

Pensions monthly update – keeping you on track

March 2014

Pension briefing

HIGHLIGHTS

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

PENSIONS360 WEBSITE

Hogan Lovells London pension team has 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

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.



PENSION PROTECTION FUND (PPF) DEADLINES]

Don't forget the following PPF deadlines:

- certifying/re-certifying contingent assets - 5pm on 31 March 2014
- certifying deficit reduction contributions made on or before 31 March 2013 – 5pm on 30 April 2014
- certifying block transfers on or before 31 March 2014 – 5pm on 30 June 2014.

DISCLOSURE REQUIREMENTS

Consolidated disclosure regulations come into force on 6 April. New requirements will apply to money purchase arrangements with a lifestyling fund – a statement explaining lifestyling, its advantages and disadvantages, and when it has been or will be adopted must be given to:

- prospective members of an occupational pension scheme, if it is practicable to do so;
- members of an occupational scheme who have not already been given the information; and

- members of an occupational or personal pension scheme between five and 15 years before the member's retirement date. The retirement date for this purpose will be a date specified by the member to the trustees or managers provided that it is acceptable under the scheme rules or, otherwise, a date specified by the trustees or managers.

FROM THE TAX MAN

Pension liberation

HMRC Newsletter 60 gives some details of HMRC's process for registering a new pension scheme following its change in policy announced on 21 October 2013:

- on receipt of the application HMRC will review the application to decide whether or not to register the scheme;
- where the initial risk assessment does not identify any problems, around 90% of schemes are registered within five working days;
- where HMRC has concerns it may request further information from the scheme administrator;

- any further information requested must be submitted within 45 days.
- HMRC has introduced an email address (pensionschemes@hmrc.gov.uk) for schemes wishing to check the registration status of a potential receiving scheme. An email request should include a scanned copy of a letter requesting confirmation, including all relevant scheme details.

VAT – HMRC briefing note

HMRC has issued guidance setting out its position on the recovery of VAT paid in relation to pension fund management costs, which has been revised in the light of the European case of PPG Holdings BV.

- HMRC has withdrawn its previous policy that, where a single invoice covered pension scheme management and administration, as well as investment of the scheme assets, 30% would be treated as attributable to management and administration costs (with VAT potentially deductible by the employer) and 70% attributable to investment services (with VAT deductible, if at all, by the trustees). However, employers and trustees may continue to use a 70/30 split for a transitional period of six months.
- According to HMRC, employers may now be able to recover VAT on some investment-related services where they could not previously. This may enable employers to claim a refund of previously unrecovered input VAT in some circumstances. However, HMRC will not accept that VAT is deductible by an employer where:
 - supplies were not made to the employer (which involves consideration of whether the employer commissioned and paid for the supplies); or
 - the supply is of investment management services only.

In practice, these restrictions are likely to limit the VAT that may be recovered, as supplies of services relating to pension fund management are usually made to the trustees.

In addition, it is not wholly clear whether the change of policy relates only to the supply of investment services or also to general scheme management/administration. Hogan Lovells tax team is seeking clarification from HMRC.

DEFINED CONTRIBUTION

Pensions Regulator tools

The Pensions Regulator has issued a standard governance statement and scheme assessment template for trustees of defined contribution (DC) schemes (including trustees with money purchase additional voluntary contributions (AVCs)). The Regulator expects trustees to publish a governance statement, used to:

- confirm that the scheme complies with the DC code of practice and regulatory guidance and that it exhibits the quality features the Regulator expects all schemes to possess;
- explain where a scheme has adopted a different approach where a quality feature is wholly or partially absent;
- set out trustees' intended action to incorporate or improve a quality feature.

The assessment template sets out each quality feature and its location in the DC code, and allows trustees to allocate a

colour to each feature to indicate whether it has been fully or partially adopted and, if not, whether an action plan for its adoption is in place. The Regulator does not expect the assessment template to be published but expects the information to be available to employers, members and the Regulator on request.

Disclosure of charges

The Pensions Bill has been amended to oblige the Secretary of State to make regulations requiring the disclosure of some or all transaction costs relating to work-based money purchase schemes (occupational money purchase schemes, stakeholder schemes and personal pension schemes with direct payment arrangements). The costs will have to be disclosed to members, prospective members and recognised trade unions.

European case - ATP PensionService

The Court of Justice of the European Union (CJEU) has followed the Advocate General's opinion given last year and had held that defined contribution pension schemes may be "special investment funds" for VAT purposes, with the consequence that management services provided to them would be exempt from VAT.

AUTO-ENROLMENT

Auto-enrolment: exceptions to employer duties

The DWP has published a response to consultation on excluding prescribed categories of individuals from the scope of auto-enrolment. It believes there is a strong case for excluding:

- individuals with pension tax protection, such as enhanced protection or fixed protection;
- individuals who have given or received notice to terminate employment, or of intention to retire;
- individuals who have been contract joined into a qualifying scheme and have cancelled their membership.

The DWP considers there is less reason to exclude:

- those at risk of redundancy at some point in the future;
- individuals with pension rights approaching the lifetime allowance;
- individuals in serious ill health ;
- very low paid workers who are eligible for auto-enrolment only because of a spike in earnings;
- new starters, temporary or casual staff, short term or zero hours contract workers;
- individuals with an address outside the UK.

Final proposals and draft legislation are expected "in due course"

Auto-enrolment: career average and hybrid schemes

New draft regulations, expected in force on 1 April, will:

- allow hybrid schemes to phase in the level of contributions in relation to their money purchase benefits. Previously, an employer which certified money purchase benefits in a hybrid scheme against one of the alternative quality requirements could not take advantage of the lower minimum contribution rates during the auto-enrolment transitional periods;
- permit career average (CARE) schemes which provide for revaluation at below the "minimum rate" to be qualifying

schemes if they are funded on the basis that benefits will revalue at or above the minimum rate and this is reflected in the statement of funding principles.

MARRIAGE (SAME SEX COUPLES) ACT 2013

Modifying scheme rules and consequential amendments

Following the introduction of same sex marriage on 13 March 2014, various consequential amendments will be made to legislation, including in relation to compensation from the Pension Protection Fund and the Financial Assistance Scheme.

The Order also amends the modification regulations to:

- disapply the subsisting rights provisions of section 67 Pensions Act 2014 where a scheme is amended to treat a same sex surviving spouse in the same way as an opposite sex surviving spouse; and
- give trustees power to amend schemes by resolution to treat same sex surviving spouses in the same way as opposite sex surviving spouses (although amendments which go further than the minimum required under the Equality Act 2010 may not be made without the employer's consent).

Without these modifications there could be concerns that amending scheme rules to provide benefits for surviving same sex spouses might unlawfully infringe others' rights, for example rights to enhanced children's benefits where there is not a surviving spouse.

OTHER DEVELOPMENTS

Abolition of DB contracting-out – protected persons

Following consultation, the DWP has announced that the statutory override (enabling employers to amend future benefits without consent to offset the effect of paying higher National Insurance contributions (NICs) following the abolition of defined benefit contracting-out) should not apply to employees from formerly-nationalised industries who have protected person status.

FROM THE COURTS

Pension Protection Fund (PPF) risk-based levy calculation reinstated

The High Court has overturned the PPF Ombudsman's ruling that the PPF Board had relied on incorrect information for a scheme's risk-based levy.

The trustees had complained that the failure score assigned by Dun & Bradstreet (D&B) to their scheme's Luxembourg-based employer did not take into account the most recent financial statements, owing to a difference in D&B's practice between the UK and Luxembourg. As a consequence, the employer's risk of insolvency had been overstated, leading to a higher levy. Having appealed unsuccessfully to D&B and the PPF Board's reconsideration committee, the trustees referred the matter to the PPF Ombudsman who ruled that the reconsideration committee's decision had been incorrectly reached. The PPF Board appealed.

The High Court upheld the appeal and reinstated Board's decision. The determination of individual levies was non-discretionary and the rules had to be applied on their strict terms, even if the outcome might be said to be unfair.

Board of the PPF v Trustees of the West of England Ship Owners Insurance Services Retirement Benefits Scheme and another

Civil partners' pensions – unequal treatment allowed

The Employment Appeal Tribunal has decided that the provision in the Equality Act 2010 which allows the exclusion of death benefits (apart from contracted-out benefits) for a surviving civil partner in respect of the member's pensionable service before 5 December 2005 was compatible with European Law. European law on sexual orientation discrimination was not retrospective.

Innospec Ltd and others v Walker

Barber equalisation had been effective

The High Court has ruled that a notice issued to female scheme members in 1991 was effective to equalise the scheme's normal retirement date at age 65 for men and women, despite a clear conflicting provision in a subsequent definitive deed and rules. The 1991 notice had been sufficient to amend the interim deed. The definitive deed stated that it would take effect as if it had been executed immediately after the interim deed; this created a legal fiction that the definitive deed was in effect by the time the 1991 notice was issued and had been, therefore, modified by it.

Vaitkus and others v Dresser-Rand UK Ltd and another

FROM THE PENSIONS OMBUDSMAN

Trustees' decision to switch to CPI indexation was reasonable

The Pensions Ombudsman has upheld the trustees' decision to switch to calculating annual pension increases on the basis of the consumer prices index (CPI) instead of the retail prices index (RPI).

The scheme rules linked pension increases to public sector uprating orders. A member and former trustee of the scheme claimed that the trustees should not have moved from RPI to CPI for calculating pension increases when this switch was made in the uprating orders. He argued that the decision had been based on flawed legal advice; that some trustees had conflicting interests as members of another of the employer's pension schemes; that the trustees had failed to consider properly whether CPI was an "appropriate national index", as required by the scheme rules; and that the switch to CPI breached members' expectations, based on the scheme literature, that RPI would always be used.

The Ombudsman rejected all the member's arguments. The trustees had reached a decision that took into account relevant advice, was within the range of reasonable decisions and was not procedurally improper.

Post

Decision to end discretionary increases had not been correctly made

The Pensions Ombudsman has held that a decision by the trustees of a defined benefit scheme to end annual discretionary increases to pensions in payment was reached incorrectly.

The rules of the scheme provided that pensions in payment would be reviewed on a regular basis and (if the company and the trustees agreed) would be increased, by such amount as they decided, having regard to the sufficiency of the fund and after taking actuarial advice. A pensioner member whose pension no longer received discretionary increases in respect of pre-1997 service complained.

The Ombudsman considered that, in deciding to stop awarding discretionary increases, the trustees had fettered their discretion under the scheme rules and had failed to

identify the relevant considerations, wrongly citing consistency across the scheme as a factor. They also did not consider their obligations separately from the views of the employer as joint decision-maker. In addition, the trustees' decision had not been clearly documented: it was not minuted or ratified in a trustees' meeting.

Wood

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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