

## NHS ENGLAND SOUTH WEST – COMMUNITY PHARMACY

### LOCAL POLICY ON MONITORING OF, AND USING CONTRACTUAL SANCTIONS IN RELATION TO, UNPLANNED CLOSURES OF COMMUNITY PHARMACIES

v0	7 June 2016	<i>Discussed in draft at the LPC Liaison Meeting</i>
v1	24 June 2016	<i>Adopted by the NHS England South West Pharmaceutical Services Regulations Committee</i>
v1.1	20 January 2017	<i>Amendment to paragraph 34 and associated footnote agreed by SW PSRC consequent on the changes to the fee structure set out in the Drug Tariff with effect from 1 December 2016</i>
v1.2	21 April 2017	<i>Amendment to paragraph 34 and associated footnote agreed by SW PSRC to reduce percentage from 0.05% to 0.025%, and include Access Scheme payments in the calculation, to take account of reduced remuneration for pharmacies as a result of the contract changes.</i>
V1.3	6 March 2019	<i>Amendment to paragraphs 9 and 10. Reporting of unplanned closures now via PharmOutcomes.</i>

#### Background

1. Paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists require community pharmacies to provide NHS pharmaceutical services during their core and supplementary opening hours respectively. If a pharmacy is unable to provide services at any point during its opening hours then there may be a 'temporary suspension in the provision of pharmaceutical services', also known as an 'unplanned closure'.
2. The presence of a registered pharmacist is required for the provision of NHS pharmaceutical services. Therefore, if there is no pharmacist present in a pharmacy, the pharmacy is considered to be closed for the purpose of the Terms of Service. Most unplanned closures occur because there is not a pharmacist present.
3. An unplanned closure may be a breach of paragraphs 23(1) and/or (7) of the Terms of Service. However, paragraph 23(10) of the Terms of Service provides as follows:

*Where there is a temporary suspension in the provision of pharmaceutical services by P [an NHS pharmacist] for a reason beyond the control of P, P is not in breach of sub-paragraphs (1) and (7), provided that–*

- (a) P notifies the NHSCB of that suspension as soon as practicable*
- (b) P uses all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable.*

4. There are therefore three requirements which must be met for an unplanned closure to not be regarded as a breach:
  - the closure is for a reason beyond the control of the contractor
  - the contractor notifies NHS England of the closure as soon as practicable
  - the contractor uses all reasonable efforts to resume service provision as soon as practicable.

5. Various decisions of the Family Health Services Appeal Unit have ruled on the issue of whether a closure is for a reason beyond the control of the contractor – see extracts in the Annex.

### **Reporting and monitoring of unplanned closures**

6. Chapter 19 of the 2016 NHS England Pharmacy Manual sets out that NHS England regional teams will monitor reports of unplanned closures of community pharmacies and establish whether closures are for reasons beyond the control of the contractor. Where they are not, the matter may be referred for further action under performance management processes, such as the issue of a breach notice.
7. This local policy sets out the approach that the South West Pharmaceutical Services Regulations Committee takes in applying the above.
8. Unplanned closures may be reported to NHS England by:
  - contractors – as required by paragraph 23(10)(b)
  - third parties – for example patients or other providers of health or social care services.
9. In the event of an unplanned closure, all contractors in the South West are expected to immediately complete the 'Reporting an unplanned closure' form on PharmOutcomes /Services / Unplanned closures. This is to provide details of the reason for the closure, the steps being taken to resume services and the measures put in place to mitigate the effect for patients.

When services have been resumed then the 'pharmacy reopening service' form needs to be completed.

10. The South West pharmacy team record details of all unplanned closures on the 'Reporting an unplanned closure' form which includes the following details:
  - date of closure
  - start time of closure
  - reason for closure
  - expected duration
  - pharmacy contact details
  - notification to healthcare systemand on the 'Pharmacy reopening service' form
  - date pharmacy re-opened
  - time of reopening
11. Reports are recorded by month and a running count kept of the number of closures at each pharmacy.
12. Details of every closure, together with a running count kept of the number of closures at each pharmacy and the total number of closures and hours lost are reported to the Committee each month.

## **Further investigation of unplanned closures**

13. The South West pharmacy team may request that a contractor provides further details regarding a closure in appropriate cases. These may include:
  - closures reported to NHS England by a third party but not by the contractor
  - closures which, on the basis of information received so far, could justify the issue of a breach notice (see below).
14. When requesting further information about a closure, the pharmacy team will inform the contractor that NHS England is considering whether to take formal action in respect of the closure.
15. Requests for further information about a closure may be sent to either the pharmacy concerned, or to an area manager or head office. The Appeals Unit has confirmed (see decision 18308 in the Annex) that it is sufficient for any communications to be sent directly to the pharmacy concerned, and that it is the responsibility of the contractor to ensure that it is then appropriately dealt with.
16. The contractor's response will be considered against the criteria for issuing breach notices (see below), and it will be decided whether to ask the Committee to consider whether a breach notice or sanction should be applied.
17. It should be noted that failing to provide the requested further information may itself be a breach of paragraph 35(3)(a) of the Terms of Service.

## **Unplanned closures which may justify issue of a breach notice**

18. Each unplanned closures will be considered by the Committee on the facts of the case, however the following broad principles will be followed:

### General rules

19. As a general rule, closures lasting less than 4 hours will not normally result in the issue of a breach notice.
  - The threshold of 4 hours has been chosen as being roughly half a day (based on 40 core opening hours provided evenly over five weekdays). This threshold will be applied whether the pharmacy concerned has 40 or 100 core opening hours (or any other number of core opening hours), and whether or not it also has supplementary opening hours.

This 'grace' period is allowed for contractors to take action to deal with unexpected events and resume service provision.
  - However this general rule may be displaced by aggravating factors – see below.
20. Closures lasting 4 hours or more will generally be considered for the issue of a breach notice, unless there are mitigating factors – see below.
21. Where the closure of two pharmacies are connected (for example: pharmacy A does not open because a locum pharmacist does not arrive; the pharmacist from pharmacy

B closes pharmacy B in order to move to and open pharmacy A), it is the combined closure time that will be considered

22. Where there are both aggravating and mitigating factors, these will be weighed against each other.

### Aggravating factors

23. Aggravating factors may include (but are not limited to):

- (a) the reason for the closure is clearly within the control of the contractor, for example: not making arrangements for access to the premises
- (b) prior knowledge (4 working hours or more) of the closure on the part of the contractor – NHS England considers that where a contractor has prior knowledge of a closure it has an opportunity to prevent the closure and therefore the closure is within the contractor's control. Example: the contractor was aware that there was a gap in the rota and did not fill it.
- (c) closing even though permission to close has been sought and refused (and either not appealed or refusal confirmed on appeal) – because NHS England's decisions must be respected
- (d) a failure to open in accordance with a specific direction to open (for example, on a bank holiday) – this is because NHS England was specifically relying on the pharmacy being open to ensure the availability of services for patients
- (e) a trend of unplanned closures during the preceding 6-12 months, either at an individual pharmacy or across a contractor's pharmacies in the area – this may include the same locum pharmacist causing numerous short closures at several of the contractor's pharmacies
- (f) the contractor notifies NHS England of the closure very late or not at all
- (g) a failure by the contractor to make any attempt to re-open as soon as practicable
- (h) a failure by the contractor to take steps to mitigate the effect of the closure on patients – NHS England expects the contractor to advise patients presenting (or telephoning) the pharmacy of when the pharmacy is expected to re-open, and of nearby alternative pharmacies which are open
- (i) NHS England receives complaints from patients regarding the closure, or other evidence of actual inconvenience to patients, or there is evidence of patient harm having resulting from the closure
- (j) the period for which the pharmacy was closed is the whole of the pharmacy's opening hours on the day in question – particularly if the pharmacy does not open on the following day (for example, the unplanned closure is for a Saturday morning, and the pharmacy is normally closed on Saturday afternoons and on Sundays).

## Mitigating factors

24. Mitigating factors may include (but are not limited to):

- (a) significant health and safety issues which could not have been foreseen (for example: fire, flooding)
- (b) police investigations preventing access to the premises
- (c) extreme weather conditions preventing travel in general.

## Factors which are not mitigating factors

25. The following are not generally considered to be mitigating factors:

- (a) absence of a pharmacist due to sickness, where the closure lasts more than 4 hours.

NHS England considers that 4 hours is a reasonable period to allow for the contractor to arrange for a replacement pharmacist to open the pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter 'within the control of the contractor'. Some limited allowance will be made for longer journey times to some parts of the South West.

- (b) a locum pharmacist not honouring their booking, or attending the wrong premises, if the contractor has not taken reasonable steps:
  - to confirm the booking with the locum in the week prior to the date booked, and
  - to ensure that the locum has the correct pharmacy details and opening times.
- (c) issues with landlords preventing access to the premises.

NHS England considers that contractors who are tenants should ensure that the arrangements which they have with their landlords enable them to meet their obligations under the Terms of Service at all times (see appeal decision 17924 in the Annex). For example it is expected that:

- contractors will not allow leases to expire without having applied for, and been granted permission to, relocate to alternative premises
  - contractors will ensure that landlords give them sufficient notice of changes which may affect a pharmacy's opening hours to enable the contractor to give 3 months' notice to NHS England (as required by the Terms of Service)
  - if other parts of the premises are closed when the pharmacy is open, the pharmacy will still be able to operate and patients will still be able to access the pharmacy.
- (d) claims that the 'remoteness' of the pharmacy premises makes it difficult to recruit permanent pharmacists or find locum pharmacists

NHS England considers that patients in all parts of the South West are entitled to receive the services which contractors have committed to provide. Staffing a pharmacy is a fundamental part of providing services and therefore something which

a contractor should take all necessary steps to achieve – this may involve offering additional incentives, or making specific arrangements (e.g. as to accommodation), in order to attract and retain staff.

- (e) claims that cover could not be obtained because it was a public holiday or at the rates of pay being offered by the contractor.

As noted above, staffing a pharmacy is a fundamental part of providing services and therefore something which a contractor should take all necessary steps to achieve – this may involve offering enhanced rates of pay in order to secure a locum pharmacist to work; this may particularly be needed at the weekend or on public holidays.

- (f) lack of support staff.

Again, staffing a pharmacy – and this includes providing an appropriate level of support staff – is a fundamental obligation of the contractor.

- (g) regulatory action by the General Pharmaceutical Council (unless due to an error by the GPhC) – see appeal decision 18242 in the Annex.

## **Payment withholdings**

26. Because a failure of a pharmacy to open means that services have not been provided, the Committee will normally consider that it is appropriate to withhold payment as part of any breach notice issued – see appeal decision 18308 in the Annex.

27. Guidance from the Department of Health<sup>a</sup> includes the following points regarding calculation of the amount to be withheld:

- NHS England needs to consider the fees and allowances paid to contractors, the nature of the breach and calculate a level of withholding that is justifiable and proportionate
- it is not necessary to demonstrate actual loss or damage
- NHS England does not need to calculate a precise value of the service that has not been performed, or has not been performed to the requisite standard, in order to make a withholding.
- in some (but not all) cases, the starting point for the amount of the withholding is likely to be the money that the contractor has not had to pay as a consequence of being closed.
- however, it might also be appropriate to include in the withholding, an amount to dissuade contractors from such closures. If it was simply the case that the closure was cost neutral, the contractor might think it was worth, for example, closing early on the eve of a public holiday because ultimately there was no financial loss to itself in so doing and possibly a gain to itself, for example, in terms of its staff relations.
- in determining the deterrent amount, additional factors to be considered include:

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a. *Regulations under the Health and Social Care Act 2012: Performance sanctions including market exit for contractors providing pharmaceutical services – Information for NHS England* (November 2013)

- the impact on patient safety
- the duration of the breach
- the overall NHS income of the business (in order for a deterrent amount to have an impact on behaviour).

28. The Committee considers that – while being fair and proportionate – the amount that may be withheld in the event of an unplanned closure needs to be sufficient to provide an incentive to the contractor to take all necessary steps to prevent, or minimise the length of, the closure. In this context it should be remembered that the comparison is against the costs that the contractor may need to incur in resuming service provision (e.g. paying for a last-minute locum and their travel), which may be higher than normal running costs.

29. Taking into account the above, payment withholdings for unplanned closures will usually be made up of the following elements:

- an amount to reflect costs which the contractor will not have incurred because the pharmacy was closed, plus
- an amount in respect of the non-availability of pharmaceutical services to patients, plus
- (in hopefully rare cases) an additional element to deter recurrence / incentivise urgent action.

30. Any sums withheld as part of a breach notice are returned to the South West community pharmacy budget.

#### Amount to reflect costs not incurred by the contractor because the pharmacy was closed

31. For cases where there is not a pharmacist present, an hourly rate of £30 per hour will be withheld. This amount has been established in various appeal decisions (see the decisions in Part 2 of the Annex) as a reasonable rate to reflect the amount that a contractor would have otherwise had to pay a pharmacist for the period concerned.

32. In many cases other pharmacy staff will still be working, for example to signpost patients to other pharmacies. However where the circumstances of the closure are such that the contractor will not have had to pay any of the staff that normally work in the pharmacy then the amount to be withheld will be increased by £10 per hour for each member of staff that would normally have been working.<sup>b</sup>

33. It is assumed that, where a contractor needs to secure a replacement for an absent pharmacist, it would have to pay something towards the replacement pharmacist's travel costs. In cases where no replacement is secured, those costs will be not incurred. Recognising that such costs may vary considerably from case to case, in such cases an additional fixed amount of £50 will be withheld to reflect that those costs will not have been paid.

#### Amount in respect of the non-availability of pharmaceutical services

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b. Using the number of dispensing staff hours usually declared by the pharmacy on its monthly returns

34. To reflect the non-availability of pharmaceutical services, 0.025%<sup>c</sup> of the total of the pharmacy's annual establishment payment, Single Activity Fee and Pharmacy Access Scheme payments will be withheld per hour closed.<sup>d</sup> These are basic fees that pharmacies are paid for providing the essential pharmaceutical services and so if those services are not being provided they should not be paid.
35. Because the practice payment is related to the number of items dispensed, this means that pharmacies dispensing a higher number of items – which therefore have a higher income – will have a larger withholding imposed. This is because they are considered to be able to incur greater costs in resuming services and accordingly a higher withholding is appropriate to act as an incentive;<sup>e</sup> it also reflects the fact that the unplanned closure of a pharmacy which dispenses more items will inconvenience a greater number of patients.

#### Additional element to deter recurrence / incentivise urgent action

36. Where NHS England has grounds for considering that the unplanned closure was due to:
- a deliberate decision of the contractor (for example, to close even though permission to close has been refused),
  - gross carelessness or inaction by the contractor (for example, by not filling a long-standing gap on the rota), or
  - a failure to take action, following previous significant closures (which may be at other pharmacies operated by the same contractor), to prevent further significant closures from occurring

then it may be appropriate for the payment withholding to be increased to deter a recurrence or to incentivise the contractor to take urgent action.

37. The above does not preclude the identification by the Committee of other circumstances where an additional deterrent element may be appropriate.
38. The increase will normally take the form of a multiplier being applied to the payment withholding – for example, doubling the amount to be withheld.

#### **Review**

39. This local policy will be kept under regular review by the Committee and the LPC Liaison meeting.

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c. 0.025% = 1 / 80th of 1 / 52nd (52 weeks per year)

d. For the period prior to 1 December 2016, the calculation will be 0.05% of the total of the pharmacy's annual establishment, practice, repeat dispensing and ETP payments. The most recent six months' data available will normally be used in the calculation.

e. For reference, the range of hourly rates using this method across Devon & Cornwall (2014/15 data) was from below £10 to £99. The average was £41.



## ANNEX – EXTRACTS FROM APPEAL DECISIONS <sup>f</sup>

### 1. Decisions on whether circumstances are beyond the control of the contractor

#### SHA/17861 (April 2015)

5.9 ... I am of the view that a problem with the staffing of a pharmacy during core contracted hours is not good cause as to why a pharmacy is not able to open. Staffing levels of a pharmacy are not beyond the control of a company. The arrangements and number of pharmacists employed or locums procured to cover the core contracted hours are a commercial consideration and a matter for the company to ensure that there is sufficient cover.

5.12 ... the lack of cover for a resident pharmacist is not beyond the control of the appellant as it relates to the general management of the pharmacy which will include having appropriate levels of staffing to ensure there is cover on any given day where the pharmacy is required to be open. It is open to the appellant to manage this appropriately which could for example include having sufficient staffing so as not to have to rely on locum cover. To not do so is a commercial decision on the behalf of the appellant.

#### SHA/17924 (June 2015)

4.11 ... I consider it not unreasonable given the co-location of the pharmacy in the Healthy Living Centre, to expect that the lease arrangements include provisions which would allow the pharmacy to continue providing services during its contracted hours. I was not provided with a copy of any lease arrangements. The unplanned closing of the Healthy Living Centre whilst unfortunate, should not have been beyond Rowlands to control as part of the general management of the pharmacy.

#### SHA/18242 (April 2016)

5.7 It is my view that it is the Appellant's responsibility as a body corporate, to ensure that it had procedures in place to ensure that it would not be in a position as occurred ...

5.8 I am of the view that the Appellant should have had measures in place to ensure the wholly foreseeable lapsing of the pharmacy's registration with GPhC was realised and acted upon in good time.

#### SHA/18308 (May 2016)

5.8 I am of the view that it was reasonable for NHS England to communicate with the pharmacist as listed in the entry on the pharmaceutical list... It is not a matter for NHS England to establish whether or not the pharmacist as listed would prefer correspondence to be sent to an alternative address. It is a matter for the pharmacist to arrange its own internal communications as appropriate. Further, it is a matter for the Appellant to ensure that all its staff are properly trained and understand the requirements of the Regulations and the Terms of Service therein.

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f. Full decisions can be found by visiting [www.nhsla.com/FHSAU/Decisions/](http://www.nhsla.com/FHSAU/Decisions/), then clicking the relevant year under 'Pharmaceutical Market Exit & Performance Related Sanctions'

5.15 ...I am of the view ... that compliance with paragraph 23(8) [signposting patients to an alternative pharmacy] does not necessarily mean that there has not been a breach of paragraphs 23(1) or 23(7).

5.23 I am of the view that the failure to ensure that pharmaceutical services were provided between 2pm and 7pm on the day in question, which was already being covered by a locum pharmacist, was not beyond the control of the Appellant as it relates to the general management of the pharmacy which will include having appropriate levels of staffing to ensure there is cover on any given day where the pharmacy is required to be open. It is open to the Appellant to manage this appropriately for example, by having sufficient staffing so as not to have to rely on locum cover. To not do so is a commercial decision on the behalf of the Appellant.

5.24 ... the Appellant states that it could not have prevented the assigned pharmacist from being able to attend. While I agree that the Appellant has little control over whether a pharmacist becomes ill and as a result is not able to get to work, I consider that, for the reasons above, it is not beyond the control of the Appellant to ensure it has arrangements in place to avoid a breach of the Terms of Service that require it to ensure the provision of pharmaceutical services at the premises during the relevant times.

5.28 I am of the view that the Appellant is not able to substitute its supplementary hours as core hours to make up a shortfall of its core hours or amend its core hours as it chooses. The Appellant did not apply to change its core hours, as set out in the Regulations, and there is no mechanism for doing so retrospectively.

5.29 I am of the view that the Appellant failed to ensure the provision of pharmaceutical services at the premises during a time when it should have been providing pharmaceutical services and I place the same weight on the failure to provide services during core hours as I do the failure to provide services during supplementary hours.

5.32 I am of the view that a problem with the staffing of the Appellant is not good cause as to why the Appellant is not able to provide pharmaceutical services during core or supplementary hours. Staffing levels of the Appellant are not beyond the control of the Appellant. The arrangements and number of pharmacists employed or locums procured to cover the core contracted hours, as well as the supplementary hours offered by the Appellant, are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover. It is open to the Appellant to employ more than one pharmacist to work during the same hours thus limiting the need for locums at all if one of the employed pharmacists should be unavailable for some reason; to not do so is a commercial decision under the control of the Appellant.

## **2. Decisions on the amount of payment withholdings**

### SHA/17184 et al (July 2013)

[In this case NHS Cambridgeshire withheld a sum based on £30 per hour for a pharmacist and £10 per hour each for pharmacy support and security staff.]

4.17 I am of the view that each pharmacy would have needed at least 3 staff (including the pharmacist) for the provision of the pharmaceutical services and consider it reasonable for the withholding to reflect this. The combined 'hourly rate' of saving would therefore be £50...

SHA/18115, 18116 and 18117 (November 2015)

[In these cases the contractor disputed the rate of £30 per hour for a pharmacist, arguing that it normally paid £21 on weekdays and £24 at weekends.]

5.17 I don't consider that it is unreasonable or disproportionate to base the amount of withholding on an average sum that has been applied consistently in this sector rather than enquire each time the actual cost to the relevant contractor. I am of the view that ... the amount that NHS England have chosen to withhold is justifiable and proportionate...

SHA/18308 (May 2016)

5.35 I am of the view that it is justifiable and proportionate to apply a withholding of payments in respect of the closure of the Appellant's pharmacy on the day in question as there was a lack of provision of services to patients during the five hours that the pharmacy was closed.

5.39 Mindful of the guidance, I consider that it is reasonable for the amount of withholding to be based on an average hourly rate of a locum pharmacist that has been applied consistently in this sector, i.e. £30 an hour.