SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

7 April 2017 / Issue 7

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 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. Pensions Bulletin 17/06
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. Contracting out - Government response

The Government has published, on 13th March, 2017, its response to the DWP consultation on: (1) GMP equalisation (2) contracting-out policy and (3) draft amendments to contracting out regulations (please see Pensions Bulletin 16/19).

A. GMP equalisation

1. The consultation proposed a possible method for equalising GMPs involving a one-off calculation.

2. Calls for a 'statutory safe harbour' in respect of the proposed method have been rejected by the Government.

3. The response states that it is for trustees to decide what, if any, action is needed for their scheme to provide equal pension benefits.

4. A timeline for GMP equalisation guidance and any changes to legislation has yet to be set.

5. The Government states that it will consider its position in the light of any action taken by the Lloyds Trade Union and any decisions resulting from that action.

   Comment: Lloyds Bank, the Trustee Board and the Lloyds Trade Union have agreed jointly to refer a series of questions on GMP equalisation to the High Court (for further detail please see the union's November, 2016 newsletter to members).

6. Several comments made by consultation respondents are to be examined by the GMP equalisation industry working group (set up by the DWP in 2013).

7. These comments include:

   7.1 setting a de minimis amount for selecting members for GMP conversion.

   7.2 where some or all members' benefits have been secured through annuities, could equalisation be achieved through an additional free-standing pension or lump sum?

   7.3 whether other equalisation methods could be used.

   7.4 how should schemes deal with GMPs that have been transferred or bought out - where does responsibility lie?

   7.5 is backdating payments by more than 6 years unnecessary?

   7.6 how should benefits to be converted be valued?

   7.7 where data is unavailable what should schemes do?

   Comment: A great deal of the response amounts to a holding position, leaving much to be decided following future discussions with the industry working group.

8. The response does confirm, however, that:

   8.1 unisex assumptions should be used; and

   8.2 the GMP conversion definition should include survivors.

   Comment (1): Most schemes have not attempted GMP equalisation because of the cost and complexity involved. Many schemes have decided to wait and see what the Government's approach would be before committing to an equalisation exercise.

Comment (2): There are reasonable arguments for the view that there is no requirement in law to equalise GMPs.

Comment (3): Even if there is a requirement to equalise, there is no guarantee that the proposed method put forward by the DWP will comply with the equalisation laws.

B. Policy reviews

1. The Government believes that the existing legislation reflects the policy intention to protect contracted-out accrued rights when there is a rule change.

2. However, it plans to give further consideration to issues raised by the pensions industry in relation to the requirement that the scheme actuary must certify that members' rights accrued while the scheme was contracted-out are not affected. Any changes would not be implemented before Autumn 2017, however.

3. The Government hopes to be in a position to consult by Autumn 2017 on the inability to make bulk transfers without consent from contracted-out schemes to schemes that have never been contracted-out.

C. Miscellaneous amendment regulations

1. The Occupational Pension Schemes and Social Security (Schemes that were Contracted-out and Graduated Retirement Benefit) (Miscellaneous Amendments) Regulations 2017 (SI 2017/354) make a number of changes in consequence of the abolition of DB contracting-out on 6th April, 2016.

2. The draft version of the regulations contained a change strengthening the protections given to earners and their surviving spouse/civil partner when their Section 9(2B) rights are to be altered (please see Pensions Bulletin 16/19).

3. That proposed change has been dropped in the final version. The Government plans to reflect on this and perhaps consult further, however.

4. The regulations also set out the fixed rate of revaluation of GMPs at 3.5% compound for individuals leaving pensionable service on or after 6th April, 2017.

5. The Government intends to review the fixed rate every 5 years despite the removal of the requirement to review NI rebates when contracting-out came to an end.

6. The regulations also include a provision allowing HMRC to extend the deadline for late notification and payment of a Contributions Equivalent Premium where outstanding payments come to light as a result of HMRC's scheme reconciliation service.

7. The regulations come into force on 6th April, 2017.

II. PPF consultation on triennium starting 2018/19

1. The PPF launched its consultation on the PPF levy rules for the triennium 2018/19 to 2020/21 on 23rd March, 2017.

2. The consultation closes on 15th May, 2017.

3. There will be a second consultation in the Autumn, setting out the PPF's conclusions and seeking further views.

4. Included amongst the proposals are:

   4.1 changes to the scorecards to improve their ability to predict insolvency;

   4.2 the use of credit ratings for some of the larger employers;

   4.3 an industry specific scorecard for entities providing regulated financial services;

4.4 a levy discount for good governance, as suggested by the Work and Pensions Committee report on DB pension schemes (please see Pensions Bulletin 17/01) – to make this change the PPF need evidence that good governance has an impact on one or more of the risk factors set out in legislation;

4.5 possibly moving from monthly scores to an annual assessment starting on 31st March, 2018;

4.6 simplifying the current approach to the certification of deficit reduction contributions, or basing certification on recovery plan payments;

4.7 requiring a guarantor strength report to be prepared in advance of the certification of Type A contingent assets where the realisable recovery is certified at £100 million or higher – the report would also be required with each re-certification; and

4.8 a full review of the wording of contingent asset agreements will take place, expected to result in updated standard forms which must be reflected in relation to both new and existing contingent assets.

5. The PPF considers that the scorecard changes proposed would result in two-thirds of schemes experiencing a reduction in their levy. However, one-fifth of schemes, particularly those with large employers, would experience a levy increase.

III. PPF long service cap - regulations and Government response

1. The PPF compensation long service cap is provided for under Section 50 and Schedule 20 of the Pensions Act 2014. Commencement regulations[2] have been made to bring those provisions into force on 6th April, 2017.

2. The increase to the cap will be set at 3% for each full year of pensionable service over 20 years, with an overall cap of twice the standard cap.

3. The cap currently applied to an individual is the one in place when they first take their compensation.

4. The Government consultation, published on 15th September, 2016, sought views on the practical implications of introducing a long service cap (please see Pensions Bulletin 16/14). Views were sought on the draft Pension Protection Fund (Modification) (Amendment) Regulations 2017.

5. The Government has published, on 13th March, 2017, its response to the consultation, confirming that it will go ahead with its proposals.

6. The Pension Protection Fund (Modification) (Amendment) Regulations 2017 (SI 2017/324) (“**the final regulations**”) come into force on 6th April, 2017.

7. The final regulations provide that a person with accrued pension based on their own pensionable service plus a pension credit will have the long service cap applied separately to each entitlement. This particular change will take effect retroactively to 6th April, 2005.

8. The final regulations also provide that where an individual has 2 or more tranches of entitlement arising from the same source (for example, where the scheme has changed its NRD from 60 to 65) the pensionable service attached to the 2nd or subsequent tranche of PPF compensation will be taken into account when calculating the long service cap.

[2] *The Pensions Act 2014 (Commencement No 10) Order 2017 (SI 2017/297)

9. The final regulations also enable the PPF to pay money purchase funds worth £10,000 or less directly to the member as a lump sum (the PPF currently does this in relation to pots worth £2,000 or less).

IV. Auto-enrolment consultation on new employers - response and regulations

1. The Government has published, on 10th March, 2017, its response to its consultation (dated 10th February, 2017) on how the auto-enrolment ("**AE**") legislation is to apply to employers due to become subject to AE duties in 2017 who do not fall within the AE staging framework.

2. The response confirms that the Government is to press ahead with its proposals to:

   2.1 trigger AE duties for these employers on the date on which the first worker starts employment. Without this change, the new employer's AE duties would only be triggered when PAYE income is first payable in respect of any worker; and

   2.2 offer employers the opportunity to defer by 3 months the date on which they become subject to AE duties. In that event, the employer must give its workers notice of its intention to defer. The notice would need to comply with requirements set out in the regulations referred to below.

3. The Employers' Duties (Implementation) (Amendment) Regulations 2017 (SI 2017/347), which come into force on 1st April, 2017, implement the Government's response.

   Comment: The staging framework has given smaller employers more time to prepare for AE. The last tranche of staging will apply to new employers set up before 30th September, 2017.

V. Auto-enrolment earnings trigger and qualifying earnings band

1. The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2017 (SI 2017/394) was made on 14th March, 2017.

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 £43,0000 and the lower limit is currently set at £5,824.

Tax

VI. Finance (No.2) Bill published

1. The Finance (No. 2) Bill and explanatory notes were published on 20th March, 2017.

2. The Bill covers:

   2.1 **the new charge on certain transfers to QROPS**, as announced in the Spring Budget 2017 (please see Pensions Bulletin 17/06);

   2.2 **changes regarding foreign pensions**, including the requirement that accrual under Section 615 schemes must end before 6th April, 2017, outlined in the Autumn Statement 2016 (please see our briefing on this);

   2.3 **the reduction of the money purchase annual allowance** from £10,000 to £4,000 (please see Pensions Bulletin 17/06); and

   2.4 **the income tax exemption for the first £500 of pensions advice** arranged or paid for by employers - draft guidance has been published regarding this (please see below).

VII. Income tax and Class 1 NICs treatment of pensions advice

1. Employment Income Manual draft guidance on the tax treatment of pensions advice was published on 20th March, 2017.

2. From 6th April, 2017, an income tax exemption[3] will be available, if certain conditions are met, where the employer:

   2.1 provides pensions advice to its employees, or

   2.2 pays or reimburses the costs of pensions advice incurred by an employee.

3. The information or advice must relate either to the individual's pension arrangements or to the use of his pension funds.

4. The exemption applies to the first £500 worth of information or advice each tax year and is available in respect of:

   4.1 employees,

   4.2 former employees, and

   4.3 prospective employees.

Comment: In its response to consultation on the Pension Advice Allowance (dated 3rd February, 2017) the Government confirmed that the Pension Advice Allowance (please see below) can be combined with this income tax exemption for financial advice. Individuals to whom both measures apply will therefore be able to access up to £1,000 of tax advantaged advice.

5. An exemption from Class 1 National Insurance Contributions will also be available in respect of the above information or advice from 6th April, 2017, under The Social Security (Miscellaneous Amendments) Regulations 2017 (SI 2017/307).

VIII. Pension Advice Allowance authorised payment

1. The Registered Pension Schemes (Authorised Payments) (Amendment) Regulations 2017 (SI 2017/397) take effect on 6th April, 2017.

2. The regulations introduce a new authorised payment, to be known as the 'pension advice allowance payment', made by a registered pension scheme.

3. The payment would have to meet certain conditions listed in the regulations. For example, the payment must be made by the registered pension scheme directly to the financial adviser.

4. The advice to which the payment will relate is broad. The 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". The payment can also be used for "the implementation of such advice".

Comment (1): The Pension Advice Allowance ("**PAA**") is scheduled to come into force on 6th April, 2017.

Comment (2): The PAA will allow individuals to use £500, tax-free, from their DC pension pot (or the money purchase or cash balance element of a hybrid scheme) to pay towards regulated advice on up to 3 occasions. To read about HM Treasury's response to its consultation on the PAA, please see Pensions Bulletin 17/04.

IX. Overseas schemes requirements - regulations

1. The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) (Amendments) Regulations 2017 (SI

[3] Under Section 308C of the Income Taxes (Earnings and Pensions) Act 2003, inserted under the Finance (No.2) Bill 2017

2017/398) come into force on 6th April, 2017.

2. The Government issued a consultation on the draft regulations on 5th December, 2016 (please see Pensions Bulletin 16/19).

3. The final version of the regulations reflects the changes covered in the consultation regarding the conditions which must be met for a scheme to be:

   3.1 an 'overseas pension scheme' ("**OPS**") or

   3.2 a 'recognised overseas pension scheme'("**ROPS**").

4. The changes:

   4.1 remove the requirement for schemes to designate 70% of funds that have received UK tax relief to provide the member with an income for life in order to be a OPS or a ROPS;

   4.2 require that, if the scheme itself is not regulated, a provider of a non-occupational pension scheme would need to be regulated in the country in which the scheme is established;

   4.3 enable benefits to be paid before age 55 if the payment would be an authorised payment if paid by a registered pension scheme; and

   4.4 expand the type of agreement that satisfies one of the conditions to be a ROPS to include tax information exchange agreements.

5. The explanatory notes to the regulations promise guidance on the changes in the next available update of the HMRC Pensions Tax Manual.

Points in practice

X. Consultation on (1) draft monetary penalties policy and (2) professional trustee description

The Regulator launched a consultation on its draft monetary penalties policy and a professional trustee description on 23rd March, 2017. The consultation closes on 9th May, 2017.

A. Draft monetary penalties policy

1. The draft policy does not cover penalties issued in relation to non-compliance with auto-enrolment duties nor penalties in relation to master trust requirements.

2. The consultation proposes 3 penalty bands, with the nature and impact of a breach determining which band it falls into. Band 1 would be the least severe and band 3 the most severe.

3. The draft policy lists examples of factors that the Regulator might take into account when assessing the band level.

4. The document also lists factors that the Regulator plans to take into consideration when calculating the amount of the penalty, such as levels of engagement and cooperation.

5. The starting position in most instances is likely to be the mid-point of the penalty range.

6. Professional trustees are likely to face higher penalties than non-professionals (please see below). Where there has been a scheme return breach, professional trustees would be required to pay twice the penalty payable by non-professionals.

B. Professional trustee description

1. The consultation proposes that professional trustees should be:

   "any person, whether or not incorporated, who:

   - acts as a trustee of the scheme in the course of the business of being a trustee

   - is an expert, or holds themselves out as an expert, in trustee matters generally".

2. Neither a person's remuneration for the role (beyond their necessary

expenses) nor their independence will determine whether they will be classed as a professional trustee.

3. The Regulator will "consider all relevant factors" when applying the description and it expects trustee boards to assess and "evidence the value their remunerated trustees bring to the board".

4. A remunerated trustee is less likely to be viewed as "acting … in the course of the business of being a trustee if:

    - they are or have been:

        - a member of the scheme or a related scheme (ie a scheme with a sponsoring employer in the same corporate group)

        - employed by a participating employer in the scheme (or an employer in the same corporate group)

    - they do not act, or offer to act, as a trustee in relation to any unrelated scheme."

5. However, where the Regulator concludes that a trustee is not a professional it may, nevertheless, take account of the following when deciding whether to impose a monetary penalty and the penalty amount:

    5.1 remuneration is being paid,

    5.2 the amount and circumstances of that remuneration, and

    5.3 the fact that the trustee has expertise, or holds himself out as having expertise.

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.