

Focus on industrial action and undated resignations

August 2016

Executive Summary

Please note that this summary must be read in conjunction with the full guidance in order to ensure you are fully and accurately informed of the complexities of this subject.

Clearly, any proposals for action must balance the intended impact with the effect on patient care, ensuring that patient safety remains paramount.

Mass submission of undated resignations (page 5 onwards)

- As part of co-ordinated action, GPs would submit to the BMA their letters of resignation from their practice contract/salaried contract
- The conditions under which the BMA could submit these letters would be specified in advance
- GP partners would need to take account of any contractual obligations they are subject to when submitting an undated resignation letter, for example their partnership agreement
- No breach of contract involved and no need to inform the commissioner at the time of submitting the undated resignation
- If not all partners in a practice wanted to submit undated resignation, partnership would need to be mindful of viability of practice with remaining partners
- Partnership would be liable for costs of any practice redundancies and other associated costs, for example premises
- Salaried GPs participating would be resigning from their contract with their practice
- GPs resigning from their contracts would not be guaranteed an alternative contract in future
- GPs resigning from their contract would need to consider alternative employment options in order to continue receiving an income

Industrial action that could lead to a breach of contract (page 8 onwards)

- GP partners do not have the same (limited) immunities from the consequences of taking industrial action as employees do
- If a practice refuses to do something which is a contractual obligation, they could be served with a breach notice or have their contract terminated irrespective as to whether it is done as part of a campaign of industrial action
- Forms of industrial action which would breach contractual or other legal obligations could include:
 - The complete or partial withdrawal of essential services
 - The complete or partial withdrawal of other contracted services (without lawful termination of the contract on the required notice)
 - Non-compliance with various statutory and regulatory requirements such as:
 - Not undertaking appraisals (which would breach performer's list obligations)
 - Not undertaking revalidation (which would breach GMC rules)

- Failure to cooperate with the CQC (which would breach statutory requirements and which could result in a termination of practice registration and an inability of provide primary medical services)
- Locum salaried GPs are not a party to the contract between the practice and the commissioner and so are not directly affected by it
- A 'trade dispute' between a salaried/locum GP and their practice would need to be proven for salaried/locum GPs to take protected industrial action

Industrial action that would not breach the contract (page 11 onwards)

- The withdrawal of services that are over and above their contractual obligations would not constitute a breach of contract but could nonetheless be a form of industrial action
- Such options may include:
 - Increased use of external referral as a means of discharging the obligation to provide essential services
 - Withdrawal of non-contractual services that GPs voluntarily provide
 - Withdrawal from additional services, such as the provision of contraceptive services
 - Withdrawal from enhanced services, such as the provision of minor surgery, extended hours
 - Withdrawal from the quality and outcomes framework
 - Temporary suspension of new patient registration

Introduction

The purpose of this guidance is to provide GPs with a broad overview of the main areas to note should they be in a situation where they are considering, or being asked for their willingness to, submit undated resignations and/or take industrial action.

The broad categories of action that GPs could consider taking include:

- i. The mass submission of undated resignations
- ii. Industrial action - involving the breaches of contracts by GP contractors
- iii. Industrial action of a type that doesn't breach contracts
- iv. Action that is neither industrial action nor a breach of contract

It is important to note that there must be a trade dispute in place in order for any industrial action to be taken.

Mass submission of undated resignations

How does the process of undated resignations work?

Submitting an undated resignation does not breach a GP contractor's contract, but is clearly a significant step to take.

The concept of an undated resignation is that as part of action co-ordinated by the BMA, the GP practice, in accordance with its own governance procedures (which may in a partnership be by way of majority vote) determines to provide to the BMA with a letter of resignation, addressed to their commissioning body, for the BMA to date and send in prescribed circumstances. Where the GP practice consists of a single GP contractor this decision is likely to be easier to take than in larger practices.

An individual GP contractor who has been unable to persuade the GP practice to submit an undated resignation may wish to provide the BMA with a personal undated resignation from his/her practice. As discussed below GP contractors will need to be mindful of any contractual obligations under their partnership agreement, such as notice periods, in preparation for the eventuality of the BMA sending the as yet undated resignation to the practice.

The GP practice/contractor would need to provide the BMA with a written mandate providing the BMA with the authority to date and send the letter in prescribed circumstances. The mandate would need to specify:

- A minimum number of resignations for the BMA to hold before it has the power to submit the same on behalf of the GP practice/contractor
- The conditions in which the BMA is authorised to submit the resignation.

At the time of any prospective action, careful consideration would need to be given to the authorisation that the BMA would be provided with. Matters that would need to be considered would include whether the authorisation were to be subject to a time limit and whether, and in what circumstances, the GP practice/contractor would be able to revoke the authorisation that it has provided to the BMA.

There would be no need for the GP practice or individual GP contractor to notify the commissioner or the GP Practice that it has given such a notice to the BMA to send.

Once the resignations have been submitted by the BMA on behalf of the GP practice or the contractor, then the GP practice/contractor would have formally resigned from their partnership and/or from their contract. The remaining partners would be under no obligation to offer a new partnership opportunity to the resigning GP in the future. Similarly the commissioner would be able to accept that resignation and would be under no obligation to offer the GP practice another contract. Likewise the commissioner would be able to offer the GP practice a less advantageous contract in the future.

The service of a notice of resignation on a commissioner will take effect in accordance with the contractual provisions. Six months' notice is the standard provision in the GMS contract or three months when the GP contractor is a sole practitioner, and the GP practice would be required to work out the contractual notice period in the normal way. The service of a notice on a GP practice by a resigning GP contractor will take effect in accordance with the governance arrangements of the practice concerned.

Once a notice of resignation had been served the GP practice/contractor would not have any entitlement to change their mind, however they would be free to contact the commissioner/ GP practice to see if the commissioner/GP practice was agreeable to the notice of termination being withdrawn and/or a new relationship being agreed.

Does the GP contractor need to have regard to provisions within their partnership agreement?

Yes. Some partnership agreements contain a provision requiring that no more than one partner can resign within any given period of time. Depending upon the wording of the partnership agreement this may pose problems if two or more partners are planning to submit resignations at the same time. GP contractors in such circumstances would be well advised to take independent legal advice so as to avoid exposing themselves to legal liabilities from their partners for breaching the partnership agreements. It may be that the partners are agreeable to a Deed of Variation to allow for multiple resignations at the same time; however this will be a matter for discussion and possibly negotiation.

What is the position if some of the partners wish to submit undated resignations and other partners do not?

As described above the partners should have regard to the content of their partnership agreements. In principle the contract with the commissioner may survive a resignation of part of the partnership, although the resource implications on the remaining partners would need to be considered in terms of the practice viability.

What are the ramifications of undated resignations on salaried GPs?

A salaried GP who learns that the partners within their practice have submitted undated resignations may worry about the security of their job.

The salaried GP would also be aware that if the BMA were to send resignations en masse that there may be a large number of other salaried GPs facing redundancy at the same time as themselves and conclude that it is better to move practice in advance of resignations being activated.

Can a salaried GP submit an undated resignation?

Yes, however, salaried GPs are not a party to the contract between the practice and the commissioner and so are not directly affected by it. If the BMA were to serve undated resignations provided by salaried GPs then it would have to serve these on to the Practices themselves for them to have legal effect. Salaried GPs may take a different view to partners, based on their specific contractual agreement with their practice, mindful that any resignation to lend political leverage to changes to the practice's national contract, would result in a loss of their employment and income (and not necessarily any changes to their specific contract).

Can a locum GP submit an undated resignation?

Some locums may consider they have already “resigned” from their national contract, and others may have chosen locum work as a rejection of the pressures in the national contract; therefore an undated resignation from locum work (and ceasing to receive an income) may not practically gain significant support. Further many locums typically work short term contracts or provide ad hoc sessions, therefore it may be that there is no contract to resign from. If the locum is working within a contractual arrangement for an agency, chambers or a practice, the same issues apply as in respect of salaried GPs above.

Can PMS contract holders resign their contracts in the same way as GMS practices?

Yes, all PMS contract holders can resign their contract in accordance with the terms of that contract. They would be shutting down their NHS contract and will need to retire or find an alternative source of work and would need to fund any costs associated with this decision in the same way as a GMS contract holder would.

Where a GP practice submits an undated resignation and resigns the practice contract, what liabilities do they hold for staff e.g. redundancies?

They will be liable for the costs of any redundancies, and potentially other costs relating to the closure of a practice, including any costs relating to premises and any other contractual obligations that the GP practice owes to any third parties. GP practices considering such action need to have regard to the contracts they have entered into including the provisions of any lease of premises, contracts of employment and contracts with any third parties and their partnership agreements.

Where a GP practice submits undated resignations and resign their contract, could a salaried GP claim constructive dismissal?

It is difficult to see good grounds for a claim of constructive dismissal in these circumstances.

Income implications of undated resignations

It is important to note that resigning from a contract of work would effectively cease income for the GP concerned, unless alternative work was undertaken. Seeking undated resignations without alternative employment proposals may seem an unrealistic expectation. The financial implications of this, and any additional liabilities, is likely to be a limiting factor for many GPs taking up this option, or expressing a willingness to do so.

Industrial action that could lead to a breach of contract

While it is legal and possible for GP practices/contractors to take industrial action the legal implications are very different than they are for employees. While employees have certain limited immunities at law from the consequences of taking industrial action¹, GP practices/contractors have no such immunity. Therefore any breach of contract by a GP practice/contractor is actionable against the GP practice/contractor irrespective as to whether it is done as part of a campaign of industrial action.

If a GP practice/contractor refuses to do something that is a contractual obligation then they could be served with a breach notice by the commissioner, or have their contract terminated depending upon the nature of the contractual breach.

Forms of industrial action that would breach contractual or other legal obligations could include:

- i. The complete or partial withdrawal of essential services
- ii. The complete or partial withdrawal of other contracted services (without lawful termination of the contract on the required notice)
- iii. Non-compliance with various statutory and regulatory requirements such as:
 - Not undertaking appraisals (which would breach performer’s list obligations).
 - Not undertaking revalidation (which would breach GMC rules).
 - Failure to cooperate with the CQC (which would breach statutory requirements and which could result in a termination of practice registration and an inability of provide primary medical services)

GP practices/contractors will in particular need to be mindful of provisions in their contract that give contractual force to the requirement to comply with all legislation and have regard to any guidance produced by the Secretary of State as required by section 94 of the GMS Regulations which states as follows:

“94 Compliance with legislation and guidance

The contractor must—

- (a) comply with all relevant legislation; and
- (b) have regard to all relevant guidance issued by the Board, the Secretary of State or local authorities in respect of the exercise of their functions under the Act”.

All of the above forms of industrial action would constitute a breach of contract and could have professional as well as commercial consequences for the GP contractor.

¹ (providing that the provisions of the Trade Union Labour Relations (Consolidation) Act 1992 (‘TULRCA’) and, once it is in force, the Trade Union Act 2016, are complied with)

What are the implications of taking industrial action for a GP practice / contractor?

GP practices/contractors could be served with breach notices, or have their contact terminated by their commissioning body, in response to industrial action.

In 2012, over 100 breach notices were served in London in response to the single day's industrial action from GPs.

The legal advice at that time was that there was no effective action that GPs, or the BMA, could take to legally resist the breach notices.

What are the implications of taking industrial action for salaried GPs?

Before industrial action can be lawfully commenced there must be a 'trade dispute' between an employee and their employer. The meaning of trade dispute is defined in section 218 of the Trade Union Labour Relations (Consolidation) Act 1992 ('TULRCA') as follows:

"218 Meaning of "trade dispute" in Part IV

- (1) In this Part "trade dispute" means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following matters—
- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
 - (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
 - (c) allocation of work or the duties of employment as between workers or groups of workers;
 - (d) matters of discipline;
 - (e) the membership or non-membership of a trade union on the part of a worker;
 - (f) facilities for officials of trade unions; and
 - (g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures."

GP practices/contractors would be claiming to have a dispute with their employer (the commissioner) on the basis of 218(1)(a) – terms and conditions of employment.

Salaried GPs would be taking industrial action against their employer, which would be the GP practice for which they work. In 2012, salaried GPs were able to take industrial action as the dispute related to their pension, which was part of their terms and condition of employment.

If the BMA is unable to demonstrate a trade dispute between salaried GPs and their employers then it cannot call upon them to take industrial action and any industrial action they do take would

lack the protections afforded by TULRCA allowing their employers to dismiss them for a repudiatory breach of contract.

What are the implications of taking industrial action for locum GPs?

The same principles apply as for salaried GPs above. However, locums are potentially in a weaker position as they are often not going to be regarded as 'employees', and if they are not employees they will lack any protection from taking industrial action even if they were able to establish a trade dispute.

Will GP practices/contractors benefit from the same protections from unfair dismissal that TULCRA provides for employees?

No, GP practices/contractors have no protection from unfair dismissal as this protection only applies to employees.

Once the Trade Union Act 2016 comes into force what turnout at ballot is needed for industrial action to be lawful and what percentage must vote in favour of industrial action for it to proceed?

A minimum turnout of 50% of those eligible to vote will be required for the ballot to be valid. In terms of the vote in favour of IA a simple majority is sufficient, however when, as in this case, the strike is to affect important public services there is an additional criteria that 40% of all members entitled to vote must have supported the industrial action for it to be legal.

Industrial action that would not breach the contract

There may be some work that GP practices/contractors undertake that goes over and above their contractual obligations and the withdrawal of such services would not constitute a breach of contract but could nonetheless be a form of industrial action applied in a coordinated fashion by GPs, via the BMA, to place pressure on government to address legitimate concerns. Such options may include:

- (i) Increased use of external referral as a means of discharging the obligation to provide essential services
- (ii) Withdrawal of non-contractual services that GPs voluntarily provide
- (iii) Withdrawal from additional services, such as the provision of contraceptive services
- (iv) Withdrawal from enhanced services, such as the provision of minor surgery, extended hours
- (v) Withdrawal from the quality and outcomes framework
- (vi) Temporary suspension of new patient registration

What are essential services?

The GMS Regulations do not seek to define in specific terms the range of functions or activities comprise 'essential services'. The key provision is Regulation 17, which describes the services which the contractor must provide in paragraphs (4), (5) and (6). These services may be summarised as follows:-

"Paragraph (4):

Throughout core hours and 'delivered in the manner determined by the practice in discussion with the patient', services required for the management of registered patients and temporary patients, who are or believe themselves to be:-

- (a) ill, with conditions from which recovery is generally expected:
- (b) terminally ill
- (c) suffering from chronic disease

'Management' is defined in paragraph (5) and includes:

- (a) offering consultations and, where appropriate, physical examination for the purposes of identifying the need, if any, for treatment or further investigation; and
- (b) the making available of such treatment or further investigation as is necessary and appropriate, including the referral of the patient for other services under the Act and liaison with other health care professionals involved in the patient's treatment and care.

Paragraph (6):

The provision of appropriate ongoing treatment and care to all registered patients and temporary residents taking into account their specific needs including

- (a) advice in connection with the patient's health including health promotion advice;
- (b) the referral of patients for other services under the Act".

It can be seen therefore that while the scope of 'essential services' is very wide, and will include diagnostic services, the manner in which the services are to be provided is to be determined by the practice in discussion with the patient, which clearly therefore allows for the possibility of such essential services to be provided by way of external referral.

What does increased use of external referrals for essential services involve?

The mere fact that a service is an essential service does not mean that the GP practice has to necessarily undertake all the work involved. If it is available to the patient via external referral then the GP practice can deliver the essential service by way of making an external referral of the service to be provided by, for example, a local hospital.

Examples of services that can often be obtained via external referral are likely to include, among other things:

- Phlebotomy
- ECGs
- Spirometry
- Ambulatory BP monitoring
- Glucose tolerance testing or any other in-house pathology services
- Routine pregnancy testing (where there is no requirement to exclude ectopic pregnancy).

There is no case law on whether the increased use of external referral could lawfully be used as a means of industrial action, however there would appear to be scope, albeit with some risk, that a programme of industrial action could be conducted on this basis.

Withdrawal of voluntarily provided services

Many GP practices provide community nursing services. Sometimes these are commissioned as an 'enhanced service', and when they are then the relevant contract would need to be terminated or varied before any withdrawal of those services if it were to not constitute a breach of the contract. In some cases the services are provided without any contractual obligation upon the GP Practice / contractor, which is to say that the provision of these services via community nursing based services falls outside the scope of 'essential services'. Examples of work undertaken by such community nursing services GPs provide are:

- (i) wound care (including dressings and suture removal for procedures performed outside the practice);
- (ii) nursing care of leg ulcers and other chronic conditions (including Doppler assessment);
- (iii) nursing care for incontinent and catheterised patients;
- (iv) ear syringing;

- (v) provision of prescriptions for conditions which are being managed solely by community nurses.

Rather than providing such services via the provision of community based nursing services the GP practice can take steps to ensure the provision of essential services via other means, such as external referral.

Withdrawal from additional services, enhanced services, or the quality and outcomes framework

A GP practice wishing to withdraw from additional services, enhanced services, or the quality and outcomes framework will need to have regard to the contractual notice provisions to which these are subject and give appropriate notice of such termination.

The commissioning body may procure the additional or enhanced services from another provider and may decline to offer the GP practice with the opportunity to provide such services in the future.

A GP practice that ceases to provide additional services will lose a defined % of their global sum. A GP practice who stops providing enhanced services will lose the payments related to that.

A GP practice who withdraws from QOF will lose the associated payments. . If they later re-join QOF in the same financial year they will find that the work required to satisfy the scheme is still required.

Temporary Suspension of Patient List

Regulation 21 of the GMS Regulations details the circumstances in which a GP practice can refuse to admit a patient onto the patient list.

It states that:

“...[t]he contractor may only refuse an application ... if the contractor has reasonable grounds for doing so which do not relate to the applicant's age, appearance, disability or medical condition, gender or gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sexual orientation or social class”.

A question has therefore arisen as to whether it would be lawful for the GP practice to refuse access to the patient list on ground that their trade union had asked them to do so as part of a campaign of industrial action. The answer to this question will hinge upon whether or not such a direction by a union constitutes ‘reasonable grounds’ for doing this. If the answer is ‘yes’ then there would not be a breach of contract and the industrial action would be lawful. If the answer is ‘no’ then the refusal would be a breach of contract and the practice would be exposed to breaches notices and termination.

There are a range of legal opinions (but no case law) upon this matter and practices cannot be confident that refusing applications to the patient list on this basis would be lawful.

The BMA is firmly of the view that where the reason for refusing an application to join the patient list is inspired by genuine patient safety concerns then it will be lawful for the GP practice to do the same. The BMA has produced guidance on this. It may well be that some practices should be considering refusing access to their patient lists on patient safety grounds and if general practice continues to be underfunded then this is likely to be increasingly the case in the future, this reality

would not however lend itself well to a campaign of industrial action in which the union would need to be able to co-ordinate a start and end to such action in a coordinated way. There may be financial implications for practices not registering new patients, with the list size reducing due to patients moving or dying, and will impact greater in areas of greater turnover.

Nursing Homes

There is often an expectation that GP practices will, free of charge, provide services to residential and nursing homes that are additional to what practices are funded and commissioned to do through essential services. Such extra services are said to include demands for repeat prescriptions over and above practices' usual arrangements; requests to write in the home's clinical records in addition to keeping the normal clinical notes in the practice held patient record; the expectation of GPs carrying out regular weekly visits to the home regardless of clinical needs and requests to complete authorisation forms for staff to administer over the counter remedies.

Another commonly recurring issue is the expectation by nursing homes and/or pharmacies that practices should prescribe at seven day intervals for patients having their drugs dispensed by means of daily dosage trays and that this is done primarily to assist pharmacists on whom this obligation is said to fall.

In the absence of any contractual obligation to provide these services then the GP practice could withdraw them as part of a campaign of industrial action.

Schedule 3 Part 1 of the GMS Regulations provides, at paragraph 5, for circumstances where the GP may be required to attend a patient outside the practice premises. Such attendance may be required where, in the contractor's reasonable opinion, it would be inappropriate for the patient to attend at the practice premises. These obligations will need to continue to be discharged in order to avoid a breach of contract, however this does not mean that GPs need to attend nursing homes where there is no clinical need to do the so.

Permitted Applications

GP contractors could make an application to reduce the size of their practice area, or for a formal closure of their list, or to temporarily opt-out of the provision of additional services. Commissioners are required to consider such applications that are made and act fairly and rationally in dealing with these requests. Therefore whilst there is some scope for a series of mass applications to cause administrative difficulty for commissioners, it is also probable that they would consider their options for responding to this action so limiting its potential effectiveness.