



Department
for Education

Handling strike action in schools

**Guidance for school leaders, governing
bodies and employers**

September 2016

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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 March 2018.

Who is this advice for?

This advice is for employers, governing bodies, school leaders and staff 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.
- 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 Under Regulation 6(4) of the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013, the headteacher's responsibilities include the internal organisation, management and control of the school.

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 and schools will need to be mindful that responsibilities could be impacted on as a result of industrial action. Further advice on health and safety is available on the [Health and Safety Executive's website](#).

3. Staff deployment

While employees are not required to tell their employers whether they intend to take strike action, employers are able 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 action.³ 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 by teachers or non-teaching staff (see section 5 for information about directly employing individuals to cover on a strike day).

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 18 of the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013.

³ School Teachers' Pay and Conditions Document 2016 para. 53.7: Teachers should be required to provide cover in accordance with paragraph 51.7 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).

The [Specified Work Regulations 2012](#) require classes to be taught by qualified teachers in maintained schools and some academies. 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**. Except in nursery classes, 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 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 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 below 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 staff member to carry out the headteacher's duties, for example a senior teacher or a retired headteacher employed by the school.

4. Staff for nursery and infant classes

The [Statutory Framework for Early Years Foundation Stage](#) sets out what schools need to do to ensure that children in nursery and reception classes are safe, adequately supervised and their needs met. Schools are free to provide activities flexibly on strike days as long as there are sufficient members of suitable qualified staff present.

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 teacher⁴ and one other member of staff must have a Level 3 qualification.

Where there is provision for 2 year old children there must be at least one member of staff for every four children. One staff member must have a level 3 qualification and at least half of the other staff members must have a level 2 qualification.

Infant class size legislation limits the size of infant classes to 30 pupils per school 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.⁵ 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 as defined by Section 122 of the Education Act 2002 and the Education (School Teachers' Qualifications) (England) Regulations 2003.

⁵ [Health and safety for school children: class sizes](#)

5. Directly employing individuals

While the *Conduct of Employment Agencies and Employment Business Regulations 2003* prevent employment businesses from supplying staff 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 cover 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 – teachers working in maintained schools in England and Wales must be paid in accordance with the School Teachers' Pay and Conditions Document. The employer would need to tell anyone they employ how much they are to be paid, the day/date they 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.
- Safeguarding - for newly appointed staff schools must obtain a barred list check with an enhanced criminal record check. For employees transferring from a similar position without a break in service of more than 3 months, schools must carry out a barred list check and can choose to carry out an enhanced criminal record check if they wish but there is no requirement to do so.

6. Using volunteers

The arrangements for the safeguarding and supervision of children are set out in statutory guidance.⁶ In the event of a strike by teaching staff or members of the wider school workforce (such as teaching assistants or lunch time supervisors), these arrangements allow schools to:

⁶ [Keeping Children Safe in Education](#) and [Statutory Guidance: Regulated Activity \(children\) – supervision of activity with children which is regulated activity when unsupervised](#)

- use existing members of the school volunteer workforce with relevant Disclosure and Barring Service (DBS) checks to provide supervision; 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 DBS check.

For DBS checks to be relevant across roles, the school may wish to recommend the [DBS update service](#). Further information and guidance on DBS checks can be found online: [‘DBS checks \(previously CRB checks\)’](#).

7. Delivering the curriculum

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

Maintained schools must ensure that they cover the programme of study for each national curriculum subject by the end of the relevant key stage. Maintained schools and non-maintained special schools are required to meet for at least 380 half day sessions per year but there is no statutory definition of ‘meet’ and no requirement to teach the national 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. School meals and out-of-hours care

If a school is unable to provide a normal **lunch service** due to strike action, there is no requirement to close the school. If the school anticipates being open and potentially not having enough staff available to prepare and serve meals for pupils entitled to free school meals, it is for the school to put suitable alternative arrangements in place. This could mean arranging temporary cover to prepare meals on-site, preparing packed lunches in place of hot meals, or arranging for meals to be delivered-in.

For **out-of-hours care**, such as **breakfast or after-school clubs**, for children who usually attend nursery classes, the staffing ratio, if no teacher is present, may be 1:8 if at least one member of staff holds a full and relevant level 3 qualification and at least half of all other staff hold a full and relevant level 2 qualification.⁷ For children who normally attend reception class or older, there must be sufficient staff as for a class of 30 children.

Providing there are enough suitably qualified members of staff present to meet these ratios, there is no need to suspend out-of-hours care during strike action.

⁷ Academies must apply the ratios and qualifications as for independent schools as set out in paragraphs 3.35 and 3.36 of the [Statutory Framework for the Early Years Foundation Stage](#).

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 in the normal way. If a pupil is required to attend school on a strike day but does not, then they must be recorded as absent. The **Y** code does not count towards the pupil or school's absence record.

10. Public examinations

In the event of industrial action during public examinations, the headteacher of a school or principal of an academy retains a formal role as 'head of centre', and is accountable for the conduct of the examinations and provision of facilities in their centre. It is recommended that centres should remain open for examinations and examination candidates where possible, even if the school is closed or partially closed. [The joint contingency plan for examinations](#) provides further information.

11. Inspection

As with any other possible disruption to a school (such as severe weather), on a strike day Ofsted inspectors will take a view as to whether there is sufficient activity taking place to enable it to conduct an inspection of the school. Where there is not, the inspection is likely to be deferred. Where there is, inspectors will assess the education that is taking place at the point of inspection, along with all other evidence about the school and its performance, to arrive at a balanced judgement about the performance of the school.

12. Insurance

Any school or academy trust that has purchased commercial 'teacher absence' insurance will need to confirm with their insurer whether teachers on strike would have a bearing on their insurance policy.

13. Other common issues raised

By employers:

- Employers in schools should use the advance notice period before any strike action to draw up **contingency plans** for minimising the impact of any action.
- Employers may wish to seek **exemptions** from the strike with trade unions to avoid disruption to essential services, whereby the unions agree not to call on certain employees, or categories of employee, to take part in the strike. For

example, employers are advised to seek exemptions for **schools road safety officers, school crossing patrols**, and employees in **residential special schools**.

- **Employee exemptions** could also be negotiated for employees who would otherwise suffer long-term financial loss, such as employees in their last year of service who are in the pension scheme; pregnant women who have notified their employer of maternity leave dates; and employees whose state benefits may be affected if they take part in strike action.⁸

By teachers:

- Teachers are not entitled to take **annual leave** when the school is in session; this includes on strike days.
- There is no requirement for striking teachers to **make up the time or teach extra sessions** following strike action. Schools need to decide how best to make up for pupils' education that has been lost.
- Striking teachers cannot be compelled to **set work for students** to complete on the day of the strike. However, if classes are running as normal, many teachers will choose to set work.
- Strike days should not count for reckonable service purposes within the **Teachers' Pension Scheme**. The [Teachers' Pensions website](#) provides guidance on how to record strike days, which should be as "days excluded", to ensure that pension cover is adjusted appropriately. There can be an impact on redundancy payments if the loss of days for strike action reduces the number of full years of continuous employment that a teacher has completed.

By support staff:

- Some support staff have a contractual entitlement to take **annual leave** during the school term. In this case, if the employer consents to an employee taking annual leave on a strike day, the employee is entitled to do so. The employer's staff handbook, however, may specifically state that the employer will not consent to leave if the purpose of it is to join striking employees in not working but without losing a day's pay. Additionally, the staff handbook may provide that agreement to a request for annual leave will be subject to the employer's needs and may be refused in critical periods.
- Strike days should not count as pensionable service within the **Local Government Pension Scheme** (LGPS). The [LGPS website](#) provides further information on the pensions implications of strike days.

⁸ [Local Government Association FAQs](#) provide more information for employers managing industrial action.

By parents:

- There is no express right for a member of the public who is affected by a lawful strike to receive **financial compensation**. Any member of the public seeking to make a claim for compensation would have to establish a legal basis for doing so, such as a breach of contract.
- Parents have a legal duty to ensure that their school-registered child of compulsory school age **attends school regularly**. Therefore, all school-registered children of compulsory school age in classes open on days when strike action is being taken are still required to attend school, regardless of parental choice or the closure of other classes in the school.

14. Case studies – use of flexibilities

There are many examples of schools staying open during strike action, sometimes in very challenging circumstances. The key factors for minimising the disruption of industrial action are effective industrial relations and good relationships between management and staff. In addition, the following case studies set out some of the ways schools have been able to stay open:

Using existing resources in a flexible way

- “We feel that we have a responsibility to parents and pupils to keep the school open on strike days. Most of our teachers chose to go out on strike, so we made the decision to collapse classes so that larger groups could be supervised to carry out a prepared task or controlled assessment. Supervision was provided by the school leadership team, cover supervisors and support staff. A small number of teachers who were not on strike gave extended revision sessions in their own subjects to exam classes, particularly Year 11. Years 12 and 13 were asked to carry out independent study.”

Pooling resources across schools

- “As a soft federation, we have a working arrangement between four schools: one secondary school and three primary schools. As strike day approached, we knew that we wouldn’t have enough teachers in each school to keep all four schools open, but we were determined to. We decided to keep the secondary school fully open, and invite pupils from the rest of our federation into the secondary school. Pooling staff meant we could provide for around half of the pupils of all four schools, enabling many parents to go in to work. This arrangement also meant that secondary school pupils could mentor primary school pupils, opening up opportunities to support with reading and other activities”.

Employing additional staff

- “Many of our teachers were on strike, so we were not able to open for all classes. However, we employed exam invigilators as temporary workers to allow public examinations to take place. One practical examination was on the same day, and those teaching staff came in to carry out the exam despite the strike, even though they were not asked to do so – they felt that this critical work could not be carried out by anyone else. We made sure that all students had access to the school’s virtual learning environment to carry out independent study, and we contacted parents to let them know that if they were not able to take time off work, we would provide supervision for their child. A small number of parents took up this offer, and these pupils were supervised in the library.”

Organising alternative activities

- “We chose to run an ‘activity’ day, when the usual timetable was suspended and enrichment activities took place. We asked a theatre company to come in and deliver performances and workshops in the school hall. This meant that a large number of students could be engaged in activities in the same room, and thus supervised more efficiently with fewer school staff and the support of members of the theatre company.”
- “We asked a local football coaching company to come in for the day and deliver coaching to the whole school. This was a safe, enjoyable activity for the pupils. Pupils who did not want to take part in the football coaching were supervised in alternative activities by teaching assistants and the few teachers who were working despite the strike. The school used the money saved from the deduction of a day’s pay from striking teachers to support this approach.”

Industrial Relations Law⁹

1. The law on trade disputes¹⁰

Ballots

A trade union must give the employer¹¹ 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 (where there are more than 50 employees being balloted) and the address and date by which ballot papers are to be returned; and
- specify who is authorised to call upon those balloted to take part in industrial action in the event of a “yes” vote.

⁹ The relevant statute – the Trade Union and Labour Relations (Consolidation) Act 1992 - is to be amended by the Trade Union Act 2016, although at the time of publishing (September 2016) those amendments are not yet in force and the law is as set out in this section.

¹⁰ Trade Union and Labour Relations (Consolidation) Act 1992, Part 5, and the Code of Practice on Industrial Action Ballots and Notice to Employers (2005).

¹¹ For maintained, community and voluntary controlled schools the local authority is the employer, with the governing body exercising employer responsibilities. As such, it is likely that notice of industrial action will be sent to the Chief Executive of the local authority in respect of these staff. Governing bodies are the direct employers of staff at foundation and voluntary aided schools. In academies the employer is the academy trust itself and, as such, they should receive notice directly from trade unions.

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 able to ask staff if they are planning to strike.

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 an unlawful 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.¹²

Employers 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 Department for Business, Energy and Industrial Strategy (BEIS, formerly Department for Business, Innovation and Skills), 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".¹³

¹² 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.

¹³ [Code of Practice: Picketing](#)

It is unlawful for people who are neither members of staff at the school nor their union representatives to join a picket.¹⁴ In this case, the employer should inform the trade union concerned. If the unlawful picketing does not end the employer may apply to the court for an order preventing, or stopping, the unlawful picketing or its organisation.¹⁵ The employer may also claim damages from those responsible where activities of the unlawful pickets have caused loss to the employer, for example by persuading a member of staff not to attend work. In the first instance, the employer may wish to contact the union to inform them that there are individuals who are picketing unlawfully.

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.

¹⁴ 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”.

¹⁵ The employer must inform the trade union of legal proceedings (see section 221(1) of TULR(C)A).

Further sources of information

Department for Education advice and guidance

- [Advice on the NASUWT and NUT action short of strike action](#)
- [Advice on health and safety for schools](#)
- [Keeping Children Safe in Education - statutory guidance](#)
- [Statutory guidance on supervision](#)
- [Statutory Framework for Early Years Foundation Stage](#)

External advice and guidance

- [Advisory, Conciliation and Arbitration Service \(Acas\)](#)
- [Local Government Association FAQs for employers: industrial action](#)
- [BEIS Code of Practice on Industrial Action Ballots and Notice to Employers](#)
- [BEIS Code of Practice on Picketing](#)

Legislation

- [Trade Union and Labour Relations \(Consolidation\) Act 1992](#)
- [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#)
- [Education \(School Teachers' Qualifications\) \(England\) Regulations 2003](#)
- [Education \(Specified Work\) \(England\) Regulations 2012](#)
- [School Teachers' Pay and Conditions Document 2015](#)



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Reference: DFE-00303-2013



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