



Top of the class

Pensions obligations for academy trust outsourcings



Leading education and pensions practices

Eversheds Sutherland's award-winning pensions and education practices, include a dedicated education sector pensions team.

The team is nationally recognised for its expertise in this area and has extensive experience of advising academy trusts on a whole range of pension issues. Recent work has included advising academy trusts who have decided to outsource cleaning, catering and other services to external contractors, with the aim of cost saving.

This article provides an insight in into what pension issues academy trusts should consider when outsourcing and how Eversheds Sutherland's specialist pensions education team can assist.



The outsourcing contract

The terms of the outsourcing will usually be set out in an outsourcing agreement (also known as a "services contract" or "commercial contract"), entered into between the academy trust and the contractor.



What happens on an outsourcing?

As a result of outsourcings, non-teaching employees of the academy trust who are currently carrying out the services in-house are likely to become employees of the contractor, in line with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). (We would recommend that advice is sought as to whether TUPE would apply in any given scenario).



What does New Fair Deal say and what do academy trust need to do?

From the outset the academy trust must consider whether it wishes to comply with the requirements of HM Treasury's new Fair Deal policy 2013 ("New Fair Deal"). In New Fair Deal HM Treasury made it very clear, for the first time, that fair deal terms will apply to staff transferring from an academy trust.

For academy trusts, the New Fair Deal policy (broadly) provides that:

- staff who are members of the LGPS and who are compulsorily transferred from the academy trust 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 independent contractor, including any staff employed to deliver the outsourcing service or function who were not compulsorily transferred from the academy trust
- it is the responsibility of the 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
- academy trusts should 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 or on a sale by the contractor of part of its business.



Is New Fair Deal mandatory?

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



Admission Agreements

Continued access to the LGPS for staff post-transfer is provided by the well-established mechanism of an admission agreement, which in these cases will be a tripartite agreement between the contractor, the 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, which will help to protect the academy trust against financial risk as ultimate guarantor.





Update – Government consultation

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 LPGA without an admission agreement and having the Scheme employer (such as the academy trust) continue to pay the employer’s pension contributions in respect of outsourced employees.

We are awaiting the outcome of that consultation.

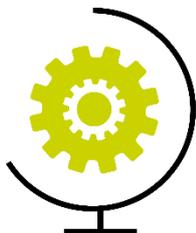
We would recommend legal advice is sought on the implications of the new regime in preparation for when the potential changes come into effect. Many LGPS Funds are also updating their admission agreement and/or having “pass-through” versions of these (broadly, where the contractor pays a set employer 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 academy trusts who are considering outsourcing services. We can assist academy trusts by:

- advising on the requirements of 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
- drafting contractual provisions on pensions protection
- advising on admission agreements and obligations under those agreements.



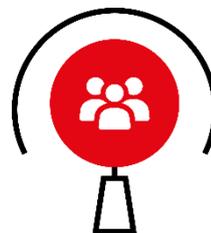
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Key contacts

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to be a general guide only and is
not a substitute for legal advice.*



The quality of the work, expertise and representation has been consistently excellent.

Chambers and Partners

A really strong pension team with a genuinely pragmatic approach coupled with strong and clear communication skills.

We have been consistently impressed with the advice we have received from Eversheds Sutherland. The individuals we have dealt with have consistently provided excellent service. They have provided innovative solutions to complex scenarios, and have communicated the issue and solution clearly. They have a wide range of expertise and have always been able to find a specialist who can provide the required input into an issue. They adopt a pragmatic approach and in our experience get to the right answer more quickly than other advisers we have worked with.

I've found Eversheds Sutherland to be very responsive, experienced and well connected. In particular the depth and breadth of expertise, and ability for those from different disciplines to work together to provide a seamless service is impressive. Their knowledge of what's going on in industry, government and other circles is helpful and impressive.



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