Pensions monthly update – keeping you on track

May 2014 Pension briefing

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news Alerter for May setting out developments over the last months.

Our Pension Planner gives a comprehensive overview of legal developments in the previous 12 months and expected future changes. For the latest issue, please click on the link in the email Alerter.

PENSIONS360 WEBSITE

In March, Hogan Lovells London pension team launched "Pensions360: the full picture", a new interactive website, featuring:

- Interactive Pension Planner – an online version of our Pension Planner, allowing you to navigate developments in pensions by topic and time frame
- Training & Events – register online for our seminar and update sessions
- Publications & News – download copies of our technical guides and news alerts
- Pensions360 wheel – browse a user-friendly tool to explore the comprehensive range of pension legal services Hogan Lovells provides.

The website can be found at http://www.hoganlovells.com/pensions360.

DATES FOR YOUR DIARY

14 May 2014 – Defined contribution (DC) half-day workshop

The workshop will be relevant to trustees of all schemes with DC benefits, including defined benefit (DB) schemes with DC additional voluntary contributions (AVCs). Using interactive case studies and small group discussion, Hogan Lovells speakers and facilitators will focus on dealing with the legal issues faced by those responsible for DC schemes. To pre-book a place, please click on the link in the email Alerter.

2 July 2014 – recent developments in pensions

Our regular informal breakfast seminar aimed at trustees and sponsors of occupational pension schemes and their advisers. To pre-book a place, please click on the link in the email Alerter.

BUDGET 2014 – PENSION TAX CHANGES

Relaxations in taking benefits – applicable from 27 March 2014

The Finance (No 2) Bill contains provisions which will make various relaxations to the pension tax regime. Although the Bill is not yet in force, the changes have been given temporary effect by resolution and may be acted upon from 27 March 2014.

- The trivial commutation limit has increased from £18,000 to £30,000, applicable to all commutation periods starting on or after 27 March 2014.
- The size of a small pot that may be taken as a lump sum, regardless of an individual's other pension pots, has increased from £2,000 to £10,000.
- An individual may take up to three pension pots as lump sums under the small pot rules, increased from the previous limit of two small pots.
- The maximum income that can be drawn from a capped drawdown arrangement (including a dependant's drawdown arrangement) has increased from 120% to 150% of an equivalent annuity. The new limit applies to all drawdown pension years starting on or after 27 March 2014.
- The level of guaranteed annual income required in order to use flexible drawdown has reduced from £20,000 to £12,000, applicable to all individuals who apply for flexible access to their drawdown pension on or after 27 March 2014.

Minimum pension age

- The minimum age at which an individual can take benefits from a registered pension scheme (other than on ill health) without suffering tax penalties will increase at the same rate as the increase in State Pension age, to 57 in 2028 (when State Pension age will increase to 67).
- The Government is consulting on whether the minimum pension age should rise further, for example to five years below State Pension age.

Relaxations in taking benefits from DC arrangements – applicable from April 2015

- Individuals will be able to access the whole of their DC pots from minimum pension age, regardless of the size of the pot. Benefits taken (above the tax-free pension commencement lump sum) will be subject to the individual's marginal rate of income tax. It will still be possible to use a DC pot to purchase an annuity.

- Everyone with a DC pension will be offered free and impartial face to face guidance on the range of options available at retirement. There will be a new duty on pension providers and trust-based pension schemes to offer a "guidance guarantee" at the point of retirement.
- The Government has asked whether a statutory override should be put in place to ensure that pension scheme rules do not prevent individuals taking advantage of the increased flexibility.

DB arrangements – transfers out from April 2015

- Transfers from public sector DB schemes to DC arrangements will be banned, except in very limited circumstances.
- The Government has asked for views on restricting transfers from private sector DB schemes to DC arrangements.

Budget 2014: HMRC guidance on pension flexibility

HMRC has issued further details of the tax consequences of unravelling actions taken before 27 March 2014 (Budget day). The guidance is aimed at individuals who have:

- taken a tax free lump sum before Budget day; and
- either cancelled an annuity that was linked to the lump sum within the cooling off period; or not yet decided how to access the rest of their pension savings.

Individuals who cancelled an annuity contract within the cooling off period and repaid the lump sum will have their benefit crystallisation events in respect of the annuity and lump sum cancelled and will be able to use the flexibility available from 6 April 2015.

Individuals who cancelled an annuity contract within the cooling off period but retained the lump sum will be able to use the flexibility available from 6 April 2015. Payment of the lump sum will be treated as a benefit crystallisation event (BCE 6), with the amount paid as the "permitted maximum".

Budget 2014: pension flexibility – extended decision period

HM Treasury has announced that individuals who have recently taken a tax free lump sum from a defined contribution (DC) pension will be given 18 months (extended from six months) to decide what they wish to do with the remainder of their pension fund. The extension will enable such individuals to take advantage of the pension flexibility available from April 2015.

Budget 2014: statement from Pensions Regulator

The Pensions Regulator has issued a short statement aimed at trustees of occupational defined contribution (DC) schemes and others involved in their governance and administration. Trustees are advised to consider recent member communications that might be affected by the Budget, as well as those due to be issued in the future. The statement emphasises that members should, where appropriate, seek their own tax and financial advice.

Budget 2014: FCA guidance on interim period

The Financial Conduct Authority (FCA) has issued guidance, setting out its expectations of pension providers in the interim period between the Budget 2014 announcements and April 2015.

Pension liberation

The Finance Act 2004 will be amended to help prevent the registration of pension liberation schemes and to facilitate the de-registration of such schemes. In particular, HMRC will have new powers to:

- send information notices to the scheme administrator and other persons;
- enter business premises to inspect documents.

HMRC – OTHER NEWS

Abolition of DB contracting-out: HMRC Bulletin

HMRC has issued the first in a series of bulletins, intended to provide updates on activities linked to the cessation of contracting-out in April 2016. From April 2014, HMRC will offer a Scheme Reconciliation Service to assist administrators and trustees to reconcile records for non-active members against HMRC's records in advance of April 2016. Details of the service and how to use it are provided at http://www.hmrc.gov.uk/nic/srsrequest.htm.

Tax: annual allowance - RPSM updates

HMRC has updated the Registered Pension Schemes Manual (RPSM) to reflect to reduction in the annual allowance to £40,000 on 6 April 2014. HMRC has confirmed that:

- for the purpose of carrying forward unused annual allowance to the 2014/15 tax year, the previous annual allowance of £50,000 may still be used for the tax years 2011/12, 2012/13 and 2013/14,
- there are no transitional rules to cover the reduction of the annual allowance as the reduced amount was known ahead of pension input periods that started in 2013/14 but would end in 2014/15.

DEFINED CONTRIBUTION SCHEMES – DEVELOPMENTS IN ADDITION TO THE BUDGET

Updated guidance

The Pensions Regulator has updated its regulatory guidance for defined contribution (DC) schemes, intended to be read in conjunction with Code of Practice 13 (Governance and administration of occupational defined contribution trust-based pension schemes). The guidance has been updated to reflect the coming into force on 6 April 2014 of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013. It also refers to the Government's consultation on allowing DC pots to be taken entirely as cash from April 2015 and states that trustees should ensure that members are made aware of the full range of options available to them, including commutation for small pots and deferring their pension.

Regulation of workplace DC pensions

The Pensions Regulator and the Financial Conduct Authority (FCA) have issued a joint regulatory guide setting out how they regulate defined contribution (DC) workplace pensions.

Definition of money purchase benefits

The Pensions Minister has announced that the "Bridge" regulations, containing transitional provisions relating to the new definition of "money purchase benefits" in section 29 of the Pensions Act 2011, will come into force in July 2014. The regulations especially concern benefits (such as GMP underpins) which may previously been treated as money purchase benefits but which do not fall within the section 29 definition. Previous consultation had indicated that the regulations would have effect from April 2014.

Following consultation the DWP has changed its policy and, in most cases, transitional protection will be provided in respect of events occurring from 1 January 1997 (the date from which section 29 will have effect) and the date the regulations are in force in July 2014. This means that in almost all cases schemes will not need to revisit decisions made before the regulations were in force.

PENSION PROTECTION FUND (PPF)

Pension Protection Fund: valuation assumptions

The PPF has consulted on changing the assumptions used for section 143 valuations (used for schemes in assessment periods) and section 179 valuations (used when setting a scheme's risk-based levy). The PPF expects that the proposed changes would increase section 143 and section 179 liabilities by just under 4% and would potentially lead to a small increase in the number of schemes transferring to the PPF.

Pension Protection Fund: insolvency risk provider

The PPF has issued a note giving information on its progress with the move to Experian as its insolvency risk provider.

- It is intended to use a measure of insolvency risk specifically designed for the PPF: The PPF-Specific Insolvency Score.
- Employers' insolvency risk will be assessed using one of eight scorecards, decided according to factors such as whether the employer is part of a group or is a stand-alone business. A separate scorecard will be used for the not for profit sector.

AUTO-ENROLMENT

Auto-enrolment: updated guidance notes

The Pensions Regulator has issued updated guidance notes on auto-enrolment, revised to reflect changes to regulations in force in April 214, including the extension to the auto-enrolment period for an eligible jobholder from one month to six weeks and increases to the qualifying earnings band and earnings trigger.

MARRIAGE (SAME SEX COUPLES) ACT 2013

The Marriage (Same Sex Couples) Act 2013 came into force on 13 March 2014.

Further consequential provisions

Various consequential amendments have been made, including:

- The requirements for providing a survivor's guaranteed minimum pension (GMP) have been amended to continue more favourable treatment for widows of a male earner, compared to widowers (of both male and female spouses), surviving civil partners and (from 13 March 2014) widows of a female earner (whose survivor's GMP is calculated only by reference to contracted-out service from 1988/89 to 1996/97).
- Consequential amendments are made to the Modification Regulations to make clear that trustees may modify schemes to provide benefits for surviving same sex spouses in the same way as for surviving opposite sex spouses without offending the subsisting rights provisions, or by resolution (provided that rights to benefits exceeding those required under the Equality Act 2010 may only be conferred with the employer's consent).

OTHER DEVELOPMENTS

Pensions Ombudsman: permission to appeal

The Civil Procedure Rules have been amended to introduce a requirement for permission from the High Court to bring an appeal against a determination of the Pensions Ombudsman or the Pension Protection Fund Ombudsman.

TUPE transfers

The Transfer of Employment (Pension Protection) Regulations 2005 have been amended to allow a transferee employer which offers a money purchase scheme to transferred employees the choice of:

- matching the level of contributions paid by the transferring employer immediately prior to the transfer; or
- matching the level of contributions paid by the employee, to a maximum of 6%.

FROM THE COURTS

DC Pension fund could be a "special investment fund" and so exempt from VAT

The ECJ has confirmed that an occupational DC scheme can claim exemption from VAT on third-party administration expenses, on the basis that the scheme is a "special investment fund", provided that:

- the scheme pools assets of several beneficiaries to spread investment risk;
- the members bear the investment risk; and
- the scheme is funded by the persons to whom the retirement benefits are paid.

ATP PensionService A/S v Skatteministeriet

Employer in breach of duty of good faith (IBM case)

The High Court has held that statements made by the employer at the time of previous amendments to defined benefit pension schemes had established members' "reasonable expectations" as to the future. Subsequent proposals (including to close the schemes to future accrual and to procure the agreement of DB members that future pay increases would be non-pensionable) breached both the implied duty of good faith on an employer not to destroy or seriously damage the relationship of trust and confidence between them and the employer's contractual duty of trust and confidence. There was also a breach of the contractual duty in the way the associated consultation exercise was carried out.

The Court held that the test of the implied duty of trust and confidence is a severe one; the employer's conduct must be such as to destroy or seriously damage the relationship. In deciding whether there has been a breach, any "reasonable expectations" of members had to be brought into the balance and might be critical in that conduct which disappointed those expectations would amount to a breach.

IBM UK Holdings Ltd and another v Dalgleish and others

FROM THE PENSIONS OMBUDSMAN

Independence of medical experts for ill-health early retirement

The Deputy Pensions Ombudsman has held that, when considering whether a medical expert was "independent", the word "independent" must carry its intrinsic meaning and a "reasonable perception of independence is also required". A properly instructed physician working for the same organisation as a physician who has previously advised does not automatically lose independence as a result but the facts of this case raised doubts that the doctors were truly independent.

Major

Consideration of application for ill-health early retirement pension

The Ombudsman has held that the process followed by the principal employer and trustee in considering a member for an ill-health early retirement pension did not match the scheme rules. The two bases on which a member could qualify for an ill-health pension were confused and it was not clear in what capacity the various medical advisers were giving advice and to whom they were giving it at several stages in the process. Decisions that were for the trustee under the scheme rules were made by an employee of the sponsoring employer without proper delegated authority and without the trustee's knowledge. The trustee also wrongly adopted a medical adviser's opinion when it should have reached its own view under one of the bases for qualifying.

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About Pensions360

Hogan Lovells' broad cross-practice capability covers the full spectrum of legal advice from lawyers who understand pension clients; advising on issues from scheme investments, corporate restructurings and transactions, to funding solutions and interaction with the Regulator or the courts. The ability to draw on specialists from other practices who are not only experts in their field but have an in-depth understanding of pension issues sets us apart from our competitors.

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