

When Is Consultation Required?

Before a person (employer/trustees/named person under the rules) makes a “listed change” to a pension plan the employer of “affected members” must carry out a consultation process under pensions law if it employs 50 or more employees (even if not all of those employees are in the relevant pension plan).

Additionally, if employment contracts are being varied or terminated as a consequence of the changes to the pension plan it will be necessary to carry out consultation under employment law, as well as under pensions law. The two forms of consultation can be run simultaneously but it will be important to ensure that the consultation requirements of both pensions law and employment law are complied with.

What Is a “Listed Change”?

The following are all “listed changes”:

All Occupational Pension Plans – Including Defined Benefit, Money Purchase & Hybrid Plans

- Increasing the normal pension age
- Closing to new members
- Stopping further benefit accrual
- Stopping or reducing the employer’s liability to contribute
- Introducing or increasing member contributions
- Changing the rates at which pensions in payment are increased or other benefits are revalued, if the change is less generous to all or some members
- Changing benefits to pure money purchase benefits
- Changing future benefit accruals
- Changing the calculation of pensionable earnings

Personal Pension Plans Only

- Stopping or reducing employer contributions
- Increasing member contributions

Who Must Carry Out the Consultation?

The obligation to consult rests with the employer of the affected members.

Where the proposal to make a change is being made by a person other than the employer of the affected members (for example, by the principal employer of a multi-employer pension plan) that person must give written notice of the proposed change to the employer so that it can carry out the consultation.

Who Is an Affected Member?

Only active members and prospective members (e.g. those currently in a waiting period for membership) are affected members for the purposes of the consultation requirements. There is no requirement for the employer to consult with deferred members or pensioners.

Who Should Be Consulted?

Representatives

Where any of the following bodies exist in respect of affected members, the employer must consult with at least one of them:

- A recognised independent trade union (A)
- Representatives of the affected members under an information and consultation agreement (B)
- The affected members themselves (if a negotiated or pre-existing agreement under the Information and Consultation of Employees Regulations provides for direct consultation) (C)
- Representatives previously elected for the purposes of consultation under pensions legislation (D)

If the employer chooses to consult with (B), (C) or (D) then there is no requirement to also consult recognised independent trade unions under (A).

Affected Members

If there are no arrangements under (A), (B), (C) or (D) above then the employer may:

- Run elections for the appointment of representatives for the purposes of the consultation
- Consult directly with affected members.

Where an affected member is not represented by any of the above representatives the employer must consult with that affected member directly.

TIP: The golden rule of consultation is that it must be genuine and meaningful. It is important that the consultation documents are clear that the outcome is not pre-determined. Members should be encouraged to provide feedback and adequate time should be allowed to consider all feedback received.

How Should the Consultation Be Carried Out?

Written notice of the proposed change must be given to all affected members and all representatives with whom the employer is going to consult. The notice must include details of:

- The proposed listed change and the effect this will or is expected to have
- Any relevant background information
- Timescales for introducing the change

Consultation should be meaningful and provide affected members with a genuine opportunity to express their views. The law says that all parties have a duty to work in a spirit of co-operation, taking into account the interests of both sides.

The consultation process must last for at least 60 calendar days.

If the employer is not making the proposals then the employer must pass all responses from the consultation exercise to the person proposing the change. It is important that the proposer does carefully consider the responses before deciding whether to proceed with the change. If the proposer simply implements the proposal without being able to evidence that they have properly considered the responses this could invalidate the consultation.

If the proposer decides to make a different listed change, further consultation is not required if the consultation was about:

- Stopping further benefit accrual (in an occupational pension plan) and the revised proposal is to reduce the accrual rate instead
- Stopping employer contributions and the revised proposal is to reduce contributions instead.

Are There Any Exceptions to the Consultation Obligations?

Some employers are exempt from the requirements, including those that participate in public service pension plans and certain very small plans.

There are also a number of situations which fall outside the scope of the consultation requirements. These include changes made to comply with legislation or Pensions Ombudsman determinations and changes that have no lasting effect on a person's rights to be admitted to the plan or benefits under the plan e.g. pay alterations or reductions in working hours.

What Are the Consequences of Failing to Comply?

Failure to carry out the required consultation does not invalidate any change that is made.

However, if the employer of affected members fails to carry out the required consultation and a listed change is made the Pensions Regulator can:

- Impose a fine on that employer of up to £5,000 for an individual and up to £50,000 for a company
- Issue an improvement notice specifying the steps that its recipient must take to remedy the failure.

Contact

Kirsty Bartlett

Partner, London

T +44 20 7655 0298

E kirsty.bartlett@squirepb.com