SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

16 February 2018 / Issue 03

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.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	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
8.	GMP equalisation		
8.1	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
8.2	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
9.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
9.1	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
9.2	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.
10.	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
11.	Pensions Advice Allowance introduction date	6th April, 2017	Pensions Bulletin 17/04
		3rd January, 2018	New financial advice definition. Pensions Bulletin 17/06
12.	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.
13.	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
14.	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 but no penalty if done by 5th March, 2018	Pensions Bulletin 17/16 Pensions Bulletin 17/18 Pensions Bulletin 17/20
15.	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
16.	DC bulk transfers without member consent: anticipated	6th April, 2018	Pensions Bulletin 17/18

[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.

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	introduction of easements		
17.	Bulk transfers of contracted-out rights without consent: anticipated introduction of easements	6th April, 2018	Pensions Bulletin 18/01
18.	Auto-enrolment total minimum DC contributions will increase to 5% (of which minimum employer contribution of 2%)	6th April, 2018 to 5th April, 2019	
19.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6th April, 2019 onwards	
20.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6th April, 2016 contracts	1st May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.

No.	Topic	Deadline	Further information/action
	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.		
21.	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.
22.	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
23.	IORP II[2] transposition deadline	12th January, 2019	Pensions Bulletin 16/11
24.	Brexit	By 29th March, 2019,	UK leaves EU from effective date of withdrawal

No.	Topic	Deadline	Further information/action
		unless extended	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. Government considers punitive fines, clearance and trustees' insolvency ranking

1. The Government has indicated that it is likely to introduce punitive fines as part of the moral hazard framework operated by the Pensions Regulator.

2. The indication was made during a Parliamentary debate[3]:

   "Our manifesto in June 2017 reaffirmed this intent by proposing to give the regulator the power to impose punitive fines alongside contribution notices …. The details of the fine would be worked through with all the relevant stakeholders, but it would represent a significant strengthening of the deterrent."

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

[3] the statements were made by Esther McVey, Secretary of State for Work and Pensions on 22nd January, 2018

Comment (1): Punitive fines were suggested in the Work and Pensions Select Committee report on DB schemes (December, 2016). The report suggested that the fine should treble the original demand set by the contribution notice or financial support direction (please see Pensions Bulletin 17/01).

Comment (2): The Green Paper on DB private pension schemes (February, 2017) expressed reservations about introducing punitive fines, noting that the Regulator could find itself overwhelmed with clearance applications, or corporate activity could be halted or delayed.

Comment (3): The Green Paper did not entirely reject the possibility of introducing punitive fines, however, and envisaged limits being imposed on any such power. To read more about the Green Paper please see Pensions Bulletin 17/05.

3. The Government also indicated that it intended to make certain corporate transactions subject to mandatory clearance by the Regulator, noting that care would need to be taken to prevent adverse effects on legitimate business activity and the wider economy.

4. As regards concerns expressed about the ranking of pension scheme trustees as unsecured creditors on an insolvency of the employer, the Government commented that "… *this is something that needs to be brought forward under the governance rules for pensions.*"

5. The Government also plans to legislate to increase the Regulator's information gathering powers.

   Comment: The Pensions Act 2004 already provides the Regulator with broad information gathering powers. The Regulator's willingness to bring criminal prosecutions for failure to comply with a notice served by it under Section 72 of the Act has been clear in recent months. There have been 5 convictions for such a breach since the first conviction in April, 2017 (please see Pensions Bulletin 18/02).

II. PPF to recognise bridging pensions

1. Bridging pensions will be recognised in the calculation of PPF compensation for members of schemes entering a PPF assessment period on or after 24th February, 2018.

2. Under new regulations[4], bridging pensions (referred to as 'step-down pensions') will be recognised by decreasing the amount of PPF compensation in line with the reduction and decrease date that would have applied under the scheme had it not entered the PPF.

3. Currently, PPF compensation payments do not take account of changes to a member's pension after the date that the scheme enters the PPF assessment period.

4. This means that where the initial, higher, rate of a bridging pension is applicable to a member at the date the scheme enters its PPF assessment period, that rate is currently used as the basis for calculating the member's PPF compensation, for life.

5. The regulations also set out the way in which the PPF compensation cap will apply for individuals with bridging pensions, as well as the impact of early and late retirement, and the treatment of survivors' benefits.

6. The Government response[5] to its consultation on the draft version of the regulations also discusses the possible recognition of increases in a member's pension which would have taken place under the scheme at GMP age.

7. The majority of respondents to those questions were in favour of PPF compensation recognising 'GMP step ups' but the Government has decided that the

[4] Pension Protection Fund (Compensation) (Amendment) Regulations 2018 (SI 2018/95)

[5] issued on 29th January, 2018

bridging pensions change should bed down first.

Cases

III. Impact of amendment power restriction on 2006 closure to accrual

1. Employers contemplating the closure of their pension scheme may be interested in a High Court ruling about the interaction between taking such a step and the restriction contained in the scheme amendment power.

2. The High Court (Reed QC) considered whether the amendment power restriction contained in the Wedgwood Group Pension Plan (the **"Plan"**) prevented the closure of the Plan to future accrual and cessation of the final salary link. The court concluded that the Plan had indeed been closed to accrual, and the final salary link had been broken, in 2006.

A. Facts

1. The Plan's participating employers served notices on the trustee in 2006, terminating their liability to contribute.

2. The notices were served in accordance with a provision introduced as part of a rules rewrite carried out in 2001. That provision (**"rule 62"**) allowed employers to cease contributing on giving written notice to the trustee.

3. Prior to the introduction of rule 62, employers were to '*retire from the Plan*' in a number of situations. One such situation was '*if from any cause it shall … be found by any such Company … to be impracticable or inexpedient for such Company to continue to participate in the Plan*' (**"rule 45"**).

4. The court was asked to decide whether a restriction in the scheme amendment power prevented the introduction of rule 62.

5. The amendment power restriction stated that '*no alteration modification or addition shall be made which (i) shall prejudice or adversely affect any pension or annuity then payable or the rights of any Member."*

6. The PPF also had an interest in the court's decision because the Plan entered a PPF assessment period in 2010.

B. Decision

1. The court ruled that the termination notices given by the employers in 2006 ended future accrual and broke the final salary link.

2. The term '*rights of any Member'* covered rights which had accrued as a result of past service, but not benefits which might in the future be obtained as a result of future service.

3. The introduction of rule 62 was valid in so far as it allowed future accrual to be terminated. The restriction in the amendment power operated so as protect the final salary link, however, and that restriction came into play when rule 62 was introduced.

4. This was because introducing rule 62 prejudiced or adversely affected members' rights by making it easier for employers to cease contributing. In contrast to rule 45, rule 62 did not require employers to show that it was impracticable or inexpedient to continue contributions.

5. The court therefore decided to imply a limitation into rule 62, to mirror part of rule 45. The limitation would require it to be shown that the employers found it inexpedient or impracticable to participate in the Plan.

6. The judge considered that the principal employer would have introduced rule 62 even if it had been told that this limitation would have been necessary. Not examining

this point would have left the exercise of the power open to attack.

7. The judge then concluded that there was evidence, given the financial difficulties of the Waterford Wedgwood Group in 2006, that the employers would have found it inexpedient to continue their participation in the Plan.

Wedgwood Pension Plan Trustee Ltd v Salt

Points in practice

IV. Residency status reports

1. Scheme administrators have 6 days to download their notification of residency status report, starting from when HMRC makes the report available to the administrator.

2. The reports are intended to enable scheme administrators to apply the correct rate of relief to members for the 2018/19 tax year where the individuals are affected by the introduction of Scottish income tax.

3. HMRC's Pension schemes newsletter 95 (issued 31st January, 2018) advises administrators of relief at source pension schemes to log into the Secure Data Exchange Service to access their report as soon as the report becomes available. HMRC started to release the reports on 29th January, 2018.

4. HMRC wants scheme administrators to notify it as soon as possible (email details are in the newsletter) if:

   4.1 they have not received their report by 31st January, 2018,

   4.2 the report cannot be opened because the file is corrupt, or

   4.3 the administrator did not download the report in time.

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.