STATUTORY INSTRUMENTS

2017 No. 958

NATIONAL HEALTH SERVICE, ENGLAND

The NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017

Made - - - -	*3rd October 2017*
Laid before Parliament	*4th October 2017*
Coming into force - -	*1st November 2017*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 7(1), 28(1), (2), (4), (5) and (8), 29(2), 199(2), (4) and (5), 209(4), 272(7) and (8) and 273(4) of, and paragraphs 3, 5 and 13 of Schedule 6 to the National Health Service Act 2006(**1**).

Pursuant to section 28(7) of, and paragraph 4 of Schedule 6 to the National Health Service Act 2006, the Secretary of State has consulted those bodies he recognises as representing persons who, in his opinion, are likely to be affected by the provisions of this Order made under that section and under paragraph 3 of that Schedule.

PART 1

Introductory

Citation, commencement and application

1.—(1) This Order may be cited as the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017 and comes into force on 1st November 2017.

(2) This Order applies in relation to England only.

(**1**) 2006 c. 41. Section 7 was amended by section 21(1) to (4) of the Health and Social Care Act 2012 (c. 7) ("the 2012 Act"). Section 28 was amended by section 55(1) of, and paragraph 13 in Part 2 of Schedule 4 to, the 2012 Act. In relation to the exercise of powers to establish a new special health authority under section 28, see section 28A, which was inserted by section 48(1) of the 2012 Act and requires provision to be made for the abolition of the special health authority in orders made after the coming into force of said section 48. (Section 48 of the 2012 Act was brought into force on 1st April 2013 by SI 2013/160 (C.9).) Section 29 was amended by section 55(1) of, and paragraph 14 in Part 2 of Schedule 4 to, the 2012 Act. In Schedule 6 to the National Health Service Act 2006 ("the 2006 Act"), paragraphs 3 and 13 were amended by section 55(1) of, and paragraph 23 of Part 2 of Schedule 4 to, the 2012 Act; and paragraph 5 in Schedule 6 to the 2006 Act was amended by section 19 of, and paragraphs 9 and 11 of Part 1 of Schedule 3 to, the Health Act 2009. By virtue of section 271 of the 2006 Act, the powers exercised in making this Order are exercisable by the Secretary of State in relation to England only.

Interpretation

2. In this Order—

"the abolition date" means 31st October 2020;

"the Authority" means the NHS Counter Fraud Authority established pursuant to article 3;

"the BSA" means the NHS Business Services Authority(**2**);

"changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the Employment Rights Act 1996(**3**));

"counter fraud functions" means, in relation to the Authority, the functions the Authority is to exercise pursuant to article 4(1), (3) and (4);

"the NHS Act" means the National Health Service Act 2006;

"the transfer date" means 1st November 2017;

"the transitional period" means the period beginning on 1st November 2017 and ending immediately before 1st November 2018.

PART 2

Establishment and Constitution

Establishment

3. The special health authority to be known as the NHS Counter Fraud Authority is established by and in accordance with this Order.

Functions

4.—(1) The Authority is to exercise the functions of the Secretary of State in respect of counter fraud which are identified in paragraph (2), subject to and in accordance with this article and directions to the Authority given by the Secretary of State.

(2) The counter fraud functions the Authority is to exercise are—

(a) taking action for the purpose of preventing, detecting or investigating fraud, corruption or other unlawful activities, carried out against or otherwise affecting the health service in England;

(b) taking action for the purpose of preventing, detecting or investigating fraud, corruption or other unlawful activities against or otherwise affecting the Secretary of State in relation to his responsibilities for the health service in England;

(c) operational matters relating to the functions described in (a) and (b);

(d) providing advice to bodies and persons identified in directions given by the Secretary of State to the Authority about matters relevant to counter fraud.

(**2**) The NHS Business Services Authority is a Special Health Authority established by the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005, SI 2005/2414. That Order has effect as if made under section 28 of the National Health Service Act 2006 in relation to England, and section 22 of the National Health Service (Wales) Act 2006 (c. 42) in relation to Wales, by virtue of section 4 of, and paragraphs 1 and 2 of Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006 (c. 43).

(**3**) 1996 c. 18. There are no relevant amendments to section 139.

(3) Schedule 1 has effect, providing for directions to the Authority as to the exercise by the Authority and its senior officers of the Secretary of State's functions under sections 197(**4**) (notice requiring production of documents) and 198 (production of documents) of the NHS Act ("delegated functions") and making further provision pursuant to section 199(4) in connection with the exercise of those delegated functions.

(4) The Authority has the function of assisting and providing information to the Secretary of State when requested in relation to matters relevant to counter fraud.

(5) Nothing in this Order prevents the Authority from undertaking activity in accordance with arrangements made with it by Welsh Ministers pursuant to section 83 of the Government of Wales Act 2006(**5**).

(6) In this article—

"counter fraud" refers to the actions which may be taken in performance of the Secretary of State's counter fraud functions described in section 195(2) of the NHS Act;

"investigating" has the meaning given in section 195(5) of the NHS Act.

Constitution and Governance

5.—(1) Subject to paragraph (2), the Authority is to consist of—

(a) a chairperson;

(b) in addition to the chairperson, not less than three members who are not officers of the Authority; and

(c) at least two but not more than three members who are officers of the Authority, and those officer members must include the persons who for the time being hold the offices of chief executive and director of finance.

(2) During the transitional period, the Authority need consist only of—

(a) a chairperson;

(b) one other member who is not an officer of the Authority;

(c) an officer member appointed to act as chief executive of the Authority;

(d) an officer member appointed to act as director of finance of the Authority.

Appointments and tenure, etc

6. Schedule 2 has effect in respect of the appointment and tenure of the chairperson and other members of the Authority, of the appointment and tenure of officers of the Authority, including the making of certain temporary appointments in respect of the transitional period, and as to procedural matters relating to the conduct of the Authority's business.

(**4**) Section 197 was amended by section 55(1) of, and paragraph 105 of Part 9 of Schedule 4 to, the Health and Social Care Act 2012.

(**5**) 2006 c. 32. Section 83(1)(c) was amended by section 4(2)(a) of the Wales Act 2014 (c. 29).

PART 3

Transfer of Staff and Property etc from the NHS Business Service Authority and provisions for continuity in relation to the work of NHS Protect and the Authority

Interpretation

7.—(1) In this Part—

(a) "liabilities" do not include criminal liabilities (other than in paragraph (2));

(b) "NHS Protect" means the division within the BSA known as the Counter Fraud and Security Management Service Division, and also known as NHS Protect, maintained by the BSA in accordance with directions of the Secretary of State given on 1st June 2016(**6**).

(2) This Part does not apply to transfer, or provide for continuity in relation to, criminal liabilities of the BSA or proceedings arising from such liabilities.

Transfer of officers from the BSA to the Authority

8.—(1) This article applies to any person who—

(a) immediately before the transfer date is employed by the BSA within NHS Protect; and

(b) has been notified in writing by the BSA before the transfer date that they are to be transferred to the employment of the Authority on the transfer date.

(2) Any person to whom paragraph (1) applies is, on the transfer date, transferred to the employment of the Authority.

(3) The contract of employment of a person whose employment transfers to the Authority under paragraph (2)—

(a) is not terminated by the transfer; and

(b) has effect from the transfer date as if originally made between that person and the Authority.

(4) Without prejudice to paragraph (3)—

(a) all the rights, powers, duties and liabilities of the BSA under, or in connection with, the contract of employment of any person whose employment transfers under paragraph (2), are to transfer to the Authority on the transfer date;

(b) any act or omission before the transfer date of or in relation to the BSA, in respect of that person, or that person's contract of employment, is deemed to have been an act or omission of or in relation to the Authority.

(5) Paragraphs (2) to (4) do not operate to transfer the contract of employment of a person to whom paragraph (1) applies, or any rights, powers, duties and liabilities under, or in connection with that contract, if, before the transfer date, that person informed the BSA that the person objects to becoming employed by the Authority.

(6) Where a person to whom paragraph (1) applies has objected to the transfer of that person's contract of employment to the Authority as described in paragraph (5), this article operates so as to terminate that person's contract of employment with the BSA on the transfer date.

(7) Subject to paragraph (8), a person whose contract of employment is terminated in accordance with paragraph (6) is not to be treated, for any purpose, as having been dismissed by the BSA.

(**6**) The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) Directions 2016, a copy of which can be found at: *https://www.nhsbsa.nhs.uk/sites/default/files/2017-02/Section_2_-_B1_NHSBSA_Directions_2016.pdf*, or may be obtained by writing to the Department of Health Correspondence Unit, Richmond House, 79 Whitehall, London SW1A 2NS.

(8) Where the transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose employment is or would have transferred under paragraph (2), that person may treat the contract of employment as having been terminated, and that person is to be treated for any purpose as having been dismissed by the employer.

(9) No damages are to be payable by an employer as a result of a dismissal falling within paragraph (8) in respect of any failure by the employer to pay wages to a person in respect of a notice period which the person has failed to work.

(10) Paragraphs (2), (3) and (5) to (8) are without prejudice to any right of a person arising apart from this article to terminate that person's contract of employment without notice in acceptance of a repudiatory breach of contract by the employer.

(11) Records of the BSA's relating to the employment of officers within NHS Protect whose contracts of employment are to transfer to the Authority pursuant to this article are to transfer to the Authority on the transfer date.

(12) Where a person whose contract of employment is transferred by this article is dismissed by the Authority, that person is to be treated, for the purposes of Part 10 of the Employment Rights Act 1996(**7**) (unfair dismissal) as having been unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(13) This paragraph applies where the sole or principal reason for a person's dismissal is an economic, technical or organisational reason entailing changes in the workforce of the Authority after the transfer.

(14) Where paragraph (13) applies, paragraph (12) does not apply and, without prejudice to section 98(4) of the Employment Rights Act 1996 (test of fair dismissal)(**8**), for the purposes of sections 98(1) (reason for dismissal) and 135 (the right to a redundancy payment) of that Act—

(a) the dismissal is to be regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(b) in any other case, the dismissal is to be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position that the employee held.

(15) Paragraph (12) does not apply in relation to a dismissal of an employee if the application of section 94 of the Employment Rights Act 1996 (right not to be unfairly dismissed) to that dismissal is excluded by or under any provision of that Act, the Employment Tribunals Act 1996(**9**) or the Trade Union and Labour Relations (Consolidation) Act 1992(**10**).

(16) The following provisions apply only for purposes of giving effect to a transfer under paragraph (2), as read with paragraphs (3) and (4), and are subject to paragraphs (5) to (10) and (12) to (15)—

(a) anything (including legal proceedings) which, immediately before the transfer date, is in the process of being done by, or in relation to, the BSA in connection with the employment of persons whose employment transfers under paragraph (2) is deemed to have effect as if done by, or in relation to, the Authority, and may be continued by, or in relation to, the Authority;

(**7**) 1996 c. 18.
(**8**) Section 98 was amended by sections 9 and 44 of, and paragraphs 5 and 15 of Schedule 4 and table 2 of Schedule 9 to, the Employment Relations Act 1999 (c. 26); by section 53 of, and paragraphs 24 and 32 of Schedule 7 to, the Employment Act 2002 (c. 22); by section 57(1) of, and paragraph 30 of Schedule 1 to, the Employment Relations Act 2004 (c. 24); and by SI 2006/1031 and 2011/1069.
(**9**) 1996 c. 17.
(**10**) 1992 c. 52.