EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE PENSION SCHEME (MEMBER CONTRIBUTIONS) (AMENDMENT) REGULATIONS 2023

2023 No. 576

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 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 the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94) (the "2015 Regulations") to update the pensionable earnings bands in the member contribution structure in line with the Agenda for Change pay award for England, with effect from 1st April 2023 for the 2023/24 NHS Pension Scheme year. Agenda for Change is the pay system which covers all staff in the NHS in England except doctors, dentists, and very senior managers. The pay structure has nine pay bands with a number of pay points in each band. Staff will normally progress to the next pay band after the required number of years until they reach the top of the pay band.

2.2 Specifically, this instrument increases the pensionable earnings bands in the member contribution structure contained within the 2015 Regulations. The principle of uplifting member contribution thresholds annually in line with the Agenda for Change pay award for England was proposed as part of extensive consultation with stakeholders. This included a public consultation which ran in October 2021. Stakeholders agreed that increasing thresholds annually in line with the pay award is important to ensuing that members receive the full value of the award and do not have it eroded via increased pension contributions. This instrument increases the pensionable earnings bands in the member contribution structure to give effect to this policy intention.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 DHSC regrets that this instrument breaches the convention that Statutory Instruments subject to the negative resolution procedure should normally be laid before Parliament at least 21 days before coming into force (the "21 day rule"). It is clearly crucial for NHS staff that the pay award is implemented as quickly as possible, so that they begin to receive the benefit of it at the earliest opportunity. As payment of the award will take effect from 31 May 2023 it is therefore necessary to implement these regulations giving effect to the increased member contribution thresholds in parallel to ensure alignment. Delay in this instrument coming into force could have led to some members paying a higher pension contribution rate than they would otherwise have done. Regrettably this resulted in a breach of the 21 day rule to allow the Department

to act in the best interests of the NHS to comprehensively implement the pay award as quickly as possible.

3.2 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.

3.3 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 the pensionable earnings bands for member contributions contained in regulation 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.

3.4 The amendments contained in this instrument will come into force on 31 May 2023 but will have retrospective effect to 1 April 2023. Section 3(3)(b) of the 2013 Act confers a power to make retrospective provision but refers the reader to section 23. Section 23 provides the procedure for making scheme regulations containing retrospective provision which appear to the responsible authority to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, or appear to have significant adverse effects in any other way in relation to members of the scheme. The Secretary of State is of the view that the retrospective provisions in this instrument will not have significant adverse effect for the purposes of section 23. The amendments in this instrument are either beneficial or neutral to members. This is because the member contribution pensionable earnings bands will be uplifted to reflect the Agenda for Change pay award for England for 2023/24 (which will be backdated to 1 April 2023) and is designed to help ensure that members will continue to pay the same contribution rate following an Agenda for Change pay award. If this instrument were not to be made then the current pensionable earnings bands in the 2015 Regulations would remain in force, which are lower than the pensionable earnings bands in the proposed amending regulations. This may result in some members paying a higher pension contribution rate.

3.5 This instrument was dependent on the Agenda for Change pay award, negotiations for which were ongoing until 2 May 2023. The instrument was subsequently subject to a two week consultation commencing 3 May 2023, as referenced in paragraph 10 below, in accordance with section 22 of the 2013 Act. Scheme members have been on notice, through the consultation processes referenced in paragraph 2.2 above and paragraph 10 below, of the intention to uplift pensionable earnings bands in line with the Agenda for Change pay award.

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 and Wales.

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

6.1 The 2013 Act provides the power for the Secretary of State to make regulations establishing the NHS Pension Scheme. This instrument amends provisions relating to member contributions in the 2015 Regulations as explained in sections 2 and 7 of this memorandum.

7. Policy background

What is being done and why?

7.1 The 2015 Regulations were amended to introduce a new member contribution structure on 1 October 2022. As part of the new member contribution structure, it was proposed that the pensionable earnings bands in the member contribution structure would be updated annually, in line with Agenda for Change pay awards in England.

7.2 Consequently, this instrument increases the member contribution pensionable earnings bands for scheme year 2023/24 in the 2015 Regulations in line with the Agenda for Change pay award for England.

7.3 Regulation 27(1) of the 2015 Regulations provides for who the NHS Pension Scheme is open to. Members of the scheme are classed as either 'officer' or 'practitioner' members. Officer in the context of the 2015 NHS Pension Scheme is used to define salaried NHS staff (i.e., employees). Practitioner members are defined under regulation 166 of the 2015 Regulations. They include general practitioners who are not salaried and who run their own practices and decide how much to pay themselves and their employees.

Explanations

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

7.4 The 2015 Regulations set out the member contribution structure for the scheme year 2023/24. For officer (employee) members who have their rate set by regulation 30, there are two tables, one table for members who have their rate based on their previous year's pensionable pay, and another table for members who have their rate based on their current pensionable pay.

7.5 Regulation 31 applies to practitioner members and non-GP providers who have their contribution rates based on their estimated annualised pensionable earnings.

7.6 The two tables in regulation 30, and the table in regulation in 31 provide a mechanism to calculate rates at the start of the scheme year, even if the Agenda for Change pay award has not yet been determined and put into payment.

Why is it being changed?

7.7 The changes being made will give effect to the policy intention of annually increasing the pensionable earnings bands in the member contribution structure in line with the Agenda for Change pay award in England.

What will it do now?

7.8 The updated tables in regulation 30 will apply to officer members. This ensures that the all officer members will benefit from the increased member contribution pensionable earnings bands, whether or not they have received a pay increase for 2023/24.

7.9 The updated pensionable earnings bands in table 2 of regulation 31 enable practitioner members to apply the correct contribution rate for scheme year 2023/24 once their annualised pensionable earnings have been finalised.

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 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 regulations incorporating all the changes implemented up to and including those which came into force on 31 October 2022. These are available on the scheme administrator's website: https://www.nhsbsa.nhs.uk/nhs-pension-scheme-regulations

10. Consultation outcome

10.1 A public consultation ran from 3 to 17 May 2023 for which the Government response can be viewed here https://www.gov.uk/government/consultations/nhs-pension-scheme-proposed-uplift-to-member-contribution-thresholds-for-2023-to-2024 This gave interested individuals and stakeholders the option to provide their views on the proposals. A total of 138 responses were received from individuals and stakeholder organisations. Respondents were generally supportive of the proposal to increase the member contribution thresholds in the NHS Pension Scheme in line with the AfC award for England, with 77% of respondents to the online survey agreeing with the proposals.

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 There is no, or no significant, impact on the public sector, but these changes will impact the NHS workforce and members of the NHS Pension Scheme. By increasing the pensionable earnings bands in the member contribution structure in line with the Agenda for Change pay award in England, it reduces the likelihood that members will move up a tier and see their contribution rate increased solely because they receive a pay award. Increasing the pensionable earnings bands in the member contribution structure either benefits or has no impact on members.

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 A full 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 2013 Act, 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 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.

15. Contact

15.1 Adam Stewart at the Department of Health and Social Care Telephone: 011325 45775 or email: adam.stewart@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 The Rt. Hon. Will Quince MP at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.