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CONSULTATION! CONSULTATION! – AN UPDATE

1 BACKGROUND

With 2006 less than three weeks old, the production line of Pensions Act 2004 regulations has begun again in earnest. From 6 April 2006, employers will have to consult with employees before certain changes (known as "listed changes") can be made to a pension scheme. The new obligation, which follows a consultation document published back in June 2005, stems from the EC Directive on Informing and Consulting Employees.

Here we recap and update our original Alert: "Consultation! Consultation!" dated 8 June 2005[1].

2 KEY CHANGES

- The new consultation requirements apply from 6 April 2006.
- There is a phased implementation, starting with employers with 150 plus employees (employers with 50 or less employees are exempt and there are other exemptions, for example, for small schemes).
- The need to consult is triggered whenever a "listed change" is proposed (see section 4).
- There are two distinct stages: (i) informing (see section 5); and (ii) consulting (see section 6) (the final regulations clarify the procedures).
- The party proposing the change (which may not be the employer but, say, the trustees) must give a written notice to each scheme employer kick-starting the consultation process.

[1] See the client pages of our website at: http://www.sackers.com

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3 THE LEGISLATION

Two sets of regulations[2] have now been finalised which help to flesh out the consultation requirements set out in sections 259-261 of the Pensions Act 2004. The regulations are subject to the "affirmative procedure" in Parliament which means that they must be approved by both Houses before they come into force. Copies of the regulations can be found at:

http://www.opsi.gov.uk/si/si2006/draft/20063891.htm

http://www.opsi.gov.uk/si/si2006/20060016.htm

The pensions legislation needs to be set against the backdrop of the general employment law requirements relating to informing and consulting employees in the workplace, the phased implementation of which began in April 2005 (see section 3 of our June Alert). Like the employment requirements a gradual "roll-out" applies equally to pensions. The provisions will apply to employers with at least 150 employees from 6 April 2006, employers with at least 100 employees from 6 April 2007 and employers with at least 50 employees from 6 April 2008. Employers with less than 50 employees are exempt[3].

Unlike the general employment provisions, the pensions requirement to consult will apply automatically (as opposed to "on request").

As well as these new requirements, the employer may already have obligations to consult employees as part, for example, of its duty of trust and confidence, on the transfer of an undertaking or under the terms of a collective bargaining agreement.

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[2] The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 and The Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006

[3] The figures set out in the original regulations were modified slightly by miscellaneous amending regulations laid before Parliament on 16 March 2006 (SI 2006/778)

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4 LISTED CHANGES

Employers will need to consult on the following "listed changes":

All occupational pension schemes:

- An increase in the scheme's normal pension age.
- A change which prevents new members or certain kinds of new members from being admitted to the scheme.
- Preventing the future accrual of any benefits under the scheme.
- Removal of the liability to make employer contributions towards the scheme.
- The introduction of member contributions in any circumstances where none were previously payable.
- *Any* increase in member contributions (the draft regulations specified an increase by a margin of 2% or more).

Occupational defined contribution (DC) schemes:

- *Any* reduction in the amount of employer contributions towards the scheme (the draft regulations stipulated a reduction by 2% or more or to below a level of 3%).

Occupational defined benefit (DB) schemes:

- Changing some or all of the benefits under the scheme from DB to DC.
- Modifying "in whole or in part, the basis for determining the rate of future accrual of benefits under the scheme". (This generic wording is intended to capture, for example, changes from final salary to

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career average accrual.)

- Any reduction in the rate of future accrual resulting from a failure to agree the funding basis under the new statutory funding objective.

- Any other reduction in the rate of future accruals.

Personal pension schemes:

- There are also "listed changes" specified for personal pension schemes which, unsurprisingly, focus on changes in contribution rates (either reductions or cessations in the case of the employer or increases in the case of employees).

Exclusions

A number of scheme changes are specifically excluded from the list: these include amendments which are made "for the purposes of complying with a statutory provision" or to meet the requirements of a determination by the Regulator. Also helpful is the fact that, where the new section 67[4] applies, the duty to consult under these regulations does not (no doubt because the new section 67 incorporates its own procedure for consulting members / obtaining their consent).

5 THE INFORMATION PROCESS

Where a listed change is proposed and an employer has employees who are "affected members" the new requirements apply. ("Affected members" are the "active or prospective members of the scheme to whom the listed change relates".)

[4] See our Sackers Extra Alert: "Changing scheme benefits – the all new section 67" dated 12 July 2005 and our Sackers Extra News "The changing face of section 67" dated October 2005

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Before the consultation process starts, the employer must provide written information to affected members and to any representatives of such members (such as trade unions) who are to be consulted. The information must describe the listed change and its effect, be accompanied by any relevant background information and indicate the timescales for introducing the changes. The information must also be given "in such fashion and with such content as [is] appropriate" to enable representatives of affected members in particular to consider the impact of the change and to "conduct a study of [it]".

6 THE CONSULTATION PROCESS

The parties with whom the employer must consult will vary from organisation to organisation. The key change from the draft regulations is that where arrangements for consultation already exist (such as with trade unions, "information and consultation representatives", or representatives appointed under pre-existing agreements), the employer must consult in accordance with those arrangements.

But, if the employer has several such arrangements, it can choose which one or more of those arrangements to follow. Essentially, though, the employer has to "make such arrangements with respect to the persons to be consulted as appear to him to secure that, so far as is reasonably practicable, the consultation covers all affected members".

The regulations specifically allow for the election of representatives for the purposes of consultation. But the employer must consult directly with affected members if there are no employee representatives, or such representatives do not cover the interests of all affected members.

At the outset of consultation, the employer will have to inform the parties being consulted of any date set for the end of consultation or for making a written submission. The overall period for carrying out consultation must not be

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less than 60 days (the draft regulations said two months). Interestingly, the regulations also place the employer and the parties consulted "under a duty to work in a spirit of co-operation, taking into account the interests of both sides".

7 THE OUTCOME OF CONSULTATION

Assuming no responses are received to consultation within the set time-frame, the consultation "is to be regarded as complete". Where responses are received the party proposing the change has to "consider the responses…received…before making his decision as to whether or not to make a listed change". (If the party proposing the change is not the employer, that party will need to "take reasonable steps to satisfy [itself]" that the consultation requirements under the regulations have been met.) There is no specific duty to report back to members or to their representatives.

Leaving aside the regulations, it is important to bear in mind the meaning attributed to "consultation" in case law which we mentioned in our June Alert. To recap, in a recent pensions case, it was held that "it is plain that consultation requires more than just the mere giving of notice"[5]. 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"[6].

8 FAILURE TO COMPLY

Finally, a 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 the members of the scheme".

[5] Pitmans Trustees Limited v Telecommunications Group (2004)
[6] R v Secretary of State, ex parte Association of Metropolitan Authorities (1986)

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