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Public Sector hot topic

October 2016

Outsourcing special – where now for the LGPS?

What is the Fair Deal?

Since 1999, the Fair Deal guidance has set out the Government's policy for protecting the pension benefits of public sector staff who are compulsorily transferred to private sector employers (most commonly on the outsourcing of a public service or function to the private sector).

The Fair Deal has always applied to central government departments, agencies and the NHS but not directly to local and "best value" authorities. The latter authorities are required, by virtue of the Best Value Authorities Staff Transfers (Pensions) Direction 2007 (the "2007 Direction"), to deal with pension arrangements in accordance with principles similar but not identical to the Fair Deal.

The new Fair Deal

1

The "new" Fair Deal was published in October 2013. Until that time the key Fair Deal requirement had been for employees compulsorily transferred to the private sector to be offered a broadly comparable pension scheme (to their original public sector scheme) for the period after the transfer. There was no option for employees to continue participating in their existing central government public sector scheme for the period they were employed in the public sector.

2

The New Fair Deal represented a shift in Government policy as it opened the doors of central government public sector schemes such as the Principal Civil Service Scheme and the NHS Pension Scheme to private employers inheriting staff from the public sector. Each such public sector scheme has now published their own terms of participation for private sector employers.

3

The policy objective is to remove some of the existing barriers to greater competition in the delivery of public services. By allowing continued access to public sector schemes, the intention is that the risks to employers of having to operate their own costly "broadly comparable" DB pension schemes will be reduced, generating more tenders and better value for the taxpayer.

4

The new guidance applies directly to central government departments, agencies and the NHS (as before), plus maintained schools, academies and other parts of the public sector under the control of Government ministers. However, transfers from local authorities under the Local Government Pension Scheme ("LGPS") are not covered (and for now the 2007 Direction continues to apply to them).

LGPS regulations – consultation

Current consultation

What is the aim?

Shortly after the New Fair Deal was published, the Department for Communities and Local Government ("DCLG") announced it would be reviewing existing local government policy in light of the New Fair Deal to assess whether any changes were required. Historically, one of the key differences of the local government model has been the flexibility it has offered to private contractors to participate in the Local Government Pension Scheme (LGPS) as a way of discharging the policy expectation to provide a broadly comparable pension scheme. This is known as the "admitted body status" route. In this sense the local government has been the "front runner" and the pioneer of the New Fair Deal framework.

True to its promise, earlier this summer the DCLG commenced consulting on changes to the LGPS regulations with the aim of ensuring that participating employers in the LGPS provide the appropriate level of pension provision in light of the New Fair Deal guidance.

Building on existing foundations or a more radical shift?

As expected, the draft regulations build on the current "admitted body status" framework, which already allows independent service providers to enter into admission agreements for participation in the LGPS. There is therefore no radical shift in policy. However, there is new terminology to grapple with. We look set to have a new system of "protected transferees" – essentially employees of existing LGPS employers who are compulsorily transferred to an independent service provider.

Where New Fair Deal applies on a first transfer of "protected transferees" from local government employment, the new employer will in most cases be required to go down the "admitted body status" route whereas currently there is the option of offering a broadly comparable scheme. This is consistent with the New Fair Deal policy intention and goes further than the 2007 Direction.

Are there any surprises?

However, there are other differences which are more surprising. In our response to the consultation, we have noted that:

- the level of protection for "protected transferees" on a first generation outsourcing goes further than the current position, extending not just to employees of local authorities but also employees of admission bodies. This means that if an admission body takes on new staff to work alongside the original transferred staff (on the outsourced service) and these new staff are admitted to the LGPS, they will also be protected on any second generation transfer; but
- conversely, the provisions on re-tenders in certain circumstances appear to be less protective than both the New Fair Deal and the existing position under the 2007 Direction. This is because where transferring staff on a re-tender are already in an incumbent provider's broadly comparable scheme rather than in the LGPS, the consultation document proposes that there will be no requirement for bidders to apply for admitted body status or provide a broadly comparable scheme. This creates a "gap" in the level of protection where one did not previously exist.

Next steps

The consultation closed on 20 August 2016 and we are expecting the DCLG to publish a response in the Autumn. Following the consultation response, we expect changes to be made to the legislation and for the new regime to "go live" next year. Employers involved in public to private outsourcings will need to get on top of the new changes so that they can price their bids effectively.

For more information, please get in touch with Michaela Berry, Fuat Sami, your usual Sackers' contact or visit www.sackers.com.

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