

## The 'Fair Deal' proposals

Fair Deal for Staff Pensions sets out how pension issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services. The Government announced in December 2011 that the Fair Deal policy, introduced in 1999, was to be retained but delivered in a different way. Staff transferring from the public sector will have continued access to their public service pension scheme rather than being offered a broadly comparable private pension scheme, as was previously the case.

The Treasury published its revised guidance, Fair Deal for Staff Pensions: staff transfers from central Government, in October 2013. It covers central Government departments and their agencies, the NHS, schools that are not local authority maintained, academies, and any other parts of the public sector under the control of Ministers where staff are eligible to be members of a public service pension scheme.

In local government, the Best Value Staff Transfers (Pensions Direction) 2007 sets out the current level of pension protection for employees of English best value authorities (and Welsh police authorities) where the provision of services are contracted out, and staff transferred under TUPE to an independent provider. The Pensions Direction ensures that the employee has the right to acquire pension benefits that are the same as or count as being broadly comparable to or better than those that he had as an employee of the authority. It is now proposed that the 2013 Regulations will contain provisions to permit all transferring members to remain in the Scheme. The Pensions Direction will be revoked in due course and the associated primary legislation will be repealed.

4. When considering how best to implement the reformed Fair Deal in the Local Government Pension Scheme, account was taken of the existing admitted body regulatory framework which has been operating for over 15 years. The admitted body status framework includes safeguards to protect other employers in the Scheme by requiring appropriate risk assessments and the need for a bond, indemnity or guarantee where risks are identified. Admitted bodies are required to pay the appropriate amounts to the Scheme to meet the pensions that accrue for the members they employ. In view of this, the draft regulations build on admitted body status. **However, if there are better ways to adopt the reformed Fair Deal in local government, consultees are invited to recommend an alternative approach and say why they consider this to be preferable.**

5. Employees who would be covered by these draft regulations are those eligible for the Scheme and compulsorily transferred from local authorities and other employers listed on the face of the 2013 Regulations. This includes those employees who are designated as eligible and employees of other bodies that participate in the Scheme through an admission agreement (admitted bodies).

### **Higher and Further Education Institutions and other exempt bodies**

Fair Deal does not apply to higher and further education institutions, which are classified as private sector bodies, as the Fair Deal policy applies to transfers from the public sector. Police and Crime Commissioner are not required to adopt Fair Deal, as they are not best value authorities like a Police Authority. A PCC would not be precluded from adopting the principles of Fair Deal should they wish to.

### **Introducing a protected transferee and a protected transferee employer**

The category of person covered by Fair Deal is an employee of a current Scheme employer referred to in paragraphs 5 and who is compulsorily transferred to an independent service provider who does not offer a public service pension scheme. This category of member will be a 'protected transferee' and would remain so as long as that member remains wholly or mainly employed on the delivery of the service or function transferred.

The regulations introduce a new category of Scheme employer, a 'protected transferee employer' who is obliged to participate in the Scheme under the 2013 Regulations for those staff they receive that are 'protected transferees'. These employers will, generally, be providing a service or function under contract with a Scheme employer and can be profit-making bodies as well as not-for-profit or voluntary organisations.

It is envisaged that a 'protected transferee employer' can itself transfer staff to a new provider and these staff would also be regarded as 'protected transferees'. The original 'protected transferee employer' will be regarded as a Scheme employer for these purposes as will the receiving second 'protected transferee employer'.

### **Admitted body status**

Admitted body status arrangements have been a feature of the Scheme for many years and is the means for independent service providers to become employers in the Scheme. The 2013 Regulations will be amended to align more closely with the provisions in the Public Service Pensions Act 2013 ("the 2013 Act") dealing with eligibility for membership of a public service pension scheme. For local government, a person will be eligible for membership if actually employed in local government service; if deemed by the regulations to be employed in local government service; or if, despite not being employed in local government service, is subject to a "determination" under section 25(5) of the 2013 Act.

A determination under section 25(5) of the 2013 Act is made when an administering authority enters into an admission agreement with an independent provider of services. Alignment of the 2013 Regulations with the provisions in the 2013 Act will require no changes to the existing process for entering into admission agreements and no alteration to the status of any existing admission agreements.

Under the proposed regulations, independent service providers will be obliged to enter into an admission agreement so that the protected transferee can retain their eligibility for the Scheme. The costs of providing a local government pension to transferring staff should be clearly set out in the tender documentation. Those seeking to provide public services or functions for the first time will be obliged to offer membership of the Scheme for staff they receive under the compulsory transfer but all bidding organisations would be under the same pension obligations.

There are already provisions in the Scheme to mitigate the risks of participating employers falling into insolvency or simply failing to meet their financial obligations under the Scheme Regulations which could have the effect of requiring other employers sharing the debt left by the failing body or, ultimately, financial pressures on local tax payers. The risk assessment regime is provided for in the 2013 Regulations in Schedule 2, Part 3, paragraphs 6 – 8 and, if the level of risk identified by the assessment based on actuarial advice requires it, the protected transferee employer would have to provide a bond, indemnity or a guarantee. This will apply to a 'protected transferee employer' as it would apply to any admission body and provides a proportionate means to mitigate any risks identified and this is permitted by section 25(8) of the 2013 Act.

The provisions dealing with ceasing participation in the Scheme, for example when a contract ends, would apply to this category of Scheme employer as it does to other employers in the Scheme. This means that when the amounts needed to meet all liabilities falling to the exiting employer cannot be made by the assets held in the administering authority's pension fund, an exit payment must be paid to that administering authority to address the shortfall.

### **Retenders of contracts involving members who were previously transferred out to a new provider and joined the provider's broadly comparable pension scheme**

A member who has moved out of the Scheme under an earlier transfer may still be in that provider's broadly comparable pension arrangement permitted under the Best Value Authorities (Pensions) Direction 2007 (see paragraph 3 above) and retains the Pensions Direction protections when a contract is retendered. The Treasury code: Fair Deal for Staff Pensions states that contracting authorities should (where this is compatible with their obligations under the Public Contracts Regulations 2006) require bidders to provide them with access to the appropriate public service scheme. The legal position is not the same for local government as it would require explicit statutory powers to achieve this. The draft regulations do not include a requirement that, at retender, the formerly transferred member becomes a protected transferee member and the successful bidder becomes a protected transferee employer. This is because the individual is not being transferred out of the public sector at that point as they are employed by the current external provider. It will remain the case that new providers at a retender can access the Scheme should they wish to by seeking admitted body status but it is not proposed that they will be required to do so.

**16. Views are sought on whether this is the right approach.** If consultees recommend an alternative approach, they are asked to say why that approach should be considered and how that might be achieved from a practical perspective eg how would accrued rights transfer from the provider's Scheme to the Local Government Pension Scheme?

#### **Publishing lists of members participating in the Scheme**

17. Section 25(5) of the 2013 Act, requires the publication of a list of persons to whom the Scheme relates and the list must be kept up to date. This does not require publication of the names of individual members of the Scheme but would be a list of the determinations that have been made under that section (that is to say admission agreements entered into). The draft Regulations delegate the obligations to publish this list to the relevant administering authority. The provision in the 2013 Regulations in Schedule 2, Part 3, paragraph 11 (which requires individual notification of admission agreements to the Secretary of State) is no longer required and will be removed.