

Employer Consultation Requirements

Employers with more than 50 employees are required to consult with affected employees before making significant changes to future pension arrangements.

The requirements generally apply to proposals for “listed changes” and require at least 60 days consultation with prospective and active members and their representatives before such changes are made.

Consultation may be required where contribution rates are set out in pension scheme rules or terms and conditions and changes are being made in relation to the automatic enrolment requirements.

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Listed Changes and the Information Requirements

Occupational Pension Schemes

Listed changes for occupational pension schemes are divided into changes that apply to all schemes and those that depend on the type of scheme concerned. A change may affect all, or a category of, members.

All Schemes

- increasing the normal pension age
- closing scheme to new members / types of new members
- closing the scheme to future accrual
- removing employer liability to contribute
- introducing member contributions to non-contributory schemes
- increasing member contributions
- changing the rate at which pensions in payment are increased or benefits are revalued where the change would be less generous to members

Money Purchase Schemes

- reducing employer contributions

Non-Money Purchase Schemes

- changing some or all of the benefits provided to money purchase benefits
- altering the basis of future accrual (e.g. from final salary to career average) or reducing the rate of future accrual
- changing the elements of pay that constitute pensionable earnings, or limiting the amount of any element of pay that forms part of pensionable earnings

Personal Pension Schemes

For personal pension schemes, to which employers contribute, the listed changes are:

- ceasing or reducing employer contributions to some or all members*
- increasing member contributions

** The DWP has issued guidance which states that it considers that providing the employer's contribution rate does not reduce and the member's contribution rate does not increase, changing the GPP provider is not a listed change and does not require consultation.*

What Consultation Involves

The legislation only requires consultation with affected members over proposals. Affected members are active or prospective members to whom the proposed change relates.

The legislation imposes a requirement to consult; not necessarily to actually secure employees' agreement. Any consultation should be meaningful, this means giving employees enough detail and notice to consider the change (at least 60 days) and also enough time for employers to consider any responses on the proposals before implementation.

The Regulator has made it clear that part of the consultation process is to consider the responses made before making any final decisions and to allow an adequate time period for that consideration to be given.

The regulations enable the consultation to be considered as completed if no responses have been received by the end of the closing date for consultation.

The Regulator recognises that in certain circumstances it is not always practical for the employer to consult over a change; for instance in situations such as company restructuring or where delaying a change may affect members' jobs. In such cases the Regulator can be approached to waive the requirements.

Employers may not bypass recognised employee representatives to consult employees directly about significant changes to pension schemes. If some of the affected members are not represented by an existing representative the employer must consult directly with those employees or may arrange for representatives to be elected to represent them.

In our experience very few of our clients have existing employee consultation groups in place.

Format of the Consultation

Legislation requires information about the consultation to be given in writing to affected persons. It is not specified what form that written information is given in so does not preclude notification by email or by using notice boards. However, information that only reaches some of the relevant parties is not acceptable on its own.

Therefore the employer needs to use a method or methods of notifying members that fulfils the statutory obligation which is to ensure the widest possible coverage to affected persons.

Where a listed change is proposed, employers must as a minimum, notify each potentially affected employee and any representatives of such employees (i.e. unions). The notification must:

- state the (likely) effect on the scheme and its members
- be accompanied by any relevant background information
- indicate the timescale for implementation, and
- provide the information in such a manner to ensure those members' representatives and/or members are able to consider and respond to the proposed change

The DWP has further given the view that the following information should always be considered and included where appropriate:

- the total number of prospective and active pension scheme members upon whom the change will impact
- an explicit statement of the categories of scheme member who will be exempt from the proposed change
- the type of change that is proposed
- an illustrative worked example to give an indication of how the proposed change will affect the employee's future pension arrangements
- the date the proposed change is to take effect
- basic information about the Pensions Regulator's role in this aspect of pension legislation, including details about how the scheme members or their representatives may contact the Pensions Regulator

Trustees of occupational schemes which are party to amendment powers have no responsibility for the actual procedure of consultation but must be satisfied that the requirements have been met before agreeing to implement scheme changes.

End of the Consultation

At the end of the period in which affected members and their representatives have to consider and respond to the proposed change, the responses to the consultation must be considered by the person who is proposing the change before a decision is made.

Where the trustees, or any other person who is able to make a change to a scheme, proposed the listed change, the employer must advise them in writing that the responses have been received and forward comments for their consideration. Before the change is made the person who proposed the change (if not the employer) must be satisfied that the employer has completed the consultation in accordance with the consultation regulations.

Affected members should be told of the outcome of the consultation exercise.

The Pensions Regulator's Role

The legislation confers a limited scope for the Regulator to waive or relax the employer's statutory consultation obligation. Employers may apply to the Regulator for the obligation to be waived or relaxed; such application should set out reasons why the delay in making a change would be damaging to the scheme members'

interests. For example it could be demonstrated that such a delay would adversely affect the company's ability to remain solvent.

Sanctions for Non-Compliance

The Regulator has the power to determine that an employer has failed to comply with the consultation regulations and has effected a listed change without appropriate consultation. If the Regulator determines that an employer had breached the statutory obligation to consult on future pension changes, an order notice or direction may be made. The strongest action would be to impose a civil penalty on the employer, which currently is up to £50,000 for companies and up to £5,000 in respect of individuals.

It should be noted that the legislation on consultation does not currently give the power to the Regulator to overturn any scheme amendments that have not been correctly consulted on.

Exclusions from the Requirement to Consult on any Change to an Occupational or Personal Pension Scheme

There are exemptions given from the consultation procedures in respect of certain occupational schemes, including: one-man schemes, employer-financed retirement benefits schemes (EFRBS) and non-registered schemes based outside of the EU. The requirements do not apply in relation to personal pensions where there is no employer contribution.

Technically speaking, there is also no need to comply with the consultation requirement of 60 days for amendments which are made "for the purposes of complying with a statutory provision", which is the case for changes to correct, for example, age discrimination. However, in such circumstances employers may still wish to carry out a consultation process to encourage employees to feel informed and engaged.

If the amendment(s) constitute changes to subsisting rights then the requirements of S67 of the Pensions Act 1995 will take precedence.

Automatic Enrolment

The automatic enrolment duties imposed on employers are statutory requirements. Automatic enrolment is essentially all about making employers ensure that all eligible jobholders join a pension scheme meeting certain requirements. As a statutory requirement, it may be expected that automatic enrolment changes to schemes would mean an exemption from employer consultation.

However, there is nothing in legislation that requires an employer to utilise an existing pension scheme for this purpose. Any changes that need to be made to an existing scheme to comply with the qualifying workplace scheme requirements therefore fall outside of the statutory provisions for automatic enrolment. It is the automatic enrolment requirements that must be met that are imposed by statute, rather than how an employer chooses to meet them.

For example, any increase in contributions or a redefinition of pensionable earnings to comply with automatic enrolment, is not a mandatory change required by legislation. These changes may well be listed changes for employer consultation purposes, and the automatic enrolment legislation does not force employers to amend existing schemes, because there is the option of instead providing a brand new scheme.

Therefore employers looking to use existing schemes to meet their duties under automatic enrolment need to:

- consider what changes need to be made to their scheme to comply with the qualifying scheme requirements; and
- factor prior consultation with affected members into their planning, where a listed change is to be made. (An affected member in terms of employer consultation includes all prospective members who would be automatically enrolled into the scheme.)

Increases in Minimum Contributions

Under automatic enrolment minimum contributions are set to increase over time. Initially the dates of the increases were 1 October 2017 and 1 October 2018.

In 2015 the then Chancellor announced that the increases would be aligned with the tax years so that the increases would take effect from 6 April 2018 and 6 April 2019.

Some pension scheme rules (or terms and conditions of a personal pension scheme), may refer explicitly to the increased rates, whilst others may refer to the legislation. The Regulator's guidance states that where the scheme rules (or terms and conditions) are already set to increase to the minimum levels, either in April 2018 and 2019 or earlier, the employer will not need to consult with affected employees before deducting the increased amounts.

If the scheme's provisions explicitly state that employer contributions will increase from 1 October 2017 (and 1 October 2018) to a specified rate of contribution and the employer wishes to delay the increases until 6 April 2018 (and 6 April 2019) by an amendment to the scheme rules and this results in a reduction in the employer contribution from that set out in the scheme rules, our understanding is that the employer will have to consult with affected employees. Also, if the employer wishes to ignore the contribution rate (for its contribution) set out in the scheme rules until the date required under the legislation, this could mean that the employer falls foul of pensions law.

For further information on the increases in the phased contribution rates please refer to the Regulator's website: <http://www.thepensionsregulator.gov.uk/doc-library/increases-in-minimum-contributions-automatic-enrolment.aspx> or see our FYI Alert: 2017/52: <http://analysis.hrservices.conduent.com/2017/08/01/employer-consultation-requirements/>.

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