

**EXPLANATORY MEMORANDUM TO
THE FRANCHISING SCHEMES AND ENHANCED PARTNERSHIP SCHEMES
(PENSION PROTECTION) (ENGLAND) REGULATIONS 2017**

2017 No. 1093

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Bus Services Act 2017 inserted new provisions into the Transport Act 2000 to provide certain local authorities with the powers to introduce bus franchising and enhanced partnership schemes. In both types of scheme there is a potential for contracts to be let to bus companies to provide local bus services, and for staff to be transferred from one operator to another. The new provisions make specific provision for the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to apply in these circumstances and for those persons to receive pension protection from the new employer. The details are set out in these Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Bus Services Act 2017 amended the Transport Act 2000 to make provision for local authorities to make franchising schemes and enhanced partnership schemes in connection with the provision of local bus services.

4.2 In particular, new sections 123X and 138S deal with situations where TUPE will apply to staff who are transferred between bus operating companies as a result of local service contracts being awarded under a franchising or an enhanced partnership scheme. Those sections make specific provision for Regulations to require that the pensions of transferring employees are protected so that they have the benefit of at least the same or comparable rights as they previously had.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of these Regulations is England.

6. European Convention on Human Rights

- 6.1 As these Regulations are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The Bus Services Act 2017 inserted new provisions into the Transport Act 2000 to provide certain local authorities with the powers to introduce bus franchising and enhanced partnership schemes. In both types of scheme there is the potential for contracts to be let to bus companies to provide local bus services, and for staff to be transferred from one operator to another.
- 7.2 Where a franchising scheme for local bus services is introduced, incumbent bus operators will be required to cease providing services in the area covered by the scheme. Local bus services will instead be put out to tender and provided under a local service contract between the authority and the operator winning the bid to run the franchised service.
- 7.3 An enhanced partnership scheme is a scheme under which a local authority (subject to notice and consultation requirements) specifies an area to which the scheme relates and introduces certain requirements as to the services to be provided. Route requirements can be agreed with operators which could, for example, place a limit on the frequency of services able to operate on a particular route. Should operators not be able to agree on how to provide services within this limit, the authority may be required to cancel registrations of local bus services and conduct a tendering exercise to award a contract or contracts for the services. However, the likelihood of this situation arising is low.
- 7.4 To ensure that the employment rights of employees are protected and that there is continuity of service, the new franchising and enhanced partnership scheme provisions provide that TUPE will apply where employees transfer from one employer to another as a result of contracts awarded under franchising or enhanced partnership schemes. The new provisions also include powers for Regulations to be made to ensure that transferring employees have their pensions protected and are able to acquire pension benefits with the new employer that provide the same rights as they previously had or count as being comparable to, or better than, their previous rights.
- 7.5 These Regulations set out further details. In particular, they:
- set out the duties of local authorities and operators in securing pension protection for transferring employees;
 - set out the conditions to be satisfied for the pension provision made by the new operator to count as being ‘broadly comparable’, including the provision of any compensation payment in exceptional circumstances where it is not practicable for the new operator to provide a comparable pension;
 - set out the requirements for the new bus operator to procure a pensions statement from an actuary certifying that in accordance with HMT guidance of broad comparability of pensions, they are of the opinion that the new operator’s pension scheme contains pension rights that are in accordance with these Regulations.

Consolidation

7.6 The Bus Services Act 2017 amends Part 2 of the Transport Act 2000.

7.7 These Regulations do not amend any existing Regulations.

8. Consultation outcome

8.1 A six-week consultation exercise was held between 8th February and 21st March 2017 on these Regulations. The consultation sought views from a wide range of bodies, including the bus industry, local authorities and passenger representatives. This was supplemented by three half-day workshops to enable key stakeholders to ask questions about the Regulations before responding to the consultation.

8.2 Over 70% of respondents agreed with the proposals for protecting an employee's pension rights. There were few comments about the detail of the draft Regulations themselves. However, a number of respondents queried whether the Regulations should refer to the Local Government Pension Scheme, making it clear that new employers should be given the right to apply for 'Admitted Body Status' to provide continuity for employees. The Government considered these comments but did not feel it was appropriate to refer to specific pension schemes in these Regulations.

8.3 A small number of respondents queried the provision enabling new employers to provide employees with compensation in 'exceptional circumstances' where it would not be reasonable or practicable for the new employer to provide a 'broadly comparable' pension scheme. Others felt the draft Regulations required some finalisation, particularly with respect to updating references to relevant guidance documents that should be followed when assessing 'broad comparability'.

8.4 The Department included the 'exceptional circumstances' provision to balance the need for staff to be protected against concerns that the requirements to provide for particular types of pension schemes could act as a barrier to smaller operators bidding for franchise contracts. The Department has therefore retained this provision in the Regulations. The Department has updated the Regulations to reflect the latest available guidance on the assessment of 'broad comparability'.

8.5 A detailed Government response on the outcome from the consultation is available from the Department for Transport's website at - <https://www.gov.uk/government/publications/bus-services-bill-impact-assessments>.

9. Guidance

9.1 There is no relevant guidance relating to pension protection in the context of franchising schemes and enhanced partnership schemes that is not included in this Memorandum.

10. Impact

10.1 The impact on business, charities or voluntary bodies of these Regulations in particular will be dependent on whether or not they operate bus services in an area where a franchising scheme is introduced, or on a route which is subject to registration restriction as part of an Enhanced Partnership Scheme. There will be impacts on operators that become the new employers of transferred staff because such employers will have to provide pension protection for such staff, however, operators will be aware of these requirements when bidding for contracts, and also about the costs of hiring an actuary to verify employee pension rights that are to be secured on

transfer. We anticipate that the costs of providing pension statements will most likely be passed back to the local authority through the price that is contracted.

- 10.2 The impact on the public sector will be in the form of the duty placed on relevant local authorities to ensure that contracts are made on terms which secure the required pension protection, and in ensuring that new employers provide pensions statements to transferring staff. We anticipate that the costs of providing pension statements will most likely be passed back to the local authority through the price that is contracted. This is estimated to cost £4,000-£13,000 per local authority, and is dependent on the number of incumbent operators in the area where the authority implements its scheme.
- 10.3 These Regulations are part of a package of Regulations which enable authorities to set up franchising or enhanced partnership schemes for their local bus market. The overall impact on bus operators of franchising and enhanced partnership schemes will be dependent on the level of take-up of the powers, and the specific types of schemes pursued in local areas. Indicative analysis shows that the overall impacts on operators will be determined by a combination of factors, including changes in service quality and frequency, the level of on-road competition, and fare simplification.
- 10.4 The impact assessment prepared to accompany the Act was updated to take account of any additional impacts of the package of franchising Regulations, and can be found at <https://www.gov.uk/government/publications/bus-services-bill-impact-assessments>.

11. Regulating small business

- 11.1 These Regulations apply to activities that are undertaken by small businesses i.e. smaller bus operating companies. The impact on such smaller operators will be dependent on whether, or how, bus franchising or an enhanced partnership is implemented in the area in which they are operating.
- 11.2 A small and micro business assessment was conducted for bus franchising and enhanced partnership policies as a whole and forms part of the impact assessment prepared to accompany the Bus Services Act 2017. It sets out the potential impacts of the policies more broadly, and the actions taken to attempt to mitigate the impacts on small business. However, no specific action is proposed to minimise the regulatory burdens on small businesses of these Regulations. This is because these Regulations do not directly impose burdens on business. The Regulations set out the level of pension protection to be provided to employees that transfer, and any small business that decides to bid for a contract will be aware of the requirements and be able to take account of potential costs as part of their contract tender.
- 11.3 As part of the consultation exercise Department for Transport officials met with a number of small bus companies and organisations representing bus companies to gather their views.

12. Monitoring & review

- 12.1 Jesse Norman, Parliamentary Under Secretary of State for Transport, has made the following statement under section 28(2)(b) of the Small Business, Enterprise and Employment Act 2015.
- 12.2 “Having had regard to the Statutory Review Guidance for Departments published under section 31(3) of the Small Business, Enterprise and Employment Act 2015, in my view, it is not appropriate to make provision for review in the Franchising

Schemes and Enhanced Partnership Schemes (Pension Protection) (England) Regulations 2017. A review of these Regulations would be disproportionate, taking into account the economic impact of the Regulations on the activities of bus operators, and would be undesirable for the particular policy reasons set out below”.

- 12.3 Franchising schemes and Enhanced Partnership schemes are tools available to a local transport authority (“LTA”) to use to improve bus services in its area if it chooses to do so. Therefore the Department does not know how many such schemes will be created under the new provisions inserted by the Bus Services Act 2017; the adoption of Quality Partnership Schemes introduced under the 2000 Act was relatively small in number. Also, before a franchising scheme or an enhanced partnership scheme can be made an LTA must, under section 123E and 138F of the Transport Act 2000 respectively, consult operators providing local services in the area relating to the scheme. In addition, the LTA must set out full details of its plans for consulting on how well a franchising scheme is working once it is up and running and, in the case of enhanced partnerships, it must decide whether and on what basis the partnership arrangements are to be reviewed. Such schemes are not time limited and may exist for many years or even decades. A provision for regular five yearly review of the Regulations underpinning such scheme would be resource intensive and time consuming for the Department, LTAs and operators as information and data would have to be gathered regularly from many different bodies throughout England and then assessed by Departmental policy experts and analysts, with reports setting out the conclusions of the review having to be produced.
- 12.4 Furthermore, regularly reviewing these Regulations would adversely affect the achievement of the policy objective of securing LTAs’ and operators’ long term commitment to franchising schemes, or enhanced partnership schemes as the case may be, that are appropriate to their areas. For example LTAs may hesitate to enter into a long term financial commitment around infrastructure in a franchising scheme or an enhanced partnership scheme if they felt that every five years there was a high degree of uncertainty over the future of the scheme selected. For the same reason, operators might be reluctant to enter into financial commitments around for example, new or improved vehicles. This might result in a franchising scheme or an enhanced partnership scheme not being adopted at all or either type of scheme being adopted with a much less ambitious scope and consequently a smaller benefit being realised for local bus services.
- 12.5 The outcome of the implementation of the relevant provisions of the Bus Services Act 2017, and associated secondary legislation, will be assessed as part of the post-legislative scrutiny of that Act. A provision for review has not been included in the Regulations. As these Regulations will only apply where a local authority has implemented a franchising scheme, or been required to use the powers under an enhanced partnership scheme, a review of the effectiveness of the Regulations will be conducted once a number of such schemes have been introduced, or concerns are raised about the effectiveness of the Regulations by an authority that has implemented a scheme.

13. Contact

- 13.1 Paul Rhodes at the Department for Transport (Telephone 07773 233713 or email: paul.rhodes@dft.gsi.gov.uk) can answer any queries regarding the instrument.