Pensions: a headache for doctors and trusts

Key points

- Highly-paid NHS staff may need personalised advice on their pension positions.
- Trusts are under pressure from consultants to consider alternatives which reduce the risk of large tax bills.
- There could be legal ramifications from some of the proposed solutions so trusts need to tread carefully.

NHS pensions have been a major concern for boards over the last few months, as many consultants have turned down extra work or even reduced clinical commitments because of the impact of the increased income on their pension-related tax bills.

Like others in the public sector, NHS staff on higher salaries can face significant tax bills for future pension benefits if they exceed their pension annual allowance – which will range from £10,000 for the highest earners to £40,000 for those on more modest sums. Tax will be payable if the accrued increase in future pension multiplied by 16 exceeds an individual's annual allowance.

Consultants whose income increases significantly – for example from taking on a clinical director role – or whose income is irregular, from additional work such as sessions to clear waiting lists, are exceeding their annual allowance and facing tax bills in the tens of thousands. This is causing some consultants to consider leaving the NHS pension scheme and others to restrict their clinical commitments.

Hempsons has been asked to advise several trusts about suitable ways forward. Our advice is that consultants and others – such as executive directors – worried by these tax issues should look at the bigger longer-term picture. The NHS scheme offers excellent benefits and most people would be best advised to remain in it: this may still be the case for some of those facing a large tax bill. Personalised advice will be needed to help them reach a decision on what to do.

The government has been consulting on possible changes to the scheme and has indicated these could be in place by April 2020. One suggestion has been to allow a 50-50 option where employees can opt out of pension contributions for 50 per cent of their income. While this has not met with a warm reception from some doctors, it may provide a partial solution to the issue – albeit that the employee will lose out on some pension benefits as a result.

Some trusts, however, are under pressure from their consultant body to develop a local solution and this may continue if any government action is delayed or not viewed as adequate. Proposed schemes usually are of two types.

1. Pension flexibility where employees opt out of the NHS pension scheme and are given back all as additional salary (or a proportion – of the employers' contribution). This is superficially attractive as it can be cost neutral for the employer (once extra NI contributions are accounted for) and attractive to the employee. However, there are two issues. One is that by offering it only to those at risk of pension-related tax bills, trusts could face claims for indirect discrimination. Those benefiting from it will generally be older than other employees and may be disproportionately male: it may be possible for younger, female employees to argue they are being indirectly discriminated against by not being allowed

the same flexibility. Trusts could potentially justify this by citing the negative impact on recruitment and retention, and therefore clinical services, if they don't take this action – but this may not be demonstrable in all cases. The second concern is that pensions law prohibits "inducements" to leave a scheme. The extra income could be seen as an inducement (particularly if the employer only refunds half of the contributions) as they would then benefit financially.

2. Contracting clinical work to limited liability partnerships (LLPs) set up by consultants. This has been suggested by a number of consultants and considered by some trusts. The LLPs would carry out clinical work under a service level agreement but consultants would have the option of withdrawing their money at some time in the future when the tax regime is more favourable (this could even be after retirement). The issue for trusts is that they would need to ensure a watertight legal agreement which ensured the necessary clinical work was carried out – and drawing up a service level agreement would be a lengthy process. Even if this was done, there is a risk that HMRC could view the arrangement as one set up to avoid tax: this could result in tax having to be paid regardless.

Another consideration for the government may be a recent ruling on the fire fighters' and judges' pension scheme. In June the government was refused permission to appeal to the Supreme Court after the Court of Appeal ruled that changes to the schemes in 2015 (which allowed older employees to remain in an existing scheme while younger members had to transfer) were discriminatory on grounds of age, race and equal pay. Similar provisions apply in many public sector schemes, including the NHS. The government has said it will look at how this can be remedied across the public sector: it has already indicated this could cost around £4bn a year.

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Andrew supports employers in the health, social care and private sector on employment law issues. Andrew has a national reputation for his work in handling concerns about doctors (under the MHPS framework), dealing with discrimination issues, employment tribunal claims and TUPE in particular and he has considerable expertise across healthcare employment law. He regularly provides training for clients on a wide range of employment law and HR issues and is a regular speaker at national conferences.