

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006, and the Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006

**DWP Guidance (April 2009)**

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## Summary of the legislation

The Consultation by Employers Regulations oblige employers to consult with prospective and active pension scheme members or their representatives before making significant changes to future pension arrangements and provide protection for employees in connection with consultations carried out in order to comply with the requirement.

The Modification for Multi-employer Schemes Regulations will allow the Consultation by Employers Regulations to apply to decisions by persons other than employers or trustees or managers of a multi-employer occupational pension scheme.

- *Coverage.* The legislation applies to sponsoring employers in Great Britain who offer occupational pension schemes or personal pension schemes where direct payment arrangements exist and who have 50 or more employees. Articles 236 to 238 of the Pensions (Northern Ireland) Order 2005 contain the powers for equivalent legislation for Northern Ireland.
- *Significant changes.* These are in respect of future pension provision only. This does not include any modifications under the subsisting rights provisions (section 67 of the Pensions Act 1995, as modified by section 262 of the Pension Act 2004). The changes that trigger consultation in respect of occupational pension schemes are contained in regulation 8, and in respect of personal pension schemes where direct payment arrangements exist are set out in regulation 9, and are known in the Regulations as 'listed changes'.

The regulations exclude certain listed changes to pension schemes and exclude sponsoring employers in respect of certain occupational pension schemes from the requirement to consult active and prospective members or their representatives.

- *General Exclusions* –
  - Proposals made before the regulations came into force on 6 April 2006.
  - Schemes subject to a change, which is required by an enactment. Schemes subject to a determination made by the Pensions Regulator.
  - Administrative and marginal changes.
- *Sponsoring Employer Exclusions* - sponsoring employers of the following types of occupational pension schemes:
  - Public service pension schemes
  - Small occupational pension schemes
  - Schemes which have fewer than two members
  - Employer Financed Retirement Benefit Schemes (EFRBs)
  - Schemes with their main administration outside the EU that are not tax registered.

- *Personal Pension Scheme Exclusions* – employers who offer personal pension schemes where direct payment arrangements exist when no employer contributions are made to the scheme.
- *Trigger*. The Consultation by Employers Regulations are triggered when an employer, trustee, manager or other person who has authority to make a change proposes a significant change, that is, a listed change, to the future pensions arrangements of prospective or active members of occupational or personal pension schemes.
- *Employees and representatives*. Employers will only have to consult with prospective and active members of pension schemes or their representatives about changes to which the regulations apply. Employers may not bypass recognised employee representatives to consult employees directly about significant changes to pension schemes; there are limited circumstances where direct consultation may take place.

## Introduction

1. The Consultation by Employers Regulations 2006<sup>1</sup> give prospective and active members of pension schemes, or their representatives, of larger employers statutory rights to be consulted about changes to their future pension arrangements. The Regulations will apply to employers with 50 or more employees.
2. Employment protection is offered to employees in connection with consultations under these Regulations.
3. The Modification for Multi-employer Schemes Regulations 2006<sup>2</sup> will allow the Consultation by Employers Regulations 2006 to apply to decisions by persons other than employers or trustees or managers who have power under the rules of a multi-employer occupational pension scheme to make decisions about significant changes.
4. In the Consultation by Employers Regulations, as with the Information and Consultation of Employees Regulations 2004<sup>3</sup>, the Government strongly supports the principle of employers consulting their employees. In this case the consultation relates to proposed significant changes to future pension arrangements. The legal obligations contained in the Regulations apply to larger employers, but the Government would encourage all employers, irrespective of their size, to consult their employees in a way suited to their particular circumstances.
5. This guidance is designed to provide a plain explanation of the Consultation by Employers Regulations. It aims to help employers comply with their legal obligations. In some places it offers advice which is not a legal requirement, but which is recommended good practice to help comply with the law – where this is the case it is made clear in the text. There is a glossary to explain various terms.
6. It is important to bear in mind that this guidance contains the DWP's interpretation of the Consultation by Employers Regulations. The Pensions Regulator will use its powers based on its interpretation, if someone disagrees with this the matter may be escalated to the Pensions Regulator Tribunal and ultimately the Courts. In taking decisions the Regulator is not bound to follow this guidance, which has no status in law. However, those involved in Regulator proceedings such as employers, prospective and active pension scheme members and their representatives may bring provisions in the guidance to the attention of the Regulator as part of the evidence they submit to support their position.

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<sup>1</sup> Statutory Instrument 2006 No. 349 The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 as amended by the Occupational and Personal Pensions (Miscellaneous Amendments) Regulations 2006 (S.I. 2006/778). The amendment ensures consistency with the regulations cited at footnote 3 in relation to the numbers of employees that apply to the exclusion for small employers.

<sup>2</sup> Statutory Instrument 2006 No. 16 The Occupational Pension Schemes (Consultation by Employers)(Modification for Multi-employer Schemes) Regulations 2006

<sup>3</sup> Statutory Instrument 2004/3426

## Fit with Information and Consultation legislation

7. The Regulations operate alongside the Information & Consultation of Employees Regulations (I&C). Where the employer consults under the Consultation by Employers Regulations he may, in certain circumstances, provide employee representatives/employees with notice that he will not consult under the I&C Regulations (See below). The Consultation by Employers Regulations do not affect any other duty to consult (including the duty imposed by the I&C Regulations). However, they recognise the existence of arrangements that comply with other consultation requirements and aim to secure maximum harmonisation with these.

### Key similarities

- consultation may be with existing Information & Consultation representatives, where appropriate;
- calculation of the total number of employees in the company must be calculated in the same way as I&C regulation 4;
- employee and representative protection will be at the same level and operate in the same way as the I&C regulations;

### Key differences

- consultation will be with, or with representatives of, prospective and active scheme members rather than every employee;
- there is a list of prescribed decisions relating to pension schemes which will trigger consultation;
- there will be a period of at least 60 days for consultation.

### Interaction with I&C regulations

8. Under certain circumstances an employer may be subject to the two different legal requirements to consult over the same decision.

To avoid this, the I&C Regulations have been amended in two respects:

Firstly, they relieve employers who are subject to the standard information and consultation provisions of the obligation to inform and consult under those provisions if they notify the I&C representatives in writing that they will be consulting under the Consultation by Employers Regulations.

Secondly, they relieve employers who are subject to a negotiated agreement, which contains provisions on listed pensions changes, of the obligation to inform and consult under those provisions if they notify the I&C Representative or employees (where the agreement requires that they be informed and consulted directly), in writing that they will be consulting under the Consultation by Employers Regulations. This option will only

apply to negotiated agreements made before the 6 April 2006.

Further guidance may be found in the DTI Guidance on Informing and Consulting Employees –

<http://www.berr.gov.uk/whatwedo/employment/employment-legislation/ice/index.html>

## Scheme members to be consulted

9. Consultation by employers only relates to future pension provision and not to any modifications under the subsisting rights provisions (section 67 of the Pensions Act 1995, as modified by section 262 of the Pension Act 2004). The employer must consult only employees (or their representatives) who are:
- Active members of a pension scheme who may be affected by the proposed decision.
  - Prospective members of the pension scheme i.e. employees who have not joined the pension scheme but would be eligible to join the scheme.

Retired and deferred members of pension schemes are not covered by the Consultation by Employers Regulations.

### *Further information about prospective pension scheme members*

“Prospective member” means:

1. in relation to an occupational pension scheme-

”any person who, under the terms of his contract of service or the rules of the scheme:

- (a) is able, at his own option, to become a member of the scheme;
- (b) will become so able if he continues in the same employment for a sufficiently long period;
- (c) will be admitted to it automatically unless he makes an election not to become a member, or
- (d) may be admitted to it subject to the consent of his employer”.

(based on section 50A(3) of the Pensions Act 1995 as inserted by section 273 of the Pensions Act 2004) or

2. in relation to a personal pension scheme-

“any person who, under the terms of his contract of service, is eligible if he becomes a member of the scheme for employer contributions to be paid in respect of him”.

## Application and exclusions (regulations 3, 4 and 5)

### Occupational pension schemes – Relevant employers (regulation 3)

10. The requirement to consult applies to all sponsoring employers of occupational pension schemes, with some limited exclusions (see regulation 4). The meaning of employer in this context is defined in section 318(a) of the Pensions Act 2004 and this definition applies to the Regulations. The relevant employer, trustees or managers of the scheme (and in the case of a multi-employer scheme any other person who can make a change) may not decide to make a listed change unless the relevant employer(s) has complied with regulations 11 to 16. (see paragraph 18)
11. A “relevant employer” is any employer in relation an occupational or personal pension scheme which employs at least the specified number of employees (regulation 3(2) as amended) and is not excluded from the requirement to consult by virtue of the regulations. (Also see para 13).

#### *Further guidance in respect of employers in relation to multi-employer schemes*

There are two types of multi-employer scheme:

**Associated.** These are schemes established to provide benefits solely for employees of associated employers. That is: employers belonging to the same group of companies or with the same parent company.

**Non-associated or Industry Wide.** These schemes provide benefits for the employees of employers that are usually within the same industry.

There are two ways in which multi-employer schemes of either type are structured:

**Segregated.** This is where different sections of the scheme apply to different employers or groups of employers. Schemes may have been segregated from the outset or may segregate on individual employer insolvency.

**Non-segregated.** This is where assets and liabilities are shared between participating employers.

Application:

The Consultation by Employers Regulations apply to multi-employer occupational pension schemes, whether segregated or non-segregated schemes as they do for any other occupational pension scheme. The person who proposes the listed change will advise the “relevant employers” of the change who will carry out the consultation and pass the representations to the person who proposed the change for consideration.

## **Exclusions – (regulation 4)**

12. Employers who offer occupational pension schemes but who are excluded from the statutory consultation requirement, as amended, are:
- a) An employer in relation to a public service pension scheme as defined by section 1 of the Pension Schemes Act 1993. This ensures that the statutory provision does not cut across existing statutory requirements to consult.
  - b) An employer in relation to a Small Occupational Pension Scheme. Such schemes are defined in regulation 4(4).
  - c) An employer in relation to a scheme with fewer than two members.
  - d) An employer in relation to a scheme which is an “Employer Financed Retirement Benefit Scheme” (EFRBS).
  - e) An employer in relation to a scheme administered outside the EU that is not registered for tax purposes.

## **Personal pension schemes where direct payment arrangements exist – Relevant employers (regulation 3)**

13. Employers who employ 50 or more employees and who make contributions from their own resources into a personal pension scheme in respect of one or more of their employees by a direct payment arrangement are relevant employers. This could be into a group personal pension scheme or a stakeholder pension scheme.
14. Such an employer is required to consult if he proposes to make changes to these contributions, or the employer proposes changes to employee contributions.

## **Exclusions – (regulation 5)**

15. An employer is excluded from the statutory consultation requirement in relation to personal pension schemes where direct payment arrangements exist and no employer contribution is made (i.e. the employer only provides a payroll deduction facility which employees use to make contributions to a personal pension scheme).

### *Further information about direct payment arrangements*

“Direct payment arrangements” has the meaning given in section 318(1) of the Pensions Act 2004 and covers arrangements under which contributions fall to be paid by or on behalf of the employer towards the scheme

- (a) on the employer's own account (but in respect of the employee); or
- (b) on behalf of the employee out of deductions from the employee's earnings.

### *Further information about satisfying the definition of ‘relevant employer’ due to*

*the number of employees, (Regulation 3(2)(a)) above*

The restrictions apply to the number of employees an employer has and **not** to the number of pension scheme members. For example:

- an employer may have 200 employees but provide a certain pension scheme to a group of only 20 employees, who are all active members. In this case the employer must consult prospective and active members of the pension scheme;
- an employer may have 49 employees (after April 2008), who are all active members of a pension scheme but will not be obliged to follow the Consultation by Employers Regulations. However, the employer may consider it good practice to consult scheme members before making any changes to the scheme.

These restrictions also apply to employers in respect of multi-employer schemes. A multi-employer scheme may have members working for some employers with 50 or more employees and some with 49 or fewer employees and only those with 50 or more employees would be required to consult.

## Consultation requirements

### Exclusions from the requirement for the employer to consult. (Regulations 6(4) to (7) and 10)

16. An employer is not required to consult on any change to an occupational or personal pension scheme which:

- is made for the purposes of complying with a statutory provision

For example, the Regulations would not require consultation where a future legislative change prohibited a certain type of scheme, and employers and/or trustees were then obliged to make a significant change to the scheme (i.e. a change that would normally require consultation by the employers) in order to comply with those legal requirements.

- is made for the purpose of complying with a determination made by the Pensions Regulator or
- has no lasting affect on a person's pension rights.

This could include for example:

- a) where the payment is calculated as a percentage of a member's pay and the pay then changes;
- b) changes such as a reduction in working hours;
- c) a moveable amount such as a commission or bonus;
- d) adjustments correcting previous overpayments; or
- e) instances where an employee leaves a company and the employer is late in making an adjustment to bulk group pension payments.

- where the active and prospective members of the scheme to whom the change relates were notified before the 6 April 2006 of the proposal to make the change.(regulation 6(4))

17. In addition an employer is not required to consult in respect of an occupational pension scheme under these provisions on changes covered by the subsisting rights provisions (section 67 of the Pensions Act 1995, as modified by section 262 of the Pension Act 2004).

### **Trustees, managers of the pension scheme's or other person who has authority to make a change to the pension scheme's role**

18. The relevant employers, scheme trustees, scheme managers or any other person who is able to make a change to a multi-employer occupational pension scheme must not make a significant change (as listed in regulations 8 and 9) to the pension scheme unless the employer in relation to the scheme has consulted in accordance with regulations 11 to 16.

### **Different changes proposed following a period of consultation**

19. During a period of consultation an employer could receive alternative proposals for change, which he may be able to support, or he might consider making lesser adjustments based on the feedback he receives. If an employer wants to take up an alternative proposal or different change, the next steps depend on whether the alternative change is also a significant change listed in regulation 8 or 9. Where the issues would have been part of the original consultation a further consultation is not always necessary.

20. The Regulations provide that this will be the case in the specific exclusions described in regulation 6(5) to (7). These exclusions apply where the employer has already consulted on a proposal:

- to prevent future accrual of benefits in an occupational pension scheme (regulation 8(1)(c)) and as a result of that consultation makes a further proposal to reduce the accrual rate (regulation 8(3)(d)) or
- to remove the employer's liability in an occupational pension scheme to make employer contributions (regulation 8(1)(d)) and as a result of that consultation makes a proposal to reduce the employer contribution (regulation 8(2)) or
- to cease to make an employer contribution to a personal pension scheme (regulation 9(a)) and as a result of that consultation a proposal is made to only reduce the employer's contribution (regulation 9(b)).

In all other instances a further consultation should take place.

## Listed changes (regulations 8 & 9)

### Occupational pension schemes

21. Regulation 8 sets out the significant changes that will trigger consultation by employers in an occupational pension scheme. Consultation will be required in the following circumstances regardless of whether the change is proposed by the employer, trustees, managers of the occupational pension scheme or any other person who is able to make a change to a multi-employer occupational pension scheme.
22. Paragraph (1). Changes that apply to all occupational pension schemes (i.e. non-money purchase, money purchase and hybrid schemes):
  - a) An increase in the normal pension age.
  - b) Closure of the pension scheme to some or all new members (but active members will remain in the pension scheme).
  - c) Stopping future accruals in the pension scheme to some or all members.
  - d) Removing the employer's liability to make contributions to the scheme.
  - e) Introducing contributions for some or all pension scheme members where there had not previously been a member contribution.
  - f) Increasing member contributions in some or all cases.
  - g) The changes listed in paragraphs (2) and (3).
23. Paragraph (2). A change that applies to occupational pension schemes that provide money purchase benefits is to reduce the employer contribution to the scheme in respect of some or all members.
24. Paragraph (3). Changes that apply to occupational pension schemes which are not money purchase schemes are:
  - a) Changing the scheme to provide some or all money purchase benefits.
  - b) Changing the basis for determining future accruals (for example from final salary to career average or from final salary to a hybrid scheme).
  - c) Modification of the rate of future accrual of benefits to some or all members, with employer agreement under section 229(2) of the Pensions Act 2004.
  - d) Making any other reduction in the rate of future accrual of benefits to some or all members.

## **Personal pension schemes**

25. Regulation 9 sets out the significant changes that will trigger consultation by employers in respect of personal pension schemes where direct payment arrangements exist. The significant changes that require consultation are:

- a) Removing an employer's contribution in respect of some or all members.
- b) Reducing the employer's contribution in respect of some or all members.
- c) Requiring an increase in member contributions to the scheme from some or all members.

### *Further information about listed changes for personal pension schemes*

DWP consider that, providing the employer's contribution rate does not change nor the member's contribution rate increases, changing the group personal pension provider is not a listed change and consultation by the employer is not required.

## Consultation process (regulation 11- 16)

### Providing information (regulation 11)

26. Regulation 11 sets out whom the employer must provide with information, and what information the employer must provide, when a listed change is being proposed to a pension scheme.
27. When employers, trustees or managers of the pension scheme or any other person who is able to make a change to a multi-employer scheme propose to make a listed change (as set out in regulations 8 and 9), the employer must provide information to his employees who are affected members of the pension scheme and to the representatives of those members that he will be consulting with.
28. Paragraph (2) requires the information to be given in writing and provided before the consultation commences. The information must include details of the proposed change; its effects on the scheme and the scheme member; together with any background information.
29. This paragraph also requires the relevant employer to indicate the date that the proposal would take effect and to provide the required information in such time, such fashion and with such comment as is necessary to enable members and their representatives to fully consider and comment on the proposal. These are minimum requirements and there are no restrictions on an employer providing more information if considered appropriate.
30. How the written information is passed to affected members and their representatives is not detailed in the Regulations. The employer should use a method that fulfils his obligation to ensure the widest possible coverage of all those affected (regulation 15(1)).

#### *Further information about the manner in which consultation should be carried out.*

In the view of DWP any media which only reaches some of the relevant parties, is not acceptable on its own. For example: email when not all relevant parties have access or will be able to access their account; or simply placing information on a staff notice board in anticipation that all relevant parties will read it is not sufficient.

To ensure the widest coverage an employer is likely to have to send written information to relevant parties in the workplace and separately to those who, for whatever reason, are not attending work during the whole or part of a period of consultation.

31. Whilst regulations do not specify the exact detail of the information which must be provided DWP's view is that the following 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 that the proposed change is planned 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.

*Further guidance about the information to be provided by the employer in support of the statutory consultation.*

- The aim of providing information about which groups are affected by the proposed change and the total number of prospective and active pension scheme members is to assist the identification of both how widespread the change will be and which sections of the workforce and the management structure will be affected.

- It is important that details of the change are clearly presented and accompanied by an illustrative example which helps those affected to understand the implications of the proposal.

- If the employer is considering some different changes which might achieve a similar outcome it is advisable to consult explicitly on the range of potential changes at the same time. Employers should indicate the date from which they propose the change to take effect, this date should take into consideration other legislative requirements and individual pension scheme rules.

- It is anticipated that the employer will have undertaken preparatory work to set out the proposal and collate the appropriate information to support the consultation in advance of the minimum 60 day period required by regulation 15(4).

### **Consultation (regulations 12 and 13)**

32. An employer is required to consult with the representatives of as many affected members, or with as many affected members, as is reasonably practicable. Subject to that requirement the employer may choose one or more of the following already established groups of representatives to consult with. If an employer has previously consulted with elected pensions representatives (which have been elected by the procedures in Regulation 14 of these regulations) of some or all of the affected members before he had negotiated another consultation process he may choose to consult with those representatives. Alternatively or additionally, he may choose to consult his recognised Trade Unions, or his Information and Consultation representatives, or representatives under a pre-existing agreement or with pensions representatives elected under regulation 14. The employer may also choose to consult directly with his employees if

provision is made for this in the terms of a negotiated agreement or pre-existing agreement. Those agreements have the same meaning as that given in the I&C Regulations.

33. If none of these arrangements exist in respect of all or some of the affected members the employer may arrange for representatives to be elected to represent those affected members (using procedures outlined in the regulation 14) (see para 36 et seq). The DWP would recommend that the employer arranges for such representatives to be elected.
34. If some of the affected members are not represented by a representative the employer must consult directly with those members.
35. Further details on existing representatives

**Independent Trade Unions – regulation 12(2)(a)(i).** The term “independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992. The representatives do not have to be recognised in respect of pensions to act on behalf of active or prospective members of the pension scheme who may be affected by the proposed decision.

**Information and Consultation representatives – regulation 12(2)(a)(ii).** The definition of Information and Consultation representative is as per I&C regulation 2. This means:  
(a) in the case of a negotiated agreement which provides as mentioned in I&C regulation 16(1)(f)(i), a person appointed or elected in accordance with that agreement; or  
(b) a person elected in accordance with I&C regulation 19(1), the statutory fallback provision.

**Representatives elected under a pre-existing agreement to represent employees – regulation 12(2)(a)(iii)**

A pre-existing agreement is an agreement between the employer and his employees as set out in regulation 8(1) of the I&C regulations (which has been approved by the employees and sets out how the employer gives information to employees or representatives and seeks their views) which has not been superseded.

**Elected pension representatives – regulation 12(3).** If an employer has previously consulted with pension representatives elected under these Regulations, the employer may choose to consult with these existing elected pension representatives which were elected using the procedures in regulation 14. Where there are no existing representatives the employer may enable employees to elect pension representatives. These pension representatives will be elected by the affected employees, and will (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information about and to be consulted on changes to future pension arrangements on their behalf.

*Further information relating to employer options in respect of employee representatives.*

The employer has the discretion to choose which employee representatives he wishes to consult on behalf of prospective and affected active pension scheme members. There are four options available, as defined, in regulation 12. These are:

- independent trade union representatives;
- I&C representatives;
- representatives under a pre-existing agreement; or
- pension representatives in respect of proposed “listed changes” under these regulations.

Representatives in a pre-existing agreement with a specific reference to pensions may be used instead of Trade Union or I&C representatives. Where none of these arrangements exist the employer may establish pension representatives. However, if any of the other arrangements exist already, the employer must consult with them rather than hold an election for pensions representatives, to the extent that the representatives already in place represent the affected members. If the employer has already established pension representatives before establishing agreements with trade union representatives or I & C representatives, the employer may choose to continue to consult with these pension representatives.

## **Election of nominated member representatives (regulation 14)**

36. Regulation 14 sets out the requirements for the election of pension specific representatives. These representatives are elected to be consulted on proposed “listed changes” under these regulations. This provision only applies where an employer has established such representatives where there are no suitable representatives of the kind described in regulation 12(2)(a).
37. The employer is responsible for organising any ballot to elect representatives. This ballot must comply with regulation 14. Components of the regulation include that candidates for an election must be prospective or active members of the scheme on the date of the election. The number of pension representatives must be proportionate to the number of affected prospective and active pension scheme members employed by the employer. Employers may wish, though they are not obliged by regulations, to consider having a similar number of representatives as suggested by the I&C regulations (or arrangements) (i.e. 1 representative per 50 affected or prospective members).
38. The relevant employer must review the number of elected pensions representatives from time to time. DWP would suggest that it would be good practice to carry out this review while planning a consultation

exercise on a proposed change, to ensure that there are sufficient representatives to represent the interests of affected members. If further representatives are needed an election should be held.

## **Conduct of consultation – Regulation 15**

39. The relevant employer who carries out a consultation must ensure that the consultation covers as many people as is reasonably practicable of those who are affected by the proposed change.
40. The relevant employer and the person consulted must work together taking into account their respective interests in a spirit of cooperation. DWP consider that consultation will include an exchange of views and the establishment of a dialogue between the relevant employer and the persons he consults.
41. The relevant employer must allow a consultation period of at least 60 days and should advise the people to be consulted of the latest date he should receive responses to that consultation.
42. Paragraph (5) enables the consultation to be considered as completed if no responses have been received by the end of the closing date for consultation.

## **End of consultation (regulation 16)**

43. This regulation sets out that, 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 proposed the change before a decision is made.
44. Where the trustees, managers 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 responses have been received and forward the comments for their consideration. This information and the comments should be forwarded as soon as possible to enable the completion of the consultation.
45. Before making a decision the person who proposed the change, if not the relevant employer, must be satisfied that the employer has completed the consultation in accordance with regulations 11 to 15.

## **The role of the Pensions Regulator (Regulations 18-20)**

46. The Pensions Regulator is the body that regulates work-based pension arrangements (occupational pension schemes, certain aspects of stakeholder pension schemes and personal pension schemes which have direct payment arrangements, whereby the employer pays contributions to the scheme on behalf of the employee). The Pensions Regulator is commonly known as “the Regulator”.

### **Waive or relax the consultation requirement**

47. Regulation 19 confers a limited scope for the Regulator to waive or relax an employer’s statutory consultation obligation. Employers may apply to the Regulator for the obligation to be waived or relaxed. An application should set out reasons why delay in making a change to the pension scheme in accordance with regulations 8 or 9 by the minimum period of 60 days that is required for consultation would be damaging to scheme members’ interests. For example: it could be demonstrated that the delay would adversely impact the company’s ability to remain solvent. The Regulator may only waive or relax the requirement to consult if it is satisfied that it is necessary to do so in order to protect the interests of the generality of the members of the scheme. In view of the potential urgency to waive or relax the consultation period, Regulation 21 enables the Regulator to apply the special procedures in section 98 of the Pension Act 2004 to any request to waive or relax the consultation period. This requires the Regulator to give a “determination notice”.

### **Other aspects of the Regulator’s role in respect of consultation by employers**

48. The Pensions Act 2004 enables the Regulator to take action where it appears that an employer has failed to comply with the Consultation by Employers Regulations and has implemented a change that affects prospective and/or active scheme members’ future pension arrangements without appropriate consultation. Such matters should be brought to the attention of the Regulator as soon as reasonably practical. The Regulator will investigate the facts using the appropriate regulatory tools.

49. The Regulator may also be called upon to determine such questions as whether or not a Trade Union is recognised for the purposes of collective bargaining or whether an I&C agreement was properly negotiated. Such determinations could be prompted by an affected member, a representative group or an employer.

## Information for the Pensions Regulator

50. The Regulator has regulatory powers to demand information to support an application to waive or relax the consultation requirement, where appropriate, or to support other enquiries relating to the application of Consultation by Employers Regulations. Each request will be different depending on the nature of the change and the class of members affected.

## Sanctions

51. Where the Regulator determines that an employer has breached the statutory obligation to consult on future pension arrangement changes, an order, notice or direction may be made. The strongest action, in this instance, would be to impose a civil penalty. Before making such a determination the Regulator will have established why the employer did not approach the authority to ask for the statutory consultation procedure to be waived or relaxed.
52. Regulation 18 provides for certain remedies when the regulations have been breached. The Regulator may issue an improvement notice under section 13 of the Pensions Act 2004 or ultimately impose a penalty sanction up to £50,000 for companies and up to £5,000 in respect of individuals, where appropriate, to be paid within 28 days..
53. Sections 259(3) and 260(2) of the Pensions Act 2004 specify that changes that are made without the employer undertaking consultation do not have to be reversed. This is the case regardless of whether or not the Regulator has issued an improvement notice or imposed a civil penalty because of a breach in the consultation procedure.

## Appeals

54. Any determination, whether by the Determinations Panel or a member of the Regulator's staff, can be appealed. A directly affected party has 28 days from the date of notification of the decision to make an appeal. An appeal is made to the Pensions Regulator Tribunal and is called a 'reference'.
55. During the 28 days the Regulator is not allowed to use the power decided at the determination except where it is a power that can have immediate effect, for instance one that is needed because there is an immediate risk to the interests of the members or the assets of the scheme.

## Pensions Regulator Tribunal

56. The Pensions Regulator Tribunal is the independent body set up to hear references on determinations. The Tribunal will issue its own guidance on the form and content of a reference. The Tribunal may consider any evidence available to it in relation to the subject of the appeal. This includes evidence that was not available at the time of the original determination.

### *Further information on the Pensions Regulator Tribunal*

The Tribunal will decide whether to:

- confirm the determination and any order, notice or direction made by the Regulator;
- vary or revoke the determination and any order, notice or determination it made; or
- substitute a different determination, order, notice or direction.

The Regulator must act in accordance with the direction of the Tribunal.

## Further information about the Regulator

### **Determinations Panel – reserved functions**

(Note all of the following information in respect of The Pension Regulator determinations, appeals and tribunal (paragraphs 58 et seq) is taken directly from the Pensions Regulator website. In particular see:

<http://www.thepensionsregulator.gov.uk/regulatoryActivity/determinations/index.aspx>).

57. In most cases, a determination is carried out by the Determinations Panel. Members of the panel are people with legal, business or pensions knowledge. They are independent of the Regulator and are not involved in investigating cases.

58. Some of the Regulator's powers may be exercised by the staff of the Regulator and others by the Determinations Panel. A full list of the Regulator's powers and who can exercise them is on Regulator's website at [www.thepensionsregulator.gov.uk](http://www.thepensionsregulator.gov.uk). The same procedure for making a determination is followed regardless of who is making the decision.

59. Most determinations are carried out using the standard procedure as set out in section 96 of the Pensions Act 2004. A few will use the special procedure (section 98) when immediate action needs to be taken.

## *Further information about the determinations procedures*

### Standard

Determinations are made on the basis of the evidence contained within a warning notice, the relevant law and any representations made by the parties involved.

A warning notice is a written statement containing:

- the circumstances of the case and the details of the alleged breach or grounds for the application;
- evidence to support the allegation or application – this may include information gathered during the course of the Regulator’s investigation that demonstrates the need for a power to be used, or papers submitted that support a request for the Regulator to act; and
- details of the specific powers that the Regulator asks the Determinations Panel to consider using.

The determination will also take into account the interests of the members of the scheme and others who are directly affected by the decision. Having decided to go ahead with a determination, copies of the warning notice will be issued to everyone who will be affected by the outcome. This means that all parties concerned see exactly the same information and evidence, including the person making the decision.

The affected parties will usually have at least 14 days to read the warning notice and comment on it. Any comments made should be passed between all other parties involved. If comments are submitted, they will be included with the warning notice and considered at the meeting of the Determinations Panel.

### Special procedure

Sometimes the Regulator may believe that it needs to exercise certain powers because there is an immediate risk to the interests of the members or the assets of a scheme. In these circumstances the standard procedure of issuing a warning notice to the directly affected parties before the determination will not apply.

Only the Determinations Panel can exercise a power without issuing a warning notice. However, the law requires the Determinations Panel to review the decision as soon as possible after the determination. This review is carried out by panel members who were not involved in the original decision. Affected parties will be given the opportunity to comment on the determination prior to the review. The review panel will consider these comments, along with any relevant new information on the application, when it makes its decision. After the review, the panel may decide to confirm the original determination, amend it, or substitute a different determination.

### Meetings of the Determinations Panel

Meetings of the Determinations Panel are open and take place in public. Directly affected parties will be asked in the warning notice whether they want to attend or not. It is not necessary to attend or to have legal representation. Comments can

be submitted in writing and these will be given the same consideration as if they had been made in person. It would not normally be necessary for a directly affected person to attend a meeting unless they felt they were unable to make the comments they wished to in writing.

If none of the directly affected parties wishes to attend, the determinations decision will be made based on the warning notice and any comments made by directly affected parties. No-one else will be able to attend and say something to which others would not have the chance to respond.

### **The Determinations Panel decision**

60. After a determination has been made, the directly affected parties will be advised of the decision in writing. This notification will explain:

- what powers the Regulator has exercised or will exercise;
- what facts were used to reach the decision;
- the relevant law; and
- the reasons for the decision.

This notice will usually be issued within five days of the determination and may be appealed. The decision may also be published.

### **Exclusivity of remedy (regulation 18)**

61. Regulation 18 makes clear that where there is an infringement of any right conferred in any part of the Regulations the remedy is by way of complaint to the Regulator and not otherwise. This means that the rights cannot be pursued through the courts. However, the protections given to representatives and others by regulation 17 and the Schedule to the Regulations can be enforced through an Employment Tribunal and appealed to an Employment Appeal Tribunal.

### **Employment Rights and protections for employees involved in the consultations**

62. Regulation 17 and the Schedule to the Regulations provide protections for employees of an employer involved in a consultation carried out by way of the Consultation by Employers Regulations.

### **Right to paid time off (paragraphs 2, 3 and 4 of the Schedule)**

63. Employees who act as representatives within the scope of regulations 12 (2) (a), or 12(3) or 13(2) of the Consultation by Employers Regulations and who are consulted by an employer under those Regulations, are entitled to take reasonable time off during working hours to perform their functions as representatives and to be paid for this time (paragraphs 2 and 3). Employees may complain to an Employment Tribunal if their employer unreasonably refuses to let them take time off, or fails to pay them for it (see paragraph 4).

#### *Further guidance on the right to paid-time off for representatives*

- The right to paid time off during working hours<sup>4</sup> applies to employees who are elected or appointed as independent trade union representatives, I&C representatives, pre-existing agreements representatives or where appropriate employee pension representatives are elected under elections which meet minimum standards – equivalent to those in the TUPE regulations 1981.
- A complaint may be made to an Employment Tribunal where an employer has unreasonably refused time off, or failed to pay the employee. Complaints must be brought within 3 months<sup>5</sup> of the time taken off, or when it should have been taken off.
- Where a complaint is upheld, the Tribunal must make a declaration to that effect and, if the time off had not been allowed, order the employer to pay the employee the remuneration they were entitled to (in addition to their normal pay), or if the employee had not been paid for the time off, order the employer to pay them what they were entitled to.

#### **Right not to suffer unfair dismissal or detriment (paragraphs 5 to 8 of the Schedule)**

64. Employees are protected against unfair dismissal or detriment by their employer when acting as representatives as set out in regulations 12(2) (a), or 12(3) or 13(2) of the Consultation by Employers Regulations. They are also protected when standing as candidates for election when seeking to enjoy rights given them by the Regulations and in certain other circumstances. A claim for unfair dismissal, or a complaint of detriment, may be brought before an Employment Tribunal. In certain circumstances, employees who are not representatives or candidates may also be protected.

#### *Further guidance on protection against unfair dismissal and detriment*

- An employee who is:
  - an independent trade union representative;
  - an I&C representative;
  - a pre-existing agreements representative
  - a pension representative;

and who was dismissed for performing any function or activity as such, or for requesting paid time-off to act as a representative, would be unfairly dismissed. Similarly, representatives and candidates are protected against detriment by their employer on the same grounds.

- Any employee (whether or not a representative or candidate) is protected

<sup>4</sup> Working hours are any time when employees are required by their employment contracts to be at work.

<sup>5</sup> A tribunal can extend this 3 month deadline where it is satisfied it was not reasonably practical to bring the complaint within that period.

against unfair dismissal or detriment on a number of grounds including for:

- 1) taking proceedings before the Regulator or an Employment Tribunal (whether or not there is a valid complaint as long as it is made in good faith);
- 2) requesting data under the Consultation by Employers Regulations, regulation 11;
- 3) seeking the employer to provide pension representatives – Consultation by Employers Regulations, regulation 13;
- 4) indicating support or lack of support for a representative structure as per 3 above;
- 5) seeking to influence by lawful means how votes were to be cast in an election, or voting in an election;
- 6) expressing doubts about whether an election had been properly conducted.

65. From 6 April 2007, the Dispute Resolution Regulations 2004<sup>6</sup> applies to cases of unfair dismissal or detriment relating to the Consultation by Employers Regulations. They do not apply to complaints made to the Central Arbitration Committee. An employee would not be able to bring a complaint of detriment to an employment tribunal if they had not put the reasons for their grievance in writing to their employer at least 28 days before applying to the tribunal. Also, if an employee had not completed the statutory dispute resolution procedure in relation to unfair dismissal or detriment before bringing the complaint to the tribunal, even if they were successful at the tribunal, their compensation would normally be reduced by between 10 to 50%. An employer who had not set up and followed a procedure that meets the minimum requirements in the Dispute Resolution Regulations, and against whom a complaint was upheld by a Tribunal would normally have an award increased by between 10 and 50%.

### **Conciliation and appeals (paragraphs 9 and 10 of the Schedule)**

66. Where any party considers that an application or complaint to an Employment Tribunal is reasonably likely to be settled by conciliation or other assistance, it may be referred to the Advisory, Conciliation and Arbitration Service (ACAS) and ACAS may seek to promote a settlement. This applies to all applications or complaints, made under paragraphs 4 and 8 of the Schedule to the Consultation by Employers Regulations.

67. Questions of law relating to the Schedule to the Consultation by Employers Regulations may be appealed to the Employment Appeal Tribunal (EAT). Appeals to the EAT are subject to requirements set out in Part II of the Employment Tribunals Act 1996. An appeal must be brought within 42 days of the date on which written notification of the declaration or order that is subject to appeal was sent to the appellant. EAT decisions, including decisions on penalties may be appealed to the Court of Appeal on a point of law.

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<sup>6</sup> The Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752) as amended by the Employment Act 2002 (Amendment of Schedules 3, 4 and 5) Order 2007 (SI 2007/30).

## **Restrictions on contracting out of rights given by the legislation (paragraphs 11, 12 and 13 of the Schedule)**

68. Employers may not try to exclude or limit the rights and obligations in the Regulations by means of an agreement, for example through an agreement or contract with a third party, or through employees' contracts. Any provision of a contract or other agreement that sought to do so would be void (see paragraph 11 of the Schedule). Similarly, any provision that sought to prevent someone bringing a dispute or complaint before an Employment Tribunal would generally also be void except in conciliation proceedings or where a formal agreement has been made not to take proceedings before an Employment Tribunal.

### *Further guidance on contracting out of rights given by the legislation*

- Employers may not try to exclude or limit the operation of any provision in the Consultation by Employers Regulations by means of any agreement. This would include employees' contracts, an agreement or contract with a third party, or an I&C negotiated or pre-existing agreement.
- The restriction on contracting out means, for example, that employees' contracts may not waive their rights to be consulted as provided for by the Consultation by Employers Regulations.
- The restriction on contracting out of rights does not apply to an agreement to stop proceedings before the Regulator, the PRT or the EAT, because the dispute had been settled "out of court".

## Glossary of terms and abbreviations

Affected members	In relation to a proposed listed change affecting an occupational or personal pension scheme, means any active or prospective members of the scheme to whom a proposal to change the scheme relates.
Determinations Panel	As per section 9 of the Pensions Act 2004.
Direct payment arrangements	In relation to a personal pension scheme has the same meaning as given by section 111A of the Pension Schemes Act 1993.
EAT	Employment Appeals Tribunal. The EAT hears appeals against Employment Tribunal decisions and is responsible for imposing penalties.
Independent Trade Union	The same meaning as given by section 181(1) of Pension Schemes Act 1993.
Negotiated agreement	An agreement negotiated between the employer and negotiating representatives under Information and Consultation regulation 14, following a valid employee request, or an employer notification, and that meets the requirements in Information & Consultation regulation 16.
Occupational pension scheme	The same meaning given in section 1(1) of the Pension Schemes Act 1993.
Pension representatives	Employee representatives of affected members elected in an election which satisfies the requirements of regulation 14(1) of the Consultation by Employers Regulations.
Personal pension scheme	The same meaning as given in section 1(1) of the Pension Schemes Act 1993.
Pre-existing agreement	An agreement approved by employees before a change is proposed which satisfies the conditions set out in regulation 8(1)(a) to (d) of the I&C Regs.

Relevant employer	Any employer in relation to an occupational or personal pension scheme which is not excluded from the requirement to consult by virtue of the regulations.
PRT	The Pensions Regulator Tribunal, as per section 102 of the Pensions Act 2004.
TPR	The Pensions Regulator, as per section 1 of the Pensions Act 2004.