

**PENSIONS: THE CONSULTATION BY
EMPLOYERS REQUIREMENT**
Consultation on Draft Regulations

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

&

**THE PENSIONS ACT 2004 (CONSULTATION BY
EMPLOYERS) (PROTECTIONS FOR
NOMINATED REPRESENTATIVES)
REGULATIONS 2006**

A CONSULTATION DOCUMENT

June 2005



The Pensions Group
Part of the Department for Work and Pensions

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- The Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006; and
- The Pensions Act 2004 (Consultation by Employers)(Protections for Nominated Representatives) Regulations 2006.

Forward

1. This consultation document seeks views on two sets of proposed regulations to be made in exercise of the powers contained within sections 259 to 261 of the Pensions Act 2004. The regulations apply to proposals by an employer to make a major or significant change to an affected member's future pension arrangements. They require consultation to be carried out by employers before such changes are made and provide a number of protections arising out of such consultation.

Who should reply to this consultation?

2. This consultation seeks views on whether or not the draft regulations effectively implement the policy decision which the Government has taken. It is aimed at employers, pension scheme administrators, pension scheme members and their representatives. Comments are also welcomed from the wider public. It is planned to publish non-statutory guidance to support these regulations, there will be a limited consultation in respect of the guidance later this year. If you or your organisation would like to contribute please express interest by sending an email to the address in (5) below.

DWP Website

3. This document is available on the Department's website at: http://www.dwp.gov.uk/publications/dwp/2005/occ_pen_schemes/ppscer06.pdf

How to respond

4. The consultation period began on 6 June 2005 and will run until 26 August 2005; please ensure that your response reaches us by that date. Please note that any replies received after that date may not be taken into account. If you would like further copies of this consultation document you can contact Janet Cowell on 020 7962 8863 or it can be found at the website address above.

5. Responses should be sent by 26 August 2005, to:

Janet Cowell
Department for Work and Pensions
The Adelphi (3rd Floor)
1-11 John Adam Street
London
WC2N 6HT
Email: employers-consultation@dwp.gsi.gov.uk

6. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear whom the organisation represents, and where applicable, how the views of members were assembled.

7. The information you send us may need to be passed to colleagues within the Department for Work and Pensions and published in a summary of responses received in response to this consultation along with a response from the Government.

8. According to the requirements of the FOIA (2000), all information contained in the response, including personal information, may be subject to publication or disclosure. By providing personal information for the purposes of the public consultation exercise, it is understood that a Respondent consents to its disclosure and publication. If this is not the case, the Respondent should limit any personal information which is provided, or remove it completely. If a Respondent requests that the information given in response to the consultation be kept confidential, this will only be possible if it is consistent with Freedom of Information Act obligations and general law on this issue. More information about the Freedom of Information Act can be found on the website of the Department for Constitutional Affairs – <http://www.dca.gov.uk/foi/guidance/exguide/index.htm>

The consultation

9. A list of those consulted is attached. If you have any suggestions of others who may wish to be involved in this process please contact us.

10. This consultation is being conducted in line with the Code of Practice on Consultation. The criteria by which this consultation should abide are listed below. The full version can be accessed at <http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm>

1. **Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**
2. **Be clear about who may be affected, what questions are being asked, and the timescale for responses.**
3. **Ensure that your consultation is clear, concise and widely accessible.**
4. **Give feedback regarding the responses received and how the consultation process influenced the policy.**
5. **Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.**
6. **Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.**

11. We will aim to publish a summary of responses, including the next steps in December 2005.

12. DWP values feedback on how well it consults. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact the DWP Consultation Co-ordinator. Please contact

Geoff Ashton
Department for Work and Pensions
Consultation Co-ordinator
5th Floor South
1 Trevelyan Square
Leeds 3
LS1 6EB

Telephone: 0113 232 7107
Fax: 0113 232 7221
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THE DRAFT REGULATIONS

Introduction

1. The Government has decided to introduce a statutory requirement upon employers to consult with prospective and active members of pension schemes and their representatives before making major or significant changes to future pension arrangements. Implementation will be phased and employers with less than 50 employees will not be affected. This provision aims to introduce a level of protection for scheme members without hindering business flexibility to make long term commercial decisions. This provision will only affect changes proposed after the commencement of the legislation. This is planned for 6th April 2006.

2. The details of the regulations are attached for your comment. The main powers used are those contained in sections 259 to 261 of the Pensions Act 2004.

3. Section 259 of the Pensions Act 2004 provides powers for regulations to be made prescribing the circumstances in which an employer in relation to an occupational pension scheme may be required to consult certain persons before prescribed decisions are made. It provides for regulations to prescribe the types of decisions that will trigger this requirement to consult and it applies whether the decisions are made by the employer, or the trustees or managers of the scheme. In relation to certain multi-employer schemes, the powers in section 307 of the Pensions Act 2004 mean that the powers in section 259 can be extended further to cover the principal employer of such a scheme. Regulations may also be made requiring that the trustees, managers or principal employer of an occupational pension scheme may not make a prescribed decision in relation to that scheme unless they have first notified the employer of the proposed decision and they are satisfied that the employer has undertaken any consultation required by the regulations.

4. Section 260 of the Pensions Act 2004 provides a power for regulations to be made prescribing the circumstances in which an employer in relation to a personal pension scheme, where direct payment arrangements exist, may be required to consult certain persons before prescribed decisions are made by the employer about changes to the scheme. It also provides for regulations to prescribe the types of decisions that will trigger the requirement to consult.

5. Section 261 of the Pensions Act 2004 provides further details as to the regulations that may be made under sections 259 and 260. This includes regulations to create certain rights and protections

for representatives and employees and these are set out in the second set of regulations attached.

Background

6. The main issues underlying these regulations were consulted on in the Green Paper *Security, Simplicity, and Choice, Working and saving for retirement* issued in December 2002. Initial consultation on the proposed regulations took place between this department and the pensions industry, employers, CBI, TUC and DTI. Accordingly, this consultation document seeks views on whether or not the draft regulations effectively implement the policy decision which the Government has taken.

7. The Consultation by Employers Regulations will work alongside the DTI led Information and Consultation Regulations (Statutory Instrument 2004/3426).

8. Compliance with the Consultation by Employers Regulations is not to be regarded as affecting any duty to consult which arises otherwise than under these regulations.

9. These Regulations will require employers to consult with prospective and active pension scheme members and their representatives only.

CONSULTATION QUESTIONS

10. See each regulation in the commentary below.

COMMENTARY ON THE FIRST SET OF DRAFT REGULATIONS: The Occupational and Personal Pension Schemes (Consultation by Employers) Regulations

Introductory *Regulation 1*

11. This is a general regulation about citation and commencement. It gives the title to the regulations and the date they are proposed to come into force – 6th April 2006

Regulation 2

12. Provides the interpretation of terms used more than once in these regulations. Terms which are used only once are defined in the regulation in which they appear.

Application of Regulations

Regulation 3

13. This regulation defines the persons to whom these regulations apply in respect of both occupational and personal pension schemes.

Question (a)

In respect of non-segregated multi-employer schemes we wish to ensure that these regulations apply where it is the principal employer who has the power to make decisions. We want to ensure that employers in relation to schemes consult and make the responses available to the principal employer before a decision is made. Does 3(1)(c) support this?

Regulation 4

14. This regulation sets out which employers in relation to occupational pension schemes are exempt from these regulations. For the purpose of these exemptions it also defines the terms:

- employer financed retirement benefits scheme;
- public sector pension scheme; and
- small occupational pension scheme.

Question (b)

Are there any other employers in relation to a specific type of scheme who should be excluded from the requirement to consult?

Regulation 5

15. This regulation defines the employers in relation to personal pension schemes where direct payment arrangements exist who are exempt from these regulations.

Question (c)

Should any other employer be excluded from the requirement to consult?

Restriction on decision-making pending consultation

Regulation 6

16. This regulation prohibits the making of certain changes without consultation. It also sets out where the changes which must be

consulted on are listed and which changes do not trigger the requirement to consult. It makes clear that:

- changes may not be carried out by the persons to whom regulation 3 applies (i.e. the employer and certain other parties) unless the employer in relation to the pension scheme has completed a consultation process;
- changes which trigger these regulations are as set out in regulations 8 and 9;
- changes made as per regulations 8(2)(a)(i) or 3(c) do not trigger consultation if a consultation has already been carried out in respect of a change listed in regulation 8(1)(c) or (d);
- changes made as per regulation 9(1)(b)(i) do not trigger consultation if a consultation has already been carried out in respect of a change listed in regulation 9(1)(a);
- changes made to subsisting rights do not trigger these regulations.

Question (d)

Should there be any exclusion from subsequent consultation if the first consultation can be considered to have looked at the pertinent issues, and the adverse impact is likely to be reduced?

If so, are the exclusions from a further consultation as per bullet points 3 and 4 above workable?

Regulation 7

17. This regulation requires that those, other than the employer, who have the authority to make changes to future pension arrangements, give the employer in relation to the scheme written notice of the proposed change.

Question (e)

Does this capture everyone (other than the employer) who has the authority to make a change?

Regulation 8

18. This regulation sets out the changes to occupational pension schemes that will trigger the requirement to consult. It makes clear that in specified circumstances account must be taken of more than one decision in a period of 12 months. The period of 12 months or less starts from the date on which the first decision takes effect and ends with the date of the proposal to make the second (or subsequent) change.

19. In addition, paragraph (5) ensures that changes which would normally trigger the requirement to consult are ignored for the purposes of these regulations if they are:

- required by an enactment; or
- required by a determination of the Regulator; or
- result from a marginal or administrative change.

Question (f)

Are there other major or significant changes that should be included?

Question (g)

Are there other major or significant changes that should be ignored?

Regulation 9

20. This regulation sets out the changes to personal pension schemes where direct payment arrangements exist that are covered by the requirement to consult. It makes clear that in specified circumstances account must be taken of more than one decision in a period of 12 months. The period of 12 months or less starts from the date on which the first decision takes effect and ends with the date of the proposal to make the second (or subsequent) change.

21. In addition, paragraph (3) ensures that changes which would normally trigger the requirement to consult are ignored for the purposes of these regulations where they are:

- required by an enactment; or
- required by a determination of the Regulator; or
- result from a marginal or administrative change.

Question (h)

Are there other major or significant changes that should be included?

Question (i)

Are there other major or significant changes that should be ignored?

Consultation

Regulation 10

22. This regulation sets out the detail of the consultation exercise. It requires the relevant employer to conduct the consultation within a period of at least two months. The employer must provide:

- written information about the effects of the proposed change;
- consult about the proposed change in accordance with regulation 11;
- specify a deadline to receive responses to the consultation;
- indicate a timescale for implementation;
- provide the information in such a manner to ensure that members representatives and/or members are able to consider and respond to the proposed change.

Question (j)

Should more detail about the information to be provided be in the regulation rather than in practice guidance?

Question (k)

Should this be a fixed period of two months or a minimum period of two months?

Regulation 11

23. This regulation sets out who must be consulted. The employer must consult with one or more of the following:

- a Trade Union representative recognised to any extent for collective bargaining;
- an Information and Consultation representative;
- a representative elected for the purposes of consultation required by regulation 10 in line with regulation 12;
- those specified in a negotiated agreement (where there is a specific reference to pensions) as set out in I&C Regulations which provides for direct consultation with employees; or, where none of the above exist
- affected members of a pension scheme who have no nominated representative.

Question (l)

Should there be a clearer priority order of representatives?

Question (m)

Are there other representatives who should be included in this list?

Regulation 12

24. This regulation sets out the criteria for the election of representatives of prospective and active pension scheme members. If the employer opts to establish such pension representatives he determines how many representatives are required, for how long they are required and who they represent.

These representatives may act in an ongoing basis in respect of future changes affecting pension matters but not in respect of pension matters generally.

Regulation 13

25. This sets out the arrangements for completing the consultation exercise. It requires the employer to consider the responses received during a consultation and, where the authority to make the decision lies with trustees, managers or principal employer, to provide them with written notice of the responses. Trustees, managers or principal employers with the authority to make a change may not do so unless they have considered the responses sent to the employer and they are satisfied that an employer has complied with the consultation requirements.

Miscellaneous

Regulation 14

26. This regulation together with the Pensions Act 2004 sets out the role of the Regulator in relation to these regulations. The Regulator can request information to consider and make determinations to establish:

- whether employers, trustees, managers or principal employers have complied with this consultation requirement;
- whether or not a trade union is recognised for the purposes of collective bargaining or whether an Information and Consultation agreement was properly negotiated;
- whether the consultation requirement may be waived or relaxed because the delay to carry out a consultation would not be in the interests of the generality of all the members of the scheme.

Regulation 15

27. This provides that any failure to comply with an obligation under these regulations must be dealt with by making a complaint to the Regulator.

Amendments to the Pensions Act 2004

Regulation 16

28. Provides a modification of the Pensions Act 2004 to ensure the range of multi-employer schemes are captured by these regulations.

Regulation 17

29. Adds to Schedule 2 to the Pensions Act 2004 to include the Regulator's power under regulation 14 to waive or relax these provisions in the list of reserved regulatory functions which are exercisable by the Determinations Panel.

COMMENTARY ON THE SECOND SET OF DRAFT REGULATIONS: The Pensions Act 2004 (consultation by Employers)(Protection for Nominated Representatives) Regulations

Regulations 4 to 15 broadly mirror the provisions of the Information and Consultation regulations 27 to 34, 37, 39 and 40.

Introductory *Regulation 1*

30. This is a general regulation about citation and commencement. It gives the title to the regulations and the date they are proposed to come into force – 6th April 2006.

Regulation 2

31. Provides the interpretation of terms used in these regulations. Certain terms are used which have the same meaning as in the Consultation by Employers Regulations.

Regulation 3

32. This sets out that these regulations apply to any consultation carried out by employers in relation to both occupational and personal pension schemes and required by the Consultation by Employers Regulations.

Performance of functions as nominated representative *Regulation 4*

33. This regulation enables an employee who takes part in consultations under the Consultation by Employers Regulations (“a nominated representative”) to take reasonable time off from work to carry out duties as a representative.

Regulation 5

34. This regulation gives nominated representatives the right to be paid by the employer for the time taken off work while fulfilling their nominated role.

Regulation 6

35. This regulation enables employees, who act as nominated representatives, to complain to an employment tribunal and sets out the circumstances in which they may do so. It also sets out the outcome which may be determined by the tribunal if a complaint is upheld.

Protections against unfair dismissal

Regulation 7

36. This regulation sets out the circumstances in which an employee may be regarded as being unfairly dismissed. This applies if the principal reason for dismissal is:

- carrying out duties as a nominated representative;
- being a candidate in an election to become a representative;
- seeking enforcement of rights or entitlement conferred by this second set of Regulations;
- seeking enforcement of the requirements of the Consultation by Employers Regulations.

Regulation 8

37. This regulation amends sections 105, 108 and 109 of the Employment Rights Act 1996 to enable further protections against unfair dismissal to apply.

Protections from suffering other detriment in employment

Regulation 9

38. This regulation sets out the provisions that ensure nominated representatives, candidates in an election to become nominated representatives or affected members of pension schemes do not have rights or entitlements infringed because of actions taken in respect of this second set of Regulations or in respect of the Consultation by Employers Regulations. This regulation does not apply where the detriment amounts to dismissal.

Regulation 10

39. This regulation enables an employee to complain to an employment tribunal if he claims to have suffered a detriment under regulation 9 above. It also extends the provisions in sections 48(2) to (4) and 49(1) to (5) of the Employment Rights Act 1996 to apply in relation to such a complaint in the same way as they apply to a complaint under section 48 of ERA 1996.

Conciliation and appeals

Regulation 11

40. This regulation provides for conciliation procedures to be available in any proceeding before an employment tribunal in connection with proceedings under this second set of Regulations (see section 18(1) of the Employment Tribunals Act 1996).

Regulation 12

41. This regulation adds a reference to this second set of Regulations to section 21(1) of the Employment Tribunals Act 1996. This enables appeals to be made to the Employment Appeal Tribunal on a point of law in proceedings initiated before an employment tribunal.

Miscellaneous

Regulation 13 to 15

42. These provisions ensure that any agreement which tries to restrict the operation of this second set of Regulations, or to restrict the operation of the Consultation by Employers Regulations is void. This is the case whether or not the agreement is in an employee's contract of employment. However, this provision does not apply to agreements to use conciliation procedures (see regulation 14(2)) or to compromise agreements (see regulations 14(3) and 15).

STATUTORY INSTRUMENTS

2006 No.

PENSIONS

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

Made - - - -

Laid before Parliament

Coming into force - -

6th April 2006

ARRANGEMENT OF REGULATIONS

Introductory

1. Citation and commencement
2. Interpretation

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4. Excluded employers: occupational pension schemes
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7. Notifications to employers in relation to certain occupational pension schemes
8. Listed changes; occupational pension schemes
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Consultation

10. Requirement to consult
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12. Election of nominated member representatives
13. Completion of consultation

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14. Powers of the Regulator to waive or relax requirements
15. Exclusivity of remedy

Amendments to the Pensions Act 2004

16. Modification of sections 259 and 261 of Pensions Act: multi-employer schemes
17. Waiver or relaxation of requirements: amendment of Schedule 2 to the Pensions Act 2004

The Secretary of State for Work and Pensions, in exercise of the powers conferred upon him by sections 10(5)(a), 259(1) and (2), 260(1), 261(2)(a) to (e), (g) and (h) and (4), 307(1), 315(2), (3) and (5) and 318(1) and (5) of the Pensions Act 2004^(a) and of all other powers enabling him in that behalf, after consultation with such persons as he considers appropriate^(b), hereby makes the following Regulations:

Introductory

Citation and commencement

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

(2) These Regulations shall come into force on 6th April 2006.

Interpretation

2. In these Regulations—

^(a) 2004 c.35. Section 318(1) is cited because of the meaning there given to “prescribed” and “regulations”.

^(b) See section 317 of the Pensions Act 2004.

“active member—

- (a) in relation to an occupational pension scheme, has the meaning given in section 124 of the Pensions Act 1995^(c) (interpretation), and
- (b) in relation to a personal pension scheme, where direct payment arrangements exist in respect of one or more members of the scheme who are employees, means any member in respect of whom employer contributions fall to be paid;

“affected members”, in relation to a proposal to make a listed change affecting an occupational or personal pension scheme, means any active or prospective members of the scheme likely to be affected by the change;

“consultation”, in relation to a proposal to make a listed change affecting an occupational or personal pension scheme, means the process of exchanging views with, and the provision of advice by—

- (a) the representatives of affected members of the scheme, or
- (b) in accordance with regulation 11(2) or (3), the members directly

and “consult” has a corresponding meaning;

“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 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 in regulation 6(2);

“multi-employer scheme” has the meaning given in section 307 of the Pensions Act 2004 (modification of Act in relation to certain categories of scheme);

“prospective member”, in relation to an occupational or personal pension scheme, means any person who under the terms of his contract of service or the rules of the scheme—

- (c) is able, at his own option, to become a member of the scheme,
- (d) will become so able if he continues in the same employment for a sufficiently long period,
- (e) will be admitted to the scheme automatically unless he makes an election not to become a member, or
- (f) may be admitted to it subject to the consent of his employer;

“the Regulator” means the Pensions Regulator established under section 1 of the Pensions Act 2004 (the Pensions Regulator); and

“segregated scheme” means a multi-employer scheme which is divided into two or more sections where—

- (g) contributions payable to the scheme by an employer in relation to the scheme or by a member are allocated to that employer’s or that member’s section; and
- (h) a specified proportion of assets of the scheme is attributable to each section of the scheme and cannot be used for the purposes of any other section.

Application of Regulations

Application

3.—(1) These Regulations apply—

- (a) to any relevant employer in relation to an occupational or personal pension scheme;
- (b) in relation to an occupational pension scheme with one or more relevant employers, to the trustees or managers of the scheme; and
- (c) in relation to a multi-employer scheme which is not a segregated scheme, to any person^(d) who—

(c) 1995 c 26.

- (i) is not an employer in relation to the scheme, but
 - (ii) has the power to make a listed change affecting the scheme.
- (2) “Relevant employer”—
- (a) in the case of an occupational pension scheme, means an employer in relation to the scheme other than one who is excluded by regulation 4; and
 - (b) in the case of a personal pension scheme, means an employer in relation to the scheme other than one who is excluded by regulation 5.

Excluded employers: occupational pension schemes

- 4.—(1) This regulation excludes—
- (a) an employer in relation to a public service pension scheme;
 - (b) an employer in relation to a small occupational pension scheme;
 - (c) an employer in relation to an occupational pension scheme with fewer than two members;
 - (d) an employer in relation to an occupational pension scheme which is an employer-financed retirement benefits scheme; and
 - (e) an employer employing in Great Britain a number of employees which does not exceed the maximum number specified in paragraph (2).
- (2) The maximum number is—
- (a) 150 with effect from 6 April 2006 to 5 April 2007;
 - (b) 100 with effect from 6 April 2007 to 5 April 2008; and
 - (c) 50 with effect from 6 April 2008 onwards.
- (3) For the purposes of paragraph (1)(e), the number of people employed by an employer is to be determined using the method of calculation set out in regulation 4 of the Information and Consultation of Employees Regulations 2004^(e) (calculation of number of employees).
- (4) In this regulation—
- “employer-financed retirement benefits scheme” has the meaning given in section 393A of the Income Taxes (Earnings and Pensions) Act 2003^(f) (taxation of non-pension benefits);
- “public sector pension scheme” has the same meaning as in the Pension Schemes Act 1993^(g); and
- “small occupational pension scheme” means—
- (a) a scheme with fewer than twelve members where all the members are trustees of the scheme and either—
 - (i) the rules of the scheme provide that all decisions are made only by the trustees who are members of the scheme by unanimous agreement; or
 - (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^(h) (power to appoint independent trustees) (see subsection (3) of that section) and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section;
 - (b) a scheme with fewer than twelve members where all the members are directors of a company which is the sole trustee of the scheme and either—
 - (i) the rules of the scheme provide that all decisions are made only by the members of the scheme by unanimous agreement, or
 - (ii) one 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

^(d) Section 307(1)(b) provides for modifications to be made to provisions of the Pensions Act 2004 and those provisions include the powers under which these Regulations are made. Regulation 16 of these Regulations extends those powers to include the persons referred to in regulation 3(1)(c).

^(e) S.I. 2004/3426.

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

^(g) 1993 c. 48.

^(h) 1995 c. 26.

maintained by the Authority in accordance with regulations made under subsection (4) of that section.

Excluded employers: personal pension schemes

5.—(1) This regulation excludes—

- (a) any employer in relation to a personal pension scheme where—
 - (i) direct payment arrangements exist in respect of one or more members of the scheme who are employees, but
 - (ii) no contributions fall to be paid by or on behalf of the employer towards the scheme on the employer's own account (but in respect of the employee); and
- (b) an employer employing in Great Britain a number of employees which does not exceed the maximum number specified in regulation 4(2).

(2) Regulation 4(3) also applies for the purposes of paragraph (1)(b).

Restriction on decision-making pending 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 each employer in relation to the scheme has consulted about the change in accordance with regulations 10 to 13.

(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.

(3) Paragraph (1) does not apply to—

- (a) any change listed in regulation 8(2)(a)(i) or (3)(c) which is made following the completion of consultation in respect of a change listed in regulation 8(1)(c) or (d);
- (b) any change listed in regulation 9(1)(b)(i), which is made following the completion of consultation in respect of a change listed in paragraph 9(1)(a); or
- (c) the exercise of any power to modify an occupational pension scheme to which the subsisting rights provisions apply.

(4) “Subsisting rights provisions” has the meaning given in section 67 of the Pensions Act 1995⁽ⁱ⁾ (provision as to the modification of subsisting rights).

Notifications to employers in relation to certain occupational pension schemes

7. In any case where the proposal to make a listed change is made by a person falling within regulation 3(1)(b) or (c), that person must give to each employer in relation to the scheme written notice of the change with a view to enabling the employer to comply with the requirements of regulations 10 to 13.

Listed changes; occupational pension schemes

8.—(1) Listed changes that affect an occupational pension scheme generally are—

- (a) to increase, in relation to any of the active or prospective members, the age at which benefits under the scheme become payable to or in respect of them;
- (b) to prevent new members, or certain kinds of new member, from being admitted to the scheme;
- (c) to prevent the future accrual of any benefits under the scheme for or in respect of active or prospective members;
- (d) to remove an employer's liability to make contributions towards the scheme; or
- (e) to introduce member contributions where no such contributions were previously payable.

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

(2) Listed changes that affect money purchase benefits that may be provided under an occupational pension scheme are—

- (a) to reduce the amount of employer contributions towards the scheme—
 - (i) by a margin of two per cent or more; or
 - (ii) to below a level of three per cent; or
- (b) to increase member contributions by a margin of two per cent or more.

(3) Listed changes that affect benefits that may be provided under an occupational pension scheme which are not money purchase benefits are—

- (a) to change some or all of the benefits that may be provided under the scheme to money purchase benefits;
- (b) 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;
- (c) to make any other reduction in the rate of future accruals of benefit; or
- (d) to increase member contributions by a margin of two per cent or more.

(4) Paragraphs (1) to (3) apply irrespective of whether a listed change would be the result of a—

- (a) a single decision, or
- (b) in the circumstances specified in paragraph (5), more than one decision.

(5) The circumstances in which account must be taken of more than one decision are that—

- (a) each of the decisions would, if it were made, not itself result in a listed change,
- (b) the decisions all relate to one (and only one) of the following—
 - (i) changes in the amount of employer contributions, or
 - (ii) changes in the amount of member contributions, and
- (c) a period of 12 months or less has elapsed beginning with the date on which the first of the decisions takes effect and ending with the date of the proposal to make the second (or subsequent) change.

(6) But no account is to be taken for the purposes of paragraphs (1) to (5) of any change which—

- (a) is required by an enactment,
- (b) is required by 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.

Listed changes; personal pension schemes

9.—(1) Listed changes that affect a personal pension scheme are—

- (a) to cease any employer contributions towards the scheme which are payable under direct payment arrangements;
- (b) to reduce the amount of employer contributions towards the scheme which are payable under direct payment arrangements—
 - (i) by a margin of two per cent or more; or
 - (ii) to below a level of three per cent; or
- (c) to increase member contributions by a margin of two per cent or more.

(2) Paragraph (1) applies irrespective of whether a listed change would be the result of a—

- (a) a single decision, or
- (b) in the circumstances specified in paragraph (3), more than one decision.

(3) The circumstances in which account must be taken of more than one decision are that—

- (a) each of the decisions would, if it were made, not itself result in a listed change,
- (b) the decisions all relate to one (and only one) of the following—
 - (i) changes in the amount of employer contributions, or
 - (ii) changes in the amount of member contributions, and

- (c) a period of 12 months or less has elapsed beginning with the date on which the first of the decisions takes effect and ending with the date of the proposal to make the second (or subsequent) change.
- (4) But no account is to be taken for the purposes of paragraphs (1) to (3) of any change which—
- (a) is required by an enactment;
 - (b) is required by 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.

Consultation

Requirement to consult

10.—(1) Where any person falling within regulation 3(1) proposes to make a listed change that affects an occupational or personal pension scheme, each employer in relation to the scheme must—

- (a) provide to all employees who are affected members of the scheme, and to their representatives, written information about the proposal together with the closing date for the submission by them of any comments; and
- (b) consult about the listed change in accordance with regulation 11.

(2) The written information under paragraph (1)(a) must be provided at least 2 months before the date on which it is proposed that the change is to take effect and must—

- (a) state what effects the listed change would (or would be likely to) have on the scheme and its members,
- (b) be accompanied by any relevant background information,
- (c) indicate the timescale on which measures giving effect to the change are to be introduced, and
- (d) be given at such time, in such fashion and with such content as are appropriate to enable, in particular, members' representatives to consider the impact of the listed change on affected members and to conduct a study of it.

Consultation

11.—(1) The employer must consult about the listed change with whichever of the following employee representatives he chooses—

- (a) if the affected members include employees of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union;
- (b) if the affected members include employees of a description which has elected or appointed information and consultation representatives, such representatives; or
- (c) other representatives of active and prospective members of an occupational or personal pension scheme who have been elected for the purposes of participation in any consultation required by regulation 10 in an election that satisfies the requirements of regulation 12.

(2) But in any case where—

- (a) an employer has entered into a negotiated agreement which provides for direct consultation of employees in circumstances which include those of the listed change, and
- (b) the employees to whom the agreement relates include some or all of the affected members,

the employer must consult directly with the affected members who are covered by the agreement and paragraph (1) does not apply.

(3) If neither paragraph (1) nor (2) applies, the employer must consult directly with the affected members.

(4) In this regulation—

“independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992^(j);

“information and consultation representatives” and “negotiated agreement” have the meaning given in the Information and Consultation of Employees Regulations 2004^(k); and

“recognised”, in relation to an independent trade union, means recognised to any extent as entitled to conduct collective bargaining on behalf of a group or groups of employees in accordance with Schedule A1 of the Trade Union and Labour Relations Act 1992^(l) (collective bargaining: recognition).

Election of nominated member representatives

12.—(1) The requirements for the election of representatives of active and prospective members of a scheme under regulation 11(1)(c) 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 (having regard to numbers and classes of member at the time of the election) 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 classes 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;
- (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 classes of member, may vote for as many candidates as there are representatives to be elected to represent their particular class 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, one of those elected ceases to act as a representative and any of the affected members are no longer represented, those members must elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

Completion of consultation

13.—(1) At the closing date for any consultation on a listed change, the employer in relation to the occupational or personal pension scheme in question must, unless paragraph (2) applies, consider any comments on the change he has received in response to the consultation.

(2) Where the listed change was proposed by a person falling within regulation 3(1)(b) or (c), the employer must—

- (a) give to that person written notice indicating whether the employer has received any comments on the change in response to consultation, and
- (b) if he has, forward those comments to that person.

^(j) 1992 c. 52.

^(k) S.I. 2004/3426.

^(l) Schedule A1 was inserted by Schedule 1 of the Employment Rights Act 1996 (c. 18) and amended by sections 15 and 18 of the Employment Relations Act 2004 (c.24).

(3) Notification under paragraph (2)(a) must be given as soon as reasonably practicable after the closing date for the consultation.

(4) Before making his decision as to whether or not to make a listed change, a person to whom comments are forwarded under paragraph (2)(b) must—

- (a) be satisfied that the requirements of regulations 10 to 12 were complied with in relation to the consultation; and
- (b) consider those comments.

(5) Where an employer receives no comments on a listed change before the closing date, the consultation is to be regarded as complete.

(6) “Closing date”, in relation to a consultation, is the date for submission of comments on the listed change which is specified under regulation 10(1)(a).

Miscellaneous

Powers of the Regulator to waive or relax requirements

14.—(1) The Regulator may by order waive or relax any of the requirements of these Regulations in relation to a proposal to make a listed change to an occupational or personal pension scheme.

(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 all the members of the scheme.

Exclusivity of remedy

15. The remedy for a failure to comply with any obligations under these Regulations is by way of complaint to the Regulator.

Amendments to the Pensions Act 2004

Modification of sections 259 and 261 of Pensions Act: multi-employer schemes

16.—(1) In their application to a multi-employer scheme which is not a segregated scheme, sections 259 and 261 of the Pensions Act (consultation by employers) are modified as follows.

(2) Any reference in those sections to the trustees or managers of an occupational pension scheme is to be treated as if it included a reference to any person who—

- (a) is not an employer in relation to the scheme, but
- (b) has the power to decide to make a listed change affecting the scheme.

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

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

“PART 5

FUNCTIONS UNDER REGULATIONS MADE UNDER THIS ACT

- 45 The power to waive or relax any of the requirements of the Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006 (S.I. 2006/0000) (see regulation 14 of those Regulations).”.

Signatory text

Name

^(m) 2004 c. 35.

Date

Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations require employers in relation to occupational or personal pension schemes to consult on proposals to make certain changes to those schemes before any decision to make those changes is made. They also prohibit certain other persons who have power to make such changes from doing so without such consultation having been carried out.

Regulation 3 sets out the persons to whom the Regulations apply. In addition to all employers who are not excluded by regulations 4 and 5, the Regulations extend to the trustees or managers of schemes with such employers and any person with power to make changes to occupational pension schemes which are non-segregated multi-employer schemes. Regulation 16 modifies sections 259 and 261 of the Pensions Act 2004 (c. 35) so as to allow the Regulations to cover this category of persons.

Regulation 6 prohibits the making of any change specified in regulation 8 or 9 (“listed changes”) without a consultation having been carried out by the employer. If the change is proposed by a person other than the employer himself, regulation 7 requires that person to notify the employer of the proposal in order to allow him to consult. Certain kinds of changes to a scheme are excluded from the requirement to consult by regulation 6(3).

Regulations 10 to 13 provide for the way in which consultations on proposals to make listed changes are to be conducted. They specify the information that must be given to the members of the scheme who are affected by the proposed change and require consultation with members’ representatives, if they exist. If the employer chooses, discussions may be held with representatives who are specially elected for the purposes of these Regulations. Once the period allowed for consultation is ended, responses to the consultation must be considered before the decision whether or not to make a listed change is made.

Regulations 14 and 15 make provision as to the role of the Pensions Regulator in enforcing the Regulations and regulations 16 and 17 make certain amendments to the Pensions Act 2004. As a result of regulation 17, any decision whether to waive or relax a requirement of the Regulations (see regulation 14) must be taken by the Determinations Panel established under Part 1 of the Pensions Act 2004.

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, 3rd Floor, The Adelphi, 1-11 John Adam Street, London WC2N 6HT.]

D R A F T S T A T U T O R Y I N S T R U M E N T S

2006 No.

**PENSIONS & TERMS AND CONDITIONS OF
EMPLOYMENT**

**The Pensions Act 2004 (Consultation by Employers)
(Protections for Nominated Representatives) Regulations 2006**

Made - - - -

Coming into force - -

6th April 2006

ARRANGEMENT OF REGULATIONS

Introductory

1. Introduction and commencement
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3. Application

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11. Conciliation
12. Employment Appeal Tribunal: appeals from employment tribunal

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13. Agreement to contract out of requirements of the 2006 Regulations to be void
14. Agreement to contract out of requirements of these Regulations to be void
15. Conditions regulating compromise agreements

Whereas a draft of this instrument was laid before Parliament in accordance with section 316(2)(m) of the Pensions Act 2004⁽¹⁾ and approved by resolution of each House of Parliament;

The Secretary of State for Work and Pensions, in exercise of the powers conferred upon him by

⁽¹⁾ 2004 c.35.

sections 261(2)(f), 315(2), (3) and (5) and 318(1) of the Pensions Act 2004⁽⁹⁾ and of all other powers enabling him in that behalf, after consultation with such persons as he considers appropriate^(p), hereby makes the following Regulations:

Introductory

Introduction and commencement

1.—(1) These Regulations may be cited as the Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006.

(2) These Regulations shall come into force on 6th April 2006.

Interpretation

2.—(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996^(q);

“the 2006 Regulations” means the Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006^(r);

“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; and

“nominated representative” means any employee representative with whom an employer consults about a listed change under regulation 11(1) of the 2006 Regulations (consultation).

(2) The following expressions used in these Regulations—

“active member”

“affected member”

“consultation”

“listed change”

“prospective member”

“the Regulator”

have the meaning given in the 2006 Regulations.

Application

3. These Regulations apply in relation to any consultation which an employer in relation to an occupational or personal pension scheme is required by the 2006 Regulations to complete before a decision relating to a listed change can be made.

Performance of functions as nominated representative

Right to time off

4.—(1) An employee who is a nominated representative 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 under the 2006 Regulations.

⁽⁹⁾ Section 318(1) is cited because of the meaning there given to “prescribed” and “regulations”.

^(p) See section 317 of the Pensions Act 2004.

^(q) 1996 c.18.

^(r) S.I. 2006/[number to be inserted on making].

(2) For the purposes of this regulation, 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.

Right to remuneration for time off under regulation 4

5.—(1) An employee who is permitted to take time off under regulation 4 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 regulation 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 time is taken.

(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 on which 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 sub-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 paragraph (5) as are appropriate in the circumstances.

(5) The considerations referred to in 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 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 regulation 4 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and, conversely, any payment of remuneration under paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Right to time off: complaint to tribunals

6.—(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 regulation 4; or
- (b) has failed to pay the whole or part of any amount to which the employee is entitled under regulation 5.

(2) A tribunal shall not consider a complaint under this regulation 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 regulation 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 regulation 5 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 regulation 5, the tribunal shall also order the employer to pay to the employee the amount it finds due to him.

Protections against unfair dismissal

Unfair dismissal

7.—(1) An employee who is dismissed and to whom 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, 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 paragraph applies to an employee who is—

- (a) a nominated representative; or
- (b) a candidate in an election in which any person elected will, on being elected, be a nominated representative of such description as is referred to in regulation 11(1)(c) of the 2006 Regulations (nominated representatives elected for the purposes of those Regulations).

(3) The reasons are that—

- (a) the employee performed or proposed to perform any functions or activities under the 2006 Regulations in his capacity as such a representative or candidate;
- (b) the employee exercised or proposed to exercise an entitlement conferred on the employee in question by regulation 4 or 5; 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 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 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 these Regulations;
- (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1) of the 2006 Regulations (which specifies the persons to whom those Regulations apply) has decided to make a listed change affecting an occupational or personal pension scheme in contravention of regulation 6(1) of those Regulations (consultation required before deciding to make listed changes affecting schemes);
- (c) complained or proposed to complain to the Regulator that any consultation under those Regulations does not comply with the requirements of regulations 10 to 13 of the 2006 Regulations (consultation);
- (d) stood as a candidate in an election in which any person elected would, on being elected, be a nominated representative of such description as is referred to in regulation 11(1)(c) of the 2006 Regulations;
- (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 the 2006 Regulations;
- (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 sub-paragraphs (d) to (g).

(6) It is immaterial for the purpose of 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.

Subsidiary provisions relating to unfair dismissal

- 8.—(1) In section 105 of the 1996 Act^(s) (redundancy as unfair dismissal)—
- (a) for subsection (1)(c) substitute—

“(c) it is shown that any of subsections (2) to (7I) applies.”.
 - (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 (3) or (5) of regulation 7 of the Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006 (read with paragraph (6) of that regulation).”
- (2) In section 108 of the 1996 Act^(t) (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 (3) or (5) of regulation 7 of the Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006 (read with paragraph (6) of that regulation) applies.”.
- (3) In section 109 of the 1996 Act^(u) (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 (3) or (5) of regulation 7 of the Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006 (read with paragraph (6) of that regulation) applies.”.

Protections from suffering other detriment in employment

Right not to suffer detriment

- 9.—(1) An employee to whom 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, paragraph (3) or (5).
- (2) This paragraph applies to an employee who is—
- (a) a nominated representative; or
 - (b) a candidate in an election in which any person elected will, on being elected, be a nominated representative of such description as is referred to in regulation 11(1)(c) of the 2006 Regulations (representatives elected for the purposes of those Regulations).
- (3) The grounds are that—
- (a) the employee performed or proposed to perform any functions or activities under the 2006 Regulations in his capacity as such a representative or candidate;
 - (b) the employee exercised or proposed to exercise an entitlement conferred on the employee in question by regulation 4 or 5; or
 - (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

^(s) 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.

^(t) Subsection (1) of section 108 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.

^(u) Section 109(3) (which specifies cases in which the upper age limit does not apply) has been amended on a number of occasions to add new cases.

(4) This 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 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 these Regulations;
- (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1) of the 2006 Regulations (which specifies the persons to whom those Regulations apply) has decided to make a listed change affecting an occupational or personal pension scheme in contravention of regulation 6(1) of those Regulations (consultation required before deciding to make listed changes affecting schemes);
- (c) complained or proposed to complain to the Regulator that any such consultation under those Regulations does not comply with the requirements of regulations 10 to 13 of the 2006 Regulations (consultation);
- (d) stood as a candidate in an election in which any person elected would, on being elected, be a nominated representative of such description as is referred to in regulation 11(1)(c) of the 2006 Regulations;
- (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 the 2006 Regulations;
- (f) voted in such a 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 sub-paragraphs (d) to (g).

(6) It is immaterial for the purpose of 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 regulation does not apply where the detriment in question amounts to dismissal.

Detriment: enforcement and subsidiary provisions

10.—(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 9.

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

Conciliation and appeals

Conciliation

11. In section 18(1) of the Employment Tribunals Act 1996^(w) (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 regulation 6 or 10 of the Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006.”

^(v) 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.

^(w) 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.

Employment Appeal Tribunal: appeals from employment tribunal

12. In section 21(1) of the Employment Tribunals Act 1996^(x) (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 Pensions Act 2004 (Consultation by Employers) (Protections for Nominated Representatives) Regulations 2006.”.

Miscellaneous

Agreement to contract out of requirements of the 2006 Regulations to be void

13. 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 the 2006 Regulations.

Agreement to contract out of requirements of these Regulations to be void

14.—(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 these Regulations; or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under them.

(2) 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) 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^(y)) if the conditions specified in regulation 15 regulating compromise agreements are satisfied in relation to the agreement.

Conditions regulating compromise agreements

15.—(1) For the purposes of regulation 14(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 sub-paragraphs (a) to (e) are satisfied.

(2) A person is a relevant independent adviser for the purposes of 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

^(x) 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.

^(y) See insertion made by regulation 11 of 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 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 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 (2)(c), if the employee makes a payment for the advice received from him.
- (4) In 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^(z)); and
 - (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 paragraph (4)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors' practice.
- (6) In this Regulation—
- (a) "independent trade union" has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992^(aa); and
 - (b) for the purposes of 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.

Signatory text

Name

Date

Department for Work and Pensions

^(z) 1990 c. 41.
^(aa) 1992 c.52.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for a number of protections for employees and their representatives, in connection with consultations which employers in relation to occupational or personal pension schemes are required to conduct under the Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006 (S.I. 2006/0000) (“the 2006 Regulations”).

Regulations 4 to 6 provide that a person is entitled to time off and remuneration when acting as an employee representative in such consultations.

Regulations 7 to 10 contain provisions protecting employees and their representatives against unfair dismissal and other detriment. These protections include that such persons are to be regarded as unfairly dismissed if the only or principal reason for a dismissal is one connected with such consultations (regulation 7). This covers participation in the consultation procedures or in elections to act as a representative which are held under the 2006 Regulations. It also extends to steps taken by any person for the purpose of seeking compliance with those Regulations or to secure any rights or entitlements that are conferred by these Regulations. Similar protections apply in relation to detriment other than dismissal that an employee or representative may suffer (regulation 9).

Regulation 11 provides for conciliation procedures to be available in any proceedings before an employment tribunal which are brought under these Regulations and regulation 12 makes provision for appeals to be made to the Employment Appeal Tribunal on a point of law.

Regulations 13 to 15 place restrictions on contracting out of the rights provided by these Regulations.

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, 3rd Floor, The Adelphi, 1-11 John Adam Street, London WC2N 6HT.]

Association of British Insurers
Association of Consulting Actuaries
Association of Pension Lawyers
Association of Pensioner Trustees
Auditing Practices Board
Better Regulation Executive
British Chamber of Commerce
Confederation of British Industry
Consumers Association
Dept of Trade and Industry
Engineering Employers Federation
Federation of Small Businesses
Financial Services Authority
HM Treasury (MOCOP)
Industry Wide Pension Schemes Group
Inland Revenue
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants in Scotland
Institute of Directors
Investment Managers' Association
NAPF
National Consumer Council
Office of Fair Trading
OPAS (the Pensions Advisory Service)
Pensions Ombudsman
Policy and Legal Division DHSS Northern Ireland
Small Business Service
The Association of Corporate Trustees
The Faculty and Institute of Actuaries
The Law Society of England and Wales
The Law Society of Scotland
The Pensions Management Institute
The Pensions Regulator
The Scottish Executive
The Society of Pension Consultants
The Welsh Assembly
Trades Union Congress

REGULATORY IMPACT ASSESSMENT

An extract of the Pensions Act 2004 Regulatory Impact Assessment is attached.

3.7 Requirement to consult employees

- 3.7.1 Currently there is no requirement for employers to consult employees who are members of pension schemes, or their representatives, before making major changes to future pension arrangements. However, many employers already follow good practice and give members the opportunity to feed in their views. This proposal would place a statutory requirement on employers to consult.
- 3.7.2 Doing nothing would mean that there would continue to be employers who would make changes to future pension arrangements without consultation. Working through non-legislative routes such as developing codes of good practice is unlikely to provide an effective remedy, particularly since decisions on pension schemes can be of key significance to the future financial position of businesses and the future retirement security of employees.
- 3.7.3 It is not intended that the consultation requirement should provide members or their representatives with any sort of veto on change.
- 3.7.4 The proposal has been broadly welcomed. The key issues highlighted in consultation in terms of how it is implemented are:
- to tailor the requirement so that it applies to those affected by the proposed change rather than wider groups, and that the changes covered are significant;
 - to recognise that there are already a range of consultation mechanisms in place; and
 - to ensure that any new regulations do not hinder business flexibility to make long term commercial decisions.
- 3.7.5 Further consultations have taken place with the TUC and the CBI and the pensions industry as more detailed policy design has developed.
- 3.7.6 The proposal will ensure that employees who are affected active members of pension schemes and/or their representatives have the opportunity to feed in their views on proposed changes to their future pension arrangements before the decision is made.

Benefits

- 3.7.7 It could benefit up to around 7.4 to 7.7 million employees who are currently active members of private sector occupational pension schemes or group personal pensions, by ensuring they are consulted about changes which will affect their future pension. Introducing this requirement will also help to highlight the value of workplace pension provision to both employers and employees.

Costs/savings

- 3.7.8 The cost to business from this proposal might be between £2.2 million and £2.8 million per year, depending on the provisions made in the regulations for small employers. This cost is based on the assumption that any given scheme is likely to make the type of major change which triggers the requirement on average once every four years. Or put another way, in any given year, it is assumed that one if four schemes are likely to make such major changes.
- 3.7.9 It is assumed that to fulfil the consultation requirement, employers will i) circulate information about the proposed changes ii) hold a meeting with employee representatives where these exist. Indications are that many employers already engage in formal consultation on major pensions changes as a matter of good HR practice and employment relations. Therefore the requirement will only impose additional costs on a proportion of employers who do not currently consult. It is assumed for the purposes of these costings that around a quarter of companies where there is a formal representative structure, and around half of companies where such a structure does not exist will be affected.
- 3.7.10 The requirement could imply a proportionately higher cost (on a per member/employee basis) for smaller businesses. Possible exemptions are currently being considered. These include a small employer exemption for employers with fewer than 50 employees in line with the Information and Consultation Directive or employers with fewer than 5 employees in line with current Stakeholder Pension provision.
- 3.7.11 The Pensions Regulator will enforce compliance with the requirement to consult. The maximum penalty will be a fine of £50,000 for the breach of the duty to consult, in line with The Pension Regulator's powers to fine for other breaches of pensions legislation.