



Department
of Health

The draft National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2016

Consultation response

March 2016

<p>Title: The draft National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2016 Consultation response</p>
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Introduction

1. The Department of Health published for consultation a Statutory Instrument titled The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2016.
2. This instrument will implement reforms to pensions and benefits for NHS workers in England & Wales.
3. The Statutory Instrument proposes a series of amendments to the regulations that provide the rules for the NHS Pension Schemes in England & Wales, the supplementary Additional Voluntary Contribution arrangements and the Injury Benefits scheme that, in summary:
 - enable GPs to pension earnings from sub-contracts where the holder of the main contract is also an NHS employer;
 - clarifies how claimants moving on to Employment & Support Allowance should be assessed;
 - permit the money purchase AVC arrangements to pay lifetime allowance excess lump sums;
 - make consequential changes to scheme rules to accommodate the introduction of shared parental leave, the abolition of contracting-out and the Pension Schemes Act 2015;
 - make technical corrections and refinements to improve the operation of scheme regulations.
4. This document sets out the Government's response to the comments received through consultation.

1. Consultation Process

- 1.1 The draft regulations were subject to an 8-week public consultation which began on 17 December 2015, ending on 12 February 2016.
- 1.2 Alongside the draft regulations, explanatory documents were prepared and are available at <https://www.gov.uk/government/consultations/proposed-changes-to-the-regulations-for-the-nhs-pension-schemes>. Responses to the consultation were invited by email or post.
- 1.3 As part of existing governance arrangements underpinning the NHS Pension Scheme, the major NHS Trade Unions, NHS employers and other interested parties were formally notified of the consultation. The draft regulations and consultation documents were published on gov.uk and the scheme administrator's website.
- 1.4 Six formal responses to the consultation were received. These included two individuals, Hempsons (a law firm representing over 300 GP practices), City and Hackney GP Confederation, an NHS trade union representing dentists (the British Dental Association – BDA), and the Prudential, one of the NHS' money-purchase pension providers.
- 1.5 The Department worked closely with the scheme administrator, the NHS Business Services Authority (NHS BSA), throughout the consultation period and received feedback from NHS BSA on a number of aspects of the consultation.

2. GP Federations

- 2.1 The consultation proposed a number of changes to the scheme rules to respond to issues arising as a result of developments in primary care around organisational forms and ways of contracting.

Sub-contracting

- 2.2 The particular problem identified for GPs, and their practice staff, in relation to work commissioned by GP federations – which are being encouraged and supported by NHS England and through the Prime Ministers' Challenge Fund – was the inability to pension income from sub-contracts between the federation, which holds the main contract, and the individual member practices.
- 2.3 The instrument proposed a number of amendments to the rules around what type of income can be pensioned by GPs (including locums) to include income from prescribed sub-contracts. The respondents who commented upon the changes to GPs' pensionable income all welcomed this move, with one describing the policy as “eminently sensible”.
- 2.4 The use of the prescribed form of sub-contract was commented upon by one respondent, who approved of the use of a sub-contract containing certain minimum standards, but did not believe that mandating use of a particular form of sub-contract (in this case, the NHS standard sub-contract, jointly produced by the Department and NHS England¹) was desirable. The respondent gave the following reasons:

“Mandating a form of subcontract that must be used in any cases is problematic because:

- it would require existing subcontracting arrangements to be re-documented, which will be burdensome;
- it leads to uncertainty. How far can a contract be amended before it ceases to become a contract on NHS standard terms?
- who will police the above?”

Individual Respondent

- 2.5 The Department recognises that there may be existing sub-contracting arrangements in place; however, these will have been entered into in the knowledge that that income would not be pensionable. The Department believes that by publicly consulting on the proposed use of a mandated form of sub-contract from 1 April 2016 it has enabled those considering forms of sub-

¹ <https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services>

contracting from that date, or later, to weigh up whether or not to use the NHS standard sub-contract.

2.6 The Department considers that the use of a mandated form of sub-contract is an important control measure when widening the scheme to new forms of pensionable income. Use of a standard form of sub-contract is one way of ensuring that there is no inappropriate extension of scheme liabilities; allowing the sub-contractor to be confident that income will be pensionable and enabling the scheme administrator to effectively review and audit end of year returns from GP practices and other employing authorities. There will of course be administrative challenges to overcome, however, the Department believes – and no view was received to the contrary – that this is not seen as a problem for GP federations nor for the scheme administrator. The scheme administrator will, as now with other forms of contract, be responsible for ensuring that the sub-contract provided meets the requirements set out in scheme regulations.

2.7 The other aspect of the proposed amendments that was commented upon by Hempsons and the City and Hackney GP Confederation, in very similar terms, related to the fact that the changes only permit income from sub-contracts to an NHS standard contract to be allowed. Both respondents argued that the changes should have gone further, to allow income from sub-contracts from APMS contracts, as well as GMS and PMS contracts, to be pensionable.

“The proposed amendments set out in the consultation only permit practices to pension income received from a sub-contract where the main contract holder holds an NHS standard contract. Where the main contract holder holds a classic APMS contract, the sub-contracting practices are therefore excluded from benefiting from this extension to the pension scheme.”

Hempsons

2.8 The Department has carefully considered these points, but has decided not to widen the scope at this stage for two reasons. Firstly, at present there is no existing standard form of sub-contract to any contract other than to the NHS standard contract. As mentioned above, the use of a standard form of sub-contract is an important control mechanism for the scheme to ensure that there is no inappropriate extension of scheme liabilities.

2.9 Secondly, there is already scope for individual GPs to pension income from contracts held by other practices. A GP partner (i.e. Dr X) or a salaried GP (i.e. Dr Y) in a GMS, PMS or APMS practice (Practice A) can pension income from another GMS, PMS or APMS practice (Practice B).

2.10 If Dr X works at Practice A as a partner, and for Practice B as an individual (either salaried or long-term fee-based GP) Dr X is therefore, in terms used by

the NHS pension scheme regulations, concurrently a type 1 and type 2 medical practitioner. All of the income Dr X receives must be pensioned. However, if Dr X works on a shorter term fee-based arrangement (i.e. less than 6 months) for Practice B, then Dr X can choose whether to pension the income from Practice B as a GP locum.

- 2.11 If Dr Y works at Practice A as a salaried GP, the same would apply – although Dr Y would either have two concurrent type 2 medical practitioner posts or a type 2 plus a locum post. The partners at Practice B regard work done for them by Dr X and/or Dr Y as an expense, which they reflect in their own end of year certificate which states their pensionable pay plus any share of the practice's profits. This allows the income from the relevant contract to be traced through the practice that holds the contract, to its GPs and those it employs or contracts with.
- 2.12 If the regulations were to allow income from sub-contracts to GMS, PMS or APMS contracts to be pensioned by other practices, rather than just by individual GPs, NHS England (Local Health Boards in Wales) would not be in a position to verify the end of year certificates filed by GPs, which they must do, under the scheme regulations.
- 2.13 The Department will continue to monitor the issue of sub-contracting and consider further changes where appropriate to support reforms to how NHS services are delivered.

Definition of practice staff

- 2.14 No comments were received from respondents on the proposed amendments to the definition of GP practice staff. However, during the consultation period member enquiries to the scheme administrator highlighted further examples of arrangements that GP practices were entering into in order to help other local providers with short-term pressures or recruitment difficulties.
- 2.15 In the scenario presented, which involved an out of hours (OOH) provider temporarily assisting a local NHS trust to deliver their services during a period of winter pressures, the OOH staff – who were not GPs – would not have been able to pension that income despite the amended definition proposed in consultation. However, a GP delivering this kind of service would have been able to pension the income. The Department aims to ensure that GPs and their practice staff are largely able to pension the same types of income.
- 2.16 Accordingly, the Department considers that it would be appropriate to further amend the definition of pensionable income for practice staff as it occurs in all three sets of regulations.

2.17 The new definition of practice staff to be inserted into the 1995 section, 2008 section and 2015 scheme rules is as follows:

““practice staff” means a person who is not a registered medical practitioner, a GP registrar or a non-GP provider and who is employed by a GMS practice, a PMS practice, an APMS contractor or an OOH Provider to assist in the provision of any of the following—

- (a) OOH services or services that practice or provider provides pursuant to a GMS contract, PMS agreement or an APMS contract;
- (b) services pursuant to an NHS standard contract;
- (c) services pursuant to an NHS standard sub-contract;
- (d) clinical health care services for the NHS commissioned by an employing authority that is not a GMS practice, a PMS practice, an APMS contractor, an OOH provider or an Independent Provider;”.

Locum GPs

2.18 No comments were received from respondents in relation to the amendments proposed in respect of locum GPs; which – as with other GPs – allowed income from sub-contracts to be pensionable; as well as correcting an error relating to locums being able to pension income from NHS standard contracts work and deleting duplicated provisions. During the consultation period it was noted that the proposed amendments did not include necessary changes to the definition of locum practitioner in schedule 15 of the 2015 Scheme regulations, to include reference to the NHS standard contract and sub-contract. This has been corrected in the final Statutory Instrument.

Allowing for retrospective granting of Independent Provider status

2.19 No comments were received on the proposed changes in relation to independent providers (IPs), which would allow an application for IP status to contain a retrospective “nominated date”, which can be the “approval date” for IP status in certain limited circumstances. Existing regulations only allow IP status to commence from a forward date. This amendment will allow more flexibility in relation to applications for IP employing authority status.

Other

2.20 The consultation response from the British Dental Association referred to the establishment of dental federations and argued for equal treatment of dental and GP federations. The Department has not been made aware of any dental federations being established nor of any related pensions issues prior to receiving the BDA’s consultation response. The Department continues to monitor developments in contracting, commissioning and organisational forms

and will work with NHS England and other partners to consider issues that arise as a result of emerging new models of care provision.

- 2.21 One of the individual respondents welcomed the proposed amendments, but wrote in detail on matters beyond the scope of the changes in this Statutory Instrument. The points raised related to changes to pension taxation, specifically the annual and lifetime allowances. The respondent argued that these changes, coupled with the lack of any flexibility within the NHS pension scheme rules to allow – for example – flexible benefit accrual or limits on contributions, left higher earners with little choice other than to opt out of the scheme completely.
- 2.22 The Department is grateful for the response, and will give the points raised further consideration. This will happen in the context of any announcements made in the 2016 spring budget on March 16th 2016. The Department is expecting to hear HM Treasury’s response to its 2015 consultation on “Strengthening the incentive to save – a consultation on pensions tax relief” at the spring budget. Depending upon the outcome and any changes to future arrangements for pension taxation further changes to the NHS pension scheme rules may be considered.

3. Injury Benefits Scheme

- 3.1 None of the formal responses commented on the proposed amendments to the NHS Injury Benefit Scheme. Those changes were to add Universal Credit to the list of relevant benefits in the NHS Injury Benefit Scheme and to clarify how claimants moving on to Employment & Support Allowance should be assessed.

Employment and Support Allowance

- 3.2 The NHS Injury Benefit Scheme provides an annual allowance for staff who have suffered a permanent loss of earning ability as a result of an injury or illness that is wholly or mainly attributable to their NHS employment. The amount payable is offset by income from a “relevant benefit”, with the payment level re-assessed at the start or cessation of a relevant benefit. Amending regulations effective from 1 April 2009 inserted Employment and Support Allowance (ESA) to the list of “relevant benefits”. Claimants moving on to ESA from 1 April 2009 have had their injury benefit scheme award re-assessed.
- 3.3 The Injury Benefit Scheme regulations are made under powers contained in the Superannuation Act 1972 and any amending statutory instrument must include a “no detriment” provision. This allows affected claimants to opt that a potentially detrimental change should not apply to them. The majority of claimants moving onto ESA saw awards generally reduced, affecting their overall income and meaning that the regulatory amendment was arguably detrimental.
- 3.4 The Department carefully considered these cases and decided to implement a retrospective change to the Injury Benefit Scheme regulations removing any detriment to claimants moving on to ESA. This change will be retrospective to 1 April 2009 – the date when ESA became a relevant benefit. The Injury Benefit scheme administrator, NHS BSA, will reconsider affected cases and contact claimants in due course.

Universal Credit

- 3.5 The proposed amendment to include Universal Credit in the list of “relevant benefits” in regulation 4(6)(b) was removed following comments received from NHS BSA, which led to a reconsideration of the nature of Universal Credit. As an income- rather than contributions-based benefit it is not relevant to the Injury Benefit Scheme. The final Statutory Instrument does not, therefore, contain this provision and the list of “relevant benefits” remains the same.

4. Additional Voluntary Contributions

- 4.1 A single respondent (Prudential) commented on the AVC amendments. The proposed amendments included some technical corrections, but the substantive amendment was to remove the restriction on withdrawing savings over the lifetime allowance limit as a lump sum. The Department believes that restriction is out of step with wider pension industry practice, and AVC providers had reported a demand for such payments to be permitted by scheme rules. The member pays a tax charge on the “lifetime allowance excess lump sum” so there is a gain to the Treasury. Notably, other public service pension schemes had already removed this restriction from their AVC scheme rules.
- 4.2 The Prudential’s response welcomed the proposed changes as they felt they added flexibility to the scheme which was in keeping with wider industry practice, including comparable public service pension AVC schemes, and also reacted to demands from scheme members. The response also pointed out a further technical error with a cross reference in regulation 15(3) which had not originally been corrected in the consultation version of the Statutory Instrument. We are grateful for this and include a correction in the final version of the Statutory Instrument.
- 4.3 Prudential’s response also raised a number of additional matters which are beyond the scope of these amendments; including a request to clarify certain provisions to eliminate ambiguity in relation to ‘pension credit’ members (scheme members by virtue of a pension sharing order following a divorce) and also in relation to the meaning of “date of retirement”.
- 4.4 Prudential also made recommendations in relation to provisions around life cover; and to transfer rights. We will give these points further consideration. The Department is keen to ensure that the AVC scheme regulations meet the legitimate needs of scheme members who are customers of the three AVC scheme providers (Equitable Life, Prudential and Standard Life).

5. Technical and Consequential Amendments

- 5.1 No formal responses were received on any of the proposed technical and consequential amendments, which included provisions relating to the cessation of contracting out, the introduction of shared parental leave and various other minor technical corrections. These provisions have therefore been included in the final Statutory Instrument.

6. Next steps

- 6.1 The Department is grateful for the comments received from all respondents in response to this consultation. The draft Statutory Instrument published for consultation has been revised as described in this document.
- 6.2 The final Statutory Instrument will be laid shortly in Parliament with the regulations, subject to the parliamentary process, becoming effective from 1 April 2016.