

Making the case for facilities time and facilities agreements in the NHS

ACTIVISTS





This publication is due for review in June 2020. To provide feedback on its contents or on your experience of using the publication, please email publications.feedback@rcn.org.uk

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1. Introduction

The Trade Union Act 2016 poses significant challenges to UK unions – particularly in relation to their ability to take industrial action – but also in respect of the amount of paid facility time that might be available to trade union representatives in the future. The legal right to facility time (paid and unpaid) which allows union representatives to represent members have not changed.

This guidance sets out the provisions in the Trade Union Act, looks at the benefits of union representation and facilities agreements and restates what the law and good practice say about the issue.

It aims to provide you with information to make the case for facilities time and agreements. At the back of this publication, there are also template letters to share with employers to help you make the case.

2. What are facilities agreements and facility time?

Facilities agreements cover all aspects of employment relations between trade unions and employers including recognition and negotiation as well as time off for union representatives. They also include other aspects of the union's rights to represent its members, such as information for the purposes of collective bargaining and access to physical resources like rooms and means of communication.

Union representatives – learning reps, safety reps and stewards – have statutory rights to reasonable paid time off to carry out trade union duties. In addition, separate regulations mean that employers are required to allow health and safety representatives paid time, as is necessary, during working hours to perform their functions.¹

However, the RCN and many employers alike view these rights as only a minimum and no substitute for a good local agreement, which is well understood and supported by union representatives and employers. An agreement cannot provide less than the law but it is the RCN's experience that most provide for more than the legal minimum.

¹ Safety Representatives and Safety Committee Regulations 1977 regulation 4(2)(a)

3. The Trade Union Act

The Trade Union Act 2016 was passed on 4 May 2016. The most important element of the changes is that industrial action will be lawful only when there has been a ballot turnout of at least 50% and a simple majority must be in favour of action. In 'important public services' the 50% threshold has to be met but in addition 40% of all those balloted must be in favour of the industrial action before it is lawful.

The Act also covers facility time and covers employers in the public sector (and some private sector employers that provide public services) who will have to publish information on the amount of paid time off for union duties and activities. The Act also allows the government

to issue regulations restricting facility time at particular employers. After three years from the commencement of the Act the Secretary of State can exercise 'reserve powers' to limit the amount of paid facility time to a maximum percentage of payroll costs.

It may be the case that some employers seek to reduce the amount of facility time used in their organisations before the Secretary of State exercises their powers. RCN representatives need to be continually aware to any challenge to facility time in their workplace – whether it is time allocated to the RCN or other unions.

4. The benefits of workplace reps and facility time

This section sets out various benefits that workplace representatives bring to an organisation, as well as the benefits of formal facilities agreements.

If you are trying to get a formal agreement, or stop your existing agreement being eroded, you could use these points to make your case. Gather evidence on the positive benefits that facility time brings your organisation or point out the disadvantages of not having an agreement. You could point out examples where RCN work aided by facilities time resolved a difficult issue for management or lack of facilities time meant that the issue dragged on and became more difficult for management. As an RCN representative you are uniquely equipped to highlight how improving the workplace can impact on the quality and safety patient care.

The benefits of RCN representatives

- RCN representatives provide employment relations expertise which benefits both members and employers. Facility time allows reps to access union learning and development in key areas such as equal opportunities, job evaluation, and health and safety. Learning and development for RCN representatives also uniquely reinforces the relationship between a good working environment and safe care for patients.
- RCN representatives help to sort out problems before they become serious, and often avoid the need for expensive tribunals or getting higher levels of management involved. They provide a vital link with members and can provide advice before issues become complex problems. This often saves time and reduces workloads for HR and other managers. But reps need to be given time to tackle these issues before they do get serious.
- RCN representatives can play a big part in facilitating the management of change. They can help by explaining the situation to members, supporting them through the process and ensuring that it is carried out correctly.
- RCN representatives, who combine their responsibilities with their health care role in the organisation, bring a unique perspective and expertise. They understand how changes impact on both staff and patients and enable effective communication with members.
- As many organisations face the need to make cost savings, they are looking at ways to restructure and redesign services. Staff are often the ones who know best how the service works and can help come up with ideas about how they can be improved.
- Involving staff in change management often results in raised motivation and productivity, leading in turn to reduced staff turnover, lower recruitment costs and loss of skills. In turn, a healthy work environment leads to increased job satisfaction and improved patient outcomes.
- RCN representatives have access to resources and colleagues at a regional and national level providing useful information and advice on employment relations and professional issues.
- RCN representatives ensure that there is a consistent and mutually understood approach in sorting out collective and individual problems.
- Union learning representatives (ULRs) have successfully introduced many thousands of employees to learning and development, helping employees to improve their skills and work capabilities with direct benefits for patients.
- The Health and Safety Executive (HSE) has reported that health and safety representatives are highly effective in improving safe working practise by forming safety committees, undertaking safety audits, and recruiting other employees as safety representatives as well as organising learning and development events.

The benefits of facility time

- Representing union members is complex and time consuming – and the best way of allocating time for these duties is through union facility time. This ensures that members have access to representation at a specific time and gives employers the confidence that union representatives are available for individual or collective representation.
- Investing in facility time is an investment in organisational development as employee relations and staff productivity are improved.
- It can sometimes be difficult to come to an agreement on how facility time is arranged, releasing people from their jobs to undertake union duties. It can also be difficult to come to an agreement on what constitutes reasonable time off. Flexibility is key to negotiating facilities arrangements – between HR, line managers and union representatives. Full-time RCN officers are available to help negotiate an arrangement to suit everyone.
- Many HR departments decide to centrally fund facility time; this can share the load rather than falling on the individual departments where those representatives work. Suggesting this option may help you make the case for facility time.
- Some employers pay for the full-time release of staff to take on a representative role and for the backfill for their job ensuring they can undertake their responsibilities without worrying about leaving their colleagues in the lurch. You could recommend this approach as a model of partnership working at its best.

5. RCN Research on the economic case for facility time

The RCN has worked with Professors Nick Bacon from Cass Business School and Kim Hoque from the University of Warwick to look at the economic benefits of union representatives and facility time.

Their research shows that in workplaces with union representatives, there is lower turnover of staff than those without representatives, which means that these organisations are more stable and do not have to face the cost of constantly replacing staff who leave.

In fact, union representatives are estimated to save a typical NHS hospital £1.2 million a year.

The research also shows a clear correlation between the number of hours of facility time that reps obtain and the influence they have in a workplace – with the ability to have an impact on key workplace issues such as learning and development, staffing levels and organisational change.

In fact, the research shows that stewards need at least five hours a week facility time to make an impact on:

- disciplinary matters/grievances
- sickness
- capability
- the use and management of agency and bank nurses
- reorganisation (including TUPE)
- promotion of a positive organisational culture and wellbeing.

But they need at least 15 hours a week facility time to make an impact on:

- discrimination
- staffing levels
- hours of work
- learning and development
- job evaluation.

Learning reps need at least 15 hours a week of facility time to have an influence on the proportion of staff receiving:

- appraisal/development reviews
- mandatory training.

The RCN document *The Value of Trade Union Workplace Representatives in Health Care* sets out the key arguments.

6. What legal rights do union representatives have?

Union representatives take on many different responsibilities, ranging from individual member cases to regular meetings with management as well as keeping in touch with colleagues from the RCN and other unions. Union representatives and employers should work together to arrange appropriate time off and make arrangements for cover while representatives are undertaking union duties or activities.

Trade union representatives have a statutory right to paid time off from employment to carry out union duties and to undertake training as provided by the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA). The amended 2002 Act provides additional

rights for union learning reps to promote and enable training and learning.

Under the Safety Representatives and Safety Committee Regulations 1977 employers are required to allow union health and safety reps paid time, as is necessary, during working hours to perform their functions. In addition, there is no limit to the amount of time that can be taken and unlike other reps, they can represent all employees in the workplace, not just union members.

Union representatives are entitled to paid time off to cover the following duties:

Health and safety reps	Learning reps	Stewards
<p>Performing their functions under health and safety legislation.</p> <p>Functions include:</p> <ul style="list-style-type: none"> investigating potential hazards, incidents or complaints workplace inspections making representations to the employer on health or safety matters representing employees. <p>Undergoing learning and development to carry out their duties and responsibilities.</p> <p>Attending health and safety meetings at local, regional, national and international levels where appropriate.</p>	<p>Analysing learning and development needs.</p> <p>Arranging, promoting and advising on learning or training.</p> <p>Consulting with employers and undergoing relevant learning and development.</p>	<p>Trade union duties related to collective bargaining, on issues like:</p> <ul style="list-style-type: none"> terms and conditions of employment redundancies job evaluation flexible working discipline trade union facilities negotiating machinery. <p>Individual representation.</p> <p>Meetings with management and preparation for these meetings.</p> <p>Keeping members informed about negotiations.</p>

7. What can be covered in a facilities agreement?

Facilities agreements usually refer to trade union duties and trade union activities.

Trade union duties refer to all matters relating to collective bargaining and individual representation, such as pay negotiations, consultation meetings, disciplinary hearings and staff inductions.

Trade union activities may include attending branch meetings, or an RCN conference.²

Facilities agreements

A facilities agreement will usually cover the following aspects. This list is not exhaustive, however, and both parties may decide to negotiate the content and structure of their agreement.

- Terms and conditions of employment including physical working conditions.
- Engagement, termination or suspension of employment and the duties of employment.
- Allocation of work or the duties of employment as between employees or groups of employees.
- Discipline and grievance.
- Activities associated with trade union membership.
- Facilities for union officers, such as office space, storage facilities for files, etc.
- Negotiation or consultation machinery and other procedures.
- Procedures for collective bargaining, disputes, joint consultation, communicating with members and other trade union officers.

The Agenda for Change agreement encourages and promotes partnership working. As part of this approach, employers should ensure that union reps are released appropriately to participate in partnership. This can be found in the NHS Terms and Conditions Handbook – section 1.³

The Agenda for Change Terms and Conditions of Service Handbook states:

“NHS employers should allow reasonable paid facility time for recognised staff officials to carry out negotiations with the employer about matters for which the union is recognised and to undergo training relevant to these duties.” (section 25)

In Scotland, NHS trade union facilities arrangements are agreed through the national *Partnership Information Network (PIN) Guidelines*.⁴

² There is no statutory requirement that union representatives should be paid for time off taken for trade union activities. However, employers may consider payment in certain circumstances.

³ www.nhsemployers.org/your-workforce/pay-and-reward/pay/agenda-for-change-pay

⁴ www.scotland.gov.uk/Publications/2011/12/06131150/0

8. Local practice

Sometimes local arrangements may not be written into formal agreements and local practice has developed which could either be written or unwritten. Local practices agreed in writing might be found in letters, minutes of meetings or emails. They usually have the same weight as an agreement but can often be changed more easily than a written agreement.

Some local arrangements are not written down anywhere and might be the result of a verbal agreement or just accepted as 'the way we've always done it'. Representatives and

managers may prefer to rely on unwritten arrangements – but these are easy to change or be misunderstood.

The RCN recommends that local practices – both written and unwritten – are written into formal agreements to provide you with safeguards. Representatives should get in touch with their regional office when planning to formalise any agreements.

9. Useful guidance and advice

Acas Code of Practice

The 2009 *Acas Code of Practice and Guidance on Time Off for Trade Union Duties* contains provision for work and/or workload reductions for representatives when time off for trade union duties or activities is required. It states that:

“Employers should ensure that, where necessary, work cover and/or workload reductions are provided when time off is required. This can include the allocation of duties to other employees, rearranging work to a different time or a reduction in workloads.”

The code provides for reasonable paid time off for trade union duties even when a representative would not ordinarily be at work:

“There is not a statutory requirement to pay time off where the duty is carried out at a time when the union representative would not otherwise have been at work unless the union representative works flexible hours, such as night shift, but needs to perform representative duties during normal hours.”

The code provides guidance in determining what constitutes reasonable time off, and this list is not exhaustive, taking into account any operational difficulties, the need to maintain a service and the difficulties for trade union representatives in respect to shift patterns.

There is also an expectation for employers to ensure work cover and/or workload reductions are provided when time off is required. In practice, this can often be difficult to enforce, but the provision in the code should be highlighted if problems are encountered.

Health and safety representatives have a separate entitlement to the provision of facilities to help them perform their duties under the Safety Representatives and Safety Committees Regulations 1977. Further information is available on the [Health and Safety Executive website](#).

The Trade Union Act 2016 does not change this entitlement and employers cannot restrict the time that health and safety reps need to undertake their functions.

10. What does the Trade Union Act say about facility time?

New regulations came into force on 1 April 2017 which require relevant employers in the public sector (with at least 50 employees) to publish information on facility time.

The regulations require the following information to be published on the employer’s website before 31 July each year:

Table	What information is required	More details
1	The number of employees who were relevant union officials during the relevant period, and the number of full-time equivalent employees	Total number of employees who were relevant union officials during the relevant 12-month period Total number of full-time equivalent employees
2	The percentage of time spent on facility time for each relevant union official	Number of employees who were relevant union officials employed during the relevant period who spent: 0% 1-50% 51-99% 100% of their working hours on facility time
3	The percentage of pay bill spent on facility time	Total cost of facility time; the total pay bill and the percentage of the total pay bill spent on facility time. Total cost of facility time is calculated by taking the following steps: 1. work out the hourly cost of each employee who is a relevant union official during the relevant 12-month period 2. multiply the hourly cost for each such employee by the number of paid facility time hours spent by that employee on facility time during the relevant 12-month period; 3. where there is more than one employee who is a relevant union official, add together each of the amounts produced by step 2. In calculating the hourly cost for step 1, this includes gross wages, pension contributions and national insurance contributions divided by the working hours of the employee during the period. Where this could lead to an individual employee being identified, then the organisation can use a notional hourly cost instead, which must be reasonable having regard to the type of work the identifiable employee ordinarily did during the relevant period. This is most likely to be relevant where there is only one relevant union official. The total pay bill is calculated by adding the total gross amount spent on wages on all of its employees during the relevant 12 month period to the amount spent by it on pension contributions and national insurance contributions. The percentage of the total pay bill spent on facility time is calculated by dividing the total cost of facility time by the total pay bill and multiplying by 100.
4	The number of hours spent by relevant union officials on paid trade union activities as a percentage of total paid facility time hours.	Total hours spent on paid trade union activities divided by the total paid facility time hours and multiplied by 100. Paid trade union activities means the time taken off by relevant union officials during their working hours for the purpose of taking part in any activities in relation to which they are acting as a representative of the union and for which they receive wages. Total paid facility time hours means the total of all hours spent on facility time by all employees who are relevant union officials, excluding hours when such employees are taking part in any activities when acting as a representative of the union for which they are not paid.

What is not included?

The regulations do not require public sector employers to provide:

- a breakdown by types of union reps such as learning reps, safety reps or stewards – all facility time will be included together
- a breakdown of time spent on different union duties such as negotiating on pay, disciplinary or grievance hearings, promoting learning and development or health, safety or wellbeing
- a breakdown on how paid time spent on union activities is used, for example: consulting members, preparing for cases
- details about union facilities such as offices, phones, internet access.

Devolution implications of the Trade Union Act

The provisions of the 2016 Act and the consequent amendments to the Trade Union and Labour Relations (Consolidation) Act 199, extend to Great Britain – and not, therefore, to Northern Ireland. The National Assembly for Wales has introduced its own legislation to prevent certain provisions of the Trade Union Act 2016 from applying in Wales. The Trade Union (Wales) Bill could dis-apply parts of the Trade Union Act 2016 relating to facility time

Checklist for officers and representatives

- ✓ Know your rights as a union representative – remember that the Acas code sets on minimum obligations on employers – not the maximum. The RCN always tries to negotiate better arrangements for our rep than set out in the Acas Code.
- ✓ The legal entitlement to time off with pay for trade union duties and time off without pay for trade union activities has not changed.
- ✓ Employers cannot restrict the time that health and safety reps need to undertake their functions. There should be a guarantee that they will be given such time as they require.
- ✓ Put together a case of the local benefits of facilities agreements and union representatives in your workplace. Use the RCN research. Use local evidence about the difference you make to both members and the employer.
- ✓ Be clear that facility time is not 'trade union time' used for supporting staff and employers in employment, safety and learning issues in the workplace.

Checklist on new reporting requirements

- ✓ Keep a diary of the time you spend both on paid and unpaid union duties – every week will vary so it is important to keep an accurate record.
- ✓ Make sure that the way the information is being collected by the employer is done in an agreed, transparent way – so that all unions at your workplace understand and agree with all definitions and classifications. Make sure that roles are not double counted so that if a rep is a steward as well as a learning rep then they are only counted once.
- ✓ Make sure your regional office is updated on all developments.

11. Letter templates

Dear [name],

We all know that [the NHS/health care] faces tough times ahead – there is less money with which to do more. And the only way we can get through this challenge is a commitment to build trust – between staff, employers and trade unions.

I am writing to you to ask for a meeting to discuss facilities agreement with RCN.

[Use this section to explain what the current situation is and what you want ie a renewed or formalised agreement, a completely new agreement or stop the employer taking away existing facility time.]

The RCN firmly believes that facilities agreements are the best way of promoting constructive dialogue between employers, staff and their union representatives.

Local agreements often prevent problems emerging and find solutions to problems if they do emerge. In fact, problems often occur when the RCN is not consulted.

A major feature of the RCN is our commitment to making our members better health care professionals – supporting their ongoing learning and development and ensuring they are engaged in and motivated by their work.

We are also health and safety champions. We want to make sure our members work in a health and safe environment and our health and safety reps have access to the latest advice and best practice. Our work on needlestick injuries and wellbeing at work demonstrate we are leaders in the health and safety field.

The RCN is also an expert in helping NHS organisations manage change and minimise uncertainty among staff. The best way to secure organisational change is to involve staff – they are the ones who best know the service and how it can be improved. Involving RCN reps helps ensure that change does not undermine health care delivery.

Poor employment relations is damaging [for the NHS], for the organisation and is costly. Working closely with RCN reps minimises time and costs. Treating the RCN as a key stakeholder leads to improved employee relations which in turn leads to better staff morale, lower turnover and improved wellbeing. This all adds up to better staff productivity.

But this all takes time and making sure that RCN representatives have adequate time to fulfil all these roles and duties. A formal agreement, which sets out paid time off for union duties and activities, is the best way of establishing a mutually understood and consistent approach.

I hope you'll agree that this is a constructive agenda and I look forward to meeting with you to discuss it.

Dear [name],

This letter is to formally let you know that your staff member [name] has been elected as a representative for the Royal College of Nursing. Their role will be as a [role] which will allow them to represent the interests of RCN members through partnerships within the workplace.

This role requires [name of rep] to be trained and competent to deliver both individual and collective support representation for members.

In the first instance, this will involve participation in the RCN Representative Development Pathway. [How many days will this involve?]

The pathway is based on national occupational standards for trade union representatives in the workplace (ENTO standards) and ensures that RCN representatives are effective, competent and confident in their roles.

Once [name] has undertaken their learning and development, they will require time off to perform their trade union duties and activities. Your organisation may already have facilities arrangements for the RCN or other trade unions and it will be fairly straightforward to extend these arrangements to [name]. Developing a robust facilities agreement with time off for representatives to undertake trade union duties is an effective way of making sure they have adequate time and resources to get on with their roles.

RCN representatives take on many and varied roles, including offering advice and support to members on employment issues, representing members and working closely with employers on service improvements and restructuring.

Representatives are entitled to time off in order to perform their trade union duties and attend appropriate training (Ref Section 168 TULCRA 1992 and Employment Act 2002). In addition, Section 25 of Agenda for Change promotes agreement of paid time off and facilities for representatives to perform their duties in order to improve staff engagement.

A key feature of the RCN representative programme is the individual support they receive from RCN full-time officers. We provide mentorship to all our representatives and I will be working closely with [name]. I would be happy to discuss with you any aspect of the development pathway or how we can work with you in developing partnership arrangements.

Evidence shows that trade union representatives who are properly trained, and with access to a good facilities agreement provide many benefits to an organisation and an assurance that partnership arrangements are working effectively.

I enclose a copy of our role descriptor for [name] and if you would like to discuss this further, then please do contact me.

I look forward to working with you in the future.

The RCN represents nurses and nursing, promotes
excellence in practice and shapes health policies

RCN Online
www.rcn.org.uk

RCN Direct
www.rcn.org.uk/direct
0345 772 6100

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