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Legal update —— November 2012

Employment and Pensions
Response to Fair Deal Consultation

Fair Deal or No Fair Deal?

The Government has published its much awaited response to the consultation on the "Fair Deal" guidance (which was issued in March 2011). The current "Fair Deal" guidance ("A Fair Deal for Staff Pensions") was re-issued in 2004 and is a non-statutory policy applying to pension provision for public sector staff. In July this year, the Government issued a Written Ministerial Statement confirming that the overall approach to the Fair Deal policy would be retained, but that this would be achieved by providers offering transferring staff continued membership of public service pension schemes rather than through a broadly comparable pension scheme.

Government response

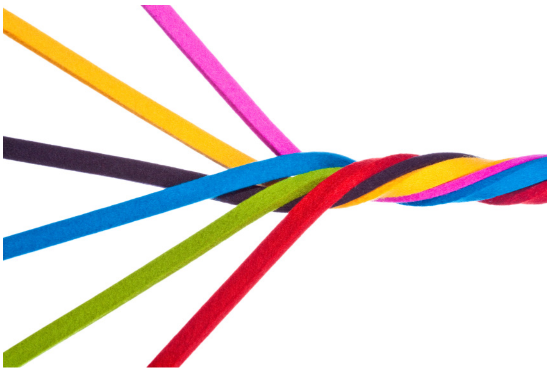
The Government response to the 2011 consultation includes draft guidance setting out details of how the new Fair Deal policy will work in practice and raises further issues for consultation in respect of the retendering of existing contracts which apply the current Fair Deal Policy.

The draft guidance is intended to reflect employers' concerns that operation of the current Fair Deal policy is confusing and that the commitment to a defined benefit risk may be a deterrent to potential contractors. The guidance is aimed primarily at central government public sector arrangements, although it does address the position in respect of local government pension provision. A final version of this guidance will be issued in advance of implementation of the new Fair Deal policy.

It should be noted that the Government has confirmed that, whilst it considers the specific mechanisms needed to ensure that the new Fair Deal is implemented and administered effectively, the existing Fair Deal policy will continue to apply until the new policy is announced.

Staff transferred out of the public service for the first time

When the new Fair Deal is implemented, all staff whose employment is compulsorily transferred from a public sector employer under TUPE, to independent providers of public services, will be able to retain membership of their current employer's pension arrangements. The current requirement to provide broadly comparable pension arrangements and offer bulk transfers under the existing Fair Deal will fall away. Staff will no longer be required to make a decision on whether to transfer their accrued public service pension benefits or leave them in deferment.



Source: Fotolia

The final Fair Deal guidance will detail scheme specific mechanisms for the implementation of the new Fair Deal policy - such as the process for determining employer contribution rates. The contribution rate may vary within the lifetime of the contract according to the result of periodic scheme valuations.

The scheme administrator/relevant contracting authority and/or scheme manager, will set out the circumstances in which transferred staff will stop receiving access to public service pension arrangements. Access will cease when staff stop working on the public service contract that they worked on at the point of transfer and employers will be required to immediately inform schemes when staff are no longer eligible for Fair Deal protection as a condition of entry to the scheme. The new Fair Deal will cease to apply if an employee voluntarily chooses to move to a different role with different terms and conditions. Accrued pension rights will be deferred in the same way as if that employee had left the public sector.

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Staff already transferred under current Fair Deal guidance whose contracts are retendered

The draft guidance also addresses the position of contractors bidding for a contract involving employees covered by the existing Fair Deal policy. Employers will have the option of providing those employees with access to a public service scheme, or continuing to provide a broadly comparable scheme. However, if an employer chooses to offer their own scheme, under the new Fair Deal policy the scheme offered would be required to be broadly comparable to the scheme currently available to comparable employees in the public sector (which after 2015 is likely to be a career average scheme), instead of a pension scheme broadly comparable to their previous pension arrangement (which is likely to be a final salary pension scheme). Employers will be required to provide transitional protection to employees who are near to retirement. An employer will not be able to offer the public service pension scheme to one employee and a comparable scheme to another employee; they will need to decide on one option.

On either option, any accrued rights transferred from the independent provider's pension will be protected through the provisions of a bulk transfer into the new pension scheme arrangements. This is the case whether staff transfer to the new independent provider's scheme or the public service pension scheme, unless the employee chooses to become a deferred member of the old scheme. Employees who transfer their rights, to a public service scheme or a broadly comparable CARE scheme, will be able to maintain their final salary link for any previous service accrued in the old final salary schemes. Employees who took the option of deferring their pension when they originally left the public service scheme will be treated in the same way as other deferred members when returning to the public service scheme. This means that they will not benefit from the final salary link upon taking their pension if they do not return to the public service scheme within five years of leaving.

When a contract is retendered, providers will need to set out how whether they intend to meet their obligations under Fair Deal, whether or not they are the incumbent holder of the contract. This will only apply to contracts to which the previous Fair Deal applied and have been retendered.

The Government has raised additional consultation questions on how the new Fair Deal policy will be applied to staff that have already transferred under existing Fair Deal whose contracts are retendered in its response to the Fair Deal consultation.

Treatment of accrued rights and operation of bulk transfers

Staff moving back into the public service schemes will have their accrued pension rights protected via a bulk transfer arrangement. As with other types of transfers, this will require a transfer payment to be made by the transferor to the receiving scheme which extinguishes its liability to the person leaving the scheme.

The 2004 Fair Deal guidance specified that all contracts covering employees protected by the Fair Deal should include clear provisions about how staff pensions should be handled at the end of the contract. The draft Fair Deal guidance proposes a similar level of protection.

However, there may be risk that this is insufficient to cover the new liabilities. Under the previous Fair Deal policy when bulk transfer provisions applied at the end of the contract, the cost in compensating for any shortfall in the terms demanded by the receiving pension scheme falls on the contracting authority. This feature of the previous Fair Deal policy will be maintained for employees returning to the public service schemes.

Application to local government outsourcings and transfers

The new Fair Deal guidance states that it will apply in the same circumstances as the previous Fair Deal policy. Transfers from local government, and other best value authorities, will continue to be outside Fair Deal. The impact of the new Fair Deal will be considered by the Department for Communities and Local Government, and other Departments, in view of the extant Best Value Authorities Staff Transfers (Pensions) Direction 2007, together with admitted body status in the Local Government Pension Scheme. This position differs somewhat to the position set out in a LGPS circular (no. 162 issued in August 2004) which stated that the Fair Deal guidance should apply to local authority outsourcing contracts.

Where Fair Deal will not apply

The draft guidance does not apply to staff transferred out of the public sector under contracts signed prior to the existing Fair Deal policy's implementation (i.e. contracts signed prior to 1999 and many before 2000). Staff involved in second or subsequent generation contracts that were recruited by an independent provider after the primary transfer are also excluded from Fair Deal protection.

Contracting authorities can still make provision for protection of pensions for staff not covered by the Fair Deal in a re-let, as they are not prohibited from doing so by the guidance. It will be for them to determine how they will meet the minimum TUPE pension obligations, although access to the public service schemes will not generally be an option for employees that are not covered by the Fair Deal.

Comment

Martin McFall in our pensions team comments that the draft Fair Deal guidance raises a number of interesting issues.

Notable for employment lawyers is the statement that the Cabinet Office Statement of Practice (COSOP) will be reviewed following the implementation of changes to Fair Deal. The draft guidance will also raise eyebrows amongst local authorities and service providers. The assertion that transfer from local government and other best value authorities will continue to be outside Fair Deal is questionable.

Whilst Fair Deal was originally intended to apply to transfers from central government, the COSOP states in no uncertain terms that Fair Deal should be adopted by all public sector employers. This is consistent with the view and approach taken by the Local Government Pensions Committee and local authorities to the implementation of and compliance with Fair Deal guidance. We would expect a clarification with HM Treasury to be raised to address this point.

The consultation closes on 11 February 2013 and we would expect a number of issues to be clarified before the final version of the guidance is issued.

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