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Date: 28 February 2019
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Dear Sirs

Local Government Pension Scheme; Fair Deal – Strengthening pension protection
Policy Consultation

The reply is from the Local Government Pension Scheme Technical Group.

Each question is answered in turn, split between general comments and regulations.

Q1 – Do you agree with this definition? (points 7 to 18)

General Comments

In principle we agree with the definition.

Technical Group (TG) agreed LGPS employers must ensure protected transferees are given access to membership of the LGPS for so long as they remain transferee and have an entitlement to membership of the scheme.

TG agreed points 16 and 17.

TG felt the Regulations still offer opportunity for employers not to bring all eligible employees into the Scheme from day one of transfer, with the option to opt out. TG felt it is worth reiterating this requirement for consistency of approach.

TG thought, whilst “wholly or mainly” is referred to in TUPE Regulation 3(3)(b) it isn’t defined within Regulation 1 (interpretation), so TG was uncomfortable if this could be relied on in reference to TUPE. TG’s preference would be to introduce a definition; for “wholly or mainly” as spending not less than 51% of employees time of employment on the delivery of the service or contract tasks.

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Regulations

It was thought useful to make move Regulation (3) (15) to the start of Regulation (3) to make it clear the meaning of “employer of a protected transferee” early within Regulation (3).

Q2 – Do you agree with this definition of a Fair Deal employer? (points 19 to 23)

General Comments

Whilst TG would like to offer security of the LGPS to a wider audience, including those employers excluded from Fair Deal, TG agreed the definition of a Fair Deal employer as detailed in the consultation.

Regulations

N/A

Q3 – Do you agree with these transitional measures? (points 24 to 26)

Comments

TG agreed with the transitional measures in points 24 to 25 providing ongoing security of the LGPS for second stage transferred staff.

TG agreed those staff that transferred in point 26 and were given access to a broadly comparable pension arrangement should have the right to transfer their benefits back into the LGPS as long as the person still has benefits within the Fund.

TG therefore agrees with the transitional measures in the consultation.

Regulations

N/A

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Q4 – Do you agree with our proposals regarding the calculation of inward transfer values? (point 26)

Comments

TG feels the proposed calculation of inward transfers seems reasonable.

However, TG thought those members who have had a five year break or more, since their TUPE out from LG to a broadly comparable arrangement (but who have not transferred and therefore retained preserved benefits) should still be afforded the security of a the final salary link. It was considered unreasonable to limit those members to only CARE when the break was outside their control or at the instigation of their LGPS employer.

TG considered the option of allowing a person who is an employee of a service provider working on the delivery of a service or function transferred from a Fair Deal employer who has not been compulsorily transferred to join the LGPS. TG agreed this is a good option but agreed it has to be for all groups of employers under Fair Deal and not just certain groups (e.g. it could not be an excluded item for Academies)

TG thought termination of an agreement must be with both parties agreement.

Regulations

TG felt Regulation (7) and (11) should state it is for all Fair Deal employers and Regulation (11) should be prefixed with subject to Regulation (7).

Regulation (8) should be changed to – An agreement under sub-paragraph (7) may be terminated with the [written] agreement of both the Fair Deal employer and the service provider at any time.

Q5 – Do you agree with our proposals on deemed employer status? (points 27 to 39)

Comments

In principle TG support the proposal on deemed employer status but highlight a number of practical issues that need to be resolved in order for this to become a solution.

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Under the proposed change - the outsourcing employer transfers staff to a service provider but the staffs former employer (the outsourcing employer) is their deemed employer.

TG feels risk sharing or de-risking known as pass-through is a positive and sensible solution.

TG felt, in New Fair Deal those fund employers in the definition of a Fair Deal employer must be able to become deemed employers and pass-through should be the default position, but Funds individual Funding Strategy Statement can provide the administrative tool to allow differences if required, i.e. if the Fund requires a contractor to be an admission body via an admission agreement.

In points 32 and 37 TG feel Funds can still have a legal agreement if they choose but the main contract between outsourcing Fair Deal employer and service provider must detail how the two parties deal with pensions and risk sharing.

The SAB guidance becomes critical in this area and must include a template contract in the Annex that Administering Authorities can provide to the Fair Deal employer.

TG felt that the Fair Deal employer must have full regard to its liabilities and financial requirements in terms of any outsourcing should be strengthened, as must have “full regard” is simply not strong enough and needs to be stated in regulation.

TG very strongly emphasise the success of deemed employers falls onto the contractual arrangement between the Fair Deal employer and the contractor. Administering Authorities must not be responsible for the contractual arrangements.

The Fair Deal employer must ensure within the contract that it will not incur unnecessary financial burden from the contractor’s actions.

TG agreed the decisions made by the Fair Deal employer still remain in force at the contractor, thereby limiting its future costs. The areas that need to be covered in the contract include;

- Pay awards
- Discretions

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- Ill Health
- Redundancy
- APCs
- Shared cost AVCs
- Flexible retirement provisions
- Waiver of reductions

In terms of the above, the Fair Deal employer must still manage these areas within the contract, apart from those already covered in Regulation 68.

TG also considered other Pension implications and agreed these still fall under the Fair Deal employer, including IDRPs, pension strain costs, monthly posting of contributions, breaches and reporting to the Pension Regulator. Effectively, the Fair Deal employer retains all its existing pension responsibilities for running the LGPS in respect of the staff transferred over to the contractor.

TG feel consideration needs to be given to the area; does the Fair Deal employer have responsibility for the staff the contractor decides to bring into the LGPS (if the contractor decides to do this), who were not part of the original transfer.

TG felt in terms of administration the process could work well as long as the Fair Deal employer does all it is required to do. There was a feeling that the member's records must be identifiable separately within the pension administration systems.

Administrators may decide how best to approach this.

TG felt all contributions (employees and employers) should ideally come from the Fair Deal employers but Administering Authorities could allow flexibility within their own Service Level Agreements. If Administering Authorities chose to have a SLA with the contractor it was considered prudent to have this within the contract between the Fair Deal employer and contractor.

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TG felt DfE guidance mentioned in point 39 of the consultation must be written in conjunction with MHCLG. It is imperative this is agreed by both parties and ideally provide one single document. This document must make it clear Academies can become deemed employers without need for Secretary of State approval, thereby negating the requirement for a full bond. This was strongly welcomed by TG.

Regulations

No comments have been made on the Regulations but they need to reflect the requirements as detailed above.

Q6 – What should advice from the scheme advisory board contain to ensure that deemed employer status works effectively? (points 27 to 39)

Comments

TG felt details of accounting requirements must be included

TG felt that Fair Deal employers must be made aware they retain pension responsibility for the staff that transferred over to the contractor, and potentially those new staff brought in by the contractor, just as they did prior to transfer, and in all areas including discretions, IDRPs etc.

TG felt that the SAB guidance must include an example template of the contractual arrangements between the Fair Deal employer and the contractor, covering all elements of pensions.

TG felt the guidance must be to all Fair Deal employers (not to the Administering Authority) and whilst this is guidance, it must be explained this is effectively statutory, and the implications of not meeting the guidance need to be made clear.

Regulations

N/A

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Q7 – Should the LGPS Regulations 2013 specify other costs and responsibilities for the service provider where deemed employer status is used? (points 40 to 41)

Comments

TG felt, that by having all pension decisions made via the Fair Deal employer and with a sufficiently robust contract in place between the Fair Deal employer and the contractor, no other costs and responsibilities need to be specified.

Administering Authorities will need to ensure their processes are adequate to manage monthly contributions and year-end information coming from two separate sources (if they chose this route) for members record held under “one single” employer.

Administering authorities may choose to have a SLA in place with the service provider and deemed employer in these cases. The group support greater details from the SAB on how the administration of the scheme in relation to the LGPS deemed employers should work in practice.

Regulations

N/A

Q8 – Is this the right approach? (points 42 to 43)

Comments

TG felt just one approach was better, that being the deemed employer route. However, the group understand why employers will still decide on the admission body route. This could potentially add extra complexity on Administering Authorities as it adds another route that needs to be available.

The group thought that if Funds still choose to use admission agreements in certain cases this is reasonable.

The group felt each Fund’s Funding Strategy Statement is the correct place for determining risk share arrangement options and the legal admission agreements will reflect this.

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TG agreed that it must be made clear that for administrative purposes the Fair Deal employer ultimately retains the full responsibility for all employer duties under the Regulations, unless the contract between the Fair Deal employer and the contractor state otherwise.

Regulations

TG felt Regulation (13) should be amended as follows;

A Fair Deal employer must have read, understood and have full regard to the advice issued by the Scheme Advisory Board on the matters to be considered in regard to the provision of pension protection to a protected transferee or persons who may be regarded as protected transferees, including the sharing of risk. The Fair Deal employer must confirm to the Administering Authority which route it is taking prior to the contract start date.

Q9 – What further steps can be taken to encourage pension issues to be given and timely consideration by Fair Deal employers when services or functions are outsourced?
(Points 44 to 46)

Comments

We fully support the need to get all parties to engage with administrators early in the process but from experience this is unlikely to happen in all cases.

We suggest the Regulations state the deemed employer route is the Administering Authorities default option but employers can adopt differing approaches.

The group also felt automatic fines should be applied by the Fund administrator to the Fair Deal employer if all pension issues and all legal documents are not complete before the staff transfer to the contractor. The fine amounts should be of sufficient value to prohibit Fair Deal employers proceeding with the transfer before all pension issues are resolved.

In addition, failing cases should automatically be recorded as material breaches and reported to the Pensions Regulator from each Fund administrator.

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The group felt fines should be referenced in the SAB guidance and the contract template.

Regulations

N/A

Q10 – Are you aware of any other equalities impacts or of any particular groups with protected characteristics who would be disadvantaged by our Fair Deal proposals?

Comments

The group thought all Fair Deal employers must have the same rules applied to them. If certain fair Deal employers were able to have differing rules (e.g. academies) their staff could potentially have less protection that could impact on their work force – which could be predominately female and lower paid.

Regulations

N/A

Chapter 3

Q11 – Is this the right approach? (points 48 to 53)

Comments

The group felt this is the right approach.

The group thought the cost of administration, legal and actuarial work should be rechargeable back to the outsourcing employer. This could be either in the Regulations or via SAB guidance.

Regulations

N/A

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Q12 – Do the draft regulations effectively achieve our aims?

Comments

The group thought the draft regulations broadly achieved the aims.

Regulations

Regulation 4(11) (b) the words: “from the date of transfer” to be added at the end of the current draft.

Regulation 4 (12) could be made clearer to state the assets and liabilities relate to the scheme.

The group thought the regulation already in place in the Northern Ireland regulations could be applied as follows;

The regulation in relation to recovering monies from an external body is regulation 68 (8) of The Local Government Pension Scheme Regulations (Northern Ireland) 2014 (SRNI 2014 No. 188) and is as follows:

(8) Where inherited liabilities are attributable to a guarantor or any other person which is not an employing authority, at the direction of the Committee, the actuary shall calculate such amount which in the actuary's opinion such a guarantor or other person that is not an employing authority should pay by reason of its assumption of responsibility for these inherited liabilities.

Q13 – What should guidance issued by the Secretary of State state regarding the terms of assets and liability transfers?

Comments

The group had no views but consideration of fairness to the overall funding position of the Fund is required. For example a Fund may not wish to pick up a large debt from another Fund.

The group thought actuarial input was needed to answer this question in detail.

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Regulations

N/A

As requested in the consultation document, my details are as follows;

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Yours sincerely

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