SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

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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 1.1 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. 1.2 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. 1.3 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. 1.4 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 **and ongoing requirement**	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5th July, 2016 at the latest **and ongoing requirement**	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 **2014** staging date must complete cyclical re-enrolment process between December **2016** and June **2017**. Publication available to clients on request from usual pensions contact.
7.	Chair's annual governance statement	Within 7 months of end of scheme year	For example, schemes with a 31st **March** year end must submit statement by 31st **October, 2017**. 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 Trustees entering into OTC derivatives must perform an independent legal review of the enforceability of their netting and collateral arrangements. Briefing note; FCA statement on timing
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.	Pensions Advice Allowance introduction date	6th April, 2017 3rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
15.	**Gender pay gap information regulations in force**	**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.
16.	**Pension Schemes Bill 2017 receives Royal Assent**	**27th April, 2017**	**Existing master trusts have notification duty for triggering events on or after 20th October 2016 (see item III below)**
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

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

No.	Topic	Deadline	Further information/action
			compliance with the EU General Data Protection 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 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. Transferring pensioners' GMPs/Section 9(2B) rights with consent - Government response

1. The Government has published, on 26th April, 2017, its response to the consultation regarding the draft Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2017.

2. The response confirms that the proposals contained in the consultation will go ahead.

3. The consultation, issued on 10th April, 2017, concerned draft regulations which would allow pensioners' contracted-out salary-related benefits to be transferred with consent to a scheme that has never been contracted-out if:

   3.1 the transferring scheme has entered a PPF assessment period; or

   3.2 a regulated apportionment arrangement has been entered into.

Comment: The ability to transfer contracted-out benefits to a scheme other than a former contracted-out scheme applies only where the member has not "become entitled" to the pension attributable to those benefits. The legislation is unclear as to whether a person has "become entitled" to the pension when the pension comes into payment or when the member reaches the applicable pension age.

4. Such a transfer will not be permitted to be made to an overseas scheme.

5. The member will be required to acknowledge in writing:

   5.1 his consent;

   5.2 receipt of a statement showing the benefits to be awarded in respect of the transfer;

   5.3 that the receiving scheme benefits may differ, in form and amount, from benefits under the transferring scheme; and

   5.4 that the receiving scheme benefits may not provide a survivor pension.

6. The Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2017 (SI 2017/600) come into force on 3rd July, 2017.

7. The response also repeats the assertion contained in the consultation that it intends to consider:

   7.1 extending "more generally" the transfer of pensioner members to new schemes, and

   7.2 the inability to make bulk transfers to such schemes without member consent.

II. Section 75 - new Deferred debt arrangement - consultation

1. The DWP has issued a consultation, on 21st April, 2017, regarding the draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017.

2. The draft regulations anticipate an 'in force' date of 1st October, 2017.

3. The consultation proposes the introduction of a new deferred debt arrangement ("**DDA**").

4. Employers in multi-employer schemes who have experienced an employment cessation event ("**ECE**") may be able to use a DDA to defer the requirement to pay an employer debt on ceasing to employ an active member.

5. Employers in a period of grace arrangement will also be able to enter into a DDA.

6. The consultation asks whether DDAs should be available to employers who have already used another type of arrangement to manage their employer debt.

7. Employers using a DDA will continue to be treated as if they were still an employer in the scheme for scheme funding and financial support direction purposes and will remain responsible for their share of orphan liabilities.

8. The paper refers to several requirements which must be met before a DDA can be entered into, including:

   8.1 the funding test that is currently required for apportionment arrangements;

   8.2 trustee consent;

   8.3 the scheme is not in a PPF assessment period, and the trustees are satisfied that the scheme is unlikely to be so in the next 12 months; and

   8.4 the employer is not restructuring.

9. The consultation lists a number of circumstances in which the DDA could come to an end, included amongst which are:

   9.1 the employer's restructuring;

   9.2 the trustees being reasonably satisfied that the employer has not complied with its funding obligations; and

   9.3 and the trustees being reasonably satisfied that the employer's covenant is likely to weaken in the next 12 months.

10. Entering into or ending a DDA will be a notifiable event.

11. The consultation covers a range of other amendments, such as:

    11.1 an amendment intended to prevent an employer debt being triggered where an employer's restructuring is limited to a change in its status;

    11.2 various provisions on period of grace arrangements; and

    11.3 where there are 2 ECEs, the debt from the most recent ECE is the debt to be dealt with but only if:

    - the 1st ECE and subsequent employment of an active member happen before 1st April, 2017, and
    - the 2nd ECE happens on or after the draft regulations enter into force.

12. The consultation closes on 18th May, 2017.

III. Pension Schemes Act 2017

1. The Pension Schemes Bill received Royal Assent on 27th April, 2017.

2. The Pension Schemes Act 2017 chiefly contains provisions on the authorisation and supervision of master trusts.

   Comment (1): The detail of how authorisation will operate will be set out in regulations, a draft of which is not yet available.

   Comment (2): It is hoped that the regulations will restrict the definition of master trusts to exclude schemes which ought not to be caught by the current definition - for example, DB schemes with AVCs where one of the employers is not "connected" with the other employers (eg, a joint venture company where the corporate group holds a minority stake).

3. Master trusts in existence before Section 3 of the Act comes into force will need to comply with transitional provisions.

4. Those transitional provisions include a requirement to notify the Pensions Regulator of any triggering event which occurred on or after 20th October **2016** but before Section 3 of the Act comes into force.

5. If the triggering event has happened between 20th October **2016** but before Section 3 comes into force then the Act appears to require the notification to have been given within 7 days of the date of the triggering event.

   Comment (1): It is unclear whether this part of the legislation has been correctly drafted and it would be unusual for legislation to require an action to be performed prior to the legislation being enacted by Parliament.

   Comment (2): There is nothing in the Act's commencement provision (Section 44) which provides for retroactive commencement.

   Comment (3): It may be that this will be clarified by regulations made under Section 44.

   Comment (4): If you are affected by a triggering event in that period and have concerns over the timing of notification, you may wish to seek specific legal advice.

6. Regulations will set the deadline where the triggering event occurs on or after Section 3 comes into force.

7. The transitional provisions contain a number of deadlines where a triggering event has been resolved. If it was resolved before the date of Royal Assent (27th April, 2017) then the requirement for trustees to notify the Regulator applied during a 14-day period starting on 27th April, 2017.

8. Where a triggering event has been resolved on or after 27th April, 2017 then trustees must notify the Regulator within 14 days of the date on which it was resolved. However, the deadline will be set out in regulations where the triggering event happened on or after Section 3 of the Act comes into force.

9. Depending on the triggering event, that duty to notify rests with the:

   9.1 scheme funder,

   9.2 trustees,

   9.3 person taking the decision, or

   9.4 "scheme strategist" (a person who is responsible for making business decisions relating to the commercial activities of the scheme).

10. The Pensions Regulator has published guidance on the duty.

11. The Act also contains a provision allowing regulations to be made in relation to early exit charges and member-borne commission charges (please see Pensions Bulletin 17/08 regarding the DWP's consultation).

Tax

IV. Pension Schemes Newsletter 86 published

1. HMRC has published, on 21st April, 2017, Pension Schemes Newsletter 86.

2. The Newsletter includes items on:

   2.1 **In specie contributions to registered pension schemes** - HMRC confirms that its position on these has not changed, despite "recent speculation". It will continue to look into transactions where there are concerns that the transfer of an asset does not give effect to a cash contribution.

   Comment: The Pensions Tax Manual (PTM042100) states that "it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets" if certain conditions are met. The position on this has not changed.

2.2 **Relief at source and NI numbers** – Administrators are reminded that if they have not been supplied with an NI number, relief at source cannot be claimed

Comment: If they do not already do so, schemes should consider clarifying in their member communications that relief at source is subject to the provision of an NI number.

2.3 **Lifetime allowance look up service for administrators** – This has been delayed once more. HMRC are aiming to introduce a basic look up service in Summer, 2017.

2.4 **Lifetime allowance online service for members** - An extra function is to be added 'later in the year' to enable members to notify HMRC online if they have lost their LTA protection.

2.5 **New postal address** - There is a new address for HMRC has changed to : Pension Schemes Services, HM Revenue and Customs, BX9 1GH, United Kingdom.

2.6 **Further suspension of the ROPS list** - This will take place on 2nd June, 2017, with the updated list to be published on 5th June, 2017.

2.7 **Scheme pays guidance** - HMRC confirms that it has updated the Pensions Tax Manual (PTM056410) on annual allowance mandatory scheme pays.

Comment (1): The Pensions Tax Manual now clarifies that members can only oblige a scheme to pay the annual allowance charge arising on the excess pension input amount over £40,000 (where the individual meets the other conditions for mandatory scheme pays).

Comment (2): This is the case even if the member's own tapered annual allowance is much lower and he therefore has a much higher charge.

Comment (3): Although the wording in the Pensions Tax Manual has been clarified, the position on in specie contributions remains unchanged.

V. Overseas pensions - HMRC additional guidance

1. HMRC has published, on 20th April, 2017, additional guidance on the tax treatment of overseas pensions.

2. The guidance is based around the changes introduced under Finance (No.2) Bill 2016/17 (now the Finance Act 2017).

3. It includes information on:

   3.1 income and lump sums from pensions held overseas, and

   3.2 Section 615 schemes.

Comment: This supplements guidance (issued on 3rd January, 2017) in relation to the changes to the conditions to be an 'overseas pension scheme' and a 'recognised overseas pension scheme' (please see Pensions Bulletin 17/02).

Points in practice

VI. PPF Fraud Compensation Fund levy to be raised for 2017/18

1. The PPF has announced, on 24th April, 2017, that it plans to raise the fraud compensation levy for 2017/18.

2. The PPF runs the Fraud Compensation Fund (**"FCF"**). The fraud compensation levy is collected by the Pensions Regulator, however, alongside its general levy.

3. The FCF pays compensation to eligible work-based pension schemes, including defined contribution schemes, where the employer is insolvent and the scheme has suffered loss due to an offence involving dishonesty.

4. The press release states that this is the first time in 5 years that the levy will be raised. A decision to raise the levy for 2017/18 has been taken because the PPF has been notified of a number of possible claims which may come to the FCF in the next few years.

5. The FCF levy will be set at 25p per member and is expected to raise around £5 million in total.

6. The press release states that the collection process began on 1st April, 2017.

Comment (1): The FCF levy is payable by the scheme trustees. However, where the levy exceeds the value of unallocated assets (meaning assets not specifically allocated for benefits or for the payment of scheme expenses) then the employer owes a debt to the trustees equal to that levy deficit.

Comment (2): It may be worth cross-checking what the scheme schedule of payments, required under Section 87 of the Pensions Act 1995, provides for.

VII. Updated auto-enrolment detailed guidance

1. The Pensions Regulator has published updated auto-enrolment detailed guidance, dated April, 2017.

2. The update is intended to reflect recent auto-enrolment changes, including the 2017/18 qualifying earnings thresholds and the phased changes to minimum contribution rates in defined contribution schemes.

VIII. Conviction for refusal to provide Regulator with information

1. The Pensions Regulator announced on 6th April, 2017 that the head of a charity has been convicted of refusing to provide the Regulator with information in connection with an investigation into 'unusual scheme investments'.

2. The Regulator's press release states that the Chief Executive of Yateley Industries for the Disabled Limited, failed to provide documents despite the Regulator's pursuit for over 18 months. Mr McLarry, was a former trustee of the charity's pension fund.

3. He was issued with an information notice for the documents but refused to supply them, claiming that, as the documents contained third party information, supplying them would be a breach of French privacy law.

4. He also asserted that certain French bank statements, in his name and that of his wife, were protected by legal privilege and that providing the statements might incriminate him.

5. The Regulator engaged an expert in French law to give evidence on its behalf.

6. Mr McLarry was found guilty of refusing to produce, without reasonable excuse, documents required under section 72 of the Pensions Act 2004, which is an offence under section 77 of the Act. He was ordered to pay a £2,500 fine.

Comment (1): This is the second time that the Regulator has decided to pursue a conviction under Section 77 of the Pensions Act 2004.

Comment (2): Please see Pensions Bulletin 17/08 regarding the first time such a conviction was achieved, following the refusal of a solicitor to provide documents requested as part of a wider investigation. In that case the Regulator's pursuit of the documents lasted 9 months.

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.