



JONES DAY
COMMENTARY

THE OCCUPATIONAL AND PERSONAL PENSION SCHEMES (CONSULTATION BY EMPLOYERS AND MISCELLANEOUS AMENDMENT) REGULATIONS 2006

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the "Regulations") came into force on 6 April 2006 and prohibit the making of 'listed changes' to occupational or personal pension schemes, unless consultation about the change is carried out first.

The Regulations apply to 'relevant employers' participating in a scheme, the trustees of the scheme and any other person, most commonly the principal employer, who has power, under the rules of the scheme, to make a 'listed change'. 'Relevant employers' are those who employ more than 50 employees, but do not include employers who:

- offer employees a group personal pension scheme, but make no contributions to the scheme;
- participate in an occupational pension scheme with fewer than two members;

- participate in an occupational pension scheme with fewer than 12 members (where all of the members are trustees and certain other requirements are met); or
- participate in a scheme which is not registered with HMRC (with minor exceptions).

'LISTED CHANGES'

If there is a proposal to make a 'listed change' affecting a scheme, a 'relevant employer' must comply with prescribed information and consultation requirements in respect of those of its employees who are active or prospective members of the scheme, to whom the 'listed change' relates ("affected members").

The changes set out below trigger these requirements, whether they affect all members or only members of a particular description.

In respect of an occupational pension scheme:

- to increase the normal pension age specified in the scheme rules;
- to close the scheme to new members;
- to close the scheme or part of it to future accrual;
- to remove the liability to make employer contributions;
- to introduce member contributions;
- to increase member contributions;
- to reduce employer contributions;
- to change any benefit from final salary to money purchase;
- to change, in whole or part, the basis for determining the rate of future accrual; and
- to reduce the rate of future accrual.

In respect of a personal pension scheme:

- to cease or reduce employer contributions; and
- to increase member contributions.

A change will not be a 'listed change' if:

- it is made for the purpose of complying with a statutory provision or a determination made by the Regulator;
- it has no lasting effect on a person's rights to be admitted to a scheme or on the benefits that may be provided under it; or
- it is a regulated modification and is subject to the subsisting rights provisions under section 67 Pensions Act 1995.

CONSULTATION REQUIREMENTS

Prescribed information about the proposal must be given to affected members and any representatives of affected members who are to be consulted. The information must be provided in writing, before the start of the consultation, and must be provided in a way that enables, in particular,

representatives of affected members to consider, conduct a study of, and give their views to the employer on, the impact of the 'listed change' on such members.

WHO MUST BE CONSULTED?

The representatives who must be consulted are:

- any trade union representatives, where any independent trade union is recognized by the employer;
- any representatives appointed or elected pursuant to the Information and Consultation of Employees Regulations 2004; and
- any representatives appointed or elected pursuant to a pre-existing agreement to represent employees.

If any of the affected members are not represented, then the employer must consult directly with those members or elect representatives under the terms of the Regulations. The election process must meet certain requirements which are intended to ensure that:

- the election is fair;
- the interests of all of the affected members are adequately represented; and
- all the affected members are given the opportunity to vote for a representative or representatives.

HOW TO CONSULT

The 'relevant employer' and any person consulted are under a duty to work in a spirit of co-operation, taking into account the interests of both sides. The period set for consultation must be at least 60 days, and the date set for the end of the consultation period, or the submission of written comments, must be notified to the affected members and their representatives.

The person proposing the change must take reasonable steps to satisfy himself or herself that the consultation was carried out in accordance with the requirements of the Regulations and must consider the responses received, before making his decision as to whether or not to make

the 'listed change'. It is important that no final decision be made or action taken until consultation is complete.

CONSEQUENCES FOR NON-COMPLIANCE

The Regulations were amended with effect from 6 April 2009, to enable the Pensions Regulator to impose a fine (of up to £5,000 in the case of an individual and £50,000 in the case of a company) or issue an improvement notice, in the event of a failure to consult. An improvement notice will require the person to whom it is issued to take specified steps to remedy, or prevent the reoccurrence of, the contravention. A failure to comply may leave the person open to a fine of a similar amount. However, the change itself remains valid even if the consultation requirements are not met.

CONTRACTUAL COMPLICATIONS

Employers looking to introduce a listed change should also take care to review the pension entitlements that are specifically set out in the contracts of employment of the affected employees. Where the proposed change to the pension scheme in question would result in an express contractual benefit being lost or reduced, the employer would be acting in breach of contract were they to impose that change without the employee's express consent. This breach could also lead to the employees resigning and claiming constructive dismissal. Ultimately, in order to effect the required listed change, an employer may have no choice but to dismiss any dissenting employees and then offer them re-engagement on amended terms and conditions that reflect the new pension entitlements. Where it is anticipated that it may be necessary to dismiss 20 or more employees in any one establishment, this would give rise to separate consultation requirements under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. Whilst in many cases this consultation could be run in parallel with the consultation process required under the Regulations, the duration and scope of the consultation is likely to be different. It would therefore be prudent for an employer to seek appropriate advice to ensure that it

complied with any additional obligations that may arise in such circumstances.

LAWYER CONTACTS

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