Undertakings

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What are undertakings?

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Undertakings are measures which can be put in place to address problems in the nurse, midwife or nursing associate's practice that pose a current risk to patients.

Case examiners agree these with the nurse, midwife or nursing associate to allow them to work on the areas of their clinical practice which cause concern.

This lets them demonstrate that there is no longer a need to restrict their practice, because they no longer present any risk to patients.

Undertakings are intended to be a pathway back to safe practice, so they need the nurse, midwife or nursing associate to take positive steps within clear time limits.

They're different to conditions of practice orders, which are ordered by the Fitness to Practise Committee, as they are agreed with the nurse, midwife or nursing associate first. Conditions of practice orders also run for fixed time periods, and there has to be a review hearing, usually towards the end of their duration. With undertakings, case examiners review the nurse, midwife or nursing associate's progress and there's no need for a hearing to do the review.

When we would recommend undertakings

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Case examiners may recommend undertakings when they find a case to answer.

Undertakings may be recommended in cases which, if they were being considered at a hearing, would involve:

- lack of competence
- misconduct (particularly where the conduct related to clinical practice)
- not having the necessary knowledge of English
- health.

Undertakings are less likely to address the regulatory concern in cases involving:

- misconduct not involving clinical practice
- criminal convictions or cautions
- determinations of impaired fitness to practise by another health or social care regulator.

What we consider before recommending undertakings

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Before case examiners recommend undertakings, they will have decided that:

- our investigation fully explored the regulatory concern

- the regulatory concern is not so serious that permanent removal from the register is likely to be necessary
- it's possible to identify a list of proportionate, measurable and workable requirements, and that these will be sufficient to protect patients, judged against the background of the particular case - if such measures cannot be identified then more restrictive outcomes are likely to be required, which means the case should be referred to the Fitness to Practise Committee.

Deciding which undertakings to recommend

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When recommending undertakings, case examiners will consider which measures would be sufficient to protect the public and provide a structured approach towards the nurse, midwife or nursing associate returning to safe practice. They'll look at the undertakings bank to assist them with this.

Measures may need to be tailored to take account of particular features of the case, or of the setting in which the nurse, midwife or nursing associate practises.

Undertakings will normally include both:

- 'restrictive' measures, which prevent a nurse, midwife or nursing associate from undertaking a particular activity, and
- 'rehabilitative' steps, which require a nurse, midwife or nursing associate to do something in order to address the outstanding regulatory concern.

Standard requirements to inform employers, and other parties, that the nurse, midwife or nursing associate is subject to undertakings are a 'restrictive' measure.

The measures included in the undertakings should focus on addressing the specific concerns about the nurse, midwife or nursing associate's practice. Case examiners will consider the guidance on insight and strengthened practice in identifying what steps are required to address the particular concerns in the case they are considering.

Both the case examiners and the nurse, midwife or nursing associate's need to have a clear understanding of what the nurse, midwife or nursing associate needs to do in order to comply with the undertakings, and this must be clearly set out. The undertakings must set out how the nurse, midwife or nursing associate should demonstrate that they have observed any duties which the undertakings impose.

Because undertakings are a pathway back to safe practice, it is important that any 'rehabilitative' measures the nurse, midwife or nursing associate is required to complete have clear time limits so everyone knows when the nurse, midwife or nursing associate will be expected to have taken the steps.

Restrictive' measures, such as those which prevent a nurse, midwife or nursing associate from carrying out particular tasks, will not have fixed dates by which they will automatically expire. This is because the purpose of them is to prevent risks from occurring, so they must be in place until case examiners are satisfied, once the nurse, midwife or nursing associate has provided relevant evidence, that they are no longer needed to protect members of the public.

Agreeing the undertakings

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Case examiners will send the recommended undertakings to the nurse, midwife or nursing associate to consider. They'll have 28 days to tell us if they agree to follow the recommended undertakings. If the nurse, midwife or nursing associate does not confirm that they agree the undertakings by the date provided, then the concerns will be referred for a hearing.

Case examiners can use their discretion to decide if the 28 day period for agreeing undertakings needs to be extended.

When deciding if the period should be extended, they'll consider the nature of the reason why more time is needed, and whether the request for more time was made within the original time period.

We recognise that the nurse, midwife or nursing associate may need to suggest amendments to the recommended undertaking because they have concerns about whether the undertakings are workable. Case examiners will consider whether these amendments can be made if they're sure the undertakings are sufficient to address the concerns in the case and protect patients, while giving the nurse, midwife or nursing associate the opportunity to put the concerns right.

At the end of our investigation we send the nurse, midwife or nursing associate our statement of regulatory concern along with the material we gathered in our investigation. The nurse, midwife or nursing associate will be able to

comment on that statement when they respond to the investigation material. It's only once the time period for a response has passed that the case examiners will consider whether there is a case to answer (and if there is, whether to recommend undertakings). We publish the statement of regulatory concern as part of the undertakings in most cases. If the concern is about the nurse, midwife or nursing associate's health, or is otherwise sensitive, we do not publish details of the concern and we do not publish the undertakings if they could identify a health condition or sensitive information.

We can use undertakings to resolve cases at any stage before the start of a Fitness to Practise Committee hearing. Case Examiners are encouraged to recommend undertakings where they consider that undertakings would provide an appropriate outcome consistent with our overarching objective of protecting the public.

Where Case Examiners initially decide not to recommend undertakings, but to refer the matter to the Fitness to Practise Committee, the power to recommend undertakings remains available. However, Case Examiners should only exercise this power where there is a clearly identified reason to depart from the Case Examiners' original decision and decide to recommend undertakings. This is most likely to arise:

a) where there is new relevant information that was not available at the time of the original decision; or

b) where there has been a change in the NMC's policy position on recommending undertakings.

How we monitor undertakings

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We monitor the progress of nurses, midwives or nursing associate who have agreed undertakings with us. We keep in regular contact with the nurse, midwife or nursing associate and, where we need to, review their progress against the undertakings on an ongoing basis.

We'll refer the case to case examiners if we receive new information which shows that there's a possibility that:

- the undertakings can be lifted and the case closed
- the undertakings should be varied or restated, or
- there are serious concerns about compliance[1] with the undertakings which mean the case needs to be sent to the Fitness to Practise Committee

The case examiners will then assess the case and decide whether one of the above outcomes are necessary.

We'll tell the nurse, midwife or nursing associate that we are doing this, and we'll give them a short period to send in any representations for the case examiners to consider.

Lifting the undertakings

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If the case examiners decide that the nurse, midwife or nursing associate has completed the steps identified in their undertakings and that no other steps are needed to deal with the risks that come from the original regulatory concerns, they'll direct that the undertakings should be lifted and the case will be closed.

Case examiners will only recommend further steps or variations if they're needed to deal with the underlying concerns about the nurse, midwife or nursing associate's fitness to practise. For example, this might be needed if a nurse, midwife or nursing associate has completed a period of practice under direct supervision and needs to show that they are safe to practise by operating under indirect supervision.

Varying the undertakings

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Case examiners may need to vary the agreed undertakings for a number of reasons.

Variation may be necessary so the undertakings can remain workable. For example, if there are changes in the setting in which the nurse, midwife or nursing associate practises, such as a change in management or supervision arrangements, this could mean that the current undertakings can no longer be complied with. In these circumstances a variation in the undertakings may be appropriate to reflect the nurse, midwife or nursing associate's new circumstances.

Variations may also be used where the nurse, midwife or nursing associate has completed the steps that were initially included in their undertakings, but the case examiners believe that some further progress is required before they are able to return to safe practice without restriction. An example of this might be where the nurse, midwife or nursing associate is required to carry out retraining, such as a preceptorship, and there are still concerns about an area of their clinical practice which is related to the original regulatory concern when this is completed.

Where the case examiners recommend variations to undertakings, but the nurse, midwife or nursing associate does not agree to these variations, the case may be reviewed by the Registrar (or one of our Assistant Registrars who also make decisions on behalf of the Registrar).

If the Registrar decides that a new case to answer decision is needed, they will have all of the available outcomes that were originally open to the case examiners.

Where the case examiners recommend variations to undertakings, but the nurse, midwife or nursing associate doesn't make any response at all, the case should be referred straight to the Fitness to Practise Committee for a hearing. This situation is similar to the nurse, midwife or nursing associate not agreeing to an initial recommendation of undertakings, and the same procedure will be used.

Addressing non-compliance with undertakings

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Undertakings are intended to be a pathway back to safe practice, while making sure that patients and members of the public are protected. Where the case examiners receive information that suggests that the nurse, midwife or nursing associate has not complied with the agreed undertakings, they will need to look at whether undertakings remain suitable to help the practitioner return to safe practice, or whether further action is needed. Where there is evidence of non-compliance with undertakings, the case examiners can:

- restate the requirements of the undertakings to the nurse, midwife or nursing associate
- write to the nurse, midwife or nursing associate proposing varied undertakings
- revoke the undertakings and refer the original concerns to the Fitness to Practise Committee.

Restating or varying the undertakings to address non-compliance

Where there's evidence to suggest that undertakings have not been complied with, we'll consider the reasons for this and look at whether there are any risks to patient safety. We'll usually write to the nurse, midwife or nursing associate and ask them to send us information about the possible non-compliance and the reasons for it when carrying out this assessment.

Where non-compliance with undertakings is less serious, and a lower risk to patients, it's more likely that the case examiners will be able to restate or vary the undertakings to allow the practitioner to continue their return to safe practice. An example of this might be where there has been late compliance with one or more of the requirements, where the nurse, midwife or nursing associate has made genuine and substantial attempts to complete the requirements in time, and they have insight into the need for restrictions to be in place.

In cases where continued undertakings are an appropriate way to manage risk and support the nurse, midwife or nursing associate back to safe practice, the case examiners may write to the nurse, midwife or nursing associate restating the undertakings, confirming that they remain in effect and must be complied with.

Alternatively, the case examiners may propose variations to the undertakings which must be agreed by the nurse, midwife or nursing associate. If a nurse, midwife or nursing associate asks for a variation to the undertakings to allow further time to complete one or more of the steps identified, case examiners can approve the variation if this is a proportionate way of dealing with the case.

Revoking the undertakings and referring the case to the Fitness to Practise Committee

Where it appears that the nurse, midwife or nursing associate has not complied with the agreed undertakings, case examiners have the power to revoke them. Case examiners will normally only revoke the undertakings and refer the case to the Fitness to Practise Committee for a hearing where it appears that undertakings are no longer an appropriate way of managing risk and supporting the nurse, midwife or nursing associate back to safe practice.

This will usually be where the nurse, midwife or nursing associate hasn't been able to complete the steps necessary to show they've put the concerns right, having been given repeated chances or extensions of time to do this. If this happens, there will often be no realistic possibility that the nurse, midwife or nursing associate will be able to meet the requirements in the undertakings, even though they still have insight into the failings in their practice.

Where cases are referred to the Fitness to Practise Committee the charges will relate to the original regulatory concern. We'll put forward the evidence to show that the nurse, midwife or nursing associate had agreed the undertakings and we'll usually use evidence of their non-compliance with the undertakings to show the Committee that they are not currently fit to practise.

In rare cases, there may be evidence that an alleged failure to comply with undertakings was deliberate or particularly serious, for example if the nurse, midwife or nursing associate knowingly breaches a restriction placed on their practice putting patients at risk of harm. In such cases, we will notify the nurse, midwife or nursing associate that we will recommend referral to the Fitness to Practise committee to consider the original regulatory concern as well as the non-compliance with the undertakings and give them the chance to respond. Case examiners should make it clear whether or not there is a case to answer in respect of the non-compliance with undertakings concern so that an additional misconduct charge relating to the breach can be added and determined by the Fitness to Practise Committee. Our sanctions guidance explains how the Panel should approach such a concern.

Where a nurse, midwife or nursing associate is not complying with undertakings because they no longer wish to practise, agreed removal from the register will usually be the most appropriate way of dealing with case, where possible.

There would need to be exceptional circumstances for the case examiners to revoke the undertakings without sending the case onto the Fitness to Practise Committee. This is because the undertakings were there to address a current risk to patient safety, so patients would be put at risk if the undertakings were removed without further consideration at how best to address the concerns.

Considering interim orders in undertakings cases

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If our monitoring and compliance team has information that shows that the nurse, midwife or nursing associate may not be complying with their undertakings, we'll always carry out a risk assessment to consider whether there's a need for an interim order, to put additional restrictions on their practice.

An interim order will not be necessary in all cases where there are concerns about a failure to comply with undertakings. It is more likely an interim order will be needed where the non-compliance has given rise to a risk to patients which isn't being effectively managed by an employer, or where there are concerns about the professional's willingness to comply with their undertakings.

When deciding whether to impose further restrictions on someone's practice, one of our practice committees will need to decide whether the case satisfies the test for interim orders to be made, taking into account the original regulatory concerns and the circumstances of the professional's failure to comply with their undertakings.

Where we think a panel needs to consider imposing an interim order, we will tell the nurse, midwife or nursing associate about this, by giving them a formal notice of interim order hearing at the same time as we inform them that our monitoring and compliance team has asked the case examiners to consider how to address the possible breach.

We'll usually give the nurse, midwife or nursing associate the opportunity to respond, in a short timeframe, to the case examiners.

In most cases we'll aim to have the panel consider an interim order immediately after the case examiners have made their decision about how to address the possible breach. This will keep the period for which the public may not be fully protected by the undertakings to a minimum, but allows the nurse, midwife or nursing associate a short period to make representations to the case examiners before they make their decision, and allows the panel's consideration to be informed by how the case examiners dealt with the case.

In some rare cases, the possible risks to patients or the public from the undertakings not being followed may be so serious or immediate that the panel will need to consider making an interim order as soon as possible. We'll still give nurse, midwife or nursing associate reasonable notice of the interim order hearing, but the panel may need to make its

decision before the case examiners have assessed the possible breach.

Failure to comply with or 'breach' of undertakings may be serious, or may be due to circumstances outside the nurse, midwife or nursing associate's control. The outcome will depend on the nature of the non-compliance ('breach').