

Foundation Trusts: Unite briefing and campaign guide

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| Contents | Page |
|---|-------------|
| Introduction and Unite policy | 4 |
| What a Foundation Trust is and the wider policy context | 5 |
| How organisations become a Foundation Trust | 6 |
| Foundation Trust 'freedoms' and flexibilities | 8 |
| • Private sector involvement | 8 |
| • Agenda for Change | 8 |
| Membership and Governance of Foundation Trusts | 11 |
| • Membership | 11 |
| • How is a Foundation Trust governed? | 12 |
| • Illustration of Governing Boards and their broad responsibilities | 13 |
| Human Resource strategy and workforce planning | 15 |
| Staff involvement with Foundation Trusts and the Board of Governors | 17 |
| • Why be involved? | 17 |

■ INTRODUCTION

Unite joined with others in opposing the Governments plans to push ahead with Foundation Trusts in 2003 at the Labour party conference and in Parliament. Now an increasing number of Unite workplace representatives and members are working in Foundation Trusts. This is likely to continue to grow in the next couple of years – 2008 is the year when all organisations were supposed to be in a position to become a Foundation Trust. Unite policy remains opposed to Foundation Trusts, and concerns about Foundation Trusts engaging with the private sector have heightened given the wider NHS policy context in recent years.

Unite believe that if you are in a Foundation Trust it is important to engage with, and use, whatever levers are in place to progress the best interests of staff, patients, users and the local community. Current Government NHS reforms are designed to involve the private sector on a scale and scope never before seen, the accumulative impact of which threatens to undermine the fundamental values of the NHS, (see the Unite and 'Keep Our NHS Public' 'Patchwork Privatisation' guide for more details).

Unite have also been involved in a number of recent cases where Foundation Trusts have tried to stretch the boundaries of their specified freedoms to the detriment of staff. Foundation Trusts have also emerged as a strong lobby calling for greater freedom and flexibility to work with and involve the private sector than they currently have and further reduce accountability to the Department of Health. Unite will continue to work and campaign nationally to prevent this, arguing in favour of a universal, publicly funded, owned and accountable NHS. For this to be as effective as possible needs Reps and members being as active and effective as possible locally.

This guide can be used by Reps that are already in Foundation Trusts to check what duties and governance structures Foundation Trusts should have, and how to utilise them. Throughout the guide important information for people whose employers may wish to become a Foundation Trust is also highlighted. It has been structured so that questions workplace reps should ensure they have the answers to, checklists of what to look out for and actions that Reps should take are all clearly marked – it is not exhaustive but should serve as a good starting point. Throughout this guide Reps and members are referred to their regional office for support. The contact details of yours can be found on your membership card and on the union website.

■ WHAT A FOUNDATION TRUST IS AND THE WIDER POLICY CONTEXT

Foundation Trusts were created by the government in 2003 in the Health and Social Care (Community Health and Standards) Act. They are independent legal bodies called 'public benefit corporations' – a type of business company registration the Government created specifically to develop Foundation Trusts. Foundation Trusts were one of the first steps along the current road of creating competitive markets and opening up of the possibility of an increasing amount of public services being handed to the private sector under the banner of service reform.

In the NHS in England this wider agenda has been carried out through reforming and pushing NHS Trusts and Primary Care Trusts (PCTs) into being commissioning bodies, rather than directly providing care themselves. The purchaser-provider split divides a Trust's role to provide health services from its function of purchasing health services on behalf of patients and service users. Trusts can commission (contract) others to run services – with the private sector and the third sector competing against current public provision, (see the Unite briefing on Social Enterprises and the NHS for more information). As well as different providers having to compete with each other to win contracts, competition has also been embedded by allowing patients and (theoretically) users to choose between different providers as to where they are treated. As part of developing this market and competition, the 'Payment by Results' (PbR) funding system has been established where services and procedures are paid for by the commissioning body after they have been delivered or performed. Service providers therefore have to compete – and win – patients and service users to secure income.

Within this context, Foundation Trust status puts an organisation on much more of a competitive footing as they are set up to run as commercial business units. It is important to note that although they have particular processes, requirements and flexibilities set out in legislation Foundation Trusts are legally part of the NHS. To be eligible to become a Foundation Trust an NHS organisation currently has to be an acute, specialist or mental health organisation. The government has committed to expanding this in future; for example, from 2009 Ambulance Trusts will be able to apply for Foundation status. It should also be noted that the door remains open to private sector companies to apply for Foundation Trust status. Foundation Trusts are not performance managed by the Strategic Health Authority and have a large degree of autonomy from the Department of Health – indeed Foundation Trust status means that although the Trust is still technically within the NHS the ownership of services and assets passes from the Secretary of State to the relevant independent corporation. They are able to make capital investments, sell certain assets, retain and sit on surpluses, can borrow money commercially and, as companies, can risk insolvency. Unlike the rest of the NHS they are not required to breakeven. They also have more freedom to enter into direct agreements with private sector partners. They are also able to generate income by treating private patients – though they are not supposed to prioritise those patients above NHS patients.

■ HOW ORGANISATIONS BECOME A FOUNDATION TRUST

There will be an initial assessment to establish if the Trust is a 'viable candidate' for Foundation Trust status. The criteria for selection has softened – originally an NHS organisation had to achieve '3 stars' in its annual assessment. This then became those achieving strong '2 stars'. Since the star rating system was dropped by the Healthcare Commission the pool of candidates has widened as organisations simply have to show they are performing well.

This initial assessment is carried out with the Strategic Health Authority (SHA), and decides whether or not the SHA supports Foundation Trust status.

The applying Trust then has to produce an 'Integrated Business Plan' to present to the Department of Health. This Plan will include the future strategy of the Trust, governance structures and the Trust's future Human Resources strategy and workforce planning (see below for more detail).

The Trust and its plans are assessed by the Department of Health, during which time a statutory consultation of the local community must be carried out, lasting a minimum of 12 weeks. It should be noted this consultation is not on the question of whether an organisation should become a Foundation Trusts, but on its plans and strategy for when it becomes a Foundation Trust.

Once the consultation is finished and the Department of Health think the Trust is ready, the decision as to whether or not the application can proceed is referred to the Health Secretary of State. If the application is supported by the Secretary of State it is then passed to Monitor - the body that regulates and authorises Foundation Trusts.

Monitor then make the decision as to whether a Trust can become a Foundation Trust or not, awarding the Trust its terms of authorisation.

The terms of authorisation are important as they will state, amongst other things, the Trust's cap on the percentage of their income that can be generated by treating private sector patients and 'protected services' – services that can only be changed with the agreement of the regulator.

As soon as the Secretary of State has given support to the application for Foundation Trust status elections for the Board of Governors can occur straight away, (for more about governance and elections see below).

Questions for Unite trade union reps on establishing a Foundation Trust

1. Is your Trust putting forward an application for Foundation Trust status?
2. Has Unite been consulted on any application for Foundation Trust status?
3. As part of any application is the Trust planning to sell assets, and reduce or cease certain service activities?
4. Are there areas where the Trust is already planning partnerships with private providers?

If your Trust is putting forward an application for Foundation status you may need to adopt an approach that can oppose the application and secure the best outcome for staff and the local community.

There is no formal process of preventing a Foundation Trust application proceeding and it is difficult to do so; your ability to stop it will depend on the support of staff and the local community. (See the example of Unite members in Kings College Hospital Foundation Trust further below.) The level and nature of each local campaign will obviously vary according to each local situation.



■ FOUNDATION TRUST 'FREEDOMS' AND FLEXIBILITIES

Central to the whole concept of Foundation Trusts is that ownership passes from the Government to the independent corporations, and control leaves Whitehall and passes to the local community. Unite believe in practice local communities are likely to exercise little control over Foundation Trusts. Community involvement is narrowly limited to votes and elections for the Board of Governors and formal consultation exercises.

PRIVATE SECTOR INVOLVEMENT

As mentioned above;

- Foundation Trusts have autonomy from the Department of Health to enter into agreements and partnerships with private companies as they wish.
- Under the terms of authorisation that an organisation was allowed to become a Foundation Trust it will be stated what percentage of its income is allowed to come from the treatment of private sector patients. Foundation Trusts have increasingly been trying to get around this cap by setting up third party referral organisations.
- The door is open to the private sector establishing themselves as a Foundation Trust.

Actions for trade union reps on campaign against private sector involvement

1. If your Foundation Trust is planning to enter into a private sector agreement that will be detrimental to staff and patient and service users care, then contact your regional office to help you organise a campaign to prevent it and let the national health sector team know. Your regional office will be able to help and advise you on actions such as;
 - Organising members effectively and drafting campaign materials,
 - Contacting, lobbying and working with your local Councillors and MPs,
 - Working with local community networks, such patient and service user groups (called LINKs). You may also want to speak to, and give any leaflets or posters to your local Labour party, local Trades Councils and other community hubs, such as places of worship and community centres and your local Overview and Scrutiny Committee (for more information see the Staff Involvement section). Involving the local community will help to strengthen your campaign.
 - Coverage in the local media.
2. If you hear of a non NHS Employer wishing to establish themselves as a Foundation Trust then contact your regional office and the national health sector team to let them know.

AGENDA FOR CHANGE

The critical point to note is that Foundation Trusts are part of the NHS and Agenda for Change applies. This was established at the time Foundation Trusts were created and when Agenda for Change was agreed following strong arguments from the trade unions. Foundation Trusts do have some flexibility – but these are flexibilities as specified under the AfC agreement, which states that,

“The new pay system set out in this handbook will be implemented in all NHS organisations...But where NHS organisations acquire earned autonomy or foundation trust status in England, they will have greater autonomy in relation to the use of specified local freedoms under this agreement.” (1)

The possible flexibilities allowed to Foundation Trusts are then listed in the AfC agreement (Annex K). These include;

- the ability to offer ‘alternative packages of benefits’ to individual employees, for example, working longer hours each week but more annual leave – but these must at least be to the equivalent value of the standard benefits in the AfC agreement.
- Local arrangements can be negotiated for ‘compensatory benefits’, such as expenses or subsistence allowances.
- Recruitment and Retention Premia above 30% of basic pay – where justified - can be awarded without being authorised by an external body, for example, the SHA or NHS Staff Council.
- New team bonuses and other incentive schemes, non-pay benefits above the specified AfC minimum and accelerated development and progression can also be implemented.

These types of ‘pick and mix’ contractual entitlements of equivalent value are not common practice in Britain, and it can be a complicated system to operate and administer.

That Agenda for Change applies as the nationally agreed terms and conditions for all directly employed NHS staff (except doctors, dentists and senior management) has been recently re-affirmed in a Tribunal ruling, (see below box). Unite has been involved in several examples recently where Foundation Trusts have tried to argue that they are free not to apply Agenda for Change, or that they have much greater discretion than is actually the case.

(1) *NHS terms and conditions of service handbook, Annex K*

Example – Newcastle Upon Tyne Foundation Trust, 2007

Newcastle upon Tyne Foundation Trust argued and took to tribunal that they did not have to pay the Recruitment and Retention Premia to maintenance and craft workers at the hospitals within their Foundation Trust. Unite members were the respondents in this case. The union argued that as the RRP was an agreed part of Agenda for Change the RRP was part of the basic terms and conditions that had been collectively agreed nationally. The tribunal agreed and ruled that the full Agenda for Change terms and conditions as set out in that agreement applied to staff in the Foundation Trust, and constituted part of their contract of employment.

Action for Unite trade union reps on Agenda for Change

If your Foundation Trust is suggesting that Agenda for Change, or sections of Agenda for Change, are not applicable to staff contact your regional office for advice and support immediately.

It is also important to note that because Foundation Trusts are legally part of the NHS if your Trust is awarded Foundation status then employees should not be subject to a change of employment status or continuity, and therefore not subject to a 'Transfer of Undertakings of Employment' (TUPE).



MEMBERSHIP AND GOVERNANCE OF FOUNDATION TRUSTS

The membership and the governance structure of the Foundation Trust will be set out in the constitution of that Foundation Trust.

There are some minimum legislative requirements about how a Foundation Trust is governed (2). These are set out below. It is important to note that these are minimum standards, and your local Trust chooses how to meet them. The exact governance structures and processes will therefore vary from Foundation Trust to Foundation Trust. It is worth bearing in mind that in some cases the specified names of these bodies may also differ – for example, rather than a Board of Governors in some Foundation Trusts it may be called a ‘Council of Members’.

MEMBERSHIP

Membership of a Foundation Trust – as a minimum – has to be open to all staff and people who live in the local area (referred to as the staff and public constituencies) and should be free. Foundation Trusts can also make their membership open to people who have been patients or carers of patients who have been treated by the Foundation Trust (within a relevant period, which should be stated in the constitution of the Trust) and people who exercise a function for the Trust.

A common example is staff that are employed in a private sector partnership or any agency staff the Trust uses - so even though they are not directly employed by the Foundation Trust they can have membership opened up to them.

You can only be a member of one constituency at a time. Individual members of the public (and patients and their carers if applicable) will usually have to apply for membership. Staff will normally be members of the Foundation Trust automatically, but they may also have to apply for membership. The staff constituency can be sub-divided into different sections – for example, into different professional groupings, specialities or geographically if your Trust is located across a number of sites.

A Foundation Trust constitution can also exclude particular people from membership as long as the reason for exclusion is reasonable, for example, someone who has assaulted a staff member could be excluded (3).

Formally, members should be regularly consulted about the future of the Foundation Trust. They can vote and stand in elections to the Board of Governors, and put themselves forward for appointment as Chair of the Trust or to be a non-Executive Directors on the Board of Directors.

(2) Information taken from the Department of Health’s ‘NHS Foundation Trusts: A sourcebook for developing governance arrangements’, (Version D, January 2006).

(3) Department of Health, ‘NHS Foundation Trusts: A sourcebook for developing governance arrangements’, (Version D, January 2006), page 3

Questions for Unite trade union reps about Foundation Trust membership

1. Are staff automatically members of the Foundation Trust or do they have to apply, and is membership open to staff who may not be directly employed by the Trust?
2. Is the staff constituency divided into sections, and how are these sections defined?
3. Can patients and their carers be members of your Foundation Trust?

Action for Unite trade union reps and Health sector branches on membership

If in your Trust staff membership is not automatic then ensure as many as possible become members. You can also encourage supportive members of the public. This could become important to any future campaign that needs to be organised around actions a Foundation Trust wish to take.

HOW IS A FOUNDATION TRUST GOVERNED?

Again there are minimum parameters set out in legislation, outlined below, but Foundation Trusts do have flexibility to vary their exact arrangements as long as they meet these basic standards.

There should be a Board of Governors which is supposed to help set the strategic direction of the Trust and ensure the Trust acts consistently with its terms of authorisation. There can be as many governors as a particular Foundation Trust wishes, but there should be governors elected from the public constituencies and they must number more than the combined total of all the other types of governor. There should also be at least three staff member governors who are elected from the staff of the Foundation Trust. There should be at least one local authority governor, one primary care trust governor and where applicable at least one university governor, all of whom are nominated. Where there is a 'designated partner organisation' in the Foundation Trusts' constitution, that organisation also has the right to appoint a governor (4).

The Board of Directors sits above the Board of Governors, with responsibility for day-to-day management, such as setting the budget of the Foundation Trust, staffing and operational matters.

The Board of Governors are responsible for electing the Chair of the Foundation Trust (who Chairs both the Board of Governors and the Board of Directors) and for electing the non-executive directors on the Board of Directors.

ILLUSTRATION OF GOVERNING BOARDS AND THEIR BROAD RESPONSIBILITIES

Board of Directors
Chair of Foundation Trust, Directors and Non-Executive Directors
 Responsible for: setting the Foundation Trust budget, staffing and all operational matters – responsible for day-to-day management of the Trust.



| | |
|---|---|
| <p>Board of Governors <i>Chair of the Foundation Trust – elected by the Board of Governors, chairs the Board of Governors (though not a governor themselves)</i></p> | |
| <ul style="list-style-type: none"> • Number of Staff Governors – at least 3 (elected by the Staff membership) | <ul style="list-style-type: none"> • Number of Public Governors – at least 1 more than the combined total of other Governors |
| <ul style="list-style-type: none"> • Number of Local Authority Governor(s) – at least 1 (appointed) | |
| <ul style="list-style-type: none"> • Number of Primary Care Trust Governor(s) – at least 1 (appointed) | |
| <ul style="list-style-type: none"> • Number of University Governor – at least 1 where applicable (appointed) | |
| <ul style="list-style-type: none"> • Any other designated partner organisations also have the right to appoint at least 1 governor | |
| <p><i>Responsible for: setting the strategic direction of the Foundation Trust, ensuring that the Trust acts according to its terms of authorisation and electing non-Executive Directors and the Chair of the Board of Governors and the Board of Directors.</i></p> | |

Questions for Unite trade union reps on Foundation Trust governance

1. When do the elections to the Board of Governors (or equivalent) take place?
2. How many Board members are there in total, and how does this break down to the different groups – staff, public, local authority etc.?
3. What plans, strategies and actions are in place to ensure the Board representatives reflect the local population?
4. Are Board meetings open to staff and the public to attend?

Checklist for Unite trade union reps on Foundation Trust governance

1. Reps in Foundation Trusts should have a copy of the Constitution, terms of authorisation, governance structure and any other relevant documents your Trust may have produced.
2. Up-to-date contact details of the current Chair of the Foundation Trust, the Board of Governors – and whether they are staff, public, local authority or university Governors.
3. Up-to-date contact details of the current Board of Directors, including non-executive Directors.

Action for workplace reps and Unite Health sector branches

1. Make sure that staff representation goes beyond medical and nursing staff groups.
2. Seek agreement that employee governors are trade union representatives.
3. Establish a remit in the constitution that clearly defines the role of employee representatives on the Board of Governors and their relationship with trade unions, the Staff Side committee, and ensures accountability.

Example – Kings College Hospital Foundation Trust

The Staff Side committee were clear in their opposition and campaigned against the transformation of their organisation to a Foundation Trust, and made sure their concerns were well known and formally recognised. They were also able to ensure the maximum possible number of staff seats on the Board of Governors, including one nominated directly by Staff Side committee. By campaigning and making their concerns well-known they were able to ensure some of these were concerns were addressed in the HR document and governance strategy.

■ HUMAN RESOURCE STRATEGY AND WORKFORCE PLANNING

Foundation Trusts (or applicants) must be able demonstrate that staff are consulted over the HR strategy and matters - they have a statutory duty of partnership and staff involvement. Department of Health guidance to applicants and established Foundation Trusts mentions the need to involve and engage with staff, it does not mention trade unions (5). The fuller guidance only mentions trade unions in the following context;

"The shift to NHS foundation trusts status may provide an opportunity and the impetus to0 review and reform local staff side arrangements. This may lead to greater strengthening of relationships and practices, and would be undertaken mutually between the Trust and the TUs locally."

It continues to ask if the organisation recognises *"the difference between staff involvement and management and trade union partnership"* (6). Some management will seek to by-pass trade union representatives and set up alternative staff forums that would still fulfil their obligation to consult with staff.

Questions for Unite trade union reps on the Human Resource strategy

1. Will Unite, and other recognised trade unions, be properly consulted on the Human Resource Strategy?
2. After different stakeholders have been consulted, will there still be a chance to discuss points and opportunities to amend the document?
3. Will Unite workplace reps involved in consultation have access to all the necessary facilities – including funded backfill, a computer, printing and telephone access?

Action for Unite trade union reps

Agreements with the Trust covering all of these points should be sought and obtained at the very beginning of the process. You can contact your Regional Office for support and advice.

If your Trust is consulting on their Human Resource Strategy, or your Trust is already a Foundation Trust then Unite has outlined below some points that you should make sure are included.

(5) Department of Health, "A short guide to Foundation Trusts", 2005

(6) Department of Health "NHS Foundation Trusts: A guide to developing HR systems and practices", July 2007

Checklist for Unite trade union reps – what to look for in a Human Resource strategy

1. There should be a clear and unambiguous commitment to partnership working with the recognised trade unions.
2. It should give details of how education and training will be delivered and funded.
3. There should be concrete plans to address staff shortages.
4. It should set out policies and actions to tackle institutionalised discrimination to ensure a diverse workforce at all levels of the organisation.
5. A commitment to consult with other local employers (including other NHS Trusts) before implementing changes that may impact on the local labour market.
6. There should be a commitment to best practice performance standards

Action for Unite trade union reps about consultation and partnership working

If the trade unions in your Foundation Trust have been, or risk being, marginalised then contact your Regional Officer. They will be able to help you draw up an action plan to organise, recruit and mobilise members to get an effective collective staff voice as possible.



■ STAFF INVOLVEMENT WITH FOUNDATION TRUSTS AND THE BOARD OF GOVERNORS

Unite believe that trade union representatives should hold all or some of the places set aside for staff governors. It is also important that there are appropriate and active reporting mechanisms in place so that any staff governors are genuinely accountable to Staff Side Committees, Unite health sector branches and staff members.

WHY BE INVOLVED?

Much of the power will lie with the Board of Directors, for example, through the setting of budgets and other decision making. However, Unite believe there is value in being involved in the Governance structures to emphasise the voice of staff and as a campaigning tool. Being involved in the governance structure – at the Board of Governor level down to the ‘reporting back’ mechanisms at Health Sector branch meetings – the flow of, and the right to access, information can help give an invaluable early indication of the Trusts plans and possible decisions that may impact on staff. It is another lever staff can use to make sure that issues such as workload, morale, work-life balance and so on are placed on the agenda of the Governors and the Directors from a staff perspective, alongside other campaign methods. Unite members and branches can help to stand candidates and mobilise voters who are supportive of our policies in the local community in the Trusts’ elections.

When campaigning on these and other relevant issues such as the quality of care, or highlighting the detrimental impact on the care because of increasing workloads, low morale, frozen posts and so on, working alongside and forming an alliance with local networks and representatives will strengthen any campaign. For example, there should be a ‘Local Involvement Network’ or LINK, which is supposed to involve patients and the local community. You may also want trade union members in the local Labour party to raise the issue, contact your MP, local trades councils and other community hubs, such as community centres and places of worship.

You should also contact your local ‘NHS Overview and Scrutiny Committee’, details of which should be on your local councils website. These are committees which are linked to local councils, and are made up of local councillors. They are supposed to consider the development of the local health service, policy implementation and the effects it may have on NHS partners, public health matters and reducing health inequalities.

Question for Unite trade union reps on staff involvement

1. In some Trusts to be eligible to vote in elections you not only need to be a member, but also you need to declare your that you are a member and are therefore qualified to vote in a certain timeframe before the election. This should be in the Foundation Trusts' constitution.

Checklist for Unite trade union reps on staff involvement

1. Make sure there are active reporting arrangements in place for staff governors and Unite representatives to report back to Unite Health Sector branches and Staff Side to monitor the accountability of the Board of Governors.

Action for Unite reps on staff involvement in Foundation Trusts

Decide on Unite (and other union) candidates and secure support for them, amongst staff groups and the wider community. Using the union's health sector web-board discussion group can be a useful place to exchange campaigning ideas and find out what has worked in other Trusts.

