

EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE PENSION SCHEME AND ADDITIONAL VOLUNTARY CONTRIBUTIONS (AMENDMENT) REGULATIONS 2017

2017 No. 275

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The instrument amends five statutory instruments relating to pensions and benefits provided for National Health Service staff.

2.2 Key changes implemented by this instrument include:

- the introduction of a charge to cover the cost of administering the NHS Pension Scheme payable by all employers who participate in the scheme;
- the inclusion of the NHS standard sub-contract as one of the contract types that enable Independent Healthcare Providers to offer membership of the NHS Pension Scheme to certain employees;
- the exclusion of pay increases arising from changes to the National Minimum Wage from the scope of regulations dealing with excessive pensionable pay increases.

2.3 The instrument also makes a number of other miscellaneous and technical amendments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Section 12(1) of the Superannuation Act 1972 confers a power to make regulations having effect from a date earlier than the date of their making.

3.2 Section 3(3) of the Public Service Pensions Act 2013 confers a power to make regulations having effect from a date earlier than the date of their making. Section 3 refers the reader to section 23.

3.3 The Department does not consider that section 23 of the Public Service Pensions Act 2013 applies in this case. That section provides the procedure to be followed when retrospective provisions are included within scheme regulations that will have a significant adverse effect in relation to the pension payable to or in respect of members of the scheme. The Secretary of State, as the responsible authority, does not consider that the retrospective amendments have any significant adverse effects for the purposes of section 23.

3.4 Paragraphs (3) and (4) of regulation 4 have retrospective effect from 1 April 2016.

- 3.5 Regulations 33, 36(2), 37(2), 38, 46, 48, 51 and 52 have retrospective effect from 1st April 2015.

Other matters of interest to the House of Commons

- 3.6 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Part 2 of the instrument amends the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) (“the 1995 section”). Part 3 of the instrument amends the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) (“the 2008 section”). Part 4 of the instrument amends the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) (“the 2015 scheme”). Part 5 of the instrument amends the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95). Part 6 of the instrument amends the National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 (S.I. 2000/619) (“the AVC Regulations”).

5. Extent and Territorial Application

- 5.1 This entire instrument extends only to England and Wales. The instrument does not have minor or consequential effects outside England and Wales.
- 5.2 This entire instrument applies only to England and Wales. The instrument does not have minor or consequential effects outside England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

Scheme Administration Charge

- 7.1 The contributions made by employers and employees meet the cost of the pension rights and benefits building up under the scheme but the Department of Health has, until now, funded the cost of administering the NHS Pension Scheme.
- 7.2 As part of the 2016 Spending Review, the Department reviewed what it funds centrally in this way and concluded that paying for scheme administration was no longer appropriate. Instead the Department proposed that future costs should be met by participating employers as the scheme is provided for the benefit of their workforces.
- 7.3 This is consistent with common practice in the wider pension industry, where employers typically bear the cost of scheme administration. Other major public service pension schemes have similar charging practices; in particular the Teachers' Pension Scheme introduced a charge in 2015.
- 7.4 The size of the scheme means that administration costs and the consequential charge to participating employers are modest when spread out across 1.5 million active

members and set as a specified percentage of each active member's pensionable earnings.

- 7.5 This approach ensures that the cost to employers better reflects both the size and structure of their workforces, and therefore the relative benefit gained from the scheme and its administration. It also achieves a better correlation between administration effort and consumption.
- 7.6 The initial rate of the charge will be set at 0.08% of active member pensionable pay (approximating to an average of £23 a year per active member).
- 7.7 The rate will be reviewed during 2018, together with the standard employer contribution as part of the scheme valuation process. A new rate will then be set for the four year period 2019-20 to 2022-23.
- 7.8 Accordingly, amending regulations 3(6), 12(2), 22(2) and 49(2) insert a new definition of "scheme administration charge" into the 1995, 2008 and 2015 Scheme Regulations ("the NHS Schemes Regulations"). The definition points the reader to the new regulations which provide the details concerning the operation of the charge (see 7.9 below).
- 7.9 The new regulations inserted by amending regulations 5, 15, 25 and 31 require the scheme administration charge to be paid by employing authorities in respect of each member who is liable to pay scheme contributions. The charge is to be paid on the same day and for the same period as the employer's standard rate contributions are paid. The charge is calculated as a percentage of such a member's pensionable pay or earnings for the month in which it was earned. The percentage is determined by the Secretary of State taking into account the administrative costs of the scheme and will be notified to each employing authority.
- 7.10 Amending regulations 4(2), 7, 9(4) and (5), 19, 21, 28 and 30 make consequential provisions to ensure that interest becomes due where the scheme administration charge is paid late. These amending regulations also adjust similar terminology used elsewhere in the NHS Schemes Regulations to better distinguish the scheme administration charge from other charges for which employers may become liable.
- 7.11 Amending regulations 8, 12(7) and 22(7) ensure that, in circumstances where practitioners or non-GP providers are liable to pay employer contributions in respect of their own membership, they will also become liable to pay the scheme administration charge.

Sub-contracts as qualifying contracts for Independent Providers of clinical health care services

- 7.12 An independent provider (IP) is a non-statutory provider of NHS clinical health care services. Such providers may qualify as NHS Pension Scheme employing authorities. This enables them to extend access to the scheme to certain employees if the IP holds a qualifying contract. From 1 April 2014, qualifying contracts have comprised NHS standard contracts, Alternative Provider Medical Services contracts, and certain relevant contracts entered into with local authorities relating to the improvement and protection of public health.
- 7.13 IPs are only granted employing authority status following acceptance as a result of a formal application process including vetting for financial security. If granted, further qualifying criteria, checks and balances also apply. For example, the Secretary of State may require a guarantee that in the event of a default on contribution payments

by the IP, for any reason, the NHS Scheme will be indemnified in full by a suitable guarantor, removing the risk of losses accruing to the scheme that would otherwise be borne by all NHS Pension Scheme employers, only employees working wholly or mainly on the qualifying contract may join the scheme, and the amount of pay which may be pensioned by those employees without causing an employer contribution surcharge is 75% of the total gross amounts payable in a scheme year to an IP in respect of a qualifying contract.

- 7.14 The policy that extended scheme access in this way from 2014 was subject to review throughout 2015. As part of that review persuasive representations were made by NHS clinical service sub-contractors wanting to offer NHS Scheme membership to eligible employees via the IP route primarily in order to promote a more level playing field for organisations delivering healthcare.
- 7.15 The Department listened carefully to the arguments made and, in the context of growing sub-contracting as a result of emerging new care models, is introducing an extension of scheme access limited to IPs who hold an NHS standard sub-contract. The same application process and various checks and balances will also apply to NHS standard sub-contractors seeking to become scheme employing authorities as apply to other qualifying contract holders.
- 7.16 Accordingly amending regulations 3(5), 12(6), 22(6) and 42 extend the definition of a “qualifying contract” in relation to IPs to include an NHS standard-sub-contract.

Pensionable Pay increases as a result of increases to the National Minimum Wage

- 7.17 Regulation D3 (further contributions by employing authorities in respect of excessive pay increases) of the 1995 Section was introduced from 1 April 2014. Its purpose is to levy charges on employers who award excessive pay increases to members of that Section during the final pay period used for the calculation of benefits (in the 1995 Section this is the best out of the final 3 years’ pay).
- 7.18 Recent legislative changes relating to the national minimum wage have the potential to engage regulation D3 unintentionally.
- 7.19 Accordingly paragraphs (3) and (4) of amending regulation 4 amend 1995 Section regulation D3 so that pensionable pay increases that are solely due to increases in the national minimum wage are ignored for the purposes of that regulation. This change is made with retrospective effect from 1 April 2016.

Miscellaneous, Consequential and Technical Amendments

Amendments made across the NHS Pensions Schemes’ Regulations

Independent Providers – clarification that the wholly or mainly condition applies to both ‘closed’ and ‘open’ status

- 7.20 Two levels of access to the NHS Pension Scheme have been available to IPs since 2014; open or closed. Closed access only allows employees to join the scheme if they have been eligible to do so in the preceding twelve months; open access allows any eligible IP employee to join the scheme.
- 7.21 As mentioned in paragraph 7.13 only employees working wholly or mainly on the relevant health care contract are eligible to join the scheme (“the wholly or mainly condition”). Amending regulations 9(2) and (3), 20 and 43 clarify further that this requirement applies to both open and closed access levels.

NHS standard sub-contract definition

- 7.22 Income from NHS standard sub-contracts has been pensionable since April 2016 when appropriate amendments were introduced into the scheme.
- 7.23 Amending regulations 3(3), 12(4), 22(4), and 49(2) update the definition of NHS standard sub-contract with reference to the latest 2016/17 guidance.
- 7.24 Amending regulations 3(4), 12(5), 22(5) and 49(3) extend the reference to NHS standard sub-contracts found in the definition of “practice staff” to ensure that work performed under such a contract may only be pensioned by GP practice staff if the holder of the main NHS standard contract is a scheme employing authority.

Amendments made to the 1995 and 2008 Sections only

Definition of “NHS standard contract”

- 7.25 The definition of “NHS standard contract” is made consistent across the NHS Schemes’ Regulations by amending regulations 3(2), 12(3) and 22(3).

Internal Transfer arrangements

- 7.26 Deferred members of the 1995 and 2008 Sections returning after a break in service exceeding five years have the option of transferring their earlier benefits across to the 2015 Scheme. Currently such members are automatically provided with detailed transfer information within three months of joining the 2015 Scheme.
- 7.27 Amending regulations 6, 17 and 26 adjust this process so that members will be informed of their right to transfer benefits across to the 2015 Scheme automatically within three months of joining the 2015 Scheme and will be invited to request detailed transfer information. This will then be provided within three months of the date of their request.

Amendments made to the 2008 Section only

Protected members of public service final salary schemes in Northern Ireland

- 7.28 When new public service career average earnings (CARE) pension schemes opened in 2015, certain members were permitted to remain in the old final salary schemes rather than moving across to the new CARE schemes. In addition such protected members are, in certain circumstances, are also permitted to join other public service final salary schemes when moving around the public service voluntarily.
- 7.29 Amending regulations 12(2), 13, 22(2) and 24 ensure that those arrangements also apply to protected members of public service final salary schemes in Northern Ireland on joining the NHS in England and Wales by the inclusion of relevant references to the Public Service Pensions Act (Northern Ireland) 2014.

Transfer of final salary linked service

- 7.30 Amending regulation 16 ensures that service in another public service pension scheme that qualifies for a final salary link under either the Public Service Pensions Act 2013 or the Public Service Pensions Act (Northern Ireland) 2014 may be transferred into the 2008 Section on cash equivalent terms where the member does not qualify for a transfer under the Public Sector Club arrangements.

Amendments made to the 2015 Scheme only

Eligibility to make a buy-out election

- 7.31 Certain members of the 2015 Scheme are entitled to elect to pay additional contributions to buy out some of the actuarial reduction that would otherwise apply to benefits on retirement before reaching normal pension age. Amending regulation 32 ensures that members have an opportunity to make such an election once in respect of each period of service that results in a new member's account being established. This will be on first joining or on re-joining after having taken a refund of contributions or a transfer or after a break in service exceeding five years.

Elections to buy additional pension

- 7.32 Amending regulations 33 to 38 make various technical refinements to regulations covering the purchase of additional pension by the payment of additional contributions by either members or their employers. Amending regulations 33, 36(2), 37(2) and 38 do so with retrospective effect from 1 April 2015.
- 7.33 Amending regulation 33 clarifies when a member or their employer is to be treated as having made an election.
- 7.34 Amending regulations 34(2), 35, 36(3) and 37(3) clarify that a references to a member's representatives are references to their personal representatives following death.
- 7.35 Amending regulations 34(3) and (4), 36(2), and 37(2) make further minor changes to text and correct typographical errors.
- 7.36 Amending regulations 37 and 38 also omit duplicate provisions and drafting is brought into line with equivalent provisions in the 2008 Section.

Ill-Health Pensions

- 7.37 Amending regulations 39 and 40 make amendments to provisions covering ill-health retirement. Amending regulation 39 clarifies that a member must be qualified for retirement benefits in order to qualify for a tier 1 ill-health pension. A typographical error is also corrected. Amending regulation 40 clarifies that when considering whether a member has received "appropriate medical treatment" the scheme manager must only consider such treatment as could have been received before the member reached prospective normal pension age or that would have improved the member's health before reaching that age.

Child Pensions

- 7.38 Amending regulation 41 clarifies the scope of pension increase to be included in the base pension which is used to calculate a child pension in circumstances where a member dies within twelve months of leaving the scheme. The pension increases to be applied will be those due up until the day after the deceased member's last day of service.

Definition of leaver index adjustment and benefit accounts for members who leave without qualifying for benefits

- 7.39 Amending regulation 46 makes changes to and includes further provision at Schedule 9 (pension accounts) to the 2015 Regulations. These changes have retrospective effect from 1 April 2015.
- 7.40 The “leaver index adjustment” generally applies when pensions first come into payment. It is the prorata increase or decrease that applies to the pension resulting from the application of the Consumer Price Index (CPI) plus 1.5% from 1st April in the member’s last year of service up to their retirement date. For this purpose the appropriate rate of CPI is not confirmed until the following year so is generally applied after a pension comes into payment. The amendments at regulation 46(2) ensure that where the application of a negative CPI plus 1.5% would otherwise cause the pension to reduce, the amounts of pension will remain unchanged.
- 7.41 Paragraph (3) of amending regulation 46 inserts three new paragraphs into Schedule 9 to cover circumstances not adequately provided for in the original 2015 Scheme Regulations. The new paragraphs provide for what will happen to an active member’s pension account when the member leaves without qualifying for benefits (the account to be closed), subsequently return after a break of less than five years (the account to be re-opened and operate as if the member had not had a break) or subsequently return after a break exceeding five years (the account to remain closed and a new account opened for the later service).

General Medical and Dental Practitioners (“practitioners”)

- 7.42 Amending regulation 47 clarifies that bonuses are non-pensionable and should not be included in the pensionable earnings of practitioners.

Lump sums payable on the death of a member

- 7.43 Amending regulation 48 has two purposes. The first is to ensure that where a member dies in service but also has entitlement to a deferred pension for earlier service, only one lump sum is due on death to be paid at the higher death in service rate.
- 7.44 The second is to refine the definition of “revalued pensionable earnings” for the purposes of calculating a lump sum on death. The Regulations now include more detail on the way in which increases equal to pension increases under the Pensions Increase Act 1971 (PI Act) are to be applied. This is in line with how such increases are also applied in a similar way in the 2008 Section. Amending regulation 48 has retrospective effect from 1 April 2015.

Amendments made to the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015

- 7.45 These regulations make transitional provisions for members of the old scheme (the 1995 or the 2008 Section) moving across to the new 2015 Scheme on or after 1st April 2015.

Uprating of practitioner earnings in the old final salary scheme

- 7.46 Transitional regulation 18 ensures that pensionable earnings of practitioners in the old scheme are not uprated twice (once under Scheme Regulations and again under the PI Act) after a practitioner has moved across to the new 2015 Scheme. However, the uprating due in respect of the credit of earnings for added years of service being purchased under transitional arrangements should still be provided for in Scheme Regulations. This omission is corrected by amending regulation 51 with retrospective effect from 1 April 2015.

Transitional Ill-health benefits

- 7.47 If a transition member retires on health grounds after moving across to the new 2015 Scheme, regulation 28 provides for the benefits paid to include an amount equivalent to the benefits that would have been due in respect of a member's service in the old scheme.
- 7.48 If such a member dies before reaching old scheme normal pension age, any survivor pension due to an eligible spouse, partner or child will also be paid from the 2015 Scheme. Those benefits also include amounts equivalent to the survivor benefits that would have been due in respect of a member's service in the old scheme.
- 7.49 However, provisions in the 2015 Regulations currently underpay the portion of the survivor benefits that represent the value of the member's benefits in the old scheme. Amending regulation 52 corrects the position with retrospective effect from 1 April 2015.

Amendments made to the AVC Regulations

- 7.50 The AVC Regulations provides facilities for members to supplement the value of their NHS pension by making money purchase additional voluntary contributions (MPAVCs) to external pension providers.
- 7.51 Amending regulation 57 extends the same death benefit nomination options to MPAVC members as those currently available to members in respect of benefits and pension credit benefits in the main NHS Schemes.

Other minor and technical amendments

- 7.52 Amending regulations 11, 14, 18, 23, 27, 44, 45, 53, 55, and 56 correct typographical errors and cross-references, address formatting issues, omit obsolete provisions, or make various very minor operational and technical corrections to scheme regulations.

Consolidation

- 7.53 The Department has produced informal full consolidations of NHS Pension Scheme regulations incorporating all changes implemented up to and including those which came into effect on 1 April 2016. These are available on the scheme administrator's website: <http://www.nhsbsa.nhs.uk/Pensions/2654.aspx>

8. Consultation outcome

- 8.1 The draft regulations were subject to two eight-week public consultations ending in January 2017. The first consultation concerned the scheme administration charge proposal, with the second consultation presenting the other matters contained in the instrument. The documents for both consultations were shared with NHS trades unions, NHS employer representatives and other interested parties by email, and were published on the Government (www.gov.uk) and scheme administrator's websites. During the second consultation, a workshop took place for NHS trades unions and employer representatives to discuss the proposals.
- 8.2 97 responses were received in relation to the scheme administration charge proposal, in the main from NHS bodies and general medical practices. A majority of respondents described the potential financial impact of the charge suggesting that whilst acceptable in principle, there should be a corresponding transfer of funding into NHS budgets. NHS England recognises the impact for general medical practices and has included the charge in funding increases for general medical practices from April

2017. The Department intends to raise the charge for inclusion in the next round of funding discussions concerning the tariff price paid to healthcare providers for delivering NHS services. The methodology to apportion and collect the charge across employers was generally viewed as fair and proportionate. The plans to modernise and digitise the administration service were received positively. This is expected to improve service quality and lower costs, resulting in a lower future charge rate.

8.3 9 responses were received to the second consultation on the other proposed changes, mainly from social enterprises. The draft regulations were either supported by respondents or received no comment. The provisions permitting scheme access for Independent Providers using an approved sub-contract were well received, with calls to include other contract types.

8.4 The Department has published two documents responding to the comments received in each consultation. These are available at www.gov.uk/government/consultations/nhs-pension-scheme-proposed-changes-to-scheme-regulations

9. **Guidance**

9.1 Guidance is provided via a range of resources including factsheets, online videos and scheme guides on the scheme administrator's website <http://www.nhsbsa.nhs.uk/Pensions.aspx>. Guidance relating to the NHS standard sub-contract is available on gov.uk at <https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services>.

10. **Impact**

10.1 There is no impact on business, charities or voluntary bodies. Participation in the NHS Pension Scheme is voluntary for businesses, charities or voluntary bodies that provide NHS funded services. As noted in paragraph 7.13, Independent Providers can apply for scheme membership with eligibility dependent on a range of factors including holding a qualifying contract for NHS service provision. Such providers are able to withdraw from scheme membership and pursue alternative pension arrangements.

10.2 There is a marginal impact on the public sector. For employers who participate in the NHS Pension Scheme, including NHS public bodies, the scheme administration charge marginally increases the cost of that participation, however steps are being taken to offset this. NHS England are including the charge cost in the annual funding increase to general medical practices from April 2017, and the Department of Health will raise the charge for inclusion in the next round of funding discussions concerning the tariff price paid to healthcare providers for delivering NHS services. There is no impact on individual scheme members.

10.3 An Impact Assessment has not been prepared for this instrument.

11. **Regulating small business**

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. **Monitoring & review**

12.1 In accordance with section 7 of the Public Service Pensions Act 2013, there is a Scheme Advisory Board comprising representatives of NHS employers, NHS trades unions and the scheme administrator. The Board discusses changes to the NHS Pension Schemes and provides advice to the Secretary of State for Health where requested on scheme policy.

12.2 This instrument does not provide for a review pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (2015 c 26) (Duty to review regulatory provisions in secondary legislation).

12.3 The Department does not consider that the NHS Pension Scheme Regulations amended by this instrument make regulatory provision in relation to a qualifying activity or amend any regulatory provision relating to that activity for the purpose of section 28 of the Small Business, Enterprise and Employment Act 2015. They regulate only the activities of public bodies. The exempting provision of section 29(3)(b) of the same Act therefore applies.

13. **Contact**

13.1 Gareth Probert at the Department of Health (telephone: 0113 25 45491 or email: gareth.probert@dh.gsi.gov.uk) can answer any queries regarding the instrument.