

EXPLANATORY MEMORANDUM TO
THE FINANCIAL ASSISTANCE SCHEME AND INCAPACITY BENEFIT
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2009

2009 No. 792

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 These Regulations relate to the assistance paid by the Government's Financial Assistance Scheme. They will provide for early unreduced payment of assistance for qualifying members who are aged 55 or over and who are not terminally ill, but have a significantly shortened life expectancy.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 These Regulations follow on from changes made by the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/1903). Those Regulations (made following the December 2007 announcement by Peter Hain, the then Secretary of State for Work and Pensions) provided for early access on an actuarially reduced basis for those within five years of normal retirement age who are unable to work due to ill health and likely to remain so until that age.
5. **Territorial Extent and Application**
 - 5.1 With the exception of Regulation 2, this instrument applies to all of the United Kingdom. Regulation 2 does not apply to Northern Ireland.
6. **European Convention on Human Rights**

The Parliamentary Under-Secretary of State, Lord McKenzie of Luton, has made the following statement regarding Human Rights:

In my view the provisions of the Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009 are compatible with the Convention rights.

7. Policy Background

- *What is being done and why*

The Financial Assistance Scheme

7.1 The Financial Assistance Scheme was announced on 14 May 2004 as a means to help those closest to retirement who had suffered significant losses to their accrued pension rights as a consequence of employer insolvency. Under the original scheme the Government committed £400 million in cash terms over 20 years to help an estimated 15,000 people.

7.2 Since 2004, the Financial Assistance Scheme has been significantly extended. The most recent extension was announced by the then Secretary of State for Work and Pensions in December 2007. Key aspects of that extension have already been implemented, including providing for people who are unable to work due to ill health to apply for Financial Assistance Scheme payments up to five years before normal retirement age. This provision came into force on 17 July 2008. These payments are actuarially reduced for early payment so that the overall value of the amounts they will receive over their expected lifetime is maintained. The test for ill health is that the member is unable to work due to ill health, and is likely to remain unable to work due to ill health until they reach their Normal Retirement Age. The threshold is intended to include those people who are working when they apply (perhaps due to their lower-than-expected pension) but have been advised by their doctor not to work due to their health.

7.3 The rules of many occupational pension schemes allow members to take their benefits before normal retirement age where they are in ill health (sometimes without actuarial reduction) or for general early retirement (usually with actuarial reduction). These options typically fall away once a scheme has started to wind up.

7.4 Financial Assistance Scheme payments can also be made before normal retirement age, without reduction, where a person is terminally ill. However, these provisions only apply where a person has a progressive disease from which death may reasonably be expected in the following six months.

7.5 During consultation on the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/1903) representations were received that a small number of people with ill health leading to significantly reduced life expectancy could be excluded from these earlier Financial Assistance Scheme payments because they were not within five years of normal retirement age and not terminally ill within the definition in legislation. There were also representations that the actuarial reductions in payments under the ill health provisions were inappropriate where a person was likely to have a significantly

shorter life expectancy due to their ill health¹.

7.6 The Government now propose to address these concerns with a further extension to the Financial Assistance Scheme to enable some people, with significantly reduced life expectancy, who do not qualify under the terminal illness provisions, to receive Financial Assistance Scheme payments before normal retirement age and without an actuarial reduction.

The changes

7.7 These Regulations make a number of amendments to the Financial Assistance Scheme Regulations 2005 (SI 2005/1986) (“the Financial Assistance Scheme Regulations”).

7.8 Alongside the existing provisions for ill health and terminal illness these Regulations make additional provision without actuarial reduction for eligible scheme members over 55 who have a significantly reduced life expectancy as a result of ill health (that is, severe ill health) and are not already in receipt of Financial Assistance Scheme payments.

7.9 Only qualifying members who satisfy the same test of being unable to work as applies for ill health payments will be capable of being entitled under the new provision, as the intention is that early access should be concentrated on those people unable to work. The new provision does not apply to survivors or qualifying members who are regarded as qualifying members as a result of regulation 15(5) of the Financial Assistance Scheme Regulations (that is, those who at wind-up have a right to payments from the scheme, but otherwise than through their own pensionable service. These are normally survivors of members who died before wind-up commenced).

7.10 The new provision in most regards follows the same principles as existing ill health provision as far as eligibility, determination and calculation of payments and access to review and appeal is concerned. The age of 55 is consistent with changes to the tax rules in section 279 of the Finance Act 2004 which means that from 2010 early retirement will not normally be available before age 55.

Reduced life expectancy/severe ill health

7.11 The Government considered a number of options for a test to identify the people with severe ill health resulting in reduced life expectancy. Any test needs to be:

- focused on the people in most need of early payments of assistance;
- clear, so decision-makers know how to apply the test and members know when they should apply for these payments; and

¹ In its response to the consultation on the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/1903) Regulations, the Government undertook to consider this issue further.

- in a form that would enable medical advisors to express informed opinions.

The Government concluded that the best way to achieve this is via a test in the form ‘the member can reasonably be expected to die within five years’.

7.12 A member will satisfy the test where the Financial Assistance Scheme manager is satisfied that a qualifying member has a progressive disease from which death within five years can reasonably be expected. This wording does not mean that a doctor would have to believe that the prognosis for a person was shorter than five years in order for that person to satisfy the test; rather, that the medical condition of the person is such that five years or less would be among the reasonable prognoses that a doctor could give for someone in their situation.

7.13 Departmental medical advisors advise that it would be impractical to try and apply a test looking more than five years ahead due to the lack of reliable survivability data and the need to take into account the large range of factors, such as lifestyle, which could influence longevity over longer periods. For example, if data on ten-year survival rates were available, the problem of disaggregating the effects of a medical condition from lifestyle and other factors would remain, and the Government does not think that a test requiring such a degree of projection into the future could be other than arbitrary.

Past Periods

7.14 These new provisions will create new entitlements and in some cases, further entitlement to assistance for a past period on top of the existing regime. The new entitlements will be available to current Financial Assistance Scheme recipients, including those who are receiving Financial Assistance Scheme payments because they terminally ill, where they would have been entitled to earlier access of payment for past periods had these Regulations been in force at the time (new Regulation 17C(5)). As a result people will not be penalised for taking advantage of earlier changes to the Financial Assistance Scheme.

7.15 People who have reached normal retirement age during the period between 14 May 2004, when Financial Assistance Scheme was announced and these Regulations coming into force will be able to choose to receive payments from an earlier date when they would have satisfied what will be known as the severe ill health test. This will allow payments in respect of past periods, but might mean a lower ongoing payment since it would only be revalued up to the earlier payment date.

7.16 The Regulations also allow for people to be able to receive payments for past periods if they could have been disadvantaged by the absence of these provisions in the past. It is not intended that payments for past periods of ill health will be a regular feature of the Financial Assistance Scheme. The Regulations do this by providing for a period of one year during which people can identify

themselves as someone may be entitled to severe ill health payments for a past period. During this time the Department will take steps to ensure that availability of this new provision is included in a range of leaflets and communications. This will ensure there is ample opportunity for scheme members to take advantage of this change.

7.17 The Regulations provide (new Regulation 17C) for payments for past periods in the following circumstances: where a person –

- in the year following these Regulations coming into force, makes a written request and provides evidence that satisfies the Financial Assistance Scheme manager that they are entitled to severe ill health payments, and,
- satisfies the Financial Assistance Scheme manager that their condition at a point in the past, no earlier than 14 May 2004 when the Financial Assistance Scheme was announced, meant that it would have been reasonable to expect that their life expectancy at that point would be less than five years in consequence of a progressive disease and that they would have been entitled to severe ill health payments at that time had these Regulations applied.

Deceased but may have been eligible

7.18 In response to submissions to the consultation, provisions are also made (new Regulation 17C (9) to (12)) for Financial Assistance Scheme payments where it can be shown that a person who died before the regulations come into force, who was unable to work due to ill health and there is evidence that the reduced life expectancy criteria were met.

Payments to survivors

7.19 Under Financial Assistance Scheme rules, widows, widowers and surviving civil partners are eligible for Financial Assistance Scheme assistance. The Financial Assistance Scheme Regulations provide for the survivors of members who had qualified for severe ill health payments, or initial payments for reduced life expectancy, to receive assistance based on the member's Financial Assistance Scheme early payment rate and these Regulations do not change that.

7.20 These Regulations also allow for a representative of a qualifying member who would have been eligible to apply had he not died, to make an application for severe ill health payments where there is no survivor to do so, and for those payments to be made to the deceased's estate.

Change to Incapacity Benefit

7.21 The Regulations include amendments (Regulation 2) to the Social Security (Incapacity Benefit) Regulations (S.I. 1994/2946) to ensure that a Financial Assistance Scheme payment is treated as a pension payment for the purposes of

Incapacity Benefit and thus taken into account when calculating entitlement to that benefit.

Consolidation

7.22 Consolidated versions of the Financial Assistance Scheme Regulations will be available in the Law Relating to Social Security (Blue Volumes). These can be found at:

<http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/index.asp>. These are updated quarterly and are available on the internet at no cost to the public.

8 Consultation outcome

8.1 As the Regulations were made more than six months after the coming into force of the provisions of the Pensions Act 2004 under which the Regulations are made, the Secretary of State was required to consult such persons as he considered appropriate before making them.

8.2 The written consultation period started on 5 November and closed on 3 December. Cross party and key stakeholder support was obtained for a limited consultation period to enable the Regulations to be introduced and allow payments to be made as soon as possible. During this period the Department held meetings with representatives of the Pensions Action Group and trade unions to facilitate their responses. Officials also met Dr. Ros Altmann (an adviser on policy and strategy to the pensions industry) a number of times during policy development, including one meeting with a DWP medical advisor.

8.3 44 responses were received on the draft Regulations. All of the responses raised concerns about the approach the Government proposed. Many of the responses were made on the basis that there was a duty for the Government to provide pensions, including ill health pensions which members had lost due to employer insolvency, leaving schemes underfunded. It has never been the intention that Financial Assistance Scheme should replicate all the benefits scheme members would have received had their scheme not wound up.

8.4 Specific concerns focused on the test based on reduced life expectancy, where the majority of respondents suggested it was too severe to require that death should reasonably be expected within five years, and that the Government should relax the test to 10 years. No medical evidence was submitted to support this contention.

8.5 Two submissions to the consultation agreed with the Government's view stated in the consultation document that it was possible to take a view on life expectancy over five years, but that it was not meaningful to prognosticate further in the future.

8.6 The Government has considered these issues carefully, and has concluded that the test expressed in the consultation document is appropriate. It would be very difficult to take meaningful judgements on a test that death could reasonably be expected within ten years, and would enable early access to unreduced payments to a large group of people who would not have got such payments from their pension schemes, at significant cost to the taxpayer.

8.7 A full response to the consultation was published on the Financial Assistance Scheme website - <http://www.dwp.gov.uk/fas> - at the time these Regulations were laid.

8.8 Regulation 2 was submitted to the Social Security Advisory Committee for scrutiny. The Committee decided that it need not be formally referred to them.

9. Guidance

9.1 Details of the proposed changes have been published on the Financial Assistance Scheme website. The Department will also be updating its public leaflets and guidance.

10. Impact

10.1 The impact on business, charities and voluntary bodies is nil.

10.2 The impact on the public sector is negligible.

10.3 An Equality Impact Assessment (EIA) will be published as part of the proposed package of Financial Assistance Scheme Amendment Regulations to be published in Summer 2009. The EIA will cover all previous Financial Assistance Scheme Regulations and thus the scheme as a whole that has been introduced including the Regulations to which this Explanatory Memorandum accompanies.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 The Regulations are intended to allow early unreduced access to Financial Assistance Scheme payments for small group of people with a significantly reduced life expectancy but who could not access Financial Assistance Scheme payments under the current Financial Assistance Scheme terminal ill health provisions.

12.2 Following the introduction of the Regulations, the Department will continually monitor and review the policy and supporting operational processes to ensure that the policy intent is met and the eligibility criteria allow access to the Financial Assistance Scheme for those intended.

13. Contact

13.1 Any enquiries about the contents of this memorandum should be addressed to:

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