

2006 No. 349

PENSIONS

TERMS AND CONDITIONS OF EMPLOYMENT

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006

Made - - - - 15th February 2006

Coming into force in accordance with regulation 1(2) and (3)

ARRANGEMENT OF REGULATIONS

Introductory

1. Citation and commencement
2. Interpretation

Application of Regulations

3. Application
4. Excluded employers: occupational pension schemes
5. Excluded employers: personal pension schemes

Restriction on decision-making pending completion of consultation

6. Consultation required before decisions to make listed changes affecting schemes
7. Notifications to employers and duty to consult
8. Listed changes: occupational pension schemes
9. Listed changes: personal pension schemes
10. Listed changes: exclusions

Information provision and consultation

11. Requirement to provide information
12. Consultation under existing arrangements
13. Consultation in cases not covered by regulation 12
14. Election of representatives
15. Conduct of consultation
16. End of consultation

Miscellaneous

17. Employment rights and protections in connection with consultation
18. Exclusivity of remedy
19. Powers of the Regulator to waive or relax requirements
20. Waiver or relaxation of requirements: amendment of Schedule 2 to the Pensions Act 2004
21. Waiver or relaxation of requirements: prescribed regulatory function
22. Miscellaneous amendment

SCHEDULE

These Regulations are made in exercise of the powers conferred by sections 10(5)(a), 259(1) and (2), 260(1), 261(2) and (4), 286(1) and (3)(g), 315(2), (3) and (5) and 318(1), (4)(a) and (5) of the Pensions Act 2004(a).

In accordance with section 317(1) of that Act, the Secretary of State for Work and Pensions has consulted with such persons as he considers appropriate, except in the case of regulation 22, to which section 317(2)(b) of that Act applies, as it appears to the Secretary of State that by reason of urgency consultation is inexpedient.

A draft of this instrument has been laid before Parliament in accordance with section 316(2)(m) and (n) of the Pensions Act 2004 and approved by a resolution of each House of Parliament.

Accordingly, the Secretary of State for Work and Pensions makes the following Regulations:

*Introductory***Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

(2) Subject to paragraph (3), these Regulations shall come into force on 6th April 2006.

(3) Regulation 22 shall come into force on the day after the day on which these Regulations are made.

(4) Regulation 22 extends to Northern Ireland.

Interpretation

2. In these Regulations—

“active member”—

(a) in relation to an occupational pension scheme, has the meaning given by section 124 of the Pensions Act 1995(b) (interpretation), and

(a) 2004 c. 35. Sections 259 and 261 have been modified by regulation 2 of the Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006 (S.I. 2006/16). Section 318(1) is cited because of the meaning there given to “modifications”, “prescribed” and “regulations”.

(b) 1995 c. 26.

- (b) in relation to a personal pension scheme, means any member in respect of whom employer contributions fall to be paid;
- “affected members” has the meaning given by regulation 7(4);
- “employer contributions”, in relation to an occupational or personal pension scheme, means contributions payable by or on behalf of the employer in relation to the scheme on his own account (but in respect of one or more employees);
- “member contributions”, in relation to an occupational or personal pension scheme, means contributions, other than voluntary contributions, by or on behalf of active members of the scheme which are payable out of deductions from the member’s earnings;
- “listed change” has the meaning given by regulation 6(2);
- “multi-employer scheme” has the meaning given by section 307 of the Pensions Act 2004 (modification of Act in relation to certain categories of schemes);
- “personal pension scheme” has the meaning given by regulation 3(3);
- “prospective member”–
- (a) in relation to an occupational pension scheme, means any person who, under the terms of his contract of service or the rules of the scheme–
- (i) is able, at his own option, to become a member of the scheme,
 - (ii) will become so able if he continues in the same employment for a sufficiently long period,
 - (iii) will be admitted to the scheme automatically unless he makes an election not to become a member, or
 - (iv) may be admitted to it subject to the consent of his employer;
- (b) in relation to a personal pension scheme, means any person who, under the terms of his contract of service, is eligible if he becomes a member of the scheme for employer contributions to be paid in respect of him;
- “the Regulator” means the Pensions Regulator established under section 1 of the Pensions Act 2004 (the Pensions Regulator); and
- “relevant employer” has the meaning given by regulation 3(2).

Application of Regulations

Application

- 3.—(1) These Regulations apply to–
- (a) in the case of an occupational pension scheme which is not a multi-employer scheme–
- (i) any relevant employer, and
 - (ii) if there is a relevant employer, the trustees or managers of the scheme;
- (b) in the case of a multi-employer scheme in relation to which there are one or more relevant employers–
- (i) each relevant employer,
 - (ii) the trustees or managers of the scheme, and
 - (iii) any other person who, under the rules of the scheme, has the power to make a listed change affecting the scheme(a); and
- (c) in the case of a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are his employees, a relevant employer.

(a) The persons referred to in regulation 3(1)(b)(iii) are specified by virtue of modifications of sections 259 and 261 of the Pensions Act 2004 which are made by the Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006 (S.I. 2006/16).

Regs. 3-4

¹Reg. 3(2) substituted by reg. 10(2) of S.I. 2006/778 as from 6.4.06.

- ¹(2) For the purposes of these Regulations “relevant employer” means—
- (a) an employer employing in Great Britain at least the number of employees specified in paragraph (2A); and
 - (b) in the case of—
 - (i) an occupational pension scheme, an employer in relation to the scheme other than one who is excluded by regulation 4, and
 - (ii) a personal pension scheme, an employer in relation to the scheme other than one who is excluded by regulation 5.
- (2A) The number of employees referred to in paragraph (2)(a) is—
- (a) 150 from 6th April 2006 to 5th April 2007,
 - (b) 100 from 6th April 2007 to 5th April 2008, and
 - (c) 50 from 6th April 2008 onwards.
- (2B) For the purposes of paragraph (2)(a)—
- (a) the number of people employed by an employer is to be determined using the same method of calculation as is set out in regulation 4 of the Information and Consultation of Employees Regulations 2004(a) (calculation of number of employees), but
 - (b) references in that regulation to the previous twelve months are to be taken as references to the period of twelve months ending with the date of the proposal to make a listed change to which regulation 6 of these Regulations applies.◀
- (3) In these Regulations references to a personal pension scheme are to a personal pension scheme falling within paragraph (1)(c).

Excluded employers: occupational pension schemes

- 4.—(1) This regulation excludes—
- (a) any employer in relation to a public service pension scheme;
 - (b) any employer in relation to a small occupational pension scheme;
 - (c) any employer in relation to an occupational pension scheme with fewer than two members;
 - (d) any employer in relation to an occupational pension scheme which is an employer-financed retirement benefits scheme;
 - (e) any employer in relation to an unregistered occupational pension scheme which has its main administration outside the ►²EEA states◀; and

►³◀

- (4) In this regulation—
- “employer-financed retirement benefits scheme” has the meaning given by section 393A of the Income Tax (Earnings and Pensions) Act 2003(b) (employer-financed retirement benefits scheme);
- “public service pension scheme” has the meaning given by section 1(1) of the Pension Schemes Act 1993(c);
- “small occupational pension scheme” means—
- (a) a scheme with fewer than twelve members where all of the members are trustees of the scheme and either—
 - (i) the provisions of the scheme provide that ►⁴any decision made by the trustees is made by the unanimous agreement of◀ the trustees who are members of the scheme, or

²Words in reg. 4(1)(e) substituted by Sch. to S.I. 2007/3014 as from 26.11.07.

³Paras. (1)(f), (2) and (3) omitted in reg. 4 by reg. 10(3) of S.I. 2006/778 as from 6.4.06.

⁴Words substituted in defn. of “small occupational pension scheme” by reg. 19(2)(a) of S.I. 2007/814 as from 6.4.07.

(a) S.I. 2004/3426.

(b) 2003 c. 1. Section 393A was inserted by section 249 of the Finance Act 2004 (c. 12).

(c) 1993 c. 48. The definition was amended by S.I. 1999/1820. Section 1 is amended by section 239 of the Pensions Act 2004.

- (ii) the scheme has a trustee who is independent in relation to the scheme for the purposes of section 23 of the Pensions Act 1995^(a) (power to appoint independent trustees) and is registered in the register maintained by the Regulator in accordance with regulations made under subsection (4) of that section;
- (b) a scheme with fewer than twelve members ▶¹where a company is the sole trustee◀ of the scheme, and all the members of the scheme are directors of the company and either—
 - (i) the provisions of the scheme provide that any decision made by the company in its capacity as trustee ▶¹is made by the unanimous agreement of the directors◀ who are members of the scheme, or
 - (ii) ▶¹one of the directors of the company◀ is independent in relation to the scheme for the purposes of section 23 of the Pensions Act 1995 and is registered in the register maintained by the Regulator in accordance with regulations made under subsection (4) of that section; and“unregistered occupational pension scheme” means an occupational pension scheme which is not registered under section 153 of the Finance Act 2004^(b) (registration of pension schemes).

¹Words substituted in reg. 4(b),(i) & (ii) by reg. 19(b)(i)-(iii) of S.I. 2007/814 as from 6.4.07.

▶²**Excluded employers: personal pension schemes**

5. This regulation excludes any employer in relation to a personal pension scheme where no employer contributions fall to be paid towards the scheme.◀

²Reg. 5 substituted by reg. 10(4) of S.I. 2006/778 as from 6.4.06.

Restriction on decision-making pending completion of consultation

Consultation required before decisions to make listed changes affecting schemes

6.—(1) No person falling within regulation 3(1) may decide to make a listed change that affects an occupational or personal pension scheme unless such consultation as is required by regulation 7(3) has been carried out.

(2) For the purposes of these Regulations, a change affecting an occupational or personal pension scheme is a “listed change” if—

- (a) in relation to an occupational pension scheme, it is listed in regulation 8, or
- (b) in relation to a personal pension scheme, it is listed in regulation 9,

and it is not excluded by virtue of regulation 10.

(3) Paragraph (1) does not require consultation to be carried out in any of the four cases described in paragraphs (4) to (7).

▶³(4) The first case is where the active or prospective members of the scheme to whom—

- (a) a listed change mentioned in regulation 8(1)(h) relates were notified before 6th April 2012 of the proposal to make that change, or
- (b) any other listed change relates were notified before 6th April 2006 of the proposal to make that change.◀

³Reg. 6(4) substituted by reg. 2(2) of S.I. 2012/692 as from 6.4.12.

(5) The second case is where, in relation to an occupational pension scheme—

- (a) consultation has already been carried out under these Regulations in respect of a proposal to prevent the future accrual of benefits, as described in regulation 8(1)(c), and
- (b) there is a further proposal as a result of that consultation to make a decision to reduce the rate of such accrual, as described in regulation 8(3)(d).

(6) The third case is where, in relation to an occupational pension scheme—

- (a) consultation has already been carried out under these Regulations in respect of a proposal to remove the liability to make employer contributions, as described in regulation 8(1)(d), and

(a) 1995 c. 26. Section 23 was substituted by section 36(3) of the Pensions Act 2004.

(b) 2004 c. 12. Section 153 was amended by paragraphs 2 and 3 of Schedule 10 to the Finance Act 2005 (c. 7).

OCCUPATIONAL AND PERSONAL PENSION SCHEMES (CONSULTATION BY EMPLOYERS AND MISCELLANEOUS AMENDMENT) REGULATIONS 2006

- (b) there is a further proposal as a result of that consultation to make a decision to reduce such contributions, as described in regulation 8(2).
- (7) The fourth case is where, in relation to a personal pension scheme—
 - (a) consultation has already been carried out under these Regulations in respect of a proposal to cease employer contributions, as described in regulation 9(a), and
 - (b) there is a further proposal as a result of that consultation to make a decision to reduce such contributions, as described in regulation 9(b).

Notifications to employers and duty to consult

7.—(1) Any person falling within regulation 3(1) who proposes to make a listed change affecting an occupational or personal pension scheme must give written notice of that change to each employer in relation to the scheme.

- (2) Paragraph (1) does not apply—
 - (a) in any of the four cases described in regulation 6(4) to (7), or
 - (b) where the person proposing the change is a relevant employer in relation to—
 - (i) an occupational pension scheme which is not a multi-employer scheme, or
 - (ii) a personal pension scheme¹, or
 - (c) where the person proposing the change employs all the affected members.◀

¹Reg. 7(2)(c) inserted & sub-para. (3) substituted by reg. 7(a) & (b) of S.I. 2011/672 as from 6.4.11.

▶¹(3) A relevant employer must consult about the listed change in accordance with regulations 11 to 16 if—

- (a) it employs all the affected members, or
- (b) its employees appear to it to include affected members and it is a relevant employer who—
 - (i) has been notified under paragraph (1), or
 - (ii) falls within paragraph (2)(b).◀

(4) For the purposes of these Regulations “affected members”, in relation to a proposal to make a listed change affecting an occupational or personal pension scheme, means the active or prospective members of the scheme to whom the listed change relates.

Listed changes: occupational pension schemes

- 8.—(1) Listed changes that affect occupational pension schemes are—
 - (a) to increase the normal pension age specified in the scheme rules for members or members of a particular description;
 - (b) to prevent new members, or new members of a particular description, from being admitted to the scheme;
 - (c) to prevent the future accrual of benefits under the scheme for or in respect of members or members of a particular description;
 - (d) to remove the liability to make employer contributions towards the scheme in respect of members or members of a particular description;
 - (e) to introduce member contributions in any circumstances in which no such contributions were previously payable;
 - (f) to make any increase in member contributions by or on behalf of members or members of a particular description;
 - (g) to make any change specified in paragraph (2) or (3)▶²;
 - (h) to change the rate at which—
 - (i) pensions in payment under the scheme are increased, or
 - (ii) pensions or other benefits payable under the scheme are revalued, but only where that change would be, or would be likely to be, less generous to members or members of a particular description.◀

²Reg. 8(1)(h) inserted by reg. 2(3) of S.I. 2012/692 as from 6.4.11.

(2) A listed change affecting only money purchase benefits is to make any reduction in the amount of employer contributions towards the scheme in respect of members or members of a particular description.

(3) Listed changes affecting only benefits which are not money purchase benefits are—

- (a) to change to money purchase benefits some or all of the benefits that may be provided under the scheme to or in respect of members or members of a particular description;
- (b) to change, in whole or in part, the basis for determining the rate of future accrual of benefits under the scheme for or in respect of members or members of a particular description;
- (c) to modify the scheme under section 229(2) of the Pensions Act 2004 (matters requiring agreement of the employer) so as to reduce the rate of future accrual of benefits under the scheme for or in respect of members or members of a particular description;
- (d) to make any other reduction in the rate of future accrual of benefit under the scheme for or in respect of members or members of a particular description;
- ▶¹(e) to change what elements of pay constitute pensionable earnings, or to change the proportion of or limit the amount of any element of pay that forms part of pensionable earnings, for or in respect of members or members of a particular description. ◀

¹Regs. 8(3)(e) & (5) inserted by reg. 7(2) & (3) of S.I. 2010/499 as from 6.4.10.

(4) “Normal pension age” has the meaning given by section 180 of the Pension Schemes Act 1993(a) (normal pension age).

▶¹(5) “Pensionable earnings” means the earnings by reference to which pension benefits are calculated, and an “element of pay” includes basic salary, a pay rise, an overtime payment, and a bonus payment. ◀

Listed changes: personal pension schemes

9. Listed changes that affect personal pension schemes are—

- (a) to cease employer contributions towards the scheme in respect of members or members of a particular description;
- (b) to make any reduction in the amount of employer contributions towards the scheme in respect of members or members of a particular description;
- (c) to make any increase in member contributions by or on behalf of members or members of a particular description.

Listed changes: exclusions

10.—(1) For the purposes of regulations 8 and 9, no account is to be taken of any change which—

- (a) is made for the purposes of complying with a statutory provision,
- (b) is made for the purposes of complying with a determination made by the Regulator, or
- (c) has no lasting effect on a person’s rights to be admitted to a scheme or on the benefits that may be provided under it.

(2) No change which is—

- (a) a regulated modification within the meaning of the subsisting rights provisions, and
- (b) subject to the requirements of those provisions,

falls within regulation 8.

(3) “Statutory provision” means a provision comprised in—

- (a) an Act of Parliament or subordinate legislation made under such an Act, whenever passed or made,
- (b) an Act of the Scottish Parliament or subordinate legislation made under such an Act, whenever passed or made.

(a) 1993 c. 48.

(4) “Subsisting rights provisions” has the meaning given by section 67 of the Pensions Act 1995(a) (the subsisting rights provisions).

Information provision and consultation

Requirement to provide information

11.—(1) In relation to a proposal to make a listed change affecting an occupational or personal pension scheme, each relevant employer to whom regulation 7(3) applies must provide information about the proposal to—

- (a) such of his employees as appear to him to be affected members of the scheme, and
- (b) any representatives of such members who are to be consulted under regulation 12(2)(a) or (3) or 13(2).

(2) The information provided under paragraph (1) must—

- (a) be in writing,
- (b) be provided before the start of consultation under regulation 12 or 13,
- (c) describe the listed change and state what effects it would (or would be likely to) have on the scheme and its members,
- (d) be accompanied by any relevant background information,
- (e) indicate the timescale on which measures giving effect to the change are proposed to be introduced, and
- (f) be given in such fashion and with such content as are appropriate to enable, in particular, representatives of affected members to consider, conduct a study of, and give their views to the employer on, the impact of the listed change on such members.

¹Reg. 11(3) added by para. 15 of Sch. 9 to S.I. 2013/2734 as from 6.4.14.

►¹(3) Information provided under this regulation may be provided in accordance with regulations 26 to 28 of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (giving information and documents).◄

Consultation under existing arrangements

12.—(1) If arrangements specified in paragraph (2) or (3) exist in relation to his employees, each relevant employer to whom regulation 7(3) applies must consult about a listed change in accordance with such one or more of those arrangements as he may choose.

(2) The specified arrangements are arrangements under which employees appearing to the employer to be affected members—

- (a) are represented by—
 - (i) in the case of employees of a description in respect of which an independent trade union is recognised by the employer, the representatives of the trade union,
 - (ii) in the case of employees of a description which has elected or appointed information and consultation representatives, those representatives, or
 - (iii) where there exists one or more pre-existing agreements which apply to any of the employees, any representatives identified in accordance with such agreement or agreements; or
- (b) are to be consulted directly in accordance with the terms of a negotiated agreement or a pre-existing agreement.

(3) In any case where—

- (a) an election of representatives as described in regulation 13(2) has taken place before any arrangements referred to in paragraph (2) are made, and
- (b) the interests of affected members are represented by such representatives,

the specified arrangements also include arrangements for consultation of those representatives.

(a) 1995 c. 26. Section 67 is substituted by section 262 of the Pensions Act 2004.

(4) “Independent trade union” and “recognised”, in relation to an independent trade union, have the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992(a).

(5) “Information and consultation representatives” and “negotiated agreement” have the same meaning as in the Information and Consultation of Employees Regulations 2004(b).

(6) “Pre-existing agreement”–

- (a) means an agreement between an employer and his employees or their representatives which satisfies the conditions set out in regulation 8(1)(a) to (d) of the Information and Consultation of Employees Regulations 2004 and which has not been superseded, but
- (b) does not include an agreement concluded in accordance with regulations 17 or 42 to 45 of the Transnational Information and Consultation of Employees Regulations 1999(c) or a negotiated agreement.

Consultation in cases not covered by regulation 12

13.—(1) This regulation applies to a relevant employer to whom regulation 7(3) applies if (and only if) any of the employees who appear to the employer to be affected members are not covered by consultation arrangements referred to in regulation 12.

(2) Where, for the purposes of engaging in consultations under these Regulations, representatives of any affected members have been elected in an election which satisfies the requirements of regulation 14(1), the relevant employer must consult with those representatives about a listed change.

(3) If the interests of any affected members are not represented by representatives who are consulted under paragraph (2), the relevant employer must also consult directly with those members.

(4) If no representatives have been elected as described in paragraph (2), the relevant employer must consult directly with the affected members about a listed change.

(5) Consultation under this regulation–

- (a) is required only in relation to the affected members falling within paragraph (1), and
- (b) is additional to any consultation in relation to other affected members which is required by regulation 12.

Election of representatives

14.—(1) The requirements of this paragraph are that–

- (a) the employer must make such arrangements as are reasonably practical to ensure that the election is fair;
- (b) the employer must determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of active members and the interests of prospective members;
- (c) the employer must determine whether the active and prospective members should be represented by representatives of all such members or by representatives of particular descriptions of such members;
- (d) before the election the employer must determine the term of office as representative of active and prospective members;
- (e) the candidates for election must be active or prospective members of the scheme on the date of the election;

(a) 1992 c. 52; see sections 5 and 178(3) of that Act.

(b) S.I. 2004/3426.

(c) S.I. 1999/3323.

- (f) no active or prospective member may unreasonably be excluded from standing for election;
- (g) all active or prospective members on the date of the election are entitled to vote for member representatives;
- (h) the members entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be classes of representative for particular descriptions of member, may vote for as many candidates as there are representatives to be elected to represent their particular description of member;
- (i) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret, and
 - (ii) the votes given at the election are accurately counted.

(2) Where, after an election of representatives satisfying the requirements of paragraph (1) has been held—

- (a) one of those elected ceases to act as a representative, and
- (b) the active or prospective members (or any description of them) are no longer represented,

those members must elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

(3) The relevant employer must from time to time review the number of representatives determined under paragraph (1)(b) and the number of representatives elected must be adjusted accordingly (whether by members electing one or more other representatives by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i), by not holding an election under paragraph (2) or otherwise).

Conduct of consultation

15.—(1) Each relevant employer who carries out a consultation must make such arrangements with respect to the persons to be consulted as appear to him to secure that, so far as is reasonably practicable, the consultation covers all affected members.

(2) In the course of consultation, the relevant employer and any person consulted are under a duty to work in a spirit of co-operation, taking into account the interests of both sides.

(3) At the start of any consultation required by these Regulations, the relevant employer must notify the persons to be consulted of any date set for the end of the consultation or for the submission of written comments.

(4) An appropriate period must be allowed for carrying out the consultation which in any event must not be less than 60 days.

(5) If no responses to the consultation are received before the end of the period allowed for the consultation in accordance with paragraphs (3) and (4), the consultation is to be regarded as complete.

End of consultation

16.—(1) Where the relevant employer who carries out a consultation is not the person who proposed the listed change (“P”), the relevant employer must, as soon as reasonably practicable after the consultation is complete—

- (a) report to P on the views (if any) which were expressed to the relevant employer otherwise than in writing,
- (b) where the responses include written comments, forward those comments to P, and
- (c) in any case where no responses were received, notify P accordingly.

(2) In a case falling within paragraph (1), P must take reasonable steps to satisfy himself that each consultation required by these Regulations in relation to the scheme was carried out in accordance with regulations 11 to 15.

(3) After the end of the period allowed for the consultation, the person who proposed the listed change must consider the responses (if any) received in the course of consultation before making his decision as to whether or not to make a listed change.

Miscellaneous

Employment rights and protections in connection with consultation

17. The Schedule to these Regulations contains provision as to employment rights and protections which, in connection with consultation under these Regulations, apply to the employees of an employer in relation to an occupational or personal pension scheme.

► **Remedies for failure to comply**

18.—(1) The only remedies for a failure to comply with any obligations under regulations 6 to 16 in respect of any proposal or decision to make a listed change are—

- (a) making a complaint to the Regulator.
- (b) an improvement notice issued under section 13 of the Pensions Act 2004 (improvement notices), and
- (c) a penalty imposed under regulation 18A.◀

(2) A complaint ►¹under paragraph (1)(a)◀ may be made by—

- (a) any representative of affected members who falls within regulation 12(2)(a) or (3) or 13(2) (including any such representative who is not consulted), and
- (b) any active or prospective member of an occupational or personal pension scheme who considers that he is or may be an affected member.

¹Heading & reg. 18(1) substituted, words in reg. 18(2) & reg. 18A inserted by reg. 20(2) of S.I. 2009/615 as from 6.4.09.

► **Penalties**

18A.—(1) Where a person fails, without reasonable excuse, to comply with a requirement to consult under regulation 7(3), the Regulator may by notice in writing require that person to pay a penalty.

(2) Any such penalty must be paid within 28 days and must not exceed—

- (a) in the case of an individual, £5,000; and
- (b) in any other case, £50,000.◀

Powers of the Regulator to waive or relax requirements

19.—(1) The Regulator may by order waive or relax any of the requirements of regulations 6 to 16.

(2) The power under paragraph (1) may be exercised only if the Regulator is satisfied that it is necessary to do so in order to protect the interests of the generality of the members of the scheme.

Waiver or relaxation of requirements: amendment of Schedule 2 to the Pensions Act 2004

20. After paragraph 44 of Schedule 2 to the Pensions Act 2004 (the reserved regulatory functions) add—

“PART 5

OTHER FUNCTIONS

45. The power to make an order under regulation 19 of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (S.I. 2006/349) to waive or relax any of the requirements of regulations 6 to 16 of those Regulations.”.

Waiver or relaxation of requirements: prescribed regulatory function

21. The Regulator’s power to make an order under regulation 19 to waive or relax any of the requirements of regulations 6 to 16 is prescribed for the purposes of section 97(5)(u) of the Pensions Act 2004 (special procedure: applicable cases).

Miscellaneous amendment

22. In regulation 5(3) of the Financial Assistance Scheme (Internal Review) Regulations 2005(a) (time for making an application for a review of a reviewable determination), for “or (b)” substitute “or (c)”.

Signed by authority of the Secretary of State for Work and Pensions.

15th February 2006

Stephen C. Timms
Minister of State,
Department for Work and Pensions

(a) S.I. 2005/1994, amended by S.I. 2005/3256.

SCHEDULE

Regulation 17

Employment rights and protections in connection with consultation

1. In this Schedule—

- “the 1996 Act” means the Employment Rights Act 1996(a);
- “consulted representative” has the meaning given by paragraph 2(2);
- “contract of employment” means a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing;
- “employee” means an individual who has entered into or works under a contract of employment and includes, where the employment has ceased, an individual who worked under a contract of employment;
- “employment”, in relation to an employee, means employment under a contract of employment (and “employed” has a corresponding meaning);
- “employer”, in relation to an employee, means the person by whom the employee is (or where employment has ceased, was) employed.

Right to time off and remuneration

2.—(1) An employee who—

- (a) is a representative falling within regulation 12(2)(a) or (3) or 13(2), and
- (b) is consulted under these Regulations about a listed change by a relevant employer,

is entitled to be permitted by his employer to take reasonable time off during the employee’s working hours in order to perform his functions as such a representative.

(2) In this Schedule “consulted representative” means an employee who satisfies the conditions specified in sub-paragraph (1)(a) and (b).

(3) For the purposes of this paragraph, the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

3.—(1) An employee who is permitted to take time off under paragraph 2 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter 2 of Part 14 of the 1996 Act (a week’s pay) shall apply in relation to this paragraph as it applies in relation to section 62 of the 1996 Act (right to remuneration of certain representatives).

(3) The appropriate hourly rate, in relation to an employee, is the amount of one week’s pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time is taken off.

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week’s pay shall be divided instead by—

- (a) the average number of normal working hours calculated by dividing by twelve the total number of the employee’s normal working hours during the period of twelve weeks ending with the last complete week before the day when the time is taken off, or
- (b) where the employee has not been employed for a sufficient period to enable the calculations to be made under paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in sub-paragraph (5) as are appropriate in the circumstances.

(a) 1996 c. 18.

- (5) The considerations referred to in sub-paragraph (4)(b) are—
- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract, and
 - (b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.
- (6) A right to any amount under sub-paragraph (1) does not affect any right of an employee in relation to remuneration under his contract of employment (“contractual remuneration”).
- (7) Any contractual remuneration paid to an employee in respect of a period of time off under paragraph 2 goes towards discharging any liability of the employer to pay remuneration under sub-paragraph (1) in respect of that period, and, conversely, any payment of remuneration under sub-paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.
- 4.—**(1) An employee may present a complaint to an employment tribunal that his employer—
- (a) has unreasonably refused to permit him to take time off as required by paragraph 2, or
 - (b) has failed to pay the whole or part of any amount to which the employee is entitled under paragraph 3.
- (2) A tribunal shall not consider a complaint under this paragraph unless it is presented—
- (a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted, or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
- (3) Where a tribunal finds a complaint under this paragraph well-founded, the tribunal shall make a declaration to that effect.
- (4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under paragraph 3 if the employer had not refused.
- (5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under paragraph 3, the tribunal shall also order the employer to pay to the employee the amount it finds due to him.

Protections against unfair dismissal

- 5.—**(1) An employee who is dismissed and to whom sub-paragraph (2) or (4) applies shall be regarded, if the reason (or if more than one, the principal reason) for the dismissal is a reason specified in, respectively, sub-paragraph (3) or (5), as unfairly dismissed for the purposes of Part 10 of the 1996 Act (which makes provision as to rights and remedies relating to unfair dismissal).
- (2) This sub-paragraph applies to an employee who is—
- (a) a consulted representative, or
 - (b) a candidate in an election in which any person elected will, on being elected, be a representative of such description as is referred to in regulation 13(2).
- (3) The reasons are that—
- (a) the employee performed or proposed to perform any functions or activities under these Regulations in his capacity as such a representative or candidate,

- (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by paragraph 2 or 3, or
- (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

(4) This sub-paragraph applies to any employee who is an active or prospective member of an occupational or personal pension scheme, whether or not he is an employee to whom sub-paragraph (2) applies.

(5) The reasons are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce a right or secure an entitlement conferred on him by this Schedule,
- (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1)—
 - (i) has decided to make a listed change affecting an occupational or personal pension scheme in contravention of regulation 6(1), or
 - (ii) has failed to comply with the requirements of regulation 16(2) or (3),
- (c) complained or proposed to complain to the Regulator that any consultation required by these Regulations was not carried out in accordance with the requirements of these Regulations,
- (d) stood as a candidate in an election in which any person elected would, on being elected, be a representative of such description as is referred to in regulation 13(2),
- (e) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in an election arranged under regulation 14,
- (f) voted in such an election,
- (g) expressed doubts, whether to an election supervisor or otherwise, as to whether such an election had been properly conducted, or
- (h) proposed to do, failed to do, or proposed to decline to do any of the things mentioned in paragraphs (d) to (g).

(6) It is immaterial for the purpose of sub-paragraph (5)(a)—

- (a) whether or not the employee has the right or entitlement, or
- (b) whether or not the right has been infringed,

but for that provision to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

6.—(1) In section 105 of the 1996 Act **(a)** (redundancy as unfair dismissal)—

- (a) for subsection (1)(c) substitute—

“(c) it is shown that any of subsections (2A) to (7I) apply.”; and
- (b) after subsection (7H) insert—

“(7I) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule).”.

(a) Section 105 specifies circumstances in which a person who is made redundant is to be regarded as unfairly dismissed. The section has been amended on a number of occasions to add new circumstances. Subsection (1)(c) was substituted by section 40(4) of the Employment Relations Act 2004 (c. 24) and amended by S.I. 2004/2326 and 2004/3426. Subsection (2) was repealed by Schedule 4 to the Employment Relations Act 1999 (c. 26) and subsection (2A) inserted by section 40(5) of the Employment Relations Act 2004. Subsection (7H) was inserted by S.I. 2004/3426.

OCCUPATIONAL AND PERSONAL PENSION SCHEMES (**CONSULTATION BY EMPLOYERS** AND MISCELLANEOUS AMENDMENT) REGULATIONS 2006

(2) In section 108 of the 1996 Act(a) (exclusion of right: qualifying period of employment), in subsection (3)–

- (a) omit the word “or” at the end of paragraph (k); and
- (b) after paragraph (l) insert–
“, or
- (m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies.”.

(3) In section 109 of the 1996 Act(b) (exclusion of right: upper age limit), in subsection (2)–

- (a) omit the word “or” at the end of paragraph (k); and
- (b) after paragraph (l) insert–
“, or
- (m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies.”.

Protections from suffering other detriment in employment

7.—(1) An employee to whom sub-paragraph (2) or (4) applies has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on a ground specified in, respectively, sub-paragraph (3) or (5).

(2) This sub-paragraph applies to an employee who is–

- (a) a consulted representative, or
- (b) a candidate in an election in which any person elected will, on being elected, be a representative of such description as is referred to in regulation 13(2).

(3) The grounds are that–

- (a) the employee performed or proposed to perform any functions or activities under these Regulations in his capacity as such a representative or candidate,
- (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by paragraph 2 or 3, or
- (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

(4) This sub-paragraph applies to any employee who is an active or prospective member of an occupational or personal pension scheme, whether or not he is an employee to whom sub-paragraph (2) applies.

(5) The grounds are that the employee–

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce a right or secure an entitlement conferred on him by this Schedule,
- (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1)–
(i) has decided to make a listed change affecting an occupational or personal

(a) Section 108(1) was amended by S.I. 1999/1436. Subsection (3) (which specifies cases in which no qualifying period of employment is required) has been amended on a number of occasions to add new cases. Paragraph (k) was inserted by S.I. 2004/2326 and paragraph (l) was inserted by S.I. 2004/3426.

(b) Section 109(2) (which specifies cases in which the upper age limit does not apply) has been amended on a number of occasions to add new cases. Paragraph (k) was inserted by S.I. 2004/2326 and paragraph (l) was inserted by S.I. 2004/3426.

- pension scheme in contravention of regulation 6(1), or
- (ii) has failed to comply with the requirements of regulation 16(2) or (3),
 - (c) complained or proposed to complain to the Regulator that any consultation required by these Regulations was not carried out in accordance with the requirements of these Regulations,
 - (d) stood as a candidate in an election in which any person elected would, on being elected, be a representative of such description as is referred to in regulation 13(2),
 - (e) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in an election arranged under regulation 14,
 - (f) voted in such an election,
 - (g) expressed doubts, whether to an election supervisor or otherwise, as to whether such an election had been properly conducted, or
 - (h) proposed to do, failed to do, or proposed to decline to do any of the things mentioned in paragraphs (d) to (g).
- (6) It is immaterial for the purpose of sub-paragraph (5)(a)–
- (a) whether or not the employee has the right or entitlement, or
 - (b) whether or not the right has been infringed,

but for that provision to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

(7) This paragraph does not apply where the detriment in question amounts to dismissal.

8.—(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of paragraph 7.

(2) The provisions of sections 48(2) to (4) and 49(1) to (5) of the 1996 Act(a) (complaints to employment tribunals and remedies) shall apply in relation to a complaint under this paragraph as they apply in relation to a complaint under section 48 of that Act.

Conciliation and appeals

9. In section 18(1) of the Employment Tribunals Act 1996(b) (which specifies the proceedings and claims in which conciliation procedures are available)–

- (a) omit the word “or” at the end of paragraph (o); and
- (b) after paragraph (p) insert–
“ , or
- (q) under paragraph 4 or 8 of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.”.

(a) Sections 48 and 49 were amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8). There have been other amendments not relevant to these Regulations.

(b) 1996 c. 17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies. Paragraph (o) was inserted by S.I. 2004/1713 and amended by S.I. 2004/3426 and paragraph (p) was inserted by S.I. 2004/3426.

(c) Section 21(1) has been amended on a number of occasions to add additional circumstances in which an appeal to the Employment Appeal Tribunal lies. Paragraph (p) was inserted by S.I. 2004/1713 and amended by S.I. 2004/3426 and paragraph (q) was inserted by S.I. 2004/3426.

10. In section 21(1) of the Employment Tribunals Act 1996(c) (circumstances in which an appeal on a question of law lies to the Employment Appeal Tribunal from an employment tribunal)–

- (a) omit the word “or” at the end of paragraph (p); and
- (b) after paragraph (q) insert–
“ , or
- (r) the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.”.

Miscellaneous

11. Any provision in any agreement (whether an employee’s contract or not) is void in so far as it purports to exclude or limit the operation of any provision of regulations 6 to 16.

12.—(1) Any provision in any agreement (whether an employee’s contract or not) is void in so far as it purports–

- (a) to exclude or limit the operation of any provision of this Schedule, or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under this Schedule.

(2) Sub-paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Sub-paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1) of the Employment Tribunals Act 1996 (which specifies proceedings under these Regulations as being proceedings where conciliation is available(a)) if the conditions specified in paragraph 13 regulating compromise agreements are satisfied in relation to the agreement.

13.—(1) For the purposes of paragraph 12(3) the conditions regulating compromise agreements are that–

- (a) the agreement must be in writing,
- (b) the agreement must relate to the particular proceedings,
- (c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal,
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or a professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice,
- (e) the agreement must identify the adviser, and
- (f) the agreement must state that the conditions in paragraphs (a) to (e) are satisfied.

(2) A person is a relevant independent adviser for the purposes of sub-paragraph (1)(c)–

- (a) if he is a qualified lawyer,
- (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union, or

(a) See amendment of section 18(1) in paragraph 9 of the Schedule to these Regulations.

- (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.

(3) But a person is not a relevant independent adviser for the purposes of sub-paragraph (1)(c)–

- (a) if he is, is employed by or is acting in the matter for the employer or an associated employer,
- (b) in the case of a person within sub-paragraph (2)(b) or (c), if the trade union or advice centre is the employer or an associated employer, or
- (c) in the case of a person within sub-paragraph (2)(c), if the employee makes a payment for the advice received from him.

(4) In sub-paragraph (2)(a) “qualified lawyer” means–

- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or a solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990(a));
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(5) A person shall be treated as being a qualified lawyer within the meaning of sub-paragraph (4)(a) if he is a Fellow of the Institute of Legal Executives(b) employed by a solicitors’ practice.

(6) In this paragraph–

- (a) “independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992(c); and
- (b) for the purposes of sub-paragraph (3) any two employers shall be treated as associated if–
 - (i) one is a company of which the other (directly or indirectly) has control, or
 - (ii) both are companies of which a third person (directly or indirectly) has control,and “associated employer” shall be construed accordingly.

(a) 1990 c. 41.

(b) The Institute of Legal Executives is located at Kempston Manor, Kempston, Bedfordshire, MK42 7AB.

(c) 1992 c. 52.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations prohibit the making of certain changes to occupational or personal pension schemes unless consultation about the change is carried out beforehand. They also amend the Financial Assistance Scheme (Internal Review) Regulations 2005 (S.I. 2005/1994).

Regulations 3 to 5 specify the persons to whom the Regulations apply. For all occupational or personal pension schemes, these are relevant employers. For occupational pension schemes which have at least one relevant employer, the Regulations also apply to trustees or managers of the scheme and, if the scheme is a multi-employer scheme, to any other person who has power to change the scheme.

Regulation 6 prohibits the making of any change specified in regulation 8 or 9 (“listed changes”) without consultation having been carried out by each relevant employer in relation to the scheme. Regulation 10 specifies certain changes that are excluded. Regulation 7 requires the person who proposes the change to notify all employers in relation to the scheme. If an employer is a relevant employer and has employees who are affected by the change, regulation 7(3) requires him to consult in accordance with regulations 11 to 16.

Regulations 11 to 16 provide for the way in which consultations are to be conducted. Information must be provided under regulation 11. Under regulation 12, where arrangements for consultation already exist, a relevant employer must consult in accordance with those arrangements. He is able to choose one or more of those arrangements and, if any affected members are not covered by such arrangements, he must also consult in accordance with regulation 13. If no consultation arrangements already exist, the employer has to consult in accordance with regulation 13 only. Regulation 13 provides that, where representatives have been specially elected for the purposes of consultation under the Regulations, the employer must consult with them. Regulation 14 sets out the requirements for such an election. If no representatives have been elected, or if the representatives do not represent the interests of all the members who are not covered by any consultation required under regulation 12, the employer must consult directly with the members.

Regulation 15 requires the employer to ensure that the consultation covers all affected members so far as is reasonably practicable and outlines a duty of co-operation that applies to those engaged in it. Once the period allowed for consultation is ended, responses to the consultation must be considered under regulation 16.

Regulation 17 introduces the Schedule to the Regulations which makes provision for employment rights and protections in relation to persons who are consulted. Paragraphs 2 to 4 of the Schedule provide that consulted representatives are entitled to time off and remuneration when acting as a representative. Paragraphs 5 to 8 make provision protecting employees, and any representatives who are consulted, against unfair dismissal and other detriment. Paragraph 9 provides for conciliation procedures to be available in any proceedings before an employment tribunal brought under the Schedule and paragraph 10 makes provision for appeals to be made to the Employment Appeal Tribunal on a point of law. Paragraphs 11 to 13 place restrictions on contracting out of the requirements imposed by these Regulations.

Regulations 18 and 19 make provision as to the role of the Pensions Regulator in enforcing the Regulations. Regulation 20 amends the Pensions Act 2004 (c. 35) so that any decision of the Pensions Regulator under regulation 19 to make an order to

waive or relax a requirement of the Regulations must be taken by the Determinations Panel established under Part 1 of the Pensions Act 2004. Regulation 21 adds the power under regulation 19 to the list of regulatory functions which are eligible to be carried out under the special procedure in cases of urgency.

Regulation 22 amends the Financial Assistance Scheme (Internal Review) Regulations 2005 to correct a typographical error.

An assessment of the impact on business, charities and the voluntary sector of the provisions in these Regulations is included in the Regulatory Impact Assessment that accompanied the Pensions Act 2004. A copy of that assessment has been placed in the libraries of both Houses of Parliament. Copies can be obtained by post from the Department for Work and Pensions, Better Regulation Unit, 4th Floor, The Adelphi, 1-11 John Adam Street, London WC2N 6HT.

