

alert

Consultation! Consultation!

1 BACKGROUND

The obligation on employers to consult employees regarding major pension scheme changes from 6 April 2006 is the focus of the latest consultation to emerge from the DWP.

The driver behind the requirements to consult is the EC Directive on Informing and Consulting Employees. This Directive was implemented in the UK in terms of employment rights from 6 April 2005 (see paragraph 2 below), but the pensions aspects were left to the Pensions Act 2004 (PA 2004).

Sections 259 - 261 of PA 2004 set out a framework for requiring employers to consult about certain "prescribed decisions" relating to future benefit provision. Two sets of draft Regulations¹ have now been published for consultation which help to flesh out the changes which are likely to be affected.

The consultation period closes on 26 August 2005.

2 GENERAL EMPLOYMENT REQUIREMENTS

From 6 April 2005, employees in organisations with 150 or more employees have a right to be informed and consulted on a regular basis about issues relating to their employer (for example, the economic situation of the business). The requirements in the employment legislation do not apply automatically, but only if the employees request that it does. A written request must be made by at least 10% of the workforce.

Organisations with 100 or more employees will come within the scope of the legislation in April 2007, and those with 50 or more employees in April 2008. (The Directive does not apply to businesses with fewer than 50 employees.)

¹ The Occupational and Personal Pension Schemes (Consultation By Employers) Regulations 2006 and The Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006

alert

Continued

Consultation! Consultation!

3 THE PENSIONS CONSULTATION

Although the pensions provisions come into force from 6 April 2006, a similar phased “roll-out” applies to pensions, with the same exclusion for organisations with 50 or less employees. There are also some pension specific exemptions – for example, public service schemes and small schemes.

The key difference from the general employment provisions is that the requirement to consult on pensions will apply automatically. Therefore, there are a number of important areas which larger employers will have to get to grips with immediately:

- What changes will require consultation?
- Who should be consulted?
- Whether to appoint “member representatives”.
- If consultation does need to take place, what information should members be given?

4 WHAT CHANGES WILL REQUIRE CONSULTATION?

The draft Regulations contain a list of the changes to future benefits which require consultation. The “listed changes” are:

For all occupational pension schemes:

- An increase in the age at which benefits become payable to (or in respect of) both active and prospective members.
- A change which prevents new members or certain kinds of new members from being admitted to the scheme.
- The prevention of future accrual of any benefits under the scheme (again, for or in respect of both active and prospective members).

SACKER[®]
& PARTNERS

Solicitors specialising in pensions law

Sacker & Partners LLP
29 Ludgate Hill London EC4M 7NX
Tel 020 7329 6699 Fax 020 7248 0552

enquiries@sackers.com
www.sackers.com

alert

Continued

Consultation! Consultation!

- Removal of an employer's liability to contribute to the scheme.
- The introduction of member contributions (if none were previously required) or the increase of member contributions by 2% or more.

For occupational defined contribution (DC) schemes:

- The reduction of employer contributions by 2% or more (or to below a level of 3%).

For occupational defined benefit (DB) schemes:

- Changing some or all of the benefits under the scheme from DB benefits to DC.
- Modifying the scheme to reduce future accrual.

For personal pension schemes:

- There are also "listed changes" specified for personal pension schemes – not surprisingly these focus on contribution rates, using the same criteria for occupational schemes as described above.

The Regulations also make it clear that if more than one change is made in employer or member contributions within a 12 month period which add up to a "listed change" (even though on their own each change does not), an employer must consult.

5 WHO SHOULD BE CONSULTED ON PENSIONS?

If the change is a "listed change", the draft Regulations currently seem to contain two separate requirements.

Firstly, each employer must provide written information to "all employees who are affected members of the scheme" and to their representatives, giving a date for the submission of comments.

SACKER^S
& PARTNERS

Solicitors specialising in pensions law

Sacker & Partners LLP
29 Ludgate Hill London EC4M 7NX
Tel 020 7329 6699 Fax 020 7248 0552

enquiries@sackers.com
www.sackers.com

alert

Continued

Consultation! Consultation!

Secondly, the employer must consult "with whichever of the following employee representatives he chooses":

- representatives of a recognised trade union (if applicable);
- any persons appointed as "information and consultation representatives" in accordance with the general employment arrangements described above; and
- any persons who have been elected as "member representatives"(see paragraph 6 below).

But the employer must consult directly with affected employees if there are no employee representatives or where there is a negotiated agreement requiring direct consultation "in circumstances which include those of the listed change".

6 MEMBER REPRESENTATIVES

The draft Regulations contain proposals for the appointment of "member representatives" - either as a general appointment or for a specific period. The appointment of such representatives is up to the employer. If the employer opts to appoint representatives, the Regulations provide that there should be sufficient "member representatives" appointed to represent the different classes of members affected by the change.

But note that if "member representatives" are elected they are given rights to paid time off and not to be unfairly dismissed or to suffer detriment in their employment (this is similar to the protection given to appointed trade union representatives).

7 CONSULTATION CONTENT

The employer must provide written information on the proposed "listed change" at least 2 months before the date on which it is to take effect, together with the closing date for any submissions. But the notice must be given "at such time, in such fashion and

alert

Continued

Consultation! Consultation!

with such content as are appropriate” to enable member representatives in particular to consider the impact of the change and to “conduct a study of it”.

The written information must also:

- state the effect the “listed change” would (or would be likely to) have on the scheme and its members;
- be accompanied by any relevant background information; and
- indicate the timescale for introducing the change.

There will also be modifications to the Regulations for multi-employer schemes.

8 EFFECT OF CONSULTATION

Leaving aside the procedural aspects of consultation, we suspect that what will be troubling employers most is the question of what consultation actually means. Unhelpfully, the term is not defined in the Regulations, but the Regulations do require that the employer “consider any comments on the change he has received in response to the consultation”.

In a recent pensions case, it was held that “it is plain that consultation requires more than just the mere giving of notice”². The judge also approved the following earlier statement: “the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice”³.

In practice, the individual characteristics of the organisation and the change proposed will probably determine what is appropriate in each case to meet the consultation requirement.

² Pitmans Trustees Limited v Telecommunications Group (2004)

³ R v Secretary of State, ex parte Association of Metropolitan Authorities (1986)

alert

Continued

Consultation! Consultation!

Importantly, the change is not invalidated (and there are no specific remedies built into the Regulations) if consultation is not carried out properly – the remedy for failure to comply is by way of a complaint to the Pensions Regulator. The Regulator also has power to waive the consultation requirements if he is satisfied that “it is necessary to do so in order to protect the interests of the generality of all the members of the scheme”.

9 DON'T FORGET...

As well as these new requirements the employer may already have obligations to consult employees as part of the duty of trust and confidence, on the transfer of an undertaking or under the general requirements for consultation in the employment context where the changes are significant or where pensions are included in collective bargaining arrangements.

Consultation requirements will also feature in the revised method for modifying schemes under section 67 (as amended by the PA 2004). As the new section 67 will also be introduced in April 2006, employers will need to think about the process involved in making change very carefully before taking any steps to amend a scheme.