29 July 2013

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Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
CN: Contribution Notice
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
FCA: Financial Conduct Authority
FSD: Financial Support Direction
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPAS: The Pensions Advisory Service
TPR: The Pensions Regulator

LEGISLATION

The Registered Pension Schemes (Authorised Payments) (Amendment) Regulations 2013

From 6 April 2012, contracting-out through a DC scheme was abolished. These Regulations amend the Authorised Payments regulations to reflect this.

Explanatory memorandum

The Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Amendment) Regulations 2013

The lifetime allowance (LTA) provides an overall limit on the amount of UK tax relieved pension savings that an individual can receive in their lifetime. When the total benefits paid exceed the LTA then a tax charge applies on the excess.

The Government reduced the LTA from £1.8 million to £1.5 million from tax year 2012/13 onwards. From tax year 2014/15 onwards, the LTA will decrease further to £1.25 million.

In recognition that reducing the LTA created a potential issue for individuals who had already built up pension pots in the expectation that the LTA would remain around £1.5 million, a transitional protection regime (known as "fixed protection") was introduced.

Individuals with fixed protection have a higher LTA of the greater of £1.8 million and the standard LTA. The policy intention is that fixed protection should continue to apply where an individual is not accruing additional benefits. However, there are a number of circumstances where fixed protection is lost through no fault of the individual. For example, in some cases where statutory increases to existing pension rights of deferred members are given these can result in new benefits being accrued and fixed protection being lost.

These Regulations aim to ensure that fixed protection is not lost in certain circumstances outside of the individual's control. In addition, they ensure that fixed protection applies equally to members of and savings in overseas pension schemes that are tested against the LTA.

Explanatory Note

The Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Notification) Regulations 2013

The Finance Act 2013 introduces transitional provisions which provide protection from the LTA charge ("fixed protection 2014") for those who may already have built up pension savings in the expectation that the LTA would remain at the current level of £1.5 million.

These Regulations set out the process individuals should follow for notifying HMRC that they intend to rely on fixed protection 2014 (applications will need to be made to HMRC by 5 April 2014).

HM REVENUE & CUSTOMS

Pensions Industry Business Update published

HMRC has published the Pensions Industry Business Update Issue 6. It includes information on:

- the 2013 Pension Industry conference which was held to discuss the challenges brought about by the Government's decision to accelerate the introduction of the single tier state pension from April 2017 to April 2016;
- roles and responsibilities for form completion; and
- requests for widow(er)s and surviving civil partners GMP.

FINANCIAL CONDUCT AUTHORITY (FCA)

How firms are implementing the Retail Distribution Review (RDR)

On 25 July 2013, the FCA published an early review of how advisory firms have implemented some of the core aspects of the RDR months after its implementation.

The RDR came into effect on 31 December 2012 and made significant changes to the investment advice market. The aim of RDR is to make clear how much consumers pay for financial advice, what they pay for, and to improve professional standards by introducing a minimum level of qualification for all investment advisers.

The FCA's research found that the majority of firms have made progress and there was a willingness to adapt to the new rules. However, there were some common issues such as;

- providing charges in percentages, rather than cash terms, which some consumers found confusing;
- firms describing themselves as independent but in fact choosing products from a limited number of providers or products; and
- not clearly explaining what service customers will receive for ongoing fees.

The review is the first of three planned over the next year to assess what progress advisory firms are making to meet the new RDR rules.

PARLIAMENT

Business, Innovation and Skills (BIS) Committee: Report on Kay Review

The BIS Select Committee inquired into the Kay Review of UK Equity Markets and Long-Term Decision Making and the Government's response to that review.

On 25 July 2013, it published its report in which it urges the Government to immediately publish clear, measureable and achievable targets for implementing each of Professor Kay's 17 recommendations. This should include:

- a clear measure of success for the recommendation (a target);
- who is responsible for achieving the target;
- a clear deadline by which the target needs to be achieved; and
- the action the Government will take if it is not.

The report also considers some of the underlying principles of the Kay Review and outlines how these can be turned into specific recommendations. For example, "the Government should outline what it considers a minimum acceptable level of sign up to the Stewardship Code and outline what action it will take if this target is not met by the market on a voluntary basis".

The Financial Reporting Council welcomed the recognition the report brought to the concept of stewardship, and is pleased the committee continues to focus on the importance of investor engagement. It intends to respond in detail to the report once it has considered the recommendations in more depth.

NAPF comment

THE PENSIONS ADVISORY SERVICE

Annual Review 2012/13 published

TPAS has published its annual review for 2012/13. The review outlines the most common pension complaints and queries, and highlights the reasons why members of the public need independent and impartial information on pensions and saving for retirement.

The main reasons for complaint concerned mistakes, overpayments and failed ill-health retirement applications.

THE PENSIONS REGULATOR

Record keeping survey results published

TPR set targets for schemes to meet its "common data" standards by the end of 2012. These standards concern information (such as name, date of birth and National Insurance number) which is needed to identify scheme members. For further information, please see our "Governance Spotlight: all I want for Christmas is accuracy".

This year's annual survey (published on 23 July 2013) shows that the majority of large and medium trust based schemes are engaged with the measurement of common data and over half meet the target for common data overall.

However, the survey highlights that measuring "conditional" data, (more detailed data such as contribution history, date of leaving and other items needed to accurately calculate a member's benefit), is less of a priority for schemes.

This was particularly evident in larger trust based schemes where, of the 42% that have not generated a conditional data score, 29% said it was not a priority. Half of small trust based schemes who do not measure this score were not aware of the requirement to do so.

TPR intends to publish the results of its detailed record-keeping review towards the end of the year. It will also be updating its record-keeping guidance to reflect the main findings of the review.

TPR pension liberation ruling postponed

The High Court case involving TPR and suspected pension liberation schemes (which began in May 2013), has been adjourned until October 2013. This case will clarify whether or not the nine vehicles in question, which received transfers from workplace plans following member requests, are occupational pension schemes.

Statement on Nortel / Lehman judgment

On 24 July 2013, TPR issued a statement welcoming the Supreme Court's judgment in the case of Bloom and Others versus TPR and Others.

The Supreme Court found that liabilities under a financial support direction (FSD) issued against an insolvent company would rank as a provable debt.

The judgment therefore confirms that the FSD is effective in an insolvency, but overrules the findings of the High Court and the Court of Appeal that the costs of complying with an FSD issued against an insolvent target company following insolvency would rank as an expense of the administration or liquidation.

Stephen Soper, TPR's executive director for DB funding said:

"We are pleased that the Supreme Court has decided that an FSD issued against an insolvent target is effective. This will be welcome news for many thousands of pension scheme members and will provide clarity to insolvency practitioners on how to treat a pension scheme liability.

In this case, TPR was forced to defend against arguments that an FSD issued against an insolvent company would be ineffective and disappear down a 'black hole'. Such an outcome would have had serious consequences for our efforts to protect members' benefits and the PPF. We argued in response that FSD liabilities ranked either as an administration expense or, in the alternative, as a provable debt.

Since the challenge was first made, we have made clear that we have no intention of frustrating the proper workings of the administration process. Today's judgment will provide clarity to the UK's restructuring and rescue practitioners that FSD liabilities have to be recognised in insolvent situations but do not have priority over administration expenses or secured debts."

CASES

Bloom and others v TPR and Others (Supreme Court)

This long awaited decision addresses how the administrators of a target should treat the target's potential liability under a financial support direction (FSD) (and in due course the liability under a contribution notice (CN)) in a case where the FSD is not issued until after the target has gone into administration.

Background

In 2010, TPR made determinations to issue FSDs against companies within the Lehman Brothers and Nortel groups, both of which were involved in insolvency proceedings in the UK and elsewhere. In each group there was a significant employer debt.

The administrators of the insolvent companies in those groups challenged TPR's ability to enforce the FSDs. The administrators argued that they should not have to take the FSDs into account as they were not a provable debt (i.e. one which has arisen out of matters which have occurred, or begun to occur, prior to the insolvency cut-off date). TPR argued that it was an expense of the administration and should therefore be paid out before other creditors.

The path to the Supreme Court

The courts considered whether the liability under an FSD would rank:

a) as an expense of the companies' administrations, ahead of the companies' preferential and unsecured creditors;

b) equally with the companies' other unsecured creditors as a provable debt; or

c) as neither of the above and therefore behind the unsecured creditors.

Considering themselves constrained by previous case law, both the High Court and the Court of Appeal concluded that option (b) was not open to them and therefore preferred option (a) to option (c).[1]

In particular, delivering the Court of Appeal's judgment, Lord Justice Lloyd considered that there would be a greater anomaly if an FSD or a CN were neither provable debts nor expenses of the administration, as the only other alternative would result in what he described as a "black hole" (namely, the possibility that the liability would not be met at all). But the effect of the decisions by the High Court and Court of Appeal was to give FSDs and CNs "super priority" in an insolvency.

Supreme Court

The Supreme Court expressed "little concern" about overruling the earlier decisions which led the lower courts to their conclusions and declared that a target company's liability under the FSD regime, arising pursuant to an FSD issued after the company has gone into administration, ranks as a provable debt of the company rather than as an expense of the administration.

[1] For more information, please see 7 Days 17 October 2011

Comment

To give an FSD or a CN super priority due to a quirk in timing would clearly have been a boon for pension scheme members, but this pragmatic decision provides insolvency practitioners with much needed clarity and TPR with the potential for a degree of recovery from insolvent companies.

TPR has issued a statement welcoming the judgment.