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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)
CPI: Consumer Prices Index
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
FAS: Financial Assistance Scheme
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

DEPARTMENT FOR WORK AND PENSIONS

Automatic enrolment: Career average schemes as qualifying schemes

The Government intends that career average revalued earnings (CARE) schemes can be used as qualifying schemes for the purposes of auto-enrolment, so long as they provide for the accrued rights to benefits under the scheme to be revalued at, or above, a prescribed minimum rate at any time when the jobholder's pensionable service is continuing.

Revaluation can be achieved either by the scheme providing for guaranteed revaluation or providing for funded discretionary revaluation. The minimum required by regulations is the increase in CPI capped at 2.5%.

At present, the Automatic Enrolment Regulations[1] do not allow a CARE scheme that has a mix of guaranteed revaluation below the minimum rate and a discretionary power to revalue at a higher rate to meet the minimum to qualify. The DWP has therefore today (30 April 2012) published a consultation on proposals to amend the regulations to allow schemes which provide for a mix of guaranteed and discretionary increases to qualify, provided that the revaluation is funded for and included in the statement of funding principles.

It is intended that these minor technical amendments will reduce the level of prescription about how revaluation in CARE schemes is achieved, while ensuring that CARE scheme members remain protected.

The consultation closes on 11 June 2012.

Disclosure: Consultation on draft regulations

The DWP is consulting on the Occupational Pension Schemes (Disclosure of Information) (Amendment) Regulations 2012. The aim of these draft regulations is to bring existing disclosure requirements into line with the requirements for auto-enrolment.

Current legislation requires occupational pension schemes to provide basic scheme information to prospective members, or if that is not practicable, to new members within two months of joining. With the introduction of auto-enrolment, this could mean that members may not receive this information until the opportunity for them to opt-out of pension saving has expired. The DWP therefore proposes to amend the timescales for providing basic scheme information to new members, subject to auto-enrolment, to make it more likely that schemes disclose the information before the expiry of the one month opt-out period.

[1] The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (SI 2010/772), regulation 36

The DWP notes that it has a longer-term aim of creating a single set of disclosure regulations for pension schemes, which will update the existing provisions and set out, where possible, a consistent disclosure regime across occupational, personal and stakeholder pension schemes. To coincide with the introduction of auto-enrolment, the DWP had intended to introduce consolidated regulations in 2012. But due to the Government's current "Red Tape Challenge" (which seeks view from members of the public on whether or not existing legislation should be retained, simplified or removed), the next major set of disclosure regulations for pension schemes has been put back until 2013, in a bid to avoid multiple changes to the regulations.

The present consultation closes on 22 May 2012.

FINANCIAL SERVICES AUTHORITY

New rules and guidance on pension transfers

Following consultation, the FSA has published new rules and guidance which are designed to strengthen the protection for members of occupational DB pension schemes who are considering moving their money into personal pension arrangements. The changes aim to address the FSA's concern that, in most cases, this kind of pension transfer is not in the best interests of pension scheme members.

The guidance is primarily aimed at financial advisory firms advising on pension transfers, but will also be of interest to the sponsoring employers of DB schemes.

FSA Press Release and policy statement summary

HM REVENUE AND CUSTOMS

Draft regulations: Age 75 and drawdown reforms and non-UK pension schemes

HMRC has published the Pensions Schemes (Application of UK Provisions to Relevant Non-UK Schemes) (Amendment) Regulations 2012 (draft regulations) for public comment.

The Finance Act 2011 removed a number of restrictions that previously applied to members of pension schemes from the age of 75 and also permitted individuals to draw unlimited amounts from their drawdown pension fund provided certain conditions are met (known as "flexible drawdown"). The draft regulations are designed to ensure that these changes work properly for members of foreign pension schemes which contain funds that have received UK tax relief.

The changes to be made by these regulations are due to have retrospective effect to 6 April 2011, when the Finance Act 2011 reforms came into force.

Further information can be found in the draft explanatory memorandum which accompanies the regulations.

Consultation on the draft regulations closes on 30 May 2012.

HMRC Press Release

OFFICE FOR NATIONAL STATISTICS (ONS)

Pensions in the National Accounts: A fuller picture of the UK's funded and unfunded pension obligations

The ONS has, for the first time, published a set of official statistics on the total obligations (or gross liabilities) of UK pension providers, including the UK Government. The total pension obligations also represent the pension entitlements of UK households.

The ONS presents a breakdown of statistics (based on estimates for 2010) for private sector pensions, workplace pensions for which the Government is responsible (both funded and unfunded) and state pensions. The statistics indicate that at the end of 2010:

- the total accrued-to-date pension obligations of all UK pension providers were estimated at £7.1 trillion, nearly five times the UK's Gross Domestic Product (GDP). The total comprised £5.0 trillion of Government obligations and £2.1 trillion of private sector obligations;

- of the £5.0 trillion pension obligations for which the UK Government was responsible, £3.8 trillion were in respect of state pensions (263% of GDP). The latest comparable EU-level estimate (for the end of 2007) was 278% of GDP;

- obligations relating to unfunded pensions for public sector employees in the UK were estimated at £0.9 trillion (58% of GDP). The latest comparable EU-level estimate (for the end of 2007) was 52% of GDP;

- the UK Government's obligations in respect of funded and unfunded workplace pension schemes were estimated at £1.2 trillion (80% of GDP); and

- UK private sector obligations in respect of workplace pensions – all of which were funded – were estimated at £1.7 trillion (118% of GDP).

PENSIONS POLICY INSTITUTE (PPI)

Report: "Retirement income and assets: the implications for retirement income of Government policies to extend working lives"

The PPI has published a report on research which examines the current patterns of work and retirement in the UK among people over age 50 and considers how these might change in the future.

The report notes that the Government has introduced a range of policies and programmes aimed at extending working lives, including policies aimed at moving people off benefits and into paid work, changes to the age at which people can receive state pension and benefit income, and the removal of legal barriers to working longer. The research looks at international experience of similar policy changes and considers what lessons the UK might learn from them.

The research also considers what patterns of work and retirement might mean for income adequacy in retirement.

PPI Press Release

PENSION PROTECTION FUND

PPF to move compensation administration in-house

The PPF has today (30 April 2012) announced that it plans to run its own customer services operation to make compensation payments to its members. These services are currently run by business services specialists, Capita Hartshead, whose contract with the PPF runs until summer 2014.

The PPF wants to bring member services in-house because it believes that - with a projected membership of more than 300,000 by 2014 - it is now large enough to make this move a viable option. The PPF notes that this is a similar model to that used by many of the top 100 UK pension funds.

The PPF is due to take the first step in the implementation programme this week, by requesting expressions of interest for an IT system which will be used to run the new in-house services. Capita Hartshead will continue to be a strategic partner of the PPF, and will provide the administration services for FAS, which the PPF runs on behalf of the Government.

PPF Press Release

THE PENSIONS REGULATOR

First annual funding statement published

On 27 April 2012, TPR published the first in what is to be a series of annual statements on scheme funding. Aimed at providing guidance for trustees of DB schemes who are going through the valuation process, the statement sets out TPR's views of "acceptable approaches" to scheme funding in the current economic climate.

While TPR's statement is particularly aimed at trustees and employers who are undertaking valuations with effective dates between September 2011 and September 2012, it is relevant to all trustees and employers with a DB pension scheme.

Since the beginning of the current economic crisis, TPR has sought to guide trustees through the funding cycle, setting out its expectations for protecting members' benefits "without undermining the viability of employers, whose support is vital to pension schemes". However, factors such as low gilt yields and quantitative easing continue to put pressure on pension scheme funding.

Recognising the impact of market volatility, TPR notes that schemes with effective valuation dates in December 2011 may appear less well funded than those with effective dates in March 2012, following a general improvement in conditions in the first quarter of 2012. However, TPR is keen to point out that existing flexibility in the funding regime means "that the outcome should not necessarily be more burdensome for those employers". It is also of the view that a substantial proportion of schemes will be "broadly on track to achieve previously agreed plans" as a result of existing risk management, asset allocation and contribution strategies.

For more information, please see our Alert: "Funding in a cold climate: TPR's first annual statement" (dated 27 April 2012).

TPR Press Release

CASES

Seldon v Clarkson Wright & Jakes (Supreme Court)

This much anticipated Supreme Court decision considers the scope for justifying direct discrimination on the grounds of age and, in particular, a mandatory contractual retirement age.

Facts

Mr Seldon was an equity partner in a firm of solicitors, Clarkson Wright & Jakes (CWJ). He was a signatory to a partnership deed (dated 19 March 1992) which provided that each equity partner who had attained the age of 65 was to retire on the following 31 December.

A new partnership deed was signed on 31 December 2005. It was similar to the 1992 deed in most respects but permitted an equity partner to remain after the age of 65 with the consent of the other partners.

During 2006, Mr Seldon proposed that he continue to work part-time as a consultant and also stated that he wished to carry on working full-time. However, CWJ did not offer him any post-retirement position.

On 31 December 2006, Mr Seldon ceased to be an equity partner and subsequently brought proceedings before the Employment Tribunal (ET).

The path to the Supreme Court

The ET was satisfied that the compulsory retirement provision was a proportionate means of achieving a legitimate aim. Whilst the Employment Appeal Tribunal (EAT) reached a similar conclusion, Mr Seldon's case was sent back to the ET for a fresh decision as there was no evidence to support one of the assumptions in the case - that performance would decline at age 65.

Mr Seldon appealed to the Court of Appeal. The arguments focused on whether an employer can justify age discrimination using its own objectives, or whether, following the ECJ and High Court's decisions in Heyday (the Age UK case), it must have social policy objectives.

The Court of Appeal dismissed Mr Seldon's appeal, concluding that the need for a social aim in order to justify discriminatory action related only to the UK Government and the age discrimination legislation enacted by it, and not to a private employer. It was therefore sufficient for an employer's aims to be consistent with the Government's social and labour policy. The Court was satisfied that the firm's aims (for example, staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify his departure and damage his dignity) met this requirement.

Mr Seldon appealed to the Supreme Court.

Supreme Court Decision

Lady Hale concluded that the aims set out in the EU Framework Directive on equality[2] are directed to Member States such as the UK, not employers. Employers have flexibility to choose which legitimate aims to pursue provided that these objectives:

- can count as legitimate objectives of a public interest nature within the meaning of the EU Directive;

[2] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

- are consistent with the social aims of the state; and
- the means used are proportionate, i.e. both appropriate to the aim and (reasonably) necessary to achieve it.

Lady Hale was satisfied that the aims identified by CWJ were capable of being "legitimate aims" for the purposes of the equality legislation. They fell within two broad categories of legitimate objective identified by the ECJ; "inter-generational fairness" and preserving the dignity of older workers. (Although she commented that the latter was controversial as it seemingly perpetuates age stereotypes).

Having validated the firm's aims, Lady Hale confirmed that it is only necessary for the employer to demonstrate that its aims are legitimate in the particular circumstances of the employment concerned. It is not necessary to justify the use of the rule in the individual circumstances. However, Lady Hale commented that "all businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified".

The decision also makes clear that potentially age discriminatory rules can be justified at the time they apply to an individual making a claim, and employees do not have to demonstrate that they had a full defence in place at the time the rule was adopted.

Finally, Lady Hale declined to address whether the choice of a retirement age of 65 was a proportionate means of achieving these legitimate aims in CWJ's case, and the question has been remitted to the ET to decide. However, she made clear that, in determining the issue, the ET must have regard to the circumstances as they were in 2006, when it was lawful to retire employees at age 65.

Mr Seldon's appeal was dismissed.

Comment

This is a welcome, practical approach to justifying age discrimination.

Although we doubt the decision will have an immediate, dramatic impact on occupational pension schemes (which already have the ability to set an age at which people become entitled to benefits), it might open up arguments for how long, or what type of benefits need to be continued if people work beyond their normal retirement age. For example, it arguably raises the question whether inter-generational fairness justifies stopping DB benefits at normal retirement age if new joiners only have access to DC. However, the decision does not remove the need for each scheme to consider any potential objective justification to any age discriminatory rule in relation to the particular circumstances of the employer's business.

The ability to justify a potentially age discriminatory rule retrospectively is also very helpful. However, in reality it seems unlikely, now that anti-age discrimination law has been in place for over five years, that schemes would be looked on favourably if they had made no analysis of the justification for an age discriminatory rule at the time it was adopted.