

Board of Directors (in Public)

Item 1.5

Subject:	Overview of the new NHS Pensions Rules, Taxation & Options to support staff and service delivery
Date of Meeting:	Tuesday 26th November 2019
Prepared by:	Frankie Morris, Deputy Chief Finance Officer, Sue Hodgkinson, Interim Director of People & Culture
Presented by:	Frankie Morris, Deputy Chief Finance Officer, Sue Hodgkinson, Interim Director of People & Culture
Purpose of Report:	To Note & Approve

BAF Reference	Impact on BAF
1, 3 & 4	To provide assurance and to highlight the revised risk score rating within BAF Reference 4 due to the implications of this risk.

1. Executive Summary

The purpose of this paper is to inform the Board of Directors of new Pensions rules and taxation and the implications for staff and service delivery. The paper outlines the changing position nationally, with further instructions issued by NHS England and NHS Improvement (NHSEI) on 22 November 2019 to support all clinician members of the NHS Pensions Scheme and the instruction from NHSEI on 5 November 2019, as part of the national stocktake for winter readiness. In this communication, NHSEI are now signalling their expectation that Trusts that have not done so already should make immediate use of the flexibilities (unless they are demonstrably not experiencing any issues with medical staff availability).

The paper outlines the guidance that has been received by NHS Employers, which indicates a series of options or flexibilities Trusts should consider in agreeing a way forward and gives consideration to the operational impact on service delivery.

A series of recommendations have been identified to enable the Board of Directors to consider and approve a way forward to support those staff affected and minimise the risk to service delivery, particularly over the winter period.

2. Background

Since 2006, a number of tax policies have been introduced by Her Majesty's Revenue & Customs (HMRC) to limit an individual's tax-free pension investment. In recent years, the limits have reduced as follows:

- The Lifetime Allowance (the total amount of your pension benefit/savings before tax) was introduced in 2006 and has reduced over time from £1.5m to £1,055,000 (2019/20);
- The Annual Allowance (the annual build-up in your pension benefit/saving), also introduced in 2006, has decreased significantly from £215k to £40k (2014/15 onwards);
- The Tapered Annual Allowance was introduced in 2016/17 for higher earners. As their total earnings increase above a specific threshold, the annual allowance reduces from £40,000 to a minimum of £10,000.

Where annual pension build-ups are below the annual allowance, carry forward of up to 3 years is allowed.

Large tax bills have been increasing in number from 2017/18 onwards as the carry forward from earlier years, when the annual allowance was higher, runs out. There is a much greater awareness of the issue, arising from a combination of individual's publicising the receipt of high tax bills and from unions educating and lobbying on the issue.

NHS staff are particularly exposed to unexpected and significant tax bills arising from these tax policies for two reasons:

- There are national shortages of key healthcare staff groups, particularly amongst medics, which has created a reliance on additional sessions, additional PAs, and overtime to deliver direct clinical care;
- The defined benefit nature of the NHS Pension Scheme means that pension build-up is not under the dynamic control of the employee and cannot be easily modified.

3. Action on 2019/20 Pension Tax Impacts

On 22 November 2019, NHSEI issued a communication to all provider Chief Executives giving instructions that there is now national agreement in place to support clinical members of the NHS Pension Scheme. As shown in Appendix A & B, the NHS will therefore now ensure that clinicians who exceed their NHS pension annual allowance in this financial year are not left out of pocket. This scheme will apply to doctors, nurses, Allied Health Professionals and other clinicians in active clinical roles who are members of the NHS Pension scheme (see Appendix E for which professions are regulated). It will cover all pensions saving in the NHS schemes in 2019/20 (but not annual allowance tax charges falling due on pension saving outside the NHS schemes).

Specifically, this will be achieved by:

- clinicians who as a result of reaching their annual pension allowance are subsequently notified of a tax liability in respect of this year (2019/20) will be able to choose 'Scheme Pays' on their pension form, meaning that they don't have to worry about paying the fee out of their own pocket; AND
- The NHS will make a contractually binding commitment to pay them a corresponding amount on retirement, ensuring that they are fully compensated for the effect of the Scheme Pays deduction.

This scheme is being nationally funded at no net cost to trusts or CCGs and clinicians are therefore now immediately able to take on additional shifts or sessions without worrying about an annual allowance charge on their pension for 2019/20. The instruction requests that NHS

employers are being asked to actively promote this development to affected staff as they plan for extra capacity and staffing over the winter period.

These proposals will only apply to pension's tax annual allowance charges arising with respect to 2019/20 financial year. The Government has launched a consultation on a package of new proposals such as the introduction of a flexible accrual rate. As the NHS Pension Scheme is a statutory scheme, any flexibilities outlined in this consultation would require legislation and significant amendments to pension administration and payroll systems. As such, they are not currently planned for implementation before April 2020.

A series of frequently asked questions for employers and staff can be found at: <https://www.england.nhs.uk/pensions/> and further guidance is being provided by NHS Employers via a webinar on Tuesday 26 November 2019, to support on the practical implementation.

It is important to note that this is a supportive step for those staff members affected by the Annual Allowance but does not address the issues resulting in the changes to the Lifetime Allowance. In addition, this is only applicable for clinical members of the NHS Pension Scheme (as referenced in Appendix E) and as such, it is not applicable to non-clinical members of staff.

4. Winter Letter 2019/20

On the 5 November 2019, Trust Chairs and Chief Executives were written to by Pauline Philip DBE, National Director of Emergency and Elective Care and Bill McCarthy, Executive Regional Director (North West) (Appendix C). In this letter, it references that the most significant shared challenge for winter preparedness is the challenge relating to workforce availability and the continuing impact of pension taxes on doctors.

The letter indicates that many providers have requested clarification on what the national "default" should now be and NHSEI confirm that of the options set out by NHS Employers as detailed in section three, among the most effective have been local policies on the payment of employer contributions foregone as additional salary where scheme members have elected to opt out of the scheme due to tax arrangement (section 3b of Appendix C).

NHSEI are now signalling that their expectation is that Trusts that have not done so already should make immediate use of the flexibilities available (unless they are demonstrably not experiencing any issues with medical staff availability). They have also indicated that they would find it helpful if Chairs or Chief Executives confirm in a fortnight from the letter the arrangements that they have in place or intend to put in place, through Regional Directors. There is also an expectation where Remuneration Committee approval is needed that these meetings are arranged on an extraordinary basis.

5. Local Flexibilities to support staff & service delivery during the 2019/20 financial year

In September 2019, NHS Employers published "Pension tax guidance for Employers – local measures to support staff and service delivery during the 2019/20 financial year" (Appendix D). This guidance has been prepared to enable Trusts in supporting staff who are likely to be affected by pension tax issues and it is intended to support employers implement a number of optional, temporary measures locally.

On 7 August 2019, the government announced it will act to introduce pension changes to enable senior clinicians to take on additional clinical activities without incurring unexpected pension tax bills. The Department of Health and Social Care (DHSC) will consult on revised proposals to make the NHS Pension Scheme more flexible to allow senior clinicians (i.e. those in a registered clinical profession) to control the growth of their pension benefits. The announcement also confirmed HM Treasury will review the annual allowance taper to support the delivery of public services, such as the NHS.

The guidance and measures outlined can be used during the 2019/20 financial year to support staff and service delivery, ahead of any changes to the NHS Pension Scheme or wider tax system. It recommends that any local arrangements that are implemented are reviewed from April 2020 but also that employers are encouraged to engage with staff and listen to their concerns in order to reach local agreements in partnership with Trade Union colleagues, whilst supporting staff and service delivery.

The guidance places significant focus on the importance of financial advice being taken by employees to ensure their decisions are well informed, based on reliable and accurate information and positioned in the context of their overall individual financial position and long-term plans. It recommends that employers can signpost staff to general information and resources but emphasises that it is not appropriate for employers or NHS Pensions to give advice on the pension tax position, as they are not regulated and do not have the sufficient information about the employees financial circumstances.

When considering the choices employees may have with the new Pension rules and Taxation changes, particularly if they are affected by both the changes to the Lifetime Allowance, the Annual Allowance, and the introduction of the Tapered Annual Allowance, there are two options they will consider:

- Do they choose to remain in the NHS Pension Scheme?
- Do they decide to opt-out of the NHS Pension Scheme?

Section Two of the guidance details the existing flexibilities for employees choosing to remain in the NHS Pension Scheme. These flexibilities include:

- ***Managing Pensionable Pay*** – certain elements of pay can be determined as non-pensionable;
- ***Local Clinical Excellence Awards (LCEAs)*** – Converting old style LCEAs, which are pensionable and recurrent, to the new style LCEAs (non-pensionable and non-recurrent);
- ***Designing Time Off In Lieu (TOIL) arrangements*** – offering staff TOIL instead of pay;
- ***Use of multiple contracts*** – if an employee has multiple contracts of employment, they can opt out of the NHS Pension scheme for one or more of their employments;
- ***Establishing new organisations for service delivery*** – also known as Limited Liability Partnerships (LLPs). This option is not generally supported by the Department of Health & Social Care (DHSC) or NHSEI due to potential tax avoidance risks, considerable set

up time and costs, contracting arrangements, impact on the tapered allowance, IR35 implications, working arrangements and managing indemnity cover.

Our anaesthetic body are keen to explore this option and have set out a potential proposal. This initial response from our solicitors has highlighted that HMRC would be unlikely to see this as a contracted out service and therefore the IR35 guidelines would apply. Discussions with our solicitors and the Anaesthetists continue.

Section Three outlines the Potential arrangements for employees who decide to opt out of the NHS Pension Scheme. These arrangements include:

- ***Opting out of the scheme for part of the scheme year*** – this enables employees to opt out of the NHS Pension scheme for a period of time and then to return, which allows the build-up of lower value pension benefits;
- ***Paying the employer contributions as additional salary*** – often known as “employer contribution recycling”, this provides the option to make an additional pay offer to staff using any unused employer contributions. The BMA has produced a model policy for introducing an alternative contribution arrangement. Some Trusts have adopted this model policy and have found it useful in developing their local policies.

6. Trust Context

Along with all other healthcare providers, the Trust is reliant on additional clinical sessions to deliver direct clinical care. In 2018/19, £1.4m was paid to medical staff for additional sessions, equivalent to 5 Anaesthetists, 4 Cardiologists, 2 Cardiac Surgeons and 2 Radiologists. Radiology reporting was also supported through the use of an external company RMS. Attempts to recruit substantively have not always been successful and have involved overseas recruitment firms, resulting in premium payments.

As all elements of earnings are taken into account in determining pension tax liabilities, it is not possible for the Trust to accurately identify all those who are affected by these tax changes. Looking solely at Trust pay in 2018/19, at least 54 individuals will be impacted by a tapered annual allowance, nearly all of whom are medical staff. 11 of these individuals have already withdrawn from the NHS Pension Scheme. The actual numbers affected will be higher than this as all other earnings (e.g. private practice, property) and other pension schemes need to be taken into account.

The issue has been regularly raised by clinicians at the Local Negotiating Committee, and discussed at Executive Committee, Operational Board, and at divisional reviews. It is highlighted on the Risk register as a key cause of the risk to delivery of statutory waiting times.

7. Operational Context

Analysis of the number of lost session's 2019/20 year to date is provided in Table 1 below. This data illustrates the number of lost sessions within Surgery, with the majority of it being due to the lack of uptake of Waiting List Initiatives (WLI). Information for medicine was not available at the time of writing the paper.

Table One : Lost Sessions Surgery 2019/20

Month	No Anaesthetist	No Surgeon	No Consultant
July	9	18	0
August	10	29	4
September	4	7	5
October	13	8	14
Total	36	62	23

In addition, the number of additional sessions by month across speciality is provided below in Table 2 & 3, which provides further context and illustrates how the number of additional sessions undertaken since April 2018 has reduced.

Table 2: Additional sessions by speciality 2018/19

	2018/19											
Specialty	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Anaesthesia	72	72	51	22	101	107	81	65	61	56	62	65
Cardiology	52	112	67	73	55	48	55	42	82	40	46	130
Cardiac Surgery	36	23	41	21	42	29	34	16	4	24	21	21
Radiology	9	39	19	52	34	22	25	47	19	30	14	21
Thoracic Surgery	19			6	4	3				3		9
Respiratory			8			3		7			3	6
ACHD	4					5	5	2	7			
Grand Total	191	246	185	173	235	216	199	178	173	153	145	252

Table 3: Additional sessions by speciality 2019/20 (year to date)

	2019/20						
Specialty	Apr	May	Jun	Jul	Aug	Sep	Oct
Anaesthesia	36	34	45	32	27	46	58
Cardiology	24	31	37	42	41	47	39
Cardiac Surgery	7	27	29	25	15	25	27
Radiology	10	7	3	7	13	8	8
Thoracic Surgery	2	5	23	6	5	2	13
Respiratory	7		5	7	2	4	2
ACHD		13		2	3		2
Grand Total	86	117	142	121	106	132	149

8. Risks & Implications

The key risks that have initially been identified related to the Pension Tax Impacts on staff and service delivery to the Trust are:

- Increased risk on our ability to provide outstanding patient care due to the potential delays to treatment, as a consequence of reduced activity;
- Medical staff will no longer carry out the additional sessions required to meet patient demand, impacting on direct clinical care. LHCH is particularly exposed in the area of Anaesthetics, which impacts on both Cardiology and Surgical interventions;
- In the longer term there is a risk that doctors may no longer take up managerial roles and that clinical leadership is significantly reduced;
- Potential regulatory risks associated with the risk of failing to meet access targets, due to reduced activity;
- Potential financial risks associated with reduced activity and associated income which could impact on financial stability and failure to meet financial targets. This may also result in a higher risk segmentation category;
- Additional costs due to premium external staffing that may be required to deliver capacity;
- As no solution is yet nationally available for senior and executive roles, these are becoming increasingly more difficult to fill as members of staff delay progression to manage their annual pension build-up. This is evidenced by the low numbers going forward to the North Regional Talent Board Aspire Together programme;
- Staff affected retire early and withdraw from the workforce;
- Potential scrutiny from HMRC and/or regulators if an LLP was implemented;
- Doing nothing will increase dis-engagement across staff groups;
- A delay in the national review and implementation in potential changes beyond April 2020.

9. Considerations from a legal perspective

The Interim Director of People & Culture has consulted with Weightmans (Jane Marshall, Partner and Pensions Advisor) who are in the process of providing a summary of the key considerations related to Pension Tax Impacts from a legal perspective for the Trust. This will be provided separately to this paper.

10. Recommendations

The Board of Directors is asked to note the contents of this paper and the supporting appendices and to approve the following recommendations:

- To agree that the Trust actively promotes the Action on 2019/20 Pension Tax Impacts instruction, following the NHSEI announcement on 22 November 2019 (Appendix A & B).
- To agree that the Trust will not be taking forward the Limited Liability Partnership (LLP) approach at this time due to the NHSEI announcement, the timeliness of implementation and the current risks that this approach presents. A separate set of discussions is recommended with the key leads within Anaesthesia to ensure they are fully communicated with around this decision.

- To respond to the Executive Regional Director (North West) on the arrangements the Trust intends to put in place.
- To respond to the Local Negotiating Committee (LNC) formally on the agreed way forward.
- To communicate with Partnership forum on the agreed way forward.
- To provide educational sessions open to all staff who may be affected.

List of Appendices

Appendices	Title
Appendix A	NHS England & NHS Improvement Action on 2019/20 Pension Tax Impacts (22/11/19)
Appendix B	NHS England & NHS Improvement Pension Tax Impactions on the NHS – A solution for 2019/20 (22/11/19)
Appendix C	NHS England & NHS Improvement Winter Letter 2019/20 (05/11/19)
Appendix D	NHS Employers Pensions tax guidance for employers. Local Measures to support staff and service delivery during the 2019/20 financial year (September 2019)
Appendix E	Professional Standards Authority – Which professions are regulated?

List of Abbreviations

BMA	British Medical Association
DHSC	Department of Health & Social Care
HMRC	Her Majesty's Revenue & Customs
LHCH	Liverpool Heart & Chest Hospital NHS Foundation Trust
LLP	Limited Liability Partnerships
LNC	Local Negotiating Committee
NHSEI	NHS England and NHS Improvement
NHSPS	NHS Pension Scheme
NIC	National Insurance Contributions
WLI	Waiting List Initiative