

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE PENSION SCHEMES (MEMBER
CONTRIBUTIONS ETC.) (AMENDMENT) REGULATIONS 2022

2022 No. 273

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ('DHSC') and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) (the '2015 Regulations') to make changes to member contribution rates and the way that they are determined.
- 2.2 Specifically, this instrument changes the mechanism for determining member contribution rates so that contributions are based on actual annual rates of pensionable pay from 1 October 2022 instead of members' notional whole-time equivalent pay. The member contribution structure is amended to introduce new contribution rates and pay thresholds for those rates. This instrument also introduces a structure for changing the pay thresholds annually, if required.
- 2.3 This instrument implements the first phase of the changes to the member contribution structure, with further changes planned to follow in 2023.
- 2.4 This instrument also makes temporary modifications to the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) (the '1995 Regulations'), the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) (the '2008 Regulations') and the 2015 Regulations to suspend restrictions which apply to members who partially retire or return to NHS employment when in receipt of NHS Pension Scheme benefits.
- 2.5 The aim of these temporary modifications is to allow retired and partially retired staff to be able to return to NHS employment during the pandemic response period and work without having the payment of their pension benefits abated or suspended.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 22 of the Public Service Pensions Act 2013 (the '2013 Act') provides the procedures to be followed when changing the protected elements of scheme regulations within the protected period. Amendments to members' contribution rates are a protected element of scheme regulations under section 22(5) of the 2013 Act.
- 3.2 Accordingly, DHSC has consulted with the persons (or representatives of the persons) who appear to the Secretary of State likely to be affected by this instrument with a view to reaching agreement on the changes to member contributions contained in Part 2. Additionally, a report setting out why the Secretary of State proposes to make these

regulations has been laid before Parliament in accordance with section 22(2)(b) of the 2013 Act. The amendments contained in Part 2 of this instrument have effect from 1 October 2022.

- 3.3 Part 3 of this instrument makes temporary modifications to the NHS Pension Scheme regulations described in paragraph 2.4 and comes into force immediately after the expiry of section 45 of the Coronavirus Act 2020. Regulation 9 provides that the modifications in Part 3 apply until the end of 31 October 2022.
- 3.4 DHSC regrets that this instrument breaches the rule that statutory instruments subject to the negative resolution procedure should normally be laid, and copies provided to the Committee, at least 21 days before the instrument comes into force (“the 21-day rule”). It is necessary for Part 3 of this instrument to come into force immediately after the expiry of section 45 of the Coronavirus Act 2020 and in order to do this the instrument will breach the 21-day rule.
- 3.5 The provisions in Part 3 reproduce temporary measures introduced by section 45 of the Coronavirus Act 2020 as part of the Government’s response to the Coronavirus pandemic, which is a fast paced and changing situation. These provisions preserve the law as it currently stands for a further seven months, providing continuity for members and maintaining NHS workforce capacity benefits. These temporary provisions have been consulted on in accordance with the statutory requirements and have been laid as soon as possible thereafter but will regretfully breach the 21-day rule.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Public Service Pensions Act 2013 provides the power for the Secretary of State to make regulations establishing the NHS Pension Scheme. The Superannuation Act 1972 provided equivalent powers prior to 2013. This instrument amends the 1995 Regulations, the 2008 Regulations, and 2015 Regulations. Part 2 of this instrument only amends the 2015 Regulations in respect of member contributions provisions. Part 3 of this instrument makes temporary modifications to all three sets of NHS Pension Scheme regulations. Further background on these changes is set out in section 7 below (‘Policy background’).
- 6.2 A separate instrument making changes to the NHS Pension Scheme regulations to prospectively address discrimination that arose when existing public service pension schemes were closed to certain members between 2014 and 2016 will be laid before parliament following passage of the Public Service Pensions and Judicial Office Bill. The provisions in that instrument are aligned with changes in other public service pension schemes to implement a uniform cross-government remedy in response to the discrimination, whilst the provisions in this instrument implement NHS Scheme

specific policy. Therefore, for the purpose of clarity and to aid understanding, relevant changes are contained in two separate instruments.

7. Policy background

What is being done and why?

Amendments to the 2015 Regulations member contribution provisions – Part 2 of this instrument

- 7.1 Part 2 of this instrument amends the member contribution structure, which determines the amount of contributions that members pay for access to the NHS Pension Scheme.
- 7.2 Since 2008, the NHS Pension Scheme has had a tiered member contribution structure in which higher earners contribute a higher percentage of their earnings towards pension membership than lower earners. This was to reflect that higher earners were likely to receive proportionately more pension benefits than lower earners over the course of their retirement, due in part to their final salary link.
- 7.3 However, from 1 April 2022 all scheme members will move to a Career Average Revalued Earnings (CARE) model for future benefit accrual. This change, to be introduced as part of the Public Service Pensions and Judicial Offices Bill, ensures that the costs and benefits of the scheme are more evenly shared.
- 7.4 DHSC therefore consulted with the Scheme Advisory Board to develop proposals for an updated member contribution structure, with a view to reaching agreement, which reflects the move to a CARE scheme. The Scheme Advisory Board is a statutory board comprising of trade union and employer representatives, that advises the Secretary of State for Health and Social Care on the merits of making changes to the NHS Pension Scheme. As part of these reforms, the proposals considered that:
- Members' contribution rates would change to be based on actual pensionable pay rather than members' notional whole-time equivalent pay.
 - The structure for member contributions would change.
 - The thresholds for the member contribution tiers would be increased in line with annual Agenda for Change pay awards.
 - The proposed member contribution structure would be phased over two years.
- 7.5 Whilst the Scheme Advisory Board could not reach a consensus view on their preferred proposal, DHSC carefully considered their views when developing the proposal to put out to public consultation (details of the consultation outcome are set out in section 10 below).
- 7.6 In order to introduce these reforms, the 2015 Regulations are amended as follows:
- 7.6.1 Regulations 3 and 4 of this instrument make amendments to Regulation 30 and Regulation 31 of the 2015 Regulations respectively. Regulations 30 and 31 set out the contribution rates that members of the scheme will pay depending on their pensionable earnings. The contribution table shows the percentage contribution rates that apply to a member's pensionable earnings depending where those earnings fall within seven pensionable earnings bands. The amendments contained in this instrument provide new contribution rates and pensionable bands that will apply from 1 October 2022. In paragraph 3 of Regulation 30, "each scheme year from 2015/16" is replaced with "the scheme year 2022/23" to reflect the introduction of the new

structure. The table in paragraph 3 is replaced with an updated table of contribution rates which take effect during the 2022/23 scheme year from 1 October 2022.

- 7.6.2 Regulations 3 and 4 of this instrument also introduce a second contribution table in Regulation 30 and 31 of the 2015 Regulations. The purpose of this table is to allow the pensionable earning bands to be updated by further regulations if there is an Agenda for Change national pay rise in any scheme year. In the 2015 Regulations, members in scope of regulation 30 have their contribution rate assessed using pensionable earnings received during the preceding year or current scheme year. The majority of members have their contribution rate based on pensionable pay in the previous scheme year if they were employed with the same employing authority in the previous and current scheme year and if one of the cases in paragraph 2 of Schedule 11 of the 2015 Regulations applies to their circumstances. If a member starts or changes employment in the current scheme year, or none of the cases in paragraph 2 of Schedule 11 apply, then the member's annualised current pay is used to determine their pensionable pay for the purposes of setting a contribution rate. Different tables are used depending on whether it is the previous or current year that their pensionable pay is based on, as if there is an increase in bands to take into account an Agenda for Change pay reward, this ensures that rates are based on the bands for that particular year and whether this includes any increase in pay following a pay reward. It ensures that staff pay the correct contribution rates, regardless of when they received a promotion or started in employment with their current employer. The second table is, for now, the same as the first table but will be updated as soon as reasonably practicable to take account of any Agenda for Change pay uplift that may apply from the beginning of the 2022/2023 Scheme year. Providing the necessary structure in regulations to facilitate this in advance of any such changes has two purposes. Firstly, it is hoped that it may aid understanding of how contribution assessment will work in future and, secondly, it will assist with the timely implementation in regulations of any newly updated contribution table.
- 7.6.3 Regulations 5 and 6 of this instrument amend Regulations 38 and 39 of the 2015 Regulations respectively to ensure the references to the table in Regulation 31 are correct, and that they reflect the updated table of contributions introduced from 1 October 2022.
- 7.6.4 Regulation 7 of this instrument amends Schedule 11 of the 2015 Regulations. Schedule 11 sets out how a member's pensionable earnings are determined for the purpose of establishing which band and therefore which contribution percentage rate applies to the member.
- 7.7 Schedule 11 is amended to reflect that members have their contribution rate calculated based on actual earnings rather than their notional whole-time equivalent under the new contribution structure. The table in paragraph 2 is amended to include updated and simplified case examples of how contribution rates are calculated under the new structure. Schedule 11 is also amended to make it clear which table in the amended regulation 30 of the 2015 Regulations will be used to determine a member's contribution rate. If a member is within scope of amended paragraph 2 of Schedule 11, their pensionable earnings will be based on their pay in the previous scheme year, and so these members will use the first table in Regulation 30 of the 2015 Regulations. If a member is within scope of new paragraph 2A or amended paragraph 3 of Schedule 11, their pensionable earnings will be based on their pay in the current

scheme year, and so these members will use the second table in Regulation 30 of the 2015 Regulations.

- 7.7.1 Finally, regulation 8 of this instrument makes a consequential amendment to paragraph 4(5) of Schedule 12 of the 2015 Regulations to insert a reference to the relevant table of member contributions for Practitioners.

Amendments to the 1995 Regulations, 2008 Regulations and 2015 Regulations – Part 3 of this instrument.

- 7.8 Part 3 of this instrument temporarily modifies the 1995 Regulations, 2008 Regulations, and 2015 Regulations to omit regulations that provide for pension abatement or suspension. This is to enable retired and partially retired staff to return to work, or increase their working capacity if they have already returned, without having their pension benefits abated or suspended.
- 7.9 The provisions modified by Part 3 of this instrument have been suspended since 25 March 2020 by amendments made under section 45 of the Coronavirus Act 2020. The amendments in Part 3 are temporary and will take effect immediately following the expiry of Section 45 of the Coronavirus Act 2020 on 24 March 2022 until the end of 31 October 2022.
- 7.10 The provisions made under section 45 of the Coronavirus Act were introduced to help boost NHS workforce capacity during the coronavirus pandemic response, by allowing retired and partially retired staff to return to work or increase their working commitments without affecting their NHS pension. The Government has listened to concerns from the service that a further continuation of these provisions is required beyond the planned expiry of Section 45. This instrument therefore amends National Health Service Pension Scheme Regulations to provide a continuation of these provisions to 31 October 2022, to assist NHS workforce capacity during the ongoing pandemic response.
- 7.11 Regulation 10(a) omits regulation S1 of the 1995 Regulations so that a member who has recently retired from the NHS and elects to immediately return at a capacity of above 16 hours per week will not have their pension suspended.
- 7.12 Regulation 10(b) omits the reference to Regulation S2(1A)(c) in paragraph (3) of regulation S2 of the 1995 Regulations. Regulation S2(1A)(c) applies to members who are “special class officers”. Special class officers are able to access their pension benefits at age 55 rather than 60. If a special class officer in receipt of benefits returns to work before the age of 60, they will have their pension abated in accordance with regulation S2(3) of the 1995 Regulations. Removing the reference to Regulation S2(1A)(c) in regulation S2(3) will allow special class officer members to return to NHS work, or increase their working commitment if they have already returned without having their pension abated.
- 7.13 The 2008 Regulations and the 2015 Regulations make provision for the partial retirement of members. Members exercising this option are able to draw down a portion of their pension on the condition that they reduce their pensionable pay (or level of commitment to the NHS) by at least 10%.
- 7.14 Regulation 11 omits regulation 2.D.6(2)(a) (abatement of pension following increase in pensionable pay) and regulation 3.D.6(2)(a) (abatement of pension following increase in engagement in employment) of the 2008 Section. Regulation 12 omits regulation 86(3) of the 2015 NHS Pension Regulations. Those regulations in the 2008

Regulations and 2015 Regulations provide that a member will have their pension abated in full if the terms of the member's employment change and their level pay increases within 12 months of the member electing to drawdown their pension.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 DHSC recognises that formal legislatively consolidated pension scheme regulations are good practice and intends to undertake a formal consolidation once Government business allows. In the interim period, the Department has informal full consolidations of NHS Pension Schemes and Injury Benefits regulations incorporating all the changes implemented up to and including those which came into effect on 1 July 2021. These are available on the scheme administrator's website:
<https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations>

10. Consultation outcome

- 10.1 The member contributions proposals and draft regulations in Part 2 of this instrument were published for consultation between and 15 October 2021 and 7 January 2022. 1,031 consultation responses were received. Respondents included NHS organisations, Trade Unions, GP surgeries and medical centres, and medical accountants.
- 10.2 The majority of respondents agreed that that members' contribution rates should be determined by their actual rates of annual pensionable pay and not their notional whole-time equivalent rate. Respondents stated that contribution rates for lower earners should not be increased, but many recognised the rationale for a narrowing of the tiers as members move to a CARE scheme. Respondents were broadly supportive of the proposal that the tier thresholds should be uplifted in line with any centrally agreed annual Agenda for Change pay awards. Respondents had differing views on the proposed phasing of the approach, with some respondents wanting the proposals to be implemented immediately, with others wishing to see them phased over a longer time period.
- 10.3 In accordance with section 22 of the Public Service Pensions Act 2013, DHSC has followed the procedure for making changes to the protected elements of the NHS Pension Scheme within the protected period, including having regard to the desirability of not making a change to member contribution rates (see also paragraphs 3.1, 3.2, 7.4 and 7.5 above). DHSC has also carefully considered the timing of these changes and has listened to concerns from consultation respondents that the proposals would be introduced at a time of significant wider economic challenge.
- 10.4 In recognition of this, DHSC decided to delay the implementation of the new member contribution structure to 1 October 2022.
- 10.5 The consultation response document is available at:
<https://www.gov.uk/government/consultations/nhs-pension-scheme-proposed-changes-to-member-contributions>
- 10.6 The retire and return proposals and draft regulations in Part 3 of this instrument were published for consultation between 15 February 2022 and 1 March 2022. 990

consultation responses were received. Respondents included NHS organisations and Trade Unions.

10.7 Respondents were almost universally supportive of the proposed changes to the NHS Pension Scheme Regulations in Part 3 of this instrument to continue the temporary easements for a further period. A number of respondents argued that the continuation should be extended for longer than 31 October 2022 but DHSC remains of the view that this is an appropriate duration for the temporary provisions.

10.8 The consultation response document is available at:
<https://www.gov.uk/government/consultations/nhs-pension-scheme-proposed-continuation-of-temporary-easements>

11. Guidance

11.1 Pension scheme guidance is provided via a range of resources including factsheets, online videos and scheme guides on the scheme administrator's website:
<https://www.nhsbsa.nhs.uk/nhs-pensions>

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is minimal, but these changes will impact the NHS workforce and members of the NHS Pension Scheme. The changes to member contributions will mean that some members will pay a higher contribution rate from 1st October 2022, and some will pay less. Approximately 40% of members will receive a reduction in contributions, and 54% will continue to pay less than the average 9.8% rate.

12.3 The net impact of these changes on scheme contribution income, and required income against the 9.8% yield will be assessed at the next quadrennial actuarial valuation of the scheme. This will consider other factors which affect scheme costs.

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

13. Regulating small business

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

14. Monitoring & review

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

14.2 The instrument does not provide for a review pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (S.I. 2015/26) (Duty to review regulatory provisions in secondary legislation).

14.3 DHSC does not consider that the NHS Pension Schemes 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.

15. Contact

- 15.1 Johanna Rhodes at the Department of Health and Social Care Telephone: 011325 45195 or email: Johanna.rhodes@dhsc.gov.uk can be contacted with any queries regarding this instrument.
- 15.2 Tim Sands, Deputy Director for NHS Pensions policy at the Department of Health and Social Care, can confirm that this explanatory memorandum meets the required standard.
- 15.3 Edward Agar MP, Minister of State for Health at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.