Pension Monthly Update - Keeping you on track

June 2011

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news **Alerter** for June, setting out developments over the past month.

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

Recent publications

We are pleased to send you our latest briefing note on the impact on occupational pension schemes of the Bribery Act 2010.

Dates for your diary

6 July 2011 - Recent developments in pensions

Our regular breakfast seminar aimed at trustees and sponsors of occupational pension schemes and their advisors. Speakers from Hogan Lovells pension team will review legal developments over the past few months and will explain the practical implications for pension schemes. For an invitation or to pre-book a place please click on the link in the email alerter.

9 September 2011 - Trustee training day

A full day seminar aimed at new or inexperienced trustees, or those who would like a refresher, covering all legal aspects of the Pension Regulator's trustee knowledge and understanding syllabus. To pre-book a place, please click on the link in the email alerter.

29 September 2011 - Investment and pensions

Aimed at trustees and employers interested in the legal aspects of the investment of pension scheme assets. Speakers from our pension group will be joined by the Hogan Lovells financial institutions team to help trustees understand the legal issues to be considered before entering into investments. To pre-book a place, please click on the link in the email alerter.

For training events later in the year, please see our training programme attached to the email alerter.

FROM THE TAX MAN

Asset-backed pension contributions

HMRC has issued a consultation document on proposed changes to the tax treatment of non-cash, asset-backed contributions to pension scheme, the proposed changes were originally announced in the Budget 2011.

The changes are intended to address the unintended tax reliefs available for firms which set up asset-backed income streams to fund defined benefit pension schemes. The Government states that it is not its intention to inhibit the use of asset-back contributions, but rather to ensure that the tax reliefs available reflect the increase in the fair value of pension scheme assets.

Early access to pension saving

The Government has concluded that early access to pension savings should not be considered at the present time. However, the issue may be revisited once auto-enrolment has been fully phased in and research carried out on why some people opt out.

Flexible drawdown

Draft regulations set out detailed requirements to be fulfilled before an individual with lifetime pension income of at least £20,000 per year may access the whole of their drawdown fund without being subject to annual limits.

Income that will not count as "relevant income" for the purposes of the £20,000 minimum includes:

- scheme pensions from DB arrangements with fewer than 20 pensioner members;
- scheme pensions from a DC arrangement where fewer than 20 pensioner members are entitled to a scheme pension;
- payments of lifetime or dependants' annuity above a prescribed level.

HMRC has announced that ESC11 (which allows individuals who move to or emigrate from the UK to split a tax year for residence purposes) will not apply to flexible drawdown so that the whole of the flexible drawdown pension arising or accruing in the tax year will be chargeable to tax.

Reduction in annual and lifetime allowances, removal of annuitisation

HMRC has issued various draft regulations making consequential amendments to existing legislation relating to the reduction in the annual and lifetime allowances and the removal of the requirement to take pension benefits by age 75.

FROM THE DWP

Auto-enrolment

The DWP has issued informal consultation on draft regulations. The proposals include:

- employers who take advantage of the three month waiting period will have to give jobholders prescribed information within one week of the start of the period;
- there will be a six-month window for re-enrolment, (three months either side of the employer's re-enrolment date;
- the time period for employers to register with the Pensions Regulator will be extended from two months to four months after their staging date;
- employers will be able to certify that their scheme satisfies alternative certification requirements if it meets one of the following tests:
    - contributions are at least 9% of pensionable pay, with at least 4% from the employer;
    - contributions are at least 8% of pensionable pay, with at least 3% from the employer and 85% of the total pay bill is pensionable; or
    - contributions are at least 7% of pensionable pay, with at least 3% from the employer and all pay is pensionable when assessing whether a jobholder earns more than the earnings trigger his or her monthly earnings should be added up for a 12 month period.

Guidance has been issued which sets out standards for default options in auto-enrolment schemes. Adherence to the guidance and its practical implementation will be monitored and the DWP have said they will consider further legislation if the guidance is not adhered to.

DC contracting-out

Following consultation, regulations (two sets still in draft) have been issued which make various consequential amendments relating to the abolition of DC contracting-out and the removal of the protected rights requirements.

Scheme pays

The DWP has issued a consultation on draft legislation amending the current prohibition on forfeiture to allow the introduction of "scheme pays" facilities. The "scheme pays" facility will allow members whose annual allowance charge is a minimum £2,000 to request that their scheme meets the charge with a corresponding reduction in benefits, rather than the individual paying for it through their self-assessment tax return.

FROM THE PPF

2012/2013 levy

The PPF has confirmed its intention to implement a new levy framework from 2012/13. Key features of the framework confirmed in the policy statement include:

- the levy formula will be fixed for three years;
- market movements will be averaged over five years to reduce volatility in assessed funding levels (and scheme levies);
- account will be taken of investment risk;
- schemes with liabilities over £1.5Bn will have to analyse the impact of stresses on their assets (draft guidance has been issued for consultation);
- all schemes will have the option of individual certification of their investment risk (likely to be of most benefit to schemes using derivatives to manage investment risk).

Valuation assumption guidance

Following consultation, the PPF has updated its valuation assumption guidance for s 179 and s 143 valuations. The new assumptions take effect from 1 April 2011 and reflect the fact that the insurance market currently makes no difference in the pricing of CPI and RPI linked annuities.

FROM THE PENSIONS REGULATOR

Corporate plan

The Pensions Regulator has issued its corporate plan, setting out its priorities for 2011 to 2014, including preparing for auto-enrolment in 2012 and publishing detailed guidance on all aspects of employer duties.

FROM THE EUROPEAN COMMISSION

Review of IORP directive

The European Commission has issued a call for advice in relation to the review of the IORP (occupational pensions) directive. Issues on which advice is specifically sought include: avoiding regulatory arbitrage between financial sectors so that the supervisory system is, as far as possible, compatible with the approach used for supervising the life assurance industry subject to Solvency II.

FROM THE COURTS

Employer's exercise of discretionary powers

In a case concerning a decision in 2005 by the employer to scale back discretionary pension increases, the High Court has held that:

- an employer exercising such a discretionary power will not breach its implied duty of trust and confidence unless the decision is irrational or perverse
- members' interests and expectations may be relevant when considering whether an employer has acted irrationally or perversely
- powers such as the one at issue are not fiduciary and the employer was entitled to take its own interests into account. This fact would severely limit the circumstances in which a decision would be found irrational or perverse.

(Prudential Staff Pensions Limited v Prudential Assurance Company Limited and Others)

Power to amend contribution rule - interpretation of pension scheme documents

The Court of Appeal has dismissed an appeal against a decision of the High Court that the scheme amendment power was wide enough to introduce a new deficit repair regime, including imposing contribution obligations on former employers. The Court of Appeal reviewed case law on the construction of pension scheme deeds and found that a previous provision that effectively gave employers a right of veto over the trustees' proposals for removing a deficit had been removed once and for all in 2001 and had not survived the 2001 amendment as an implied restriction. *(Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd)*

FROM THE PENSIONS OMBUDSMAN

Delay in transfer had not caused loss

In relation to a claim concerning delay in completing a transfer from a money purchase scheme, the Deputy Pensions Ombudsman has held that:

- It was maladministration for the employer to take two months to inform the administrator of the member's redundancy. Letting the administrator know within one month would have been reasonable.
- The Trustees had no obligation to inform members of an impending freeze on individual transfers pending completion of a bulk transfer to a new provider.

Although the value of the member's fund had fallen, he had not demonstrated that he had suffered particular or foreseeable loss and the value of other assets he might have wished to purchase had also fallen. In general, awards should not be made merely for value shifts due to market fluctuations. *(Banks)*

Member wrongly expected to fulfil criterion not in policy

The Pensions Ombudsman has directed the employer Council to reconsider the member's application for an early payment of pension on compassionate grounds. There was nothing in the early payment policy that required the member's circumstances to be "exceptional" and this should not have been given as a reason for rejecting the application. However, the Council still retained discretion whether or not to grant a pension if the member fulfilled the criteria. If the Council departed from its policy in reaching a decision, it should identify its reasons for doing so. *(Jaszczyk)*

Incorrect test applied on review of ill health early retirement pension

The Pensions Ombudsman has directed the administrators of a scheme to reconsider the termination of a member's ill health early retirement pension on the basis that the incorrect test was applied. Application of the Department for Education regulations, stating that a return to work was indicative that the member no longer met the incapacity test, would create a more stringent test for proving continued incapacity than the initial test if the member's circumstances were not considered.

It was also maladministration for the new employer of the member not to take steps to find out whether the member was receiving an IHER pension, nor to warn her of the risk to her pension entitlement on returning to employment. *(Picano)*

Failure to inform of disinvestment timescale

The Deputy Pensions Ombudsman has held that a SIPP administrator's failure to tell the member that his transfer out would be delayed while waiting to disinvest an illiquid asset and that meanwhile the bulk of the fund would be encashed and deposited in a low-interest account was maladministration. The administrator had an ongoing responsibility to make clear to the member what actions it was proposing to take, notwithstanding that he had appointed his own IFA. *(Price)*

FROM THE PENSION PROTECTION FUND OMBUDSMAN

Legal opinion on PPF contingent asset

The Deputy PPF Ombudsman has dismissed an appeal against a decision by the PPF Board not to recognise a contingent asset for the purposes of calculating the risk-based levy. Although a Dutch legal opinion covering the relevant points had been submitted, the guarantee was governed by English law and the English legal opinion provided did not cover what was required. A supplementary English legal opinion clarifying the relevant points had been submitted after the PPF deadline for registering contingent assets and did not assist the trustees. *(Brickbusiness Pension Scheme)*

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