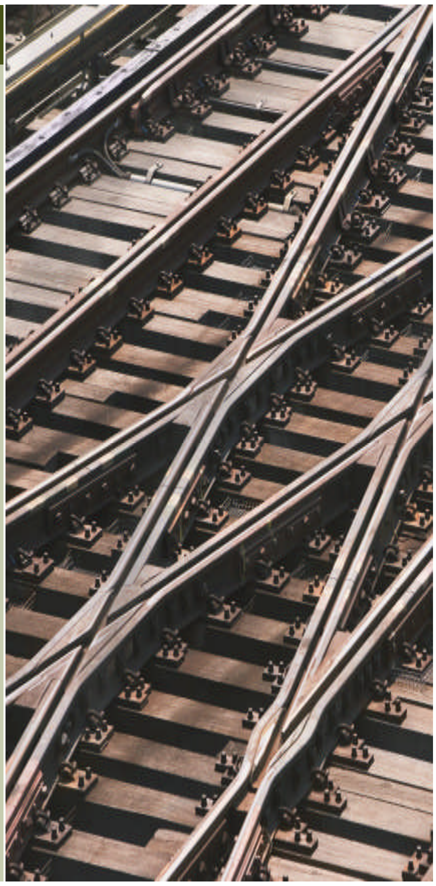
Pensions monthly update – keeping you on track

October 2013

Pension briefing



HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news Alerter for October, 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.

DATES FOR YOUR DIARY

13 November 2013 – 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. For an invitation and to book a place, please click on the links in the email alerter.

22 January 2014 – 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 previous year and will look ahead at what we can expect in 2014. To pre-book a place, please click on the link in the email alerter.

DISCLOSURE OF UNFUNDED EFRBS

HMRC has issued revised draft regulation and guidance on tax avoidance, intended to bring disguised remuneration arrangements within the scope of the disclosure of tax avoidance (DOTAS) regime.

One of the examples in the guidance demonstrates how an unfunded employer-financed retirement benefits scheme (EFRBS), set up to avoid the disguised remuneration provisions which would apply to a funded EFRBS, would be caught by the new regulation and so be subject to the DOTAS disclosure requirements.

AUTO ENROLMENT

Technical changes to auto-enrolment process

Following consultation, the DWP has confirmed that various technical changes will be made to the auto-enrolment process:

"Pay reference period" for assessing jobholder status

From 1 November 2013, an alternative method for defining "pay reference period" for the purposes of assessing individuals' jobholder status will be available:

- The length of a pay reference period will be decided by reference to how often the individual is paid (for example, monthly).
- The pay reference period will start on the first day of the tax week or month in which the earnings fall to be paid.
- The earnings payable in the pay reference period will be used to assess whether there are qualifying earnings.

The new option will not be compulsory and will run alongside the existing provisions.

Alternative pay reference period for assessing quality of DC schemes

From 1 November 2013, employers may use one of three definitions of "pay reference period" when assessing the quality of their DC scheme:

- one year starting with the anniversary of the employer's staging date (the current definition);
- the period between the jobholder's regular payments of pay (for example, a month or a week), starting on the first day of a tax month (if paid monthly) or the first day of a tax week (if paid weekly);
- the period by reference to which the jobholder is paid their regular pay (for example, a month or a week), commencing on the first day of that period.

The new alternative definitions of pay reference period remove the need to carry out an annual reconciliation of contributions and qualifying earnings, unless the employer chooses to do so.

Extension of contribution deadline

From 1 November 2013, contributions deducted during the first three months of membership must reach the scheme by the 19th day of the fourth month (or the 22nd day if the payment is sent electronically). The extended deadline will apply to all new joiners irrespective of whether or not they are jobholders and whether they joined through auto-enrolment or a contract arrangement.

Flexibility in form and content of opt-out notice

From 1 November 2013, opt-out notices will have to include information and warnings set out in the regulations but will be allowed to include additional information and use different wording.

Extension of joining window

From 1 April 2014, the joining window for a jobholder to achieve active membership will be extended from one month to six weeks from the individual's auto-enrolment date. The extension will apply to auto-enrolment, automatic re-enrolment, enrolment following opt-in, and to the deadline for the joining processes at the end of the transitional period for DB and hybrid schemes.

Test scheme standard

From 1 November 2013, the test scheme standard for non-contracted-out schemes will be amended:

- when determining whether a scheme meets the standard, employers and actuaries will be able to take into account future increases to state pension age set out in regulation 38 of the auto-enrolment regulations, without having to wait until the increases have effect;
- the revaluation and maximum service requirements in relation to cash balance schemes will be clarified.

Exceptions to the auto-enrolment duties – NOT INCLUDED IN THE FINAL REGULATIONS

Disappointingly, the regulations do not exclude certain categories of jobholder, for example those with enhanced or fixed protection or those who had recently opted-out of their employer's contractual arrangement, from the scope of the employer duties. Further consultation is planned.

Guidance on qualifying schemes

The DWP has issued updated three guidance papers on certifying defined benefit, hybrid and money purchase schemes, intended to help employers to determine whether their scheme meets the test scheme standard and when the scheme actuary should be involved.

Where members of a contracted-out scheme include jobholders who are not in contracted-out employment (for example, because they are over state pension age):

- If benefits for jobholders who are not contracted-out are calculated in the same way as those for jobholders who are contracted-out, the scheme will satisfy the test scheme standard;
- If there are differences in calculation, the standard approach to assessing whether the quality standard is met must be applied in relation to the non-contracted-out jobholders.

PENSION LIBERATION

HMRC has made various changes to strengthen existing processes to deter pension liberation and safeguard pension saving.

- In a departure from its previous "process now, check later" approach, HMRC will no longer automatically confirm that a scheme is registered on the successful submission of the online registration form. It is intended that this will enable HMRC to conduct detailed risk assessment activity before deciding whether or not to register a scheme.
- HMRC will respond to requests from scheme administrators for confirmation of the registration status of a receiving scheme without seeking the consent of that scheme.
- HMRC will only confirm the registration status of a receiving scheme where:
  - the scheme is registered; and
  - HMRC does not hold information to suggest that there is a significant risk of the scheme being set up or used to facilitate pension liberation.

  In other cases, HMRC will respond setting out the conditions in which it will confirm registration status and explaining that one or both of the conditions are not met.
- The guidance makes clear that seeking confirmation from HMRC is not the only check that a transferring scheme should carry out and rely on.

DEFINED CONTRIBUTION SCHEMES

Reporting late payment of contributions

The Pensions Regulator has issued final versions of revised codes of practice 5 and 6 on reporting late payment of contributions to money purchase occupational pension schemes and personal pension schemes, plus guidance and a consultation response.

Trustees or managers should report payment failures to the Regulator where the failure is likely to be of material significance and, in any case, where contributions are outstanding for 90 days (reduced from 120 days proposed in consultation).

Pensions Regulator - Strategy for regulating DC schemes

The Pensions Regulator has set out its framework for regulating the governance and administration of DC schemes plus its approach to enforcement for occupational DC trust-based schemes.

- Governance; investment governance and decision making; administration; and fraud have been identified as core risk areas.
- The Regulator intends to carry out a programme of thematic reviews focussing on a particular field or market segment.
- When deciding whether to take enforcement action, the Regulator will take into account the immediacy and materiality of the risk or issue, plus other factors which may include: the number of members affected; the financial impact on individual and/or groups of members; the severity and duration of the breach; and whether trustees are able to demonstrate that they have adequate knowledge and understanding and have a training schedule in place.

FROM THE EU

Investment – financial benchmarks

Following the Libor-fixing scandal, the European Commission has published draft legislation to provide more stringent rules for benchmarks used in financial instruments and financial contracts in the EU, including benchmarks used to measure the performance of investment funds.

MEMBER BENEFITS

Missing beneficiaries: tracing service

The DWP has issued short guidance on using its tracing and letter forwarding service for pensions, insurance companies and solicitors. The guidance notes that every effort must have been made to trace the person concerned before using the service.

PUBLIC SECTOR OUTSOURCING: FAIR DEAL

HM Treasury has set out revised Fair Deal guidance and standard practice the Government will follow when its staff are compulsorily transferred to an independent provider. In a departure from the previous position, transferred staff will be able to remain in their public sector scheme and contractors will be expected to participate in the relevant public sector scheme rather than providing a "broadly comparable" arrangement for transferred staff.

The Government expects the new guidance to be reflected in procurement practice as soon as is practicable without disruption to projects which are already at an advanced stage.

FROM THE COURTS

Age related contributions to DC scheme allowable under EU law

The Court of Justice of the European Union has held that an occupational pension scheme with employer and member contributions increasing with age (in three age bands) could be permitted under the Equal Treatment Directive, if the national court considered that the difference in treatment on grounds of age was appropriate and necessary to achieve a legitimate aim. The Court of Justice said the national court must consider whether the detriment to the (younger) employee from the differential treatment is outweighed by the benefits of receiving employer contributions (albeit at a lower level) and paying lower employee contributions than those payable by older employees. *HK Danmark v Experian A/S*

FROM THE PENSIONS OMBUDSMAN

Redundancy

The Deputy Pensions Ombudsman has held that a member who took voluntary redundancy had had her employment "terminated by reason of redundancy" and, as she also satisfied certain other conditions, she was entitled to an unreduced early retirement pension under the NHS Pension Scheme. *Fenteman-Coates*

Misleading AVC information

The Pensions Ombudsman has held that information referring to a particular AVC fund as a "cash fund" and "secure" were misleading, where the fund was largely invested in asset backed securities. The member had joined the fund in 2002, when he was seven years away from retirement, because he was risk averse and wanted a secure fund with a modest return.

The AVC provider had already compensated fund members for the loss in January 2009 associated with the collapse of the financial markets. The Ombudsman upheld the member's complaint about the provider and directed it to pay an additional £500 compensation. *White*

Death benefit paid without reasonable enquiries

The Pensions Ombudsman has directed the trustees of a SIPP to consider afresh their decision as to who should receive the member's lump sum death benefit, having made reasonable enquiries and disregarding the fact that they had already paid the lump sum to the member's fiancé.

Various circumstances had led to it not being apparent that the member had previously been married and had two dependent children. The rules required the trustee to make "reasonable enquiries" and the common sense approach was to make such enquiries at the point of death. The information the member gave on taking out the plan had been factually correct but was given for purposes other than to identify potential beneficiaries. In particular, the trustee should have asked whether the member had any dependent children or whether she had made a will. *Young*

Ill health early retirement – untried treatments

The Pensions Ombudsman has directed the council employer to reconsider a member's application for an ill health pension from the Local Government Pension Scheme, having first obtained a fresh medical opinion from an independent medical practitioner (IRMP) not previously involved with the case.

In criticising the council's treatment of the application, the Ombudsman commented that:

In relation to untried treatments, the IRMP should be asked whether it was more likely than not that the untried treatment would improve the member's condition such that she would be able to discharge her former duties efficiently and would not have a reduced likelihood of being capable of undertaking gainful employment before normal retirement age.

Even though an employing authority would be likely to come to a radically different view to that expressed by the IRMP "only rarely", the IRMP's view was not binding and should not be accepted uncritically. *Bell*

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