



Department
of Health

‘Fair Deal for Staff Pensions: staff transfers from Central Government’

DH Guidance for the NHS Pension Scheme

March 2014

Title: 'Fair Deal for Staff Pensions: staff transfers from Central Government' – DH Guidance for the NHS Pension Scheme

Author: Directorate/ Division/ Branch acronym / cost centre

Strategy & External Relations Directorate, Pay Pensions & Employment Services, Cost centre: 13710

Document Purpose:

Guidance

Publication date:

March 2014

Target audience:

Organisations performing NHS Services

Contact details:

NHS Pensions Policy Team

Department of Health

Room 2W09, Quarry House

Quarry Hill

Leeds, LS2 7UE

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INTRODUCTION

Fair Deal is a non-statutory policy setting out how pension issues are to be dealt with when staff are compulsorily transferred from the public sector to independent sector providers delivering public services. The policy was originally introduced in 1999. The approach taken was for staff compulsorily transferred from the public sector to have access via the new employer to a pension scheme broadly comparable to their originating public service pension scheme.

The Government announced in July 2012 that the Fair Deal was to be reformed. 'Fair deal for staff pensions: staff transfers from central government' was published by HM Treasury on 7th October 2013. The new policy applies when staff who were members of a public service pension scheme move from the public sector to an independent sector contractor by way of a transfer under TUPE, and when staff who are members of a public service pension scheme move by way of a non-voluntary transfer to a public service mutual or to other new models of public service delivery (regardless of whether or not TUPE applies). Under the new Fair Deal, all staff whose employment is compulsorily transferred from the public sector to an independent sector provider of public services will be entitled to retain membership or eligibility for the public service pension scheme they were in or eligible to join immediately prior to the transfer, subject to the eligibility criteria of the relevant scheme.

The Treasury guidance in relation to the revised Fair Deal policy highlights several areas that required the relevant public service pension scheme or the contracting authority to make decisions on. The attached document identifies these areas and outlines the Department of Health's recommended position specifically for the NHS Pension Scheme (NHSPS).

This DH guidance will provide further clarity to contracting authorities, bidders and providers in relation to the application of the new Fair Deal policy where the relevant public service pension scheme is NHSPS. It has been prepared in collaboration with representatives of NHS

England, NHS Business Services Authority (BSA) and the Government Actuary's Department (GAD).

Due to the complexities of issues that can potentially arise in different contracting scenarios, the NHS guidance is set out in two stages:

Stage 1: Guidance on policy application in relation to first generation transfers i.e. where the award of a contract results in staff being compulsorily transferred from a public sector employer to an independent sector employer for the first time after the HM Treasury guidance comes into effect;

Stage 2: Additional guidance on application in relation to retenders i.e. retender of contracts involving compulsory transfers of staff who were previously transferred out of the public sector under the old Fair Deal.

Further Information and Contact Details

HM Treasury Guidance

<https://www.gov.uk/government/publications/fair-deal-guidance>

FAQ's on New Fair Deal

[http://www.nhsbsa.nhs.uk/Documents/Pensions/FAQs New Fair Deal in the NHS for IPs.pdf](http://www.nhsbsa.nhs.uk/Documents/Pensions/FAQs%20New%20Fair%20Deal%20in%20the%20NHS%20for%20IPs.pdf)

BSA Application Guidance for Pension Direction

<http://www.nhsbsa.nhs.uk/Pensions/4327.aspx>

Staff Passport Group Webpage

<http://www.socialpartnershipforum.org/about-spf/spf-sub-groups/spf-staff-passport-group/>

DH Contact Details:

Saurabh Das (DH – Procurement, Investment & Commercial)

Saurabh.das@dh.gsi.gov.uk T: 020 7972 5793

Julie Badon (DH – Pensions Policy)

Julie.badon@dh.gsi.gov.uk T: 0113 25 46283

1. Stage 1

Timing of Implementation

- 1.1. HM Treasury's new Fair Deal guidance came into effect from 7 October 2013, and requires that contracting authorities reflect that guidance in procurement practice in from that date onward, without disrupting procurements which are already at an advanced stage.
- 1.2. DH had previously indicated that April 2012 would be the commencement date for the application of new Fair Deal to the NHSPS. New Fair Deal participation by employers from April 2012 has been considered by DH on a case-by-case basis taking into account procurement and value for money considerations, among other factors.

Rate of Employer Contributions

- 1.3. The employer contribution rates for participating independent sector employers will be the same as those for NHS employers. The employer contribution rate is currently 14%. As is the case for NHS employers, there will be a requirement for independent sector employers to comply with any future changes in employer and employee contribution rates.
- 1.4. Except in relation to NHS commissioning contracts, there is an expectation that any changes in employer contribution rates will be passed through to the contracting authority by way of an adjustment to the service charges due from the contracting authority to the contractor under the relevant contract. Relevant NHS standard contracts will be updated to reflect this requirement.
- 1.5. In the context of NHS commissioning contracts there will be no requirement for any adjustment mechanism to be built into contracts, as it is anticipated that changes in employer contribution rate will be reflected in national tariffs and adjustment factors.

Managing Risk using Contribution rates

- 1.6. For level playing field purposes, it is not the DH's current intention to apply differential rates of employer contributions as between NHS and independent sector employers, nor as between different independent sector employers. Independent sector employers' contribution rates will be the same as those for NHS employers. There will not be a separate administration charge or differential contribution rate for independent sector employers whose employees are members of the NHSPS. However, there will be penalties and interest charges for late payments of employer contributions – in accordance with the terms of the Pension Direction.
- 1.7. Clearly, there is a need for the NHSPS to put in place sensible control mechanisms to ensure that the taxpayer is protected from liabilities associated with an organisation becoming insolvent and being unable to pay the required contribution costs. Contractual provisions will be used to mitigate the risk of default. If an independent contractor is in arrears in respect of contributions due to the NHSPS, as notified to the contracting authority by NHS Pensions, the contracting authority must deduct the amount overdue from sums due to the contractor under the contract and pay that amount to NHSPS.

Managing Risk on Contributions by other means

- 1.8. Subject to the contractual set-off provisions referred to in the previous section being in place, independent sector employers will not be required to provide indemnities, guarantees or bonds to protect the scheme from a potential shortfall arising from their default in relation to the scheme. This is based on an assessment of level playing field and value for money considerations and may change when a review of the implementation of the new Fair Deal is undertaken in due course. In certain circumstances, a conditional guarantee may be required from an independent sector employer if that employer has had previous instances of default in relation to payments due to NHSPS. This is at discretion of the Secretary of State for Health.

Participation Agreement and Eligible Employees

- 1.9. DH does not intend to require Participation Agreements between independent sector employers and NHS Pensions for participation in the NHSPS. Instead, as is currently the case for non-NHS employers, a Pension Direction will be issued by NHSPS in respect of the staff transferring to the independent sector employer for each public service contract, requiring that independent sector employer to participate in the NHSPS in relation to the transferring staff.
- 1.10. Where there may be a transfer of NHS staff to an independent sector employer as a result of the award of a contract, the contracting authority will need to obtain a template Pension Direction from NHS Pensions and include it in the tender documentation for that contract so that all bidders can bid on the same basis.
- 1.11. As a precondition to the commencement of services, the independent sector contractor will be required to obtain a Pension Direction in respect of staff transferring to it or its sub-contractor. Failure by the independent sector contractor or its sub-contractor to comply with its obligations under a Pension Direction, as notified to the contracting authority by NHS Pensions, will constitute an event of default under the service contract, entitling the contracting authority to terminate the contract.
- 1.12. An NHS Pension Direction authorised in respect of new Fair Deal will be a 'closed' document i.e. its application will be restricted to those staff listed in the official direction document, who are the subject of the relevant transfer.
- 1.13. The whole-time or part-time employees named in a Pension Direction under new Fair Deal will be eligible for the NHSPS provided that their minimum engagement time on the transferred NHS function amounts to more than 50% of their employed time for the relevant employer. This 'more than 50% condition' does not have to be met on any one day or week but must be met overall in respect of any complete scheme year. Where employment with the new Fair Deal employer is for less than a scheme year, the 'more than 50% condition' must be met overall in respect of the part year.
- 1.14. Employees named in a Pension Direction who cease work on the transferred NHS function, but move to other NHS work for that employer, can also remain eligible for the NHSPS on the above basis.

Contract Provisions

- 1.15. In order to ensure compliance with HM Treasury new Fair Deal guidance and the NHS PS Guidance, it is intended that the following provisions will be included in NHS commissioning contracts, outsourcing contracts etc where new Fair Deal applies:

- 1.16. As a precondition to commencement of services, the independent sector contractor (and any sub-contractor to whom staff are transferring) must obtain a Pension Direction in respect of the eligible staff.
- 1.17. The independent sector contractor must comply (and ensure that its sub-contractor complies) with the terms of the Pension Direction.
- 1.18. The independent sector contractor must provide (and ensure that its sub-contractor provides) transferred staff with continued access to the NHS PS for as long as they continue to be engaged in relation to the relevant contract. That access must be in accordance with the Pension Direction.
- 1.19. The independent sector contractor's contracts of employment, and those of its sub-contractors, with transferred staff must give staff the right to continued access to the NHSPS for as long as they continue to be engaged in relation to the relevant contract.
- 1.20. The independent sector contractor must ensure that transferred staff have the right to continued access to the NHSPS on any subsequent transfer, as a result of sub-contracting or termination of a sub-contract, for as long as they continue to be engaged in relation to the relevant contract.
- 1.21. Failure by the independent sector contractor or its sub-contractor to comply with its obligations in relation to the NHS PS (including those under any Pension Direction), as notified to the contracting authority by NHS Pensions, will constitute an event of default entitling the contracting authority to terminate the contract.
- 1.22. If the independent sector contractor or its sub-contractor is in arrears in respect of contributions due to the NHS PS, as notified to the contracting authority by NHS Pensions, the contracting authority may deduct the amount overdue from sums due to the independent sector contractor under the contract and pay that amount to NHS Pensions.
- 1.23. The contract must include appropriate provisions setting out how pensions of transferred staff are to be handled at the expiry or earlier termination of the contract.
- 1.24. The Pension Direction should in all cases be addressed to the employer of the relevant staff, which may be a sub-contractor. Withholding of pension contributions should however be dealt with in the principal contract between the contracting authority and the lead contractor.
- 1.25. The standard contracts may also include an amended third party rights clause making the pensions provisions enforceable by relevant employees.

Exit Payments

- 1.26. As the NHSPS is funded by members' contributions, it is anticipated that exit payments or additional payments will not arise, but the exiting member may nevertheless be liable for late payments penalties/interest charges accrued during its membership

2. Stage 2

Decision not to provide continued access to a public service pension scheme and bulk transfer liability

- 2.1. When contracts involving staff already transferred under the old Fair Deal policy are retendered, there will be a presumption that staff will be offered:
 - access to a public service pension scheme; and
 - a bulk transfer of accrued rights.
- 2.2. The option to continue to provide broadly comparable schemes will be available only if necessary for legal reasons. That is:
 - If the contracting authority would be unable to offer a “level playing field” for the retendered contract without allowing that option; and/or
 - If an incumbent contractor intending to bid on the retendering has a contractual obligation to provide a broadly comparable pension scheme to staff
- 2.3. But, in any event, a decision by the procuring authority to make available the option to continue to provide a broadly comparable scheme should be based on a detailed consideration, taking into account employment, actuarial and procurement legal advice and should be made clear at the launch of the procurement process.
- 2.4. In such circumstances, the incumbent (if bidding on the retendering) should be given the option to bid on new Fair Deal as well as on a broadly comparable basis. In exceptional circumstances, it is possible that even allowing the incumbent the two options will not level the playing field, and in that case both incumbent and other bidders should be required to bid on the old Fair Deal broadly comparable basis.

Bulk Transfer Shortfall on retendering when the contract was originally tendered under the old Fair Deal policy

- 2.5. This is a complex area of the policy and contracting authorities will need specialist legal, actuarial and employment advice to assess the Bulk Transfer shortfall issues relevant to the procurement activity being undertaken.
- 2.6. On the issue of bulk transfers and potential shortfalls which may arise on a retendering, early on in the procurement process the procuring authority must assess the financial implications and determine the bulk transfer position. The process will involve the authority instructing its own actuaries and, usually through them, making an early request of the incumbent contractor for it to instruct the actuaries to its broadly comparable scheme to make available their bulk transfer terms for a transfer from the incumbent’s scheme to the NHSPS. Contact will also need to be made with the NHSPS actuaries, if different from the authority’s actuaries. This process should allow the authority’s actuaries to assess whether the terms offered by the incumbent’s scheme meet the requirements of the Fair Deal policy and the extent to which any potential shortfalls may arise. The authority and/or the incumbent contractor will also need to share all relevant employee data with the authority’s actuaries, as well as relevant contract details, so they can make calculations in order to advise the authority.

- 2.7. In terms of assessing where liability for the any bulk transfer shortfall should lie, there can be three different levels of bulk transfer terms: (i) those offered by the trustees of the incumbent's scheme; (ii) those required in order to meet the requirements of the Fair Deal policy (i.e. the obligations on incumbent providers set out in Annex B of the HM Treasury new Fair Deal guidance, including allowance for the underpin and any shortfall terms in connection with the inward terms for the incumbent provider's scheme); and (iii) those required by the NHSPS in order for the NHSPS to provide day-for-day service credits (or actuarial equivalent reflecting benefit differences between schemes) for staff who wish to transfer their accrued benefits from the incumbent's scheme.
- 2.8. The procuring authority should review the terms of any existing contract with the incumbent contractor to see (a) whether old Fair Deal was applied at the time of the original outsourcing and (b) if it was, to check whether the contract included exit provisions for onward bulk transfer terms that meet the requirements of the Fair Deal policy (i.e. as in (ii) above). If the original contract is silent on exit provisions and process and there is nothing to contractually bind the incumbent to procure that bulk transfer terms are offered as in (ii) above even though Fair Deal applied, the authority will need to meet the cost of the any difference between the terms under (i) and the terms under (ii), to the extent that it is unsuccessful in securing an improvement in the terms under (i). There may also be a difference between the terms under (iii) and the terms under (ii). In this case, a bidder (including the incumbent) may include a price adjustment in its bid on account of some of all of that difference. Although the terms under (ii) and (iii) will be the same terms for all bidders, it is a matter for individual bidders to decide whether to absorb part or all of the associated shortfall.

To which employees should the new Fair Deal policy apply on a retendering situation?

- 2.9. When a contract is retendered, and that retendering involves the compulsory transfer of employees who had previously been transferred out of NHS employment under the old Fair Deal policy, the contracting authority should require bidders to provide relevant employees with access to the NHSPS. Relevant employees will be those originally transferred out under the old Fair Deal policy who are still working on the contract, regardless of whether they elected to join the incumbent contractor's broadly comparable scheme at the point of the original transfer out.
- 2.10. Details of relevant staff must be provided to all bidders needs at an early stage of the tendering process to allow them to price their bids accurately.