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SCOTTISH STATUTORY INSTRUMENTS

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**2013 No. 174**

The National Health Service Superannuation  
Scheme (2008 Section) (Scotland) Regulations 2013

PART 3

BENEFITS FOR PRACTITIONERS, ETC.

CHAPTER 3.A

INTRODUCTION

*Pensionable earnings*

**Meaning of “pensionable earnings”**

**3.A.7.**—(1) In the case of a principal practitioner who is not in receipt of a salary, wages, fees or any regular payments in respect of that person’s employment as an officer, “pensionable earnings” means practitioner income less—

- (a) any sum on account of practice expenses (for these purposes, C3 contributions payable under regulation 3.C.5(5) or (6) (payment of contributions) are neither practitioner income or practice expenses); and
- (b) in the case of a dental practitioner, the pensionable earnings to the extent allowed by the Scottish Ministers, of any assistant practitioner in the practitioner’s employment or in the case of an assistant practitioner who is not in pensionable employment under this Section of the scheme, the amount that would have been taken to be that practitioner’s pensionable earnings if the practitioner was in such pensionable employment.

(2) Subject to paragraph (3), in this regulation, the practitioner income of a principal medical practitioner means—

- (a) income that accrues to the principal medical practitioner which is derived from—
  - (i) a GMS contract;
  - (ii) a section 17C agreement;
  - (iii) an HBPMS contract;
  - (iv) payments from, or to, a practitioner who is a GMS practice, a section 17C agreement provider or an HBPMS contractor in respect of the performance of certification services, commissioned services or collaborative services;
  - (v) the practitioner’s engagement by a Health Board to assist in the provision of primary medical services under section 2C(2) (functions of health boards: primary medical services) of the 1978 Act<sup>(1)</sup>;
  - (vi) in the case of a principal practitioner, the provision of locum services;

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(1) Section 2C(1) was inserted by the Primary Medical Services (Scotland) Act 2004 ([asp 1](#)), section 1(2).

- (vii) payments made to a principal practitioner by an OOH provider or other employing authority providing OOH services in respect of the performance of primary medical services, commissioned services, collaborative services and certification services;
  - (viii) payments made to a principal practitioner by an employing authority in respect of general dental services, general ophthalmic services or pharmaceutical services provided by the practitioner; or
  - (ix) practice based work carried out in educating or training, or organising the education or training of GP registrar or practitioners;
- (b) any charges collected from patients in respect of the services mentioned in subparagraph (a) which the principal medical practitioner is authorised by or under any enactment to retain, other than charges authorised by regulations made under section 73(b) of the 1978 Act<sup>(2)</sup> (charges for more expensive supplies of dental appliances);
  - (c) any sums paid to the practitioner out of a fund determined by reference to the number of beds in a hospital; and
  - (d) in the case of a principal medical practitioner, allowances and any other sums (but excluding payments made to cover expenses) paid in respect of board and advisory work.
- (3) If a practitioner is in concurrent employment as an officer, or with a local authority or university, or as a civil servant, or in any other employment that the Scottish Ministers may in any particular case allow, practitioner income does not include any amounts for which the practitioner is required to account to the employer as a term or condition of that employment.
- (4) In paragraph (2)(a), “locum services” has the meaning given in regulation 3.A.11(3) (meaning of pensionable earnings in relation to other practitioners).
- (5) The pensionable earnings of a principal practitioner include the amount of any pensionable earnings the practitioner is entitled to count under Chapter 3.K (2008 Section Optants).

### **Pensionable earnings: breaks in service**

- 3.A.8.**—(1) This regulation applies to members who are absent from work because of—
- (a) illness or injury;
  - (b) maternity leave;
  - (c) adoption leave;
  - (d) paternity leave; or
  - (e) parental leave.
- (2) If the earnings used to calculate a member’s pensionable earnings are reduced during a period of absence to which this regulation applies—
- (a) for the purpose of calculating the member’s contributions to this Section of the scheme under regulations 3.C.1 (contributions by members) and 3.C.2 (members’ contribution rate), pensionable earnings for the period of absence are to be calculated on the basis of the member’s reduced earnings; and
  - (b) for all other purposes, the member’s pensionable earnings for the period of absence are to be calculated in accordance with paragraph (3)(a) or (b).
- (3) In the case of a member who—
- (a) is one of a number of practitioners who have elected as described in regulation 3.A.9(2) (calculating pensionable earnings of medical practitioners in partnership), each

(2) Section 73(b) was amended by the Health and Social Security Act 1984 (c.48), Schedule 8 and by the National Health Service (Primary Care) Act 1997 (c.46), Schedule 2.

practitioner's or non-GP provider's pensionable earnings are to be calculated as if the partnership's aggregate pensionable earnings were equal to the amount of the partnership's aggregate pensionable earnings during the 12 month period ending immediately before the member's earnings were reduced or ceased; and

- (b) except where the member's pensionable earnings fall to be calculated as described in sub-paragraph (a), the member will be treated as having continued to receive the same average rate of pensionable earnings as during the 12 month period ending immediately before the member's earnings were reduced or ceased.

(4) If the earnings used to calculate a member's pensionable pay cease during a period of absence to which this regulation applies—

- (a) a practitioner falling within paragraph 1(a) is, subject to sub-paragraph (b), to be treated as having continued in pensionable employment for a period of 12 months from the date on which the member's earnings ceased and the member is to be treated as having left pensionable employment until the end of that 12 month period; and
- (b) a member falling within paragraph 1(b) to (e) who paid contributions on the basis of reduced earnings in accordance with paragraph 3(a) must, subject to paragraph (6), continue to pay contributions at that rate, except that no refund of contributions or other benefit will be payable until the member actually leaves pensionable employment.

(5) For the purposes of paragraph (4)(a)—

- (a) during the 12 month period, the member's pensionable earnings are to be calculated as described in paragraph (3)(a) or (b) (whichever is applicable); and
- (b) at the end of the 12 month period, when the member is regarded as having left pensionable employment, no refund of contributions or other benefit is to be payable until the member actually leaves employment.

(6) For the purposes of paragraph (4)(b), the rate of contributions payable is the rate that would have been payable on the basis of reduced earnings in accordance with paragraph (2)(a) had the member's reduced earnings excluded any earnings for a day during which the member, whilst on maternity leave, returned to work for the purposes of keeping in touch with the workplace.

(7) If a member fails to pay any contributions which are required to be paid to this Section of the scheme in respect of a period of absence to which this regulation applies, the member is to be treated as having left pensionable employment except that no refund of contributions or other benefit is payable unless the member actually leaves pensionable employment.

(8) If a member to whom this regulation applies leaves pensionable employment or, by virtue of paragraph (5)(b) or (7), is treated as having left pensionable employment, without becoming entitled to a preserved pension, if the member later returns to pensionable employment, regulation 3.A.6(4) (qualifying service: disregard of breaks in service) applies as if the reference to 12 months was a reference to three years.

(9) The benefits payable on the death of a member whose earnings ceased during a period of absence to which this regulation applies are to be calculated as if the member had died in pensionable employment on the day before the member's earnings ceased.

(10) For the purposes of making contributions to this Section of the scheme under regulations 3.C.1 and 3.C.3 (contributions by employing authorities: general), during any period of absence which counts as pensionable service under regulation 3.A.4(3) or (4) (pensionable service: breaks in service), amounts equal to the rate of the member's pensionable earnings calculated as described in paragraph (3)(a) or (b) are treated as pensionable earnings.

(11) Before a calculation of a member's pensionable earnings can be made in accordance with paragraph (3), written notice of the length of the period of absence to which this regulation applies must be given to the Scottish Ministers by—

- (a) the member, where the member is a principal practitioner or a non-GP provider; or
- (b) in all other cases, the relevant Health Board or someone appointed to act on their behalf.

(12) The notice referred to in paragraph (11) must be provided to the Scottish Ministers in such form and manner as the Scottish Ministers may stipulate from time to time.

### **Calculating pensionable earnings of medical practitioners in partnership**

**3.A.9.**—(1) In the case of principal practitioners practising in partnership (with or without a non-GP provider who is a partner in a partnership), the pensionable earnings of each principal practitioner and non-GP provider who is a partner in a partnership is calculated by aggregating the pensionable earnings of each (including for this purpose, any amount that would constitute pensionable earnings in the case of any of them who are not included in this Section of the scheme) and, subject to paragraph (2), dividing the total equally by reference to the number of such partners.

(2) If the principal practitioners and any non-GP providers who are partners in a partnership do not share equally in the partnership profits, they may elect that each partner’s pensionable earnings correspond to each partner’s share of the partnership profits.

(3) If a registered medical practitioner<sup>(3)</sup> practising in partnership also has earnings in respect of NHS employment otherwise than as a practitioner (under Part 2), the partners may elect that the pensionable earnings of that practitioner, as determined in accordance with paragraph (1) or (2), must be reduced by the amount of those earnings and the pensionable earnings of each of them (including that practitioner) be then increased in proportion to their respective shares of the partnership profits.

(4) The calculations described in paragraphs (2) and (3) are to be made by the Health Board or someone appointed on its behalf to whom the partners are required to give notice of their election in accordance with regulation 3.A.10(1) (elections relating to calculation of pensionable earnings in medical partnerships).

### **Elections relating to calculation of pensionable earnings in medical partnerships**

**3.A.10.**—(1) Principal practitioners who are partners in partnership must exercise the election described in paragraph 3.A.9(2) and (3) (calculation of pensionable earnings of medical practitioners in partnership) by giving notice in writing to the practitioner’s contracting Health Board or someone appointed on its behalf in accordance with this regulation.

(2) The notice must be signed by all the principal practitioners and any non-GP providers in the partnership and must state as a fraction each practitioner’s and non-GP provider’s share in the partnership profits.

(3) In the case of medical practitioners, the notice must state the name of every Health Board on whose list the name of any practitioner in the partnership is included.

(4) A notice given under this regulation—

(a) takes effect—

(i) from the date agreed between the practitioners and the Health Board concerned or someone appointed on its behalf; or

(ii) if no agreement is reached, a date decided by the Scottish Ministers;

(b) continues in effect until cancelled, or amended by a subsequent notice in writing signed by all the practitioners in partnership; and

(c) is automatically cancelled upon a change in the members of the partnership.

(3) “Registered medical practitioner” is defined in Schedule 1 to the Interpretation Act 1978 (c.30), as amended by S.I. 2002/3135.

### **Meaning of pensionable earnings in relation to other practitioners**

**3.A.11.**—(1) In the case of an assistant practitioner, pensionable earnings means—

- (a) all salary, wages, fees and other regular payments paid to the practitioner by an employing authority in respect of the performance of essential services, additional services, enhanced services, dispensing services, OOH services, commissioned services, certification services, collaborative services, general dental services or pharmaceutical services;
- (b) allowances and other sums (but excluding payments made to cover expenses) paid by an employing authority in respect of board and advisory work; and
- (c) practice-based work carried out in educating or training, or organising the education or training of, GP registrars or practitioners,

but does not include bonuses or payments made to cover expenses or for overtime.

(2) In the case of a locum practitioner, pensionable earnings means all fees and other payments made to the locum practitioner in respect of the provision of locum services (but excluding payments made to cover expenses or for overtime), less such expenses as are deductible in accordance with guidance laid down by the Scottish Ministers.

(3) In this regulation, references to the provision of locum services, in relation to a practitioner, are to primary medical services, commissioned services, collaborative services or pharmaceutical services performed by a practitioner engaged by an employing authority under a contract for services to deputise for a registered medical practitioner or to temporarily assist in the provision of such services.

(4) The pensionable earnings of an assistant practitioner or a locum practitioner, include the amount of any pensionable earnings the practitioner is entitled to count under Chapter 3.K (2008 Section Optants).

### **Exclusions and deductions from pensionable earnings: all practitioners**

**3.A.12.** Any sum that is withheld or otherwise recovered from a practitioner under the National Health Service (Service Committees and Tribunal) (Scotland) Regulations 1992<sup>(4)</sup> is to be excluded or deducted from the practitioner's pensionable earnings in such manner and to such extent as the Scottish Ministers may approve.

### **Limit on pensionable earnings: dental practitioners carrying on deceased person's business**

**3.A.13.** In the case of a dental practitioner employed by persons carrying on a deceased practitioner's dentistry business, pensionable earnings cannot exceed the total of the amount paid to the dental practitioner by those persons, plus any amounts paid to the practitioner by a Health Board that those persons allow the practitioner to retain.

### **Out of hours providers**

**3.A.14.**—(1) In this Part, an “OOH provider” means—

- (a) a company limited by guarantee (which is not otherwise an employing authority)—
  - (i) in which all the members of the company are registered medical practitioners<sup>(5)</sup>, HBPMS contractors, GMS practices or section 17C agreement providers and the majority of those members are—

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(4) [S.I. 1992/434](#). The Regulations were revoked by [S.S.I. 2006/330](#).

(5) “Registered medical practitioner” is defined in Schedule 1 to the Interpretation Act [1978 \(c.30\)](#), as amended by [S.I. 2002/3135](#).

- (aa) HBPMS contractors, GMS practices or section 17C agreement providers whose HBPMS contracts, GMS contracts or section 17C agreements require them to provide OOH services; or
- (bb) registered medical practitioners who are partners or shareholders in an HBPMS contractor, a GMS practice or section 17C agreement provider which is a partnership or a company limited by shares and which is required to provide OOH services under its HBPMS contract, GMS contract or section 17C agreement;
- (ii) which has a contract with a Health Board, an HBPMS contractor, a GMS practice or a section 17C agreement provider for the provision of OOH services;
- (iii) in respect of which a Health Board appointed by the Scottish Ministers to act on their behalf—
  - (aa) is satisfied that the provision of OOH services by the company is wholly or mainly a mutual trading activity;
  - (bb) is satisfied that the company has met all the conditions for being an OOH provider in this regulation; and
  - (cc) has, pursuant to a written application made by the company to it for that purpose, approved the company as an employing authority; or
- (b) some other body corporate (which is not otherwise an employing authority) which—
  - (i) operates in the interests of those who are the recipients of the primary medical services it provides or the general public;
  - (ii) operates on a not for profit basis;
  - (iii) is not an associated company in relation to another person;
  - (iv) has memorandum or articles or rules which—
    - (aa) prohibit the payment of dividends to its members;
    - (bb) require its profits (if any) or other income to be applied in promoting its objects; and
    - (cc) require all assets which would otherwise be available to its members generally to be transferred on its winding up either to another body which operates on a not for profit basis and whose purpose is to provide health or social care for the benefit of the community or to another body the objects of which are the promotion of charity and anything incidental or conducive thereto;
  - (v) has at least one member who is—
    - (aa) an HBPMS contractor, a GMS practice or a section 17C agreement provider;
    - (bb) a partner in a partnership which is an HBPMS contractor, a GMS practice or a section 17C agreement provider; or
    - (cc) a shareholder in a company limited by shares that is an HBPMS contractor, a GMS practice or a section 17C agreement provider;
  - (vi) has a contract with a Health Board, an HBPMS contractor, a GMS practice or a section 17C agreement provider, for the provision of OOH services; and
  - (vii) is approved as an employing authority by a Health Board appointed by the Scottish Ministers to act on their behalf—
    - (aa) pursuant to a written application made by the body to it for that purpose; and

(bb) that Board being satisfied that the body has met all the conditions for being an OOH provider in this regulation.

(2) For the purposes of paragraph (1)(b)(iii), a body corporate is to be treated as another person's "associated company" if that person has control of it, except where that person is an employing authority, and for these purposes a person is to be taken to have control of a body corporate if they exercise, or are able to exercise, or are entitled to acquire direct or indirect control over its affairs.

(3) A company limited by guarantee or other body corporate which provides or is to provide OOH services and which wishes to be approved as an employing authority must make a written application to a Health Board appointed by the Scottish Ministers to act on their behalf ("the appointed Board").

(4) An application referred to in paragraph (3) may specify a date from which approval by the appointed Board (if given) is to have effect (the "nominated date").

(5) Where a company limited by guarantee or other body corporate makes an application and—

(a) the appointed Board is satisfied that the company or other body corporate meets the conditions for approval or will do so at any nominated date which is later than the date on which approval is actually given (the "approval date"); and

(b) it approves that application,

that approval takes effect on the later of the nominated date (if any) and the approval date.

(6) NHS employment is to be treated as commencing on the later of the nominated date (if any) and the approval date.

(7) For the purposes of this regulation—

(a) the conditions for approval are those referred to in paragraph (1)(a) or (b) as the case may be; and

(b) the nominated date cannot be earlier than 1st April 2004.

(8) The appointed Board may give an OOH provider a notice in writing terminating its participation in this Section of the scheme where that provider—

(a) does not have in force a guarantee, indemnity or bond as required by the Scottish Ministers in accordance with regulation 3.C.4(2) (guarantees, indemnities and bonds); or

(b) has ceased to satisfy the conditions for approval;

(c) has notified or has an obligation to notify the Board that any one of the following events has occurred in respect of the OOH provider—

(i) a proposal for a voluntary arrangement has been made or approved under Part 1 (company voluntary arrangements) of the Insolvency Act 1986<sup>(6)</sup> ("the 1986 Act");

(ii) an administration application has been made, or a notice of intention to appoint an administrator has been filed with the court, or an administrator has been appointed under Schedule B1 (administration) to the 1986 Act<sup>(7)</sup>;

(iii) a receiver, manager or administrative receiver has been appointed under Part 3 (receivership) of the 1986 Act;

(iv) a winding up petition has been presented, a winding up order has been made or a resolution for voluntary winding up has been passed under Part 4 (winding up of companies registered under the Companies Acts) or Part 5 (winding up of unregistered companies) of the 1986 Act or an instrument of dissolution has been drawn up in accordance with section 58 (instrument of dissolution) of the Industrial and Provident Societies Act 1965<sup>(8)</sup>; or

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<sup>(6)</sup> 1986 c.45.

<sup>(7)</sup> Schedule B1 was inserted by Schedule 16 of the Enterprise Act 2002 (c.40).

<sup>(8)</sup> 1965 c.12. Section 58 was amended by S.I. 2001/2617 and 3649 and 2011/2687.

- (v) notice has been received by the OOH provider that it may be struck off the register of companies, or an application to strike it off has been made, under Part 31 (dissolution and restoration to the register) of the Companies Act 2006<sup>(9)</sup>.
- (9) An OOH provider—
  - (a) must give the appointed Board notice in writing upon the occurrence of any of the events referred to in paragraph (8)(c) and must give such notice on the same day as that event; and
  - (b) that wishes to cease to participate in this Section of the scheme must give the appointed Board and its employees not less than three months' notice in writing (to commence with the date of the notice) of that fact.
- (10) An OOH provider ceases to participate in this Section of the scheme on—
  - (a) such date as the appointed Board may specify in notice under paragraph (8); or
  - (b) the day upon which the period referred to in paragraph (9)(b) expires where a notice under that paragraph has been given.