

April 2022

PSNC Briefing 011/22: Temporary closures of community pharmacies

This PSNC Briefing provides information on temporary closures of community pharmacies due to illness or other reasonable cause – beyond the control of the contractor – from 1st April 2022.

Summary

1. In broad terms, if contractors do not want to breach the terms of service for unplanned temporary closures of pharmacies, they should:
 - only close for staff illness or other reasonable cause – that is a reason beyond their control;
 - notify NHS England and NHS Improvement (NHSE&I) of the closure/unplanned temporary suspension as soon as practicable (using form annex 14 – notification of unplanned temporary suspension of services – which is available on the [NHSE&I website](#));
 - update their Directory of Service (DoS) and NHS website entry¹;
 - make arrangements with one or more NHS community pharmacies in the same area for the continued provision of pharmaceutical services, if this is practical; and
 - use all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
2. Contractors should consider carefully whether NHSE&I and, if applicable, NHS Resolution (and ultimately the courts if they seek Judicial Review) will consider any closure is for a reason beyond their control – particularly if the reason is that in their area, for that day or time, they could not arrange a locum pharmacist.

The current guidance suggests that NHSE&I do not consider that pharmacy staffing is beyond the control of contractors, but arguably, the guidance relates to earlier times before the current acute workforce shortages in some areas of England. NHS Resolution has taken the view that a problem with the staffing of a pharmacy is not a reason beyond the control of the contractor as to why the contractor is not able to provide pharmaceutical services during its core or supplementary hours.

3. Contractors should note that this document relates to those who are included in a pharmaceutical list. Those who are providing services under a Local Pharmaceutical Services (LPS) contract must ensure they comply with the provisions of that contract, which may not be the same as those referred to in this document.

¹ Contractors can use the NHS website profile editor and the DoS Profile Updater to do this. Note, a new tool called NHS Profile Manager to simplify this process is scheduled for release in spring but is not yet available.

[Read more about updating NHS website profiles](#)

[Read more about updating DoS profiles](#)

Introduction

4. The relevant regulations are the [NHS \(Pharmaceutical and Local Pharmaceutical\) Regulations 2013](#) (NHS Regs) and the relevant guidance is within [NHSE&I's Pharmacy Manual](#).
5. On 31st March 2022, the Secretary of State's declaration of an emergency due to the COVID-19 pandemic, for the purposes of NHS Regs ended, and the option for contractors to apply for temporary changes to opening hours and temporary closures under the provision 'activated' by the declaration (paragraph 27 of schedule 4 of the NHS Regs) also ended.
6. From 1st April 2022, the usual terms of service applied, which provide for contractors to submit...
 - notifications of unplanned closures for staff illness or other reasonable cause (which must be for a reason that is beyond a contractor's control if there is to be no breach of the terms of service);as well as,
 - applications for unplanned temporary closures for a reason that is beyond a contractor's control;
 - applications for planned temporary closures;
 - applications for changes to core opening hours (temporary or permanent);
 - notifications for changes to supplementary opening hours (temporary or permanent); and ...
 - notifications of permanent closures all made to NHSE&I.
7. This briefing considers unplanned, temporary pharmacy closures (unplanned temporary suspensions of service).

Unplanned closures for staff illness or other reasonable cause

8. The NHS Regs make provision for unplanned closures in certain circumstances and where the contractor takes certain steps.
9. Where a community pharmacy contractor is prevented by *illness or other reasonable cause* from opening the pharmacy, the contractor must *make arrangements with one or more NHS community pharmacies ... situated in the same area* for the continued provision of pharmaceutical services, if this is practicable. For the avoidance of doubt, pharmaceutical services include Essential services, any Advanced services that the contractor has chosen to provide, and any Enhanced services they are commissioned to provide by NHSE&I. It does not include any services commissioned by a Local Authority or Clinical Commissioning Group.
10. In addition, where there is a suspension in the provision of pharmaceutical services for a reason beyond the contractor's control, the contractor must:
 - **notify NHSE&I of the suspension as soon as practical;** and,
 - *uses all reasonable endeavours* to resume the provision of pharmaceutical services as soon as is practicable.

As long as a contractor complies with the requirements of the NHS Regs, they will **not** be in breach of the terms of service under the NHS Regulations. (Paragraph 23 of schedule 4 of the NHS Regs.)

Considering each aspect:

Illness or other reasonable cause

11. The NHSE&I Pharmacy Manual indicates that:

... there may be occasions where [pharmacies] are unable to open in line with their agreed opening hours for reasons beyond the control of the contractor...

(Paragraph 42, Chapter 37, procedure – monitoring compliance and managing performance – all Pharmacy Manual references unless otherwise stated are Chapter 37)

12. According to the Pharmacy Manual, there is good cause to close a pharmacy for *utilities interruptions and minor flooding*.

13. Staff illness or suspected staff illness with COVID-19, or self-isolating for public protection should also be examples of good causes to close a pharmacy.

14. Some circumstances may never be a reasonable or good cause to close a pharmacy, and the NHS Regs and Pharmacy Manual state that:

Planned refurbishment is neither a ‘reasonable cause’ ... nor a ‘reason beyond the control of a contractor’ ... for a suspension in the provision of pharmaceutical services.

(Paragraph 23(11), Schedule 4 of the NHS Regs).

Locums

15. Some circumstances may need to be considered more closely to determine whether they are a reasonable cause to close a pharmacy.

For example, the Pharmacy Manual indicates that failure to arrange locum cover where there was sufficient time to do so, is not a good reason – not outside the control of the contractor. (Paragraph 45, point 8)

16. Therefore, failure to arrange a locum could be a reasonable cause for closure beyond the control of the contractor, for example, if the contractor did not have sufficient time to arrange a locum. It is suggested that as a matter of logic and common sense, there may be other reasonable causes for closure beyond the control of the contractor due to staffing problems.

17. However, two appeals to NHS Resolution suggest that the approach of NHSE&I and NHS Resolution’s Primary Care Appeals committee, which hears contractors appeals against decisions by NHSE&I are not helpful to contractors.

18. In decision [REF: SHA/23363 of 8th July 2020](#) in respect of a two breach notices dated 12th March 2020, one in relation to a closure on one day for a number of hours and the other in relation to the contractor’s failure to report the closure (this was before the COVID-19 pandemic and under the usual terms of service) is stated that:

NHSE&I deem staffing levels of a pharmacy to not be beyond the control of a pharmacy. The arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover core contracted as well as supplementary hours offered by a pharmacy are a commercial consideration and a matter for the pharmacy to ensure that there is sufficient cover.

(Paragraph 4.5)

Primary Care Appeals considered that: *... a problem with the staffing of a pharmacy is not a reason beyond the control of the Appellant as to why the Appellant is not able to provide pharmaceutical services during its core or supplementary hours. Staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover core contracted as well as supplementary hours offered by the Appellant are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover.*

19. In decision [REF: SHA/24632 of 5th January 2022](#), in respect of a remedial notice concerning the emergency flexible temporary regulations that are no longer applicable and about the effects of the pandemic on a 100-hour pharmacy, the following was stated ...

NHSE&I considered that: *the continuous period of time that [the contractor] has been operating on reduced hours (April 2020 to present, a period of 18 months) can be classed as 'temporary' and we do not consider that recruitment issues are provided for within the regulations. NHSE&I is therefore of the opinion that the issuing of a remedial notice was appropriate as it is satisfied that there is no good cause (as has been defined on appeal) for the reduced opening hours."*

NHS Resolution stated: *I am of the view that a problem with the staffing of a pharmacy is not a reason beyond the control of the Appellant as to why the Appellant is not able to provide pharmaceutical services during its core or supplementary hours. Staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover core contracted hours as well as supplementary hours offered by the Appellant are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover.*

I have sympathy with the Appellant and acknowledge that the pandemic has caused many difficulties, including in the recruitment of staff, which I note has been acknowledged in the Remedial Notice. However, I am of the view that the reasons given for the reduced opening hours were not beyond the Appellant's control. Therefore I consider that NHS England did not act unreasonably in considering that the reasons given by the Appellant were not adequate.

20. **The question is whether the workforce issues and difficulty arranging locums in some parts of England are now so acute that in some circumstances, a staffing problem, including securing a locum, is a reason to close that is beyond the control of a contractor.**
21. **PSNC is seeking amendments to the Pharmacy Manual to recognise in the guidance that in some circumstances securing a locum/a staffing problem can be a reason to close that is beyond the control of a contractor.**
22. A failure to arrange a locum if a locum is available and where a contractor has reasonable time to arrange such locum cover, would not be a reasonable cause for closure or a reason for closure beyond the control of the contractor.

Makes arrangements with one or more NHS community pharmacies ... situated in the same area

23. Contractors should already have business continuity plans in place and these may include, for example, 'buddy arrangements' with one or more other NHS pharmacies in the same area, so that if the pharmacy has to close temporarily, it is more practicable to implement such contingency arrangements.

Notifies NHSE&I of the suspension as soon as practical

24. NHSE&I must be informed of the temporary closure or suspension of services as soon as practicable using the relevant form (annex 14 – notification of unplanned temporary suspension of services), which is available on the [NHSE&I website](#).
25. In this form, a contractor is asked to set out the reasons for the temporary suspension of services and the actions taken to limit the impact of the closure on users of the pharmacy.

Uses all reasonable endeavours to re-open the pharmacy

26. A pharmacy contractor is expected to use all reasonable efforts to re-open the pharmacy for the contracted core and supplementary opening hours.

Other relevant terms of service

27. Other terms of service may be relevant, for example, that a contractor must ensure the pharmacy's Directory or Services (DoS) and NHS website entries are accurate and updated.

100-hour pharmacies

28. It is suggested that as a matter of logic and common sense, 100-hour pharmacies, as well as 40-hour pharmacies, may be prevented by *illness or other reasonable cause* from opening the pharmacy, or close for reasons beyond the control of a contractor, however ...
29. ... the notification form for unplanned temporary suspension of service, annex 14, includes the following - *If you are subject to a 100 hours condition, please set out in the box below how you will continue to be open for at least 100 hours per week (as required by regulation 65(2) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended) in light of the unplanned temporary suspension of pharmaceutical services...*
30. ... Reg 65 deals with core opening hours conditions and relevant applications and arguably notification of an unplanned temporary suspension of service is not so much an application as a notification, and, therefore, Reg 65 should **not** apply.

Performance Procedures – closures, dispute resolution, breach notices and market exit

Closures

31. If a contractor notifies NHS England of a closure or temporary suspension of pharmaceutical services due to *illness or other reasonable cause*, for reasons NHSE&I agree are beyond their control, and makes appropriate arrangements with one or more other pharmacies, and uses all reasonable endeavours to resume service provision as soon as is practicable, there is **no** breach of the terms of service.
32. Closure of the pharmacy during its core or supplementary opening hours without reasonable cause or without complying with the requirements of the NHS Regs, is a breach of the terms of service.

Informal resolution and dispute resolution

33. Any relevant term of the NHS Regs or Drug Tariff may be considered to be part of the terms of service. Therefore, a contractor may be in breach of the terms of service for a closure and separately for any failure to notify NHS&I of that closure.
34. According to the Pharmacy Manual, if there is no risk to patient safety or significant financial loss to NHSE&I, generally, the NHSE&I will deal with the breach informally, at least initially.
35. The Pharmacy Manual states that this informal approach to a contractor may be *through telephone communications, meetings or written communications including emails. There is no set process and the most appropriate means of engagement will depend on the nature of the dispute and the preferred ways of working of NHS England and contractor.*
36. If NHSE&I is considering performance action against a contractor, generally, NHSE&I must undertake local dispute resolution.
37. A contractor may involve the Local Pharmaceutical Committee at the informal and/or local dispute resolution stage, or at any stage of this process.
38. If the pharmacy has not been open during its core or supplementary hours before issuing a breach notice, NHSE&I must *make reasonable efforts to communicate with the contractor with a view to establishing the*

cause of the closure. (Reg 69 (3)(b)(i) of the NHS Regs) i.e. must seek to establish whether there was a reasonable or good cause for the contractor to close the pharmacy.

Breach and remedial notices

39. Even if a contractor closes the pharmacy without good or reasonable cause, the contractor may not receive a breach notice if NHSE&I considers this is the appropriate course of action.
40. NHSE&I regions may have written policies that add more detail about how they will consider unplanned pharmacy closures and these policies may consider, for example, that failure to open the pharmacy for a short period of time is not sufficiently serious to warrant performance action.
41. A breach notice is likely for closures without good or reasonable cause, rather than a remedial notice. The Pharmacy Manual sets out certain contractual breaches that cannot be remedied including *failure to open on a specific day or days, or at specific times of a day or days, in line with agreed core and supplementary opening hours.* (Paragraph 58)
42. To be valid, a breach notice must include the nature of the breach and an explanation how the contractor may appeal the breach notice.
43. If NHSE&I considers issuing a breach notice, it may also decide to withhold remuneration – withhold payment of fees and allowances. *Payments can be withheld where:*
 - *the breach relates to a failure to provide, or a failure to provide to a reasonable standard, a service that the contractor is required to provide;*
 - *the decision-maker is satisfied that the breach the withholding relates to is, or was, without good cause; and*
 - *the amount to be withheld is justifiable and proportionate having regard to the nature and seriousness of the breach and the reasons for it.*

(Paragraph 65 point 14)
44. The breach notice must contain the reasons for the decision to withhold and the reason for the amount to be withheld. (Reg 72)
45. Breach notices may be issued without any withholding of remuneration and, in effect, be used by NHSE&I as a formal warning to the contractor.
46. Breach notices including those with any proposed withholding may be appealed within 30 days of the date on which the contractor was notified of the decision.
47. Any withholding of remuneration should not take place until after any appeal (and only then if appropriate).

Market exit

48. Contractors should note that repeated breaches of the terms of service, particularly where the contractor is likely to persist in breaching the terms of service without good cause, may result in NHSE&I taking steps to remove the pharmacy/contractor from the pharmaceutical list.
49. NHSE&I must consider whether removal is justifiable and proportionate.
50. NHSE&I must consult with the Local Pharmaceutical Committee if it is considering removing the pharmacy.
51. Contractors should seek legal advice at this stage of the process if they have not done so already.

Applications to change core and supplementary opening hours or for planned closures

52. There are separate provisions in the NHS Regs dealing with the other applications referenced at the start of this briefing.

There may be occasions where a contractor is unable to provide pharmaceutical services from their pharmacy premises due to circumstances beyond their control. The examples given in the NHS Regs are fire or flooding. In these situations, the contractor will need to notify NHSE&I of the temporary suspension of pharmaceutical services at their damaged premises as soon as is practicable. If the contractor wishes to temporarily provide pharmaceutical services from alternative premises whilst their damaged premises are repaired, then they may apply under regulation 29(1). It should be noted that if such an application is granted by NHSE&I it is initially only for six months. However, NHSE&I can extend that period to 12 months, where it has good cause to do so. It cannot, however, allow the contractor to stay in the alternative premises for more than 12 months.

53. Where a contractor is planning a temporary suspension of service provision, for example to undertake refurbishment work on the pharmacy premises, then NHSE&I may agree to this where the contractor has given 3-months' notice (paragraph 23(1), Schedule 4 of the NHS Regs).

Pharmacy Manual and legal advice

54. More information on these procedures can be found in [NHSE&I's Pharmacy Manual](#).
55. If contractors require legal advice, they should seek the advice of a solicitor.

Further information

[PSNC Briefing 019/20: Emergency closure checklist for community pharmacy](#)

This briefing for pharmacy contractors explains those contractual, IT and other actions needed if the pharmacy may be faced with a risk of a short-term closure because of the ongoing COVID-19 pandemic or for another reason.

If you have queries on this PSNC Briefing or you require more information, please contact [Gordon Hockey, Director, Legal](#).