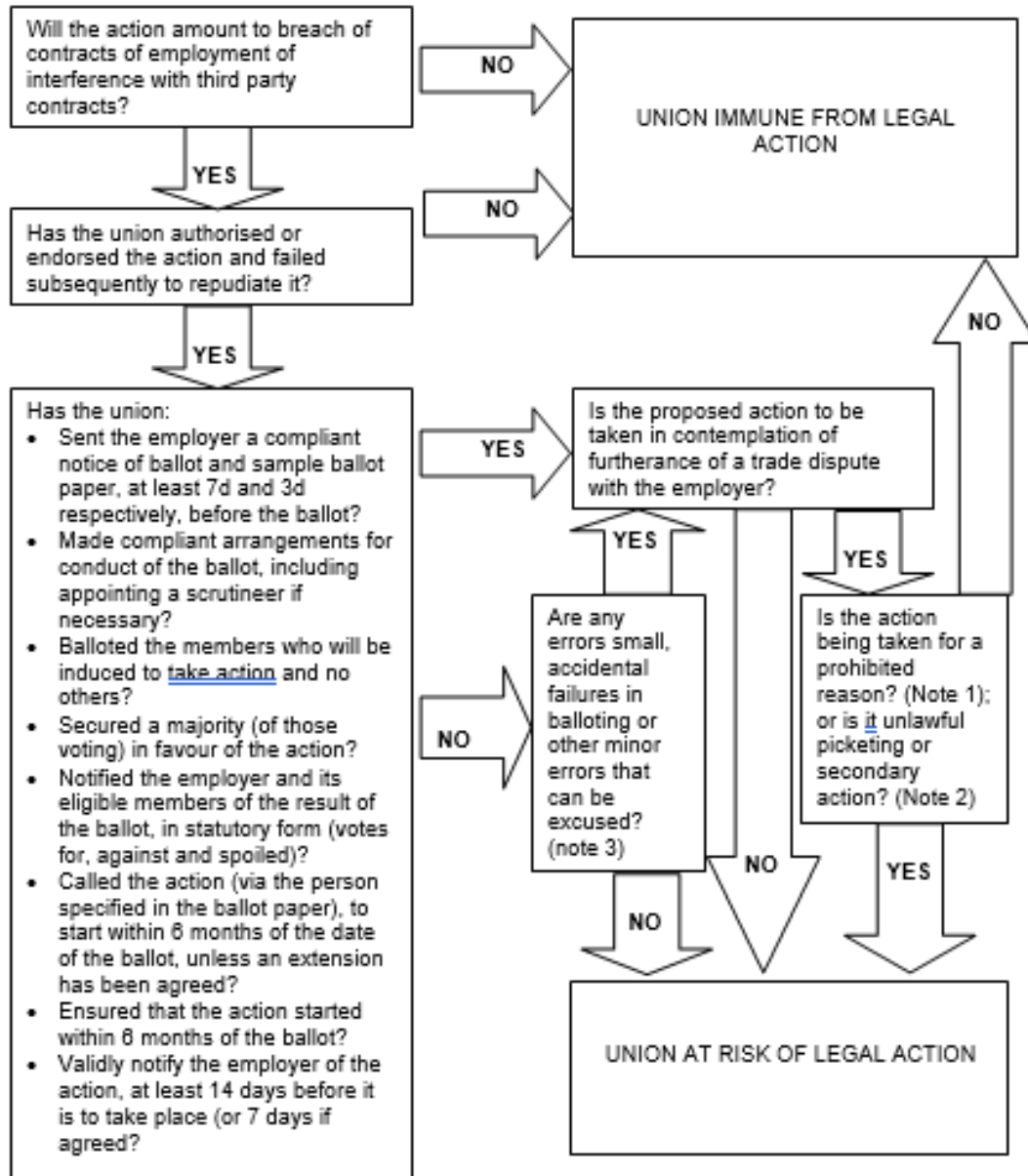
**Answer** – Staff have a right to strike. If they choose to, every effort should be made to accommodate the change of leave. However, service needs will need to be met and the principles relating to carry forward of leave applied.

Further frequently asked questions can be found in the NHS Employers document “Managing Industrial Disputes: Guidelines for Employers in the NHS” at <https://www.nhsemployers.org/industrial-action>.

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## Appendix 2 - Flowchart – Establishing the Lawfulness of Industrial Action

NOTE: This flowchart is a simplification of the detailed rules governing union immunity from legal action in relation to industrial action. It is not intended to be a substitute for legal advice.



**Note 1:** Action will not be protected if its purpose is: to enforce union membership; to protest against dismissal of employees who have taken part in unofficial action; or to impose union membership or recognition on a supplier.

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**Note 2:** Some lawful picketing can amount to secondary action and can be lawful. Generally, however, if the action is about a dispute between another employer and its employees, it will be unlawful secondary action.

**Note 3:** following the Court of Appeal's March 2011 judgement in RMT-v- Serco and ASLEF – v- London and Birmingham Railway, the standard of accuracy required of the unions in notifying and balloting is less onerous than was previously the case. Minor errors which would have made no difference to the result of the ballot are more likely to be forgiven.

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### **Appendix 3 - Trade Union Ballots - Key procedural requirements**

#### Notification of ballot to employer:

- Notification of intention to ballot, at least seven days before the ballot.
- A copy of the ballot paper, at least three days before the ballot.
- Notification of the result of the ballot, as soon as reasonably practicable
- Notification of industrial action, at least fourteen days before it is due to start (or seven days if the parties agree).

#### Arrangements for ballot:

- The ballot must be held in accordance with the balloting rules. Where more than 50 members are entitled to vote in the ballot, the union must appoint an independent scrutineer to run the ballot.

#### Entitlement to vote:

- Every union member whom the union reasonably believes will be induced to participate in the industrial action has been given an equal opportunity to vote by post, and no others, save for minor accidental breaches.

The ballot must be organised so that all union members entitled to vote are able to do so:

- Without interference or constraint from the union or its officers, employees or officials.
- Without incurring any direct cost to themselves, which means that the ballot forms must be accompanied by stamped addressed return envelopes.

#### Result of ballot:

- The union must take reasonable steps to announce the result of the ballot (including the number of votes for and against, and the number of spoiled papers) as soon as reasonably practicable, to the union members who were entitled to vote **and** to their respective employers.

#### Required level of support:

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- There is a turnout requirement of at least 50% of eligible members. Ballot turnout requirements and required levels of support are complicated areas and it is advisable to seek advice on this matter.

- .

#### Report on conduct of ballot:

- The independent scrutineer must issue his report on the conduct of the ballot, within four weeks of the ballot taking place. Relevant employers can require the union to send them a copy of the report.

#### Notice of Industrial Action:

- This must be served on the relevant employers (that is, those whose employees the union expects to ask to participate in it) at least 14 days before the start of the industrial action, or 7 days if both parties agree.
- If the action is to be discontinuous (that is, in several bouts), the union must give at least seven days' notice of each day when the industrial action will take place. These may be set out in one notice or several, specifying the start dates of each bout.
- Industrial action must be started within 6 months of the date the ballot closed, otherwise the ballot result will be treated as "stale".
- The ballot cannot validate industrial action that started before the ballot date. The action can only start when the person specified in the ballot paper as having authority to do so calls for the industrial action to proceed.
- An industrial action ballot must comply with the following requirements:

#### Secret postal ballot:

- The arrangements must be sufficiently secure to allow those voting to do so in secret and for the votes to be accurately and fairly counted.

#### Multi-site ballots:

- If the ballot covers several sites, there should be separate ballots of only those union members entitled to vote at each workplace.

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There can be a single ballot if:

- Members of the same union at each of the sites are directly affected by the outcome of the dispute.
- Entitlement to vote is given to all union members at those sites who the union reasonably believes have a common occupation or occupations and are employed by the particular employer or employers in dispute (but no others); or
- Entitlement to vote is given to all the members of the union who are employed by the employer or employers with whom the union is in dispute (but no others).

Miscount:

- An accidental miscount of the votes will be insignificant and disregarded if the error is so small that it could not affect the outcome of the ballot



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## **Appendix 4 – Management Action Card**

### **Upon Notice of Industrial Action**

Organisation advises manager/or designated lead of notice of industrial action.

#### **Within the first 24hrs the manager/or designated lead will:**

- Ascertain the number of staff who are considering taking industrial action in their area (also consider worst case scenario i.e., all members of a union (and non-members of any Union) in an area choose to take industrial action).
- Review rotas to identify impact on service delivery, identify any gaps.
- Rearrange rotas, if able, to minimise disruption to service delivery, identify any gaps.
- Prioritise essential services, i.e. those services where failure to provide timely care will compromise patient safety and clinical outcomes.
- Match available staff capacity with provision of essential services, identify any gaps.
- Inform line manager of capacity shortfall to maintain essential services (this will inform senior managers' decisions about the deployment of staff across the Health Board).
- As further intelligence becomes available relating to individual staff decisions the plan should be reviewed and the line manager advised accordingly, at least daily.

In some areas the Manager may plan to take Industrial Action if this is the case, they should advise their Line manager and the actions on this card be delegated to another senior member of the team

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## **Appendix 5 –Terms of Reference Control and Command**

**(Insert name of Health Board or Trust)  
Managing Industrial Action  
Urgent Response Group  
DRAFT EXAMPLE  
Terms of Reference**

### **Purpose**

This meeting will be established if there is a risk of industrial action. The purpose of the Managing Industrial Action – Control and Command Group is to oversee the preparation and organisational readiness for the impact of industrial action, assess the impact and provide direction during an event. To support management decisions to ensure the continuation of essential services and to maintain a whole organisational perspective. To develop and agree a communication strategy for use within the organisation and to the public. To monitor recovery following industrial action and receive analysis of the impact.

### **Scope**

The Group will:

- Provide corporate leadership and direction prior to, during and following industrial action
- Review the local plans in place to manage during industrial action
- Identify gaps in staffing
- Monitor redeployment of staff as required
- Agree the reduction or cessation of non-essential services if required
- Monitor the ongoing impact of industrial action
- Receive information from HR in relation to 'horizon scanning' of the national picture to prepare the organisation for future impact
- Receive and review organisational data relating to the extent and impact of industrial action and report to the Executive Team
- Manage communications/messages internally and externally

### **Membership**

The group will consist of senior representatives from Divisions and Localities from across the Local Health Board or Trust, members of the communication team, and emergency planning leads. Members of the group will have knowledge of the impact or potential impact of industrial action in their area and the ability to make or contribute to decisions relating to redeployment of staff and the safe reduction or cessation of services.

### **Chair**

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The group will be chaired by an executive director.

**Administrative support**

To be agreed.

**Frequency of meetings**

To be agreed as required.

**Reporting arrangements**

The group will report to the Executive Team.

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## **Appendix 6 – Payroll Guidance**



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Industrial Action Payr

## **Appendix 7 – Model Data Collection Forms**



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**Appendix 8 – Internal situation report**

To enable effective monitoring of the impact of industrial action please complete and return this form to \*\*\*\* by \*\*\*\* each day when action is taking place.

Staff group and numbers of individuals

Staff group	Number of staff on strike	Number of staff taking action short of strike
Nursing and Midwifery (registered)		
Nursing (other)		
Medical		
Therapies & Health Sciences		
Additional Clinical Services		
Ancillary Staff		
Management		
Admin and Clerical		
Works and Estates		
Other		

<b>Impact of action on service</b>
<b>Mitigation put in place</b>
<b>Other notes</b>

Organisation.....Division.....  
 Department.....Ward/Area.....  
 Completed by ..... Date.....