SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

19 January 2018 / Issue 01

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

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 persons with significant control ("PSC") for trustee company where trustee is a corporate	6th April, 2016 and ongoing requirement	Pensions Bulletin 16/03
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, has dropped	Retroactive effect from 6th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
	from £10,000 to £4,000 under Finance (No.2) Act 2017		
9.	GMP equalisation		
9.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15th May, 2017 Trial window	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. Between 1st June, 2018 and 31st October, 2018
9.2	DWP publishes consultation proposing methodology for equalising GMPs Government response published	28th November, 2016 13th 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 *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 introduction date	6th April, 2017 3rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
14.	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.
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 Deadline for registering with HMRC for its Trusts Registration Service	26th June, 2017 31st January after tax year in which tax paid, starting 31st January, 2018 **but no penalty if**	Pensions Bulletin 17/11 Further guidance awaited from HMRC. Pensions Bulletin 17/16 Pensions Bulletin 17/18 **Pensions Bulletin 17/20**

[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.

No.	Topic	Deadline	Further information/action
		done by 5th March, 2018	
17.	HMRC's existing practice on VAT and pension schemes to continue indefinitely		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. **Pensions Bulletin 17/18**
18.	DC bulk transfers without member consent: anticipated introduction of easements	6th April, 2018	Pensions Bulletin 17/18
19.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6th April, 2016 contracts where payment made on or after 1st October, 2017. Applies where scheme used as "qualifying scheme" for auto-enrolment purposes and some or all of benefits are money purchase.	1st May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.
20.	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.
21.	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
22.	IORP II[2] transposition deadline	12th January, 2019	Pensions Bulletin 16/11
23.	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.

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

New law

I. PPF Levy Determination for 2018/19

1. The PPF has confirmed, in a press release dated 19th December, 2017, its Levy Determination for 2018/19 and its Levy Policy Statement for 2018/19.

2. Both documents, along with several Appendices and Guidance notes, are available here.

3. In line with its consultation issued on 27th September, 2017, the PPF confirms in its Levy Policy Statement that for 2018/19:

   3.1 the Levy Scaling Factor will be 0.48;

   3.2 the Scheme-based Levy Multiplier will be 0.000021;

   3.3 the Risk-Based Levy Cap will be reduced from 0.75% of liabilities to 0.5% of liabilities;

   3.4 the levy rate for band 4 employers will remain at 0.40 but for bands 1-3 the levy rates will be increased;

3.5 the way in which deficit reduction contributions are certified is to be simplified;

3.6 where a Type A contingent asset results in a levy saving of at least £100,000, a guarantor strength report should be provided to the trustees prior to the certification of that contingent asset; and

3.7 the Levy Estimate is £550 million, a reduction from the 2017/18 Levy Estimate which was £615 million.

Comment: To read about the consultation please see Pensions Bulletin 17/17.

4. When certifying deficit reduction contributions, schemes will be able to exclude all expenses associated with investment, not just investment management expenses.

5. Schemes will be able to base their deficit reduction contributions certification on recovery plan payments if they:

   5.1 have Section 179 liabilities of less than £10 million,

   5.2 are closed to accrual throughout the certification period, and

   5.3 have a recovery plan in force at some point during that period.

6. The 2018/19 Levy Policy Statement also states that the PPF intends to publish the new contingent asset documentation in mid-January, 2018.

7. Contingent assets entered into after that date will need to be on the new forms.

8. The Policy Statement (at paragraph 1.8.2) lists the changes that the PPF expects to make to those forms.

9. The PPF expects to require re-execution of contingent assets that involve a fixed cap, but it will not require re-execution for those contingent assets limited solely to either a proportion of Section 179 liabilities, or to the full Section 75 liability.

10. The PPF's key dates table for the 2018/19 levy is replicated below:

Item	Key dates
Monthly Experian Scores	Between 31 October 2017 and 31 March 2018
Deadline for submission of data **to Experian** to impact on PPF-specific Monthly Scores	One calendar month prior to the Score Measurement Date
Submit scheme returns **on Exchange**	By midnight, 31 March 2018
Reference period over which funding is smoothed	5-year period to 31 March 2018
Contingent Asset Certificates to be submitted **on Exchange**	By midnight, 31 March 2018
Contingent Asset hard copy documents to be submitted as necessary **to PPF**	By 5 pm, 29 March 2018
ABC Certificate to be sent by e-mail **to PPF**	By midnight, 31 March 2018
Mortgage Exclusion ('Officers') Certificates and supporting evidence to be sent **to Experian**	By midnight on 31 March 2018
Accounting Standard Change certificate	By midnight on 31 March 2018
Special category employer certificate	By midnight on 31 March 2018
Deficit Reduction Contributions Certificates to be submitted **on Exchange**	By 5pm, 30 April 2018
Certification of full block transfers to be completed **on Exchange** or sent to PPF (in limited circumstances)	By 5pm, 29 June 2018 (Exempt transfer application by 5pm 30 April 2018)
Invoicing starts	Autumn 2018

II. Consultation on bulk transfers of contracted-out rights without consent

1. The Government has published, on 21st December, 2017, a consultation concerning proposed changes to enable, in certain circumstances, the transfer of contracted-out rights without member consent to schemes that have never been contracted-out, where the transfer is a 'connected employer transfer'.

2. The consultation ended on 17th January, 2018.

3. The Government intends the draft Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018 to come into force on 6th April, 2018.

   Comment (1): At the moment, members with contracted-out rights can be transferred without their consent only where the receiving scheme was previously contracted-out.

   Comment (2): Contracting-out was abolished on 6th April, 2016, meaning that new schemes that had never been contracted-out were no longer able to become contracted-out and could not, therefore, receive contracted-out rights without the member's consent.

4. The draft Regulations set out several requirements that must be met for the without-consent transfer to be made.

5. For example, a transfer of Section 9(2B) rights would not be permitted if the transfer would alter those rights so that the benefits would or might be less generous.

III. MiFID II

1. The EU's Markets in Financial Instruments Directive and Regulation (known as MiFID II) introduced requirements on 3rd January, 2018 which will need to be reflected in investment management agreements between trustees and fund managers.

2. These requirements are likely to impact on the following parts of the investment management agreement:

   2.1 categorisation of the client for regulatory purposes (pension fund trustees should be categorised as a "professional" client);

   2.2 the complaints procedure and compensation arrangements;

   2.3 an update on client money requirements (this may also impact on custody agreements);

   2.4 order handling and execution policy; and

   2.5 an updated conflict of interest policy.

3. In general, these updates are meant to be for the benefit of the pension fund trustee, although care will need to be taken in certain areas.

4. Trustees may wish to double check that the effect of these changes does not alter what they expect the answer to be in relation to fees and expenses.

5. For example, MiFID II requires fund managers to unbundle research costs from trading commission. Trustees may wish to ask the fund manager to confirm whether it will meet any research cost or whether such costs will be passed on to the trustees.

6. A further impact of MiFID II is that investment firms subject to MiFID II transaction reporting obligations are no longer able to execute a transaction in a financial instrument unless their client has obtained a Legal Entity Identifier ('**LEI**') code. Investment firms are expected to contact their clients for whom an LEI is needed.

7. LEI codes are issued by the London Stock Exchange The LEI code is included in a global data system which enables every legal entity or structure that is a party to a relevant financial transaction to be identified in any jurisdiction.

IV. Auto-enrolment reviews

A. Earnings trigger and qualifying earnings band

1. The DWP has published, on 18th December, 2017, its 'Review of the automatic enrolment earnings trigger and qualifying earnings band for 2018/19: supporting analysis'.

2. The Government has concluded that the existing threshold of £10,000 should remain for 2018/19 in respect of the earnings trigger.

   Comment: Employers are subject to auto-enrolment duties in respect of certain individuals who meet a range of conditions. One of those conditions is that the individual earns an amount above the earnings trigger. Contributions are then based on qualifying earnings between the lower limit and the upper limit.

3. The lower limit of the 2018/19 qualifying earnings band is to be set at £6,032 (the current figure is £5,876).

4. The review points out the Government plans to remove the lower limit 'in the mid-2020s', however.

   Comment: In addition to this, the Government has stated in its 'Maintaining the Momentum' review (please see below) that it intends to reduce the lower age limit for auto-enrolment from age 22 to age 18.

5. The upper limit of the 2018/19 qualifying earnings band is to be set at £46,350 (the current figure is £45,000).

B. Maintaining the momentum: 2017 review

1. The DWP has published, on 18th December, 2017, 'Automatic Enrolment Review 2017: Maintaining the Momentum'.

2. The review states that the Government plans to:

   2.1 reduce the lower age limit for auto-enrolment from age 22 to age 18; and

   2.2 remove the lower earnings limit, so that pension contributions would be based on the first pound earned.

3. The Government intends to implement these changes '*in the mid-2020s, subject to discussions with stakeholders on the implementation approach during 2018/19*'.

V. Safeguarded benefits - financial advice

1. The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment No. 2) Regulations 2017 (**"the Regulations"**) were made on 12th December, 2017 and come into force on 6th April, 2018.

2. Section 48 of the Pension Schemes Act 2015 requires trustees to check that members and survivors with safeguarded benefits exceeding £30,000 have received appropriate independent advice before exchanging those benefits for flexible benefits by a transfer-out, by converting their safeguarded benefits, or by taking an uncrystallised funds pension lump sum.

3. Safeguarded benefits are benefits other than money purchase benefits or cash balance benefits.

4. The Regulations will alter the legislation[3] with effect from 6th April, 2018 so that the requirement to obtain appropriate independent advice will not apply where the 'transfer value' of the member's or survivor's safeguarded rights is £30,000 or less.

5. The 'transfer value' is defined under the Regulations, in broad terms, as the cash equivalent of the safeguarded benefits, tweaked so as to disregard, for example, the ability of trustees to reduce the initial cash equivalent in certain circumstances. This will apply regardless of whether the member or survivor actually has a statutory transfer right under the Pension Schemes Act 1993.

6. The Regulations also contain transitional provisions to deal with situations where the impact of the above change means that the member or survivor is no longer required to obtain appropriate independent advice.

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[3] *Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015

VI. FAS - long service cap consultation - Government response

1. The DWP has published, on 18th December, 2017, its response to the consultation issued on 18th September, 2017 regarding the introduction of a long service cap for the Financial Assistance Scheme ("**FAS**").

2. The proposal to introduce a long service cap for the FAS will go ahead.

3. The Government intends to introduce the FAS long service cap on 6th April, 2018.

4. In common with the PPF long service cap, the proposed FAS long service cap is to be set at 3% for each full year of pensionable service over 20 years, with an overall limit of twice the standard cap.

   Comment (1): Payments under the FAS are available in limited circumstances. Broadly, the FAS applies where a DB scheme in deficit has no employer support (for example, where the employer is insolvent) and the scheme:

   - started to wind-up between 1st January, 1997 and 5th April, 2005; or

   - started to wind-up after 5th April, 2005 but was ineligible to enter the PPF because the employer became insolvent before that date.

   Comment (2): The FAS closed to new applications on 1st September, 2016.

VII. Unpaid scheme contributions - employer insolvency definition widened

1. The Employment Rights Act 1996 and Pension Schemes Act 1993 (Amendment) Regulations 2017 came into force on 26th December, 2017.

2. Section 124 of the Pension Schemes Act 1993 ("**the Act**") enables 'persons competent to act in respect of an occupational pension scheme or a personal pension scheme' to apply to the Secretary of State for him to pay into the scheme an amount to cover any unpaid contributions which the insolvent employer should have paid across.

3. This relates to employer contributions and contributions paid on behalf of the worker by the employer following a deduction from the worker's pay.

4. The Regulations include amendments to Section 123 of the Act so as to widen the range of situations in which an employer will be considered insolvent.

5. The change means that the opening of collective proceedings based on the insolvency of the employer, as provided for under a Member State's laws, will result in the employer being considered insolvent for the purposes of applications under Section 124 of the Act.

6. The Regulations also provide that applications made under Section 124 of the Act can only be made in respect of workers who worked, or habitually worked, in Great Britain in the employment to which the application relates.

7. The changes are being introduced following a review conducted by the Redundancy Payments Service which concluded that the amendments were required in order to comply with the requirements of Directive 2008/94 EC on the protection of employees in the event of the insolvency of their employer.

Points in practice

VIII. Pension scams report by Select Committee

1. The Work and Pensions Select Committee has published a report, on 11th December, 2017, concerning pension scams.

2. Commenting on the Financial Guidance and Claims Bill, the report recommends:

   2.1 the introduction of a ban on pensions cold calling by June, 2018; and

   2.2 a requirement for individuals to take free and impartial guidance before accessing their pension pot, unless they choose to opt out of that requirement.

IX. Withholding tax - Code of Conduct

1. The European Commission has, on 11th December, 2017, announced the publication of a Code of Conduct on Withholding Tax.

2. When passive investment income (such as dividends, interest or royalties) is paid cross border, the EU Member State in which the income is generated may require tax to be withheld at source on the payment.

3. Investors often find that the income is taxed again in the country where the investor resides.

4. The current refund procedures for withholding tax are widely regarded as expensive and slow.

5. The Code is intended to offer a range of approaches which could be used to improve the efficiency of current procedures where refunds of withholding tax are sought.

6. Compliance with the Code is voluntary.

7. The 'Follow up' section of the Code encourages Member States to commit to the Code to improve 'the status quo' by 2019. A review of the Code could take place 'after 2019'.

8. The UK does not process many withholding tax reclaims in practice because of the limited scope of UK withholding tax and the way the rules apply generally to give relief at source, so HMRC is likely to conclude that the UK is already generally compliant with the spirit of the Code.

9. If other Member States choose to comply with the Code and improve their refund procedures, this should benefit UK taxpayers receiving passive income even post-Brexit, as the Code applies to withholding tax procedures on payments sourced in an EU Member State and that are paid to investors in EU and non-EU countries.

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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