

Sharing your school of thought

Pensions issues for school or
academy outsourcings



In times when budgets are stretched, many schools and academies are deciding to outsource cleaning, catering and other services to external private contractors, in order to save costs.

We advise schools, academies and administering authorities of the Local Government Pension Scheme funds, in relation to the obligations on the various parties when a school/academy outsources its non-teaching functions to a contractor.

This article provides information on the types of things that you should consider from a pensions law perspective and how Eversheds Sutherland can assist.



What happens on an outsourcing?

As a result of an outsourcing, non-teaching employees who are currently carrying out the services in-house will likely become employees of the contractor, in line with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Whether TUPE applies in practice depends on a number of factors and we would recommend that advice is sought on to whether TUPE would apply in any given scenario.



The Outsourcing Contract

The terms of the outsourcing will usually be set out in an outsourcing agreement (also known as a "services contract"), entered into between the school or the academy trust and the contractor. Depending on the school type, the local authority may be the body which is entering into the outsourcing contract, rather than the school.



What should be included in the outsourcing contract?

Does New Fair Deal or the Best Value Pensions Direction apply?

When the outsourcing contract is being negotiated, the school/academy trust may need to ensure that it includes appropriate pension protection for its transferring staff.

What is required will depend on whether HM Treasury's New Fair Deal policy 2013 ("New Fair Deal") or the Best Value Authorities Staff Transfers (Pensions) Direction 2007 applies (the "Best Value Direction"). Which of these applies will depend on the type of school involved.

A brief summary of the pensions protections required by New Fair Deal and the Best Value Direction are set out below:

New Fair Deal – applicable to certain maintained schools and academy trusts

New Fair Deal made it clear that the New Fair Deal terms will apply to staff transferring from academy trusts and certain maintained schools (where the local authority is not the employer of the staff).

For governing bodies of schools to which New Fair Deal is applicable and also academy trusts, the New Fair Deal policy (broadly) provides that:

- staff who are members of the LGPS and who are compulsorily transferred to a contractor, and who remain continuously employed on the delivery of the outsourced service or function, will remain eligible to be members of the LGPS while they continue to be employed on the transferred service or function
- this protection does not apply in relation to other staff of the contractor, including any staff recruited to deliver the outsourced service or function who were not compulsorily transferred from the school/academy trust
- it is the responsibility of the school/academy trust to ensure that the terms of the outsourcing contract require the contractor to provide protected staff with continued access to the LGPS in their new employment

- schools/academy trusts must also ensure that staff protected by New Fair Deal are provided with continued access to the LGPS on any subsequent compulsory transfer while they continue to be employed on the contracted-out service or function, including any transfer to a sub-contractor.

Although New Fair Deal does not have the force of law, the Department for Education – and public sector unions – usually expect schools/academy trusts to comply with it as a matter of practice. It is also important to note that the policy is not overriding, and that failure to include appropriate provisions in the outsourcing contract will result in staff having no protection.

In order to provide continued access to the LGPS for staff post-transfer, the administering authority will require the contractor to enter into an admission agreement, which in these cases will be a tripartite agreement between the contractor, the governing body of the school or academy trust (who must stand as guarantor of last resort for the contractor's LGPS liabilities) and the relevant LGPS administering authority. The contractor may also be required to obtain a bond from a third-party provider.

Contractors will often seek protection under the terms of the contract against the funding risks of participation in the LGPS.

We strongly recommend that schools/academy trusts seek legal advice where a contractor is seeking to put LGPS risk onto them. The school/academy trust should, ideally, consider what LGPS risk it is willing to take on at the outset of the service procurement and include wording in respect of this in the tender.

Best Value Direction – Applicable where the local authority is the employer of the staff

If the current legal employer of the transferring employees is the local authority, the outsourcing contract will be subject to the Best Value Direction. This is because the Best Value Direction applies to 'best value authorities' as listed in section 1 of the Local Government Act 1999, which include local authorities and schools where the local authority is the employer of the staff, such as community schools.

The Best Value Direction provides that:

- where the local authority enters into a contract with a person for the provision of services, and those services are, in the period immediately before the contract is entered into, provided by the local authority and carried out by employees of that local authority, such a contract must provide that the contractor shall secure "pension protection" for each transferring employee; and that the provision of pension protection is enforceable by the transferring employee
- for the purposes of the above "pension protection" is secured for the transferring employee if after that change in employer they have rights to acquire pension benefits and those rights are the same as, or count as being broadly comparable to or better than, those that they had, or had a right to acquire, as an employee of the authority
- in terms of second generation contracts (i.e. whereby a local authority has contracted with a contractor and TUPE has resulted in employees of the local authority becoming the employees of the contractor, and the authority subsequently contracts with a subsequent contractor) then the contract between the local authority and the subsequent contractor must provide that the subsequent contractor must secure pension protection for any transferring original employees.



Update – Government consultations on New Fair Deal

The Government has previously consulted on a set of proposals intended to give effect to the principles of New Fair Deal within the local government context. Those proposals would have required all transferred staff to be offered continued access to the LGPS, with the option for contractors to provide a broadly comparable arrangement being removed.

The Government's response to that consultation confirmed its commitment to introduce the strengthened New Fair Deal principles into the LGPS, but given the number of concerns raised by respondents regarding details of the original proposals, promised to issue a further consultation. The Government published that second consultation in 2019.

The changes, if enacted, will give New Fair Deal principles the force of law in the LGPS. They are also intended to provide greater flexibility by, for example, allowing contractors to participate in the LGPS without an admission agreement and having the Scheme employer (such as the local authority or academy trust) continue to pay the employer's pension contributions in respect of outsourced employees.

We are awaiting the outcome of that consultation.

We would recommend legal advice is sought on the implications of the new regime in preparation for when the potential changes come into effect. Many LGPS Funds are also updating their admission agreement and/or having 'pass-through' versions of these (broadly, where the contractor pays a set employer contribution rate and the Scheme employer is responsible for funding deficit at the end of the contract).



How can we help?

Eversheds Sutherland has considerable experience in acting for schools and academy trusts who are considering outsourcing services. We can assist schools and academy trusts by:

- advising on the requirements of the Best Value Direction and New Fair Deal and obligations under contracts/agreements
- drafting pensions provisions in contracts
- advising on pensions cost and risk sharing provisions in tender documentation and contracts
- advising on admission agreements and obligations under those agreements

Please note that this is intended to be a general guide only and is not a substitute for legal advice

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