

## Pensions monthly update: keeping you on track

July 2012

Pension briefing

### HIGHLIGHTS

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

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

### DATES FOR YOUR DIARY

#### 14 September 2012 – Training day for new trustees

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. For an invitation, please click on the link in the email alerter. To book a place please click on the link in the email alerter.

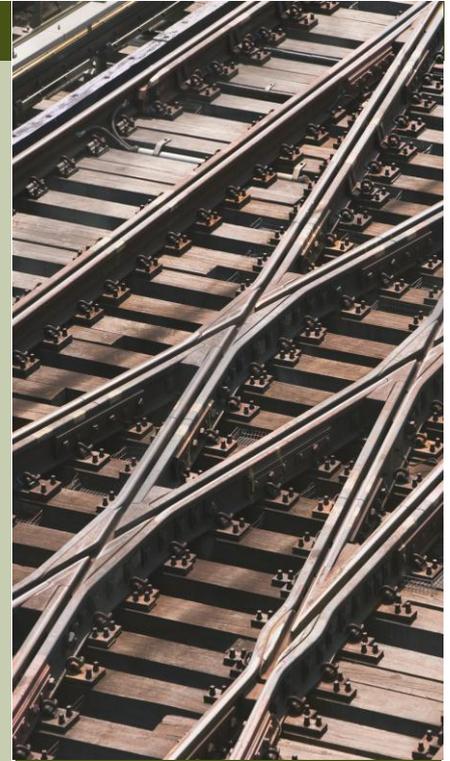
For further details of our 2012 training events, please see our training programme.

### RECENT PUBLICATIONS

For our recent briefing notes on:

- Essential pension issues for buyers and sellers of a company or business
- TUPE and pension rights: the Procter & Gamble case
- The Foreign Account Tax Compliance Act (FATCA) – potential implications for UK pension schemes

please click on the links in the email alerter.



### AUTO-ENROLMENT

#### Principal provisions in force

Key provisions of the Pensions Act 2008 and the Pensions Act 2011 have been brought into force, including:

- the requirement to auto-enrol a jobholder into a qualifying scheme, with effect from the auto-enrolment date;
- the conditions a pension scheme must satisfy to be a qualifying scheme;
- rights of jobholders to opt into or out of membership of a qualifying scheme; and
- prohibitions on inducements to workers to opt out of active membership of a qualifying scheme.

#### Career average schemes

Following consultation, the DWP has confirmed that the auto-enrolment regulations will be amended so that:

- Career average schemes which provide for a mix of guaranteed revaluation below the minimum rate during active membership with a discretionary power to revalue at a higher rate to meet the minimum to qualify will be allowed to be qualifying schemes for auto-enrolment purposes, provided that the revaluation is funded for and included in the statement of investment principles.
- Qualifying career average schemes will be allowed to use revaluation by reference to CPI or RPI, capped at 2.5%.

#### Disclosure

Final regulations have been issued to amend the disclosure requirements for occupational pension schemes to align them with requirements under the auto-enrolment provisions.

Under the regulations, auto-enrolment schemes will be required to provide basic information about the scheme within one month of receiving information regarding a jobholder. Where a scheme has not received "jobholder information" in respect of a prospective member (so that the scheme is not being used to fulfil any auto-enrolment request in respect of that member), basic information must be given to the individual within two months of joining the scheme.

The regulations also extend the basic information to be disclosed to a member to include the range of ways that members can be admitted to the scheme under auto-enrolment.

#### Earnings trigger and earnings threshold

Final regulations have set the 2012/13 auto-enrolment thresholds as follows:

- £8,105 for the earnings trigger (to align with the PAYE threshold);
- £5,564 for the lower earnings threshold (to align with National Insurance Contributions (NICs) lower earnings limit); and
- £42,475 for the upper earnings threshold (to align with the NICs upper earnings limit).

#### Guidance on certifying schemes

The Department for Work and Pensions has issued statutory guidance on certifying money purchase schemes; guidance for actuaries on certifying defined benefits and hybrid pension schemes; and guidance for employers on certifying defined benefit and hybrid pension schemes, intended for use when certifying that a scheme meets the requirements of a qualifying scheme for auto-enrolment.

### Pensions Regulator materials

The Pensions Regulator has set out how it intends to enforce compliance by employers with their auto-enrolment duties. The Regulator plans to write to employers 12 months and three months ahead of their staging date (plus at 18 months for larger employers). The papers include details of the penalties which may be imposed for non-compliance.

The Regulator has also issued template letters to assist employers in communicating with their employees about auto-enrolment.

### Salary sacrifice

HMRC has updated its salary sacrifice guidance in response to industry concerns about the interaction of the auto-enrolment requirements with restrictions on salary sacrifice.

Where salary is sacrificed to pay contributions to a workplace pension scheme in which the employee is auto-enrolled, it will not be necessary to stipulate a time period for which the arrangement must be entered into or to require that employees may only opt out of contributions before the end of a specified period where they have undergone a "lifestyle event".

### Staging dates

The DWP has issued final regulations to implement its revised timetable for the auto-enrolment staging dates.

## PENSION REFORM

### Transfers: small pension pots

The DWP has issued a response to its consultation on dealing with small dormant pension pots in DC schemes. Following consultation, the Government's preferred approach is:

- to put in place a system for automatic transfers to a new employer's scheme;
- in response to concerns about implementation, to develop a model of automatic transfers for pots created in auto-enrolment schemes only leaving deferred defined benefits and DC pots created before auto-enrolment out of the scope of the automatic transfer mechanism at this stage;
- there should be provision for opting-out of automatic transfer;
- to abolish short-service refunds at the earliest legislative opportunity, although allowing refunds of micro-pots will be considered.

## EU MATTERS

### IORP Directive: consultation by EIOPA

The European Insurance and Occupational Pensions Authority (EIOPA) is consulting on draft technical specifications to be used in a Quantitative Impact Study (QIS) on the effect of the proposed "Holistic Balance Sheet" (HBS) approach to the European Commission's Review of the IORP Directive.

A key element of the HBS would be the "Solvency Capital Requirement" (SCR), calculated using methodology drawn from capital requirements for insurance companies under Solvency II but, possibly, making some adjustment for support from the sponsoring employer and the Pension Protection Fund.

The Pensions Minister, Steve Webb, has issued a statement emphasising the UK Government's resolution to oppose EU plans to apply Solvency II funding rules to occupational pensions.

## FROM THE PENSIONS REGULATOR

### Annual report

The Pensions Regulator has issued its annual report and accounts for 2011/12. Points to note include:

- The Regulator used its powers to appoint trustees 498 times, compared to 278 times in the previous year.
- During the year, the Regulator used its powers 37 times on unauthorised access (pension liberation) cases.
- Of 1,752 recovery plans for schemes with valuation dates between 22 September 2009 and 21 September 2010, 786 were subject to further review or extra action.

### Incentive exercises: statement from Pensions Regulator

The Pensions Regulator has replaced its detailed guidance on incentive exercises with a shorter statement, following the publication of a pension industry code of practice in June 2012.

The statement supports the industry code and states that the Regulator will have regard to the Code, wherever relevant, in the conduct of any regulatory proceedings relating to incentive exercises.

### Scheme specific funding and recovery analysis

The Pensions Regulator has issued analysis of recovery plans for 1,928 schemes with effective valuation dates between 22 September 2009 and 21 September 2010. Findings include:

- 21% of schemes surveyed had some form of contingent assets;
- average funding levels were 78.8% on the scheme specific (technical provisions) basis and 57.8% on the buy-out basis;
- the average length of recovery plan was 8.1 years.

### Section 75 debts: updated guidance

The Pensions Regulator has updated its guidance on multi-employer schemes and employer departures to take account of the new option of using a flexible apportionment arrangement and trustees' new power to extend from 12 to 36 months the period of grace for employers to employ an active member of the scheme and so avoid triggering a section 75 debt. Before agreeing to extend the period of grace, the Regulator expects that trustees will usually require evidence of the employer's intentions to employ another active member and an explanation as to why it will take so long.

## FROM THE COURTS

### Principles for construction of scheme rules

The High Court was asked to consider construction issues relating to a "target benefit" scheme under which members had a right to a guaranteed rate of interest on member and employer contributions, with the trustees having power to increase a member's benefits by the amount of any surplus.

Where the language of the relevant provision was clear and unambiguous, the starting point should be to see whether, with common sense and appropriate adjustments, the provision could be made to work in practice. Only if the machinery were clearly unworkable, or if it would give rise to consequences that could never sensibly have been contemplated, could a departure from the apparently clear language of the rule be justified. (*Entrust Pension Limited v Prospect Hospice Limited and another*)

### Statutory retirement age of 67 was objectively justified

The Court of Justice of the European Communities has held that a Swedish law allowing employers lawfully to terminate an employee's employment at age 67 was not contrary to the requirements of the Equal Treatment Directive, even though the relevant law did not take account of the level of retirement pension the individual concerned would receive. (*Hornfeldt v Posten Meddelande AB*)

### Moral hazard – trustees could refer decision to Upper Tribunal

The Upper Tribunal has refused to strike out a reference by trustees of the Lehman pension scheme challenging the Pensions Regulator Determinations Panel's decision to issue a financial support direction (FSD) to only six companies in the Lehman group and not to 38 other target companies named in the Regulator's warning notice. The Tribunal held that:

- The trustees were "directly affected" by the issue of the FSD and so fell within the class of person who could challenge the Determination Panel's decision by a reference to the Upper Tribunal.
- The determination not to include the target companies in the FSD could be referred to the Upper Tribunal where those targets had been included in the Regulator's warning notice.
- The Upper Tribunal would be able to direct the Regulator to issue a FSD against the targets even though the two year time limit for issuing a FSD had expired, where the targets had been included in the Regulator's warning notice. (*The Trustees of the Lehman Brothers Pension Scheme v The Pensions Regulator and others*)

### GAD was concerned with administration of the scheme and so subject to jurisdiction of Pensions Ombudsman

The High Court has held that the Government Actuary's Department (GAD) had an on-going duty to consider revising commutation tables relating to the Firefighters' Pension Scheme and that this duty was part of the administration of the scheme, bringing GAD within the jurisdiction of the Pensions Ombudsman under legislation applicable at the relevant time. (*Government Actuaries Department (GAD) v Pensions Ombudsman*)

### Detrimental reliance on apparent approval of transfer – estoppel by representation

In relation to a transfer of benefits, the Privy Council has held that the member had been entitled to rely on representations made by an agent of the receiving scheme's trustees regarding approval of the transfer (even though the transfer was never, in fact, approved by the trustees). It was perfectly possible for an entity to organise its affairs so that subordinates who would not have authority to approve a transaction are held out as persons who are to communicate the fact of approval by the proper authorities. Pension trustees hardly ever communicate personally with members but make decisions which are then communicated and applied by professional managers. (*Kelly and others v Fraser*)

## FROM THE PENSIONS OMBUDSMAN

### Ill health benefits – extension of Ombudsman's time limits

When upholding a complaint about entitlement to ill health provision, the Pensions Ombudsman considered it reasonable to extend the usual three year time period in

which complaints must be made to him, and directed that the member's ill health pension be backdated to June 2006. Since that time, the member had been engaged in a more or less continuous quest for early payment of her deferred benefits, including seeking assistance from the Pensions Advisory Service. (*Cooper*)

## OTHER DEVELOPMENTS

### CPI consultation

The Office for National Statistics (ONS) is consulting on expanding the Consumer Price Index (CPI) to include owner occupiers' housing costs in a new index, CPIH. It is intended that the CPIH would become ONS' main inflationary index. In addition, the statistical calculation of RPI is to be brought closer to that for CPI, so that there will be in future potentially much less difference between RPI and CPI.

### Gender-neutral insurance premiums

The Treasury has issued a response to earlier consultation on draft regulations, issued following the ECJ judgment in *Test-Achats* on gender-based insurance premiums. The Government's view remains that the effect of the judgment is that contracts for insurance and related financial services entered into on or after 21 December 2012 may not use gender-based premiums but that gender-sensitive pricing of premiums or benefits under contracts concluded before 21 December 2012 may continue unchanged.

The Government does not believe at this stage that there is enough evidence to warrant removing the exemption for insurance under arrangements made by an employer for employees and other persons as a consequence of their employment.

The Government intends to provide separate statements on how drawdown tables issued by the Government Actuary's Department (GAD) should be modified as a result of the ECJ judgment.

### National Audit Office (NAO): regulating defined contribution pension schemes

The NAO has issued a report on the Pensions Regulator's regulation of defined contribution pension schemes. The report concludes that:

- Under the Regulator's current system of performance management, it is not possible to judge whether the Regulator is effective in protecting members' benefits.
- The DWP, HM Treasury, the Pensions Regulator and the Financial Services Authority should establish overarching objectives for the regulation of DC schemes.

### Takeover Panel: pension scheme trustee issues

The Takeover Panel is consulting on pension scheme trustee issues relating to the Takeover Code. It proposes that trustees of an offeree company's pension scheme should be entitled to receive certain information relating to a proposed takeover and to append their own opinion to the offeree board's circular, in line with certain aspects of the current framework for providing information to employee representatives.

### Public sector outsourcing

A Written Ministerial Statement has confirmed that the overall approach of the Fair Deal policy on public sector outsourcing will be maintained, but that access to public sector schemes will be offered to transferring staff, including on subsequent transfers. The current broad comparability and bulk transfer approach under Fair Deal will no longer apply

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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