

# PENSIONS IN 30 PODCASTS

# 17

## CHANGING PENSION ARRANGEMENTS - consultation with employees

### Key points

- Employers with more than 50 employees are required to consult with 'affected members' if they propose making certain types of changes to pension schemes. These changes are known as 'listed changes';
- The minimum consultation period is 60 days;
- Affected members include active members and employees who have an entitlement to join the pension scheme (i.e. prospective members);
- Affected members must be provided with information. The requirements for what needs to be in this information are set out in legislation. In addition, the Pensions Regulator has provided guidance on what it expects to see in consultation information.

### Main sources

- Pensions Act 2004 (s259 to 261)
- The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the "Pensions Consultation Regulations")
- The Pensions Regulator's Guidance for Employers: The duty to consult on scheme changes February 2015

### Overview

Since 6 April 2006 there has been an obligation on an employer to consult with affected members in relation to certain changes (known as "listed changes") which it proposes to make in relation to either an occupational pension scheme or a personal pension scheme

The employer must consult for a minimum 60 day period before making a listed change. Failing to consult will not render the changes void under these regulations but it could lead to a fine being imposed by the Pensions Regulator of up to £50,000. In addition, the ruling in *IBM UK v Dalgleish* has raised the prospect of other possible sanctions if an employer fails to consult properly.

The duty applies to each employer employing at least 50 employees in Great Britain (regardless of how many employees are affected by the proposed listed change).

### Listed changes

There are specific occupational pension scheme listed changes, including significant changes such as:

- closure of a pension scheme to future accrual for all employees or employees of a particular description;
- preventing employees or employees of a particular description from joining the scheme in the future;
- removing an employer's obligation to contribute to the scheme; or
- introducing or increasing member contributions.

There are also comparatively less radical listed changes such as capping pensionable pay, increasing the scheme's normal pension age or reducing the rate at which pensions under the scheme are increased or revalued.

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### More information

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Changes made to personal pension schemes may also be "listed changes" and therefore require consultation with affected members.

The full list of listed changes is found at regulations 8 and 9 of the Pension Consultation Regulations.

An employer does not have to consult under the Pensions Consultation Regulations where:

- (a) the change is made to comply with a statutory provision;
- (b) the change is made to comply with a determination of the Pensions Regulator; or
- (c) the change has no lasting effect on a person's rights to be admitted to a scheme or the benefits that may be provided under it (e.g. scheme merger).

### To whom must information be provided?

Where an employer (or trustee/manager of the scheme) is proposing to make a listed change, each relevant employer must provide certain minimum information about the proposal to affected members and their representatives to ensure a full and fair process.

Affected members are active members and prospective members of the scheme to the extent that the listed change affects them.

Whilst active members might be relatively easy to identify (those who are actively contributing to the scheme or having employer contributions made on their behalf and who are building up benefits), care should be taken to ensure that prospective (i.e. eligible members) are also included in the consultation.

Because of the wide definition of prospective members in the Pensions Consultation Regulations, this may mean a larger group of employees will be subject to the information and consultation exercise than the employer might have expected.

### What information must be provided?

Each relevant employer must provide, as a minimum, the following information about the proposed change in writing:

- describe the listed change;
- details of the effects it would or would be likely to have on the scheme and its members;
- any relevant background information;
- indicative timescales for the proposed changes to be introduced;
- sufficient detail to enable representatives of the affected members to consider, conduct a study of and feedback their views on the listed change to the employer.

The information must be provided to affected members and their representatives before the consultation begins.

The Pensions Regulator issued guidance in February 2015 in relation to an employer's consultation obligations. The Department for Work and Pensions previously issued guidance (April 2010) has now been withdrawn, but it recommended that employers should consider providing certain additional information to affected members and their representatives to ensure a full and fair process.

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### What is the consultation requirement?

The employer can determine when the consultation starts and ends, but it must last for a minimum 60 day period.

Each relevant employer should ensure that as far as it is reasonably practicable the consultation includes all affected members. Consultation may be with appropriate representatives (as defined in the Pensions Consultation Regulations), or with affected members, or both.

The relevant employer and any person who is consulted are under a duty to work in a spirit of co-operation, taking into account the interests of both sides. This does not extend so far as a negotiation, or seeking that any persons consulted with agree to the changes before they are implemented.

At the end of the consultation period the person who proposed the listed change (be that the relevant employer, the trustees or managers of the pension scheme) must consider the responses (if any) received during the pensions consultation period before making its decision as to whether to go ahead with the listed change.

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