

Pensions monthly update – keeping you on track

September 2013

Pension briefing

HIGHLIGHTS

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

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.

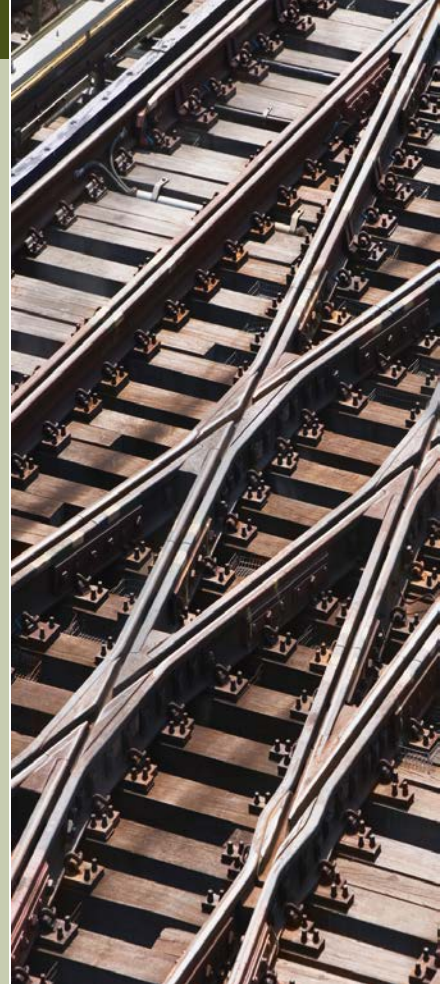
22 January 2013 – Trustee training

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 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.

Recent publications

We are delighted to send you our latest briefing note on pension liberation. The note explains the issues that arise for trustees and members from pension liberation and sets out safeguards that trustees may adopt to help protect themselves and members from unauthorised or fraudulent transfers.

We are also pleased to send you our revised briefing on amending pension schemes by extrinsic contract and our updated note for trustees on basic pension legislation.



AUTO ENROLMENT

Consultancy charges

Regulations have come into force prohibiting the deduction of consultancy charges from members' benefits in defined contribution automatic enrolment schemes. Deductions that reduce the value of jobholder's rights under the scheme are not allowed:

- from payments to the scheme made by or on behalf of the jobholder; or
- from income or capital gains arising from contributions paid by or on behalf of the jobholder;

where the amount deducted is to be paid to a third party under an agreement between the employer and the third party.

The prohibition applies in relation to occupational money purchase schemes and personal pension schemes but is not applicable to agreements entered into before 10 May 2013.

FROM THE DWP

Bridging pensions

Final regulations give trustees a statutory power to modify their scheme rules regarding bridging pensions, to take account of the increasing state pension age. Modifications under the regulations will not be a "listed change" for the purposes of the employer consultation regulations.

Disclosure requirements

The DWP has issued a response to consultation on draft regulations amending the disclosure regime.

- The new regulations will come **into force on 6 April 2014**, delayed from October 2013 to give schemes more time to make necessary changes.
- Where a scheme adopts a **lifestyling investment strategy**, members must be told of this as part of the basic scheme information and again between five and 15 years before their retirement.
- Schemes may choose not to send a new member a **statutory money purchase illustration (SMPI)** where no contributions have yet been credited to the scheme

and the member has no accrued benefits or where the member is in their opt-out period when the first SMPI is due.

- The requirements for use of **electronic communications** will be amended to clarify that schemes which have made every effort to obtain a member's email address or the member's opt-out of electronic communications do not have to continue to give notifications by post or by hand each time information is placed on a website.

The DWP has also stated that the consultation responses showed no overwhelming desire from the pensions industry to move towards a **principles based approach to disclosure**. In view of this, the DWP will bring the regulations into force as planned.

FROM THE PENSION PROTECTION FUND (PPF)

2014/15 levy documents

The PPF has issued a consultation paper, draft determination and other documents in relation to the pension protection levy for 2014/15.

- The PPF has confirmed that it intends to make no change to the levy parameters for 2014/15.
- The rule that a contingent asset could only be recertified if it had been certified in the previous levy year will be amended. Instead, a contingent asset may be recertified if it has been certified in at least one of the previous five years, provided that the underlying agreement remained in place throughout the period.
- The wording of the certification to be given by trustees in relation to the ability of a guarantor to meet its obligations under the guarantee will be slightly changed to read:

"The trustees, having made reasonable enquiry into the financial position of each certified guarantor, are reasonably satisfied that each certified guarantor, as at the date of the certificate, could meet its full commitment under the contingent asset as certified, having taken account of the likely impact of the immediate insolvency of all of the relevant employers."

Levy guidance

The PPF has confirmed that invoices in respect of the 2013/14 levy will be issued from September 2013. It has also issued its annual guide to the Pension Protection Levy, setting out data that goes into the levy calculation; how the calculation is carried out; and how schemes may query their invoice.

FROM HMRC

Newsletter 58 – fixed protection

Points to note in relation to fixed protection include:

- an online tool is available to help individuals decide whether they should apply for fixed protection 2014 (FP14);
- an online form is now available to apply for FP14. The deadline for submission is 5 April 2014;

- individuals who have lost previous protection before 6 April 2014 may apply for FP14.

Reporting requirements for QROPS and fixed protection

Final regulations have amended the information that scheme administrators are required to report, in particular in connection with transfers to qualifying recognised overseas pension schemes (QROPSs) and fixed protection 2014. In addition, scheme administrators who issue a pension savings statement to a member (because the member's pension saving for the tax year has exceeded the annual allowance) will have to report the supply of the statement to HMRC.

Fixed protection and members of non-UK pension schemes

Regulations have come into force which:

- extend fixed protection 2012 to relieved members of non-UK pension schemes who are not also members of a registered pension scheme;
- extend the deadline for members of a relieved non-UK scheme to give notice claiming fixed protection 2012 to 5 April 2014;
- provide that certain increases in the value of a member's benefits, such as revaluation of GMPs and some increases in the value of annuity contracts, do not count as benefit accrual for the purposes of fixed protection 2012.

DEFINED CONTRIBUTION SCHEMES

Office of Fair Trading market study

The Office for Fair Trading (OFT) has issued a market study of defined contribution workplace pensions in the UK, following its investigation launched in January this year of whether such schemes are set up to deliver the best value for money for savers. To address concerns raised by the study, the OFT has agreed with the DWP, the Pensions Regulator and the Association of British Insurers (ABI) that:

- The ABI and its members will carry out an immediate audit, overseen by an independent project board, of old and high charging contract and bundled trust schemes. The audit is intended to understand the charges and any benefits associated with the schemes and to ensure that savers receive value for money.
- ABI members will establish independent governance committees, which will recommend changes to providers and escalate issues to regulators where they identify risks of poor outcomes for savers.
- The Pensions Regulator will assess which smaller trust based schemes are not delivering value for money. The DWP has agreed to consider whether the Regulator needs new enforcement powers to deal with this issue.

The OFT has also recommended that the DWP should consult on:

- Improving the transparency and comparability of information about schemes' costs and quality, to make employers' initial choice of scheme easier;
- Preventing schemes being used for auto-enrolment that have built-in adviser commissions or active member discounts.

Regulating occupational DC schemes

The Regulator has finalised its Code of Practice on governance and administration of occupational defined contribution trust-based pension schemes. Following consultation, the overall length and detail of the Code have been reduced. Other changes include:

- acknowledging that there may be alternative and justifiable actions or approaches that trustees may adopt to meet legislative requirements;
- clarifying the extent to which some quality features may not be relevant to DC AVCs in defined benefit schemes;
- improving the practical guidance on investment, in particular the default strategy, longevity of investment strategies and stewardship.

The Regulator intends to work with the Institute of Chartered Accountants of England and Wales (ICAEW) and master trust providers on developing control objectives for an independent assurance framework for master trusts.

Defined contributions – quality standards in workplace DC schemes

The DWP has issued a call for evidence on standards in workplace defined contribution schemes. The Government intends to use a power in the Pensions Bill to make regulations setting out minimum quality standards that workplace defined contribution schemes (occupational and personal pension schemes) will be required to meet. The DWP is particularly concerned about: scheme governance; default investment options; administration and record keeping; and whether members of small schemes are disadvantaged by their size.

The call for evidence confirms that the DWP has no plans to change the 8% minimum auto-enrolment contribution level at this stage.

FROM THE COURTS

Death in service lump sum payable where member died shortly after unfair dismissal

Mr Fox, who suffered from a severe back condition, died around a month after being dismissed for incapability. Had he died while in service a lump sum death in service benefit of £85,000 would have been payable. His father issued a claim for unfair dismissal and disability discrimination. As a preliminary issue, it was considered whether compensation for unfair dismissal (if any) should include the loss of the lump sum death benefit.

The Court of Appeal has upheld a decision of the Employment Appeal Tribunal that the loss of the death in service benefit was of real substance to Mr Fox, and that the loss could only be quantified by awarding the full amount payable on death. Other things being equal, the appropriate measure of damage would have been the cost of obtaining equivalent insurance. However, in the unusual circumstances of this case, Mr Fox had not been able to put in place alternative life cover before his death.

Fox v British Airways plc

Preventing complaint to Pensions Ombudsman was not an abuse of process

The member claimed, on the basis of a letter from a former trustee, that he was entitled to have his pension augmented. The sponsoring employers disagreed. Correspondence between the member, his solicitors and the employer followed and the member invoked the scheme's internal dispute resolution procedure ("IDRP") and took advice from TPAS.

The employers issued proceedings in the High Court, seeking a declaration that the member was not entitled to an enhanced pension. They acknowledged that they wished the opportunity to seek costs against the member if his claim failed and to have the matter dealt with by oral evidence. Issuing proceedings meant that the IDRP was suspended and that the member could no longer complain to the Pensions Ombudsman. The member applied to have the claim struck out as an abuse of process.

The High Court refused to strike out the claim, holding that the fact that issuing proceedings might have had an improper motive was beside the point if the claimant had a genuine claim. The judge dismissed arguments that there was a statutory preference for claims to be dealt with by the Pensions Ombudsman rather than the Court.

Pell Frischmann Consultants Limited and another v Prabhu and others

VAT on management and operating fees could be deducted

The Court of Justice of the European Union has ruled that an employer which had established a legally separate pension fund for its employees and former employees could deduct the VAT it had paid on management and operating fees relating to the fund, provided that there was a "direct and immediate link" between the input transactions and the output transactions.

The CJEU refused to consider a second question of whether an employer's pension fund could be a "special investment fund" (which would have meant that the fund's management fees would have been exempt from VAT). This was essentially identical to the question in the *Wheels* case, in which it had been decided that the pension fund in question was not a special investment fund. *PPG Holdings BV v Inspecteur van de Belastingdienst*

Moral hazard – priority order of claims on insolvency

The Supreme Court has held that a company's liability under the financial support direction (FSD) regime where an FSD is issued after the company had gone into liquidation or administration ranked as a provable unsecured debt in the company's insolvency.

The High Court (upheld by the Court of Appeal) had previously held that the liability under an FSD issued after the commencement of insolvency would rank as an expense of the administration/liquidation and so have higher priority than preferential and floating charge creditors and unsecured provable debts.

The Supreme Court applied three tests to determine that the company's obligation giving rise to the FSD had been incurred before the start of the insolvency, meaning that the liabilities in this case were provable debts. If the liability in question had not ranked as a provable debt, it would not have counted as an expense of the administration.

Re Nortel, Re Lehman

FROM THE PENSIONS OMBUDSMAN

Ill health – both employers should comply with requirements

Ms Dolan was dismissed from concurrent employments with a school and a local council on grounds of ill health and poor attendance. She was a member of the Local Government Pension Scheme (LGPS) in respect of both employments. Her applications for ill health early retirement were dismissed.

Under the LGPS rules, the decision whether Ms Dolan was entitled to an ill health pension was to be made by the employer, having obtained a certificate from a suitably qualified independent registered medical practitioner. Neither employer had complied with these requirements and the council admitted that it had simply rubber-stamped the decisions made by the school.

The school and the council were directed each, independently, to decide whether she should receive an ill health pension under the LGPS. *Dolan*

Misstatement – member has relied on incorrect quotations

The Deputy Pensions Ombudsman has upheld a complaint by a member who was given inaccurate quotations for early retirement benefits and who subsequently took a reduced early retirement pension from a scheme in which she was a deferred member.

Mrs Robbins had secured four job interviews in the period between the end of her previous employment contract and taking early retirement. It was likely that, had she known of the lower, correct amount of pension payable, she would have continued to seek work up to her normal retirement age (NPA) in October 2011 and would have had a reasonable prospect of securing work. *Robbins*

OTHER DEVELOPMENTS

Marriage (Same Sex Couples) Act 2013

The Marriage (Same Sex Couples) Bill will require the Secretary of State to review, by 1 July 2014, the differences in survivor benefits from occupational pension schemes between:

- benefits provided to a widow and to a widower: and
- benefits provided to a surviving opposite sex spouse and those provided to a surviving same sex spouse or civil partner.

Longevity risk – consultation

The Bank for International Settlements has published a consultation paper "Longevity risk transfer markets: market structure, growth drivers and impediments, and potential risks". It is concerned that, although the longevity swap market is relatively small, there is potential for significant growth and systematic risk concerns could arise in future. It recommends that national regulators should communicate and cooperate on longevity risk transfer internationally and across sectors to reduce the potential for regulatory arbitrage.

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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