

Explanatory Memorandum to The Firefighters' Pension Schemes and Compensation Scheme (Amendment) (Wales) Order 2024

This Explanatory Memorandum has been prepared by the Public Services and Welsh Language Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Firefighters' Pension Schemes and Compensation Scheme (Amendment) (Wales) Order 2024. I am satisfied that the benefits justify the likely costs.

Hannah Blythyn MS
Deputy Minister for Social Partnership
10 January 2024

PART 1

1. Description

1.1 This Order amends the Firefighters' Pension Scheme (Wales) 2007 and the Firefighters' Compensation Scheme (Wales) 2007. The purpose of this Order is to:

- extend the period during which persons who were employed in Wales as retained firefighters have access to a pension scheme;
- provide that firefighters who sustain injuries under certain types of secondary contracts, with the same fire and rescue authority, receive compensation awards which are commensurate with the level of their service and pay under their primary contract of employment.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

2.1 The Committee will wish to note that neither the Firefighters' Pension (Wales) Scheme Order 1992 nor the Firefighters' Compensation Scheme (Wales) Order 2007 was created bilingually, hence the form of the 2024 Orders amending those earlier orders. Welsh Ministers have determined that it would not be proportionate to revoke and remake the 1992 Order or the 2007 Order bilingually.

3. Legislative background

3.1 This Order amends the Firefighters' Pension Scheme (Wales) Order 2007 ("the 2007 Pension Scheme Order"), to extend the period during which persons who were employed in Wales as retained firefighters have access to the pension scheme set out in Schedule 2 to that Order. It also makes a consequential amendment to the Firemen's Pension Scheme Order 1992 ("the 1992 Order").

3.2 The amendments to the 2007 Pension Scheme Order are made by the Welsh Ministers under sections 34(1), (2) and (4), and 60(2) of the Fire and Rescue Services Act 2004 ("the 2004 Act"). The powers conferred by section 34 were conferred on the National Assembly for Wales so far as they apply to Wales by section 62 of the 2004 Act. They were transferred to the Welsh Ministers by virtue of section 162 of, and paragraphs 30 and 32 of Schedule 11 to, the Government of Wales Act 2006.

3.3 The amendments to the 1992 Order are made by the Welsh Ministers under section 26(1), (2) and (5) of the Fire Services Act 1947. That Act was repealed by the 2004 Act. But subsections (1), (2) and (5) of section 26 continue to have effect in relation to Wales for the purposes of the pension scheme set out in Schedule 2 of the 1992 Order, by virtue of article 3 of S.I. 2004/2918 (W. 257) and the Schedule to it. So far as the 2004 Act continues in force, the powers under section 26 as they relate to Wales have effect as if references to the Secretary of State were references to the

National Assembly for Wales, by virtue of article 2 of S.I. 2006/1672 (W. 160). Those functions were transferred to the Welsh Ministers by virtue of section 162 of, and paragraphs 30 and 32 of Schedule 11 to the Government of Wales Act 2006.

- 3.4 This Order also amends the Firefighters' Compensation Scheme (Wales) Order 2007 ("the 2007 Compensation Scheme Order"). The amendments make provision for cases where a firefighter sustains an injury in the exercise of duties under certain types of secondary employment contract that they have with the same fire and rescue authority. Those amendments are also made under sections 34(1), (2) and (4), and 60(2) of the 2004 Act.
- 3.5 The Welsh Ministers consulted such persons as they considered appropriate before making this Order, in accordance with section 34(5) of the 2004. The process is explained in further detail below under section 5.
- 3.6 This Order is being made under the negative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 "On-call" firefighters under the Retained Duty System (RDS firefighters) in Wales were given access to an occupational pension scheme for the first time from 6 April 2006, under the 2007 Firefighters' Pension Scheme. Following the Employment Tribunal case of Matthews and others vs Kent and Medway Towns Fire Authority, the 2007 Scheme was amended in 2014 to introduce a 'modified scheme' for RDS firefighters. The Fire and Rescue Authorities ('FRAs') were required to undertake an options exercise ('first options exercise') offering all 'in scope' RDS firefighters the opportunity to retrospectively purchase their past service from 1 July 2000 onwards. That date represented the coming into force in the UK of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Those regulations implemented EU Directive 97/81, albeit they did so after the transposition deadline of 7 April 2000.

4.2 In 2018, the Court of Justice of the European Union (CJEU) (on reference from the Supreme Court in the case of O'Brien v Ministry of Justice), ruled that a part-time judge who was in post on the transposition deadline was entitled to benefit from Directive 97/81 from 7 April 2000, and in relation to any uninterrupted service before that date. The Welsh Government has acknowledged that this ruling applies equally to RDS firefighters, such that the 1 July 2000 cut-off in the modified scheme for RDS firefighters in the amended 2007 Firefighters' Pension Scheme is also unlawful.

4.3 The amendments in this Order will provide individuals with RDS service between 7 April 2000 and 30 June 2000, the opportunity to purchase pension for that period, as well as any uninterrupted pre-7 April 2000 service; and also, for individuals with RDS service between 1 July 2000 and 6 April 2006 who could not be contacted during the first options exercise in 2014-15 to have the opportunity to purchase pension rights now.

4.4 The amendments include specific provisions for the following :-

- clear eligibility parameters, and the period of entitlement (which covers all past continuous service up to 31 March 2015),
- requiring FRAs to undertake a second options exercise to be completed within an 18 month period, inviting eligible individuals to decide whether they wanted to purchase pension rights for their RDS service,
- the calculation of the pensionable pay and pensionable service of eligible individuals,
- payment arrangements for employee contributions owed, subject to interest and taking into account tax relief entitlement,
- the provision of member benefits and personal awards, including specific provisions relating to ill-health retirement, and survivor's special death grant,
- dealing with associated matters such as pension transfers, pension conversion, and ensuring the 30-year maximum service cap is not to be breached.

4.5 The Order also amends the Firefighters' Compensation Scheme (Wales) 2007 to provide that an injury sustained in the course of a secondary contract should be treated as if it were sustained in the exercise of duties under the firefighter's primary contract.

- For firefighters with temporary secondary employment to respond to an emergency of a type mentioned in section 7 of the Fire and Rescue Services Act 2004, or articles 2, 3 or 3A of the Fire and Rescue Services (Emergencies) (Wales) Order 2007 with the same FRA, an injury sustained in the performance of duties responding to such incidents will be treated as if it were an injury sustained under their employment as a regular or retained firefighter.
- For a regular firefighter with a secondary employment with the same FRA as a retained firefighter, an injury sustained in the performance of their retained employment would be treated as if it were sustained under their employment as a regular firefighter.

5. Consultation

5.1 Section 34(5) of the 2004 Act requires the Welsh Ministers to consult any persons they consider appropriate before making, varying or revoking an order under section 34 of the 2004 Act.

5.2 A twelve-week consultation on the draft regulations ran from 14 July 2023 to 06 October 2023. The consultation was discussed at the Firefighters'

Pension Scheme Advisory Board for Wales¹ and was drawn to the attention of organisations representing fire and rescue services staff in Wales, and relevant scheme managers and scheme administrators. The consultation was also circulated to a forum accessible to retired firefighters.

- 5.3 All formal Welsh Government consultations on matters relating to firefighters' pensions, including on these and other scheme regulations, are publicly available and are not limited to specific organisations. Any organisation or individual can read and respond to them if they choose; we aim to draft consultation documents in ways that are accessible to individual scheme members as well as their employers and representative bodies.
- 5.4 The Welsh Government received fourteen responses to the consultation. Those responses came from the three Fire and Rescue Authorities (FRAs) in Wales, representative organisations and trade unions representing FRA staff, a pension software provider, and from eight individuals.
- 5.5 The replies to the consultation have been considered. There was broad agreement that the draft proposals fulfilled the requirements set out; to make provisions needed to implement the second options exercise and to ensure firefighters who sustain injuries under certain types of secondary contracts, with the same fire and rescue authority, are able to receive compensation awards on a more fair basis.
- 5.6 Amendments have been made to the provisions to address various issues identified by respondents and to reflect further post consultation considerations.
- 5.7 The consultation documents and a summary of the responses are available at:

[Pension entitlements for retained Firefighters 2023 | GOV.WALES](#)

6. Regulatory Impact Assessment (RIA)

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

6.1 The options available to the Deputy Minister are as follows:-

Option 1. Do Nothing - RDS firefighters submitted Employment Tribunal claims seeking equal treatment with wholetime firefighters. This was referred to the House of Lords in 2006 and a subsequent

¹ The members of the Board are, the three Fire and Rescue Authorities in Wales; the Fire Brigades Union; the Fire Leaders' Association; the Fire Officers' Association; and the Fire and Rescue Services Association. The Chair is independent of all of these organisations and of the Welsh Government.

Employment Tribunal decision ruled that, under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, RDS firefighters should be treated equally with whole-time regular firefighters regarding their terms and conditions of service, including pension benefits. In 2014, the Welsh Government, along with other administrations, introduced significant modifications to the 2007 Pension Scheme to provide access to pension benefits for RDS firefighters who were employed during the period 1 July 2000-5 April 2006 (the first options exercise).

The Court of Justice of the European Union (CJEU), (on reference from the Supreme Court) in 2018, ruled that the full extent of an individual's service should be pensionable, not just service on or after the introduction of the Part Time Workers Regulations 2000.

Without this Order, the Welsh Government will be in breach of its obligations to ensure RDS firefighters are provided with comparable terms and conditions to their wholetime equivalents. It would also mean RDS firefighters in Wales would be in a worse position than those in the rest of the UK, given that the administrations in England and Northern Ireland have introduced equivalent measures.

A firefighter who sustains an injury whilst undertaking Urban Search and Rescue (USAR) duties under a secondary contract with a Fire and Rescue Service is not currently eligible to receive compensation under the Firefighters' Compensation Scheme (Wales) 2007. Some wholetime firefighters also hold secondary contracts to undertake RDS duties. Most RDS contracts are paid only for the basis of the incidents that the firefighter attends, meaning that earnings under such contracts tend to be significantly lower than under their wholetime employment. Under current scheme provisions, should an injury occur which was solely attributable to the duties under the retained contract, injury benefits would be based on the pay and service under that contract only, and any service under their wholetime contract would be disregarded. This would potentially result in the individual receiving a significantly lower amount of compensation than they would have been entitled to under the primary contract of employment.

Without this Order the unfair and inequitable position set out above would remain.

Option 2. Make the Legislation – The Order will ensure that the Welsh Government is compliant with its obligations under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, as ruled by the Court of Justice of the European Union (CJEU), (on reference from the Supreme Court) in 2018. The Order will allow eligible RDS members to purchase some or all their service prior to and post 7 April 2000 up to 1 April 2015 in the Modified Scheme. This will also apply to those who were not given the opportunity to purchase **all** their past service in the first options exercise (which only applied from 1

July 2000 onwards). It would mean that provisions for RDS firefighters in Wales would be in line with those in England and Northern Ireland where equivalent measures have been introduced.

It will also ensure that the 2007 Firefighters' Compensation Scheme treats injuries sustained under certain secondary contracts more fairly.

7. Costs and benefits

Costs

- 7.1 The 2007 pension scheme amendments will lead to increased payments to members of public service pension schemes over many years. We estimate that 1,700 individuals will be eligible to take part in the options exercise. This is based on data from one of the three Fire and Rescue Authorities in Wales. The cost of the second options exercise is being reflected in the 2020 pension scheme valuation that is currently underway, using assumptions set by Welsh Ministers, including the number of eligible individuals referred to above, their pattern of employment and birth dates, a pay assumption of 25% of pensionable pay and an assumption for a take up rate based on the first options exercise. The valuation results are expected to be published early in 2024.
- 7.2 However, a full and accurate calculation of the cost implications cannot be made until the second options exercise is completed and the number of RDS firefighters who choose to take up membership of the scheme is known. The costs of the scheme amendments will continue to be reflected in future valuations.
- 7.3 The Welsh Government does not hold data on ill-health retirements resulting from injury at work, or the costs of any associated compensation under the 2007 compensation scheme. Data on the number of major injuries (reporting of injuries, diseases and dangerous occurrences regulations – RIDDOR) and fatal injuries whilst undertaking firefighter duties are recorded, but the numbers are too low to be published. As the overall numbers of serious injuries are so low anyway we can assume that the additional changes to the compensation requirements will have a minimal financial impact.
- 7.4 Costs are funded by employer and employee contributions, plus an Annual Managed Expenditure grant from HM Treasury, which is used to top-up the difference between scheme income and expenditure.
- i. **Member costs** – all individuals who choose to join the pension scheme will need to pay the owed member contributions for the period of service for which they are purchasing pension. Those who are already retired and are entitled to the immediate payment of benefits will have their contributions netted off any pension benefits owed.

Individuals who are not yet retired will be able to pay contributions owed as a lump sum immediately or periodically over a period agreed between themselves and the employing FRA.

- ii. **Employer costs** –The valuation referred to in paragraph 7.1 determines future employer contribution rates. The next change in employer contribution rates will take effect on 1 April 2024. The costs of administering the options exercise will be met by the FRAs. The FRAs fully fund the costs of compensation under the firefighter compensation scheme. FRAs funding is derived from their constituent Local Authorities. The UK Government has committed to providing funding for 2024-25 to cover the employer costs resulting from the valuation.

Benefits

7.3 All eligible individuals will have the opportunity to purchase pension rights in the modified section of the 2007 pension scheme. Membership of the scheme will provide pension benefits under normal retirement and ill-health retirement, and survivor benefits. The amendments will also provide for fairer access to compensation in relation to injury or death sustained while a person is performing certain duties under a secondary contract of employment with the same fire and rescue authority.

8. Competition Assessment

8.1 Not applicable.

9. Post implementation review

9.1 This will be undertaken through the Firefighters Pension Scheme Advisory Board for Wales, at which employer and employee representatives will have the opportunity to raise issues regarding the Order and its practical implementation.