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GMB Pensions – deferred pay matters



The Fair Deal – what happens to pensions when staff are TUPE'd out of the public sector to independent providers delivering public services?

This briefing sets out the revised Fair Deal guidance which came into effect in October 2013. The Fair Deal is a non-statutory policy¹ setting out how pensions issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services.

The policy states that when staff who are members of a public service pension scheme transfer from the public sector to an independent contractor under TUPE, they retain the right to continue to be members of the public service pension scheme they were in prior to the transfer. Staff retain this eligibility following any subsequent compulsory transfer. It is no longer appropriate to transfer these staff to a broadly comparable scheme

This policy should be reflected in procurement practice and applies directly to central government departments, agencies, the NHS, maintained schools (including academies) and any other parts of the public sector under the control of Government ministers where staff are eligible to be members of a public service pension scheme.

It does not apply to best value authorities (listed in section 1 of the Local Government Act 1999) nor to other staff of the independent contractor.

Contracting authorities should ensure

- That when staff are compulsorily transferred, the contractor provides them with access to the appropriate public service pension scheme in their new employment while they continue to be employed on the transferred service or function.
- That the contract for the transferred service or function specifically requires the contractor to provide transferred staff with continued access to the

¹ The Fair Deal is a Code of Practise not a statement of the law and so there is no direct penalty for failure to comply. However, when deciding if legal requirements have been met a court must take the Code of Practise into account.

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relevant public service pension scheme while they remain employed on the public service contract.

- That the contracts of employment of staff who are compulsorily transferred provide a right to continued membership of their public service pension scheme.
- That staff who have been compulsorily transferred are provided with continued access to the relevant public service pension scheme upon any subsequent compulsory transfer
- That the contracts of employment of staff who are compulsorily transferred in second or subsequent generation transfers continue to provide a right to continued membership of their public service pension scheme - a right which will be enforceable against the new employer - and that this is made clear at an early stage in the procurement process
- That Pension issues should be dealt with as an integral part of the overall procurement exercise

Contracting authorities

- May also wish to confirm at an early stage in the procurement process that prospective bidders are willing to comply with the regulations
- Should notify the authority responsible for the relevant public service pension scheme at an early stage in the process that existing members may be being transferred to a new employer who will need to participate in the scheme.
- Should accept that a Participation Agreement² between the independent contractor and the relevant public service pension scheme will be required for each public service contract before the transfer of staff takes place.
- Should provide the scheme manager with the names of the individuals transferring to the new employer

No decision should be taken not to provide continued access to a public service pension scheme to staff who are to be compulsorily transferred from the public sector unless any recognised trade union or, in the absence of such a body, the staff, have been consulted with a view to reaching agreement with them.

Only in exceptional cases should members of staff to whom this guidance applies not remain members of their public service pension scheme.

² See the full guidance

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These rights are ultimately enforceable by staff, although contracting authorities have a responsibility to ensure that independent contractors comply with those of their contractual responsibilities which give effect to the Fair Deal policy, as outlined above. Independent contractors, as scheme employers in the public service pension schemes, will also be subject to requirements of the scheme regulations and the jurisdiction of the Pensions Regulator and Pensions Ombudsman.

Retenders of contracts involving staff who were transferred out of the public sector under the old Fair Deal guidance

When a contract involving the compulsory transfer of employees already transferred out under the old Fair Deal is retendered, contracting authorities should require bidders to provide them with access to the appropriate public service scheme.

The successful bidder should provide the relevant staff with access to the appropriate public service pension scheme in their new employment, while they continue to be employed on the contracted service or function. The appropriate scheme will normally be the scheme that staff would be in, had they remained in the public sector and not been transferred out. All staff and employers will be subject to the rules of the scheme at the time of transfer and all subsequent changes.

Only under exceptional circumstances should this not be the case

Decisions on whether staff should be returned to a public service pension scheme in circumstances other than a retender should be made on a case by case basis.

This briefing is a précis of the HM Treasury Document “Fair Deal for Staff Pensions: staff transfer from central government” which contains additional and further guidance in relation to all of the above, participation in the public service pension schemes, and Broad Comparability assessments. The full guidance is available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262490/PU1571_Fair_Deal_for_staf_pensions.pdf

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