



Department
of Health

Reform of the Fair Deal policy

NHS Pension Scheme Guidance

May 2014

Introduction

- Fair Deal policy was introduced in 1999 to provide pension protection for staff compulsorily transferred out of the public sector
- *“The guiding principle should be that the new employer offers transferring staff membership of a pension scheme which though not identical is ‘broadly comparable’ to the public service pension scheme which they are leaving”*
- Further guidance issued in 2004 set out further details about how bulk transfers should be carried out when contracts were retendered, to ensure the protection of accrued rights on transfer

Background to the reform

- Independent Public Service Pensions Commission found in 2011 that the policy was a barrier to plurality in public service provision, and recommended that the policy be reviewed
- HM Treasury consulted stakeholders in 2011 on how the policy should be reformed to provide staff with pension protection, while delivering value for money and removing barriers to plurality of public service provision
- Further consultation on the treatment of staff that have already been transferred out under Fair Deal

New Fair Deal Policy

- Chief Secretary to the Treasury confirmed in 2012 that Fair Deal would be reformed by allowing transferred staff to remain in their public service pension scheme
- New guidance published on 7 October 2013 sets out how the policy will be implemented (link below)-

<https://www.gov.uk/government/publications/fair-deal-guidance>

- The HMT policy and guidance was developed with extensive engagement with a wide range of stakeholders, including trades unions and business representatives

Scope of New Fair Deal

- Policy applies to staff eligible for a public service pension scheme in:
 - central government departments and agencies;
 - the NHS,
 - maintained schools, including academies (except when covered by other arrangements for local govt);
 - any other parts of the public sector under the control of Government ministers.

NHS Pension Scheme

- NHS Pension Scheme (NHSPS) specific guidance has been developed in collaboration with NHS England, the Government Actuary Department alongside consultation events with NHS procurement representatives, independent sector providers and external advisors
- It seeks to provide further clarity to the contracting authorities, bidders and providers in relation to the application of the new Fair Deal policy where the relevant public service pension scheme is NHSPS

<https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme>

A. New Fair Deal - timing

- New guidance is effective immediately :
 - No requirement to disrupt ongoing procurements which are already at an advanced stage;
 - NHS BSA has put in place procedures to admit Independent Sector employers to the NHSPS under new Fair Deal
 - DH will consider any requests for participation in the scheme from April 2012 on a case-by case basis taking account procurement and value for money considerations
- Contracting Authorities may decide not to apply the new Fair Deal policy only under exceptional circumstances, for legal reasons:
 - If the contracting authority would be unable to offer a “level playing field” for the retendered contract; or
 - If an incumbent contractor has a contractual obligation to provide a broadly comparable pension scheme to staff

B. Rate of Employer Contributions

- Rates for participating independent sector employers will be the same as for NHS employers – currently 14%
- The Employer contribution rate is expected to be 14.3% from April 2015
- All employers are required to comply with any future changes in rate, both for employer and employee contributions
- However, any changes in contribution rate are to be passed through to the contracting authority by way of an adjustment to the service charge (except in NHS commissioning contracts, where the change will be reflected in the national tariffs and adjustment factors)

C. Managing Risk on Contributions

- In order to maintain a level playing field, contribution rates will not be used to manage risks associated with this policy
- Like NHS currently, no administration charge will be applied to independent sector employers involved in the scheme
- No indemnities, bonds or guarantees will be required to protect NHSPS from the risk of shortfall in contributions. However, conditional guarantees may be sought from independent sector employers if they have defaulted on contributions previously
- Penalties and interest charges will be applied with regard to late payment of employer contributions and these will be set out in the relevant Pension Direction
- Withholding provisions to be used in the contract between the independent sector contractor and the contracting authority

D. Participation Agreements

- Participation Agreements will not be required between independent sector employers and NHSPS;
- Instead, Pension Directions will be issued (as currently) with respect to the relevant staff transferring into the NHSPS and there will also be a contract providing the legal levers;
- Contracting Authorities will need to obtain a template Direction Letter from NHS Pensions and include this in the relevant procurement documentation, allowing all bidders to bid on the same basis;
- Prior to commencement of service, an independent sector contractor, or the relevant sub-contractor must obtain a Pension Direction to cover all transferring staff;
- The Pension Direction is 'closed', in that it is restricted to all transferring staff and listed as such in the direction document.

E. Eligible Employees

- Employees named in the Pension Direction will be eligible for the NHS pensions, provided they are engaged for more than 50% of their employed time with that employer.
- The more than 50% condition does not have to be met on any one day or week but must be met with regard to engagement in one complete scheme year (or equivalent on a pro rata basis where employment is for less than one scheme year)
- Any employee named in the Pension Direction who ceases to work on the transferred NHS function but continues to be involved on other NHS work for that employer, can remain eligible on the above basis

Contract Provisions

- In order to ensure compliance with HM Treasury new Fair Deal guidance and the NHS PS Guidance, it is intended that the following provisions will be included in contracts where new Fair Deal applies and already included in the Standard NHS Commissioning Contract :
- The independent contractor must provide transferred staff with continued access to the NHS PS for as long as they continue to be engaged in relation to the relevant contract. That access must be in accordance with the Pension Direction.
- The independent contractor's contracts of employment, and those of its sub-contractors, with transferred staff must give staff the right to continued access to the NHSPS for as long as they continue to be engaged in work relating to the relevant contract.

Contract Provisions (continued)

- The independent contractor must ensure that transferred staff have the right to continued access to the NHSPS on any subsequent transfer, as a result of sub-contracting or termination of a sub-contract, for as long as they continue to be engaged in relation to the contract.
- Failure by the independent sector contractor or its sub-contractor to comply with its obligations in relation to the NHS PS (including those under any Pension Direction), as notified to the contracting authority by NHS Pensions, will constitute an event of default entitling the contracting authority to terminate the contract.

Contract Provisions (continued)

- If the provider or its sub-contractor is in arrears in respect of contributions due to the NHS PS, as notified to the contracting authority by NHS Pensions, the contracting authority may deduct the amount overdue from sums due to the provider under the contract and pay that amount to NHS Pensions.
- The contract must include appropriate provisions setting out how pensions of transferred staff are to be handled at the expiry or earlier termination of the contract.
- The Pension Direction should in all cases be addressed to the employer of the relevant staff which may be a sub-contractor. Withholding of pension contributions should however be dealt with in the principal contract between the contracting authority and the main contractor.

Exit Payments

- As the NHSPS is funded by members' contributions, it is anticipated that exit payments or additional payments will not arise apart from any potential late payments penalties/ interest charges.

Re-Tendering: Eligible Employees

- When a contract involving the compulsory transfer of employees already transferred out under the Old Fair Deal is retendered, contracting authorities should look to require bidders to provide these employees with access to the NHSPS
- This will apply to all staff still working on the contract, which were originally transferred out under old Fair Deal policy, regardless of whether they elected to join the incumbent contractor's broadly comparable scheme at the point of the original transfer out
- Any data which is being prepared for bidders needs to clearly identify all such staff at the outset to allow bidders to price their bids accurately

Retendering: Broadly Comparable

- When contracts involving staff already transferred under the old Fair Deal policy are retendered, staff will be offered:
 - access to a public service pension scheme
 - a bulk transfer of accrued rights
- The flexibility to continue to provide broadly comparable schemes will be available only for legal reasons:
 - If the contracting authority would be unable to offer a “level playing field” for the retendered contract; or
 - If an incumbent contractor has a contractual obligation to provide a broadly comparable pension scheme to staff
- Any decision to provide a ‘broadly comparable scheme’ should be based on a detailed consideration, taking into account employment, actuarial and procurement legal advice and should be made clear at the launch of the procurement process.

Retendering: Bulk Transfer Shortfall

- Due to the complexities of this area of the policy, it is advised that contracting authorities seek specialist actuarial, legal and employment advice
- Bulk Transfer Shortfalls become apparent when there is disparity between terms applied to the pension scheme. Assessment of any Shortfall should be carried out early on in the procurement process by the contracting authority
- The contracting authority's actuaries to assess whether the terms offered by the incumbent's scheme meet the requirements of the Fair Deal policy and the extent of any potential shortfalls
- The contracting authority and/or the incumbent contractor will also need to share all relevant employee data with the contracting authority's actuaries, as well as relevant contract details, so they can make calculations in order to advise the contracting authority

Retendering : Bulk Transfer Calculations

- There are three terms to be considered:
 - Those offered by trustees of incumbent scheme
 - Those required in order to meet Fair Deal Policy
 - Those required by NHSPS in order for NHSPS to provide day-for-day service credits for staff who wish to transfer their accrued benefits
- It is the responsibility of the contracting authority to assess the bulk transfer terms contained in the existing contract to ascertain if:
 - Old Fair Deal was applied at time of original outsourcing; and if it was
 - To review the contractual exit provisions for onward bulk transfer terms

Monitoring

HMT guidance sets out annual reporting requirements:

- the number of transferred staff that are enrolled in a public service pension scheme on the day that their new employment commences;
- the number of employees covered by the NFD policy on the anniversary of the contract being awarded and at the end of the contract; and
- the contributions (employer and employee) paid in respect of these;
- details of employers that have failed to meet their responsibilities in the schemes.

Further information and contact details

HM Treasury Guidance

<https://www.gov.uk/government/publications/fair-deal-guidance>

DH Guidance for the NHS pension scheme

<https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme>

FAQ's on New Fair Deal

<http://www.socialpartnershipforum.org/SiteCollectionDocuments/FAQs%20New%20Fair%20Deal%20in%20the%20NHS%20for%20IPs%205th%20November%202013.pdf>

Staff Passport Group Webpage

http://www.socialpartnershipforum.org/national-level/sub-groups/Pages/Staff_Passport_Group.aspx

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