

Pensions monthly update – keeping you on track

January/February 2013

Pension briefing

HIGHLIGHTS

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

PENSION PROTECTION FUND – MORE STRINGENT REQUIREMENTS FOR CONTINGENT ASSETS!

If you are using contingent assets (guarantees, security or letters of credit) to support your scheme funding and would like account to be taken of this in your PPF risk-based levy, don't forget that you must certify the arrangement (or recertify existing arrangements) with the PPF by 5pm on 28 March 2013. The PPF's expectations in relation to guarantees have tightened, meaning that more investigation may be needed before documents can be submitted to the PPF. Details are set out in the attached briefing note attached to the email Alerter.

Please speak to your usual Hogan Lovells contact if you would like help with (re-)certification.

Recent publications

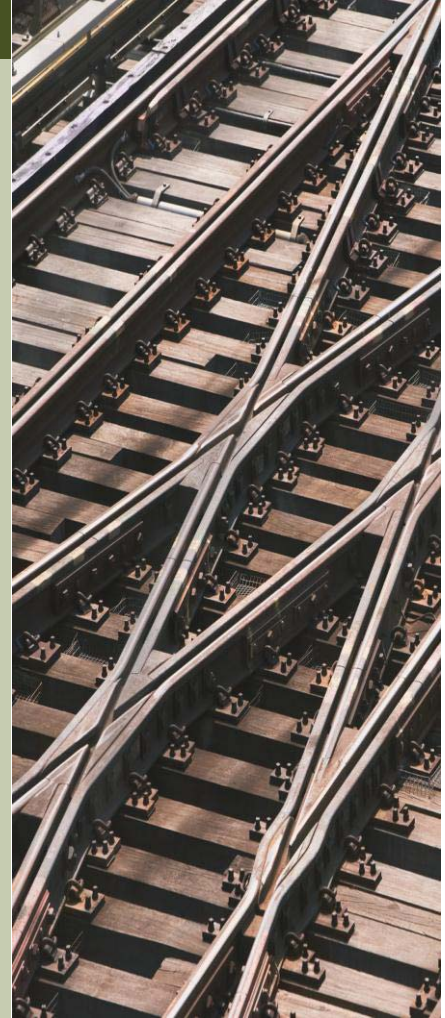
In addition to our note on PPF contingent assets, we are pleased to attach a briefing note outlining the recent proposals for reform of State pensions and the implications for occupational pension schemes of the future abolition of defined benefit contracting-out.

DATE FOR YOUR DIARY

20 March 2013 – Trustee training

A half-day seminar aimed at trustees with some experience or who have attended our one day introductory course (or similar training). Focusing on the trustee's perspective, we will consider developments in the past year and will look ahead to what we can expect in 2013. For an invitation, please click on the link in the email Alerter.

For our programme of pension seminars planned for the first half of 2013, please click on the link in the email Alerter.



STATE PENSION REFORM

Single-tier pension

The DWP has issued a long-awaited White Paper setting out its proposed reforms to State pensions for the long term review of State Pension Age. Key points are as follows:

- The Basic State Pension and the State Second Pension (S2P) will be replaced with a single-tier pension of approximately £144 per week.
- To receive the full single-tier pension, individuals will need 35 qualifying years of paying National Insurance contributions (NICs) or receiving credits while caring for children, seeking work, etc.
- Defined benefit contracting-out will cease and employers and employees will revert to paying full rates of NICs. Employers will be given a statutory power to amend scheme rules without trustee consent to adjust for the additional cost of paying higher rate NICs. The DWP is consulting on whether this power should be extended to employers of protected persons from formerly nationalised industries.

- Transitional arrangements will provide for anyone who has accrued State pensions totalling more than £144 per week at the implementation date to retain their higher benefit.
- State pension age will be reviewed every five years, based on the principle of maintaining a given proportion of adult life in receipt of a State pension. The intention is to provide a minimum of ten years' notice to anyone affected by changes to State pension age.
- More details of the State pension reforms and the implications for occupational pension schemes of the end of DB contracting-out are considered in the briefing note attached to the email Alerter.

AUTUMN STATEMENT (DECEMBER 2012) AND FINANCE BILL 2013

Reduction in annual and lifetime allowances

The annual allowance will be reduced from £50,000 to £40,000 and the lifetime allowance will be reduced from £1.5m to £1.25m, both from the 2014/15 tax year.

"Fixed protection 2014", giving a personalised lifetime allowance of the greater of £1.5m and the standard lifetime

allowance, will be available for individuals who expect the value of their pension saving at retirement to exceed £1.25m, provided that the individual ceases benefit accrual from 6 April 2014 and has not already claimed primary protection, enhanced protection or fixed protection.

The Government is considering offering an additional form of personalised protection for individuals with pension accrual of at least £1.25m on 6 April 2014, which would permit further pension accrual, although with the lifetime allowance charge applicable to accrual above the individual's personalised lifetime allowance.

Bridging pensions

The Finance Bill will amend existing tax legislation to allow a scheme pension to be reduced for a member aged 60 to 65, or state pension age if later, without it becoming an unauthorised payment.

Drawdown: change to annual limit

The annual limit on capped drawdown will increase from 100% to 120% of the value of an equivalent annuity for drawdown pension years starting on or after 26 March 2013.

Family pension plans: anti-avoidance

Anti-avoidance mechanisms will be put in place to counter arrangements in which employers contribute to pension schemes of members of an employee's family to circumvent restrictions in the annual allowance. As amended, the standard income tax exemption for employer contributions to a registered pension scheme must be made "in respect of the employee".

SCHEME FUNDING

Smoothing liabilities

The DWP has called for evidence on the likely impact of providing for smoothing of assets and liabilities in scheme valuations being undertaken in 2013 and going forward. Factors to consider include: whether smoothing should be mandatory for all schemes or optional; the period to be used for smoothing; and whether schemes should be required to use the smoothing model for more than one valuation.

New objective for Pensions Regulator?

The DWP is consulting on the likely advantages and disadvantages of providing the Pensions Regulator with a new statutory objective to consider the long-term affordability of deficit recovery plans to sponsoring employers. It asks whether considerations of long-term affordability are already implicit in existing requirements on the Regulator.

The Regulator has issued a statement emphasising that, until it is clear whether the present funding regime will be altered, there is no change in the responsibilities of sponsoring employers and trustees, who should continue to develop funding plans in line with current statutory requirements and Regulator guidance.

FROM THE PENSION PROTECTION FUND

2013/14 levy determination

The PPF has issued its final levy determination for 2013/14 plus appendices and guidance. In relation to contingent assets:

- For Type C contingent assets (letters of credit or bank guarantees), the requirement for the credit rating of the institution granting the credit or guarantee has been reduced.

- For Type A contingent assets (guarantees from a group company or "associate"), the PPF guidance makes clear that trustees who give the required certification in relation to a guarantor's ability to meet its liabilities under the guarantee without considering the PPF's more stringent requirements, risk having the guarantee rejected and not taken into account when calculating the scheme's risk based levy. (For more details, please see the Hogan Lovells briefing note.)

Compensation payments

The DWP is consulting on various changes to PPF compensation, including allowing members not in receipt of pension compensation to postpone taking their PPF benefits.

PUBLIC SECTOR

Local Government Pension Scheme (LGPS)

Draft regulations set out the proposed new benefit structure for the LGPS, under which members will accrue benefits on a career average (CARE) basis at a rate of 1/49 of pensionable salary, with normal pension age linked to State pension age.

Public sector outsourcing: Fair Deal

HM Treasury has issued a response to consultation and draft guidance on a revised Fair Deal policy.

Where staff are compulsorily transferred from the public sector to a private contractor:

- transferred staff will be able to retain membership of their current employer's pension arrangements;
- the contribution rate for the contractor will generally reflect the rate paid by public service employers whose staff are members of the scheme;

On a retender involving staff covered by the existing Fair Deal policy:

- a contractor will have the option of allowing staff to return to a public sector scheme or providing access to a broadly comparable scheme. The same option must be chosen for all relevant staff. A broadly comparable scheme must reflect benefits available to comparable employees in the public sector, likely to be a CARE scheme from 2015.

AUTO-ENROLMENT

Checklist for trustees

The Pensions Regulator has issued an updated checklist for trustees of schemes which may be used for auto-enrolment.

OTHER DEVELOPMENTS

RPI: no change

Following consultation, the Office for National Statistics has recommended that the formula for calculating the Retail Prices Index (RPI) should not be altered. An additional index, to be known as RPIJ, will be published from March 2013. The obligations on schemes whose rules require revaluation of deferred pensions or increases of pensions in payment by reference to RPI will remain unchanged.

FATCA

Draft regulations and guidance notes have been issued to implement the US-UK intergovernmental agreement signed on 12 September 2012. Under the agreement, affected UK financial institutions will have to report information to HMRC rather than to the US authorities as had been previously proposed and, provided they do so, will not be subject to a

30% withholding tax on US source income. In addition, most registered UK pension schemes and certain UK pension products will fall outside the requirements to report information to HMRC for these purposes.

FROM THE COURTS

Treatment of surviving unmarried partner irrational and disproportionate

In an application for judicial review, the Northern Ireland High Court has held that an absolute requirement in the Local Government Pension Scheme for an unmarried cohabitee to be nominated by the member, in addition to satisfying various other conditions, in order to be entitled to a survivor's pension was a breach of article 14 European Convention on Human Rights. The surviving partner was undeniably in a qualifying relationship that fulfilled the substantive conditions and imposing a disqualifying hurdle such as the nomination requirement was irrational and disproportionate. (*Re: Brewster*)

No breach of duty of trust and confidence

The High Court has held that the employer was not in breach of its duties of trust and confidence if it did not consent to amendments allowing deferred members to retire without actuarial reduction between ages 60 and 63. This follows a judgment given in October 2012 that the IBM plan should be rectified to allow active members a right to unreduced retirement between 60 and 63. (*IBM United Kingdom Pensions Trust Ltd v IBM United Kingdom Holdings Trust Ltd and others*)

Reduced redundancy compensation for older workers could be objectively justified

The Court of Justice of the European Union has held that it was not unlawful age discrimination for a redundancy policy to provide workers aged over 54 with reduced compensation, taking into account the shorter time before they would be eligible for a state pension. The policy could be justified by the legitimate aims of protecting younger workers and facilitating their reintegration into employment; and achieving a fair distribution of limited resources. In addition, the means used to achieve the aims did not exceed what was appropriate and necessary. (*Odar v Baxter Deutschland GmbH*)

Extent of Pensions Ombudsman's jurisdiction

The High Court was asked to consider whether the Pensions Ombudsman had jurisdiction over a complaint by a member about a compromise agreement entered into between the pension scheme trustees and three companies: the principal employer under the scheme, a participating employer and the US parent of the participating employer (which had never participated in the scheme). Pursuant to the terms of the compromise agreement, the US parent put the two sponsoring employers in funds to enable them to contribute £1.2m to the scheme and would contribute a further £60,000 to make available independent financial advice to members. In return, the three companies would be released from any further liability to the scheme and the scheme put into winding up.

The High Court reviewed the decisions in *Edge v Pensions Ombudsman* and *Marsh Mercer Pension Scheme v Pensions*

Ombudsman and took into account that the US parent had contractual rights under the compromise agreement which would be adversely affected were it set aside. It held that no court would entertain the member's complaint without joining the US parent to the proceedings (which could not be done in a complaint before the Ombudsman). The principles in *Edge* were fully applicable to the member's complaint and it would be improper for the Ombudsman to assume jurisdiction over it. (*The Pensions Ombudsman v EMC Europe Ltd and others*)

Death benefit for civil partner

The Employment Tribunal has held that the employer and trustees had unlawfully discriminated against the claimant in that, on his death, his civil partner would be entitled to a survivor's pension in respect of service only after 5 December 2005 (when the Civil Partnership Act 2004 came into force) whereas, if he had been married to a woman, she would receive a pension based on his entire pensionable service.

An exemption, now in para 18(1) sch 9 Equality Act 2010, allows the exclusion of death benefits (apart from contracted-out benefits) for a civil partner to the extent they would be attributable to service before 5 December 2005. The Employment Tribunal held that the exemption was contrary to the requirements of the EU Framework Directive on discrimination and did not provide a defence to Mr Walker's claim.

As the judgment was made by the Employment Tribunal it does not have precedent value. The case is being appealed to the Employment Appeal Tribunal. (*Walker v Innospec Limited and others*)

FROM THE OMBUDSMAN

CPI/RPI: interpreting "cost of living" as CPI was not unreasonable

The Pensions Ombudsman has held that changing the measure used to calculate annual increases of pensions in payment from RPI to CPI without consultation and despite the scheme booklet referring to RPI did not constitute maladministration. Under the scheme rules, pensions were to be increased at least in line with "the cost of living". The trustees were ultimately responsible for determining the meaning of "cost of living" and their decision to refer to CPI, following the Government's interpretation of the cost of living as being in line with CPI, was not unreasonable. There was no requirement for the trustees to consult on the change and it did not constitute a modification of accrued benefits. (*Houghton*)

Ill health retirement: decision maker could prefer opinion of own adviser where there was a conflict of opinions

The Deputy Pensions Ombudsman has dismissed the member's complaint that he should have been awarded a total (rather than partial) incapacity pension. The company, as decision-maker under the rules, had considered all the relevant evidence and was entitled to determine what weight to attach to the evidence it had. In addition, the company could rely on the evidence of its own advisors unless there was a compelling reason not to. (*Meacock*)

KEY HOGAN LOVELLS CONTACTS

Jane Samsworth	(Partner)	+44 20 7296 2974	jane.samsworth@hoganlovells.com
Katie Banks	(Partner)	+44 20 7296 2545	katie.banks@hoganlovells.com
Duncan Buchanan	(Partner)	+44 20 7296 2323	duncan.buchanan@hoganlovells.com
Claire Southern	(Partner)	+44 20 7296 5316	claire.southern@hoganlovells.com
Edward Brown	(Partner)	+44 20 7296 5995	edward.brown@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

© Hogan Lovells 2013. All rights reserved. #3718487