Following consultation in 2016 about introducing New Fair Deal to the Local Government Pension Scheme, the Government promised new proposals by the end of this year for further consultation, but so far it has not produced them.

Fair Deal for Pensions the 2007 Direction and New Fair Deal

1 A major concern to the Government and public sector unions about the outsourcing of services was that the exemption from TUPE of mainstream pension benefits provided by occupational pension schemes would result in the transferring employees, many of whom are in relatively low paid work, losing one compensating valuable benefit, membership of a public sector pension scheme.

2 This was intended to be and has been substantially remedied by the Fair Deal for Staff Pensions guidance first issued by the Office of the Deputy Prime Minister in June 1999. Fair Deal required contracting authorities to impose on contractors an obligation to provide for transferring employees pensions, which are the same as or broadly comparable with the transferring authority’s public sector scheme.

3 In June 2007 the Department for Communities and Local Government issued a direction under the Local Government Act 2003 s101 and s102. The direction applies to TUPE transfers by best value authorities, as defined in the Local Government Act 1999 s1 (mainly local and similar authorities and fire services), and not to other public sector employers such as the Civil Service, teachers and the NHS. The effect of the 2007 Direction is that, where an authority contracts with a person for the provision of services, the contract must provide that the contractor secures pension protection for each employee transferring under TUPE, and the provision of pension protection is enforceable by the employee, with corresponding provisions for subsequent contracts for those services. Pension protection for the transferring employee is the right to acquire pension benefits which are the same as or broadly comparable to or better than those that he had, or had a right to acquire, as an employee of the authority or before the latest change of employer.

4 In October 2013 HM Treasury published and brought into effect “Fair Deal for Pensions”, which everyone else calls New Fair Deal, the effect of which, broadly speaking, is that compulsorily transferred employees will be entitled to remain in their present public sector pension schemes without the option for contractors to provide a broadly comparable scheme.

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New Fair Deal applies to public sector schemes, including unfunded schemes, but not (yet) to best value authority schemes.

enforcing pension rights

5 The weakness of the Fair Deal and New Fair Deal is that it is not statutory and is enforceable only by the contract between the outsourcing authority and the contractor and gives no directly enforceable rights to the transferring employees. The 2013 policy paragraphs 1.10 and 1.11 include the following.

> 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.

6 The 2007 Direction has statutory force and requires the contract for the provision of services to provide that the contractor must secure pension protection for each transferring employee and that the provision of pension protection is enforceable by them.

7 In each case the application and enforcement can be uncertain. If a public authority has a pressing need to outsource a particular service, the bidding contractor senses that it can drive a hard bargain and the local trade union branch is compliant, or if the outsourcing is hurried, the guidance or the Direction’s requirement for a contractual pension obligation might be ignored or omitted by accident or incompetence. In these circumstances the contractor might argue that its legal obligation is limited to providing a money purchase pension scheme under the Pensions Act 2004 ss 207 and 208.

share of surplus

8 One of the hazards of admission to the LGPS had been the risk of an exit payment on the termination of the admission agreement, if the contractor’s notional part of the LGPS was then in deficit, but without a corresponding right to a payment if it were in surplus, as a result of which contractors could not risk paying higher contribution that the minimum for fear of a locked-in surplus. This has been remedied by SI 2018/493, which inserted into regulation 64 of SI 2013/2356 (the main LGPS regulations) provisions for an “exit credit” to be paid to the contractor if there is a surplus.

END