
WELSH STATUTORY INSTRUMENTS

2020 No. 263 (W. 62)

NATIONAL HEALTH SERVICE, WALES

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

<i>Made</i>	- - - -	<i>11 March 2020</i>
<i>Laid before the National Assembly for Wales</i>	- -	<i>13 March 2020</i>
<i>Coming into force</i>	- -	<i>6 April 2020</i>

The Welsh Ministers make the following Regulations in exercise of the powers conferred by sections 30(8) and (9), and 203(9) and (10) of the National Health Service (Wales) Act 2006⁽¹⁾.

Title, commencement and application

1.—(1) The title of these Regulations is the National Health Service (Existing Liabilities Scheme for General Practice) (Wales) Regulations 2020.

(2) These Regulations come into force on 6 April 2020.

(3) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

“the 2006 Act” (“*Deddf 2006*”) means the National Health Service (Wales) Act 2006;

“ancillary health services” (“*gwasanaethau iechyd ategol*”) 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,
- (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);

(1) [2006 c. 42](#); see section 206(1) for the definitions of “prescribed” and “regulations”. Subsections (8) and (9) of section 30 were inserted by section 1 of the National Health Service (Indemnities) (Wales) Act 2020 ([anaw 2](#)).

“eligible person” (“*person cymwys*”) means a person specified in regulation 5;

“the health service” (“*y gwasanaeth iechyd*”) means the health service continued under section 1(1) of the 2006 Act;

“Local Health Board” (“*Bwrdd Iechyd Lleol*”) means a Local Health Board established in accordance with section 11(2) of the 2006 Act;

“medical defence organisation” (“*sefydliad amddiffyn meddygol*”) 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 the persons providing services as part of the health service;

“Part 4 contractor” (“*contractwr Rhan 4*”) 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 of the 2006 Act—

- (a) section 41(2)(b) (primary medical services),
- (b) section 42(1) (general medical services contracts: introductory), or
- (c) section 50 (arrangements by a Local Health Board for the provision of primary medical services);

“primary medical services” (“*gwasanaethau meddygol sylfaenol*”) means the primary medical services that the Local Health Board is under a duty to secure in accordance with section 41 of the 2006 Act;

“primary medical services sub-contractor” (“*is-gontractwr gwasanaethau meddygol sylfaenol*”) means a person providing primary medical services under a contractual arrangement made with a Part 4 contractor;

“relevant function” (“*swyddogaeth berthnasol*”) means—

- (a) providing or making arrangements for the provision of—
 - (i) primary medical services, or
 - (ii) ancillary health services, or
- (b) carrying out an activity in connection with any of the activities mentioned in paragraph (a);

“relevant liability” (“*atebolrwydd perthnasol*”) means an existing liability to which the Scheme applies;

“the Scheme” (“*y Cynllun*”) means the scheme established by 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 Scheme is to be administered by the Welsh Ministers.

Meaning of “existing liability”

4. In these Regulations, “existing liability” means a 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 omission that—

- (a) occurred before 1 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 omission 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 member of a medical defence organisation and a person falling within paragraph (2), or
 - (b) a person engaged or permitted to carry out a relevant function by a person falling within sub-paragraph (a).
- (2) The following persons fall within this paragraph—
- (a) a Part 4 contractor,
 - (b) a primary medical services sub-contractor, or
 - (c) a person providing ancillary health services.
- (3) In paragraph (1), “relevant date” means the date on which the act or omission 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 Welsh Ministers have entered into a contractual arrangement with a medical defence organisation, and
 - (b) under that arrangement, the Welsh Ministers are required to consider providing indemnity or assistance in respect of an act or omission 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 1 April 2021 or any earlier date determined by the Welsh Ministers.
- (3) The Welsh Ministers must publish any date determined under paragraph (2) in the London, Edinburgh and Belfast Gazettes.

Payments under the Scheme

- 7.—(1) The Welsh Ministers 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 an eligible person—
- (a) has died,
 - (b) has been dissolved or wound up (within the meaning of the Companies Act 2006(2)), 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 Welsh Ministers in accordance with regulation 8.
- (5) In this regulation—

(2) 2006 c. 46.

- (a) “bankrupt” has the same meaning as that given in section 381(1) of the Insolvency Act 1986⁽³⁾ (“Bankrupt” and associated terminology), and
- (b) “insolvency” has the same meaning as that given in section 247(1)(4) of the Insolvency Act 1986 (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 Welsh Ministers 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⁽⁵⁾ made under section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁽⁶⁾ (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 contribution towards the legal and associated costs incurred by, a person in respect of a relevant liability, the relevant matters are the amount of—

- (a) the payment,
- (b) any contribution, and
- (c) any 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.

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

(4) Section 247(1) of the Insolvency Act 1986 was amended by the Enterprise Act 2002 (c. 40), section 248(3), Schedule 17, paragraphs 9, and 33(1) and (2).

(5) S.I. 2013/611.

(6) 2012 c. 10.

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

9. Without limit to the Welsh Ministers' powers under regulation 7, the Welsh Ministers 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 Welsh Ministers' written consent,
- (b) liability has been determined by a court in proceedings conducted by, or on behalf of, the eligible person, otherwise than in consultation with the Welsh Ministers,
- (c) the eligible person has not complied with a condition imposed by the Welsh Ministers in relation to a claim,
- (d) a payment falls to be made by the eligible person and, without first obtaining the Welsh Ministers' 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 to which the Scheme applies, or
 - (ii) make any other payment in respect of the relevant liability, otherwise 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 less than any amount specified by the Welsh Ministers 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 Welsh Ministers under regulation 7, where a payment falls to be made by an eligible person in connection with a relevant liability and the Welsh Ministers have not yet made a determination under regulation 7 as to whether a payment is to be made in respect of the relevant liability, the Welsh Ministers 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 no payment is to be made under regulation 7 in respect of a relevant liability, any payment on account made in respect of a 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 Welsh Ministers may, by notice in writing, require an eligible person to provide the Welsh Ministers with such assistance or information as may be specified in the notice.

(2) A notice given 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).

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Information as to any directions or guidance given by the Welsh Ministers

12. The Welsh Ministers must make the following information available to eligible persons, in such form and at such times as the Welsh Ministers consider appropriate—

- (a) any directions given by the Welsh Ministers under section 30(5) of the 2006 Act, and
- (b) any guidance given by the Welsh Ministers to any of the bodies specified in that subsection, in relation to the Scheme.

11 March 2020

Vaughan Gething
Minister for Health and Social Services, one of
the Welsh Ministers

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 Wales and come into force on 6 April 2020.

The Scheme relates to tortious liabilities arising from incidents that occurred before 1 April 2019 which have either been reported or incurred but not yet reported in connection with the provision of primary medical services and other healthcare services by general practice as part of the NHS. In the main, the liabilities covered by the Scheme will be clinical negligence liabilities.

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

Regulation 5 specifies who is an “eligible person”, namely persons whose existing liabilities may be met under the Scheme, subject to the liabilities being liabilities to which the Scheme applies. This is a person who is or who, on the relevant date was, a member of a medical defence organisation and also either a Part 4 contractor (a person contracted under Part 4 of the National Health Service (Wales) 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 such services); a person providing ancillary health services; or a person 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, giving rise to an existing liability, occurred and “ancillary health services” are NHS services, other than primary medical services, provided as part of general practice by a Part 4 contractor, a primary medical services sub-contractor or a person sub-contracted by such persons 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 owed to a third party that arise from acts or omissions connected to the provision of primary medical services or ancillary health services and which result in personal injury or harm to the third party. Existing liabilities of eligible persons are covered under the Scheme where the Welsh Ministers have entered into a contractual arrangement with a medical defence organisation and, under that contractual arrangement, the Welsh Ministers have agreed to consider providing discretionary indemnity or assistance for acts or omissions of members and former members of the medical defence organisation.

Acts or omissions of an eligible person’s employees or others engaged or permitted by an eligible person to carry out activities connected to the provision of primary medical services or other NHS services for the eligible person are also covered under the Scheme.

Regulations 7 to 10 provide for payments to be made under the Scheme, including regulation 9 which sets out circumstances in which the Welsh Ministers may decide that no payment is to be made.

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

Regulation 12 places the Welsh Ministers under a duty to make information available to an eligible person about directions or guidance given by the Welsh Ministers in relation to the Scheme.

The Welsh Ministers Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. A regulatory impact assessment relating to this instrument has been prepared as to the likely costs and benefits of complying with these Regulations.

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A copy can be obtained from the Primary Care and Health Science Directorate, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.