

Guidance for employers

The duty to consult on scheme changes

February 2015

The Pensions
Regulator

This guidance provides information to help employers comply with the legal requirements that surround the process of making certain changes that affect pension schemes.

The employer duty to consult on changes that affect a pension scheme is set out in:

- sections 259-261 of the Pensions Act 2004
- the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the main regulations), and
- the Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006.

Unless otherwise excluded, the duty to consult applies to an employer with at least 50 employees in Great Britain in relation to listed changes (ones which affect future pension arrangements) as defined in the main regulations. It requires the employer to consult with affected members or their representatives. Affected members are defined in legislation as the active or prospective members of the scheme to whom the proposed change relates. The consultation process is not onerous and we expect employers to carry it out in good faith, taking all responses into account.

In the great majority of cases we expect employers to comply in full with the requirement to consult. The employer should provide as much information to initiate the consultation period as is necessary to enable those affected to understand the implications of the proposal and the context in which any decisions regarding the proposal have been made. The employer should also consider the quantity and complexity of the information that is being provided and allow an appropriate time period for carrying out the consultation. In any event, the consultation period must not be less than 60 days.

The employer and any person consulted have a duty to work in a spirit of co-operation, taking into account the interests of both sides. We would therefore not expect to see instances of coercion or inducement. Employers should not make employees feel that the proposals will be implemented irrespective of how they respond to the consultation, for example, by seeking decisions during the consultation period on options arising out of the proposals. Employees who have not agreed to the proposals should not be treated any differently than those who have agreed to them and any employee who feels they are being unfairly treated during the course of the consultation may consider taking the matter to an employment tribunal.

If anyone other than the employer has proposed a change (for example, the trustees) that person must satisfy themselves that the consultation has been carried out in accordance with the regulations. We would also remind employers or anyone else who has proposed a change that they must consider the responses received before making any final decisions regarding implementation. We expect an adequate time period to be allowed for this consideration.

If any of the requirements in connection with the duty to consult have not been met, any persons who believe that they are or may be affected members (or their representatives) may make a complaint to us.

We realise that it is not always practical to consult, for example, when restructuring is taking place and there is an immediate threat to either the scheme or employees' jobs if the process is delayed. In such cases we urge employers to provide as much information as possible to those affected even if only on a confidential or restricted basis and to apply the longest practicable timescale before the changes are implemented.

We may agree to waive or relax any of the requirements in connection with the duty to consult if we are satisfied that it is necessary to do so in order to protect the interests of the generality of the scheme members.

However, we will investigate reports of cases where behaviours give cause for concern and we have a number of options available to address the risks identified. These range from provision of information to help educate employers and engagement to enable compliance through to the use of enforcement powers where needed.

Our discretionary enforcement powers are:

- to issue an improvement notice under section 13 of the Pensions Act 2004 to the person who has contravened the regulations, directing them to take whatever steps are necessary to remedy the contravention
- imposition of a penalty not exceeding £5,000 in the case of an individual or £50,000 in any other case, where a person fails without reasonable excuse to comply with the duty to consult.

Under the legislation, the validity of any decision made in respect of a listed change is not affected by any failure to comply with the consultation requirements. We therefore have no power to alter any listed change that has been made.

We support the obligation on employers to consult. We believe it is important to allow employees to provide their views on proposed changes to pension schemes before any final decisions are made as to whether or not to implement these changes. We also encourage employers to consider consultation on any matter that would affect the growth of employees' pension rights even if there is not a statutory requirement to do so.

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