



# Employers' pension consultation obligations

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## Briefing

December 2017

## Introduction

With effect from April 6, 2006, under the combined provisions of two sets of regulations, employers in multi-employer schemes and employers with occupational pension schemes, or personal pension schemes where direct payment arrangements exist, are required to consult active and prospective members before taking decisions to make certain changes to future pension provisions. Prospective members are, broadly, employees eligible to join. There is no requirement to consult deferred or pensioner members.

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the Consultation Regulations) list the changes that will trigger the duty to consult, but do not prescribe details of the manner in which the consultation should be undertaken, nor do they require employers to obtain members' consent before effecting any changes. However, the Consultation Regulations emphasise that the consultation must be in good faith, with proper consideration being given to the views received.

The Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006 (the Multi-employer Regulations) extend the Consultation Regulations to cover multi-employer schemes so that they apply where someone other than the immediate employer or the trustees of the scheme has the power to amend the scheme rules. The Multi-employer Regulations apply to each employer in a multi-employer scheme, rather than to a group of companies as a whole.

## Which employers are affected?

Employers, trustees and managers of a scheme, and in the case of multi-employer schemes, any other person who has the power to make a change under the scheme rules (the most obvious example being the principal employer), cannot decide to make a “listed change” unless consultation under the Consultation Regulations has been carried out. In many instances, a listed change will involve the exercise of the scheme’s power of amendment. However, there may be circumstances in which a change in practice under an existing scheme power, which does not involve the exercise of the scheme’s amendment power, will be a listed change. If the trustees have the power to make a change, they cannot do so unless they are happy that the employer has undertaken the required consultation.

Employers with 50 or more employees in Great Britain are subject to the requirements of the Consultation Regulations. For multi-employer schemes, this could result in an employer with at least 50 employees having a duty to consult, whilst another employer which participates in the same scheme and which has fewer than 50 employees would not have a duty to consult, even though the change to the scheme will affect both sets of employees in the same way. Employers should note that these figures relate to the total number of employees, not just employees who are pension scheme members and, in a multi-employer scheme, each employer who meets the threshold criteria has its own obligation to consult.

Employers in limited circumstances are excluded from the consultation requirements. These include employers in relation to a scheme with fewer than two members and employers with small self-administered schemes (i.e. with fewer than 12 members where all of the members are trustees of the scheme).

## When must an employer consult?

The Consultation Regulations impose a duty on employers to undertake consultation before any “listed change” is made.

In respect of occupational pension schemes, these changes are

- Increasing normal retirement age.
- Closing the scheme to new members (or a class of new members).
- Ceasing or changing members’ future accrual of benefits under the scheme.
- Removing the liability to make employer contributions to the scheme.
- Introducing or increasing member contributions.
- Changing the rate of revaluation or indexation where this would be, or would be likely to be, less generous to members.<sup>1</sup>

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<sup>1</sup> This was included as a listed change with effect from April 6, 2012, following the government’s switch from using the Retail Prices Index to the Consumer Prices Index for the purposes of statutory revaluation and indexation.

- Changing any final salary benefits to money purchase benefits.
- Reducing employer contributions to money purchase schemes.
- Changing the elements of pay that constitute pensionable earnings or changing the proportion, or limiting the amount, of any element of pay that forms part of pensionable earnings.

Employers with personal pension schemes where direct payment arrangements exist must consult when proposing to make the following changes

- Ceasing or reducing employer contributions to the scheme in respect of some or all members.
- Increasing member contributions in respect of some or all members.

However, there is no requirement to consult on changes to a scheme if those changes are necessary to comply with legislation or a determination made by the Pensions Regulator. Additionally, consultation need not take place where the proposed change has no lasting effect on a person's pension rights.

### Who should be consulted?

The obligation to consult is in relation to as many of the affected members of the scheme, or their representatives, as is reasonably practicable. If there are existing consultation arrangements relating to affected members, employers must consult with representatives in accordance with one or more of those arrangements. Representatives may include

- The representatives of an independent trade union recognised by the employer
- Information and consultation representatives (elected under the Information and Consultation of Employees Regulations 2004)
- Representatives specifically elected in accordance with the Consultation Regulations to engage in consultation on pension changes on behalf of affected members.

Where members of a scheme are not represented by any representative, the affected members must be consulted directly by the employer.

### The consultation process

Employers are required to provide information in writing to affected members (and any representatives who are to be consulted) about the proposed changes to the scheme at the start of the consultation process. The consultation period must last for at least 60 days. The information provided to affected members should include

- Details of the proposed change.
- The date the proposed change would come into effect.
- The likely effect on the scheme and its members.
- Relevant background information.
- The closing date for receipt of responses to the consultation.

Although employers are required to consider any responses, they are not under an obligation to obtain employee agreement before the changes are effected. The Consultation Regulations impose on the employer and any person consulted a “*duty to work in a spirit of co-operation, taking into account the interests of both sides*”.

### **Role of the trustees**

As mentioned above, the trustees cannot agree to make a listed change unless they are satisfied that the consultation has been properly carried out. Where the trustees are required or requested to agree to a listed change, they may wish to see copies of the consultation documents and to be kept up-to-date with the progress of the consultation.

### **Failure to consult**

A failure to consult will not affect the validity of any change. However, employers may be at risk of a financial penalty of up to £50,000 (or £5,000 if the employer is an individual) which may be imposed by the Pensions Regulator. The Pensions Regulator has the power to waive certain requirements of the Consultation Regulations, but only if it is satisfied that such waiver is necessary in order to protect the interests of the generality of the members of the scheme.

In *IBM UK Holdings Limited and another v Dagleish and others* [2014], the High Court held that the defective consultation process amounted to a breach of the employer's contractual duty of good faith. Although a number of the findings in the High Court's decision were successfully challenged on appeal, this finding was not challenged. The Court of Appeal therefore considered the remedies that would be available to members in respect of this breach of the employer's contractual duty. The Court held that the remedies set out in the Consultation Regulations did not affect any other remedies which might be available to members for breach of contract. It is therefore possible for members to bring a claim for damages in respect of a failure to comply with the Consultation Regulations. However, in practice it may be hard for members to establish that the outcome of the consultation would have been different even if the correct process had been followed.

For more detail on the IBM decision, please see our [September 2017 briefing](#).

## Consultation

The consultation process does not require employers to obtain member consent to changes. However, if benefit changes are proposed, the 60 day consultation period will have to be factored into employers' implementation plans. Employers who ignore the consultation requirements are at risk of reputational damage and/or a penalty being imposed by the Pensions Regulator, although this would not mean that the scheme change itself would be invalidated. There is also the possibility that members could bring claims for damages as a result of a breach of the employer's contractual duty of good faith. It is also possible that, where the amendment power under the scheme rules is jointly exercised by the employer and the trustees, the trustees may refuse to agree to the proposed changes.

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