

Pensions and Employment: Pensions Bulletin

24 February 2017 / Issue 4

Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Bridget Murphy](#)

Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Severance payments and tapered annual allowance pitfall	From 6 th April, 2016	<p>Pensions Bulletin 16/06</p> <p>2.1 Since 6th April, 2016, the £40,000 annual allowance for high income individuals is reduced by way of a taper to a minimum of £10,000 for those with income of £210,000 or more.</p> <p>2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of:</p> <ul style="list-style-type: none"> ◆ £110,000 “threshold” income, and ◆ £150,000 “adjusted” income. <p>2.3 Any taxable element of a termination package counts towards both threshold and adjusted income. A taxable termination payment could therefore catapult an individual over the £150,000 limit, resulting in a tax charge for the</p>

No.	Topic	Deadline	Further information/action
			<p>member on pension provision already made.</p> <p>2.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.</p>
2.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits (note that fixed protection may be lost on joining a registered life cover arrangement)	6th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed	6 th April, 2016	<p>If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the</p> <p>Note: Statutory power to amend, retrospective to 6th April, 2016,</p>

No.	Topic	Deadline	Further information/action
			<p>expires on 5th April, 2017</p> <p>accrued GMPs of those active members. See further Pensions Bulletin 16/03.</p>
4.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th July, 2016 at the latest	Trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04 .
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	<p>For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016.</p> <p>Publication available to clients on request from usual pensions contact.</p>
7.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6 th July, 2015)	<p>For example, schemes with a 31st December year end must submit statement by 31st July, 2016.</p> <p>Client note dated June, 2015 available from Dawn Holmes.</p>

No.	Topic	Deadline	Further information/action
8.	“Brexit”	Referendum held on 23 rd June, 2016	<p>8.1 Supreme Court ruled¹ on 24th January, 2017 (8/3) that Article 50 notice triggering 2 year exit period requires an Act of Parliament to authorise the Government to serve that notice.</p> <p>8.2 Consider potential impact on pension schemes. Client publications available on Slaughter and May website.</p>
9.	DC Code of Practice 13 on governance and administration takes effect	28 th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code .
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
11.	Civil partner/same sex spouse		

¹ This was predicted in our client seminar on 23rd November, 2016 (albeit 11/0, not 8/3)

No.	Topic	Deadline	Further information/action
	pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 th November, 2016	A ‘death bed marriage’ scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18
11.2	Provisional date for Supreme Court to hear appeal in <i>Walker v. Innospec</i>	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.
12.	EMIR - Derivatives: New requirements to exchange variation margin	1 st March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply. Pensions Bulletin 17/01
13.	PPF Levy		
13.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31 st March, 2017	Pensions Bulletin 16/14
13.2	Submission deadline for most certificates and scheme return	31 st March, 2017, midnight	Pensions Bulletin 17/01
14.	Gender pay gap information - Regulations expected to be		Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin

No.	Topic	Deadline	Further information/action
	in force on 6 th April, 2017	4 th April, 2018	17/03 and Employment Bulletin 17/03 . Deadline for reporting above information.
15.	HMRC’s existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31 st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
16.	Data protection: New Regulation	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15 As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.
17.	Further EMIR exemption extension for pension scheme arrangements	16th August, 2018	Pensions Bulletin 17/01
18.	IORP II expected transposition deadline	12 th January, 2019	Pensions Bulletin 16/11

New Law

I. Pensions Advice Allowance - Government response and draft legislation

1. HM Treasury has published, on 3rd February, 2017, its [response](#) to the

‘Introducing a Pensions Advice Allowance’ consultation (dated 30th August, 2016).

2. The Pensions Advice Allowance (“PAA”) is scheduled to come into force from 6th April, 2017.
3. The consultation paper (please see [Pensions Bulletin 16/13](#)) sought views on introducing a PAA which would allow people to use £500, tax-free, from their DC pension pot to pay towards regulated advice. The response confirms that the PAA will be available in respect of the money purchase or cash balance element of hybrid schemes.
4. There will be no age limit for using the PAA.
5. The PAA will be available only where the product offers adviser charging, however.
6. Products containing guarantees and with-profits funds will not be excluded from the PAA legislation, despite the complexity of calculating an appropriate reduction for such products.
7. Individuals will be able to use their PAA on up to 3 occasions, but not more than once in a tax year.
8. Trust based schemes will be able to either:
 - 8.1 appoint a panel of approved advisers; or

8.2 make the selection of adviser the responsibility of the member.

9. The response refers to HMRC guidance being published shortly after the PAA comes into force.
 10. HMRC published the [draft Registered Pension Schemes \(Authorised Payments\) \(Amendment\) Regulations 2017](#) on 7th February, 2017.
 11. The draft regulations would introduce a new authorised payment, to be known as the ‘pension advice allowance payment’, made by a registered pension scheme in respect of a member or a beneficiary.
 12. The payment would have to meet certain conditions listed in the draft regulations. For example, the payment must be made by the registered pension scheme directly to the financial adviser.
 13. The advice to which the payment will relate is broad, however. The draft regulations state that the payment will be available for “advice in respect of the person’s financial position, including their pension arrangements and the use of their pension funds”.
- Comment:** The ability to access pension savings flexibly, in operation since April 2015, means that members have a wider range of options to consider when planning their retirement. Access to financial advice has therefore been

viewed as increasingly important within that context.

II. PPF levy ceiling and compensation cap - regulations

1. The [Pension Protection Fund and Occupational Pension Schemes \(Levy Ceiling and Compensation Cap\) Order 2017](#) provides for:
 - 1.1 the levy ceiling to be £1,007,249,095 for the financial year beginning on 1st April, 2017; and
 - 1.2 the compensation cap to be £38,505.61 from 1st April, 2017
2. The earnings percentage used to increase the new levy ceiling and the cap reflects the 2.6% increase in the general level of earnings over the 12 month period ending 31st July, 2016.

Comment: The 90% cap on PPF compensation for individuals who have not reached normal pension age (and who are not in receipt of a survivor’s pension or a pension on grounds of ill health) means that the maximum compensation that will be available to them will be £34,655.05.

III. Auto-enrolment - LTA protection exemptions

1. The [Occupational and Personal Pension Schemes \(Automatic Enrolment\) \(Amendment\) Regulations 2017](#) amend,

with effect from 6th March, 2017, the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

2. The amendment adds a further 2 circumstances in which the employer's duty to auto-enrol or re-enrol eligible jobholders becomes a discretion, rather than an obligation.
3. The 2 new circumstances are when the eligible jobholder has:
 - 3.1 fixed protection 2016, or
 - 3.2 individual protection 2016under Schedule 4 of the Finance Act 2016.

Comment (1): The legislation already exempts employers from the duty to auto-enrol or re-enrol eligible jobholders who have an earlier iteration of the various lifetime allowance protections.

Comment (2): Certain lifetime allowance protections do not allow the member to accrue pension in the future. Without the statutory exemptions, an eligible jobholder in that situation would have to opt-out from auto-enrolment in order to avoid a tax charge.

IV. Auto-enrolment draft regulations on earnings trigger and qualifying earnings band

1. [The draft Automatic Enrolment \(Earnings Trigger and Qualifying Earnings Band\) Order 2017](#) reflects the conclusions of the most recent auto-enrolment annual thresholds review, dated December, 2016 (please see [Pensions Bulletin 17/01](#)).
2. For the 2017/18 tax year the upper limit of the qualifying earnings band will be £45,000 and the lower limit will be £5,876.

Comment: The current upper limit of the qualifying earnings band is £43,000 and the lower limit is currently set at £5,824.

Cases

V. Cohabitee nomination form discriminatory

A requirement under the Local Government Pension Scheme Northern Ireland ("LGPSNI"), by which unmarried members must nominate their cohabitee for a survivor's pension, in addition to meeting other requirements, has been found to be discriminatory

A. Facts

1. Ms Brewster had lived with her partner for 10 years and they were

engaged to be married shortly before his death.

2. She sought judicial review of the requirement under the regulations² ("the regulations") governing the LGPSNI for unmarried members to nominate their cohabitee for a survivor's pension, in addition to meeting other requirements.
3. Ms Brewster argued that the regulations breached:
 - Article 14 of the European Convention on Human Rights ("ECHR"), which requires that the enjoyment of rights and freedoms in the ECHR must be secured without discrimination on any ground;
 - when read in conjunction with her right to peaceful enjoyment of her possessions under Article 1 of the First Protocol to the ECHR.

Comment (1): The Supreme Court appears to have adopted a stretched interpretation of the word "possessions" in this case by accepting that the denial of a survivor's pension is a possession of

² Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009

Ms Brewster (although this point was not in dispute).

Comment (2): A more natural interpretation would be to consider the survivor's pension, accrued by the deceased member, to be a possession of that member. A survivor does not possess a pension unless and until it is awarded to him or her.

4. The High Court decided that the nomination was "an instrument of disentitlement", but the Court of Appeal decided that the nomination requirement was not unjustified or disproportionate.

B. Decision

1. The Supreme Court allowed Ms Brewster's appeal, concluding that she was entitled to receive a survivor's pension.
2. The nomination procedure was not designed to test the truth of a claim that the relationship was stable and long-lasting and that there was financial dependency or interdependency.
3. The objective of the regulations must have been to remove the difference in treatment between a longstanding cohabitant and a married or civil partner of a member. There was no rational connection between the

objective and the nomination requirement.

4. Courts will generally respect the legislature's policy choice, particularly where the policy is socio-economic, unless it is manifestly without reasonable foundation. However, the Department of the Environment for Northern Ireland was not concerned with socio-economic choices when it decided to include the nomination requirement.

Comment (1): The Human Rights Act 1998 ("HRA") was introduced to enable ECHR rights to be dealt with by UK courts.

Comment (2): Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a right under the ECHR.

Comment (3): The situation in *Brewster* was within the scope of Section 6 of the HRA. The respondents were the Department of the Environment for Northern Ireland and the Northern Ireland Local Government Officers' Superannuation Committee (who administered the scheme).

Comment (4): Where secondary legislation is found to be incompatible with the ECHR and primary legislation prevents the removal of that incompatibility, a court may make a

declaration of incompatibility, under Section 4 of the HRA.

Comment (5): However, such a declaration:

- does not affect the validity, continuing operation or enforcement of the provision in question and
- is not binding on the parties to the proceedings.

Comment (6): If a Minister considers that there are "compelling reasons" for doing so, he may make an order (under Section 10 of the HRA) to amend the legislation to remove the incompatibility.

Comment (7): Private sector pension schemes do not fall within the ambit of Section 6 of the HRA.

Comment (8): Legislation governing private sector pension schemes does not prohibit any difference in treatment of individuals in non-formalised relationships (i.e. not married and not in a civil partnership). The sexual orientation discrimination provisions contained in the Equality Act 2010 are not breached where access to a benefit is dependent on marital or civil partner status.

Comment (9): So our initial conclusion is that the *Brewster* ruling has no impact on private sector pension schemes which,

for example, impose a nomination requirement where the deceased member was not married or in a civil partnership.

Brewster v Northern Ireland Local Government Officers' Superannuation Committee

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](#) or your usual Slaughter and May adviser.

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