

THE LOCAL GOVERNMENT PENSION SCHEME (BENEFITS, MEMBERSHIP AND CONTRIBUTIONS) (AMENDMENT) REGULATIONS 2008 (*benefit regulations*) as amended by the LGPS (AMENDMENT) REGULATIONS 2008

III Health benefits for LGPS Scheme members

Main questions answered

This CLG aide-memoire is intended to help practitioners apply the new ill health LGPS regulations and supports the LGPS Ill Health Statutory Guidance. This note does not replace the regulations and practitioners will want to seek their own legal advice as necessary.

Q. 1. Can ill health benefits be awarded if the member resigns?

No. Ill health retirement benefits are only awarded when the employer terminates the member's employment on the grounds that the member's ill-health or infirmity of mind or body, renders him permanently incapable of discharging efficiently the duties of his current employment and the member has a reduced likelihood of obtaining gainful employment (whether in local government or elsewhere) before his normal retirement age (Regulation 20(1)(b)).

3rd tier framework

Q2. Why is a 3rd tier needed?

All local authority employees who are members of the LGPS and leave their current employment because they are permanently incapable of their current job and cannot work immediately after they leave their local government job, require an ill health provision.

The ill health regulations provide a pension for those local authority employees whose employer terminates their employment because they are permanently incapable of it but either cannot work again before normal retirement age or are unlikely to work again within 3 years of leaving (1st and 2nd tiers).

The 3rd tier provides a pension for a member whose employer terminates their employment because they are permanently incapable of their current job but are judged capable of obtaining gainful employment within 3 years.

Q3. How is the 3rd tier benefit paid?

This will be a pension made up of the member's accrued benefits to the point that they left their local authority job. There will also be a lump sum if the member has pre 1 April 2008 membership and/or opts to commute some pension to a lump sum.

The 3rd tier Review

Q4. Why is there a review for the 3rd tier?

This benefit is an interim pension until the member returns to other work and is not payable if gainful employment is found. The 3rd tier member is required to inform the former employer if work is found and payments will stop if the employer considers that this is gainful employment as defined in the regulations. The employer needs to check the 3rd tier member's employment status where payments have continued for 18 months. Payments will stop if gainful employment has been obtained. If it is found that the member is not in gainful employment at the review, there is a requirement for the employer to check the latest medical position.

Q5. How many times does the employer undertake a 3rd tier review?

The employer is only required to undertake a review once when payments have continued for 18 months. The employer is not required to undertake a further review but they may decide to look at the case again in the light of the medical assessment at the review.

Q6. Is there a review for the 1st and 2nd tiers?

No

Q7. Who does the review?

The previous employer, or successor body, has to check the 3rd tier members' employment status if payments have continued for 18 months.

Q8. Why does an employer need to ask about pay and working hours the member may have at the review?

A 3rd tier member is not expected to work out themselves if they have obtained gainful employment as this is a matter for the employer. To help this process, the employer needs to know if the work obtained is actually paid employment and will need details of pay to check this. They also need to know how many hours the member is working each week and the terms of the contract so that they can establish whether gainful employment has been obtained as defined in Regulation 20 (14) of the benefits regulations ("gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months).

Q9. What happens if the person had obtained work when the employer conducts the review at 18 months?

The employers must stop payments if the work obtained is 'gainful employment' as defined in the regulations ("gainful employment" means paid employment for not less

than 30 hours in each week for a period of not less than 12 months). The employer must notify the administering authority without delay that payments should be stopped.

Q10. What happens if work was found some time before the 18 month review and the 3rd tier member failed to inform their previous employer?

The employer has powers to recover any overpayment. The date of return to gainful employment will determine the date payments should be stopped. Any payment made beyond the date of return to gainful employment will be regarded as an overpayment and can be recovered by the employer. Recovered payments should be paid without delay to the relevant pension fund.

Q11. If a 3rd tier member continues to be incapable of work at the point of the review, can benefits continue?

Yes, in certain circumstances. A further medical judgement would be needed and where the medical assessment justifies this, an employer would be able to award the enhanced 2nd tier benefit from the date of the decision to award the 2nd tier, or continue 3rd tier payments based on that medical assessment or until three years after the date of leaving employment. Payments would, of course, cease if gainful employment was found.

Q12. Can a 3rd tier member be considered for an enhanced retirement pension at the review?

Yes. Legislation provides that an uplift from a 3rd tier to a 2nd tier pension can be considered either at the review or at some other stage but this must relate to the condition that resulted in the 3rd tier award.

Stopping 3rd tier payments

Q13. Why are payments stopped after 3 years?

The duration of three years is consistent with the eligibility criteria where a member is judged capable of obtaining gainful employment within three years or, not capable of obtaining gainful employment within three years, for the 3rd and 2nd tiers respectively. The intention of a 3rd tier pension is a short term benefit to provide financial assistance until such time as gainful employment can be, or is, found. It is not the intention that a member whose medical condition requires payments beyond three years, should remain a 3rd tier member and the employer has powers to consider an enhanced 2nd tier pension at the 3rd tier review. Even after 3rd payments have been stopped a further determination can be made under Regulation 20 (11) (a) where the original medical condition justifies this.

Q14. Can 3rd tier payments be stopped regardless of whether a review has been undertaken or not?

No. Not without a previous review by the employer at 18 months as there is a requirement for an employer to undertake a review where payments have continued

for 18 months. It follows, therefore, that while 3rd tier payments will stop at three years if they are continuing at that point, they cannot be stopped at any point up to the three year threshold without an earlier review.

Q15. Does the employing authority have to notify the administering authority when payments stop?

Yes and promptly. The employing authority must notify the administering authority without delay when 3rd tier payments need to be stopped giving the reason i.e. that gainful employment has been found, or after the review when the member remains capable of gainful employment within three years, or when the payments need to stop because they have been paid for three years.

Certain protections for members

Q16. What if they leave their job on ill health grounds and are over aged 45?

For a person judged eligible for a 1st or 2nd tier enhancement, an employer will calculate the benefits under both the 1997 and the amended 2007 ill health regulations and the enhancement of prospective service for both calculations is at the 1/60th accrual rate. They will make a comparison of the calculations, and award benefits that are the greater of the two.

Q17. What about cases currently being considered where there may be uncertainty about which regulations would apply?

Under regulation 20 (15), transitional protections apply for determinations made before 1 October 2008 (even if the actual termination date is after 1 October) to provide that if the benefits payable to a member under the amended Reg 20 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall apply as if they were still in force. For all practical purposes, Regulation 27 of the 1997 Regulations and Regulation 20 of the Benefits Regulations 2007, as amended, both remain in force in the transitional period.

This means that the employer needs to consider whether the employee would be entitled to ill health benefits under Regulation 20 of the benefit regulations as amended by the LGPS (Amendment) Regulations 2008. The employer also needs to consider whether the member is entitled to ill health benefits under the 1997 Regulations. A calculation of any benefits payable, under the two sets of regulations, is made and any enhancement of prospective service for both calculations is at the 1/60th accrual rate. A comparison should then be made and the member is awarded the greater amount.

Until the end of September 2008, the ill health certificate to be completed by the independent registered medical practitioner will need to include questions about whether the member would meet the ill health definition in the LGPS Regulations 1997 as well as ill health questions relating to the Benefits Regulations 2007 (as amended).

For example, in the transitional period, a member who qualifies for a 3rd tier pension and would also qualify for an enhancement of 6 2/3 under the 1997 Regulations,

would receive a 1997 Regulation non reviewable, permanent pension with the enhancement calculated at 1/60th accrual.

Q18. If a member receives a retirement pension based on the 1997 regulations in the transitional period to 30 September 2008, but would have been entitled to a 3rd tier pension under the 2007 amended regulations, would their payments be reviewed?

No. The 1997 ill health regulations apply in all respects and there is no review.

Q19. Could a member joining post 1 April who has an ill health determination before 1 October, be eligible for an ill health award under the 1997 regulations?

Yes, if the qualifying period is satisfied. The 1997 regulations apply as if they are in force during the transitional period.

Q20. What if the person has to reduce their hours just before they leave work on ill health grounds?

- answer to follow -

Q21. What happens to a member who has always been employed part-time because of an existing ill health condition and is being considered for ill health retirement because of that ill health condition?

- answer to follow -

Need for Certification by Independent Registered Medical Practitioner qualified in occupation health medicine

Q22. Do all decisions regarding an ill health pension need a certification by an independent registered medical practitioner qualified in occupational health?

Yes, this includes decisions for those who have already left local government and are asking for early release of their pension. Regulation 31 of the *benefits regulations* requires this.

Q23. Can the independent doctor who made the medical assessment that resulted in a 3rd tier award, undertake the second medical assessment at the 18 month review if asked to do so by the employing authority?

Yes. The same doctor can sign the certificate that resulted in the first determination and at the 3rd tier review. This is because the provision to obtain a further certificate from the IMRP is under regulation 20(7)(b) which means that 56(1) of the LGPS administration regulations does not apply. There is, effectively, no requirement that the IRMP has to be able to certify at a 3rd tier review that they have not previously advised, given an opinion on, or otherwise been involved in the case.

Q24. Can a 3rd tier member whose payments have stopped ask for pension payments to resume if it relates to the condition that resulted in a 3rd tier award?

Yes, in certain circumstances but there is no future entitlement to 3rd tier payments. Regulation 20 (11) (a) permits a determination for a 2nd tier pension relating to the condition that resulted in 3rd tier payments subsequently merits such an award, and this is not time limited. A former 3rd tier member can apply for reconsideration of ill health payments and the employer will be required to seek a further independent medical assessment. Where the medical condition justifies it, the employer can agree to an enhanced 2nd tier retirement pension from the date of the 2nd tier determination.

Other relevant issues

Q25. Would a lump sum be payable again if a further determination to a 2nd tier pension is made?

No. A 3rd tier member whose benefits have stopped is a pensioner member with deferred benefits and, therefore, any future entitlement to retirement benefits would be a resumption of payments with an addition of a top up payment equivalent to 25% of their prospective service to normal retirement.

Q26. Can a 3rd tier member with suspended benefits ask for release of retirement benefits under Regulation 31 of the *benefits regulations* for an unrelated condition?

Yes. A 3rd tier pensioner member with deferred benefits is not precluded from applying under Regulation 31 as a result of a medical condition unrelated to the condition that resulted in 3rd tier payments, as the entitlement in Regulation 16 (1) would apply. A 3rd tier member, whose payments have been stopped, is precluded from resumed 3rd tier payments under regulation 20 (9). If the 3rd tier pensioner member was asking for release of suspended benefits as a result of the condition that resulted in the 3rd tier payment, an employer should consider whether there is eligibility for a 2nd tier pension under Regulation 20 (11) (a).

Q27. From what date does the administering authority make any payments payable under Regulation 31?

The member should notify the relevant employing authority that they want benefits to be released under regulation 31. The employing authority is required to obtain a certificate from an IMRP regarding the member's condition and whether it renders the member permanently incapable of their former local authority employment and whether they have a reduced likelihood of gainful employment (ie would now meet the qualifying test for tier 1 or 2 of Regulation 20). The employer should notify the administering authority to release benefits from the day the member asked or elected for these payments to be made if the medical condition justifies this.

Q28. Can a 3rd tier member be uplifted to the enhanced 2nd tier with a condition other than that which resulted in the ill health retirement?

No. The regulations are quite clear that it is the initial condition resulting in an ill health 3rd tier payment that should be considered when assessing a possible uplift to a 2nd tier pension.

Q29. Can the employee return to local authority work?

They are not expected to return to their previous job but could obtain another job in local government.

Q30. If a 3rd tier member returns to local government employment can the earlier membership resulting in a 3rd tier pension be aggregated with the new period of membership?

No. Regulation 20(10), requires that when benefits are stopped and the 3rd tier member subsequently becomes an active member of the LGPS, the earlier period of membership which resulted in 3rd tier benefits is not aggregated with the later active membership.

Q31. What happens if the member is unhappy with the employer's decision about an ill health retirement application?

A member, who has left local government employment but was not awarded an ill health retirement pension, can appeal against this decision by writing to the employing authority who made the decision and setting out the reasons for their disagreement with the decision, in accordance with Regulation 58 of the LGPS (Administration) Regulations 2008. Any appeal against the decision of the employing authority is required within 6 months of the date of the original decision.

Q32. The 3rd tier member has written to the former employer saying that they have a short term contract. How does the employer decide if the member has satisfied the gainful employment test?

It would be unreasonable for an employer to assume that a person is in gainful employment having notified them that they have just entered a short term contract of employment for, say, six months. Whether that contract will be renewed or not, would be pure conjecture and should not, therefore, fall to be considered. Even if a 3rd tier member had served two months of the six month contract, it follows that the definition of gainful employment has not been satisfied. Neither would it be reasonable to make any assumption that four months on, the contract might be reviewed for a further six months which could arguably bring it within the gainful employment definition.

A sensible way of proceeding would be to say that regulation 20(6)(a) would apply where notification was given that a short-term contract was renewed. Given that the first six month contract had already been served, and the new contractual requirement to work another 6 months had been entered into, it would be reasonable for the employer to take the view that the 12 month "gainful employment" period has been satisfied from the date of the new contract. In other words, taking short term contracts to try and avoid the 3rd tier pension being suspended may work in the short time, but once the total of the individual contracts spans a continuous 12 month

period, the definition of gainful employment would appear to be satisfied. The employer will wish to ask the 3rd tier member to let them know their employment status at the end of the period of the first short term contract.

The contract should stipulate the hours of employment and this should be straightforward if these are 30 or more in each week. Under some contracts, the hours may be variable and this may cause some difficulty in deciding whether, over the future, the 30 hour test is satisfied over a 12 month period. If employment was obtained some time ago, it should be possible to ascertain a pattern of working from the variable hours worked up to that point and to base a decision on that evidence. A better way forward would be to defer any decision until later in the employment when evidence about working hours has been established.

The view is also taken that the words “in each week” where they appear in the definition of “gainful employment” in regulation 20(14) means in each week throughout the 12 month period, rather than in each week where there is a contract of employment. Otherwise, the definition would be satisfied by a person taking just a one month contract of employment for 35 hours a week.

Q33. What happens if a member has an ‘added years’ contract?

Regulation 83 of the 1997 Regulations has been retained by the LGPS (Transitional Provisions) Regulations 2008. This means that a person with an added years contract will be deemed to have completed the purchase of the added years if they meet the definition of ill health retirement under regulation 27 of the 1997 Regulations. Therefore,

a) a member who meets the 1997 Regulations ill health definition but not the 2008 benefits regulation 20 definition, will get the added years contract bought out even though they will not be entitled to an ill health pension under the benefits regulations.

b) a member who does not meet the 1997 Regulations ill health definition but does meet the new definition in the benefits regulations will not get the added years contract bought out but will be entitled to an ill health pension under the benefits regulations

Q34. What happens if a member is paying Additional Regular Contributions (ARCs)?

- answer to follow -

Q35. Can a member receive his retirement benefits without retiring on ill health grounds if he is over 60 but would have been a 3rd tier member?

It is the employer who has to determine the reason for leaving. An employer may wish to consider not retiring the member on ill health grounds and, especially where protections permit the early release of unreduced retirement benefits, retire the employee under normal retirement.

Q36. What death grant is payable in respect of a 3rd tier pension?

If a 3rd tier member dies (either while in receipt of the 3rd tier pension or the 3rd tier pension is suspended), a death grant is payable under Regulation 35 of the benefits regulations. This would be 10 times the pension in payment (or the pension that would have been in payment but for the suspension) less the amount that has already been paid.

Q37. What do the terms mean in the regulations?

Unless defined in the scheme's regulations, words, terms and phrases are to be given their normal and everyday meaning, except where clarification or an explanation is given in the ill health statutory guidance.

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