

Pensions and Employment: Pensions Bulletin

2 March 2018 / Issue 04

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 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</p>

No.	Topic	Deadline	Further information/action
			<p>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 view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.</p>
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

No.	Topic	Deadline	Further information/action
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 .
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.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	Retroactive effect from 6 th 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	15 th 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 1 st June, 2018 and 31 st October, 2018
8.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
	Government response published	13 th March, 2017	Pensions Bulletin 17/7
9.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
9.1	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
9.2	Supreme Court ruling in <i>Walker v. Innospec</i>		Survivor benefits for civil partners and same sex spouses must be based on all service, including before the

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
		12 th July, 2017	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	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
11.	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
12.	Gender pay gap information regulations in force	6 th April, 2017	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
		4 th April, 2018	17/03 and Employment Bulletin 17/03 . Deadline for reporting above information.
13.	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
14.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26 th June, 2017	Pensions Bulletin 17/11 Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31 st January after tax year in which tax paid, starting 31 st January, 2018 but no penalty if done by 5 th 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	6 th April, 2018	Pensions Bulletin 17/18

No.	Topic	Deadline	Further information/action
	introduction of easements		
17.	Bulk transfers of contracted-out rights without consent: anticipated introduction of easements	6 th April, 2018	Pensions Bulletin 18/01
18.	Auto-enrolment total minimum DC contributions will increase to 5% (of which minimum employer contribution of 2%)	6 th April, 2018 to 5 th April, 2019	
19.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6 th April, 2019 onwards	
20.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6 th April, 2016 contracts	1 st May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.

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

No.	Topic	Deadline	Further information/action
	where payment made on or after 1 st 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	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. 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	16 th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
23.	IORP II ² transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
24.	Brexit	By 29 th March, 2019,	UK leaves EU from effective date of withdrawal

³ Section 74 of the Pension Schemes Act 2015

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 29 th March, 2019.

New law

I. Pension scams - Government response to WPSC report

1. The Government has confirmed that it intends to ‘strengthen the nudge towards pensions guidance’ for individuals with flexible benefits. Schemes providing flexible benefits will need to be aware of the requirement once the legislation is finalised.

Comment: Flexible benefits are money purchase benefits, cash balance benefits, or other types of benefit calculated by reference to an amount available for the provision of the benefit (whether calculated by reference to contributions by or in respect of the member or any other factor).³

2. The Work and Pensions Select Committee report on pension scams⁴ called for individuals to be required to take free and impartial guidance before accessing their pension pot, unless they choose to opt out of that requirement.
3. The Select Committee also called for pensions cold calling to be banned by June, 2018.
4. The joint [response](#)⁵ of the DWP and HM Treasury accepts both of the recommendations of the Select Committee report.
5. The Government intends to use the Financial Guidance and Claims Bill to introduce a measure requiring the single financial guidance body created under the Bill to provide information and guidance to help members and survivors to make decisions about what to do with their flexible benefits.
6. The Government says that it ‘will continue to work swiftly’ to introduce a ban on pensions cold calling through amendments to the Financial Guidance and Claims Bill.

⁴ [Protecting pensions against scams: priorities for the Financial Guidance and Claims Bill](#) (of 7th December, 2017)

⁵ published on 12th February, 2018

Tax

II. Lifetime allowance to increase for 2018/19

1. Trustees will need to ensure that their scheme administration systems are updated in time for the forthcoming increase to the lifetime allowance. Those systems will also need to take account of further CPI increases to the lifetime allowance in subsequent tax years.
2. The lifetime allowance for the 2018/19 tax year will increase in line with CPI to £1,030,000.⁶
3. This is the first CPI increase to the lifetime allowance. CPI increases will be made in each subsequent tax year because of a provision⁷ inserted into the Finance Act 2004 in 2016.

Cases

III. Age discrimination transitional provisions in public sector schemes

1. Schemes and advisers may be interested in the latest age discrimination decisions reached by the Employment Appeal Tribunal.

⁶ under the [Finance Act 2004 \(Standard Lifetime Allowance\) Regulations 2018](#)

⁷ Section 218(2D) of the Finance Act 2004

2. The EAT has confirmed⁸ that the transitional provisions introduced for 2 public sector schemes amounted to unlawful age discrimination.
3. The transitional provisions were associated with reforms of the judicial (*McCloud*) and firefighters (*Sargeant*) pension schemes. The intention behind the transitional provisions was that those closest to retirement should be protected from the adverse effects of the reforms.
4. In broad terms, certain types of discriminatory treatment can be objectively justified, and are not therefore unlawful, if it can be shown that there was a legitimate aim which was being achieved through proportionate means.
5. The EAT decided that the Government pursued a legitimate social policy aim of protecting those closest to retirement from the effects of pension reforms, but the means by which it sought to achieve that aim were not proportionate in the case of *McCloud*.
6. In the *Sargeant* decision the EAT concluded that the employment tribunal should have made up its own mind when examining the issue of proportionality.

⁸ in *The Lord Chancellor and the Secretary of State for Justice and the Ministry of Justice v McCloud and Sargeant v London Fire And Emergency Planning Authority* (30th January 2018).

Instead, the employment tribunal gave sole regard to the Government's social policy without applying further scrutiny. *Sargeant* was therefore remitted back to the employment tribunal on the proportionality point.

7. It is understood that the Government intends to appeal both EAT decisions.
8. For more detail on the rulings, please see our [Employment/Employee Benefits Bulletin 18/02](#). To read about the employment tribunal decisions please see [Pensions Bulletin 17/03](#) and [Pensions Bulletin 17/05](#).

Comment (1): The decisions are of less direct relevance to private sector pension schemes. EU case law⁹ has suggested that Member States enjoy a 'margin of discretion' when justifying differential treatment on grounds of age if the legitimate aim of that treatment is based on social and economic policy. That 'margin of discretion' is not in play in the private sector.

Comment (2): However, private sector schemes run in a discriminatory way must, in common with public sector schemes, objectively justify that treatment by showing that there was a legitimate aim which was being achieved through proportionate means.

IV. Ombudsman to take over TPAS dispute resolution function

1. Scheme literature which refers to TPAS's dispute resolution function will need to be updated to reflect the forthcoming transfer of the TPAS dispute resolution function to the Pensions Ombudsman.
2. The [press release](#) announcing the change promises that pension schemes and providers will be given information to enable them to make the necessary signposting changes.
3. The Pensions Ombudsman will take over the dispute resolution function run by The Pensions Advisory Service from 1st April, 2018. The new arrangement will involve the transfer of TPAS's dispute resolution team and volunteer network to the Pensions Ombudsman.
4. Complaints both before and after the internal dispute resolution procedure stages have been completed will therefore be dealt with at one centre. The stated aim of the reorganisation is to simplify and speed up the passage of complaints.

Points in practice

V. Regulator's first penalties for failure to audit accounts

1. Trustees should note that the Pensions Regulator appears to have intensified its focus on the requirement to audit scheme accounts.
2. Penalties have been imposed for the first time on trustees for failing to arrange an audit of their scheme accounts.
3. The Pensions Regulator's [press release](#) (7th February, 2018) confirmed that penalties of £500 were imposed on each individual trustee of the Pakistan International Airlines Retirement and Death Benefits Plan. The failure to arrange, without reasonable excuse, for the audit of the scheme accounts related to the years 2015 and 2016.
4. The Regulator was made aware of the breaches following the submission of a breach of law report by the scheme actuary. According to the breach of law report the Trustees and the auditor were aware that the report was being made.

Comment (1): Occupational pension scheme trustees must arrange for the scheme accounts to be audited within 7 months of

⁹ the cases examined Article 6 of the Equality Directive 2000/78

the end of the scheme year in question. Failure to take all necessary steps to comply with this may result in a penalty of up to £5,000 in the case of an individual, or up to £50,000 in any other case, unless there is a reasonable excuse for the failure.¹⁰

Comment (2): The statutory duty¹¹ to report breaches of the law which are likely to be of material significance to the Regulator applies to trustees, employers, and professional advisers, amongst others.

VI. First criminal prosecution for auto-enrolment non-compliance

1. The first criminal prosecution has taken place for non-compliance with auto-enrolment duties.
2. The Pensions Regulator's press release [announced](#) that Stotts Tours (Oldham) and its managing director were sentenced to pay fines of almost £31,500, plus costs and victim surcharges.
3. A further £14,400 in civil fines is also owed as a result of the auto-enrolment breaches.
4. According to the press release (of 7th February, 2018) 36 members of staff should have been given pension scheme

membership and contributions should have commenced from June, 2015.

¹⁰ regulation 2 of the Occupational Pension Schemes (Requirement to Obtain Audited Accounts and a Statement

from the Auditor) Regulations 1996 - very limited exemptions apply.

¹¹ Section 70 of the Pensions Act 2004

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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