



Department
for Education

Advice for handling strike action in schools

**For school leaders, governing
bodies and employers**

June 2013

Contents

Summary

About this departmental advice	3
Expiry or review date	3
Who is this advice for?	3
Key points	3

Advice on keeping schools open

1. Responsibility	4
2. Health and safety	4
3. Staff deployment	4
4. Staff for nursery and infant classes	5
5. Directly employing individuals	6
6. Using volunteers	6
7. Delivering the curriculum	7
8. Insurance	7
9. Recording pupils' attendance	7
10. Transferring control of the school premises to a third party	7

Industrial Relations Law

1. The law on trade disputes	9
2. The law on picketing	10

Further sources of information	12
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Summary

About this departmental advice

This is non-statutory advice from the Department for Education.

Expiry or review date

This advice will next be reviewed in January 2014.

Who is this advice for?

This advice is for employers, governing bodies, headteachers, principals and other school leaders in maintained schools and academies.

Key points

- This document provides advice on keeping schools open on strike days, and explains the law on trade disputes and picketing. It is part of a package of advice and support for schools on industrial action issues, including [advice on the NUT and NASUWT action short of strike action](#).
- In the event of strike action at a school, the Department for Education expects the headteacher to take all reasonable steps to keep the school open for as many pupils as possible.
- The decision to open, partially open, or close a maintained school is for the headteacher. The decision for academies rests with the academy trust, but is usually delegated to the principal.¹
- It is best practice for headteachers to consult governors, parents and the Local Authority, academy trust or diocesan representative (where appropriate) before deciding whether to close. Headteachers are entitled to ask staff whether they intend to strike.

¹ The headteacher is responsible for the “management and control of the school” under regulation 5 of the Education (School Government) (Terms of Reference) (England) Regulations 2000 (the “Terms of reference regulations”).

Advice on keeping schools open

1. Responsibility

The decision to open, partially open, or close a maintained school is for the headteacher. The decision for academies rests with the academy trust, but is usually delegated to the principal. Headteachers should consult governors, parents and the Local Authority, academy trust or diocesan representative (where appropriate) before deciding whether to close.

In the event of a strike, the Department for Education expects the headteacher to take all reasonable steps to keep the school open for as many pupils as possible.

2. Health and safety

Under the *Health and Safety at Work etc Act 1974*, the employer in a school must take reasonable steps to ensure that staff and pupils are not exposed to risks to their health and safety.² This applies to activities on or off school premises. Further advice on health and safety can be found at: <http://www.education.gov.uk/schools/adminandfinance/healthandsafety/f00191759/departmental-advice-on-health-and-safety-for-schools>

3. Staff deployment

While employees are not required to tell their employers whether they intend to take strike action, employers are fully entitled to ask staff in advance if they intend to strike to enable them to plan how to manage the strike.

Headteachers may ask other teachers to cover the classes of those taking industrial action. Where teachers are employed under the *School Teachers' Pay and Conditions Document*, however, they cannot be compelled to provide cover for other teachers during industrial action³. Cover supervisors, or teachers who are employed wholly or mainly to provide cover and are not taking industrial action themselves, can be directed to provide cover during industrial action.

The [Specified Work Regulations 2012](#) require classes to be taught by qualified

² Where the governing body is the employer, it is ultimately responsible for the health and safety of staff and pupils. However, day to day decisions about health and safety risks to staff and pupils would be delegated to the headteacher under regulation 6 of the Terms of Reference regulations.

³ School Teachers' Pay and Conditions Document 2012 para. 63.10: Teachers should be required to provide cover in accordance with paragraph 61.7 only rarely, and only in circumstances that are not foreseeable (this does not apply to teachers who are employed wholly or mainly for the purpose of providing such cover).

teachers in maintained schools and some academies.⁴ The Regulations do not prevent schools from using support staff to provide cover supervision or oversee alternative activities. Support staff are able to carry out 'specified work' provided that they are subject to the direction and supervision of a qualified teacher, and the headteacher is satisfied that they have the skills required to carry out the work. The Regulations also allow schools to employ industry experts without qualified teacher status as instructors to teach subjects where specialist qualifications and experience are required.

Schools may choose to bring together groups and classes with teachers and support staff working together, as long as pupils' health and safety is ensured. For pupils older than seven there are no set ratios for the number of staff required to supervise pupils on site (see section 4 for limits on nursery and infant classes).

A headteacher on strike should delegate their duties to another member of the leadership team. If the whole leadership team is on strike, the governing body or academy trust can approach another person to carry out the headteacher's duties, for example a senior teacher or a retired headteacher.

4. Staff for nursery and infant classes

The *Early Years Framework* sets out what schools need to do to ensure children in nursery and reception classes are safe, adequately supervised and their needs met.

For nursery provision in maintained schools (children aged 3 and over) there must be one member of staff for every 13 children. At least one member of staff must be a school teacher⁵ and one other member of staff must have a Level 3 qualification.

Infant class size legislation limits the size of infant classes to 30 or fewer with a qualified teacher. This applies to reception and other classes where the majority of the children will reach age 5, 6 or 7 in that school year.⁶

The infant class size limit does not apply to activities normally carried out in larger groups, for example assemblies, sports and other structured or unstructured activities that the school may choose to provide on strike days.

⁴ Free Schools, academies established after 29 July 2012 and any academy established prior to this date that has agreed a change to their funding agreement, are **exempt from these requirements**.

⁵ as defined by Section 122 of the Education Act 2002 and the Education (School Teachers' Qualifications) (England) Regulations 2003.

⁶ <http://www.education.gov.uk/a005569/is-there-a-class-size-limit-for-junior-classes>

5. Directly employing individuals

While the *Conduct of Employment Agencies and Employment Business Regulations 2003* prevent employment businesses from supplying teachers to cover absence during industrial action, an employer can directly employ individuals to cover those on strike. Schools or groups of schools may wish to consider building up a bank of supervisors. When employing someone for a day, a school or local authority would need to consider:

- Employment contract – the moment an applicant unconditionally accepts an offer of a job, a contract of employment comes into existence. The terms can be oral, written, implied, or a mixture. If no written contract is issued there is a legal obligation to provide the employee with a written statement of employment within two months of the start of their employment. When employing someone for one day, it would be advisable to issue a fixed term contract setting out the length of the employment.
- Pay – the employer would need to tell anyone employed the day/date he/she would be paid and how. The employer would need to check with their payroll provider how to do this.
- Insurance – Employers' Liability Insurance would already be in place so employers would not need to do anything further.
- Under the terms of the Teachers' Pension Scheme, a teacher employed for only one day would be entitled to the same pension benefits as other employees.
- General employment rights would apply.

6. Using volunteers

The arrangements set out in statutory guidance on safeguarding and supervision of children⁷ allow schools to:

- use existing members of the school volunteer workforce with relevant criminal records checks to provide supervision;
- use volunteers who have a criminal records check from another walk of life, for example as a sports coach or scout group helper. These volunteers could work unsupervised with children subject to the headteacher carrying out a risk assessment. This assessment should include how recent the check is, the nature and duration of the contact with children, the ages of the children and any further information available to assess suitability; and/or
- identify other new volunteers who could support existing staff or volunteers for whom relevant checks have been carried out. These volunteers would need to be supervised by another member of staff or volunteer with a criminal records check.

⁷ [Safeguarding Children and Safer Recruitment](#) and [Statutory Guidance: Regulated Activity \(children\) – supervision of activity with children which is regulated activity when unsupervised](#)

7. Delivering the curriculum

There is no legal requirement to teach the curriculum on strike days.

Maintained schools simply have to deliver the national curriculum during the course of the year. Maintained schools and non-maintained special schools are required to meet for 380 half day sessions per year but there is no statutory definition of 'meet' and no requirement to teach the curriculum on each day of the school year.

There is no legal requirement for academies or Free Schools to teach the national curriculum, although they are required to teach a broad and balanced curriculum during the course of the year.

8. Insurance

Whether teachers are on strike should have no bearing on a school's insurance policy. There is no exclusion in respect of staff members being on strike.

Academy trusts will need to confirm their position in relation to cover under their insurance policies with their insurers. However, it is unlikely that a strike will mean that cover is excluded.

9. Recording pupils' attendance

If a school has to close for some or all pupils on a strike day, the Y code should be used for pupils who are not required to attend. Pupils who are required to attend should be marked down in the usual way.

10. Transferring control of the school premises to a third party

Governing bodies of maintained schools are able to transfer control of the school premises to a third party to provide childcare or other activities. Third parties holding activities at the school should follow any specified health and safety policies and hold relevant insurance.

- For community, community special and voluntary controlled schools, the governing body could enter into a transfer of control agreement for a third party to use the premises for childcare or other activities during the school day, with the local authority's consent.
- For foundation, foundation special and voluntary aided schools, the governing body or trustees own the premises so could themselves provide, or ask a third party to provide childcare or other activities on the premises.

- An academy trust would be able to bring in external persons or organisations to assist in the provision of childcare and educational services at the academy. There would be no need for a 'transfer of control agreement' and the academy trust would be responsible for the premises and supervision of children.

The 'user' of the premises can be asked to pay the governing body a fee. Private providers may charge parents for services and schools could subsidise them, but would not have to.

Although childcare providers for children under the age of eight are normally required to be registered with Ofsted, they can be exempted if the provider operates from a particular premises for 14 days or less in any year and if they inform Ofsted in writing at least 14 days before starting to provide care. For children aged 8-18, registration is not compulsory.

Industrial Relations Law

1. The law on trade disputes⁸

Ballots

A trade union must give the employer notice of its intention to hold a ballot and the notice must satisfy five conditions:

- It must be in writing;
- It must state that the union intends to hold a ballot;
- It must specify the anticipated voting day or the first voting day;
- It must contain specific information so as to supply the numbers of staff to be balloted, broken down by category and workplace, and an explanation as to how that information has been ascertained; and
- It must be received by the employer no later than seven days before the ballot.

In order for the ballot to be lawful, the ballot paper must:

- include at least one of two specified questions – in effect asking those balloted whether they are prepared to take part in a strike and / or industrial action short of a strike, and requiring a “yes” or “no” answer;
- include a prescribed statement to the effect that those being balloted, if they take part in industrial action, may be in breach of their contracts of employment but cannot be fairly dismissed as a result of taking part within 12 weeks of the start of the action;
- state the name of the independent scrutineer who will oversee the ballot and the address and date by which ballot papers are to be returned (where there are more than 50 employees being balloted); and
- specify who is authorised to call upon those balloted to take part in industrial action in the event of a “yes” vote.

Industrial action

Industrial action must begin within four weeks of the last date of the ballot, although the period can be extended by order of the court or if it is agreed with the employer. Unions must give at least seven days’ notice of the beginning of the strike to employers. While employees are not required to tell their employers whether they intend to take strike action, employers are fully entitled to ask staff if they are planning to strike.

⁸ *Trade Union and Labour Relations (Consolidation) Act 1992*, sections 226-234, and the *Code of Practice on Industrial Action Ballots and Notice to Employers (2005)*.

If the conduct of the ballot does not comply with the statutory requirements, strike action taken as a result of the ballot will be unlawful (subject to provisions excusing small accidental errors in respect of the employees balloted). This means that employers can apply to the court for an injunction preventing the strike action from taking place. Where the proposed industrial action comprises discontinuous strike action or action short of a strike, provided the action is commenced within four weeks of the ballot, all subsequent action in respect of the same trade dispute is lawfully protected by the ballot.

Pay

Employees are not entitled to be paid for any period during which they are on strike. Statutory protection against deduction of wages does not apply in relation to strike or other industrial action. The calculation of pay deductions for unauthorised absence is not determined by the Secretary of State, but it is important that schools act fairly and proportionately when making pay deductions.⁹

Schools should have a clear process in place for collecting data on staff absences; this information can then be verified and forwarded promptly to those responsible for the school's payroll.

2. The law on picketing

It is lawful for striking members of staff, and union officials who represent them, to picket at or near their place of work for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working. The BIS Code of Practice on Picketing states that “in general” the number of pickets should “not exceed six at any entrance to, or exit from, a workplace; frequently a smaller number will be appropriate”¹⁰.

A picket is unlawful if it includes others who are neither members of staff at the school nor their union representatives.¹¹ In this case, the employer may apply to the court for an order preventing, or stopping, the unlawful picketing or its organisation. The employer may also claim damages from those responsible where activities of the unlawful picket have caused loss to the employer, for example by persuading a member of staff not to attend work. In the first

⁹ For any school teacher whose contract of employment incorporates the ‘*Conditions of Service for School Teachers in England and Wales*’ (The Burgundy Book), pay deductions should be made on the basis of 1/365th of their annual salary for each day of strike action.

¹⁰ <http://www.bis.gov.uk/files/file23914.pdf>

¹¹ Para. 50 of the Code of Practice states that “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 a breach of the peace or other criminal [offence] being committed on that picket line”.

instance, the employer may wish to contact the union to inform them that their picket is unlawful.

Members of a picket line cannot break the criminal law by (for example) causing damage, intimidating employees or creating public disorder. If they do, they would be committing an offence and the police should be notified.

It would be inappropriate for schools to authorise absence for children to participate in pickets or demonstrations in support of industrial action. There is clear evidence that any absence from school can have an impact on the attainment of those pupils. It is also not lawful for a picket at a closed school to include pupils of the school.

Further sources of information

Department for Education advice and guidance

- [Advice on the NASUWT and NUT industrial action](#)
- [Advice on health and safety for schools](#)
- [Statutory guidance on safeguarding children and safer recruitment in education](#)
- [Statutory guidance on supervision](#)
- [Early Years Framework](#)

External advice and guidance

- [Advisory, Conciliation and Arbitration Service \(ACAS\)](#)
- [School Teachers' Pay and Conditions Document and Guidance \(2012\)](#)
- [Local Government Employers Industrial Action Guide](#)

Legislation

- [Trade Union and Labour Relations \(Consolidation\) Act 1992](#)
- [BIS Code of Practice on Industrial Action Ballots and Notice to Employers](#)
- [BIS Code of Practice on Picketing](#)
- [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#)
- [Education \(School teachers' Qualifications\) \(England\) Regulations 2003](#)
- [Specified Work Regulations 2012](#)



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