



BMA Industrial Action Juniors Doctors Pay Dispute 2023/2024

Employers Pay and Contract Guidance v.10

Last Updated 15th March 2024

Introduction

In times of national 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 dispute and/or cause lasting damage to local industrial relations.

This guidance provides the answers to some of the most frequently asked questions from employers. It is not intended to be exhaustive or definitive. It will be updated in advance of, during and post the period of strike action and as such, employers are encouraged not to print it out.

If there is something missing or unclear, you should, in the first instance, contact your local Workforce Department or Industrial Action Planning Group/Cell. They will in turn contact the NHS Wales Employers using the dedicated email address. Any direct queries will be referred to the organisational team in the first instance.

Separate specific guidance is available on [Picketing](#), Data Collection, [Pay Rates and Strike Pay Management](#), [Guidance on Industrial action and management of time out of training for Doctors in Postgraduate Training](#) – Guidance for Wales has been issued by HEIW.

1. What is the nature of the planned industrial action?

Junior Doctors employed by the NHS in Wales have been balloted on whether they are prepared to take strike action.

A **3rd period** of Strike Action has been confirmed as a full withdrawal of labour for a **96-hour continuous period between 7am Monday 25th March 2024 and 7am Friday 29th March (Good Friday, Public Bank Holiday)**.

The ballot outcome provides the mandate for strike action up to 17th June 2024.

2. What is the view of the GMC on doctors taking industrial action?

The GMC have previously shared their position regarding industrial action, providing doctors with [industrial action FAQs](#). The GMC expects any doctors choosing to take part in strike action to continue to follow the principles of their guidance, [Good medical practice](#). It

highlights the importance of doctors working collaboratively with the healthcare team to keep patients safe, staying within the limits of their competence. Consultants may also wish to consider the [principles of leadership and management](#) for all doctors in discussion with employers.

3. Who can participate in this industrial action?

Protection is only available to those who are taking part in official strike action.

Members of a union (in this case BMA) which has balloted and called out its members (in this case Junior Doctors) will be taking part in official protected action. Employees who join the BMA which has authorised or endorsed action following the ballot but prior to the action will be protected.

Additionally, Junior Doctors with an NHS organisation, employed on the 2002 contract, who are non-union members will be protected against dismissal for taking part in industrial action.

Medical and Dental staff who do not fall within the categories of those balloted (set out below) and staff who are members of unions which have not successfully balloted and called out their members, will be taking part in unofficial action if they go out on strike and will therefore not be protected against dismissal.

The Ballot and therefore strike action covers doctors who are employed on the National Health Service Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) Terms and Conditions of Service, also known in its application to doctors and dentists in training as the “2002 contract” or “New Deal contract”.

¹Examples of roles set out in the notice to Ballot include:

- Clinical Fellow (with an NHS Contract)
- Foundation trainee FY1
- Foundation trainee FY2
- Foundation trainee FY3(or equivalent)
- GP trainee
- Senior Clinical Fellow
- Specialty trainee CT1-2
- Specialty trainee ST1-2
- Specialty trainee ST1-2/CT1-2
- Specialty trainee ST3-5
- Specialty trainee 6-9
- Trust Grade/locally employed Junior Doctor
- Locum Junior Doctor (with an NHS Contract)
- Academic trainee- (with an NHS Contract)
- Trainee in public health (without honorary contract with a non-NHS organisation)

4. Can we ask junior doctors whether they will be taking industrial action?

Yes, and we would encourage employers to do so, and engage in conversations with colleagues (including in the wider team) about how to ensure patient safety as soon as possible.

¹ This list is not exhaustive as titles may have been varied at local level.

²The request should be made as widely as possible given that Junior Doctors who are both BMA members and non-union members may take part in official strike action. Doctors are not obliged to answer and are subsequently entitled to change their mind. Managers should avoid any suggestion of intimidation or bullying when asking employees about the strike. These are sensitive times, and being alert to the possibility of misinterpretation is key.

All national guidance is that planning should be undertaken based on all Junior Doctors who are BMA members or non-union members will take strike action.

5. Should we refuse to approve requests for annual leave from Junior Doctors?

Employers are encouraged not refuse leave requests from junior doctors, submitted in accordance with normal policy, due to strike action.

It is in the interest of employers to safeguard the health and wellbeing of staff and ensure the continued safety of patients by allowing junior doctors to take their full annual leave. This is also in the best interests of the junior doctors themselves.

Both employers and junior doctors as employees must make every effort to work together to ensure that junior doctors are able to take the full annual leave entitlement. Rejecting out of hand requests to take annual leave fundamentally undermines this process. Where possible, the employer should, respond positively to all leave requests and should normally agree reasonable requests.

6. How will strike pay deductions be calculated?

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 have withdrawn labour and are on strike.

Deductions from pay for junior doctors participating in strike action will be recorded in days and pay will be reduced by 1/31, 1/29 or 1/30th depending upon the month action takes place.

Employers will be required to submit one return per Health Board/Trust by 4th of the following month (irrespective of the normal payroll deadline).

For the 3rd Round of Strike Action in March 2024 strike Pay Returns are required by 4th May 2024. No deductions or payments will be made in April due to the proximity of the strike action to Month end/Bank Holidays and pressure on employers.

Details of the information required will be provided separately in the [Strike Pay Management Guidance](#)

7. Will Junior Doctors be able to leave their shift if the strike starts before the end of their shift?

No. Under GMC's good Medical Practice, Doctors are responsible for ensuring an effective handover. This is an essential part of a patient's continuity of care.

² Managers should bear in mind that trade union membership is a special category of data under data protection regulations; the disclosure of an individual's trade union membership, even in conversation where a third party is present, constitutes a personal data breach.

8. Will Junior doctors who return to work during the strike action be paid?

Yes, in the event a junior doctor undertakes a part shift or returns to undertake work during the period of strike action, the deduction described in Q.5 will be adjusted to recognise the proportion of the day worked. More detailed guidance and clarity on the information required to be submitted will be provided separately in the [Strike Pay Management Guidance](#) as referenced in Q.5.

9. Will Junior doctors who are not rostered to work for the period of strike action be paid?

During a day where a doctor is not rostered to work, an individual will not be withdrawing labour and therefore no pay should be deducted. This also applies to zero-hour days and pre booked and approved annual leave.

Staff can spend time on the picket line when they are not rostered to work for the reasons outlined and, providing they comply with the legislation; they will be picketing lawfully. There is no requirement that staff must be striking to join the picket line and managers should not assume that all staff who are seen on or near the picket line are in fact taking part in strike action.

10. What is the impact of strike action on sickness payment?

The key issue to determine before taking any decision regarding sick pay is whether the staff member was/is 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.

For members of staff who report absence on the day of action, and who have consistently indicated their intention to take strike action, it is important that the circumstances are considered in the decision-making regarding payment/deduction. Any decision should meet the test of reasonableness on its own merits.

For those members of staff who have commenced a period of self-certification prior to strike action, unless there is tangible 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, employers 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. Care will need to be taken to ensure this does not put undue pressure on primary care.

11. Will unpaid leave as a result of industrial action affect those working under a visa?

The guidance for sponsors makes clear that they are under a duty to report to UKVI where a sponsored worker is absent from work for more than 10 consecutive working days without permission.

In addition, Sponsors must report to UKVI a reduction in salary from the level stated on the Certificate of Sponsorship within 10 working days of the relevant event occurring.

For trainees working on a sponsored visa, any industrial action undertaken will need to be registered. If the Trainee is employed and sponsored by NWSSP, they will be asked to complete the 'Certificate of Sponsorship Reporting Form,' selecting the option for Industrial Action. This form can be found on our [trainee hub](#) (Training on a Sponsored Visa (sharepoint.com)) or via the SLE Trainee App.

If the Trainee is employed by a Health Board/Trust, further guidance can be obtained from [NWSSP](#).

12. Can we rely on exemptions or derogations so that Junior doctors can be asked to work?

No. 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 employers will be to ensure that any consequent disruption does not jeopardise patient welfare or safety.

In addition to the normal capacity and demand planning undertaken for the winter and Easter/Bank Holiday Planning, Health Boards and Trusts have been asked to ensure that the impact of a full withdrawal of labour from junior doctors for the period of industrial action is factored into this planning. Decisions regarding a reduction in the level of elective and non-emergency treatment, non-clinical events, or activities, leave approval etc. should be included.

Irrespective of turnout in previous periods of action, Health Boards and Trusts should assume that all Junior Doctors who are members of the BMA or not in a union will not attend work and as such, ensure that adequate staffing levels are maintained during junior doctor industrial action by engaging and obtaining agreement from SAS and consultant doctors to provide cover, whilst also maintaining senior decision-making roles.

With adequate scenario planning, organisations should ensure that they are able to provide safe staffing levels from amongst SAS and consultant doctor staff to ensure adequate cover.

13. Will National derogation requests be agreed ahead of Junior Doctor Industrial action?

Derogation in the event of a full walkout is designed to be responsive to patient safety concerns arising during strike action rather than pre-empting impacts of strike action.

Whilst [Welsh Government, NHS Wales Employers and the BMA](#) acknowledge that this is an already challenging time of year, the BMA has stated that **no prospective** requests for derogation (call back of junior doctors) will be considered or approved before the start of the industrial action.

14. We have tried everything to cover essential patient care, how do we request a derogation during Junior Doctor Industrial Action?

Welsh Government, BMA and NHS Wales Employers have agreed a [mechanism](#) to consider and approve such requests.

Failure to adequately plan for service demand will not be reason alone for a derogation to be granted. Before any derogation will be considered by the BMA, the requesting Health

Board/Trust will be expected to have requested cover from all available SAS and Consultant doctors – including cross covering other specialties at appropriate levels – and have offered extra contractual rates of pay or where applicable, relevant enhanced contractual entitlement.

A Health Board/Trust requesting a derogation without being able to evidence having followed these principles risks having the derogation request refused on the grounds that they are still able to resolve any patient safety concerns that have arisen through the available workforce.

Where a local derogation is identified as necessary once the industrial action has commenced, the BMA and NHS Wales Employers have agreed the medical director or nominated executive director of the relevant trust or trusts should contact NHS Wales Employers. They will pass details of the situation to the BMA who will then need to agree that the incident can only be mitigated by requesting doctors to return to work and that a derogation is appropriate.

Once the BMA has approved a derogation, the Health Board/Trust may contact doctors and seek their return to work. The BMA will also communicate the approval through its local structure and will post to its Twitter account that the derogation has been agreed so that it is easy for members to verify it.

Doctors on strike need not return to work unless the need for derogations is confirmed by the BMA, the exception to this is in response to major incident (as set out below). The derogations which are agreed between the BMA and employers are an informal agreement and are not legally enforceable and so do not themselves place any legal obligation on staff to work or not to work during a strike.

15. What happens if there is a major incident that is not connected with the Industrial Action?

All parties acknowledge that, despite the comprehensive contingency plans being put in place, major incidents, or an unforeseen or extreme event is likely to require a more immediate request for staff to return to work for a limited period to maintain safe patient care.

[Welsh Government, NHS Wales Employers and the BMA](#) recognise it may be necessary, in exceptional circumstances such as a declared major incident, for a Health Board/Trust to contact doctors directly in the event of a declared major incident explaining the situation and seeking their return to work.

We have therefore agreed a failsafe bypass mechanism whereby a Health Board/Trust may ask junior doctors to return to work in parallel with central escalation from NHS Wales Employers to the BMA. The failsafe also extends to the doctors themselves to use their discretion if they hear of a major incident occurring that they feel they need to help with. Any use of this failsafe bypass should be exceptional, will be audited, and will be subject to review of arrangements in any future industrial action.

The Health Board/Trust should follow standard procedures to escalate the incident, in line with the [escalation framework](#) and via the appropriate on-call route and NHS Wales Employers will escalate to the BMA. The Health Board/Trust will be required to complete and submit a Derogation Form (in retrospect) to verify the need for the recall.

NB: This process does not apply to incidents that arise due to the industrial action itself.

16. Can we engage agency workers to cover for Junior Doctors on Strike?

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.

If essential services cannot be maintained by utilising existing staff, managers may wish to consider utilising their existing Bank. Caution will need to be exercised depending on the arrangement. N.B. the Collaborative Bank is classified as an “employment business” which means it would be captured by the same restrictions as agency workers supplied by an external agency, see above).

17. Can we ask Consultant and SAS doctors to cover the work of junior doctors in the event of industrial action?

Junior doctors taking industrial action will reduce the workforce’s capacity to deliver normal levels of patient care. Securing cover from your Consultant and SAS doctors can be a way of ensuring safe care continues. Previously, during periods of industrial action, Consultants and SAS doctors have been willing to undertake such work based on accommodating some flexibility within their job plans or picking up the work through the organisation’s bank. Our advice would be to take a conciliatory approach with your clinical teams and Consultant and SAS doctor workforce at the earliest opportunity to explain the need for cover and to agree on an approach, considering any relevant local policies.

Consultants and SAS doctors who are already scheduled to work their usual sessions on a day of action, may be more inclined to voluntarily agree to provide junior doctor cover if the tasks required are already within the scope of their existing role, competence, and confidence.

Assessments should be made to establish the level and number of duties that will need to be covered to enable provision of safe care on the basis of weekend/bank holiday activity. It is not expected that every junior doctor duty/shift will need to be covered in all areas given the experience/seniority of those covering.

18. What terms and conditions of service (TCS), and national and local policies should we be aware of when organising cover and is there any flexibility within those terms for those who are asked to cover for junior doctors as part of their job plans and rostered work.

The references below set out what is contained within the relevant terms and conditions/contracts. However, any requests must meet the following tests:

- **Any request must be meet the “is it reasonable” test.**
- **Doctors should not be expected to undertake multiple roles at the same time (i.e. undertake their own role and the role they are being asked to cover).**

- **Doctors should not be expected to undertake work they are not competent or confident to do safely.**
- **All requests and arrangements must be made in accordance with Working Time Regulations and in doing so, doctors should not suffer detriment in terms of pay.**

There are national TCS in place for consultants (“the Amendment”) and for SAS doctors (“the 2008 or 2021 TCS”).

Links to the relevant terms and conditions of service:

- [Consultants](#)
- [Specialist grade](#)
- [Specialty doctor](#)

Consultants

Paragraph 106 of the Medical and Dental Staff (Wales) Handbook December 2003 confirms:

Practitioners shall be expected in the normal run of their duties to deputise for absent colleagues in these grades (Consultants and Associate Specialists) as far as is practicable, even if on occasions this should involve interchange of staff between hospitals. However, where the normal duties of an AS colleague involve sharing a duty rota with staff in the grades of SR, SpR, R, SHO or HO, then consultants will not be expected to cover that part of the AS colleague's duties.

There is therefore a **contractual obligation to cover for absent Associate Specialist/Specialist doctors** (unless these include duties normally undertaken by junior doctors) but **not** to cover for Junior doctors.

The impact of this is that, technically, any such cover for Junior doctors and or Junior doctor duties is extra contractual.

For Consultants covering out of hours the BMA and NHS Wales Employers are clear that the provisions of Chapter 3, paragraph 3.8 of the 2003 Contract/Amendment **must** apply (**i.e. not an extra contractual or strike rate**).

Paragraph 3.8 confirms:

In exceptional circumstances where the Consultant is requested and agrees to be immediately available, i.e. ‘resident on call’, this will be remunerated at three times the sessional payment at Point 6 of the Consultant salary scale, excluding commitment awards and Clinical Excellence awards. In such circumstances, there will be an agreed compensatory rest period the following day.

For these purposes, a session will comprise four hours and apply between 5pm and 9am weekdays and across weekends.

Specialist and Speciality Doctors 2021 Contract Specialty and Associate Specialist 2008 Contract

Schedule 3, paragraph 3

Doctors will be expected to be flexible and to cooperate with reasonable requests to cover for their colleagues' absences where they are safe and competent and where it is practicable to do so.

Doctors and employers should not engage in internal cover that breaches working hours and rest breaks and periods set out in the Working Time Regulations or these Terms and Conditions of Service. Where doctors undertake duties in accordance with this paragraph and such duties take place outside of their contracted hours, they will receive either an equivalent off duty period or remuneration.

There is therefore a **contractual obligation to cover for absent Junior Doctors**

Employers **should seek to rely on this term** to request that SAS doctors provide cover for junior doctors. Agreement should be reached on the basis that the doctors concerned are competent and confident to undertake the duties requested and appropriate consideration is given to their health and wellbeing and requirements under Working Time Regulations etc.

19. What are the relevant standard working hours and out of hours range for Consultants and SAS Doctors that we need to consider during this action?

- **Consultants 2003 Contract “the Amendment”**
Standard working hours - 09.00 – 17.00 Monday to Friday
Out of Hours - Outside 9.00 – 17.00 Monday to Friday
- **Speciality and Specialist Doctors 2021 Contract**
Standard working hours – 07.00 to 21.00 Monday to Friday
Out of hours –Outside 07.00 to 21.00 Monday to Friday
- **Specialty and Associate Specialist Doctors 2008 Contract**
Standard working hours – 07.00 to 19.00 Monday to Friday
Out of hours – Outside 07.00 to 19.00 Monday to Friday

20. Will job plans need to be changed due to industrial action?

Whilst it is likely to be impractical to change job plans on a temporary basis to facilitate cover for industrial action by junior doctors, agreement should always be sought. As indicated above, there are some flexibilities within the existing SAS contractual terms that can, however, be relied on subject to the considerations outlined throughout this guidance.

Generally, SPA time will be part of an agreed job plan which cannot be changed without the agreement of the individual. However, employers could seek to agree with SAS/consultants to cover direct clinical care on an exceptional basis during strike action which coincides with SPA time. Any SPA missed should be rescheduled by either replacing DCC or paid as additional work.

21. Can we rely upon the emergency call-out provisions in the TCS to require consultants and SAS doctors to provide cover?

The relevant provisions are entitled “Recognition for Unpredictable Emergency Work arising from On-Call Duties” and are contained in Chapter 3 of the 2003 TCS for consultants and Schedule 6 of the 2021 TCS for SAS doctors. This includes the entitlement to paid compensatory rest.

If an emergency arises during a day of strike action, the usual emergency provisions in the TCS apply and a consultant or SAS doctor who is rostered on-call can be required to attend to deliver the emergency care required. Organisations may seek to rely on the emergency call out provisions in the TCS to require consultants and SAS doctors to provide cover as part of their contingency planning.

22. How should we remunerate consultants and SAS doctors that agree to provide cover as additional work?

It is recognised that these are exceptional circumstances for employers to manage in order to sustain safe patient care. It is critical that there is consistency across NHS Wales and as such, all organisations have agreed to adhere to **BMA Junior Doctor Strike Action Employers Medical and Dental Pay Rate Reference Guide**.

Details of Contractual and Exceptional Medical and Dental Strike Rates are set out in the document.

23. Will working time regulations and compensatory rest apply?

Yes, those provisions include a requirement for 11 hours of consecutive rest per day and 24 hours of uninterrupted rest per week. However, it is recognised that, as in the case of delivering services such as medical care where continuity of service by the worker is required, providing consecutive rest will not always be possible and that the compensatory rest provisions of the Working Time Regulations may apply. For further detail on compensatory rest please see - [Compensatory rest \(Gov.uk\)](#).

24. Will Consultant and SAS doctor activity need to be cancelled during industrial action?

This should be agreed locally at the earliest opportunity to minimize the impact on patients. All non-critical activity taking place on strike days should be reviewed to release staff to facilitate appropriate and agreed deployment to support clinical activity.

25. Should we consider cancelling leave or refusing leave requests for Consultants and SAS Doctors?

25th – 29th March Action – Whilst recognising that annual leave approval is subject to the exigencies of the service, it is in the interest of employers to safeguard the health and wellbeing of staff and ensure the continued safety of patients by allowing doctors to take their annual leave.

However, given the responsibility to ensure services have appropriate cover in order to deliver safe patient care rests with the employer, any request for leave must be considered in this context and on an informed basis.

As such, employers should aim to have completed the majority of planning for the strike action, including rota cover etc at the earliest opportunity to facilitate consideration of requests for annual leave in a timely manner.

Employers are advised to set out a timetable for decision making regarding requests for annual leave submitted and yet to be approved and/or already approved.

26. Should we consider cancelling Consultants or SAS Doctors pre-booked days of study leave to meet service requirements?

This is an option available to employers but should not be the first action in trying to ensure safe cover for services. In the event the decision is made to cancel pre booked study leave, doctors should not incur financial loss as a result.