

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE PENSION SCHEME (AMENDMENT)**  
**REGULATIONS 2010**

**2010 No. 1634**

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

The memorandum contains information for the Joint Committee on Statutory Instruments and for publication on the Office of Public Sector Information website.

2. **Purpose of the instrument**

- 2.1 The main purpose of this instrument is to introduce amendments that address issues raised by the Joint Committee on Statutory Instruments (JCSI) in connection with regulations providing for the rate of member and employer contributions to the NHS Pension Scheme.

- 2.2 This instrument also makes further technical changes relating to pensions provided to National Health Service staff.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 Regulation 5 makes amendments with retrospective effect from 6 April 2010.

- 3.2 Regulations 6 and 9 make amendments with retrospective effect from 1 November 2009.

4. **Legislative Context**

- 4.1 **Part 2** of the SI amends the National Health Service Pension Scheme Regulations 1995 (S.I.1995/300) (**the 1995 Section**).

- 4.2 **Part 3** of the SI amends the National Health Service Pension Scheme Regulations 2008 (SI 2008/653) (**the 2008 Section**).

- 4.3 All the above regulations were made under sections 10 and 12 of, and Schedule 3 to, the Superannuation Act 1972.

- 4.4 **Part 4** of the SI provides an option to persons detrimentally affected by these Regulations to elect for those provisions not to apply in certain circumstances.

5. **Territorial Extent and Application**

The instrument applies to England and Wales.

## 6. **European Convention on Human Rights**

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

## 7. **Policy Background - What is being done and why** **Member and Employer Contributions - Overview**

7.1 From 1 April 2008, four member contribution tiers have operated in both Sections of the NHS Pension Scheme. Rates range from 5% to 8.5% and members are allocated to a tiered rate according to the band into which their pay falls. The pay bands are uprated annually based on increases made to the NHS Agenda for Change pay scales. Currently, the regulations permit the Secretary of State to implement the uprated bands<sup>1</sup> and alter member contribution rates by making a determination outside of the regulations.

7.2 S.I. 2009/381 (effective from 1 April 2009) amended the regulations providing for tiered contribution rates. The JCSI drew the special attention<sup>2</sup> of both Houses of Parliament to that SI because there was doubt that regulations providing for the Secretary of State to implement uprated bands via a direction were *intra vires*. The remedy is for the uprated bands to be implemented annually via further amending regulations. The uprated pay/earnings bands for the scheme year 1 April 2010 to 31 March 2011 are being implemented via this amending SI<sup>3</sup>.

7.3 As a consequence of various exchanges with the JCSI on this matter, the current employer contribution rate of 14% is also to be specified in regulations.

7.4 In addition, we have taken the opportunity to better marshal 2008 Section regulations that deal with the member and employer contributions due in respect of members who are non-GP providers.

### **Member and Employer Contributions - in detail**

#### 7.5 **Members other than practitioners and non-GP providers**

Amending regulation 3 amends 1995 Regulation D1 (contributions by members),

Amending regulations 11 and 12 amend 2008 Regulations 2.C.2 (members' contribution rate) and 2.C.3 (employees) respectively

- *Mechanism for changing the pay bands*

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<sup>1</sup> with the consent of HM Treasury and after taking advice from the Scheme Actuary and employee and employer representatives

<sup>2</sup> See the JCSI's twelfth report of 2008/9 published on 6 May 2009 relating to 1995 Section regulations D1(2), paragraph 10(2A) of Schedule 2, and 2008 Section regulation 3.C.2.(3)

<sup>3</sup> It is expected that amending regulations to implement uprated bands will be made around July in each scheme year with retrospective effect to 1 April of that scheme year.

(1) Provisions that provided for the Secretary of State to amend the pay bands and contribution rates by making a determination have been removed. The bands and rates applicable to each scheme year may only be changed via amending regulations.

- *Insertion of two updated tables containing pay bands and contribution rates*

**Group 1 – members other than practitioners and non-GP providers who are employed by the same employer at the end of the last scheme year and the beginning of the current scheme year**

(2) Each scheme year the tiered rate set for members (other than practitioners and non GP-providers) depends on whether the member was employed with the same employer at the end of the last scheme year and the beginning of the current scheme year. If so, the contribution rates are set by comparing the member's pensionable pay during the last scheme year with the pay bands that applied to that year. For example, in these circumstances pay and pay bands for 2009/10 are used to set the rate for the scheme year 2010/11.

**Group 2 – members other than practitioners and non-GP providers who start a new job in the current scheme year or whose rate of pay for an existing job changes (except if unplanned or unlikely to last for 12 months or more)**

(3) Alternatively, if a member starts a new NHS job or has a change to their rate of pay after 1 April in the current scheme year, the contribution rate for the remainder of that year is set by calculating an annual pay figure and comparing that amount to the updated pay bands that apply from 1 April in that current scheme year. For example, in these circumstances pay and pay bands for 2010/11 are used to set the rate for the scheme year 2010/11. This means that two tables containing pay bands and rates are required for each scheme year. The two tables that apply to the current 2010/11 scheme year have been inserted at 1995 regulation D1(2B)(c) and 2008 regulation 2.C.2(5).

- *Calculating pensionable pay for the purpose of setting a tiered contribution rate*

(4) Various paragraphs in 1995 Regulation D1 ((2E) to (2R) and (2V)) and 2008 Regulation 2.C.3 ((4) to (17) and (21)) deal with the calculation of the pensionable pay which is to be compared to the pay bands in order to set a tiered rate. These paragraphs are amended so that they now refer to the pay bands in the "relevant table".

## 7.6 **Marshaling of 2008 Section's non-GP provider regulations**

Amending regulations 10, 13 and 14 amend, respectively, 2008 Regulations 2.C.1 (contributions by members), 2.C.4 (non-GP Providers) and 2.C.5 (contributions by employing authorities: general).

(1) Provisions formerly contained in regulation 2.C.1 which related specifically to member contributions in respect of non-GP Providers have been moved to renamed regulation 2.C.4 (contribution rate and determination of pensionable earnings for non-GP providers).

(2) Provisions formerly contained in that regulation which related specifically to employer contributions in respect of non-GP Providers have been moved to regulation 2.C.5 (contributions by employing authorities general). The result is a streamlined regulation 2.C.1 which is now focused on generic provisions relating to member contributions for all members other than practitioners.

## **Members who are practitioners or non-GP providers**

7.7 Amending regulation 7 amends paragraph 10 of Schedule 2 to the 1995 Regulations

Amending regulation 13 amends 2008 Regulations 2.C.4 (non-GP Providers)

Amending regulations 15 and 16 amend regulations 3.C.1 (contributions by members) and 3.C.2 (members' contribution rate) respectively.

- ***Mechanism for changing the earnings bands***

(1) Provisions that provided for the Secretary of State to amend the earnings bands and contribution rates for practitioners and non-GP provider members by making a determination have been removed. The bands and rates applicable to each scheme year may only be changed via amending regulations.

- ***Insertion of two updated tables containing earnings bands and contribution rates***

(2) Practitioner and non-GP provider earnings can vary significantly from year to year and are only finalised following completion of their tax return, sometime after the end of the scheme year. This means that from the 2009/10 scheme year onwards, the tiered rates for practitioner and non-GP provider members for any year have been set on a provisional basis using a 'best estimate' of likely earnings. The estimate can be based on finalised earnings and the relevant earnings bands for an earlier year, or an estimate of future earnings and the earnings bands for the current year. Once the actual earnings for the scheme year are known, the final tier is set and, if necessary, the contributions made on a provisional basis are adjusted retrospectively.

(3) This means that the earnings bands for any scheme year are only required to set the final tiered rate. However, to cater for this two-stage process for practitioners and non-GP providers, the earnings bands and rates that apply to both the 2009/10 and 2010/11 scheme years have been included in regulations. The 2010/11 earnings bands may of course be used to set a provisional contribution rate for the 2011/12 scheme year, until the earnings bands and amending regulations for that year become available. (See 1995 Schedule 2, Paragraph 10 new (1A) and 2008 2.C.4 new (15) and 3.C.2 new (17)).

- *Pensionable earnings to be used for the purpose of setting a tiered contribution rate*

(4) Various paragraphs in 1995 regulations Schedule 2 (paragraph 10 (2H), (2I), (2K) and (2L)), and in 2008 regulations 2.C.4 ((6) and (7)) and 3.C.2 ((5), (6), (8) and (9)) deal with the two stage process for setting a contribution rate for practitioners or non-GP providers. These paragraphs have been amended so that they refer to pensionable earnings and contribution rates in the “relevant table”.

### **Employer contribution rates**

- 7.8 Amending regulation 4 amends 1995 Regulation D2 (contributions by employing authorities), and Amending regulations 14, and 17 amend 2008 Regulations 2.C.5 (contributions by employing authorities: general), and 3.C.3 (contributions by employing authorities: general)

(1) Regulations across both Sections of the Scheme that provide for contributions to be made by employers have been amended so that they now uniformly refer to “the employer’s standard rate” of 14 per cent of pensionable pay or earnings.

(2) In addition, 2008 Regulation 2.C.5 has been amended so that it includes provisions relating to employer contributions for non-GP providers which have been moved from regulation 2.C.1.

### **Regulations dealing with actuarial reports and accounts - overview**

- 7.9 The Scheme Actuary is required to prepare an actuarial report of the scheme liabilities and benefits every four years. Regulations have been amended to better reflect the role of the Secretary of State, HM Treasury, the Scheme Actuary, and representatives of employees and employing authorities in the setting of actuarial assumptions on which that report is to be based.

### **Regulations dealing with actuarial reports and accounts – in detail**

- 7.10 Amending regulation 6 amends 1995 Regulation U3 (accounts and actuarial reports), and

Amending regulation 9 amends 2008 Regulations 1.B.1 (actuarial reports and accounts)

Two new paragraphs are inserted into each of the above regulations. The first paragraph ((3A) of U3 and (5) of 1.B.1) provides for the assumptions on which the Scheme Actuary's report is based to be determined by the Secretary of State following the consent of HMT. The second paragraph ((3B) of U3 and (6) of 1.B.1) permits the Secretary of State to consult representatives of employers and members and the Scheme Actuary before determining those assumptions.

### **Regulations dealing with the “contracted out” status of the 1995 Section - overview**

- 7.11 The NHS Pension Scheme contracts its members out of the second state pension and, as a result, the Scheme must reach specific standards in respect of the benefits it will pay. In respect of service up to 5<sup>th</sup> April 1997, the Scheme must pay benefits at State Pension Age (SPA) that are at least equal in value to the benefits the member would have earned from the State Earnings Related Pension Scheme (SERPS). This is known as a guaranteed minimum pension (GMP). However, whilst changes to SPA are being phased in from 6 April 2010, the obligations of occupational pension schemes in respect of GMPs will remain linked to age 60 for women and age 65 for men. Relevant amendments in this SI adjust the terminology used in the 1995 Regulations accordingly from 6 April 2010.

### **Regulations dealing with the “contracted out” status of the 1995 Section – in detail**

- 7.12 **Amending regulation 5** amends Part K (contracting-out) of the 1995 Regulations. This amendment introduces the term “guaranteed minimum pension age” into **regulation K1 (contracting-out conditions to be overriding)** and defines it as meaning the age of 65 for men and the age of 60 for women. It also replaces various references to “state pension age” with references to “guaranteed minimum pension age” in regulations **K2 (guaranteed minimum pensions)**, **K3 (late retirement)**, **K4 (early leavers)** and **K5 (guaranteed minimum pensions transferred to this Section of the scheme)**.
- 7.13 **Persons detrimentally affected by the changes - Amending regulation 18** provides for a deferred member, or a member in receipt of a relevant benefit, whose position under these regulations would be worsened by any retrospective provision, to elect that that provision will not apply to them.

## **Consolidation**

- 7.14 An informal consolidated text of the 1995 and 2008 Regulations amended by this instrument was made available to NHS Trades Unions and other stakeholders during the consultation period. Informally consolidated texts of both sets of regulations incorporating all changes implemented up to and including those which came into effect on 1 April 2010 are available on the NHS Pensions website and may be viewed here <http://www.nhsbsa.nhs.uk/Pensions/2963.aspx>
- 7.15 Whilst the necessary scoping work to consolidate both the 1995 and 2008 Regulations has started, work on the project has been deferred pending a Departmental review of programme budgets.

## **Consultation on the draft regulations**

- 7.16 A formal consultation exercise on the amending regulations began on 11 May 2010 and ended on 8 June 2010. This shortened consultation period reflects the technical and compulsory nature of the changes made in respect of contributions and GMP. It also takes into account a previous consultation exercise on potential amendments to the valuation regulations that ran from 2 April to 13 May 2009.
- 7.17 Amongst those consulted were: NHS Trades Union representatives, NHS Employers; NHS Pensions (the Scheme Administrators); other public service pension Schemes; Government Actuary's Department; the National Audit Office; the devolved administrations; and HM Treasury.

## **8. Consultation outcome**

One response in relation to the amendments made to regulations providing for Scheme Actuarial Reports and Accounts<sup>4</sup> was received from the NHS Pension Scheme Governance Group<sup>5</sup>. In the context of the Scheme's 'cap and share' arrangements, the Group's view was that the permissive amendment which allows the Secretary of State to consult representatives of employees and employing authorities on actuarial assumptions should be expressed as a mandatory requirement in NHS Pension Scheme Regulations. However, as certain of such assumptions are set centrally by HM Treasury rather than the Secretary of State for Health, the Department was not able to agree .

## **9. Guidance (for NHS Staff and NHS employers)**

No additional guidance is being issued in respect of this instrument because it does not introduce any new policies, requirements or procedures.

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<sup>4</sup> See amending regulations 6 and 9

<sup>5</sup> The group comprises representatives from NHS Employers, NHS trades unions, and NHS employing authorities. Where appropriate, this group is required to make recommendations to Health Ministers and HM Treasury on how to implement the Scheme valuation results, in terms of any increase (or decrease) to employee contributions or, alternatively, changes to the benefit structure to reduce (or increase) costs

**10. Impact**

An impact assessment has not been prepared for this instrument.

**11. Regulating small business**

No special consideration is required regarding any impact on the number of small businesses who have access to the NHS Pension Scheme (for example, GP Practices) because, as previously explained, the amendments do not introduce any new policies, requirements or procedures.

**12. Monitoring & review**

NHS Pension Scheme changes are developed, monitored and reviewed in partnership with the NHS Employers organisation and NHS trade unions (the NHS Review Partners), in the light of formal and informal consultation procedures. The Partners report and recommend changes to the Governance Group and the Department of Health, which in turn makes recommendations to the Secretary of State for Health and HM Treasury.

**13. Contact**

Mrs. Peta Cowan at the Department of Health Pensions Policy Team, Tel: 01253 774921 or e-mail [Peta.Cowan@dh.gsi.gov.uk](mailto:Peta.Cowan@dh.gsi.gov.uk) can answer any queries regarding the instrument.