



## **GMB Technical Briefing on the Updated Fair Deal**

After years of GMB campaigning, the government published updated Fair Deal guidance in October 2013, as part of the reforms to public sector pension arrangements. The new guidance will mandate contracting authorities and contractors to ensure continued access to public sector pension schemes for staff following a compulsory (non-voluntary) transfer. This includes transfers to which TUPE might not apply such as to a public service mutual or other new model of public service delivery.

This briefing gives a summary of the provisions of the new guidance. The full guidance can be seen at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/246933/P\\_U1571\\_Fair\\_Deal\\_for\\_staf\\_pensions.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246933/P_U1571_Fair_Deal_for_staf_pensions.pdf)

### **Coverage**

The guidance applies directly to staff who are transferred out (first and any subsequent transfers) of central government departments, agencies, the NHS, maintained schools (including academies) and any other parts of the public sector under the control of Government ministers where staff are eligible to be members of a public service pension scheme. It does not apply to staff transfers within the public sector, although these machinery of government transfers would be expected to include protection of pension terms.

The new Fair Deal Policy also does not apply to best value authorities (e.g. local authorities, police and fire authorities and transport authorities). The Best Value Authorities Staff Transfers (Pensions) Direction 2007 was issued to best value authorities in England and Welsh fire authorities. The Department for Communities and Local Government (DCLG) will consider what is needed in respect of directions or other arrangements to achieve the same principles of new Fair Deal in local government. In line with this, GMB will be working with DCLG to ensure that pension protection principles are afforded to LGPS members who are subject to a non-voluntary transfer of employment, regardless of who their employer is. This is in accordance with the agreement reached in reforming the LGPS.

### **Timing**

New guidance comes into force immediately and should be reflected in procurement practice as soon as is practicable. Projects that are at an “advanced stage” (no definition given) do not need to comply with this but will need to comply with existing guidance (i.e. provision of a broadly comparable scheme). Contracting authorities that plan to award a contract should ensure adherence to the revised Fair Deal from the outset.

## **Protection**

Staff who are members of a public service pension scheme and who are compulsorily transferred out of the public sector, and who remain continuously employed on the delivery of the outsourced service or function, will remain eligible to be members of their public service pension scheme. This eligibility will continue for these members of staff for further transfers to different employers.

## **Enforcement**

The contract for the transferred service or function should specifically require the independent contractor to provide transferred staff with continued access to the relevant public service pension scheme while they remain employed on the public service contract. The contracting authority should also ensure that the contracts of employment of staff who are compulsorily transferred to an independent contractor as a result of an outsourcing of a service or function provide that they have a right to continued membership of their public service pension scheme. These rights will ultimately be enforceable by staff, although contracting authorities have a responsibility to ensure that independent contractors comply with those of their contractual responsibilities which give effect to the Fair Deal policy. Independent contractors, as scheme employers in the public service pension schemes, will also be subject to requirements of the scheme regulations and the jurisdiction of the Pensions Regulator and Pensions Ombudsman.

A Participation Agreement between the independent contractor and the relevant public service pension scheme will be required for each public service contract. This will require an independent contractor to participate in the relevant pension scheme. The contracting authority should ensure that the contract for the transferred service or function specifically requires the contractor to comply with the Participation Agreement.

The contracting authority should ensure that the contract for the transferred service or function expressly provides that breach of the Participation Agreement entitles the contracting authority to terminate the contract.

## **Services that have Already Been Contracted Out**

A great number of workers will have already transferred out of the public sector under the old Fair Deal guidance. Re-tenders of the applicable contracts are covered by the new guidance. This says that a different approach can be taken:

- For groups originally contracted out prior to the introduction of Fair Deal in 1999. Consideration should be given (on a case by case basis) as to whether the approach taken in previous contract tenders was in line with the old Fair Deal guidance. If it has been then this old guidance can be followed in any re-tendering exercise.
- For staff who were contracted out since 1999 and the introduction of Fair Deal, it would normally be expected that a re-tendering exercise would include an expectation that staff would be allowed to come back in to the applicable public sector pension scheme. However the guidance recognises that this could cause problems and does allow for the continuation of a broadly comparable scheme. In future broadly comparable schemes are expected to be career average (rather than final salary) in nature, reflecting the reforms underway in the public sector.

## Further Work

A number of potential areas of further work have been identified:

- Will other forms of compulsory transfer exist that may not be covered? If so, GMB believes that the principle of allowing continuation of pension scheme access should be allowed in any other form of transfer.
- The government guidance highlights that there may be exceptional circumstances meaning that continued pension provision may not be appropriate. It is not clear what these may be. The guidance states that if such circumstances are identified then no decision should be taken in relation to pensions without consulting with recognised trade unions with a view to reaching agreement.
- In the event that the aim of providing continued access cannot be met, then the old policy of providing a broadly comparable scheme should be applied. If this cannot be met then discussions with staff would need to consider other forms of compensation.
- The Fair Deal policy does not apply to other staff of the independent contractor, including any new staff employed to deliver the outsourced service or function who were not compulsorily transferred from the public sector. However this does not stop contracting authorities, contractors or pension schemes from preventing such access. This is an area for GMB to push on to ensure this open access remains a possibility subject to the agreement of the contracting authority.
- The guidance recognises that staff turnover (i.e. contracted workers leaving the employment of a contractor) will lead to savings if these workers are not replaced by workers who have similar levels of pension protection. The guidance recognises these potential savings and indicates that contracting authorities could ask for these to be passed back to them. This would avoid any incentive to the contractor to “encourage” staff turnover; however the potential benefits to the contracting authority could leave them open to such encouragement. GMB believes that, because any such savings arise from reduced pensions access, then they should be directed towards pension provision for staff (including any who do not have access to public sector schemes).

Overall, the Fair Deal protections outlined in this note are good news for public sector staff and give a significant degree of pension security in the face of potential privatisation.