SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

24 March 2017 / Issue 6

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 your 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 6th April, 2016	Pensions Bulletin 16/06 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. 2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of: ♦ £110,000 "threshold" income, and ♦ £150,000 "adjusted" income. 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 member on pension provision already made. 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.
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 Note: Statutory power to amend, retrospective to 6th April, 2016, expires on 5th April, 2017	6th April, 2016	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 accrued GMPs of those active members. See further Pensions Bulletin 16/03.
4.	Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate	6th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5th 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	For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016. Publication available to clients on request from usual pensions contact.
7.	First Chair's annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016. Client note dated June, 2015 available from Dawn Holmes.

No.	Topic	Deadline	Further information/action
8.	"Brexit"	Referendum held on 23rd June, 2016	8.1 Supreme Court ruled[1] 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. 8.2 Consider potential impact on pension schemes. Client publications available on Slaughter and May website. **8.3 Article 50 notice to be given on 29th March, 2017.**
9.	DC Code of Practice 13 on governance and administration takes effect	28th 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
	Government response published	**13th March, 2017**	
11.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in *Parris v. Trinity College, Dublin*	Decided on 24th November, 2016	A 'death bed marriage' scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18
11.2	Supreme Court **hearing dates** in appeal in *Walker v. Innospec*	**8th and 9th** 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. **Judgment awaited.**
12.	EMIR - Derivatives: New requirements to exchange variation margin	1st March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply. Pensions Bulletin 17/01 Pensions Bulletin 17/05
13.	New 25% tax charge on certain transfers to QROPS	9th March, 2017	Transfers to QROPS in execution of requests made before 9th March, 2017 are not subject to the new tax charge. **QROPS managers must give HMRC undertaking by 13th April, 2017 to preserve QROPS status.** Pensions Bulletin 17/05
14.	PPF Levy		
14.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31st March, 2017	Pensions Bulletin 16/14
14.2	Submission deadline for most certificates and scheme return	31st March, 2017, midnight	Pensions Bulletin 17/01
15.	Pensions Advice Allowance expected introduction date	6th April, 2017 **3rd January, 2018**	Pensions Bulletin 17/04 **New financial advice definition.** **See Item II below.**
16.	Gender pay gap information - Regulations expected to be in force on 6th April, 2017	4th April, 2018	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin 17/03 and Employment Bulletin 17/03. Deadline for reporting above information.
17.	HMRC's existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
18.	Data protection: New Regulation	25th 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

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

No.	Topic	Deadline	Further information/action
			Regulation is achieved by this date.
19.	Further EMIR exemption extension for pension scheme arrangements	16th August, 2018	Pensions Bulletin 17/01
20.	IORP II expected transposition deadline	12th January, 2019	Pensions Bulletin 16/11
21.	**Brexit**	**By 29th March, 2019, unless extended**	**UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.**

New Law

I. General levy reduction for very large schemes

1. The Government has published its response (dated 1st March, 2017) to its consultation on the draft Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017 (please see Pensions Bulletin 16/19 regarding the consultation).

2. The general levy rates are reviewed annually.

3. The levy funds the administration costs of:

   3.1 the Pensions Regulator;

   3.2 the Pensions Advisory Service; and

   3.3 the Pensions Ombudsman.

4. The Government has confirmed that it will go ahead with the proposals set out in the consultation paper. The Government's aim is to eliminate by 2020 surplus funding generated by the levy.

5. Levy rates for very large schemes (meaning schemes with 500,000 members or more) will be reduced so that their levy rate will be approximately 25% lower than the current lowest rates.

6. The levy rates freeze, which has been in place since 2012/13, is to be maintained for schemes with fewer than 500,000 members.

7. The Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017 (SI 2017/203) will come into force on 1st April, 2017.

II. Consultation response on revising financial advice definition

1. HM Treasury has published, on 27th February, 2017, its response to consultation on changing the definition of 'financial advice'.

2. The consultation was launched to address the risk of consumers making poor investment decisions because firms are limiting their guidance services for fear of providing regulated advice without being authorised to do so.

3. The consultation proposed an amendment to Article 53 of the Regulated Activities Order ("**RAO**")[2] so that consumers would only receive 'regulated advice' when they are offered a personal recommendation for a specific product (please see Pensions Bulletin 16/14)

4. The definition of 'personal recommendation' would be based on the wording used in the Markets in Financial Instruments Directive (2004/39/EC).

5. The Government response announces that the definition of 'financial advice' will be changed but for regulated firms only.

[2] Financial Services and Markets Act 2000 (Regulated Activities Order) 2001

6. This means that regulated firms will be exempt from the requirement for authorisation to carry out activities under Article 53 of RAO unless they are making a personal recommendation.

7. The new definition will not apply to unregulated firms. The Government has decided to adopt this approach because of concerns that fraudsters would attempt to deliver advice that stopped short of a personal recommendation while persuading the individual to purchase a risky investment product.

8. The response states that regulations will be laid shortly and the new definition will come into effect on 3rd January, 2018.

Comment (1): Employers with group personal pension plans have had to pay careful attention to their communications so as not to fall foul of restrictions on who may provide financial advice.

Comment (2): Where an occupational pension scheme is in operation, however, the RAO regime does not apply but care is still required to avoid liability for negligent mis-statement.

III. NEST – Government response

1. The Government has published, on 2nd March, 2017, its response to the DWP consultation on NEST of 7th July, 2016.

2. The consultation covered how NEST might evolve to respond to wider pension reforms, in particular in the light of the pension freedoms introduced in April, 2015.

3. The response states that NEST will not offer additional decumulation services at this time.

4. Instead, the Government will monitor industry innovation in this area. If the Government concludes that the market has not developed sufficiently by an unspecified date in the future then it may allow NEST to offer a fuller range of decumulation options.

5. As outlined in our Pensions Bulletin 16/11, the DWP consultation also contemplated a range of options for extending access to NEST.

6. The Government has decided to allow employers to use NEST for contractual enrolment.

7. However, it "does not intend to proceed at this time" with the idea of allowing employers to use NEST as the destination for a bulk transfer without consent where the employer does not already use NEST for auto-enrolment.

Tax

IV. Spring Budget, 2017

A. Transfers to QROPS tax charge

1. A new tax charge of 25% on certain transfers to qualifying recognised overseas pension schemes was announced in the Spring Budget on 8th March, 2017.

2. The tax charge will be applied to transfers from 9th March, 2017.

3. However, the tax charge will not apply where a transfer is made to a QROPS in execution of a request made before 9th March, 2017.

4. The member's request must, according to HMRC's draft guidance, be a substantive request on which the scheme and administrator must take action. A casual enquiry is not a transfer request.

5. Please see Pensions Bulletin 17/05 for further details.

B. Money purchase annual allowance reduction

1. Documents issued with the Autumn Statement, 2016 included a consultation about the possible reduction of the money purchase annual allowance ("**MPAA**") from £10,000 to £4,000 (please see Pensions Bulletin 16/18).

2. The Spring Budget 2017 confirms that the Government intends to proceed with the MPAA reduction with effect from 6th April, 2017.

3. The response to the consultation was published on 20th March, 2017. The response states that the Government did not receive evidence that the reduction would impact on the successful roll out of auto-enrolment.

Comment (1): One of the consequences of the success of automatic enrolment is that the cost of tax relief for pension contributions is increasing, putting pressure on public finances. We can therefore expect a continued focus on ways of making savings in this area in the future.

Comment (2): The MPAA limits the contributions a person can make to defined contribution arrangements once they have taken advantage of the DC flexibilities introduced in April, 2015.

C. Master trust tax registration process

The tax registration process for master trusts is to be amended "to align with the Pensions Regulator's new authorisation and supervision regime" from October, 2018 (this is stated in paragraph 2.11 - Overview of tax legislation and rates).

Comment: The Regulator's master trusts regime is to be introduced under the Pension Schemes Bill.

V. Flexible benefits: non-registered life cover

1. The draft "optional remuneration arrangements" provisions in Finance Bill 2017 aim to remove or reduce the tax and employer NICs advantages of providing certain benefits through salary sacrifice or as a non-core benefit under flexible benefit arrangements.

2. Where the Finance Bill provisions apply, the recipient is placed in the same tax position as if they had bought the benefit out of taxed income (but employees may still make NI savings).

3. An earlier version of the Bill included a carve-out which encompassed both registered scheme benefits (pension and death benefits) and non-registered life cover.

4. The latest version of the Finance Bill, published on 20th March, 2017, revises the position by restricting the carve-out to registered schemes.

5. These particular provisions have been given temporary statutory effect under a Budget Resolution.

6. This means that there will not be an exemption for non-registered life cover schemes.

Comment: Employers affected by this, unannounced, change to the Bill should take legal advice to establish what this means for their employees.

Cases

VI. No employer duty to tell member ill health pension higher

An employer participating in the NHS pension scheme was not under a duty to tell a member who was made redundant while on sick pay that her pension would have been higher had she retired on ill health grounds.

A. Facts

1. Dr G worked for Greater Manchester Shared Services and was a member of the NHS Pension Scheme.

2. Dr G suffered from depression and anxiety and had been on sick leave since April, 2013.

3. She was signed fit for work, pending reasonable adjustments in the workplace, in December, 2013. Adjustments to her working arrangements were offered but Dr G expressed the view that she would prefer voluntary redundancy.

4. Dr G was then made compulsorily redundant in March, 2014 as a result of changes to the NHS Trust's organisational structure.

5. She then took early retirement, as a deferred member, in November, 2014. The level of pension was lower than an ill health pension would have been.

6. Her employer maintained that she was not entitled to an ill health pension because her employment had not been terminated as a result of ill health, as required under the National Health Service Pension Scheme Regulations 2008.

7. Dr G argued that she had simply indicated that she would prefer redundancy over returning to work and she should have been told about the option of applying for an ill health pension.

B. Decision

1. The Ombudsman rejected the complaint.

2. In order for an ill health pension to become payable under the scheme Dr G's employment would need to have been terminated because of physical or mental infirmity, but this was not the case.

3. Employers are required to make information about the scheme available, but they are not required to advise employees on the best way to maximise their pension benefits.

4. Information about ill health pensions and the full scheme regulations were available on the NHS website.

DR G (PO-14647)

Comment (1): There is no positive duty on an employer to provide advice to its employees about pensions.

Comment (2): However, in the House of Lords decision of *Scally* (23rd October, 1991) the court decided that the employer had to take reasonable steps to inform its employees about a contractual term, in order for the employee to take advantage of that term, where all of the following circumstances apply:

- the terms of the contract have not been negotiated individually,
- the term concerned makes available to the individual a valuable right contingent on the individual taking action to take advantage of that right, and
- an employee cannot, in all circumstances, reasonably be expected to be aware of the term, unless it is drawn to his attention.

Comment (3): The above case did not satisfy the third limb of the *Scally* test because all the relevant information was available on the NHS website.

Points in practice

VII. Regulator responds to Committee DB report

1. The Work and Pensions Committee has published, on 3rd March, 2017, the Pensions Regulator's response to the Committee's report on DB schemes.

2. To read more about the report on DB schemes please see Pensions Bulletin 17/01.

3. In its response (dated 20th February, 2017), the Pensions Regulator states it is:

   3.1 taking steps to ensure that it moves to enforcement quicker;

   3.2 "making significant efforts to pursue more cases, and to use a wider range of powers where appropriate";

   3.3 supportive of the Committee's recommendation that schemes be required to submit valuations and deficit recovery plans faster than the current statutory 15 months;

   3.4 increasing its emphasis on proactive engagement in advance of the due date of a valuation;

   3.5 considering how best it can clarify the circumstances in which it will use funding flexibilities, such as allowing longer recovery plans;

3.6 continuing to explore how small DB schemes might be consolidated; and

3.7 focusing on becoming "nimbler" through its 'TPR Future' review of its regulatory approach.

4. Frank Field MP, Chair of the Committee is quoted as saying that "*had TPR been equipped and prepared to take a more active interest in BHS, earlier, we need never have gone down this path*."

VIII. BHS settlement with Pensions Regulator

1. The Pensions Regulator has announced that it has agreed a cash settlement of up to £363 million with Sir Philip Green in connection with both BHS pension schemes.

2. A new independent pension scheme will be established to give pensioners the option of the same starting pension as they were originally promised and higher benefits than they would receive under the PPF.

3. As a result, the Regulator's enforcement action against Philip Green, Taveta Investments Limited, and Taveta Investments (No. 2) Limited has ended.

4. Enforcement action continues in respect of Dominic Chappell and Retail Acquisitions Limited.

5. The board of the new scheme will be made up of three professional independent trustees. The Regulator's quick guide to the BHS pension settlement points out that neither Philip Green nor the Arcadia group will be involved in the ongoing management of the scheme.

6. Members of the BHS schemes will have three options:

   6.1 transfer to the new scheme,

   6.2 opt for a lump sum payment if eligible, or

   6.3 remain in their current scheme and receive benefits from the PPF.

7. Members choosing to transfer to the new pension scheme will have a starting pension which will be the same as that provided for under the current BHS pension schemes. Pensions in payment earned prior to April 1997 will increase by 1.8% annually.

8. The new scheme will also be eligible for the PPF.

9. The lump sum payment option will be available to members with small pots totalling up to £18,000.

10. The settlement money is being held in segregated bank accounts. £343 million has been placed in an escrow account to fund the new scheme. An additional amount of up to £20 million is being held in other accounts to cover expenses and the costs of implementing the member options and the new scheme.

Comment (1): The PPF published a consultation paper on 20th February, 2017 on a proposed levy rule for schemes without a substantive sponsor, for inclusion in the 2017/18 Levy Determination. It would appear that the new scheme referred to above will be subject to that new levy rule.

Comment (2): The Government's Green Paper, published on 20th February, 2017, contemplates strengthening the Regulator's information gathering powers.

Comment (3): The Green Paper expresses reservations, however, about allowing the Regulator to add punitive fines to contribution notices and financial support directions so that the fine trebles the original demand. The introduction of such fines was discussed in the Work and Pensions Select Committee report on DB schemes (dated 21st December, 2016 - please see Pensions Bulletin 17/01).

Comment (4): The deal achieved in relation to the BHS schemes demonstrates that the Regulator already possesses sufficient powers for an agreement to have been reached in this instance.

IX. Work and Pensions Committee scrutiny focuses on certain schemes

1. The Work and Pensions Committee has published correspondence written by the Committee Chair, Frank Field MP to a number of high profile schemes. The correspondence contains a broad range of searching, pensions-related, questions.

2. Correspondence "seeking clarifications about the implications of the sale of Vauxhall to Peugeot"[3] was published, on 7th March, 2017. The letters were addressed to:

   2.1 the Regulator,

   2.2 the Chair of the Trustee Board, and

   2.3 the President of PSA.

3. The Committee then published, on 8th March, 2017, correspondence about:

   3.1 the BHS settlement (please see above) - addressed to the Regulator;

   3.2 Boparan Holdings Ltd's acquisition of Bernard Matthews' assets – the letters were addressed to Boparan Holdings Ltd and to Deloitte; and

   3.3 Trinity Mirror's £10 million share buyback programme – addressed to the Director of MGN Pension Trustees Ltd.

Comment (1): The Work and Pensions Committee's detailed queries about high profile pension schemes, coupled with its recent criticism of the Pensions Regulator, indicates that the Committee's perception of its role appears to be straying into the regulatory realm.

Comment (2): The Parliament.uk website states that "The Work and Pensions Committee examines the expenditure, administration and policy of the Department for Work and Pensions and its associated public bodies".

Comment (3): The Committee is currently conducting an inquiry into the PPF's sustainability and levy and the Regulator's powers. Views are invited on those issues and on trustees' powers and the relationship between the PPF, the Regulator and trustees and employers.

Comment (4): The correspondence referred to above appears to go far beyond that remit.

X. Spot checks on employers - AE compliance

1. The Regulator has issued a press release, dated 2nd March, 2017, announcing that spot checks are to be carried out on employers to ensure that auto-enrolment duties are being met.

2. The announcement goes on to clarify that the visits will take place in relation to employers who are judged by the Regulator to be at risk of failing to meet those duties.

XI. Infrastructure investments by pensions funds

1. We will be hosting a panel session to debate infrastructure investing on 9th May, 2017 at 5.30pm. We are hosting this alongside our European "Best Friend" firms: BonelliErede, Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller and Uría Menéndez. Please click here to see our invitation for more details and how to book a place.

2. If you would like to read our briefing note on infrastructure investments by pensions funds, please click here.

[3] Please see http://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2015/vauxhall-deal-investigated-16-17/

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.