Frequently asked questions about the application of “New Fair Deal” in the NHS for independent providers

When did New Fair Deal commence for the NHS?

Q1 - When did the New Fair Deal announced by Her Majesty's Treasury (HMT) on 4th July 2012 commence?

A: On 7 October 2013 HMT published: Fair Deal for staff pensions: staff transfer from central government which sets out the detail of how the New Fair Deal policy will operate. This guidance confirmed that commencement dates will vary across the public sector schemes.

The Department of Health (DH) had previously indicated that April 2012 would be the commencement date for the application of New Fair Deal to the NHS Pension Scheme (NHSPS). New Fair Deal participation by employers from April 2012 has been considered by DH on a case-by-case basis taking into account procurement, contracting and value for money considerations, among other factors.

In connection with ongoing contracts, the New Fair Deal policy applies to retenders of contracts involving compulsory transfers of staff who were transferred out of the public sector under the old Fair Deal. However, the policy also recognises that there may be circumstances apart from the retender of existing contracts where employers and contracting authorities consider there is an opportunity for such staff to return to the public service pension scheme. In such circumstances, a request may be made to DH to allow eligible staff to return to the NHSPS under a pension direction/determination to the employer.

The DH subsequently published guidance in relation to both Fair Deal staff transfers and the application of Fair Deal to ongoing contracts; these documents are available from the following weblink: https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme

Who is covered under these arrangements?

Q2 - Which staff are covered by New Fair Deal?

A: Staff covered by New Fair Deal includes people transferred out of the public sector under TUPE and other compulsory transfers, such as those to a public service mutual, or another new model of public service delivery. This includes staff who are involved in contracts subsequently renegotiated and where eligible staff are involved in a second generation transfer.
Eligible staff being those who are transferred as a result of sub-contracting or termination of a sub-contract, or cease work on the transferred NHS function, but move to other NHS work for that employer for which employees are eligible for NHSPS.

In all cases, where the employer is a non-NHS organisation, a pension direction/determination will be issued by NHSPS in respect of eligible staff. An NHS pension direction/determination authorised in respect of New Fair Deal will be a ‘closed’ document i.e. its application will be restricted to those staff listed in the official direction/determination document.

The whole-time or part-time employees named in a pension direction/determination under New Fair Deal will be eligible for the NHSPS provided that their minimum engagement time on the transferred NHS function amounts to more than 50% of their employed time for the relevant employer. This ‘more than 50% condition’ does not have to be met on any one day or week but must be met overall in respect of any complete scheme year. Where employment with the New Fair Deal employer is for less than a scheme year, the ‘more than 50% condition’ must be met overall in respect of the part year.

Employees named in a pension direction/determination who cease work on the transferred NHS function, but move to other NHS work for that employer, can also remain eligible for the NHSPS on the above basis.

If an individual feels they should be included within the scope of the New Fair Deal policy, they need to talk to their employer in the first instance. The employer will need to contact the administrator of the NHSPS, the NHS Business Services Authority (NHS BSA).

New Fair Deal does not apply to transfers within the public sector, such as machinery of government changes, which involve the transfer of staff from one part of Government to another. Those transfers are covered by the Cabinet Office Statement of Practice (COSOP) on staff transfers. Further information regarding COSOP is available at the following weblink:


Q3 - What action should an employer take if they are receiving staff who are protected under the New Fair Deal?

A: Once you are aware of a TUPE/compulsory transfer situation where employment is being transferred outside the public sector (or any subsequent transfers, as a result of subcontracting or termination of a sub contract) your employees should be able to retain membership of the NHSPS, as long as they remain wholly or mainly engaged in NHS work as outlined in the HMT guidance.
Staff transferring from the NHS will be able to retain access to the NHSPS through ‘closed’ NHS Pension Directions/Determinations. A NHS Pension Direction is a legal document drafted under powers conferred within Section 7 of the Superannuation (Miscellaneous Provisions) Act 1967 and provides access to the 1995/2008 NHSPS for those eligible transferring staff who retain scheme ‘Protection’ arrangements. Further information regarding ‘Protection’ is available at the following weblink: https://www.nhsbsa.nhs.uk/member-hub/membership-nhs-pension-scheme

An NHS pension determination is a legal document drafted under powers conferred within Section 25 of the Public Service Pensions Act 2013 and provides access to the 2015 NHSPS for those eligible transferring staff who do not have Protection.

Providers apply for a direction/determination by contacting the NHS BSA. More information, including an application pack is available at the following weblink: https://www.nhsbsa.nhs.uk/employer-hub/access-nhs-pension-scheme

The cost savings generated from being able to access the NHSPS as opposed to the “broadly comparable” route should be agreed and reflected in the final contract price.

How will it be managed and what does it offer?

Q4 – How will HMT and DH know that private sector organisations are applying this to public service work only?

A: The NHSPS is managed through directions/determinations and regulations. Training and guidance from the NHS BSA will make clear the control mechanisms that will be required to be in place to ensure that the pension scheme membership entitlement is applied correctly and not used to subsidise private sector work. This will include a legal requirement for employers to declare [annually] which staff continue to be eligible for the NHSPS supported by an audit process.

Q5 - What else will I have to do as an employer in the NHSPS (admin/information requirements etc)?

A: Like other NHS employers there will be a requirement to comply with the NHSPS Regulations referred to in the Employer’s Charter, available at the following weblink: https://www.nhsbsa.nhs.uk/employer-hub

Q6 - What other restrictions will there be?

A: HMT has indicated that there will be a need for each public service pension scheme to put in place sensible control mechanisms.
This may include measures such as a requirement to provide indemnities, guarantees or bonds to ensure that the taxpayer is protected from liabilities associated with an organisation becoming insolvent and being unable to pay the required contribution costs.

For the NHSPS, the Department of Health will ensure this risk is properly reflected in the NHS standard contracts, general contract and direction/determination documentation – however, NHSPS will normally only require a bond from participating independent sector employers if financial or administrative issues are encountered, e.g. late or non-payment of scheme contributions or a prior history of such problems.

Further details of this are provided in the DH New Fair Deal guidance for NHPS and through scheme regulations.

**Q7 - What is the legal relationship between NHPS membership and the contract?**

**A:** The contractor will be covered, through regulations and supporting directions/determinations, to provide the NHPS membership to those employed staff defined upon transfer to deliver the access to the NHPS. This is covered in the 1995, 2008 and 2015 main scheme regulations together with Directions made by Secretary of State under sections 7(1) and 7(2) of the Miscellaneous Provisions Act 1967 and Determinations made by Secretary of State under section 25 of the Public Service Pensions Act 2013. In addition the DH New Fair Deal Guidance for NHPS and NHS standard contracts provide further detail to ensure compliance with New Fair Deal and proper reflection in the contractual arrangements.

**Q8 – If you do not have a "broadly comparable" pension scheme, can you bid for NHS work on the basis of the New Fair Deal now?**

**A:** Yes. It is expected that organisations will now be bidding for NHS work on the basis of the New Fair Deal, thus the previous barrier that existed has been removed for some potential providers for transferring staff. The HMT guidance also clarifies that where broadly comparable arrangements are currently in place there will be an opportunity to use the NHPS in the future when those contracts are retendered. Further information regarding New Fair Deal policy in respect of the NHPS is available at the following weblink: [https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme](https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme)

**Q9 – Does New Fair Deal cover other terms and conditions other than the basic NHS pension?**

**A:** Yes, access and payment of the standard employer and employee contributions normally confers entitlement to the full range of NHPS personal and dependents benefits including redundancy benefits, subject to the prior payment of early payment charges.
Will there be training?

Q10 – Will there be training provided to inform independent providers what would be required from employers from the NHSPS administration.

A: NHS BSA have developed a quick start guide to the NHSPS to support organisations who have not previously had access to the scheme; the guide is available via the following weblink:
https://www.nhsbsa.nhs.uk/nhs-pensions

In addition, the Employers Charter sets out the roles and responsibilities for both NHS BSA and any employer who has staff in the NHSPS.

What are the financial implications for our organisation?

Q11 - How much will the NHSPS cost the organisation?

A: Offering access to the NHSPS will actually reduce the costs for TUPE/compulsorily transferred staff. A “broadly comparable scheme” adds circa 12% to employers’ pensions contributions (over and above the employers’ contributions to the NHSPS). The NHSPS scheme is an unfunded scheme backed by HM Government – which means that the liability is covered by employer and employee contribution rates. With effect from 1 April 2017 employers pay 14.38% (14.3% employer contributions plus 0.08% administration levy). There should normally be no other liabilities, provided that the organisation remains within the regulatory control mechanisms.

Q12 – What are the contribution rates for employers and employees?

A: The contribution rates will be the same as those for NHS employers. With effect from 1 April 2017 employers pay 14.38% (14.3% employer contributions plus 0.08% administration levy). The employee contribution rates are based on a tiered approach as set out below:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Pensionable Pay (whole time equivalent) used to determine contribution rates</th>
<th>Contribution rate (before tax relief) (gross) from 1 April 2015 to 31 March 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to £15,431.99</td>
<td>5.0%</td>
</tr>
<tr>
<td>2</td>
<td>£15,432.00 to £21,477.99</td>
<td>5.6%</td>
</tr>
<tr>
<td>3</td>
<td>£21,478.00 to £26,823.99</td>
<td>7.1%</td>
</tr>
<tr>
<td>4</td>
<td>£26,824.00 to £47,845.99</td>
<td>9.3%</td>
</tr>
<tr>
<td>5</td>
<td>£47,846.00 to £70,630.99</td>
<td>12.5%</td>
</tr>
<tr>
<td>6</td>
<td>£70,631.00 to £111,376.99</td>
<td>13.5%</td>
</tr>
<tr>
<td>7</td>
<td>£111,377.00 and over</td>
<td>14.5%</td>
</tr>
</tbody>
</table>
Q13 – How might the employer contribution change over time?

A: The contribution rates in the NHSPS are set through an actuarial valuation process. Like other NHS employers, there will be a requirement for independent sector providers to comply with any future changes in employer and employee contribution rates based on the process.

The last published actuarial valuation undertaken for the NHSPS was as at 31 March 2012 and published in June 2014. The primary purpose of the 2012 actuarial valuation was to set the employer contribution rate payable from April 2015, in light of the introduction of the new pension arrangements from 1 April 2015, and the initial employer cost cap (maximum employer contributions) which is required by the Public Service Pensions Act 2013. Both the employer contribution rate and employer cost cap have been included in scheme regulations.

The next actuarial valuation is expected to be carried out as at 31 March 2016. This will set the employer contribution rate payable from April 2019 and will consider the cost of the scheme relative to the employer cost cap. There are provisions in the Public Service Pensions Act 2013 to adjust member benefits or contribution rates if the cost of the scheme changes by more than 2% of pay. Subject to this employer cost cap assessment, any required revisions to member benefits or contribution rates will be determined by the Secretary of State for Health after consultation with the relevant stakeholders.

Except in relation to NHS commissioning contracts, there is an expectation that any changes in employer contribution rates will be passed through to the contracting authority by way of an adjustment to the service charges due from the contracting authority to the contractor under the relevant contract. Relevant NHS standard contracts will be updated to reflect this requirement.

In the context of NHS commissioning contracts there will be no requirement for any adjustment mechanism to be built into contracts, as it is anticipated that changes in employer contribution rate will be reflected in national tariffs and adjustment factors.

Q14 – Are there any assurance and governance arrangements in place for the NHSPS?

A: There are assurance and governance arrangements in place for the NHSPS. The NHS Pension Board has responsibility for setting and monitoring the performance of the NHSPS administrator. The Board includes a number of employer and member representatives and is overseen by an independent chair. Further information regarding the NHS Pension Board is available at the following weblink:

https://www.gov.uk/government/groups/nhs-pension-board
Q15 - I am a social enterprise that has access to the NHSPS via the closed direction, what does this mean in the context of the New Fair Deal?

A: Directions will remain in place as long as they are valid – however going forward where there are compulsory transfers from the NHS they will be covered through the New Fair Deal policy and accompanying DH Guidance and will be provided access under those provisions.

Q16 - How do the New Fair Deal and NHS pension access scheme differ?

A: The New Fair Deal arrangements replace the broad comparability and bulk transfer approach under old Fair Deal, which no longer applies. The New Fair Deal applies to all members of public service pension schemes that transfer out of the public sector under TUPE, and to staff that have previously transferred out of the public sector, and who have remained eligible for the old Fair Deal protection. This includes NHS staff with entitlement to contribute to the NHSPS. Staff that are subsequently transferred to a new employer are also protected under New Fair Deal.

The terms of access to the NHSPS was developed in partnership with the Trades Unions, Independent Sector and NHS Employers and builds on the New Fair Deal. It covers the terms of access for non-NHS organisations providing NHS Clinical Services (IPs), where they are delivering services under a qualifying contract e.g. an APMS contract or a NHS Standard Contract - including services procured under ‘Any Qualified Provider’ and covers both clinical and non-clinical staff delivering the clinical service.

Under the arrangements, IPs can choose from two levels of access or maintain the default position where they comply with the New Fair Deal only as outlined above:
Level 1: Access for existing members: IPs are required to auto-enrol into the NHSPS:
• from the date of commencement as a NHSPS employing authority, all existing eligible staff who were entitled to participate in the NHSPS at any time in the previous 12 months, and
• from the date of recruitment, all new eligible staff who were entitled to participate in the NHSPS at any time in the 12 months before joining the IP. Staff should be ‘wholly or mainly’ engaged in NHS work to retain access
Level 2: Access for all eligible staff: IPs are required to offer access to all staff who are eligible to join the NHSPS and are ‘wholly or mainly’ engaged in NHS work.

Q17 - Will Directions held by Independent providers cease to exist, with employees who were previously covered by them maintaining their membership under the New Fair Deal arrangements?

A: No, there will continue to be directions to support Fair Deal policy.
Q18 - Will access to public sector schemes for employees under New Fair Deal provide equitable benefits to those employed by public sector employers?

A: New Fair Deal is about Pension provision – other terms like Injury Benefit and Compensation arrangements will need separate consideration. Injury Benefit provisions are now in agenda for change contractual terms – so it depends on the T&C’s TUPEd across – however the injury benefit sunset clause would cover for any injury that may have occurred before 1 April 2013. The NHSPS regulations set out the eligibility criteria regarding Compensation arrangements in the scheme. Furthermore, the pension direction/determination will set out any additional requirements in respect of the arrangements.

For reference, a template direction/determination is available to view at the following weblink:
https://www.nhsbsa.nhs.uk/employer-hub/access-nhs-pension-scheme

Q19 - If an employee TUPE transferred from a public body to an independent provider before New Fair Deal was introduced, could staff claim membership of the relevant public sector pension scheme with immediate effect or only if at some point in the future the service is re-tendered?

A: The HMT guidance clarifies that changes should happen upon re-tender and may also be considered for ongoing contracts; any changes need to be reflected in contract prices. Further information is available to view at the following weblink:

Q20 - Will those staff employed on zero hour contracts be able to join the Scheme?

A: Zero hour contracts are not common in the NHS other than particular situations, for example bank staff, and these are unlikely to transfer out. It is not generally good practice to offer zero hours’ contract. However if an individual was on a zero hours contract and they were to TUPE/Compulsory transfer out of the NHS and continue to deliver the original public sector work on the same basis, then they would continue to have access to the NHS PS.

New staff would not be entitled to join the NHS PS under New Fair Deal. New Fair Deal is like a golden thread linked to a public sector worker who moves out to deliver public sector work under TUPE/Compulsory transfer in a non-public sector body. It sits with that individual and with that public sector role, and moves with them if the work transfers to another provider. It is not there for new staff who did not originate in the NHS.
Q21 - How will the relevant pension administration authorities monitor whether employees continue to work wholly or mainly in transferred services? Is self-declaration the only measure?

A: There will be a spot audit provision that BSA will use on a sample number of organisation. HMT have also asked for annual returns on key data as set out in the HMT New Fair Deal guidance and they may flag where they see discrepancies in data or unexpected changes in data.

Q22 - How will the amount of a required bond or guarantee be calculated?

A: Under New Fair Deal there is no routine bond requirement, except in circumstances where an organisation has shown itself to be a high risk, either by way of earlier or current contributions default. In such circumstances, the SoFS may require a bond, as provided for in regulations in respect of some or all of its liabilities under the NHS Scheme. In addition to the contribution related requirement provision is also made in regulations for the SoS, ultimately to terminate a New Fair Deal Direction/Determination, in the event of serious non-compliance with any aspect of the NHS Scheme regulations.

Q23 - How will the amount an employer is required to pay to cover any increase in pension liability (where an employee’s pay is increased in the years immediately prior to retirement) be calculated? Will the agreed limits applied to increases account for promotion, incremental increase and pay elements such as payment in lieu of annual leave?

A: For members of the 1995 final salary section of the Scheme only, employers will be charged an “excess employer contribution” for the cost of pension (but not death) benefits calculated on pay increased beyond the pay increase ‘cap’. The cap will be equal to the level of the CPI + 4.5%. The employer charge will apply to increases made above this cap, in one or more of the final three years prior to retirement.

The member’s pension benefits are NOT reduced and will continue to be calculated on uncapped pay. If the payment has been authorised by a central body – such as Advisory Committee on Clinical Excellence Awards (ACCEA) – any employer charge generated will be down to the national body. NHSBSA will bill directly the Department’s funding body responsible for national CEA, not the local employer. However, pay increases due to local CEA that are recommended by the employer will count for pay control purposes, like any other local pay increase.

It is worth remembering though that the majority of consultants who progress through CEA levels, one stage at a time, whether for a local or a national award, will not normally trigger a local employer or an ACCEA generated charge.

Pay increases that relate solely to changes in the National Minimum Wage and National Living Wage are excluded when assessing the increase ‘cap’.
These control mechanisms apply to all organisations, including NHS organisations. Further detail is available in the explanatory memorandum and the consultation response available at:

Consultation response

Explanatory Memorandum

Q24 - Can a Pension Direction/Determination be withdrawn by the NHSPS?

A: Where the Secretary of State is satisfied that the employer has failed to comply with any provision of the Pension Regulations (as modified in the Direction/Determination) the Secretary of State may terminate the Direction/Determination after giving three months written notice to the employer of an intention to do so.

Need to know more?

If you have any questions please see the weblinks and contact details below:

a) To make an application for access to the NHSPS:

weblink: https://www.nhsbsa.nhs.uk/employer-hub/access-nhs-pension-scheme
email: nhsbsa.schemeaccess@nhs.net

b) To seek assistance with administration of the NHSPS:

email: nhsbsa.stakeholderengagement@nhs.net