



The Transfer of Employment (Pension Protection) (Amendment) Regulations 2013

A response to The Department for Work and Pensions

Introduction

NEST welcomes the opportunity to respond to the consultation document *The Transfer of Employment (Pension Protection) (Amendment) Regulations 2013* published on 25 February 2013 by the Department for Work and Pensions (DWP). The comments contained in this response relate to the clarification of the policy intention of the *Transfer of Employment (Pension Protection) Regulations 2005*.

NEST is the scheme established by government as part of the reforms to the UK pension system. It's designed to make it easy for employers to meet their new workplace pension duties that started to be introduced in October 2012.

The aim of NEST is to provide a high-quality low-cost workplace pension scheme to low and moderate earners. In addition, NEST is available to all employers to meet their duties. A key factor for us when considering our response has been the need to achieve a level playing field between different types of pension schemes.

We firmly believe that it's important any obstacles that hinder employers in meeting their workplace pension obligations need to be reviewed by DWP and clarity provided. In addition, we're also keen to ensure that we're treated equally to other automatic enrolment providers to ensure that there's good customer choice when selecting a provider. The current legislation related to TUPE transfers gives rise to some ambiguities for trust-based schemes such as NEST which do not apply to group personal pension schemes (GPPs).

Having considered the proposals we're strongly in agreement with the approach the DWP is taking. However, we believe that a few tweaks to the draft regulations need to be made, which are outlined within this response in detail.

In this document we use the term NEST to refer to the scheme's legal name, the National Employment Savings Trust. We sometimes also use it to refer to the scheme's Trustee, the National Employment Savings Trust Corporation.

This paper is being submitted publicly by NEST and we're happy to discuss any aspect of it. If you have any questions please get in touch with us on the below contact details.

Email: michael.desouza@nestcorporation.org.uk

Telephone: **0207 940 8519**

Post: **Michael De Souza
NEST Corporation Policy and Legislation Team
Second Floor
St Dunstan's House
201-211 Borough High Street
London
SE1 1JA**

Background

In July 2012 the Pensions Act 2008 and the *Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 S.I. 772* came into force. These regulations require employers to enrol their eligible employees into a qualifying workplace pension scheme if they're not already in one and make minimum contributions. Between July 2012 and September 2017, the total minimum contributions will be 2 per cent of qualifying earnings, increasing to 5 per cent for the period between October 2017 and September 2018 and 8 per cent from October 2018.

The concern is that the requirement of a minimum level of employer contributions may lead to unintended consequences due to its interaction with provisions of the 2005 TUPE regulations. This provision requires an employer to match employee contributions to a maximum of 6 per cent if the transferee scheme is a defined contribution (DC) occupational pension scheme.

Giving transferring employees the right to choose the level of their own contributions could lead to higher pension contributions for the transferee employer, because the employee contributions must be matched by the employer. For example, a transferor employer could automatically enrol its employees in an occupational DC or a stakeholder scheme with initial minimum contributions made up of a 1 per cent employer contribution and a 1 per cent employee contribution. However, if during the initial phasing period employees are transferred under the terms of the 2005 TUPE regulations, the transferee employer could be required to pay contributions at the rate of up to 6 per cent.

This would lead to the transferred employees being placed in a more favourable position than they would have been in had they remained with the transferor. It also potentially puts them in a more favourable position than their peers in the transferee's scheme, which could lead to a two-tier workforce.

In order to address this concern the government is proposing that transferee employers will be able to satisfy the 'relevant contributions' provisions of the 2005 TUPE regulations by matching the contributions paid by the transferor employer immediately prior to the transfer. This would serve as an alternative to matching the level of contributions chosen by the employee up to 6 per cent. It would be for transferee employers to decide how they meet their pension obligations. This offers greater flexibility for employers, allowing a wider effective choice of pension provider but no increase in the actual cost of pension provision.

Concerns

NEST's concerns regarding employer choice

Following a TUPE transfer the transferee employer is typically required to offer and potentially provide a significantly more generous pension benefit than either:

- the transferee employer pays for its existing workforce, or
- the transferor employer paid for its employees prior to the transfer.

A TUPE transfer in this context is one whereby the transferor employer operates a DC occupational pension scheme to which the transferor contributes significantly more than the minimum amount required under the automatic enrolment legislation, based on qualifying earnings and not basic pay. We're also assuming that the transferee employer pays minimum contributions as required under the automatic enrolment legislation for their existing workforce.

The effects of this are threefold.

- This could create a two-tier workforce. That's because the TUPE rights apply only to employees who are transferred to the transferee employer. The transferee employer is not obliged to provide the same level of contributions in respect of its existing employees.
- The transferee employer could be obliged to pay higher pension contributions than that previously payable by the transferor employer. For example, in situations where the employee's contributions are more than that of the employer's.
- The TUPE legislation imposes a higher pension contribution requirement than the minimums required under the automatic enrolment legislation.

As this issue affects DC occupational pension schemes but not GPPs, we're concerned that employers who are otherwise committed to joining NEST could be deterred, since this is a material disincentive for some employers to choose NEST. However, this issue is not limited to NEST and would affect all occupational trust-based arrangements. Employers who could be particularly affected are those who operate a business model based on:

- the creation or termination of franchises
- business mergers and demergers
- creation and termination of outsourcing arrangements
- internal restructuring within corporate groups, excluding internal restructuring purely within an employer group, which is exempt.

GPPs are not affected in the same way if one of the employers in the above categories decides to use a GPP arrangement instead of NEST to meet its employer duties. If an employer subsequently arranges a business transaction to which TUPE applies, this employer (the transferor) will have comfort that the transferee need only provide exactly the same entitlement, with no separate obligation to match contributions — potentially up to 6 per cent of basic pay.

This is a consideration affecting many large employers who must choose which pension arrangement to use to satisfy their automatic enrolment and other employer duties. Any employer whose business model relies on any of the transactions above will want to take steps to ensure that, notwithstanding automatic enrolment, any potential TUPE transactions in the future will remain as attractive as possible to the transferee.

For the reasons explained above this will not be the case where NEST and other occupational pension schemes are used. This feature can therefore sway the balance of the employer's choice in favour of using a GPP arrangement. That's because this will allow the employer to continue to operate their current business model unhindered by unexpected potential commercial implications in the day-to-day running of their business.

On this basis we feel strongly it's important to support the proposals in this consultation, as the changes will create a level playing field for all providers. This ultimately means that NEST is not disadvantaged in this area when employers come to select an occupational scheme or a GPP in order to meet their duties.

NEST's concerns on the draft regulations

We're pleased that the DWP has issued this consultation and are proposing to amend the wording of the relevant regulation.

The rewording of point (1C) is welcome as it means that if an employee is only paying minimum contributions in their existing employment then when they transfer the new employer is only required to match what they were previously paying. However, the new employer would have the option of offering higher contributions up to 6 per cent if they wished.

However, having reviewed point (1D) we're concerned that the proposed wording does not fully meet the original policy intention and therefore may not actually materially alter the current position.

Point (1D) states: *"This paragraph is satisfied if, subject to paragraph (1E), the transferee's contributions are at least equal to the contributions made by the employee provided the amount of the employee's contributions are permitted under the scheme rules"*.

However, paragraph 7 of the actual consultation states:

"We believe that the wording of the 2005 Regulations does not clearly and unambiguously set out the original policy intent as there is nothing that explicitly gives the member the right to choose their rate of contribution".

In our view the amended regulation does not achieve this policy intent. The regulation appears to only allow the employee to make contributions if they're permitted to under the scheme rules. They may not be permitted to and this would prevent an employee making a 6 per cent contribution to get the 6 per cent match.

On this basis we'd recommend amending this draft regulation to make it clear that the receiving scheme rules must allow an employee to make contributions up to 6 per cent.

Conclusion

We welcome and support the DWP in addressing the issues contained within the consultation document. In addition, we believe that the clarification strengthens the original policy intent.

However, we urge the DWP to take into account the comments on the draft regulations to ensure a level playing field is created for all providers of pension provision. This in turn will support the aims and objectives of automatic enrolment.

We're happy to discuss this response with the DWP in further detail if that's required.