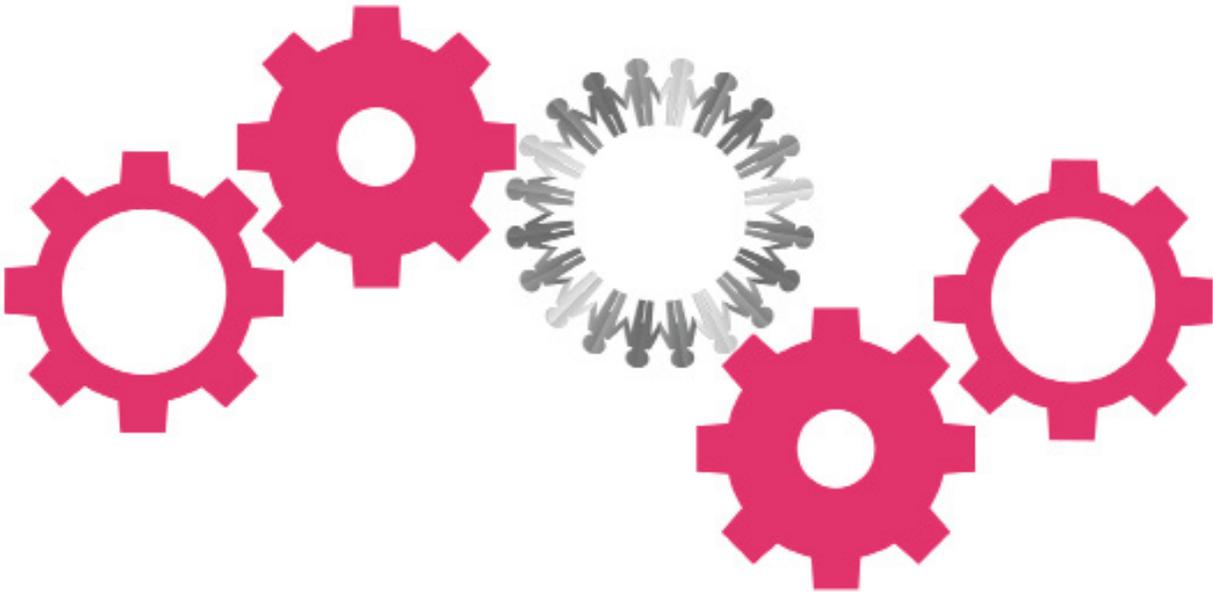


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Joined up thinking
New Fair Deal



Summary

Those involved in public sector outsourcing need to have a sound understanding of HM Treasury's **New Fair Deal guidance**, which was first issued in October 2013. The guidance, which is non-statutory policy, sets out the principles that are intended to ensure that staff compulsorily transferred out of the public sector will continue to have access to their existing public service pension scheme.

Eversheds Sutherland can support you in this complex area of employment and pension law and guide you through the requirements to ensure compliance whilst minimising risk.

New Fair Deal

Which bodies does it apply to?

The New Fair Deal guidance applies to central government departments, agencies and the NHS, and was extended to also cover maintained schools (except where local authority specific guidance applies), 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 scheme.

The guidance states that it is also open to contracting authorities in other parts of the public sector to adopt the New Fair Deal principles, where New Fair Deal does not directly apply.

Does New Fair Deal apply to local authorities?

No, local authorities and other best value authorities remain covered by alternative statutory arrangements contained in the Best Value Authorities Staff Transfers (Pensions) Direction 2007 (and The Welsh Authorities Staff Transfers (Pensions) Direction 2012 in Wales).

The Department for Communities and Local Government ran a separate consultation in 2016 on possible changes to the Local Government Pension Scheme (LGPS) regulations to incorporate the principles of New Fair Deal directly into the scheme's provisions, though to date no changes have actually been made to the LGPS. However, certain employers within the LGPS are subject to New Fair Deal (for example, academies).

New Fair Deal – new contracts

New Fair Deal applies when staff who are members of a public service scheme move from the public sector to an independent contractor by way of a transfer to which TUPE applies. It also applies when staff 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 guidance, staff should continue to be members of the public service scheme they were active members of immediately prior to the transfer, subject to the eligibility criteria of that scheme.

Transferred staff will continue to be eligible to be members of the public service pension scheme provided they remain continuously employed on the delivery of the outsourced service or function. They should also continue to be eligible to be members of the public service scheme following any subsequent compulsory transfer.

The guidance also confirms that an employee who was eligible to be a member of the public service scheme prior to the transfer - but who was not an active member - should continue to be eligible to join the scheme post-transfer. The guidance states that such staff should be enrolled back into the scheme on the day their new employment commences.



Participation in public service pension schemes

New Fair Deal contains further guidance on participating in public service schemes. However, this guidance is in very general terms and does not stipulate specific details of the participation terms that public service pension schemes are required to offer.

The main public service pension schemes, such as the NHS Pension Scheme or the Principal Civil Service Pension Scheme, have now all established their own separate admission processes which can be found on the schemes' websites.

In general terms, contractors will participate on the same or similar terms to public sector employers. Participation in public service schemes is not completely risk-free for contractors although these risks may be acceptable to a contractor or managed through risk sharing provisions in the service contract.

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Provisions of the service contract

A contracting authority should ensure that the terms of the service contract require the contractor to provide the transferred staff, with continued access to the appropriate public service scheme in their new employment while they continue to be employed on the transferred service. Many sectors have now developed their own New Fair Deal standard drafting for use in service contracts.

If an employee ceases to be employed on the transferred service then he or she will normally cease to be eligible for membership (unless they are employed in another role where staff are eligible for the same public service scheme). The precise details of how this will work will be decided on a scheme by scheme basis.

In addition, there is a requirement for the contracting authority to ensure that the contracts of employment of the transferring staff provide that the staff have a right to continued membership of the public service scheme.

The service contract should include effective mechanisms to ensure that the contractor complies with the terms of any participation agreement it agrees with the relevant scheme.

The contracting authority also needs to ensure that the service contract protects the staff in the event of any subsequent compulsory transfer, while they continue to be employed on the transferred service, for example, on any transfer to a sub-contractor.

The service contract should also include clear provisions about how staff pensions should be handled at the end of the contract. It will fall on the contracting authority to include the necessary pension protections on any subsequent re-tendering of the contract.

New Fair Deal - procurement issues

HM Treasury expect pension issues to be dealt with as an integral part of any procurement exercise, and contracting authorities should make the required level of pension protection clear at an early stage in both first generation and subsequent exercises.

Contracting authorities may ask prospective bidders to confirm that they are willing to comply with the regulations that govern the relevant public service scheme. The contracting authority should also notify the authority responsible for the relevant scheme at an early stage in the process.

Exclusions from the New Fair Deal protection

New Fair Deal recognises that there may be exceptional circumstances where it would not be appropriate to provide staff, who are compulsorily transferred from the public sector, with continued access to a public service scheme post-transfer. The strength of those reasons should be tested rigorously by the contracting authority.

No decision should be taken without consultation with any recognised trade union or, in the absence of such a body, the staff directly. Where such a decision is taken, the old Fair Deal policy should be applied and staff should be given access to a broadly comparable scheme.

In the event that it was not appropriate to offer either access to a public service scheme or a broadly comparable scheme, the contracting authority would need to consider whether compensation should be offered to transferring staff, in consultation with staff or staff representatives. Actuarial advice would need to be taken by the contracting authority on the calculation of any compensation in such exceptional circumstances.

New Fair Deal - re-tenders of contracts let under Old Fair Deal

The principles of New Fair Deal, where staff are compulsorily transferred out of the public sector for the first time, are relatively straightforward. The complexity arises where existing contracts let under Old Fair Deal come up for re-tender.

The contracting authority should (where this is compatible with its obligations under the Public

Contracts Regulations 2006) require bidders to provide the original protected staff with access to the appropriate public service scheme while they continue to be employed on the re-tendered service. This will be the pension scheme that staff would have been in, had they remained in the public sector.

Employees with deferred benefits in public service schemes

Employees who left their deferred benefits in the public service scheme when they were originally transferred from the public sector, will not have the option of maintaining their final salary link for any previous service accrued in the public service scheme when they re-join the scheme, unless permitted by the scheme's rules. For example, this option

may be available if they are returning to the relevant scheme within five years of leaving.

Also some public service pension schemes may not allow ex-public sector employees aged 60 and above with deferred benefits to re-join the scheme. Due diligence will be required to identify such employees.

Bulk transfers back to the public service scheme

Staff moving back into a public service scheme (or in exceptional circumstances to a new provider's broadly comparable scheme) should have the option of having their accrued pension rights in the current broadly comparable scheme protected via a bulk transfer arrangement.

Prior to any re-tender exercise, the contracting authority should check the onward bulk transfer provisions of the existing contract to see what bulk transfer terms the incumbent contractor is required to pay. The contracting authority should provide details of the onward bulk transfer terms from the incumbent contractor's broadly comparable scheme to each of the other bidders in the procurement, along with details of the bulk transfer terms required by the public service scheme in order to provide the required service credits.

There may well be a risk that the onward bulk transfer terms are considered insufficient to provide the service credits in the new pension scheme. Bidders should therefore indicate in their bid documentation if they agree to those bulk transfer terms or if any price adjustment is proposed on account of the acceptance of those terms and any resulting shortfall. Where staff elect to transfer their accrued

benefits to a public service scheme (or a new provider's scheme), subject to the contracting authority being satisfied that the bulk transfer arrangements meet the requirements of New Fair Deal, the contracting authority will usually be required to cover the costs of this shortfall.

Further details of the bulk transfer requirements can be found in Annex B of the guidance.

The guidance assumes that all existing service contracts will contain clear and enforceable obligations on the incumbent contractor to provide onward bulk transfer terms. In practice, this is not always the case. The New Fair Deal policy tends therefore to add extra complexity and cost to the bid process, requiring bidders to assess bulk transfer shortfalls in a process which is unlikely to directly involve them.

The New Fair Deal process hinges upon the timely provision of detailed bulk transfer information and data early in the bid process, which is not necessarily something which contracting authorities are always able to provide in practice.

The requirements in relation to the expected level of service credits awarded on a bulk transfer may also vary between public service pension schemes.

New Fair Deal - use in other situations

New Fair Deal also envisages that there may be circumstances when employees may be allowed to return to a public service scheme apart from in a retender situation. Such decisions in practice are taken on a case-by-case basis but may include cases where an existing employer is declared insolvent, where there is a change in ownership of the existing employer, or where employees are transferred to another employer as a result of the service or function being sub-contracted.

The ability to return employees to a public service pension scheme during an existing contract let under Old Fair Deal may also be possible.

The future of broadly comparable schemes

If the specific circumstances of a retender mean that the contracting authority would be unable to comply with its obligations under procurement law - to treat economic operators equally if they were to require the incumbent contractor along with all other bidders to provide access to the relevant public service scheme - then it can give the option to the incumbent contractor of either continuing to provide a broadly comparable scheme or provide access to the relevant public service scheme. The contracting authority must ensure that, before the retendering process is commenced, the incumbent employer informs any recognised trade unions or, in the absence of such bodies, the staff, of any proposal which would allow for the continuation of a broadly comparable scheme.

Where an incumbent contractor offers a broadly comparable scheme, this should wherever possible be broadly comparable to the current public service scheme. For example, following the change of the public service schemes to a career average re-valued earnings (CARE) scheme from April 2015, the broadly comparable scheme should reflect the new CARE basis. However, the scheme should also provide any transitional protection to those staff that would have been eligible for this, had they remained in the public service scheme.

Where it is not possible to change the benefits provided by the broadly comparable scheme, for example, because it is not possible to amend the current scheme rules, the broadly comparable scheme offered by the incumbent contractor should be broadly comparable to the public service scheme to which the staff had access when they first left the public sector.

It is possible that there could be exceptional cases where allowing the incumbent contractor the option to provide a broadly comparable scheme - or access to a public service scheme - would mean that the contracting authority would still be unable to comply with its obligation under procurement law to treat economic operators equally. In such exceptional circumstances, the contracting authority may require both the incumbent and new bidders to provide a broadly comparable scheme, rather than provide access to a public service scheme. In practice, this is likely to be very rare.

Annex A of the New Fair Deal guidance sets out how broad comparability assessments are to be carried out. Where a broadly comparable scheme is to be offered then the service contract must also include clear provisions covering the position when the contract ends and onward bulk transfer terms become payable to a public service scheme (or to another broadly comparable scheme). Further details are set out in Annex B.

How can we help?

Eversheds Sutherland have unrivalled experience advising clients on New Fair Deal issues across a range of sectors including central government, the education sector, the NHS and local government. We use our experience and knowledge to advise on areas such as:

- compliance with New Fair Deal (and Best Value Direction) requirements
- admission to public service pension schemes
- drafting contractual provisions including risk-sharing mechanisms
- changing pension benefits for existing staff on a re-tender
- mid-contract admission
- entitlement to enhanced public sector redundancy benefits
- planning and strategy for termination of existing contracts

Contact

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