

30 November 2011 public sector pensions day of action

Guidance for BMA members

The BMA position

A day of action to defend public sector pensions against major government reforms is being planned for 30 November. A number of public sector trade unions are balloting their members with a view to taking industrial action on the day, while others - including the BMA - are supporting the day through campaigning and lobbying activities. BMA Council has said a ballot of its members on industrial action remains a firm option for a later date if the government continues to refuse to engage in genuine negotiations on the future of the NHS scheme.

The BMA is encouraging members to show support for the day - on and around the day itself - by:

- wearing campaign items, such as stickers, carrying a message of support - and encouraging colleagues, family and friends to do the same
- considering donating to a local strike fund, where these exist
- helping to raise awareness amongst all doctors of the unfairness of the government's approach and what they can do, through meetings and social media
- writing to local media to make sure they have the real facts and impacts.

We'll be adding to this list and distributing campaign materials and tools directly to you nearer the time. We would also encourage you to get in touch with, as appropriate, your Local Negotiating Committee, Local Medical Committee or BMA division or regional council to join forces with colleagues on the campaign.

In the meantime, please make sure you are familiar with what you can and can't do on the day of action itself. Trade union law is complex and this guidance is intended to provide a clear steer on what is permissible in general. However, it is important to note that it does not constitute individual legal advice.

If you would like to seek clarification on your own position please email our dedicated day of action advice service at 30nov@bma.org.uk and an adviser will respond as quickly as possible.

Frequently asked questions

Q1: What is industrial action?

There is no statutory definition. However, it is generally considered to be concerted action, by 'workers', which is taken in order to put pressure on their employer in relation to, for example, a dispute concerning terms and conditions of employment.

Industrial action includes a strike (where 'workers' refuse to work) and action short of a strike. The latter includes (though this is not an exhaustive list):

- refusal to perform administrative or other duties
- an overtime ban
- work to contract
- unauthorised sickness - or other - absence

- withdrawal of goodwill
- a 'go slow'
- a boycott of management meetings.

Q2: Who is a 'worker'?

Employed doctors (primarily hospital doctors and employed GPs) will fall within this definition. In addition, for the purposes of trade union law, GP partners, with the exception of APMS partners, are deemed to be 'workers'.

Q3: Isn't the dispute in this situation really with the Government, not the employers?

In general, under trade union law, a dispute has to be between 'workers and their employer' to enable industrial action to be taken lawfully (for which there would first need to be a ballot). Even though, in this situation, the changes are being pursued by the government, it could also be seen to be a dispute between 'workers and their employer' as pension benefits form part of the employment relationship.

However, it is also possible, in certain circumstances, for lawful industrial action to be taken where a dispute arises directly with the Government. The nature of the dispute is not currently directly relevant to BMA members as we are not yet balloting on industrial action.

Q4: Can I participate in industrial action which is being called by another trade union?

To be lawful, a trade union must ballot its members on whether they are prepared to take industrial action and a majority of those voting must vote in favour of it. The BMA is not, at this stage, balloting its members on taking industrial action. It would not, therefore, be lawful for the BMA to advise its members to participate in any form of industrial action.

An individual who is not a member of another trade union and who takes part, of his/her own volition, in lawful industrial action organised by another trade union, has certain protection from unfair dismissal.

An individual who is a member of another trade union may, of course, vote in a ballot and participate in lawful industrial action organised by that trade union.

Q5: As an individual, what type of things can I do to show support for my colleagues?

The BMA is recommending a range of campaigning and lobbying activities to show your support (see above). We will be distributing campaign materials and tools directly to you nearer the time. We would also encourage you to get in touch with, as appropriate, your Local Negotiating Committee, Local Medical Committee or BMA division or regional council to join forces with colleagues on the campaign.

On the day of action you must attend work as normal.

You must also take great care to ensure that, whatever you do, you do not breach your contract of employment and/or, collectively, that

you and your colleagues do not take concerted action which 'puts pressure on your employer'.

The dispute regarding public sector pensions is, in reality, with the Government and anything you decide to do (such as wearing a badge to show support for the day of action) should be clearly aimed at the Government, not individual employers.

By way of example, in relation to wearing items showing your support, you must first check that there is no restriction on dress codes in your contract of employment and/or in your employers' HR policies. In addition, the content of the message must be such that it cannot be interpreted as bringing your employer into disrepute. Subject to the above, it is unlikely that an employer would take action against you for simply wearing a particular item.

Q6: Can I refuse a request to cover work not being done by a colleague taking lawful industrial action?

This will depend on the nature of the request, the terms of your contract of employment and whether the request to cover is a reasonable one. As a general rule, the more senior you are, the more flexible you will be expected to be. A request relating to patient safety will almost certainly be reasonable. If you unreasonably refuse to cover work, you could be in breach of contract and if so, you will run the risk of disciplinary action and, possibly, dismissal.

If, however, you are asked to do something which you reasonably believe is beyond your competency and/or is likely to compromise health and safety (including patient safety), then, as a general rule, you would be entitled to refuse the request. If you are in any doubt please email our dedicated day of action advice service at 30nov@bma.org.uk .

Q7: Can I attend a meeting in my lunch hour or rest period?

As a general rule, you can do what you like within your lunch hour or rest period, providing always that it does not breach your contract of employment. You should, therefore, check to ensure that there are no contractual restrictions - for example, the need to be on call to cover for emergencies. In particular, consultants should ensure that, if attending a meeting during a rest break, adequate cover is provided.

If you are in any doubt as to the action you propose to take, then you should email our dedicated day of action advice service at 30nov@bma.org.uk .

Q8: Can I take part in a picket without being a member of the union which authorised the industrial action?

In principle, yes. However, great care must be taken as you run the risk of committing an unlawful act, being in breach of contract (for example, if picketing is carried out during your normal working hours) or, by your actions, bringing your employer into disrepute.

Q9: Are there any laws relating to picketing that I should be aware of?

Yes. As a general rule, the number of pickets should not exceed six at an entrance to, or an exit from, a workplace. If this is exceeded, the picket is unlawful and you may risk disciplinary

action (for bringing your employer into disrepute) and/or be liable for claims for damages for harassment, nuisance or trespass.

There are also restrictions in terms of how pickets must conduct themselves on a picket line.

The Code of Practice on Picketing issued by the Department for Business Innovation and Skills recommends:

“ anyone seeking to demonstrate support for those in dispute should keep well away from any picket line so as not to create a risk of breach of the peace ”

In the absence of a BMA ballot in favour of industrial action, the BMA strongly advises members against joining a picket line.

Q10: Can I take refreshments to those on a picket line to show support?

Providing that you prepare and deliver the refreshments in your own time and do not participate in the picket, then, in principle, this should be okay.

Q11: Can I cross a picket line?

Yes. If you refuse to do so and do not attend work for this, or any other unauthorised reason, you will be in breach of your contract of employment. You may wish to inform those on the picket that your union has decided not to ballot its members at this point and that you are required to attend work.

Q12: What if I think health and safety is being compromised at my workplace?

Health and safety is, primarily, your employer's responsibility. Any concerns must be reported to your line manager immediately.

SPECIFIC GUIDANCE FOR GENERAL PRACTITIONERS

Q13: What is my position if my staff decide to take industrial action?

If the industrial action is lawful (ie it has been approved by a majority of the union's members in a ballot) then from a legal point of view, there is nothing that you can do to stop the industrial action. The BMA is encouraging GPs to take a tolerant attitude to lawful industrial action by their staff on the day of action, bearing in mind that patient safety must be paramount. Trade union law requires that an employer is given prior notice of a ballot for industrial action and of a decision to proceed. The notice will identify the action contemplated and the categories of employee who are likely to be involved in the action (although not their individual names). You should, therefore, have time to prepare.

Consideration should also be given as to whether practice staff who are not involved in industrial action are able to cover for those staff who are. Staff contracts of employment should be carefully checked to see if they include flexibility clauses.

Q14: Can I withhold pay from those members of staff who participate in lawful industrial action.

Yes. An employee is not entitled to be paid for the period in which he/she has taken industrial action. You are strongly advised to take advice from the BMA by emailing 30nov@bma.org.uk as to the amount of money which can be lawfully deducted.

In relation to pensions, a day of industrial action would be a 'disallowed day'. This means that an employee would lose a day of pension accrual.

Q15: What impact could industrial action by other unions have on my GMS/PMS contract with my primary care organisation (PCO)?

It is very unlikely that a PCO will take any action. The planned day of action is well known and is something which is outside the control of GP contractors.

To protect your position, you are strongly advised to contact your PCO well in advance of the 30 November to seek clarification as to what is expected of you. It is likely that GP practices will be expected to take reasonable action to mitigate any disruption.

Q16: Can I hire agency workers to cover for staff who are participating in industrial action?

No. It is a criminal offence to do so. Strictly speaking, it would be the agency who commits the offence. However, there is risk that a doctor could also be prosecuted for aiding and abetting.

SPECIFIC GUIDANCE FOR MEDICAL STUDENTS

Q17: I'm a medical student, what can I do to show my support?

Student members will also be sent campaign materials and tools nearer the day. In terms of actions on the day, there are clearly no risks in terms of breaching employment contracts but you still need to be careful not to break trade union law around picketing or be seen to bring your university into disrepute.