

Your NHS Pension Choice Employers Newsletter

November 2009

Issue 5

Newsletter for all NHS Chief Executives, Payroll Managers and Pensions Officers, Directors of Finance and of Human Resources, Direction Bodies, all GP Practices, all Out of Hours Providers, SHA Choice Leads Trade Unions.

Dear Colleagues

The following information is being sent to you on behalf of the Department of Health and should be brought to the attention of relevant personnel, including all managers involved in the contracting of services, which involves TUPE or TUPE like transfers of staff to employers unable to offer NHS Pension Scheme membership.

Yours sincerely



Ian Merga

Choice Communications and Stakeholder Manager



Department of Health Statement on TUPE and the NHS Pensions Choice Exercise

Purpose

1. The Department of Health wrote to all employers and Strategic Health Authority (SHA) workforce Leads on 4 August 2009 and asked that any staff who are part of a TUPE¹ or TUPE like transfer where their last day of NHS service would be on or after 1 October 2009 are identified as early as possible and details sent to NHS Pensions.
2. The purpose of this note is to:
 - i) encourage employers to review their TUPE timetable so that they are able to ensure that staff, who decide to opt-in to the Pension Choice Exercise (PCE), have sufficient time to do so before their employment is transferred outside the NHS to an employer, which cannot offer membership of the NHS Pension Scheme to its staff (see Annex A)
 - ii) explain that in exceptional circumstances, the Department of Health will exercise discretion and allow staff to remain in the NHS Pension Scheme (see paragraph 7)
 - ii) remind employers that the production of personalised Choice Statements is entirely dependent on 'clean' pension data free from errors and anomalies (paragraphs 8, 9 and 10)

Timetable for TUPE transfers and the Pension Choice Exercise

3. Employers should ideally allow at least 6 months in which to carry out their obligations under the PCE during the TUPE process.
4. We are however aware that for some employers, the TUPE transfer may be well advanced and transfers outside the NHS may take place before staff who opt-in to PCE have time to participate in it.
5. We appreciate that there may be important contractual and service delivery considerations to think about. As part of these deliberations, we strongly encourage employers to reflect carefully on their disclosure obligations under PCE. Employers should bear in mind that some Scheme members would choose to move to the 2008 Section of the Scheme. If there is insufficient time in the TUPE process to allow staff to opt-in to the PCE and then have up to 3 months to consider their Choice decision, employers will need to consider very carefully the risks of proceeding with the transfer without adjusting the transfer date. The risk here is that staff could bring a challenge because they believe they have been disadvantaged in terms of their future pension rights.

Please note, opting-in to the PCE enables TUPE staff to decide if they want to receive their personalised Choice Statement before their employment is transferred.

¹ Transfer of Undertaking (Protection of Employment) Regulations 2006

Staff should read all the information given to them before making this decision. It should not be inferred that all TUPE staff must opt-in to the PCE, (or that by opting-in they will choose to move to the 2008 Section) each decision is personal.

6. A table, which illustrates the interaction between disclosure requirements under the PCE and TUPE transfers, is at **Annex A**.

Retaining Short-Term Temporary Membership of the NHS Pension Scheme after Transfer

7. If following discussions with the new employer, local trades union representatives and staff, the NHS employer is unable to delay the transfer date, the Department of Health will exceptionally exercise discretion and allow the new employer to operate the NHS Pension Scheme up to and including **31 March 2010 only; by virtue of a time limited Direction**.
- 7.1 We would expect any decision regarding the application for a time limited Direction to follow discussions with those leading the transfer for the NHS, the new employer and local trades union representatives.
- 7.2 If all parties agree on extending membership of the NHS Pension Scheme so that staff have sufficient time to decide whether to participate in the PCE, the new employer should email Richard Parr as early as possible at: Richard.Parr@dh.gsi.gov.uk . Richard will provide further detail about the application process when a time limited Direction is sought.
- 7.3 Time limited Directions will only be granted where extension of the TUPE transfer date is problematic.

Before the TUPE transfer, NHS employers must ensure that:

- i) staff subject to TUPE or TUPE like transfers have received the Choice payslip leaflets provided by NHS Pensions for all staff (not just Scheme members) distributed with May pay slips, copies of 'Your NHS Pension Choice Guide' and the 'Your NHS Pension Choice DVD'.
- ii) staff have received the PCE Opt-In form and the TUPE fact sheet

The new employer (not the NHS employer) must apply to NHS Pensions for a time limited Direction

- i) a time limited Direction will apply to members of the NHS Pension Scheme who are subject to a TUPE or TUPE like transfer
- ii) the new employer will need to provide NHS Pensions with the names and National Insurance numbers and job titles of staff to whom the time limited Direction will apply
- iii) transferred staff will be required to complete special application forms in order to continue membership of the NHS Pension Scheme

- iv) the new employer will be required to pay the appropriate level of employer and employee contributions over to NHS Pensions and ensure that accurate membership records are collated.
- v) any time limited Direction will end automatically
- vi) from **1 April 2010**, transferred staff must have immediate access to the new employer's pension scheme, which is comparable to the 1995, or 2008 Section of the NHS Pension Scheme

Pension Data

- 8. The importance of NHS employers ensuring that NHS Pensions have 'clean' pension data' for their staff cannot be over-emphasised. Nic Greenfield, Director of Pay, Pensions and non Medical Regulations at the Department of Health, has written to and reminded SHA Workforce Directors about the NHS Pensions Data Cleanse Strategy on 31 December 2008 and again on 21 September 2009...Spreadsheets documenting the status of pension records by region have also been circulated to SHA Workforce Directors.
- 9. The production of personalised Choice Statements is dependent on pension data, which is free from any errors, omissions or anomalies. The time it might take to resolve pension data problems, could seriously affect your TUPE timetable and mean that the transfer is further delayed whilst NHS Pensions and employers work to resolve the problems.
- 10. If you are uncertain about the state of the pension records you hold for your staff, or you would like updated information about the data cleanse strategy in your region, please contact NHS Pensions at the following email address:
atacleanse@nhspa.gov.uk

Yours sincerely

Angie Walsh – Angie.Walsh@dh.gsi.gov.uk
Workforce Directorate
Department of Health

Annex A NHS Pension Choice Exercise and the Process for TUPE Transfers

The table below shows a process for TUPE transfers including the required steps associated with the Pension Choice Exercise² effective from **1 October 2009**. The table illustrates our understanding of the TUPE process and how, in parallel, employers are able to meet their disclosure obligations under the Pension Choice Exercise (PCE). The suggested timetable is however advisory.

Time	NHS	Contractor	Employees
6 + months (before effective date of transfer)	<p>i) Determine service to be contracted Inform and consult with staff representatives: Draw up Invitation to Tender (ITT) which should include the requirement that broad comparability must take into account the fact that the NHS Pension Scheme (NHSPS) has a 1995 Section for staff with a protected normal pension age (NPA) of 60 and a 2008 Section for staff with a NPA of 65.</p> <p>ii) Notify NHS Pensions of members by completing the special template available from their website at www.nhsbsa.nhs.uk/pensions</p> <p>iii) Raise Staff Awareness provide staff with “Your NHS Pension Choice Guide” and, “Your NHS Pension Choice DVD” available from local payroll departments and by ringing the Choice Help-line number: Telephone: 0300-123-1701 (the call centre is open Monday-Friday 8am-6pm) Email: choice.employers@prolog.uk.com</p>		

2. Employer Choice Newsletter August - 3/2009 available on the NHS Pension website at: <http://www.nhsbsa.nhs.uk/Pensions/2573.aspx>

Time	NHS	Contractor	Employees
6 months (before effective date of transfer)	<p>i) Issue ITT continue consultation with staff representatives</p> <p>ii) Provide NHS Pensions with a list of those staff who may be subject to transfer and the transfer date if not already provided. The list may change, but it is important that NHS Pensions have as much notice as possible so they can make the necessary preparations for providing accurate personalised comparison statements.</p> <p>iii) Review pension records for those who may be subject to transfer. Liaise with Tracy McMurtrie: tlmcmurt@nhspa.gov.uk at NHS Pensions to ensure pension data is 'clean' and 'Choice Ready'</p> <p>Please note, production of Choice Statements are dependent on 'clean' pension data</p>	<p>Determine how pension benefits will be provided for transferring staff (Passport, individual certificate, Directions³). Respond to ITT (including on pensions issues) consult with existing staff.</p> <p>Check Broad Comparability requirements, i.e. the NHS Pension Scheme has a 1995 section for staff with normal retirement age (NPA) of 60, and a 2008 section for staff with NPA of 65.</p> <p>Broad comparability testing is not dependent on the PCE, but is dependent on the contractor knowing which staff are in scope for the TUPE transfer.</p>	
	<p>iv) Continue to Raise Contractor Awareness about implications of the</p>	<p>May request information on PCE figures to assist in contract</p>	<p>Consult with transferring staff</p>

³ Organisations outside the NHS may be able to operate the NHS Pension Scheme under a Direction. Such organisations typically involve 'not for profit' organisations in the voluntary sector, e.g. hospices, care in the community or Social Enterprise. Eligible staff may be able to continue membership of the NHS Pension Scheme. Contractors will need to make enquiries with NHS Pensions as early as practicable in the contracting process. visit www.nhsbsa.nhs.uk/pensions

Time	NHS	Contractor	Employees
6 months (continued)	<p>PCE and that staff will need access to a comparable scheme based on the 1995 and 2008 Sections of the NHSPS, (see paragraph 5.6 of the Notes section below)</p> <p>v) if resources permit, arrange staff presentations about the PCE, i.e. opportunity for TUPE staff to watch the DVD and to raise any questions</p> <p>vi) Provide members with the special “NHS Pension Opt-In Form”. Ensure the Opt-In Forms are completed as quickly as practicable.</p> <p>vii) Provide members with the TUPE Fact Sheet “Compulsory transfer of employment under TUPE and implications for your NHS Pension Choice available from NHS Pensions telephone 0300 123 1701 or down load copies from their website http://www.nhsbsa.nhs.uk/Pensions/2573.aspx Members should complete the form and indicate if they want to participate in the PCE or not⁴.</p>	<p>pricing and provision of examples to members⁵.</p> <p>Provide examples of how staff might be affected pre and post transfer</p>	
6 months	Employees have three decisions to		

⁴ TUPE staff will be asked to ‘Opt Into’ the PCE. If members decide they do not want to ‘opt in’, they will be able to participate in the PCE if they return to the NHS within 5 years of the transfer.

⁵ Staff under age 60 on 1 October 2009, will receive one years membership in the 2008 section for one years membership in the 1995 section. Staff aged 60 or older on that date, will receive slightly less based on actuarial factors applicable from age 60 to age 72

Time	NHS	Contractor	Employees
(continued)	<p>make:</p> <p>Before Transfer</p> <ul style="list-style-type: none"> i) whether to 'opt- in' to the PCE ii) if they decide to 'opt- in' to the PCE, whether they wish to transfer their 1995 Section benefits to the 2008 section of the NHSPS <p>After Transfer</p> <ul style="list-style-type: none"> iii) separately after transfer, whether to leave their NHSPS benefits in the NHSPS OR transfer their NHSPS benefits to the new employer's pension scheme 		
5 months	<ul style="list-style-type: none"> i) Comparable pension arrangements inform staff of pension proposals post transfer. ii) Send the Opt-In Forms to NHS Pensions and inform NHS Pensions of any changes to the list of members in scope for the TUPE transfer. ii) Non return of the Opt- In Forms NHSP will assume the member has opted not to make a choice. They will therefore remain a member of the 1995 Section of the NHSPS. These members may be able to 	<p>May request more information on PCE figures, if there have been any changes to those staff in scope for the transfer</p> <p>Finalise/continue work to finalise pricing and transferees</p> <p>Finalise/continue work to finalise pension provision going forward</p>	<p>After considering information about the PCE</p> <ul style="list-style-type: none"> i) Decide if they wish to opt-in to the PCE by completing the Opt-In Form. The employer must return the form to NHS Pensions. ii) If they do not wish to participate, they must still complete the Opt In Form and the employers must return the form to NHS Pensions.
5 months (continued)			

Time	NHS	Contractor	Employees
	participate in the PCE if they return to the NHS within 5 years of the transfer.		
4 months	NHSP issue Choice Statements to members within 20 days subject to the state of the pension records, following receipt of their Opt In form i) inform NHSP on any changes to the list of members affected	Continue negotiations with contractor	<p>Receive information about the new employer's pension scheme from the contractor.</p> <p>In parallel, if they decide to 'opt-in' to the PCE:</p> <p>i) NHS Pensions will send them a personalised Choice Statement</p> <p>ii) they must decide if they wish to transfer their 1995 Section NHSPS benefits to the 2008 Section of the NHSPS OR</p> <p>iii) leave their NHSPS benefits in the 1995 Section of the NHSPS</p> <p>iv) they must complete the Opt-In Form so that NHS Pensions is aware of their decision. If they do not, they will remain a member of the 1995 Section of the NHSPS</p> <p>New Employer's Pension Scheme</p> <p>Following transfer, staff must decide:</p> <p>i) if they wish to transfer their accrued NHSPS benefits to the new employer's pension Scheme OR</p> <p>ii) if they wish to leave their accrued NHSPS benefits in the NHSPS</p>
2-3 months	Continue negotiations	Continue negotiations	Consider PCE options

Time	NHS	Contractor	Employees
1 month	<p>i) Provide contractor with information about those who will transfer from the 1995 to the 2008 Section of the NHSPS at least 10 business days before the transfer is due to take place</p> <p>ii) Finalise pricing and confirm final list of transferees at least 10 business days before the transfer is due to take place</p>	<p>Receive information on responses to the PCE</p> <p>If not already completed, finalise pricing and transferees</p> <p>If not already confirmed, finalise pension provision going forward</p>	<p>i) Confirm PCE decision</p> <p>ii) Receive confirmation of their Choice</p> <p>iii) Receive confirmation of pension provision going forward from the contractor</p> <p>iv) Post transfer, decide whether to transfer NHSP benefits to the new employer's scheme or leave benefits in the NHSPS</p>



The Fair Deal Guidance stipulates two main pension aspects, which need to be satisfied when there is a TUPE transfer of employment: 'broad comparability' and the availability of 'bulk transfer' terms. The Government Actuary Department (GAD) and NHS Pensions (a division of the NHS Business Services Authority), should be notified of the potential transfer when an advertisement is placed in the Official Journal of the European Union (OJEU) and agreement on bulk transfer methodology should be reached with GAD **before** preferred bidder stage is reached.

- 1.1 TUPE itself does not specify time limits on when consultation should start or how long it should last. It must however be "long enough before the transfer to enable consultation to take place". The Information and Consultation of Employees Regulations 2004 (see also the Transfer of Undertaking (Protection of Employment) Regulations 2006, which replaces the Transfer of Undertaking (Protection of Employment) Regulations 1981) make it clear that this process must be undertaken before a decision is made. This would mean consultation with staff and or trades union representatives must take place **before** the ITT is issued.
- 1.2 Government encourages the NHS to follow the I&C requirements – see:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/Browsable/DH_074315

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsProcurement/DH_093148)

2. **Choice Statements** - it is possible that some members who are offered Choice may not transfer. If members transferring do not take up the option of Choice, they will only receive Choice if they return to the NHS. The nature of that choice will depend on how long they have been out of the NHS. Those returning voluntarily within 5 years from an occupational scheme with a pension age of 60 will be able to re-join the 1995 Section or choose to move all benefits to the 2008 Section, those returning voluntarily after 5 years will join the 2008 Section for future service but if they left benefits deferred in the 1995 section, they will be able to choose whether to move these across to the 2008 Section or leave them in the 1995 Section). It is important therefore to ensure that staff that may be subject to transfer are confirmed as early as practicable and that NHS Pensions are made aware of any changes as soon as they occur.

Government Actuary Information on TUPE Transfers

3. Advice on the pensions issues that need to be addressed when staff transfer to a private sector contractor are given in the Guidance Note issued by HM Treasury in June 2004 "Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues" ("Fair

Deal”) (http://www.hm-treasury.gov.uk/d/pensions_bta_guidance_290604.pdf).

4. The process for handling pensions and bulk transfer issues as part of a competitive procurement exercise is also detailed in "Fair Treatment of Staff (v2 – April 2003): Chapter 13 of main NHS PFI Guidance (last updated 8 Feb 2007)" (http://www.dh.gov.uk/en/Procurementandproposals/Publicprivatepartnership/Privatefinanceinitiative/PFIguidance/DH_4071530)

Test One: Future Pension Rights: Broad Comparability

5. Transferring staff should be offered a broadly comparable pension by the new employer, both on initial transfer and at second and subsequent contracting rounds, (this applies also if staff are transferred back into the NHS under TUPE, as this is simply another transfer). At midnight on the day before the transfer, the Transferring Employee will cease to be a member of the NHSPS. One minute after midnight, unless they have chosen not to do so, the Transferring Employee will commence membership of the new 'broadly comparable' pension scheme.
 - 5.1 Broad comparability relates to the protection of transferring staff's **future** pension rights. The intention is to make sure that staff are entitled to future pension rights worth as much as they would have had, were they to have remained as National Health Service employees. For a pension scheme to be assessed as 'broadly comparable' to a public sector pension scheme it does not need to offer identical benefits. However, it must offer the same range of benefits with the same (or greater) overall value. The test of 'broad comparability' takes place at the date of transfer. At the time of transfer of employment, the new employer must provide a pension arrangement, which provides broadly comparable future service rights to those of the NHSPS, from which the employees will be transferring. There may need to be different sections within a 'broadly comparable' scheme to cover the new and updated NHS Pension Schemes.
 - 5.2 The first stage is therefore to assess the benefits within the pension scheme that each of the bidders is proposing to offer the transferring staff for broad comparability with NHSPS.
 - 5.3 The Bidder must clarify exactly what pension benefits they intend to offer to transferring staff and supply the GAD passport for these benefits if they currently hold one. If they do not hold a passport, they must apply to GAD for one, which must be valid at the date of transfer. The GAD passport is the document certifying broad comparability with the NHS Pension Scheme. Once broad comparability is achieved, the new scheme will be certified as broadly comparable for any transfer of members from the NHS Pension Scheme.

- 5.4 If the bidder already holds a GAD passport for the pension scheme on offer, then this certificate confirms that the pension benefits have already been analysed in detail and were considered to be broadly comparable for a wide range of staff who may potentially transfer from NHS employment.
- 5.5 For those bidders claiming to hold a GAD passport, please make sure you receive a copy of the certificate as soon as possible and check that none of the transferring staff fall within the exclusions mentioned in the passport. These are normally nurses with pre-1995 benefits, practitioners, and mental health officers. If there are any such staff potentially liable to be transferred then please tell us because special arrangements will need to be made for them.
- 5.6 The cost for a broad comparability application will be borne by the bidder. Summaries of the principal benefits offered by the old and new NHSPS sections are available on GAD's website (<http://www.gad.gov.uk/Documents/Occupational%20Pensions/Scheme%20Summaries/NHSPS%20for%20web%20November%202008.pdf>) so that the Bidder's advisors will be able to assess whether they are likely to be able to meet the broad comparability test.
- 5.7 **Before appointing a Preferred Bidder the Project must check the validity of their GAD passport and also check that none of the transferring staff fall within the exclusions mentioned in the passport. These are normally nurses with pre-1995 benefits, practitioners, and mental health officers. If there are any such staff potentially liable to be transferred then please advise GAD because special arrangements will need to be made for them.**

Test Two: Past Service Pension Rights: Bulk Transfer

6. In addition to having a scheme certified by GAD as broadly comparable to the NHSPS, transferred staff must be granted the option either to preserve their accrued NHSPS benefits within the NHSPS itself, or to transfer them under special terms to the new employer's scheme. However, transferred staff will not have to make a decision about this until several months after they have transferred. The introductory letter to staff should explain this in more detail.
- 6.2 The actual bulk transfer payment for those who choose to transfer their NHSPS benefits into the new employer's pension scheme is paid from the resources of NHSPS. However, the administrative costs of this exercise and GAD's fees are met by the NHS Contracting Agency instigating the bulk transfer.

