**NHS ENGLAND SOUTH WEST – COMMUNITY PHARMACY**

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

**Background**

NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 contain a clear contractual requirement for pharmacies to open for all of their core and supplementary opening hours. Schedule 4 part 3 paragraph 23 specifies that where there is an unplanned closure for a reason beyond the control of the pharmacy, the pharmacy is not in breach provided they notify the commissioner as soon as practical and use all reasonable endeavours to reopen as soon as possible. The Regulations do not specify acceptable reasons, which allows for consideration of individual circumstances.

The Regulations also specify that the pharmacy must, where practicable, make arrangements with one or more pharmacies in the same area which provides a similar list of pharmaceutical services to provide pharmaceutical services during the closure. This is increasingly important, as pharmacy services are extended i.e. hypertension diagnosis/monitoring, CPCS and PGDs, to maintain delivery of these services which are becoming critical to local system resilience

The Regulations allow that a breach notice can be issued each time contractors fail to open without good cause, NHSE, having first made reasonable efforts to ask the pharmacy what the cause was. Relevant factors may include local workforce issues including, for example, any shortage of pharmacist locums and the rate of Covid infection; as well as the potential loss of pharmacy services if they become economically unviable.

The Regulations also require that local dispute resolution takes place prior to any contractual action being taken, unless the pharmacy failed to open without good cause, i.e. a cause outside the control of the contractor, such as fire or flooding. Local dispute resolution can be resource intensive; capacity to undertake this might contribute to variation in approach and decision-making. It should be noted that a failure to engage in local dispute resolution may result in NHS Resolution referring the case back for local resolution.

Breaches may be used as a warning against future breaches without any withholding of remuneration or may include an amount of remuneration to be withheld. The amount to be withhold must be justifiable and proportionate, having regard to the nature and seriousness of the breach and the reasons for it. The breach notice should include NHSE’s or, if relevant, the ICB’s reasons for both the decision to withhold remuneration and the amounts that are to be withheld. Repeated breaches can be addressed by other sanctions and ultimately removal from the Pharmaceutical List.

All decisions by NHSE made under these circumstances are appealable by the pharmacy concerned and as such the approach undertaken by commissioning teams must be lawful, reasonable, and proportionate. The appeal process can create additional workload for the commissioner so decisions taken by commissioning team should be scrutinized during the process, to minimise variations and inconsistency.

**South West Context**

There is a commitment across all South West Health partners and Local Pharmaceutical Committees to maximise the opportunities for community pharmacy to become an integrated partner in delivering services that meet the needs to local residents. In order to achieve this, it is important that Community Pharmacy is able to demonstrate its ability to provide consistent and high-quality services to its patients. This includes provision of dispensing service and other additional and enhanced service.

For example, a significant amount of NHSE, System and Local Pharmaceutical Committee capacity has been invested in supporting community pharmacy to engage in Pharmacy Integration Fund (PIF) pilots and subsequent roll-out of services. This includes supporting community pharmacy to develop

relationships with health partners, particularly general practice. Experience of implementing PIF clearly shows that poorly managed unplanned closures, damage the relationship between pharmacy and practice/health partners, resulting in withdrawal of engagement in PIF with that pharmacy and can impact on the professional reputation of all pharmacy in an area.

It is important, therefore, that all community pharmacies across the South West are focused on seeking to provide stable and consistent services.

**Reporting and monitoring of unplanned closures**

Chapter 36 of the 2019 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. NB: the Pharmacy Manual has recently been updated to acknowledge that pharmacies do sometimes have unplanned closures for reasons beyond their control.

This local policy sets out the approach the South West Pharmaceutical Services Regulations Committee (the Committee) takes in applying the above.

Unplanned closures may be reported to NHS England by:

* the contractor whose pharmacy has an unplanned closure – as required by paragraph 23(10)(a)
* third parties – for example patients, other providers of health or social care services, other commissioners of community pharmacy services.

In the event of an unplanned closure, all contractors should immediately complete the ‘Notification of unplanned temporary suspension of service’’ form. This can be found at:

* [NHS England and NHS Improvement South West » South West Community Pharmacy information](https://www.england.nhs.uk/south/info-professional/pharm-info/sw-pharm/)

Where a pharmacy has an unplanned closure due to a cause beyond the reasonable control of the pharmacy and:

* notifies NHSE or, if relevant, the ICB as soon as practical and
* uses all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable

there is no breach of this part of the contractor’s terms of service.

Details of every closure, together with a running count kept of the number of closures at each pharmacy, plus the total number of closures and hours lost are reported to the Pharmaceutical Services Regulations Committee (the Committee) and ICBs each month.

**Further investigation of unplanned closures**

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

When requesting further information about a closure, the pharmacy team will inform the contractor that NHS England is considering whether the closure was beyond the reasonable control of the contractor and, if not, whether to take formal action in respect of the closure.

Requests for further information about a closure may be sent to either the contractor, addressed to the pharmacy concerned, and where the information is available or it has been agreed with the contractor, to an area manager or head office.

The contractor’s response will be considered against the criteria for issuing breach notices and it will be decided whether to ask the Committee to consider whether a breach notice or sanction should be applied.

It should be noted that failing to provide the requested further information will mean that relevant information from the contractor may not be taken into account when deciding whether to issue a breach notice and may itself be a breach of paragraph 35(3)(a) of the Terms of Service (broadly, where that information could be obtained by a visit to the pharmacy premises).

**Unplanned closures which do not justify the issue of a breach notice:**

Generally, contractual action will not be taken when:

* The closure is an irregular and unavoidable occurrence and contractors have demonstrated what actions they have taken in the attempt to avoid closing the pharmacy
* The contractor has put in place provisions to ensure minimal disruption to patients, including identifying another pharmacy that can meet the demand and taking reasonable steps to notify patients about the closure and their options
* Issuing a breach notice, withholdings or removal from the list are not in the best interest of the local population, for example where contractual action would leave a gap in the provision of pharmaceutical services which is unlikely to be addressed or resolved by contractual action being taken
* Where a pharmacy has an unplanned closure due to a cause beyond the reasonable control of the pharmacy and the pharmacy notifies NHSE as soon as practical and uses all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.

**Unplanned closures – factors which may make the issue of a breach notice more likely:**

Each unplanned closure will be considered by the Committee on the facts of the case; however, the following factors may make the issue of a breach notice more likely:

* Failure to inform the commissioner of the closure
* Failure to open once their application to change their core hours has been determined and refused (where there is no good cause for the closure)
* Failure to open once their application to change supplementary hours with less than the regulatory period of notice has been determined and refused (where there is no good cause for the closure)
* Failure to take actions to minimise disruption to patients, including effective communication with local health providers
* Failure to update their DoS profile or the NHS website
* Unplanned closure without good cause/not beyond the control of the pharmacy.
* Failure to put in place contingency plans to ensure patients receive their medication, including returning prescriptions to the Spine where required
* Failure to take any actions previously agreed with the commissioner
* Repeated failure to open during their contracted hours
* The length and/or frequency of closure(s) is considered to be affecting the adequate provision of pharmaceutical services for the local population.

**General rules**

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, including frequency of occurrence

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.

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

**Aggravating factors**

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

* the reason for the closure is clearly within the control of the contractor, for example: not making arrangements for access to the premises
* 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 (and there is no good cause for the closure)
* a failure to open in accordance with a specific direction to open (for example, on a bank holiday) – this is because NHS England local health partners were specifically relying on the pharmacy being open to ensure the availability of services for patients
* 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
* the contractor does not notify NHS England of the closure
* a failure by the contractor to make any attempt to re-open as soon as practicable
* 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
* NHS England receives complaints from patients regarding the closure, or evidence of patient harm resulting from the closure or a serious risk of this
* 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) (where there is no good cause).

**Mitigating factors**

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

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

In these circumstances the pharmacy is expected to implement business continuity plans to minimise impact on patients and local health partners.

**Factors which are not mitigating factors**

The following are not generally considered to be mitigating factors:

* issues with landlords preventing access to the premises.
* NHS England considers contractors who are tenants should ensure the arrangements which they have with their landlords enable them to meet their obligations under the Terms of Service at all times 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.

**Payment withholdings**

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.

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.

First breach £50 per hour

Second breach within 6 months £100 per hour

Third breach within 6 months £150 per hour

Fourth breach within 6 months £200 per hour

Application of this ratchet should ensure pharmacies remain focused on provision of service to patients during contracted hours and staffing accordingly.

Above 4 breaches within a 6-month period will be dealt with by additional financial penalties and other contractual levers available.

The count of breaches will be considered on a rolling 6-month period i.e. 1st August to 31st January, or 15th August to 14th February.

**Review**

This local policy will be kept under regular review by the Committee and the LPCs within the South West. The next formal review will be September 2023 and annually thereafter.

If revised national guidance is issued prior to the annual review, an interim review will be undertaken.