



Department
of Health

Policy Note: Application of new Fair Deal to ongoing contracts

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Application of new Fair Deal to ongoing contracts

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This guidance gives information to employers and contracting authorities on how a request may be made to DH to allow such transfers.

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Policy Note: Application of new Fair Deal to ongoing contracts

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1. Introduction and Background

The new Fair Deal policy announced by HMT in October 2013 applies when staff who are members of a public service pension scheme move from the public sector to an independent sector contractor by way of a transfer under TUPE. The policy also covers staff who are members of a public service pension scheme when they transfer to a public service mutual or to other new models of public service delivery (regardless of whether or not TUPE applies).

One of the circumstances in which the new Fair Deal policy applies is the retender of a contract which results in the further compulsory transfer of staff who had previously been transferred out of the public sector (and related public service pension scheme) under old Fair Deal. However, the policy also recognises that there may be circumstances apart from the retender of existing contracts where employers and contracting authorities consider there is an opportunity for former public sector staff to return to the relevant public service pension scheme. In such circumstances in an NHS context, a request may be made by the employer to DH to allow eligible staff to return to the NHS pension scheme (“NHSPS”) under a Pension Direction to that employer. In fact, DH has already received a small number of such requests and this note seeks to clarify the policy position in this respect. Readers of this note should also refer to the following HMT new Fair Deal Guidance from October 2013 and DH Guidance for the NHS from March 2014 respectively:

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

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

2. Principles

DH will consider such requests from employers for a Pension Direction under new Fair Deal on a contract-by-contract basis, taking into account the impact on staff, procurement and value for money considerations, among other factors. The purpose of this note is to clarify DH’s policy position when dealing with such requests by outlining the principles that apply in relation to:

- Future Service and any savings arising;
- Past Service Liability and
- Bulk Transfers

Any requests from employer providers in this respect need to be supported by the relevant contracting authorities. It must also be noted that contracting authorities are likely to need to take professional advice (legal, actuarial) before being able to make or to support such requests.

This note is only concerned with staff who were transferred out of the public sector under old Fair Deal. Different arrangements apply to other staff employed by the provider to whom the provider wishes to offer NHSPS membership under the wider access facility.

2.1 Future Service

DH will determine the date from which the provider's participation in the NHSPS will start but in general participation will not be backdated. Only staff previously transferred out of the public sector under old Fair Deal who remain employed by the provider on the proposed date of transfer back into the NHSPS can return to the NHSPS. Such staff can only be brought across in respect of future service (but see 2.2 and 2.3 below in relation to past service).

Staff who have left the employment of the provider before that date (and who have therefore had a break in continuous service) are not eligible to return to the NHSPS under the terms of this note, nor are they eligible to transfer their pension rights accrued in any broadly comparable scheme operated by the provider, into the NHSPS.

It is expected that savings would accrue to the provider by eligible employees returning to the NHSPS as this should result in a significant reduction in the provider's pension scheme contribution rate for future service benefits from this date. DH expects that these savings will be passed back to the contracting authority and fully reflected in lower contract charges, taking into any account bulk transfer shortfall funding arrangements between the provider and contracting authority.

2.2 Past Service Liability

Staff whom it is proposed will return to the NHSPS may have joined, and accrued rights in, a broadly comparable pension scheme established by the provider under old Fair Deal. In line with new Fair Deal, all such staff should be given the option to bulk transfer their accrued rights in the provider's broadly comparable scheme into the NHSPS in order to obtain day-for-day service credits (or actuarial equivalent reflecting benefit differences between schemes) in the NHSPS. If as a result of the original transfer under the old Fair Deal, any such employees had opted to bulk transfer pension rights which they accrued in the NHSPS into the provider's broadly comparable scheme in order to obtain day-for-day service credits (or actuarial equivalent reflecting benefit differences between schemes) in the provider's scheme, then this option will include service credits relevant to that transfer as well as service with the provider. Otherwise it will only apply in respect of service with the provider.

Eligible employees may well elect not to exercise their bulk transfer option and instead elect to leave their accrued rights in the provider's broadly comparable scheme. For such staff (and former staff of the provider who have accrued rights in the broadly comparable scheme), any past service liabilities will remain in the provider's scheme. Contracting authorities should check if they have assumed any financial responsibility for such liabilities and also understand any possible consequences of the proposed arrangements with the provider with regards to its broadly comparable scheme. For example, it will need to understand if the provider's scheme is in deficit and whether an employer debt under section 75 of the Pensions Act 1995 might be triggered for the provider if its scheme is to be wound up or if the provider is to cease to employ any active members in its scheme as a result of the proposed arrangements. Contracting authorities should note that such liabilities can be significant for an employer in a defined benefit pension scheme and could undermine the financial strength of the provider or in extreme cases cause the provider to face insolvency.

DH will require assurances from the contracting authority that appropriate enquiries have been made and satisfactory responses provided, and that the contracting authority is satisfied as to the provider's future covenant strength, about how the provider will finance any contributions it may be required to make in respect of any bulk transfer, including any shortfalls which may arise (see below) and the security of any accrued pension rights of ex-public sector employees who are to remain in the provider's scheme.

2.3 Bulk Transfer Shortfall

Any bulk transfers from the provider's broadly comparable scheme into the NHSPS would need to be fully funded by the provider, in accordance with any the existing contractual agreement between the contracting authority and the provider. This will be in accordance with the previous DH guidance in relation to new Fair Deal for the NHS (adapted below):

In terms of assessing where liability for any bulk transfer shortfall should lie, there can be three different levels of bulk transfer terms:

- i. those offered by the trustees of the provider's scheme;
- ii. those required in order to meet the requirements of the Fair Deal policy (i.e. the obligations on the provider set out in Annex B of the HM Treasury new Fair Deal guidance, including allowance for the underpin and any shortfall terms in connection with the inward terms for the provider's scheme); and
- iii. those required by the NHSPS in order for the NHSPS to provide day-for-day service credits (or actuarial equivalent reflecting benefit differences between schemes) for staff who wish to transfer their accrued benefits from the provider's scheme.

The contracting authority should review the terms of the existing contract with the provider to see

- a) whether old Fair Deal was applied at the time of the original outsourcing or commissioning and
- b) if it was, to check whether the contract included exit provisions for onward bulk transfer terms that meet the requirements of the Fair Deal policy (i.e. as in (ii) above). If the original contract is silent on exit provisions and process and there is nothing to contractually bind the provider to procure that bulk transfer terms are offered as in (ii) above even though Fair Deal applied, the authority will (if the relevant transfer back to NHSPS is to go ahead) need to meet the cost of any difference between the terms under (i) and the terms under (ii), to the extent that it is unsuccessful in securing an improvement in the terms under (i). There may also be a difference between the terms under (iii) and the terms under (ii).

In all cases the contracting authority and provider must agree on the funding of the difference between (iii) and (i) to enable the bulk transfer offer to proceed.

3. Administrative Matters to be considered

3.1 DH Contacts and Approvals

Employers wishing to make a request to DH in accordance with this guidance are encouraged to contact the following in DH in the first instance:

Julie Badon (Pensions Policy): Email: Julie.badon@dh.gsi.gov.uk

Saurabh Das (Procurement, Investment & Commercial): Email: Saurabh.das@dh.gsi.gov.uk

DH will consider approvals for any such requests on a contract by contract basis. The requests will be considered by the Pay Pensions and Employment Services Strategy and External Relations Directorate in DH who may also seek input from the Procurement, Investment and Commercial Directorate in DH and NHS England.

3.2 Points to consider

Independent sector employers and contracting authorities should consider the following while deciding to make an application or as part of their application process, among others:

- DH will require evidence of support from the contracting authority for each request made, and evidence that existing contracts have been varied appropriately. The relevant individual at the contracting authority should have the necessary powers to approve/accept the required changes to the contract.
- Independent sector employers will need to obtain from the NHSPS actuaries terms for bulk transfers into the NHSPS to assess any bulk transfer shortfall implications as part of their application process.
- As part of its decision on whether or not to support the transfer application, the contracting authority should weigh up the cost it incurs in meeting any bulk transfer shortfall against the benefits to be derived from service cost savings.
- The terms of the NHSPS may have changed since the staff originally transferred out (for example, due to the increase in member contributions) and will definitely have changed if the transfer back in happens after April 2015. So any employee relations issues in relation to this change in pension benefits should be considered.
- Contracting authorities should consider factors such as any risk of procurement challenge arising from the changes to the contract as part of their decision of whether or not to support any such requests from the provider. The cost of any actuarial, financial and legal advice required should also be considered.
- NHS Business Services Authority (NHS BSA) are the administrators of the NHSPS. A successful application from an independent sector employer will lead to the employer being granted a Pensions Direction in respect of eligible employees. Please refer to the following NHS BSA pages for Application guidance for Pensions Direction.

<http://www.nhsbsa.nhs.uk/Pensions/4327.aspx>

3.3 Contractual provisions requiring variation

The existing contract between the contracting authority and the provider will need to be varied in order to (a) reflect the savings due to the contracting authority and to (b) take account of the contractual provisions mentioned in Fair Deal Guidance issued by HMT and DH.

The table below outlines the principles that need to be reflected in any agreement to vary an existing contract and provides a cross-reference to where that principle is reflected in the

relevant pension schedule in the NHS Commissioning Contract as well as NHS Standard Goods and Services Contract. Clearly, the clauses will need to be adapted and amended in each particular case. It should also be noted that the standard schedules are drafted to apply in the context of a TUPE transfer where a new contract is being put into place involving Commissioners/contracting authorities, incumbent providers and new providers. In the context of ongoing contracts, there will of course be no new provider so certain provisions will need to be adapted accordingly.

Principle	Equivalent reference in NHS Commissioning Contract	Equivalent reference in Standard Goods & Services Contract
As a precondition to entering into an agreement to amend the terms of any existing contract, the provider (and any relevant subcontractor) must obtain a pensions direction in respect of eligible employees.	Para 2.1.1 and 2.1.2 of Schedule 7	Para 1.1.1 and 1.1.2 of Part D of Schedule 7
The provider (and any relevant subcontractor) is to undertake to comply with the terms of the pensions direction in respect of eligible employees until the end of the contract for as long as such employees are employed on delivery of the services.	Para 2.1.3 of Schedule 7	Para 1.1.3 of Part D of Schedule 7
Failure by the provider or its subcontractor to comply with its obligations in relation to its NHS Pension Scheme (including those under its pensions direction), as notified to the Commissioner/contracting authority by NHS Pensions, is to constitute an event of default entitling the Commissioner/contracting authority to terminate the contract.	General Condition 17.7.14 <i>(Termination: Provider Default)</i>	Clause 15.5.5 of Schedule 2
Where any member of staff omitted from a pensions direction secured by the provider (or any subcontractor) is subsequently found to be an employee eligible to return to the NHS Pension Scheme, the provider (or any relevant subcontractor) is to ensure that that person is treated as being an eligible employee from the date when other eligible employees transferred back in to the NHS Pension Scheme under the relevant pensions direction so that their pension benefits and premature retirement rights are not adversely affected.	Para 2.1.4 of Schedule 7	Para 1.1.4 of Part D of Schedule 7
Except in relation to NHS Commissioning contracts, there is an expectation that any changes in employer contribution rates will be passed through to the contracting authority by way of an adjustment to the service charges due from the contracting authority to the provider under the contract. Similarly, any cost savings arising as a result of a fall in the employer contribution rate should be passed back to the contracting authority.	N/A	Para 1.1.5, 1.1.6 and 1.1.7 of Part D of Schedule 7
Provisions recording: <ul style="list-style-type: none"> • that eligible employees have been given or will be given 	These issues and the process in	These issues and the process in general will

Principle	Equivalent reference in NHS Commissioning Contract	Equivalent reference in Standard Goods & Services Contract
<p>the option of transferring benefits accrued in the provider's (or any relevant subcontractor's) broadly comparable pension scheme into the NHS Pension Scheme; and</p> <ul style="list-style-type: none"> • that the terms of any bulk transfers which may be required to be made from the provider's (or any relevant subcontractor's) broadly comparable pension scheme into the NHS Pension Scheme have been determined/agreed (including liability for any shortfall payments); and • that any amounts which may need to be transferred from the provider's (or relevant subcontractor's) broadly comparable scheme (subject to transfer options being exercised) have been assessed and have been paid or will be paid by the trustees of the relevant broadly comparable scheme and/or the provider/contracting authority (as appropriate) into the NHS Pension Scheme. 	<p>general will need to be established prior to the entry into of any agreement to vary the contract – implementing the principles in paragraphs 2.3, 2.4, 2.5 and 2.6 of Schedule 7, as adjusted to reflect the agreed position with regard to payment of the amounts to be transferred between schemes and the timing of the payment.</p>	<p>need to be established prior to the entry into of any agreement to vary the contract – implementing the principles in paragraphs 1.3, 1.4, 1.5 and 1.6 of Part D of Schedule 7, as adjusted to reflect the agreed position with regard to payment of the amounts to be transferred between schemes and the timing of the payment.</p>
<p>From the date that eligible employees join the NHS Pension Scheme until such time as the provider (or any relevant subcontractor) ceases to employ them, the provider must provide (and/or must ensure that any relevant subcontractor must provide) premature retirement rights in respect of the eligible employees that are the same as the benefits they would have received had they remained employees of an NHS body or other employer which participates automatically in the NHS Pension Scheme.</p>	<p>Para 3.1 of Schedule 7</p>	<p>Para 1.7 of Part D of Schedule 7</p>
<p>If the Commissioner/contracting authority is entitled to terminate the contract for breach of the terms of its pensions direction, the Commissioner/contracting authority may in its sole discretion, instead of exercising its rights of termination, permit the provider (or the relevant subcontractor, as appropriate) to offer broadly comparable pension benefits, on such terms as decided by the Commissioner/contracting authority.</p>	<p>Para 4.1 of Schedule 7</p>	<p>Para 1.8.1 of Part D of Schedule 7</p>
<p>If the provider or its subcontractor is in arrears in respect of contributions due to the NHS Pension Scheme, as notified by NHS Pensions, the Commissioner/contracting authority is to be entitled to deduct the amount overdue from sums due to the provider (or its subcontractor) under the contract and pay that amount to NHS Pensions. This should be in addition to (and not instead of) the Commissioner's/contracting authority's</p>	<p>Para 4.2 of Schedule 7</p>	<p>Para 1.8.2 of Part D of Schedule 7</p>

Principle	Equivalent reference in NHS Commissioning Contract	Equivalent reference in Standard Goods & Services Contract
right to terminate the contract.		
The provider should undertake to indemnify the Commissioner/contracting authority and any new provider against all losses of the types provided for in the Commissioning Contract/Good and Services contract.	Para 6 of Schedule 7	Para 1.10 of Part D of Schedule 7
Provisions should be included so that any subcontractor is bound by obligations similar to those on the provider in relation to pension benefits and premature retirement rights.	Para 7 of Schedule 7	Para 1.11 of Part D of Schedule 7
The agreement amending the existing contract should include an amended third party rights clause making relevant provisions enforceable by eligible employees.	Para 8 of Schedule 7	Para 1.12 of Part D of Schedule 7
Provisions should be included setting out how pensions of eligible employees are to be handled at the expiry or earlier termination of the contract.	Para 9 of Schedule 7	Para 1.13 of Part D of Schedule 7