
STATUTORY INSTRUMENTS

2020 No. 296

NATIONAL HEALTH SERVICE, ENGLAND

The National Health Service (Existing Liabilities Scheme for General Practice) Regulations 2020

<i>Made</i>	- - - -	<i>13th March 2020</i>
<i>Laid before Parliament</i>		<i>16th March 2020</i>
<i>Coming into force</i>	- -	<i>6th April 2020</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 71(1) to (3) and 272(7) and (8) of the National Health Service Act 2006⁽¹⁾.

In accordance with section 71(1) of that Act, these Regulations are made with the consent of the Treasury.

Citation, commencement and application

1.—(1) These Regulations may be cited as the National Health Service (Existing Liabilities Scheme for General Practice) Regulations 2020 and come into force on 6th April 2020.

(2) These Regulations apply only in relation to services provided as part of the health service in England.

Interpretation

2. In these Regulations—

“the 2006 Act” means the National Health Service Act 2006;

“ancillary health services” means services, other than primary medical services, provided as part of the health service by a person who, at the time of providing the services, was—

(a) a Part 4 contractor whose principal activity consisted of the provision of primary medical services;

(1) 2006 c.41. Section 71 of the National Health Service Act 2006 (“the 2006 Act”) was amended by section 142 of, and paragraph 85 of Schedule 5 and Part 4 of Schedule 15 to, the Health and Social Care Act 2008 (c.14) and further amendments were made by paragraph 18 of Schedule 4, paragraphs 17 and 19 of Schedule 7, paragraphs 1 and 28 of Schedule 14, paragraph 10(1) and (3) of Schedule 17 and paragraph 9(1) and (3) of Schedule 19 to the Health and Social Care Act 2012 (c.7). Amendments were also made by paragraph 24(3) of Schedule 5 and paragraph 18(9) of Schedule 7 to the Care Act 2014 (c.23). By virtue of section 271(1) of the 2006 Act, the powers exercised by the Secretary of State in making these Regulations are exercisable only in relation to England.

- (b) a primary medical services sub-contractor whose principal activity consisted of the provision of primary medical services; or
- (c) a person providing the services under a contractual arrangement with a person mentioned in paragraph (a) or (b);

“eligible person” means a person specified in regulation 5;

“the health service” means the health service continued under section 1(1) of the 2006 Act⁽²⁾;

“Part 4 contractor” means a person providing, or making arrangements for the provision of, primary medical services in accordance with a contractual arrangement (including a contractual arrangement or agreement that is part of a set of arrangements for the provision of services, in addition to the primary medical services) made with that person under one of the following provisions in the 2006 Act—

- (a) section 83(2) (primary medical services)⁽³⁾;
- (b) section 84(1) (general medical services contracts)⁽⁴⁾; or
- (c) section 92(1) (arrangements by the Board for the provision of primary medical services)⁽⁵⁾;

“primary medical services” means the primary medical services that the Board⁽⁶⁾ has a duty to secure in accordance with section 83(7) of the 2006 Act;

“primary medical services sub-contractor” means a person providing primary medical services under a contractual arrangement made with a Part 4 contractor;

“relevant function” means—

- (a) making arrangements for the provision of primary medical services;
- (b) providing primary medical services;
- (c) making arrangements for the provision of ancillary health services;
- (d) providing ancillary health services; or
- (e) carrying out an activity in connection with any of the activities mentioned in paragraphs (a) to (d);

“relevant liability” means a liability to which the Scheme applies;

“the Scheme” means the scheme established under regulation 3(1).

Establishment and administration of the Scheme

3.—(1) A scheme, to be known as the Existing Liabilities Scheme for General Practice, is established.

(2) The purpose of the Scheme is to enable the Secretary of State to make provision to meet the relevant liabilities of eligible persons.

(2) Section 1 of the National Health Service Act 2006 (c.41) was substituted by section 1 of the Health and Social Care Act 2012 (c.7).

(3) Section 83(1), (2) and (2A) of the National Health Service Act 2006 were substituted by the Health and Social Care Act 2012, section 55(1), Schedule 4, Part 4, paragraphs 30(1) and (2).

(4) Section 84(1) was amended by the Health and Social Care Act 2012, section 55(1), Schedule 4, Part 4, paragraphs 31(1) and (2).

(5) Section 92(1) was substituted by the Health and Social Care Act 2012, section 55(1), Schedule 4, Part 4, paragraphs 31(1) and (2).

(6) The “Board” is defined in section 275(1) of the National Health Service Act 2006 (“2006 Act”) as the National Health Service Commissioning Board. It was established by section 1H of the 2006 Act which was inserted into the 2006 Act by section 9(1) of the Health and Social Care Act 2012 (c.7). The Board is more widely known and referred to as “NHS England”.

(7) Section 83 has been amended by the Health and Social Care Act 2012, section 55(1), Schedule 4, Part 4, paragraphs 30(1) to (4).

(3) The Scheme is to be administered by the Secretary of State.

Meaning of existing liability

4. In these Regulations, “existing liability” means any liability in tort under the law of England and Wales owed by an eligible person to a third party which arises from an act, or an omission to act, that—

- (a) occurred before 1st April 2019;
- (b) was connected to a relevant function;
- (c) results, or resulted, in personal injury or loss to the third party; and
- (d) was an act, or an omission to act, on the part of the eligible person, or an employee of the eligible person, connected to the diagnosis of an illness or the care or treatment of any person.

Eligible persons

5.—(1) An eligible person is a person who is, or who, on the relevant date, was—

- (a) a Part 4 contractor;
- (b) a primary medical services sub-contractor;
- (c) a person providing ancillary health services other than—
 - (i) a person mentioned in sub-paragraph (a) or (b); or
 - (ii) a person providing ancillary health services under a contract of employment; or
- (d) any other person engaged or permitted (other than under a contract of employment), by a person mentioned in sub-paragraph (a), (b) or (c), to carry out a relevant function.

(2) In paragraph (1), “relevant date” means the date on which an act, or an omission to act, giving rise to an existing liability of the eligible person, occurred.

Liabilities to which the Scheme applies

6.—(1) Subject to paragraph (2), the Scheme applies to an existing liability where—

- (a) the Secretary of State has entered into a contractual arrangement with a medical defence organisation; and
- (b) under that arrangement, the Secretary of State is required to consider providing indemnity or assistance in respect of an act, or an omission to act, on the part of a member, or former member, of the medical defence organisation which gives rise to the existing liability.

(2) The Scheme applies to an existing liability falling within paragraph (1) from 1st April 2021 or any earlier date determined by the Secretary of State.

(3) The Secretary of State must publish any date determined under paragraph (2) in the London, Edinburgh and Belfast Gazettes.

(4) In paragraph (1), “medical defence organisation” means an organisation—

- (a) that does not carry on activities for the purposes of making profits for distribution to its members or others; and
- (b) whose objects include the provision of professional indemnity cover, on a discretionary basis, for persons providing services as part of the health service.

Payments under the Scheme

7.—(1) The Secretary of State may determine whether a payment under the Scheme is to be made in respect of a relevant liability.

(2) A payment under the Scheme may be made to, or on behalf of, an eligible person.

(3) A payment under the Scheme may also be made where the eligible person—

- (a) has died;
- (b) has been dissolved or wound up (within the meaning of the Companies Act 2006⁽⁸⁾); or
- (c) has entered into insolvency or is bankrupt.

(4) The amount of any payment made under the Scheme is to be determined by the Secretary of State in accordance with regulation 8.

(5) In this regulation—

- (a) “bankrupt” has the same meaning as that given in section 381(1) of the Insolvency Act 1986⁽⁹⁾ (“Bankrupt” and associated terminology); and
- (b) “insolvency” has the same meaning as that given in section 247(1)⁽¹⁰⁾ of that Act (meaning of “insolvency” and “go into liquidation”).

Relevant matters in determining the amount of a payment under the Scheme

8.—(1) In determining the amount of a payment under the Scheme, the Secretary of State must have regard to the matters (“relevant matters”) specified in the following paragraphs.

(2) Where an award of damages has been made by a court against an eligible person, the relevant matters are the amount of—

- (a) the award;
- (b) the legal and associated costs awarded to the claimant; and
- (c) any legal and associated costs incurred by, or on behalf of, the eligible person.

(3) Where, in any legal proceedings, a settlement has been agreed to by, or on behalf of, an eligible person, the relevant matters are the amount of—

- (a) any sum paid or payable by the eligible person in relation to the claim for damages;
- (b) any contribution by the eligible person towards any legal and associated costs incurred by the claimant; and
- (c) any legal and associated costs incurred by, or on behalf of, the eligible person.

(4) Where, in any legal proceedings, a court has declined to award damages against an eligible person, the relevant matters are—

- (a) the amount of any legal and associated costs incurred by, or on behalf of, the eligible person; and
- (b) the extent to which those costs are not recoverable either from the claimant or from the Legal Aid Agency under regulations⁽¹¹⁾ made under section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁽¹²⁾ (costs in civil proceedings).

(5) Where, other than in the course of legal proceedings, an eligible person has agreed, whether in settlement of a claim against the eligible person or otherwise, to make any payment to, or any

⁽⁸⁾ 2006 c. 46.

⁽⁹⁾ 1986 c. 45; section 381(1) was amended by the Enterprise and Regulatory Reform Act 2013 c. 24, section 71(3), Schedule 19, paragraphs 1, 52(1) and (2).

⁽¹⁰⁾ Section 247(1) was amended by the Enterprise Act 2002 c. 40, section 248(3), Schedule 17, paragraphs 9, 33(1) and (2).

⁽¹¹⁾ S.I. 2013/611.

⁽¹²⁾ 2012 c. 10.

contribution towards any legal and associated costs incurred by, a person in respect of a relevant liability of the eligible person, the relevant matters are the amount of any—

- (a) payment;
- (b) contribution; and
- (c) legal and associated costs incurred by, or on behalf of, the eligible person.

(6) Where an eligible person has agreed to be bound by the determination of any person as to the making of a payment by the eligible person in respect of a relevant liability, the relevant matters are the amount of—

- (a) the payment;
- (b) any legal or associated costs awarded to the claimant; and
- (c) any legal or associated costs incurred by, or on behalf of, the eligible person.

Circumstances in which a payment may not be made under the Scheme

9. Without limit to the Secretary of State's powers under regulation 7, the Secretary of State may determine that a payment is not to be made under the Scheme where—

- (a) the eligible person has made an admission of liability, without first obtaining the Secretary of State's written consent;
- (b) liability has been determined by a court in proceedings conducted by, or on behalf of, the eligible person, other than in consultation with the Secretary of State;
- (c) the eligible person has not complied with a condition imposed by the Secretary of State relating to a claim;
- (d) a payment falls to be made by the eligible person and, without first obtaining the Secretary of State's written consent, the eligible person agrees to—
 - (i) be bound by the determination of any person as to the making of a payment in respect of a relevant liability; or
 - (ii) make any other payment in respect of the relevant liability, other than in the course of legal proceedings, or agrees to make a payment in consequence of a settlement of legal proceedings;
- (e) the payment would be an amount that is less than any amount specified by the Secretary of State as being the minimum amount payable under the Scheme in respect of a relevant liability; or
- (f) the eligible person has failed, whether fully or in part, to comply with a notice under regulation 11.

Payments on account

10.—(1) Without limit to the powers of the Secretary of State under regulation 7, where a payment falls to be made by an eligible person in connection with a relevant liability and the Secretary of State has not yet made a determination under regulation 7 as to whether a payment is to be made in respect of the relevant liability, the Secretary of State may make a payment on account in respect of the relevant liability.

(2) A payment on account may be made to, or on behalf of, an eligible person.

(3) Where the amount of any payment on account exceeds any amount subsequently determined under regulation 7, the excess is recoverable from the eligible person or the person to whom the payment on account was made.

(4) Where, under regulation 7, the Secretary of State determines that no payment is to be made in respect of a relevant liability, any payment on account in respect of the relevant liability is recoverable from the eligible person or the person to whom the payment on account was made.

Information and assistance to be provided by eligible persons

11.—(1) For the purposes of the Scheme, the Secretary of State may, by notice in writing, require an eligible person to provide the Secretary of State with such assistance or information as may be specified in the notice.

(2) A notice under paragraph (1) may specify—

- (a) the date by which any assistance or information specified in the notice must be provided; and
- (b) the manner in which the assistance or information is to be provided.

(3) An eligible person must comply with a notice under paragraph (1).

Information as to any directions or guidance given by the Secretary of State

12. The Secretary of State must make the following available to eligible persons, in such form and at such times as the Secretary of State considers appropriate—

- (a) any directions given under section 71(6) of the 2006 Act; and
- (b) any guidance, in relation to the Scheme, given by the Secretary of State to any of the bodies specified in that section.

We consent

David Rutley
Rebecca Harris
Two of the Lords Commissioners of Her
Majesty's Treasury,
Her Majesty's Treasury

12th March 2020

Signed by the authority of the Secretary of State for Health and Social Care.

Helen Whately
Minister of State,
Department of Health and Social Care

13th March 2020

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations establish the Existing Liabilities Scheme for General Practice (the “Scheme”). They apply only in relation to services provided as part of the NHS in England and come into force on 6th April 2020.

The Scheme relates to tortious liabilities arising from incidents that occurred before 1st April 2019 in connection with the provision of primary medical services and other healthcare services provided by general practice as part of the NHS. In the main, the liabilities covered by the Scheme will be clinical negligence liabilities. Clinical negligence liabilities arising from incidents occurring from 1st April 2019 onwards are covered by the Clinical Negligence Scheme for General Practice which was established by the National Health Service (Clinical Negligence Scheme for General Practice) Regulations 2019 (S.I. 2019/334).

Regulations 2 and 4 define terms used in the Regulations. Regulation 3 establishes the Scheme and provides for it to be administered by the Secretary of State.

Regulation 5 specifies who is an eligible person under the Scheme. This is a person who is, or who, on the relevant date, was, a Part 4 contractor (a person contracted under Part 4 of the National Health Service Act 2006 to provide, or make arrangements to provide, primary medical services); a primary medical services sub-contractor (a person sub-contracted by a Part 4 contractor to provide primary medical services); a person providing ancillary health services; or a person, other than an employee, engaged by any of the above to provide or carry out an activity connected to the provision of primary medical services or ancillary health services. The “relevant date” is the date on which the act, or omission to act, giving rise to an existing liability, occurred. The definition of “ancillary health services” is found in regulation 2. These are NHS services, other than primary medical services, provided by a Part 4 contractor whose principal activity is to provide primary medical services, a primary medical services sub-contractor who satisfies this condition or a person sub-contracted by such a Part 4 contractor or primary medical services sub-contractor to provide the ancillary health services.

Regulation 6 specifies the existing liabilities to which the Scheme applies and the date from which it will apply to those existing liabilities. These are existing liabilities arising from acts, or omissions to act, of members, or former members, of a medical defence organisation that has entered into a contractual arrangement with the Secretary of State where, under such an arrangement, the Secretary of State is required to consider providing indemnity or assistance in respect of such acts or omissions. The acts and omissions in question are those connected to the provision of NHS services by general practice that occurred before 1st April 2019 and which result, or have resulted, in personal injury or loss to a third party.

Regulations 7 to 10 relate to payments under the Scheme, including regulation 9 which sets out circumstances in which the Secretary of State may decide that no payment is to be made.

Regulation 11 enables the Secretary of State to require an eligible person to provide information and assistance to the Secretary of State for the purposes of the Scheme.

Regulation 12 places a duty on the Secretary of State to make available to eligible persons any directions or guidance given by the Secretary of State for the purposes of the Scheme.

An impact assessment relating to this instrument has been prepared but is not publicly available as it contains legally privileged, confidential and commercially sensitive information. A summary of the impact assessment is published, with the Explanatory Memorandum to these Regulations, on

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