Sackers

Quarterly briefing

March 2014

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Q1

March 2014

On the front cover this quarter:
Ferdinand Lovett (Associate) and
Adeline Chapman (Associate)

Abbreviations

AA: Annual Allowance

ABCs: Asset Backed Contributions

BIS: Department for Business, Innovation and Skills

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

FP14: Fixed Protection 2014

FCA: Financial Conduct Authority

FRC: Financial Reporting Council

FSCP: Financial Services Consumer Panel

GAD: Government Actuary's Department

HMRC: HM Revenue & Customs

ICAEW: The Institute of Chartered Accountants in England and Wales

IP14: Individual Protection 2014

LGPS: Local Government Pension Scheme

LTA: Lifetime Allowance

NICs: National Insurance contributions

OFT: Office of Fair Trading

PO: Pensions Ombudsman

PPF: Pension Protection Fund

PPFO: Pension Protection Fund Ombudsman

SMPI: Statutory Money Purchase Illustration

SPA: State Pension age

TPR: The Pensions Regulator

VAT: Value Added Tax

In this issue

Electronic format

You can access electronic copies of all our publications at:

www.sackers.com/knowledge

Environment

In line with our approach to corporate social responsibility (CSR), we monitor closely the number of copies printed of this publication. The paper and print manufacturing has been done in compliance with ISO14001 environmental management standards. Our paper, Cocoon 50, contains 50% post-consumer waste and 50% virgin fibres, which are certified for FSC chain of custody.

For more information on our CSR policy, please visit our website at www.sackers.com/about/csr

FSC www.fsc.org MIX Paper from responsible sources FSC® C105395

Current legal agenda

PPF levy deadlines

See page 6 for key dates

Employers and trustees who are intending to certify or recertify any PPF contingent asset should note this year's submission deadline is 31 March 2014. Please speak to your usual Sackers' contact in good time to ensure the deadline can be met.

Pensions tax

See page 2 for further details

From 6 April 2014 onwards:

- the AA will be reduced to £40,000 from its current level of £50,000
- the standard LTA will be reduced from £1.5 million to £1.25 million.

Anyone wishing to apply for "Fixed Protection 2014" must ensure their application is received by HMRC by 5 April 2014.

Pensions Bill 2013-14

Royal Assent expected in spring 2014

The Pensions Bill currently before Parliament[1] is expected to receive Royal Assent in the spring. Among other things, it provides for:

- a new statutory objective for TPR designed to minimise any adverse impact, when exercising its scheme funding functions, on the sustainable growth of an employer
- the new single tier state pension to be implemented on 6 April 2016 and the abolition of DB contracting-out from the same date
- increases to SPA from age 66 to 67 between 2026 and 2028.

Further details are still pending of a statutory power to allow the amendment of scheme rules to take account of increases in NICs as a result of the abolition of DB contracting-out.

Scheme funding

See page 7 for details of the new DB code

Nearly eight years on from the introduction of the statutory funding objective, TPR has been consulting on a new code of practice on scheme funding, together with a DB funding policy and new regulatory strategy. The code is expected to come into force in July 2014.

Disclosure

New disclosure regulations, aimed at consolidating and simplifying those currently in place, will come into force on 6 April 2014. Trustees should act now to ensure that their member communications comply with the new requirements.[2]

Automatic enrolment

2014 will see the auto-enrolment "capacity crunch", as some 40,000 mid-size employers reach their staging dates.

The automatic enrolment earnings trigger will increase to £10,000 (in line with the personal allowance for 2014/15) and the qualifying earnings band will be set at £5,772 - £41,865 from 6 April 2014.

1 Please see our Alert: Pensions Bill 2013 (15 May 2013)

2 Please see our Alert: Changes to disclosure requirements from 6 April 2014 (22 January 2014)

Pensions tax

Changes to the Lifetime Allowance

The LTA is the total amount of tax relieved pension savings that an individual can build up across all registered pension schemes over their lifetime, without incurring an additional tax charge. For this purpose, DC benefits are assessed by reference to the value of the individual's pot and, for DB savings, it is the capital value of the pension (using a factor of 20).

LTA reduced from 6 April 2014

The draft Finance Bill 2014 was published together with draft secondary legislation in December 2013.[3] The Bill is designed to introduce a number of changes to the pensions tax legislation, including introducing a new form of transitional protection from a potential LTA charge – "IP14" – to take into account the reduction of the LTA to £1.25 million (from £1.5 million) from 6 April 2014.

Available protections

Individual Protection 2014: How it works

IP14 entitles individuals to an LTA of the greater of the value of their pension savings as at 5 April 2014 (up to an overall maximum of £1.5 million) or the "standard LTA". (The standard LTA is the maximum amount of pension benefits, fixed in legislation, that an individual can generally take without incurring a tax charge.)

IP14 deadline: 5 April 2017

An individual with IP14 will have a personalised LTA expressed as a monetary amount. This amount will not increase unless the standard LTA increases to a level which exceeds it, at which point the individual would revert to the standard LTA.

In contrast to the rules for FP14, individuals with IP14 will not be subject to any restrictions on future pension savings. However, any increase above the personalised LTA on or after 6 April 2014 will be subject to an LTA charge, unless the standard LTA increases.

Applications for IP14 must be received by HMRC by 5 April 2017.

Fixed protection 2014: Deadline imminent

FP14 deadline: 5 April 2014

FP14 allows an individual to maintain an LTA of the greater of £1.5 million and the standard LTA. However, in return for this protection, the ability to accrue further pension benefits is limited.[4]

The deadline for applying to HMRC for FP14 is 5 April 2014. In contrast to applications for earlier protections (such as FP12), this can be done online.[5]

3 See our Alert: Draft Finance Bill 2014 published (12 December 2013)
4 See our Alert: Lifetime Allowance - the Government consults on individual protection (13 June 2013)
5 HMRC's online FP14 application form can be accessed from the HMRC website

Defined contribution

Spotlight on DC schemes

DC governance on the agenda

Various strands of the pensions industry have in train (or have recently completed) a number of reviews on different aspects of DC pension provision. These include the OFT's DC workplace pension market study,[6] the jointly published draft independence assurance framework for master trusts by TPR and the ICAEW,[7] and the Government's review of DC default fund charges and its proposals to implement changes to the definition of "money purchase benefits" following the Supreme Court's ruling in the Bridge Trustees case.[8]

DC code in force

Sackers offer a "Gap Analysis" service for DC schemes

TPR's code of practice on the governance and administration of occupational DC trust-based schemes came into force with effect from 21 November 2013.[9] The code sets out practical guidance to help trustees meet the legislative requirements for running an occupational trust-based DC scheme.

In line with the principles set out in its DC code and guidance, TPR expects trustees to publish a governance statement which demonstrates to employers and members that their scheme exhibits essential quality features. To help trustees do this, TPR has published a standardised governance statement, which it expects to be used to:

- confirm that the scheme complies with the requirements of the DC code and guidance
- explain where the scheme has adopted a different approach where a quality feature is absent or partly in place
- set out what action the trustees intend to take to correct the position where a feature is absent or improve an existing feature.[10]

Charges cap delayed

Introduction in 2015?

Following the DWP's consultation on capping charges in DC schemes,[11] the Pensions Minister has confirmed that the proposed cap will be delayed to give employers sufficient notice of the changes. The cap, which had been due to take effect in April 2014, will not now be introduced before April 2015.[12]

Personalised statutory money purchase illustrations

In the light of changes being made to the Disclosure Regulations from 6 April 2014,[13] the FRC has been consulting on proposals to allow providers to create more personalised SMPIs. These include amendments to the relevant actuarial standard (AS TM1) which would allow providers to create illustrations that allow for cash lump sums to be taken out prior to the calculation of the pension, for varying levels of dependants' pensions to be assumed, and for different levels of pension increases (or no increases) to be assumed.

Overhaul of the annuities market

FCA to review annuities market

In a study of the annuities market, the FSCP (which provides independent advice to the FCA) concluded that current market driven solutions carry a risk of "mass consumer detriment". It has therefore recommended "urgent regulatory and government-led structural reform in order to prevent millions of pensioners from losing out".[14]

6 Office of Fair Trading: DC workplace pension market study (17 January 2013)
7 ICAEW: Assurance reporting on master trusts (October 2013)
8 See our Alert: Reclassifying DC benefits following Bridge Trustees (31 October 2013)
9 See our Alert: TPR publishes new Code of Practice for DC Schemes (11 July 2013)
10 TPR's template governance statement was published on 6 February 2014
11 See our Alert: Charges cap proposed for DC schemes (30 October 2013)
12 DWP Written Ministerial Statement (23 January 2014)
13 See our Alert: Changes to disclosure requirements from 6 April 2014 (22 January 2014)
14 Annuities: Time for Regulatory Reform (9 December 2013)

Public sector pensions

Regulation of public sector pension schemes

New role for TPR

TPR was given an expanded role in the Public Service Pensions Act 2013, which received Royal Assent in April 2013, in respect of the governance and administration of public service schemes. From April 2015, it will set standards of practice to help the Local Government, NHS, Teachers, Civil Service, Armed Forces, Police, Fire Fighters and Judicial pension schemes to meet governance and administration requirements set out in the legislation.

In connection with this, TPR has been consulting on a draft code of practice that is designed to provide practical guidance to help public service pension schemes to meet the new requirements. It has also been consulting on a draft regulatory strategy, in which it sets out how it will educate and enable public service schemes to meet the standards of practice outlined in the draft code.

Record keeping

Reporting late payment of contributions

The DWP has been consulting on draft regulations which set out the records that public service pension schemes covered by the Public Service Pensions Act 2013 will be required to keep from April 2015.

The regulations will also remove an existing exemption so that, going forward, managers of public sector schemes covered by the 2013 Act will be required to report the late payment of member contributions by employers to both TPR and scheme members, where the late payment is likely to be of material significance.

Fair Deal

GAD statement

In an announcement[15] in relation to its work on staff transfers from the LGPS to broadly comparable schemes, GAD explains how impending changes to the Fair Deal policy will affect its broad comparability assessments and existing certifications.[16]

15 Announcement relating to broad comparability work against the LGPS (27 November 2013)

16 For more on changes to the Fair Deal and other public sector pensions developments, see our Public Sector Briefing (December 2013)

Pensions reform

State Pensions

In his 2013 Autumn Statement,[17] the Chancellor announced measures that will see faster increases in SPA, in a bid to keep pace with increasing life expectancy.

SPA to keep pace with life expectancy

The Pensions Bill 2013 already provides for SPA to increase to age 67 between 6 April 2026 and 5 March 2028 (and this plan remains unchanged). However, SPA now looks set to rise to age 68 by the mid-2030s (instead of 2046 as planned), with a further possible rise to 69 by the late 2040s.

The Government has said that future increases to SPA will be based on a core principle that "people should expect to spend, on average, up to one third of their adult life in receipt of the State Pension".[18] Alongside the Autumn Statement, the DWP published a note with further details of this core principle and how it may be defined in practice.[19]

Same sex couples

The Marriage (Same Sex Couples) Act 2013

This Act, much of which will come into force on 13 March 2014, will extend marriage to same sex couples. The first such marriages will be able to take place from 29 March 2014.[20]

Once the Act is in force, schemes will need to provide at least the statutory minimum benefits for same sex married couples as for civil partners, that is:

Same sex couples able to marry from 29 March 2014

- if applicable, contracted-out survivors' benefits relating to service on or after 6 April 1988 (the date on which contracted-out benefits for widowers were introduced)
- all other survivors' benefits relating to service on or after 5 December 2005.

Regulations[21] will allow trustees to vary schemes to allow entitlements to be given to married same sex couples without affecting members' accrued rights.

Employers and trustees will need to determine whether they wish to provide the statutory minimum or full scheme benefits.

Civil Partnerships

BIS is reviewing the operation and future of the Civil Partnership Act 2004 in England and Wales. Its current consultation seeks views on and evidence about civil partnership and its continuing role, when all couples (whether they are of the same sex or opposite sex) will be able to marry.

17 Autumn Statement 2013 (5 December 2013)
18 This proportion appears to be slightly at odds with other commentators' views on how long individuals should expect to be in receipt of state pension
19 DWP statement on the proposed core principle underpinning future State Pension age rises (5 December 2013)
20 At least 16 days' formal notice of intention to marry must be given
21 The Marriage (Same Sex Couples) Act 2013 (Consequential Provisions) Order 2014

Regulatory

Pension Protection Fund

PPF levy determination

The PPF has confirmed that its pension protection levy estimate will be £695 million.[22] The 2014/15 levy is the last to be set under the first three year period of the new levy framework implemented in 2012/13.

Levy deadlines

The following dates and deadlines have been confirmed for the 2014/15 levy year:

Deadlines for 2014

- 31 March 2014: Deadline for certification of new contingent assets and recertification of existing contingent assets
- 31 March 2014: Deadline for submission Scheme Return to TPR. Information from the Scheme Return is used in the calculation of the levies
- 30 April 2014: Deadline for the submission of deficit reduction contribution certificates for contributions made up to and including 31 March 2014
- 30 June 2014: Deadline for submission of full block transfer certificates.

Schemes wishing to put in place or recertify PPF contingent assets are advised to start this process in good time to ensure that these deadlines can be met.

Approach to restructuring and insolvency

The PPF has been involved in restructuring or rescue deals affecting employers which otherwise face certain insolvency. The negotiations that take place to agree these deals are, by their very nature, complex and confidential because of commercial sensitivities.

New regulatory approach

Recent high profile cases have meant that the PPF's role in this type of agreement has received greater scrutiny and analysis. With a view to avoiding inaccurate or misleading reports of its involvement in these deals, the PPF has produced a factsheet in which it explains why it enters into such agreements and summarises the principles it uses to make its decisions.[23]

Insolvency risk provider update

Details of new risk scores delayed

Back in 2013, the PPF announced the appointment of Experian as its new insolvency risk provider, replacing D&B. It had intended to work with Experian to develop a new model for creating insolvency risk with a view to using the new scores for the 2015/16 levy year. However, the PPF has recently announced that the development work is taking longer than anticipated, meaning that levy payers will not be able to see their new scores in early 2014 as originally intended.[24]

Compensation cap

The PPF compensation cap has been updated in line with the general level of earnings and will increase to £36,401.19 (from £34,867.04) from 1 April 2014.

22 See our Alert: PPF's levy determination for 2014/15 (9 January 2014)
23 Restructuring and insolvency: The PPF approach (13 January 2014)
24 PPF update on insolvency risk provider (9 January 2014)

The Pensions Regulator

Funding defined benefits

TPR has been consulting on funding for DB schemes, including its principles for DB funding and how TPR plans to regulate it.[25]

New code due in force July 2014

The draft revised code of practice on DB funding has a new emphasis on balance and collaborative working, as TPR recognises that a strong ongoing employer alongside an appropriate funding plan is the best support for a well governed scheme. The draft code sets out nine key funding principles intended to be universally applicable to all DB schemes.

While the code is expected to come into force in July 2014, TPR wants trustees and employers who are currently completing valuations to take the messages in the draft code into account.

Guidance on asset-backed contributions

TPR has published guidance on ABCs, including special purpose vehicles and pension funding partnerships, aimed at trustees considering a proposal to enter into such an arrangement.[26]

The trustee's role in reviewing ABC proposals

Key features of the guidance are that trustees should:

- examine ABC proposals "critically and carefully"
- consider whether there are any less risky alternatives to support their scheme
- "unpack" the ABC arrangement to identify the extent to which the value attributed to it in the scheme's accounts is reliant on future payments.

It also notes that all ABC arrangements should include a separate underpin to protect the scheme's position, should the arrangement be declared void or if there is a change in the law.

Changes to the Scheme Return

Scheme Returns

All schemes with DB benefits are required to complete and submit an annual Scheme Return to the Pensions Regulator. To help trustees and administrators with this process, TPR has published a guide to the questions covered in the Scheme Return.[27] This also highlights areas that are the subject of new questions from January 2014. We also understand from TPR that the information on statutory employers held on the scheme return will be depopulated. The information will need to be resubmitted.

Statement on statutory employers

Back in 2011, TPR issued a statement to help trustees and advisers of DB schemes to understand why it is important to be clear who legally stands behind individual schemes and what they need to do.

Insolvency of overseas employers

Following the Court of Appeal decision in the Olympic Airlines case[28] in which a DB scheme with an insolvent employer was unable to meet the requirements for PPF entry, TPR has now revised the statement to include additional information on overseas employers.[29]

25 See our Alert: Funding defined benefits (3 December 2013)
26 See our Alert: TPR publishes new guidance on asset-backed contributions (22 November 2013)
27 Changes to your scheme return: Defined benefit and hybrid schemes (December 2013)
28 Olympic Airlines Pension Scheme v Olympic Airlines (June 2013)
29 TPR Statement: Identifying your statutory employer (December 2013)

Automatic enrolment compliance visits

TPR to provide tailored guidance

TPR has carried out the first in a series of in-depth fact finding visits to business sectors that may face auto-enrolment compliance challenges. The recruitment sector was targeted for these visits, having been identified through TPR's intelligence work in line with its compliance and enforcement policy, with visits made to prevent and tackle possible breaches.

The move demonstrates how TPR aims to use direct intervention to ensure that employers comply with their statutory duties and to help establish a pro-compliance culture. As a result of the visits, TPR plans to issue targeted compliance guidance for the recruitment sector.

Update on record keeping

TPR has urged schemes[30] to continue the drive to improve their record keeping by correcting errors in "common data" (basic data items required to identify a scheme member, such as surname, NI number and date of birth) and by putting plans in place to improve the quality of "conditional data".[31]

No specific targets for conditional data

TPR plans to review its record keeping guidance in 2014. In the meantime, it has confirmed that it will not be setting targets for conditional data in the same way as for common data. It does, however, expect schemes to be able to demonstrate that they have credible plans in place to improve this data and may set targets around the timings for these plans to be implemented.

HM Revenue & Customs

VAT changes for schemes

HMRC has announced a change of policy that will allow sponsors of DB schemes to reclaim input tax in certain circumstances in the light of the PPG Holdings case.[32]

Until now, HMRC has distinguished between costs incurred in relation to the setting up and day-to-day administration of occupational pension schemes, and the management of the investment activities of the fund. Previously, HMRC allowed employers to deduct VAT incurred only in relation to the general management (ie administration) of a scheme on the basis the costs are overheads of the employer and have a direct and immediate link to their business activities. Investment management costs were deemed to be the costs of the pension fund itself, relating solely to the activities of the pension fund.

VAT on pension fund management costs

However, following the judgment of the European Court in the PPG Holdings case, HMRC has changed its policy so that in some circumstances, employers may be able to claim input tax in relation to pension funds where they could not previously. VAT incurred will potentially be deductible by the employer where the investment management costs have a direct and immediate link between the supply received and the taxable supplies made by the business.

HMRC will permit retrospective claims for overpaid VAT for periods ending within four years on which the claim is made.

30 TPR press release on improving record keeping (4 December 2013)
31 TPR has produced an illustrative list of conditional data
32 On 3 February 2014. For a summary of the case, please see our October 2013 Investment Briefing

Cases

High Court

The Board of the PPF v The Trustees of the West of England Shop Owners Insurance Services Limited Retirement Benefits Scheme

The trustees disputed their failure score with the PPF.[33] The High Court held that the PPF did not have discretion to change the score in this case as the levy calculation had been undertaken correctly.

In the trustees' opinion, the failure score attributed by D&B to the employer (which was based in Luxembourg) was too low and overstated its insolvency risk. This arose because D&B's practice in Luxembourg is not to obtain filed company accounts automatically, but only when requested to do so by a client (although D&B conceded that the trustees could not reasonably have been expected to know this).

PPF Ombudsman's decision overturned

Following a request by the trustees for a recalculation of the levy using a failure score which took account of the latest financial information, reviews by D&B, the PPF and the PPF's Reconsideration Committee upheld the original calculation. However, on appeal, the PPFO (who was seemingly guided by concerns of fairness and public policy) concluded that the Reconsideration Committee had not reached its decision correctly and directed the PPF to review and recalculate the Scheme's risk based levy for 2010/11.

The High Court found that under the terms of the PPF levy determination, the PPF can only use its discretion to amend the levy calculation when the information used is "incorrect in a material respect". In this case, it was not disputed that the failure score was the "normal" score that would have been ascribed in the circumstances, so the PPF's discretion did not come into play. The failure score and consequent levy calculation had therefore been undertaken correctly. As the Reconsideration Committee had reached the correct decision, the Court found that the PPFO had made an error of law in reaching her conclusion.

Pensions Ombudsman

Determination in a complaint by Mr John Bradbury

In this case, it was held that an agreement by a member to accept a pay rise on the basis that only part of it will be pensionable is binding on the member. That agreement will override the pension scheme's rules if necessary, subject to the employer's implied duty of trust and confidence and/or good faith (the "Implied Duties").

No breach of implied duty of trust and confidence

The BBC capped increases in pensionable pay to 1%. Members who did not agree to the cap did not receive a pay increase. In the High Court, Warren J was satisfied that the cap on pension increases could be properly implemented by means of a contractual agreement with members giving their informed consent to the changes and that such an agreement could override a scheme's rules. Following the High Court decision, the case was sent back to the PO to determine whether imposing the cap breached the Implied Duties.

Taking account of comments made by Warren J in the High Court, the PO concluded that the BBC's conduct did not amount to a breach of the implied duty of trust and confidence which arises from an employee's contract of employment.[34]

33 For a full case report, please see the summary in Sackers' Pensions Wiki

34 For a full case report, please see the summary in Sackers' Pensions Wiki

Sackers

Upcoming seminars

We offer an extensive programme of client workshops and seminars. In addition to the Quarterly legal updates, our seminars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on particular topics.

Pensions for new trustees	03/04/14	Morning workshop (09:00am-12:30pm) Getting up to speed on the Pension Regulator's Trustee Knowledge and Understanding syllabus. A workshop aimed at new trustees of DB schemes.
Quarterly legal update	08/05/14	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world.
Pension managers forum	15/05/14	Lunchtime seminar (12:30pm-2:00pm) Exploring tricky tax issues faced by pension managers in practice.
Tips and traps for dealing with member disputes	22/05/14 05/06/14	Breakfast seminar (09:00am-10:30am) Lunchtime seminar (12:30pm-2:00pm) A practical session led by our experts in pension disputes.
Quarterly legal update	24/07/14	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world.

If you would like to attend any of our seminars, please contact our marketing team at marketing@sackers.com.

Our Quarterly video distils content from the Quarterly legal update seminar into bite sized chunks, highlighting some of the current key issues. A selection of short videos on topical pensions-related issues and aspects of our firm is available on our website:

www.sackers.com/news-and-media/videos

Sign up

Stay up to date with all the latest developments in pensions law by signing up to our free publications on www.sackers.com/knowledge. These include 7 Days, our weekly round up, Alerts where topical issues in pensions are covered in depth and Briefings which summarise essential issues in pensions.

Viewpoint

Sackers' response to the consultation on TPR's new code of practice on scheme funding is now available on our website:

www.sackers.com/knowledge/publications/viewpoints

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 (0)20 7329 6699
F +44 (0)20 7248 0552
E enquiries@sackers.com
www.sackers.com