SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

10 November 2017 / Issue 18

Legal and regulatory developments in pensions

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To access our Employment/Employee Benefits Bulletin visit the Slaughter and May website.

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- Investment Association (IA) Principles of Remuneration (2017)
- FRC Annual Review of Corporate Reporting: Remuneration aspects
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More about our pensions and employment practice

Details of our work in the pensions and employment field

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.

Please click here to see the invitation and for information on how to book.

We will be covering a broad range of topics, including what schemes must do to prepare for the General Data Protection Regulation.

For example, should the employer be a controller in common with the trustee of certain pension plan membership data? Will you need to appoint a Data Protection Officer? Will individuals named on expression of wishes forms need to be informed of that fact under Article 14 of the GDPR?

A checklist on what trustees need to do to comply with the General Data Protection Regulation is available to clients from your usual Slaughter and May contact.

Other topics covered include:

- an update on recent tax developments,
- 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.

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.	Put in place register of	6th April, 2016 and	Pensions Bulletin 16/03

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No.	Topic	Deadline	Further information/action
	persons with significant control ("PSC") for trustee company where trustee is a corporate	ongoing requirement	
4.	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.
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 31st March year end must submit statement by 31st October, 2017. Client note dated June, 2015 available from Dawn Holmes.
7.	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.
8.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015, is expected to drop from £10,000 to £4,000 under forthcoming Finance Bill 2017	Retroactive effect from 6th 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, trustee and Lloyds Trade Union	15th May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
		Trial window	Between 1st June, 2018 and 31st October, 2018
9.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
	Government response published	13th March, 2017	Pensions Bulletin 17/7
10.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
10.1	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
10.2	Supreme Court ruling in *Walker v. Innospec*	12th 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 member communications as necessary.
11.	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
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 13th April, 2017 to preserve QROPS status. Pensions Bulletin 17/05
13.	Pensions Advice Allowance	6th April, 2017	Pensions Bulletin 17/04

No.	Topic	Deadline	Further information/action
	introduction date	3rd January, 2018	New financial advice definition. Pensions Bulletin 17/06
14.	Gender pay gap information regulations in force	6th April, 2017	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.
		4th April, 2018	Deadline for reporting above information.
15.	Pension Schemes Act 2017 receives Royal Assent[1]	27th April, 2017	Existing master trusts have notification duty for triggering events on or after 20th 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 and 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 (but may be extended - tbc)	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. **Please see item IV below.**
18.	**DC bulk transfers without member consent: anticipated introduction of easements**	**6th April, 2018**	**See item I below.**
19.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	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 Regulation is achieved by this date. **A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.**
20.	Further EMIR exemption extension for pension scheme arrangements	16th August, 2018	Pensions Bulletin 17/01
	Additional 3 year clearing extension proposed		Pensions Bulletin 17/10
21.	IORP II[2] transposition deadline	12th January, 2019	Pensions Bulletin 16/11
22.	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. DC bulk transfers without consent

1. The DWP has published, on 26th October, 2017, a consultation paper and draft regulations regarding the bulk transfer of DC pensions without member consent. The consultation closes on 30th November, 2017.

2. Draft regulations[3] published with the consultation anticipate the changes coming into force on 6th April, 2018.

3. The DWP proposes to remove the following in relation to transfers between DC schemes:

[1] Much of the Act is not in force yet, such as the prohibition on operating a master trust scheme unless authorised and, consequently, provisions on the authorisation criteria and ongoing supervision.

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

[3] Draft - Occupational Pension Schemes (Preservation of Benefit and Charges and Governance) (Amendment) Regulations 2018

3.1 the need to obtain an actuarial certificate stating that the transfer credits in the receiving scheme for each member are broadly no less favourable than the rights to be transferred; and

3.2 the requirement for there to be a scheme relationship.

Comment: Broadly, the scheme relationship requirement[4] provides for the transferring and receiving schemes to relate to people who are, or have been, in employment with the same employer. Where the transfer relates to people employed by different employers, the requirement is met if the transfer is a consequence of a financial transaction between those employers, or if the employers' relationship fits one of the descriptions listed in the legislation.

4. As regards DC transfers to schemes authorised under the master trust regime, the DWP plans to consider the need to develop guidance on how trustees should review the suitability of the receiving master trust.

5. For DC transfers to schemes which are **not** authorised master trusts, the DWP is proposing that trustees should consult with "*a professional who they have verified to be independent from the receiving scheme under consideration*". The decision to carry out a bulk transfer would ultimately be one for the trustees to make, however.

6. Over the 5 years leading up to the advice being given, the "*suitably qualified professional*" must not have been a director, manager, partner or employee of a firm providing advisory, administration, investment or other services in respect of the receiving scheme, or of a firm connected to such a provider.

7. In addition, the consultant must not have received any payment or benefit from such a service provider.

8. The DWP also anticipates the continued application under the receiving scheme of the auto-enrolment default fund charge cap where it applies to a member under the transferring scheme.

9. This would operate regardless of whether the cap would cease to apply to that member because of future circumstances.

10. Where the member's charge cap protected funds are switched without the member making an active choice, the DWP is also proposing that the funds should continue to be subject to the cap.

Comment (1): If the Government's proposals are adopted, trustees of DC schemes who are considering making a bulk transfer without consent may find that the transfer will be easier to achieve if they are in a position to wait for these proposals to come into effect first.

Comment (2): The Government is keen to see the consolidation of DC schemes and states in the consultation paper that it wishes to see a reduction in the barriers preventing such consolidation.

Comment (3): The DWP issued a call for evidence on 20th December, 2016 seeking views on how to improve the requirements which currently apply to bulk DC transfers without consent. To read more about the call for evidence please see Pensions Bulletin 17/01.

Comment (4): Even if the preservation requirements are relaxed, the Trust Deed still needs to contain an adequate power to allow a without consent transfer to be made which would alter the way a member's money purchase benefits are invested and the trustee would still need to be able to exercise its powers properly.

4 described in Regulations 12(2) and 12(2A) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991

II. Disclosure of costs, charges and investments

A. Introduction

1. The DWP has published, on 26th October, 2017, a consultation paper on:

   1.1 publishing information on transaction costs and charges, and

   1.2 providing members with investment information.

2. The consultation closes on 6th December, 2017.

3. The proposed duties outlined in the consultation would apply to occupational pension schemes providing money purchase benefits, with a limited number of exemptions. One exemption would be schemes that only provide money purchase benefits attributable to AVCs.

4. Draft regulations anticipate that the in force date would be 6th April, 2018. Where the deadline for a scheme's annual governance statement falls on or after that date (by reference to a scheme year ending before that date) the regulations would apply from the last day of the first scheme year ending on or after 6th April, 2018.

5. Failure to comply could result in a penalty of £5,000 for an individual or £50,000 in other cases.

B. Charges and transaction cost information

1. Trustees would be required to publish charges and transaction cost information and to disclose this to members, beneficiaries and others, including recognised trade unions.

2. Trustees would be required to publish the charges and transaction cost information on the internet, for public consumption, on a similar annual cycle to the Chair's Statement (ie, within 7 months of the scheme year end).

3. Annual benefit statements to members would need to include a web address where the member could find the costs and charges for their scheme.

4. Both the Chair's Statement and the published costs and charges information would need to set out the costs and charges for each default arrangement and each alternative fund option which the member is able to select.

   Comment: Some schemes may feel less inclined to offer numerous fund options to their members in the light of this.

5. An illustration of the compounding effect of the costs and charges would also need to be provided.

C. Investment disclosure

1. Trustees would be required to disclose, on request, to members and recognised trade unions, the name and International Securities Identification Number of each investment vehicle in which they are directly invested and for which public information is available.

2. Where the scheme invests in unit-linked contracts, the requirement to disclose would look-through the contracts to the first layer of underlying authorised funds for which there is public information.

3. Where the assets are managed through a bespoke mandate, trustees would be required to look-through the mandate to any underlying authorised funds.

4. Where the scheme invests in a pooled fund composed of other pooled funds, the DWP would not

expect the trustees to look through the top-level pooled fund to the underlying funds.

5. Annual benefit statements would need to notify recipients that they could request the above investment information.

6. Responses to requests for the information would need to be made within 2 months of the request.

7. Trustees would also be required to disclose the fund holdings over the scheme year. The information for this would need to be prepared within 7 months of the scheme year end date.

III. Money laundering - HMRC guidance

1. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("**the MLR**") impose certain record-keeping and reporting obligations on trustees.

2. The MLR will apply to registered and non-registered pension schemes (including life cover only schemes) established under trust which have become liable to pay certain types of tax charge (including SDRT and IHT) in the tax year in question.

3. The MLR require trustees to:

   3.1 maintain up-to-date records of all beneficial owners of the trust (Regulation 44 of the MLR), and

   3.2 in certain circumstances, provide HMRC with information about those beneficiaries (Regulation 45 of the MLR).

4. HMRC is expecting trustees to comply with Regulation 45 of the MLR via its Trusts Registration Service ("**TRS**").

5. Guidance about the TRS has been produced by HMRC.

6. To read our briefing note about HMRC's guidance on the TRS please click here.

Tax

IV. VAT recovery - indefinite continuation of existing input rules

1. HMRC has announced, in VIT44600 which was amended extensively on 31st October, 2017, the indefinite continuation of its existing rules for input tax deduction in respect of funded, trust based occupational pension schemes.

2. The amended text states that the transitional period previously announced, and extended on a number of occasions, comes to an end on 31st December, 2017 and goes on to state:

   "… in consideration of the difficulties encountered by some taxpayers with implementing options that would allow appropriate deduction of VAT as per PPG, HMRC has come to the view that the existing rules for input tax deduction will continue to be available to taxpayers going forward, together with the newer options following PPG."

   Comment: Employers wishing to adopt one of the 'newer options' that seek to apply the *PPG* decision so as to permit enhanced input tax recovery, will have to negotiate the minefield of the various problems that had been identified in respect of each of the alternative structures that were developed.

V. VAT and special investment funds

1. We understand, from an item posted on the ICAEW website on 7th November, 2017, that HMRC has decided to alter the implementation date of its announcement in 'Brief 3 (2017): VAT – treatment of pension fund management services' (published 5th October, 2017).

2. Brief 3 (2017) announced that the ability of insurers to treat their supplies of **non**-special investment fund pension fund management services as VAT exempt insurance would end on 1st January, 2018.

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

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

Comment (3): To read more about this please see Pensions Bulletin 17/17.

3. The ICAEW post referred to above quotes a communication from HMRC which states that it has decided to postpone the implementation of the change announced in Brief 3 (2017) to "*sometime later in 2018 or in the first half of 2019. The revised implementation date will be notified shortly and the HMRC VATINS guidance will be updated to include these changes*".

Cases

VI. Meaning of attributable to pensionable service

1. The High Court (Nugee J) has, on 12th October, 2017, examined the term "attributable to his pensionable service" contained in legislation regarding the PPF compensation cap.

2. The court concluded that the term meant that benefits transferred-into the appellant's new employer's scheme were not attributable to his pensionable service with that employer.

A. Facts

1. Mr Beaton left employment with CT Bowring & Co and joined Fenchurch Group plc in 1994. He transferred his accrued pension under his old employer's pension scheme to that of his new employer.

2. The principal employer of the successor receiving scheme went into administration in 2005 and the scheme subsequently entered the PPF. Mr Beaton then retired in 2007.

3. Mr Beaton appealed against the PPF Ombudsman's view that his pensionable service under both pension schemes should be aggregated when applying the PPF compensation cap. He considered that the cap should be applied to each pension separately.

4. The PPF Ombudsman had decided that the transferred-in benefits should be aggregated with benefits earned by Mr Beaton during employment with his new employer.

5. This was because it regarded the transferred-in benefits as being attributable to Mr Beaton's pensionable service with his new employer.

6. In such circumstances, paragraph 26(2)(b) of Schedule 7 to the Pensions Act 2004 requires both sets of benefits to be aggregated when applying the PPF compensation cap.

B. Decision

1. The High Court disagreed with the PPF Ombudsman's conclusion and remitted the matter back.

2. A statement in Parliament indicated that the mischief of the legislation was to prevent the aggregation of benefits derived from pension credits (on divorce) with benefits derived from pensionable service.

3. However, the court concluded that it was very difficult to give the term "attributable to his pensionable service" a wider meaning than the words would normally and conventionally be regarded as having.

4. The court concluded that the ordinary meaning of a benefit being attributable to pensionable service meant a benefit earned by the member as a result of giving service to an employer while a member of a pension scheme under which he accrues or earns a future pension. The source of the benefits was key.

5. The court could not displace the ordinary meaning of the words used in the legislation, despite the fact that those in Mr Beaton's position obtained a windfall which went

beyond the mischief which the legislation was enacted to address.

Beaton v The Board of the Pension Protection Fund

Points in practice

VII. PPF levy for 2018/19; contingent asset standard forms

A. 2018/19 levy determination

1. On 27th September, 2017, the PPF published:

   1.1 a draft of its 2018/19 levy determination and accompanying documents, and

   1.2 a response to its March 2017 Consultation on changes to the risk-based levy for the 2018/19 to 2021/22 "triennium".

2. The 2018/19 levy year will see a number of significant changes, including:

   2.1 changes to the Experian Risk Assessment Model;

   2.2 alternative approaches to insolvency risk in certain circumstances;

   2.3 simplified reporting of deficit reduction contributions;

   2.4 a new requirement for trustees with Type A Contingent Assets resulting in a levy saving of £100,000 a year or more to obtain a pre-certification report analysing the guarantor's strength;

   2.5 a change allowing for the share of underfunding of a scheme employer guarantor to be credited in the levy calculation;

   2.6 a new easement for the certification of asset-backed contributions based on real estate; and

   2.7 a rule amendment allowing the PPF to charge a levy on schemes entering an assessment period in the expectation that a successor scheme will be established.

Comment: To see our briefing note on this, please click here.

B. Contingent assets consultation

1. On 19th October, 2017, the PPF published a consultation on contingent assets and the PPF levy.

2. The closing date for comments is 21st November, 2017.

3. To see the consultation documents, including comparisons of the new standard forms with the current (December, 2014) versions, please click here.

4. The PPF proposes changes to the standard form documentation for **all** types of contingent asset, not just Types A and B, as originally suggested by the PPF.

5. The PPF expects to publish final versions of the new documentation in January 2018.

6. Any contingent assets executed after publication of the final form documentation must be in the new form.

7. Existing contingent assets can be certified on the old documentation for 2018/19 but will have to be re-executed/amended to reflect the new documentation if they are to be recognised for 2019/20.

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.