

Pensions Monthly Update – Keeping you on track November 2011

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news **Alerter** for November, 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 November issue, please click on the link in the email alerter.

Recent publications

We are pleased to send you our latest briefing notes on the recent Government amendment to the definition of money purchase benefits, the 2012 deadlines for the PPF risk based levy, and reclaiming VAT on investment management fees.

Dates for your diary

19 January 2012 – Liability management seminar

A breakfast seminar discussing approaches to liability management, including non-statutory pension increase exchanges, offering enhanced transfer values, reducing or ceasing future accrual, introducing or increasing member contributions, and alternative insurance based solutions. To pre-book a place please click on the link in the email alerter.

7 February 2012 – Recent developments in pensions

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

For further details of our 2012 training events, please see our training programme.



PENSIONS ACT 2011

The Pensions Bill received Royal Assent on 3 November and became the Pensions Act 2011. It makes changes in the following areas:

CPI/RPI switch

- Where a scheme's rules require revaluation by reference to RPI, the scheme need not operate a CPI underpin.
- Pensions in payment may increase by reference to RPI, CPI or a combination, depending on the scheme rules, provided that pensions under the scheme have in fact been increased at that rate (or combination) since 1 January 2011 (or commencement of the pension, if later).
- The pension increase requirements will not apply to cash balance benefits not already in payment (except where the scheme is or has been a contracted-out salary related scheme and retains contracted-out benefits).

Meaning of "money purchase benefits"

As a result of the Court of Appeal's decision in *Bridge Trustees*, some schemes (such as DC schemes with a GMP underpin) in which funding deficits may arise would be outside the protection of legislation on scheme funding, section 75 debts and the Pension Protection Fund. To rectify the situation, the Pensions Act will restrict the definition of "money purchase schemes" to those pensions calculated solely by reference to assets (and which cannot have

deficits). The changes will have retrospective effect from 1 January 1997.

For further detail on the amendment to the definition of money purchase benefits please see our recent briefing note.

Auto-enrolment

Recent technical amendments to the auto-enrolment requirements include:

- Provisions to ensure that an automatic re-enrolment requirement applies where the employer or a third party causes an individual to lose membership of a qualifying scheme.
- The Secretary of State will have power to cap charges on deferred members' pension pots, as well as charges applicable to active members.
- There will be power to make regulations to exclude individuals under cross-border regulations from the auto-enrolment requirements.
- The self-certification option will be extended to employers with DC schemes whose main administration is in another EEA state.

Section 251 – power to repay surplus

- Trustees' statutory power to resolve to retain powers under the scheme rules to repay surplus to employers from an on-going scheme will be extended to 5 April 2016.

- Section 251 of the Pensions Act 2004 will be amended to clarify that its restrictions do not apply to administration payments to employers or to repayments of surplus on winding up.

Increasing State pension age (SPA)

The Government has amended its proposals so that now:

- The SPA will still be equalised at 65 for men and women by November 2018.
- However, the transition from 65 to 66 will then be phased in more slowly, so that the SPA reaches 66 in October, not April 2020. As a result, the maximum delay to the SPA that any individual will face is 18 months (under previous proposals some women would have had a delay of two years).

FROM THE PENSION PROTECTION FUND

The PPF has issued a statement on the steps it expects trustees of occupational pension schemes in assessment periods to take in relation to equalising for the effects of GMPs. The PPF paper makes clear that it expects schemes to compensate pensioners for the inequalities by paying a lump sum (with interest). Potentially the compensation could relate back to May 1990 (the date of the "Barber" judgment).

FROM THE PENSIONS REGULATOR

Hybrid schemes

The Pensions Regulator has issued a statement to help trustees of hybrid schemes and their advisers understand the structure of their scheme. The Regulator's particular concerns include: lack of governance; unclear and incorrect member communication; use of the same bank account for DC and DB monies; inappropriate investment strategies; and failure to offer the open-market option for DC members in retirement.

The statement includes checklists for trustees, administrators and advisors. From November 2011, additional questions for DB and hybrid schemes will be included in the scheme return.

Role of DC trustees

The Pensions Regulator has issued a statement on the role of trustees in DC schemes, intended to clarify the key differences between DC and DB schemes and the behaviours that DC trustees should demonstrate. The Regulator is concerned that there may be less trustee engagement in DC schemes than in DB schemes. The statement also reminds trustees that their duties extend to all members, including deferreds.

FROM THE COURTS

Priority order on insolvency (Nortel)

The Court of Appeal has upheld the High Court's decision that, where a financial support direction (FSD) is issued against a company after that company has entered administration, liability under any subsequent contribution notice will count as an expense of the administration (or liquidation) and have higher priority than unsecured debts

and floating charges owed to the company's creditors. (*Bloom and others v Pensions Regulator and others*)

FROM THE PENSIONS OMBUDSMAN

Investment mistake should have been corrected immediately

The Pensions Ombudsman has upheld a complaint against an AVC provider which mistakenly paid a member's AVC contributions into a different investment fund to the one instructed by the member. Having discovered the error, the provider should have corrected the position immediately. If the member had been better off as a result of the mistake the provider might have decided to leave the situation as it was. However, offering the member the choice of correcting or not correcting the error while refusing to tell him the relative fund values was "simply extraordinary". (*Karmarkar*)

Death benefits: full range of beneficiaries should be considered

The Pensions Ombudsman has partially upheld a complaint about the distribution of a lump sum death benefit under the Armed Forces Pension Scheme. It was reasonable for the Service Personnel and Veterans' Agency to conclude that the member's girlfriend qualified as an adult dependent under the scheme rules but it should not have automatically then paid the benefit to her. The member's estate was also a potential recipient and there was no priority order in the categories of potential beneficiaries. The SPVA was directed to reconsider its decision, without regard to the fact that the benefit had already been paid. (*Kemp*)

Misstatement – no financial loss but £900 compensation awarded

The Pensions Ombudsman has partially upheld a claim in relation to an overstatement of pension when the member was deciding whether to take voluntary redundancy. However, given that the difference between Mr Lee's expected drop in income of £51,000 pa on taking redundancy and the actual drop in income of £55,000 pa was less than 10%, and considering that Mr Lee had not yet taken his pension despite leaving service with the employer, the Ombudsman could not say with any degree of certainty that Mr Lee would not still have taken voluntary redundancy if he had been presented with the correct information. In addition, had the difference in pension amounts been critical, he would have expected Mr Lee to have pursued the slim possibility with his employer that his redundancy could be reversed.

The Ombudsman found that Mr Lee had not suffered financial loss but awarded him £900 compensation for distress and disappointment at a time he was making life changing decisions. (*Lee*)

OTHER DEVELOPMENTS

Levies

The DWP is consulting on draft regulations concerning the General Levy and the PPF Administration Levy. It is proposed to reduce the rates of the General Levy by at least 12% and of the PPF Administration Levy by at least 25% from 1 April 2012.

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