

Pensions and Employment: Pensions Bulletin

13 October 2017 / Issue 17

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](#)

Forthcoming events

Our next Pensions Update Seminar will take place on Wednesday, 29th November, 2017, between 9.30am and 1.00pm.

We will be covering a broad range of topics, including:

- an update on recent tax developments,
- what schemes must do to prepare for the General Data Protection Regulation,
- the impact of the *Walker* decision on same sex spouses/civil partners, and
- recent case law (including the *IBM* ruling) on exercising employer and trustee discretions relating to pensions

Please click [here](#) to see the invitation and for information on how to book.

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>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.</p> <p>1.2 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>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.</p> <p>1.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in</p>

No.	Topic	Deadline	Further information/action
			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)	6 th April, 2016	Pensions Bulletin 15/16
3.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016 and ongoing requirement	Pensions Bulletin 16/03
4.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th 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 .

No.	Topic	Deadline	Further information/action
5.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact.
6.	Chair's annual governance statement	Within 7 months of end of scheme year	For example, schemes with a 31 st March year end must submit statement by 31 st October, 2017. Client note dated June, 2015 available from Dawn Holmes .
7.	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 .
8.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015, is expected to drop from £10,000 to £4,000 under forthcoming Finance Bill 2017	Retroactive effect from 6 th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.
9.	GMP equalisation		
9.1	Part 8 action brought by female staff,	15 th May, 2017	We will continue to monitor developments in this litigation, which has

No.	Topic	Deadline	Further information/action
	trustee and Lloyds Trade Union		implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997. Trial window Between 1 st June, 2018 and 31 st October, 2018
9.2	DWP publishes consultation proposing methodology for equalising GMPs Government response published	28th November, 2016 13 th March, 2017	Pensions Bulletin 16/19 Pensions Bulletin 17/7
10.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
10.1	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
10.2	Supreme Court ruling in <i>Walker v. Innospec</i>	12 th July, 2017	Survivor benefits for civil partners and same sex spouses must be based on all service, including before the Civil Partnership Act 2004 came into force. Judgments issued (Pensions Bulletin 17/12) If necessary, affected schemes should correct the position for pensions already in payment, update the trust deed and rules and update member booklets and other

No.	Topic	Deadline	Further information/action
			member communications as necessary.
11.	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 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
12.	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 13 th April, 2017 to preserve QROPS status. Pensions Bulletin 17/05
13.	Pensions Advice Allowance introduction date	6 th April, 2017 3 rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
14.	Gender pay gap information regulations in force	6 th April, 2017 4 th 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.

No.	Topic	Deadline	Further information/action
15.	Pension Schemes Act 2017 receives Royal Assent ¹	27 th April, 2017	Existing master trusts have notification duty for triggering events on or after 20 th October 2016 Pensions Bulletin 17/09
16.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26th June, 2017	Pensions Bulletin 17/11 Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31st January after tax year in which tax paid, starting 31st January, 2018	Pensions Bulletin 17/16
17.	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 (but may be extended - tbc)	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Possible further extension may be granted by HMRC to the existing practice (Pensions Bulletin 17/13).
18.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	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.

¹ Much of the Act is not in force yet, such as the prohibition on operating a master trust scheme unless authorised and,

No.	Topic	Deadline	Further information/action
19.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
20.	IORP II ² transposition deadline	12 th 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: (a) European Council and UK unanimously decide to extend period, or (b) UK withdraws, if able to do so, its Article 50 notice before 29th March, 2019.

New law

I. PPF levy for 2018/19

1. The PPF has [published](#), on 27th September, 2017, the following:

2.1 a Policy Statement regarding the levy triennium 2018/19 to 2020/21; and

consequently, provisions on the authorisation criteria and ongoing supervision.

2.2 a consultation on draft levy rules and guidance for the levy year 2018/19.

2. The above papers are set out in one [combined document](#).

A. Policy Statement

1. The Policy Statement follows the PPF's consultation of 23rd March, 2017 (to read about the consultation please see [Pensions Bulletin 17/7](#)).

2. The PPF has decided to consult further, in October, 2017, before publishing a set of amended contingent asset forms alongside the final Levy Rules for 2018/19:

"This will mean new contingent asset agreements entered into for the 2018/19 levy year will be required to be on these new forms. For existing Type A and Type B agreements, we are likely to require action to be taken for 2019/20, but will not do so for 2018/19."(paragraph 1.4.2)

"It is our intention that any contingent assets that are executed on the forms to be issued in December will not then

² Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision

have to be re-executed for 2019/20.” (paragraph 8.2.8)

3. The PPF intends to proceed with its proposal for a guarantor strength report to be provided to trustees prior to certification of a Type A contingent asset. That requirement will only apply where the contingent asset results in a levy reduction of at least £100,000.
4. All schemes will be able to certify deficit reduction contributions using a simplified version of the current approach. Schemes with liabilities below £10 million may, if they meet certain conditions, base their certification on recovery plan payments.
5. The PPF has decided that it will not include a levy discount for good governance but will keep this possibility under review.
6. The Policy Statement also confirms the PPF’s intention to use credit ratings. An industry specific scorecard will be used for financial services entities.

B. Levy consultation for 2018/19

1. The PPF expects to finalise the 2018/19 levy rules by Christmas, 2017.

2. The Levy Estimate for 2018/19 is £550 million, which is £65 million lower than the figure for 2017/18.
3. The PPF is proposing to reduce the Risk-Based Levy Cap from the current 0.75% to 0.5% of smoothed liabilities.
4. The PPF wants to narrow the range of levy rates between bands 1-4, to reflect the limited difference in risk when comparing employers within those bands.
5. The levy rate for employers in band 4 would remain at 0.40 but the levy rates for bands 1-3 would be adjusted. Employers in band 1, for example, would have a levy rate of 0.28 (instead of the current levy rate of 0.17).
6. The consultation closes on 1st November, 2017.

Comment: A briefing note with further information will follow shortly.

TAX

II. VAT and special investment funds - HMRC Brief 3 (2017)

1. HMRC has announced its latest policy on VAT and special investment funds in [‘Brief 3 \(2017\): VAT - treatment of](#)

pension fund management services’, published on 5th October, 2017.

2. Brief 3 (2017) announces that, in the light of the CJEU decision in *ATP* (C-464/12), its policy of allowing insurers to treat their supplies of non-special investment fund pension fund management services as VAT exempt insurance is to be discontinued from 1st January, 2018.
3. As most pension fund management services provided by insurers are supplied for DC pension funds, HMRC acknowledges that those services will still qualify for exemption as special investment funds, following the judgment in *ATP*.
4. Prior to the ruling in *ATP*, HMRC did not consider pension funds of any kind to be special investment funds. It therefore treated services provided in connection with all types of pension fund as falling outside the specific VAT exemption for the management of special investment funds.

Comment (1): HMRC’s announcement concerns schemes with assets which are directly managed by an insurance company.

Comment (2): Schemes which are invested solely in a unit linked life policy are unaffected by HMRC’s announcement.

Comment (3): It seems likely that this change will result in a 20% increase in fees charged by insurance companies in respect of the directly managed assets of affected schemes.

Action Point: Affected schemes could address this impact by restructuring their position through the use of a unit linked policy.

III. Pension Schemes Newsletter 91

1. HMRC has published, on 29th September, 2017, [Pension Schemes Newsletter 91](#).
2. The Newsletter includes the announcement that HMRC has now launched its lifetime allowance scheme administrator [look-up service](#) online.
3. To use the look-up service scheme administrators will need the following from the member:
 - 3.1 protection notification number; and
 - 3.2 scheme administrator reference number.

Cases

IV. Equalisation deed required - retrospectivity issue referred

1. The Court of Appeal (Lord Briggs) ruling in *Safeway v Newton*, dated 5th October, 2017, has concluded that the power to amend the Safeway Pension Scheme (“**the Scheme**”), so as to equalise Normal Pension Age (“**NPA**”) for men and women, could only be exercised by deed, not by written announcement.
2. On the separate issue of whether Article 119 of the Treaty of Rome³ Union prohibited a retrospective equalisation amendment levelling down benefits, the Court of Appeal decided to refer the point to the Court of Justice of the European Union (“**CJEU**”).

A. Facts

1. The Scheme amendment power contemplated amendments by the Principal Company, with the consent of the Trustees, being made **by deed**. Amendments could be made with retrospective or future effect, or from the date of any prior written announcement to members, or the date of the deed.

2. An announcement from the employer and Trustee was sent out to members on 1st September, 1991, stating that benefits would be equalised, so that men and women would have an NPA of age 65 from 1st December, 1991.
3. The Scheme was then administered on the basis that NPA had been equalised from 1st December, 1991.
4. A deed of amendment was executed on 2nd May, 1996 which provided for equalisation, expressed as effective from 1st December, 1991.
5. The employer argued that equalisation had taken effect on 1st December, 1991. The representative beneficiary argued that the High Court was right to conclude that equalisation took effect on 2nd May, 1996.

Comment: To read about the High Court ruling please see [Pensions Bulletin 16/3](#).

B. Decision

1. The Court of Appeal agreed with the High Court ruling that equalisation could only be achieved by a deed of amendment.

³ now Article 157 of the Treaty of the Functioning of the European Union

2. The court pointed out that trustees who administer their schemes upon the basis of announced alterations on the assumption that they will in due course be confirmed by an authorised amendment, with retrospective effect, do so at their own risk.

Comment (1): When amending a scheme it is crucial that the formalities stipulated in the Trust Deed and Rules are met, as discussed in *Briggs v Gleeds* (please see [Pensions Bulletin 14/07](#)) and the Scottish equalisation case of *Bett Homes Ltd v Wood* (please see [Pensions Bulletin 16/07](#)).

Comment (2): There are instances, however, of courts using a workaround to deal with defects in procedure, known as the presumption of regularity.

Comment (3): That workaround was applied in the Scottish equalisation case of *Knight v Sedgwick Noble Lowndes and Mercer* (please see [Pensions Bulletin 17/05](#)). The maxim is also recognised in English law.

3. EU law⁴ requires the rights of the disadvantaged class (men with an NPA of age 65) to be brought into line

with the advantaged class (women with an NPA of age 60) for the period (known as “the Barber window”) between 17th May, 1990⁵ and the date on which the scheme is amended to equalise NPAs. This is known as levelling up.

4. The High Court considered that the requirement to level up applied even where the Trust Deed and Rules permitted retrospective levelling down (ie, an amendment to raise NPA for women to age 65).
5. The Court of Appeal concluded that the CJEU should decide whether the Article 119 requirement to level up benefits during the Barber window overrides a clear power, under domestic law, to level rights down retroactively.
6. The court also decided not to comment at this stage (ie, before the CJEU ruling on the Article 119 point) on whether Section 62 of the Pensions Act 1995 had the effect of closing the *Barber* window for the scheme.

Comment (1): The ability to amend a scheme retroactively in a way which would or might adversely affect accrued

rights or entitlements has been considerably restricted by Section 67 of the Pensions Act 1995 since 6th April, 1997.

Comment (2): Retroactive amendments of the sort contemplated by the court in the *Safeway* decision would therefore need to have been made before 6th April, 1997, using a power of amendment with sufficient scope to make the change validly.

[Safeway v Newton](#)

Points in practice

V. Guide on supporting employees on financial matters without FCA authorisation

1. The Pensions Regulator and FCA have published a [factsheet](#), dated September, 2017, entitled ‘Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation’.
2. The factsheet includes a section on employers promoting pensions and contains links to the FCA [guide](#) on the topic (undated but written when the FCA was the FSA) and the Pensions

⁴ *Coloroll Pension Trustees v Russell; Smith v Avdel Systems Ltd; Fisscher v Voorhuis Hengeglo*

⁵ the date of the *Barber* ruling, which concluded that different NPAs for men and women constituted unlawful discrimination

Regulator's [guide](#) on talking to employees about DC pensions (dated July, 2014).

Comment (1): The key point is whether the information relates to an occupational pension scheme or to a workplace personal or stakeholder pension scheme.

Comment (2): Where the scheme in question is an occupational pension scheme, there are no FCA restrictions on this type of employer communication because membership of such a scheme is not an “investment” for Financial Services and Markets Act 2000 purposes.

Comment (3): Where the scheme involved is a workplace personal or stakeholder pension scheme, providing information may amount to a “financial promotion” and hence require FCA authorisation, unless the promotion falls within an exemption set out in the legislation.⁶

Comment (4): As employers make greater use of workplace personal pension schemes, the financial promotion rules are increasingly relevant.

VI. Cross border activities

1. The European Insurance and Occupational Pensions Authority (“EIOPA”) is

conducting a review of the Budapest Protocol to encourage co-operation between National Competent Authorities on certain cross-border aspects of the [IORP II Directive \(2016/2341\)](#).

2. IORP II includes provisions on notification procedures for cross-border activities (Article 11) and cross-border transfers (Article 12).
3. EIOPA is seeking to improve transparency and efficiency regarding those provisions.
4. It is expected that the notification procedures will be finalised in 2018.

Comment: Member states are required to transpose IORP II into domestic legislation by 13th January, 2019.

⁶ Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, Article 72

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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