EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE PENSION SCHEME, INJURY BENEFITS AND ADDITIONAL VOLUNTARY CONTRIBUTIONS (AMENDMENT) REGULATIONS 2016

2016 No. 245

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health 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 The instrument amends six statutory instruments relating to pensions and benefits provided for National Health Service staff.

2.2 Key changes implemented by this instrument include:

- enabling general practitioners to pension earnings from sub-contracts where the holder of the main contract is also an NHS employer;
- clarifying how NHS Injury Benefit Scheme claimants moving on to the Employment & Support Allowance should be assessed;
- permitting the money purchase additional voluntary contribution arrangements to pay lifetime allowance excess lump sums;
- making consequential changes to scheme rules to accommodate the introduction of shared parental leave, the abolition of contracting-out and the enactment of the Pension Schemes Act 2015.

2.3 The instrument also makes a number of other miscellaneous and technical amendments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Section 12(1) of the Superannuation Act 1972 confers a power to make regulations having effect from a date earlier than the date of their making.

3.2 Section 3(3) of the Public Service Pensions Act 2013 confers a power to make regulations having effect from a date earlier than the date of their making. Section 3 refers the reader to section 23.

3.3 The Department does not consider that section 23 of the Public Service Pensions Act 2013 is triggered in this case. That section provides the procedure to be followed when retrospective provisions are included within scheme regulations. Where it appears to the responsible authority that retrospective provisions will have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, the authority must first obtain the consent of those who appear likely to be affected, either directly or through their representatives (subsection (1) and (3)).

Where it appears to the responsible authority that retrospective provisions will have significant adverse effects in any way not covered by subsection (1) in relation to the members of the scheme (for example, a serious adverse effect on injury benefits as opposed to pension benefits), the authority must first consult those who appear likely to be affected, either directly or through their representatives, with a view to reaching agreement (subsection (2)). The Secretary of State, as the responsible authority, does not believe that the retrospective amendments have any significant adverse effects for the purposes of section 23.

3.4 Regulation 13 has retrospective effect from 1 April 2008; regulation 99(2) and (3) has retrospective effect from 1 April 2009; regulations 25 and 45 have retrospective effect from 1 April 2013.

3.5 Regulations 3(d) insofar as it inserts a definition of "shared parental leave", 11, 18(3)(b) and (5), 21(e) insofar as it inserts a definition of "shared parental leave", 22, 23, 26, 29, 39(e) insofar as it inserts a definition of "shared parental leave", 40, 41(3) and (4), 42, 46, 49, 57, 59, 60, 65, 87(4)(a) and (b), 88 and 89(c) insofar as it inserts a definition of "shared parental leave" have effect from 31st December 2014.

3.6 Regulations 4, 5, 6, 14, 24, 33, 44, 53, 64, 66, 67, 70(2), 71, 72, 73, 80, 81(2), 84(2), 85, 86, 91 to 96 and 98 have effect from 1st April 2015.

Other matters of interest to the House of Commons

3.7 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Part 2 of the instrument amends the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300) ("the 1995 section"). Part 3 of the instrument amends the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653) ("the 2008 section"). Part 4 of the instrument amends the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) ("the 2015 scheme"). Part 5 of the instrument amends the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95). Part 6 of the instrument amends the National Health Service (Injury Benefits) Regulations 1995 (S.I. 1995/866). Part 7 of the instrument amends the National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 (S.I. 2000/619).

5. Extent and Territorial Application

5.1 This entire instrument extends only to England and Wales (see regulation 1(9) of the instrument). The instrument does not have minor or consequential effects outside England and Wales.

5.2 This entire instrument applies only to England and Wales (see regulation 1(9) of the instrument). The instrument does not have minor or consequential effects outside England and Wales.

6. European Convention on Human Rights

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

7. Policy background

GP Federations

7.1 NHS England's Five Year Forward View, published in October 2014, confirmed the need for general medical practices to come together to explore new, innovative ways of delivering primary care at scale. One way of doing this has been for practices to come together in local areas to form a federation. A number of federations have now been established across the country.

7.2 The NHS standard contract is now increasingly used to commission primary and secondary care. General Practice (GP) federations can hold the main contract and often sub-contract elements to it to member practices. However current NHS pension scheme rules prevent members from pensioning income received from delivering services through sub-contracted arrangements, including via GP federations. This has been a significant block to engaging GPs in the reform of primary care services.

7.3 Accordingly these amending regulations extend the definition of pensionable income for GPs, practice staff and GP locums to include earnings from derived from NHS work sub-contracted from another body that is already an NHS Pension Scheme employing authority. To ensure that only sub-contracted NHS work is pensioned, and scheme liabilities are appropriately controlled, such arrangements must be governed by the NHS standard sub-contract, which has been jointly produced by the Department of Health and NHS England.

7.4 Amending regulations 3(d), 21(e), 39(e) and 89(c) insert the definition of "NHS standard sub-contract" into the 1995 section, 2008 section and 2015 scheme regulations respectively. Amending regulations 3(c), 18(2) and (4)(b), 21(c), 39(c), 43(3), 89(a) and (b) ensure that practice staff and locum GPs are able to pension income derived from NHS standard contract and sub-contract arrangements.

7.5 As a further control measure, the holder of the main contract from which work has been sub-contracted must be an NHS Pension Scheme employing authority. Details must be recorded in the annual returns that GPs and independent providers must make to the scheme administrator. This allows the scheme administrator to verify that the sub-contracting arrangements are appropriate and pensionable. This requirement is provided by amending regulations 18(3)(a), 18(4), 41(2), 43, 87(3) and 87(5).

7.6 To complement these changes, flexibility is introduced to allow independent providers to be granted employing authority status retrospectively from the start date of their NHS standard contract, rather than the point of administrative approval. An independent provider is a non-statutory provider of NHS clinical health care services that qualifies as an NHS Pension Scheme employing authority by holding an NHS standard contract. This flexibility is provided by amending regulations 19(2), 37 and 81(3).

NHS Injury Benefits Scheme – Employment and Support Allowance

7.7 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. Previous amending regulations established that from 1 April 2009 the Employment and Support Allowance (ESA) is a relevant benefit. This

means that any claimant who moved on to ESA from 1 April 2009 would have their allowance re-assessed from their ESA start date.

7.8 The Injury Benefit Scheme regulations are made under powers contained in the Superannuation Act 1972 and any amending statutory instrument, such as the one that introduced ESA to the regulations, must include a "no detriment" provision. This provision allows affected claimants to opt that a potentially detrimental change to regulations should not apply to them (the provision is included in this S.I. at regulation 105).

7.9 The "no detriment" provision should be invoked by scheme members within six months of the relevant amendment being made. In the case of ESA, it was more than twelve months after 1 April 2009 before claimants began to be moved on to ESA. It was therefore impossible for claimants to know or anticipate whether they would be affected detrimentally by the introduction of ESA within six months of the regulations being amended.

7.10 Recent experience of claimants moving onto ESA saw awards generally reduced, affecting their overall income and meaning that the regulatory amendment made in April 2009 was arguably detrimental. However, many claimants were unaware of the "no detriment" provision or, due to the passage of time, became aware significantly beyond the six month period for giving notice.

7.11 The Department has 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 is retrospective to 1 April 2009 – the date when the Employment Support Allowance was inserted into the Injury Benefit Scheme regulations as a relevant benefit. Amending regulation 99 implements this change. Any case that has already been considered, and where there has proven to be a detriment, will be reconsidered by the scheme administrator in accordance with the amended regulations.

Money Purchase Additional Voluntary Contributions (MPAVCs)

7.12 The Taxation of Pensions Act 2014 introduced new flexibility in how pension savings can be accessed. The Department introduced these changes by amending the National Health Service Pension Scheme (Additional Voluntary Contributions) Regulations 2000 (AVC regulations) with effect from April 2015. However there is further scope for removing unnecessary restrictions.

7.13 Amending regulation 102(a) allows MPAVC pension pots to be taken as a lifetime allowance excess lump sum. Such a lump sum has been a legally permissible payment since 2006, and there was no convincing reason for them not to now be allowed under the MPAVC scheme rules. Members will incur a tax charge if taking such a payment; however, MPAVC providers have informed the Department that there is a demand for such payments to be permissible. However regulation 13 limits benefits paid from the MPAVC scheme to the amount of member's lifetime allowance limit.

7.14 Accordingly amending regulation 103 deletes regulation 13 (benefit limits), with other necessary changes made by amending regulations 101 and 102(b). Amending regulation 104 corrects erroneous cross-references in regulation 15(3) of the AVC regulations.

Consequential and Technical Amendments

Abolition of Contracting Out

7.15 A major element of reforms to the new state pension is the abolition of the State Second Pension with effect from 6 April 2016. This means that salary-related pension schemes like the NHS scheme will no longer be able to 'contract' members out of the State Second Pension with effect from that date.

7.16 The Pensions Act 2014 makes various amendments to the Pension Schemes Act 1993 and a new set of regulations, The Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015 provide for the end of contracting-out with effect from 6 April 2016 and the preservation of contracting-out rights earned by members up to that date.

7.17 A small number of consequential changes to scheme regulations are required to ensure that these operate correctly in tandem with the new legislation mentioned above. These are provided by amending regulations 3(d), 7, 8, 9, 12, 15, 28, 30, 36, 48, 50, 54, 56, 68, 69, 70(3) and 84(3).

Shared Parental Leave

7.18 Part 7 of the Children and Families Act 2014 established new entitlements to shared parental leave and statutory shared parental pay. It abolished additional paternity leave and additional statutory parental pay.

7.19 Accordingly, amending regulations 3(d), 11, 18(3)(b), 18(5), 21(e), 22, 23, 26, 29, 39(e), 40, 41(3) and (4), 42, 46, 49, 57, 59, 60, 65, 87(4), 88 and 89(c) insert new references to shared parental leave alongside existing references to parental leave. Such references are found in scheme provisions dealing with absences from work, and the pay or earnings taken into account during such periods. These new provisions are retrospective to 31 December 2014.

Pension Schemes Act 2015

7.20 The Pension Schemes Act 2015 amended the Pension Schemes Act 1993 to prevent the transfer of deferred benefits from unfunded public service pension schemes, like the NHS scheme, to other schemes offering 'flexible benefits'. The ban applies to all deferred members who are covered by the Pension Schemes Act 1993 provisions (Chapter 1 of Part 4ZA).

7.21 The two Pension Schemes Acts combine to apply the ban to deferred members who leave at least one year before normal pension age and also make an application for payment. However, the 2008 section and 2015 scheme regulations contain provisions that supplement the operation of the Pension Schemes Act 1993. The effect is to permit transfers where a member leaves, makes a transfer application and applies for payment in the year before normal pension age. To ensure the ban is fully implemented, amending regulations 32, 52 and 75 close this small lacuna.

7.22 Similarly, amending regulation 10(3) clarifies the provisions of 1995 section regulation M1 that deferred members cannot transfer to Qualifying Recognised Overseas Pension Schemes offering flexible benefits where the member leaves, makes an application and applies for payment between ages 59 and 60.

Compulsory transfers

7.23 Amending regulations 5 and 24 make provision ensuring that members who are compulsorily transferred into the NHS after 1 April 2015 as a result of a machinery of government transfer (or subsequent transfer where the person was originally in a public sector scheme) can join the relevant scheme section if they meet scheme criteria for age-related protection.

Minor and Technical Amendments

7.24 The Fourth Report of the Joint Committee on Statutory Instruments identified a need to improve the clarity of 2015 scheme regulation 154. This was acknowledged by the Department in a memorandum to the Committee which is published in the report. Amending regulation 82 makes the necessary adjustments.

7.25 Other amending regulations correct cross-references, omit obsolete provisions, or make various operational and technical corrections to scheme regulations.

Consolidation

7.26 The Department has produced informal full consolidations of NHS Pension Scheme regulations incorporating all changes implemented up to and including those which came into effect on 1 April 2016. These are available on the scheme administrator's website: http://www.nhsbsa.nhs.uk/Pensions/2654.aspx

7.27 Preparations have begun to formally consolidate the 1995 and 2008 section regulations, which provide for the 'old' (pre-1 April 2015) NHS Pension Scheme.

8. Consultation outcome

8.1 The draft regulations were subject to an eight week public consultation ending on 12 February 2016. The consultation documents were shared with NHS trades unions, NHS employer representatives and other interested parties by email, and were published on gov.uk and the scheme administrator's website.

8.2 Six formal responses were received, with the scheme administrator NHS BSA also submitting informal responses to the Department throughout the consultation process.

8.3 Responses were received from two individuals, a law firm representing over 300 GP practices, an established GP federation, an NHS trade union representing dentists, and a money-purchase pension provider.

8.4 The Department has published a document responding to the comments received at https://www.gov.uk/government/consultations/proposed-changes-to-the-regulations-for-the-nhs-pension-schemes

8.5 The responses largely welcomed the amendments relating to GP federations and associated changes relating to practice staff and locums. The removal of restrictions on taking a lifetime allowance excess lump sum from a MPAVC scheme was supported, and suggestions made for further changes to those regulations which the Department will consider. The other consequential and technical changes were noted. No comments were received on the proposed changes to the NHS Injury Benefit Scheme Regulations 1995.

9. Guidance

9.1 Guidance is provided via a range of resources including factsheets, online videos and scheme guides on the scheme administrator's website http://www.nhsbsa.nhs.uk/Pensions.aspx. Guidance relating to the NHS standard sub-contract is available on gov.uk at https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services.

10. Impact

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

10.2 There is no impact on the public sector.

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

11. Regulating small business

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

12. Monitoring & review

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

12.2 This instrument does not provide for a review pursuant to section 28 of the Small Business, Enterprise and Employment Act 2015 (2015 c 26) (Duty to review regulatory provisions in secondary legislation).

12.3 The Department does not consider that the NHS Pension Scheme 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.

13. Contact

13.1 Joanne Donnelly at the Department of Health (telephone: 0113 25 45150 or email: joanne.donnelly@dh.gsi.gov.uk) can answer any queries regarding the instrument.