

EXPLANATORY MEMORANDUM TO
THE HEALTH AND SOCIAL CARE ACT 2008 (REGULATED ACTIVITIES)
(AMENDMENT) (NO. 2) REGULATIONS 2023

2023 No. 1404

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument amends Regulation 19 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (“the 2014 Regulations”) to remove the requirement for service providers to obtain a full employment history of health and care volunteers when appointing them for the purposes of carrying out a regulated activity (regulated activity is defined in section 8 of the Health and Social Care Act 2008 and prescribed in regulation 3 of the 2014 Regulations).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is being laid in Parliament the day after another set of Regulations which amend the 2014 Regulations (“the Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2023”).
- 3.2 Consideration was given to the consolidation of these two instruments.
- 3.3 However, it was considered that doing so would impact on the ability to meet the agreed Parliamentary laying date. Preference was given to laying these Regulations before December recess period so that the amendments made by the instrument can help contribute towards streamlining the volunteer appointment and onboarding process for providers and volunteers during the period of increased winter pressure on health and care services.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

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

6. Legislative Context

Health and Social Care Act 2008

- 6.1 The 2014 Regulations are made under the Health and Social Care Act 2008 (“the Act”). The Act established the Care Quality Commission and gave it the function of maintaining a registration system for service providers of health and social care who carry on a regulated activity.

Regulated Activity

- 6.2 A ‘regulated activity’ is a term defined in section 8 of the Act and prescribed in the 2014 Regulations (see regulation 3 and Schedule 1 to the 2014 Regulations). Regulation 3 of the 2014 Regulations states that an activity which is ancillary to, or is carried on wholly or mainly in relation to, a regulated activity shall be treated as part of that activity. Therefore, a large amount of the tasks undertaken by Health and Care Volunteers (HCVs) fall in scope of ‘regulated activity’.

Health and Care Volunteers

- 6.3 Currently, regulation 19 of the 2014 Regulations requires service providers to be able to make available, in relation to each person employed, the information specified in Schedule 3 to the 2014 Regulations. The reference to “each person employed” includes a person employed under arrangements to provide their services voluntarily (see regulation 2(1) and 2(2) of the 2014 Regulations for the definition of “employment”). Therefore, many HCVs are treated the same as paid, substantive staff in relation to pre-employment checks required to recruit and deploy them.

Information Requirements

- 6.4 The information listed in Schedule 3 includes a person’s “full employment history, together with a satisfactory written explanation of any gaps in employment” (see paragraph 7 of Schedule 3).

Amendments to the 2014 Regulations

- 6.5 An amendment is being made to Regulation 19 so that service providers are not required to make available the information set out in paragraph 7 of Schedule 3 (full employment history) with respect to volunteers, unless they are a case to which regulation 4, 6 or 7 applies. Regulation 5 is already covered by regulation 19(6).
- 6.6 Therefore this instrument exempts appointing service providers from the requirement to make available for CQC a full employment history with respect to volunteers. However, where the service provider is dealing with a volunteer to which the requirements set out in regulations 4,6 or 7 (concerning directors, providers, and registered managers) applies, the requirement to make available information regarding full employment history will still apply with respect to those volunteers.

Consultation Requirements

- 6.7 Before making Regulations under section 20 the Act, section 20(8) requires the Secretary of State to consult such persons as the Secretary of State considers appropriate, except with respect to Regulations which amend other Regulations made under section 20 and which do not, in the opinion of the Secretary of State, effect any substantial change in the provision made by those Regulations. In respect of the amendments being made by this instrument the Secretary of State has concluded that,

in accordance with section 20, a consultation is required and, accordingly, one has been carried out.

7. Policy background

What is being done and why?

- 7.1 This instrument removes the requirement for service providers to make available a full employment history with respect to volunteers as part of the pre-employment check processes required by Regulation 19 of the 2014 Regulations, in order to streamline volunteer appointment processes, remove barriers for applicants, and reduce unnecessary administrative barriers for providers.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.2 Prior to the changes made by this instrument Regulation 19 (fit and proper persons employed) of the 2014 Regulations required appointing providers to be able to make available “a full employment history, together with a satisfactory written explanation of any gaps in employment.” This requirement extended to volunteers as well as paid, employed staff.

Why is it being changed?

- 7.3 This change is being made so that service providers do not need to obtain from volunteers potentially excessive amounts of unnecessary information that is not pertinent to the role for which those volunteers are applying, and to remove barriers to volunteering for groups who may be disadvantaged by being required to provide a full employment history such as older volunteers. A full employment history does not provide safeguarding for those who volunteers come into contact with and there are other checks in place in the 2014 Regulations which contribute to more effectively meeting safeguarding risks such as DBS checks, references, and ID checks. This change will also bring health and care volunteering pre-employment checks closer into alignment with volunteering requirements in other similar sectors.
- 7.4 It is also being made to reduce unnecessary administrative burden for appointing service providers who do not usually utilise a full employment history in making appointment decisions concerning volunteers. This will allow appointing providers time to focus on other safeguarding measures such as thorough inductions, training and monitoring of applicants.

What will it now do?

- 7.5 This instrument will exempt providers from the requirement to be able to make available full employment history with respect to volunteers except where regulations 4, 6 or 7 apply.

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.

9. Consolidation

- 9.1 Consolidation is not being done.

10. Consultation outcome

- 10.1 A public consultation was carried out, which was published on gov.uk and ran between 19 September 2023 and 18 November 2023. Responses to the consultation were sought from service providers, volunteer managers, voluntary, community and social enterprise (VCSE) organisations, volunteers, staff and the public. The consultation asked whether the full employment history requirement poses challenges to the appointment process and whether it is necessary to inform appointment decisions. It also sought to understand whether the remaining required pre-employment checks would be enough to ensure the suitability of volunteer applicants.
- 10.2 160 responses to the consultation were received, 61 from respondents sharing their personal views, 64 from respondents sharing their professional views, and 35 from respondents sharing views on behalf of an organisation.
- 10.3 Consultation responses indicated an appetite for change to the existing regulations, with significant numbers saying the full employment history posed a challenge to the recruitment process and had little or no bearing on decisions to appoint volunteers. Some respondents raised concerns that the removal of the full employment history may result in a reduction in safeguarding measures during the pre-employment check process. However, the remaining checks required in the 2014 Regulations (such as DBS checks, references, ID checks etc) mitigate any potential safeguarding concerns and are far more robust than regulatory pre-employment checks required in other, similar sectors when appointing volunteers. Also, the purpose of a full employment history is that it forms part of the checks to ensure a candidate has the skills and experience suitable for a role and should not be relied upon as a safeguarding measure as it is not effective at ensuring safeguarding.

11. Guidance

- 11.1 DHSC officials will work with NHS Business Services Authority, NHSE England, Care Quality Commission, and key stakeholders from health and social care as they develop robust guidance to support appointing service providers to implement this change to the 2014 Regulations including reflecting the change in the NHS Employment Standards. Guidance for health and care providers and amendments to the NHS Employment Standards will be made available as soon as possible after laying.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies, and public sector is that those service providers of health and adult social care who carry on regulated activities are no longer required to obtain a full employment history when appointing volunteers. This will mean that administrative burden on providers is reduced and their staff can then focus on other more effective safeguarding measures to ensure volunteer appointment processes are robust and diligent. The removal of the full employment history requirement will not detrimentally impact the safeguarding of patients and vulnerable members of the public given the other extensive safeguarding checks that remain in place in regulation for the appointment of health and care volunteers including DBS checks, checks on previous conduct in employment relating to health and care or children or vulnerable adults, and ID checks. Appointing providers may wish to alter their existing application forms as a result of the regulatory change.

- 12.2 In addition, DHSC will review this change within two years of the new regulations coming into effect to evaluate the impact of the change.
- 12.3 A full Impact Assessment has not been prepared for this instrument because there is a low level of impact per business.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No further action has been taken to minimise the impact of the requirements on small businesses as impact will be minimal and appointing providers can still collect a full employment history from volunteer applicants should they wish to.

14. Monitoring & review

- 14.1 Sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 (SBEE Act 2015), which came into force on 1 July 2015, place a statutory duty on UK Government Ministers to either include review provisions in secondary legislation that regulates business or voluntary or community bodies or else publish a statement that it is not appropriate in the circumstances to do so.
- 14.2 For the purposes of section 31(2)(b) of SBEE Act 2015, it is determined that it is disproportionate to include a provision to review the amendments made by this instrument to the 2014 Regulations. This is supported by the analysis which shows the costs to business are unlikely to be significant. With regards to section 15(c) of the statutory guidance under section 31 of the SBEE Act 2015, there is an existing sunset provision contained in regulation 1(6) of the 2014 Regulations. The 2014 Regulations are due to expire after 31 March 2025 which is before any review provision in this instrument would be required to be completed. It is intended that a further amending instrument to implement any changes following a review of the 2014 regulations will be made before the expiry date for the 2014 Regulations.
- 14.3 The approach to monitoring of this legislation is that the department will carry out an evaluation of the regulatory change within two years after the date the new regulations come into effect to ensure no unforeseen policy consequences arise from this change and the policy intention underpinning the change is met. We will carry out this review through further engagement with health and care stakeholders and monitoring of available volunteer data in health and care.

15. Contact

- 15.1 Sarah Little at the Department of Health and Social Care Telephone: +44 113 254 6103 email: sarah.little@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Phil Harper, Deputy Director for Professional Regulation, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister of State for Social Care, Helen Whately at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.