



Pensions Act 2004

2004 CHAPTER 35

PART 5

OCCUPATIONAL AND PERSONAL PENSION SCHEMES: MISCELLANEOUS PROVISIONS

Modification of pension rights

262 Modification of subsisting rights

For section 67 of the Pensions Act 1995 (c. 26) substitute—

“67 The subsisting rights provisions

- (1) The subsisting rights provisions apply to any power conferred on any person by an occupational pension scheme to modify the scheme, other than a power conferred by—
 - (a) a public service pension scheme, or
 - (b) a prescribed scheme or a scheme of a prescribed description.
- (2) Any exercise of such a power to make a regulated modification is voidable in accordance with section 67G unless the following are satisfied in respect of the modification—
 - (a) in the case of each affected member—
 - (i) if the modification is a protected modification, the consent requirements (see section 67B),
 - (ii) if it is not, either the consent requirements or the actuarial equivalence requirements (see section 67C),
 - (b) the trustee approval requirement (see section 67E), and
 - (c) the reporting requirement (see section 67F).
- (3) The subsisting rights provisions do not apply in relation to the exercise of a power—

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- (a) for a purpose connected with debits under section 29(1) of the Welfare Reform and Pensions Act 1999, or
 - (b) in a prescribed manner.
- (4) References in this section and sections 67A to 67I to “the subsisting rights provisions” are to this section and those sections.
- (5) Subsection (6) applies in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification where a member of the scheme dies before the requirements mentioned in subsection (2), so far as they apply in his case, have been complied with in respect of the modification if—
- (a) before he died he had given his consent to the modification in accordance with section 67B(4)(b), or
 - (b) before he died, or before the trustees of the scheme had become aware that he had died, the trustees had complied with section 67C(4)(a), (b) and (d) in respect of the modification in his case.
- (6) Any of the requirements mentioned in subsection (2), as it applies in respect of the modification—
- (a) which is satisfied in the case of the member, or
 - (b) which would have been satisfied in his case had he not died before it was satisfied,
- is to be taken to be satisfied in the case of any survivor of the member in respect of the modification.

67A The subsisting rights provisions: interpretation

- (1) In the subsisting rights provisions, each of the following expressions has the meaning given to it by the following provisions of this section—
- “regulated modification”
 - “protected modification”
 - “detrimental modification”
 - “affected member”
 - “subsisting right”
 - “scheme rules”.
- (2) “Regulated modification” means a modification which is—
- (a) a protected modification, or
 - (b) a detrimental modification,
- or is both.
- (3) “Protected modification” means a modification of an occupational pension scheme which—
- (a) on taking effect would or might result in any subsisting right of—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,
 which is not a right or entitlement to money purchase benefits becoming, or being replaced with, a right or entitlement to money purchase benefits under the scheme rules,

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- (b) would or might result in a reduction in the prevailing rate of any pension in payment under the scheme rules, or
- (c) is of a prescribed description.

For the purposes of paragraph (a), the reference in the definition of “money purchase benefits” in section 181(1) of the Pension Schemes Act 1993 to the widow or widower of a member of an occupational pension scheme is to be read as including any other survivor of the member.

- (4) “Detrimental modification” means a modification of an occupational pension scheme which on taking effect would or might adversely affect any subsisting right of—
 - (a) any member of the scheme, or
 - (b) any survivor of a member of the scheme.
- (5) A person is an “affected member”—
 - (a) in relation to a protected modification within paragraph (a) or (b) of subsection (3), if, at the time the modification takes effect, he is—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,and, on taking effect, the modification would or might affect any of his subsisting rights as mentioned in that paragraph,
 - (b) in relation to a protected modification within paragraph (c) of that subsection, if he is of a prescribed description, and
 - (c) in relation to a detrimental modification which is not a protected modification if, at the time the modification takes effect, he is—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,and, on taking effect, the modification would or might adversely affect any of his subsisting rights.
- (6) “Subsisting right” means—
 - (a) in relation to a member of an occupational pension scheme, at any time—
 - (i) any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or
 - (ii) any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules, and
 - (b) in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member.

For this purpose, “right” includes a pension credit right.

- (7) At any time when the pensionable service of a member of an occupational pension scheme is continuing, his subsisting rights are to be determined as if he had opted, immediately before that time, to terminate that service.
- (8) “Scheme rules”, in relation to a scheme, means—
 - (a) the rules of the scheme, except so far as overridden by a relevant legislative provision,

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- (b) the relevant legislative provisions, to the extent that they have effect in relation to the scheme and are not reflected in the rules of the scheme, and
 - (c) any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the requirements of Chapter 1 of Part 4 of the Pension Schemes Act 1993 (preservation of benefit under occupational pension schemes).
- (9) For the purposes of subsection (8)—
- (a) “relevant legislative provision” means any provision contained in any of the following provisions—
 - (i) Schedule 5 to the Social Security Act 1989 (equal treatment for men and women);
 - (ii) Chapters 2 to 5 of Part 4 of the Pension Schemes Act 1993 (certain protection for early leavers) or regulations made under any of those Chapters;
 - (iii) Part 4A of that Act (requirements relating to pension credit benefit) or regulations made under that Part;
 - (iv) section 110(1) of that Act (requirement as to resources for annual increase of guaranteed minimum pensions);
 - (v) this Part of this Act (occupational pensions) or subordinate legislation made or having effect as if made under this Part;
 - (vi) section 31 of the Welfare Reform and Pensions Act 1999 (pension debits: reduction of benefit);
 - (vii) any provision mentioned in section 306(2) of the Pensions Act 2004;
 - (b) a relevant legislative provision is to be taken to override any of the provisions of the scheme if, and only if, it does so by virtue of any of the following provisions—
 - (i) paragraph 3 of Schedule 5 to the Social Security Act 1989;
 - (ii) section 129(1) of the Pension Schemes Act 1993;
 - (iii) section 117(1) of this Act;
 - (iv) section 31(4) of the Welfare Reform and Pensions Act 1999;
 - (v) section 306(1) of the Pensions Act 2004.
- (10) For the purposes of this section—
- (a) “survivor”, in relation to a member of an occupational pension scheme, means a person who—
 - (i) is the widow or widower of the member, or
 - (ii) has survived the member and has any entitlement to benefit, or right to future benefits, under the scheme rules in respect of the member, and
 - (b) a modification would or might adversely affect a person’s subsisting right if it would alter the nature or extent of the entitlement or right so that the benefits, or future benefits, to which the entitlement or right relates would or might be less generous.
- (11) In the subsisting rights provisions, in relation to—
- (a) the exercise of a power to modify an occupational pension scheme to which the subsisting rights provisions apply, or

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(b) a modification made, or to be made, in exercise of such a power, references to “the scheme” are to be read as references to the scheme mentioned in paragraph (a).

67B The consent requirements

- (1) References in the subsisting rights provisions to the consent requirements, in respect of a regulated modification, are to be read in accordance with this section.
- (2) The consent requirements apply in the case of an affected member—
 - (a) if the modification is a protected modification;
 - (b) if it is not a protected modification, unless the actuarial equivalence requirements apply in his case.
- (3) The consent requirements consist of—
 - (a) the informed consent requirement (see subsection (4)), and
 - (b) the timing requirement (see subsection (6)).
- (4) The informed consent requirement is satisfied in the case of an affected member if before the modification is made—
 - (a) the trustees have—
 - (i) given him information in writing adequate to explain the nature of the modification and its effect on him,
 - (ii) notified him in writing that he may make representations to the trustees about the modification,
 - (iii) afforded him a reasonable opportunity to make such representations, and
 - (iv) notified him in writing that the consent requirements apply in his case in respect of the modification, and
 - (b) after the trustees have complied with paragraph (a)(i), (ii) and (iv), the affected member has given his consent in writing to the modification.
- (5) If—
 - (a) the modification is not a protected modification, and
 - (b) before the modification is made the trustees notify an affected member in writing that—
 - (i) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but
 - (ii) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification,

the trustees are to be taken to have complied with subsection (4)(a)(iv) in respect of him.
- (6) The timing requirement is satisfied in the case of an affected member if the modification takes effect within a reasonable period after the member has given his consent to the modification in accordance with subsection (4)(b).

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67C The actuarial equivalence requirements

- (1) References in the subsisting rights provisions to the actuarial equivalence requirements, in respect of a detrimental modification which is not a protected modification, are to be read in accordance with this section and section 67D.
- (2) The actuarial equivalence requirements apply in the case of an affected member only if—
 - (a) the modification is not a protected modification, and
 - (b) the trustees of the scheme determine that they are to apply in his case.
- (3) The actuarial equivalence requirements consist of—
 - (a) the information requirement (see subsection (4)),
 - (b) the actuarial value requirement (see subsection (5)), and
 - (c) the actuarial equivalence statement requirement (see subsection (6)).
- (4) The information requirement is satisfied in the case of an affected member if before the modification is made the trustees have taken all reasonable steps to—
 - (a) give him information in writing adequate to explain the nature of the modification and its effect on him,
 - (b) notify him in writing that he may make representations to the trustees about the modification,
 - (c) afford him a reasonable opportunity to make such representations, and
 - (d) notify him in writing that the actuarial equivalence requirements apply in his case in respect of the modification.
- (5) The actuarial value requirement is satisfied in the case of an affected member if before the modification is made the trustees have made such arrangements, or taken such steps, as are adequate to secure that actuarial value will be maintained.
- (6) The actuarial equivalence statement requirement is satisfied in the case of an affected member if the trustees have, within a reasonable period beginning with the date on which the modification takes effect, obtained an actuarial equivalence statement relating to the affected member in respect of the modification.
- (7) For the purposes of subsection (6) “actuarial equivalence statement” means a statement in writing which—
 - (a) is given by—
 - (i) the actuary appointed in relation to the scheme under section 47(1)(b), or
 - (ii) a person with prescribed qualifications or experience or who is approved by the Secretary of State, and
 - (b) certifies that actuarial value has been maintained.
- (8) For the purposes of subsections (5) and (7) as they apply in relation to an affected member, actuarial value is maintained if the actuarial value, immediately after the time at which the modification takes effect, of the affected member’s subsisting rights is equal to or greater than the actuarial value of his subsisting rights immediately before that time.

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67D The actuarial equivalence requirements: further provisions

- (1) This section applies for the purposes of section 67C.
- (2) Where—
 - (a) the information requirement has been satisfied in the case of an affected member in respect of a proposed modification (“the original modification”),
 - (b) before the trustees have made a determination, or given their consent, for the purposes of section 67E(1) in relation to the original modification, the original modification has been revised, and
 - (c) the modification as so revised (“the revised modification”) does not differ from the original modification in any material respect,the information requirement is to be taken to have been satisfied in relation to the revised modification.
- (3) The trustees are to be regarded as having taken all reasonable steps to notify an affected member as mentioned in section 67C(4)(d) in respect of a modification if they have taken all reasonable steps to notify him in writing that—
 - (a) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but
 - (b) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification.
- (4) Any calculation for the purposes of section 67C of the actuarial value of an affected member’s subsisting rights at any time must conform with such requirements as may be prescribed.
- (5) Requirements prescribed by regulations under subsection (4) may include requirements for any such calculation to be made in accordance with guidance that—
 - (a) is prepared and from time to time revised by a prescribed body, and
 - (b) if the regulations so provide, is approved by the Secretary of State.
- (6) Nothing in subsections (6) and (7) of section 67C precludes actuarial equivalence statements relating to—
 - (a) two or more affected members, or
 - (b) affected members of any particular description,in respect of a modification being given in a single document.

67E The trustee approval requirement

- (1) For the purposes of section 67(2)(b), the trustee approval requirement is satisfied in relation to the exercise of a power to make a regulated modification if—
 - (a) the trustees of the scheme have determined to exercise the power to make the modification, or
 - (b) if the power is exercised by another person, the trustees have consented to the exercise of the power to make the modification,

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and the making of the determination, or giving of consent, complies with subsections (2) and (3).

- (2) The trustees must not make a determination, or give their consent, for the purposes of subsection (1) unless, in the case of each affected member—
 - (a) if the modification is a protected modification, the informed consent requirement is satisfied (within the meaning of section 67B), or
 - (b) if it is not a protected modification—
 - (i) the informed consent requirement is satisfied, or
 - (ii) the information and actuarial value requirements are satisfied (within the meaning of section 67C),
 in respect of the modification.
- (3) The trustees must not make a determination, or give their consent, for the purposes of subsection (1) more than a reasonable period after the first consent given by an affected member under section 67B(4)(b) in respect of the modification was given.

67F The reporting requirement

- (1) For the purposes of section 67(2)(c), the reporting requirement is satisfied in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification if the trustees have, in accordance with subsection (2)—
 - (a) notified each affected member in whose case the consent requirements apply in respect of the modification, and
 - (b) taken all reasonable steps to notify each affected member in whose case the actuarial equivalence requirements apply in respect of the modification,
 that they have made a determination, or given their consent, for the purposes of section 67E(1) in relation to the exercise of the power to make the modification.
- (2) The trustees must give (or, where the actuarial equivalence requirements apply, take all reasonable steps to give) the notification—
 - (a) within a reasonable period beginning with the date of the determination or giving of consent mentioned in subsection (1), and
 - (b) before the date on which the modification takes effect.

67G Powers of the Authority: voidable modifications

- (1) Subsection (2) applies in relation to a regulated modification made in exercise of a power to which the subsisting rights provisions apply which is voidable by virtue of—
 - (a) section 67(2), or
 - (b) section 67H(3).
- (2) The Authority may make an order declaring that subsection (6) applies in relation to the regulated modification.
- (3) An order under subsection (2) relating to a regulated modification may also declare that subsection (6) applies in relation to—

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- (a) any other modification of the scheme made by the exercise of the power mentioned in subsection (1), or
 - (b) the grant of any rights under the scheme (whether by virtue of the attribution of notional periods as pensionable service or otherwise) in connection with the regulated modification.
- (4) An order under subsection (2) relating to a regulated modification must specify the affected member or affected members or description of affected members in respect of whom subsection (6) applies (“the specified persons”).
- (5) An order under subsection (2) relating to a regulated modification may also—
- (a) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of giving effect to the order;
 - (b) declare that subsection (7) applies in relation to anything done by the trustees after the time at which the modification would, disregarding the order, have taken effect which—
 - (i) would not have contravened any provision of the scheme rules if the modification had taken effect at that time, but
 - (ii) as a result of the modification being void to any extent by virtue of the order, would (but for that subsection) contravene such a provision.

This is without prejudice to section 174(3).

- (6) Where the Authority make an order declaring that this subsection applies in relation to a modification of a scheme, or the grant of any rights under the scheme, the modification or grant is void to the extent specified in the order, and in respect of the specified persons, as from the time when it would, disregarding the order, have taken effect.
- (7) Where, by virtue of subsection (5)(b), the Authority make an order under subsection (2) declaring that this subsection applies in relation to anything done by the trustees, that thing is to be taken, for such purposes as are specified in the order, not to have contravened any provision of the trust deed or scheme rules.
- (8) An order under subsection (2) relating to a regulated modification, or other modification, of a scheme or the grant of any rights under the scheme may be made before or after the time at which the modification or grant would, disregarding the order, have taken effect.

67H Powers of the Authority to intervene

- (1) Subsection (2) applies where the Authority have reasonable grounds to believe that a power to which the subsisting rights provisions apply—
- (a) will be exercised, or
 - (b) has been exercised,
- to make a regulated modification in circumstances where the modification will be voidable by virtue of section 67(2).
- (2) The Authority may by order—
- (a) in a case within subsection (1)(a), direct the person on whom the power is conferred not to exercise the power to make the regulated modification;

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- (b) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of securing that any of the requirements mentioned in section 67(2) is satisfied.
- (3) A regulated modification made in exercise of a power to which the subsisting rights provisions apply is voidable in accordance with section 67G if—
 - (a) the exercise of the power contravened an order under paragraph (a) of subsection (2), or
 - (b) the trustees fail to comply with a requirement imposed by an order under paragraph (b) of that subsection relating to any exercise of the power to make the modification.

67I Subsisting rights provisions: civil penalties

- (1) Subsections (2) and (3) apply where a regulated modification is voidable by virtue of section 67(2).
- (2) Where the modification was made by the exercise of a power—
 - (a) by the trustees of the scheme, or
 - (b) by any other person in circumstances which do not fall within subsection (3),
 section 10 applies to any trustee who has failed to take all reasonable steps to secure that the modification is not so voidable.
- (3) Section 10 applies to any person other than the trustees of the scheme who, without reasonable excuse, exercises a power to make the modification if—
 - (a) the trustees have not given their consent, for the purposes of section 67E(1), to the exercise of the power to make the modification, or
 - (b) in the case of any affected member, the timing requirement is not satisfied (within the meaning of section 67B) in respect of the modification.
- (4) Where the trustees fail to comply with any requirement imposed, by virtue of subsection (5)(a) of section 67G, by an order under subsection (2) of that section, section 10 applies to any trustee who has failed to take all reasonable steps to secure such compliance.
- (5) Where a regulated modification is made by the exercise of a power in contravention of an order under section 67H(2)(a)—
 - (a) if the power is exercised by the trustees, section 10 applies to any trustee who has failed to take all reasonable steps to secure that the order was not contravened;
 - (b) section 10 applies to any other person who without reasonable excuse exercises the power in contravention of the order.
- (6) Where the trustees fail to comply with any requirement specified in an order under section 67H(2)(b), section 10 applies to any trustee who has failed to take all reasonable steps to secure such compliance.”

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Commencement Information

II S. 262 in force at 6.4.2006 in so far as not already in force by S.I. 2005/2447, art. 2(5), **Sch. Pt. 2**

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