

Quarterly briefing

June 2015

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



Q2

June 2015

On the front cover this quarter:
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Abbreviations

AVCs: Additional Voluntary Contributions
CETV: Cash equivalent transfer value
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work & Pensions
FA04: Finance Act 2004
FCA: Financial Conduct Authority
HMRC: HM Revenue & Customs
IGC: Independent governance committee
LMS: Last man standing
LTA: Lifetime allowance
NICs: National Insurance contributions
NPA: Normal Pension Age
PPF: Pension Protection Fund
PTM: Pensions Tax Manual
RPSM: Registered Pension Schemes Manual
SIP: Statement of Investment Principles
TKU: Trustee knowledge and understanding
TPR: The Pensions Regulator
VAT: Value added tax

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Environment

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Current legal agenda

Freedom & choice

See pages 4 & 5 for further details of the new flexibilities

6 April 2015 saw the introduction of significant new flexibilities for DC pension savers. There are now three main retirement options: lifetime annuities; flexi-access drawdown; and lump sum payments. Schemes do not have to make the new options available but, if trustees and employers decide to do so, help is at hand to ease implementation.

In addition, recognising that members may need to transfer out their benefits to take advantage of the new flexibilities, the statutory transfer requirements have been extended.

Prompted by the new flexibilities, changes to the disclosure requirements will affect trustees of both DC schemes and DB schemes with DC AVCs. Furthermore, DB trustees faced with a transfer request from a member (or survivor) to a DC arrangement will generally need to check that he/she has taken appropriate independent advice.

DC governance & charges

The new DC governance and charges requirements are outlined on pages 6 & 7

Also from 6 April 2015, both trust and contract-based DC schemes are now subject to new governance standards. DC schemes used as qualifying schemes for automatic enrolment purposes also need to identify whether they have default funds and, if so, ensure that charges are kept within the new legislative cap.

End of DB contracting-out

See page 9 for details of the employer's modification power

DB contracting-out will come to an end with effect from 6 April 2016, when the new single tier state pension is introduced. As a result of this change, employer and employee NICs will increase to the standard rate. However, regulations are now in force which will help employers change scheme rules to offset the loss of the NIC rebate.

Budget 2015 & General Election

Budget proposals now on track for implementation

George Osborne's final Budget before the General Election heralded yet more changes for pensions and pensions tax relief, including plans to:¹

- further reduce the LTA to £1 million (from £1.25m) from 6 April 2016
- allow indexation of the LTA annually by CPI from 6 April 2018
- allow people already receiving income from an annuity to assign their annuity income to a third party in exchange for a lump sum or alternative retirement product from 6 April 2016.

In common with previous reductions in the LTA, transitional protection for pension rights already over £1 million will be introduced to ensure the change is not retrospective. Details of these protections have yet to be released.

With the Conservatives winning the right to govern the country for another five years in the recent General Election, albeit this time alone, we are likely to see George Osborne's Budget proposals come to fruition. In addition, although Iain Duncan Smith has retained his post as Secretary of State for Work and Pensions, a new Pensions Minister was needed to fill the post vacated by Steve Webb. It has been confirmed that Ros Altmann, a pensions campaigner and former adviser to Tony Blair, will be appointed. Whether a change in personality will lead to different reforms, or a reshaping of existing ones, remains to be seen.

¹ See our Alert: [Budget 2015](#) (18 March 2015)

Freedom & choice

Key changes: A quick recap

On 6 April 2015, significant new retirement flexibilities were introduced for DC savers. Whether an individual can take advantage of the new DC flexibilities will be subject to the scheme's rules. Trustees should consider whether they want to offer their members the ability to take advantage of all or some of the new options and discuss issues of benefit design with the employer.

Introducing the new flexibilities

Where trustees and employers wish to make any of the new flexibilities available to DC members, options available to help schemes include:

- a permissive “scheme rules override” in FA04 which gives trustees or managers of DC registered pension schemes power to pay any of the new types of benefit
- a modification power set out in regulations² which allows trustees, with employer consent, to amend scheme rules by resolution.

Trustees and employers considering allowing members to take advantage of the new options should discuss the legal aspects with their usual Sackers' contact.

Disclosure and communications

New regulations

Much of the detail of the new regime has been brought into force from 6 April 2015, under regulations which include:

- changes to the information and reporting requirements for “scheme administrators” for tax purposes (generally trustees) to provide appropriate information to the receiving scheme administrator on a transfer to ensure that the correct tax treatment is applied to future payments
- new disclosure requirements³ stipulating the information to be given to members with “flexible benefits” (broadly, DC or cash balance benefits) and the information to be given to members in connection with the new guidance service, Pension Wise.

The new disclosure requirements apply to all members with both a right to and an opportunity to transfer “flexible benefits”. This means that even DC schemes which do not intend to offer the new flexibilities need to comply, as do DB or hybrid schemes in respect of any affected members, including those whose only DC benefits are AVCs.

TPR guidance

TPR has published an “essential guide”⁴ to help pension scheme trustees communicate with their members about the impact and possible risks of their DC retirement choices. The guide explains the new disclosure requirements and the duty for trustees to “signpost” the availability of Pension Wise in specified circumstances. TPR also encourages trustees to provide members with generic risk warnings in respect of their main retirement options, and gives example wording for trustees to use or adapt and reminds trustees to be careful not to give advice. For example, trustees should not provide specific risk warnings based on a member's particular circumstances.

New disclosure requirements apply even where new DC flexibilities are not on offer

² The Occupational Pension Schemes (Consequential and Miscellaneous Amendments) Regulations 2015

³ Under changes to the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013

⁴ TPR [Essential guide to communicating with members about pension flexibilities](#) (23 April 2015)

Freedom & choice cont.

Transfers and conversions

New transfer right

Statutory transfer rights extended

With effect from 6 April 2015, members with flexible benefits are able to request a CETV up to the date on which they crystallise their benefits (rather than up until one year before NPA as previously). In addition, all members now have a statutory right to a partial transfer,⁵ provided such a transfer extinguishes all of a member's rights in one of the new categories of benefit.⁶

Appropriate independent advice

Trustees must check advice has been received

For members with benefits over £30,000, trustees must check that a member (or survivor) with "safeguarded" (ie DB) benefits has received appropriate independent advice in relation to DB to DC transfers or the conversion of their DB benefits into DC in their existing arrangement. The member (or survivor) will need to provide confirmation of this in a specified form. Trustees are not required to make a transfer of DB benefits where they are unable to carry out this check.⁷

Generally, it is the individual who will be required to pay for this advice. However, where an employer sends communications to two or more members (or survivors) setting out their options "in terms that encourage, persuade or induce" the member (or survivor) to make a transfer (or conversion) request, the employer is required to pay for the advice. A new income tax exemption was introduced for payments made in these circumstances from 6 April 2015.⁸

Form of confirmation

The member's (or survivor's) confirmation that appropriate independent advice has been received must be in the form of a statement in writing from the authorised independent adviser which includes the following:

Member must provide confirmation in specified form

- the member's (or survivor's) name and that of the scheme in which the member (or survivor) has DB benefits to which the advice given applies
- confirmation that advice has been provided which is specific to the type of transaction proposed by the member (or survivor)
- the FCA authorisation number of the company or business in which the adviser works.

Once they have received the above confirmation, trustees will need to check that the company or business has permission to provide the advice against the Financial Services Register maintained by the FCA. However, it is important to note that trustees are not responsible for checking what advice was given to the member (or survivor) or that any recommendation is being followed.

FCA rules

Whilst the FCA already regulates advice on transfers to personal pensions, the new regime brings advice on transfers from DB schemes to occupational DC schemes within the FCA's remit. The FCA has therefore been consulting on changes to its pension transfer rules which are expected to be in place by June 2015 and which will require advice on such transfers to be provided or checked by a pension transfer specialist.⁹

⁵ See our Alert: [Transfer Rights - Post-April 2015](#) (16 December 2014)

⁶ Namely, "money purchase benefits"; "flexible benefits other than money purchase" (ie cash balance); and benefits that are not flexible benefits (ie DB)

⁷ See our Alert: [Freedom & choice in pensions: Appropriate independent advice on DB to DC transfers and conversions](#) (5 March 2015)

⁸ HMRC Tax information and impact note: [Pension scheme benefits: independent advice for employees](#) (18 March 2015)

⁹ [FCA's proposed changes to pension transfer rules](#)

DC focus

Governance

New governance standards

From 6 April 2015, new minimum governance standards apply to DC schemes:¹⁰

- trustees must assess the extent to which an occupational DC scheme's charges and transaction costs represent "good value" (this new duty sits alongside trustees' existing responsibility to test value for money in accordance with TPR's DC Code of Practice)¹¹
- IGCs (required for firms operating workplace pension schemes since 6 April 2015) must assess and raise any concerns about the "ongoing value for money" of a provider's contract based workplace DC pension scheme.

Annual governance statement

The chair of trustees is now responsible for signing off an annual statement, which will form part of the scheme's annual report, on how governance standards have been met in their scheme. In brief, the statement will have to:

- report the level (or range) of charges and transaction costs in the default arrangement(s) and the range of costs and charges in other funds, and include an assessment of the extent to which the charges represent good value
- describe how the [TKU requirements](#) have been met throughout the year and give an explanation as to how the trustees have, or have access to, all the competencies necessary to run the scheme properly.

Where the first scheme year ending after 6 April 2015 is sooner than 5 April 2016, the statement should relate to the period from 6 April 2015 to the end of the first scheme year, except where the period covered would be less than three months (in which case this period can be rolled up into the following year's statement).

Charges

Cap on default fund charges

Since 6 April 2015, workplace pension schemes used by employers for automatic enrolment are subject to a cap on charges in default funds of 0.75%. The idea is to protect members who have not made an active choice about their investments.

The DWP has published guidance for trustees to explain how the charge cap works, with particular emphasis on identifying the default arrangement and how to assess charges.¹² Meanwhile, the FCA has confirmed similar final rules¹³ on charges for firms which operate workplace pension schemes.

The starting point for trustees is to identify the default fund(s) which are available in their DC scheme (bearing in mind that there may be more than one).

Assessing value
for money

Trustee chair to confirm
how governance
standards are met

10 See our Alert: [Better workplace pensions - response to consultation](#) (9 February 2015)

11 Our latest [DC Hot Topic](#) (available on our website under Latest Briefings) examines how trustees and IGCs can comply with their duties to assess value for money

12 [The charge cap: guidance for trustees and managers of occupational schemes](#) (2 March 2015)

13 [PS15/5: Final Rules for charges in workplace personal pension schemes and feedback on CP14/24](#) (2 March 2015)

DC focus cont.

Default fund SIPs required

Investment review

Also from 6 April 2015, DC scheme trustees will be required to prepare and review a SIP in respect of a default fund. Trustees will also have to explain how the default strategy ensures that assets are invested in the best interests of members and beneficiaries.¹⁴

Trustees will need to be prepared to undertake fund reviews at regular intervals, to enable them to benchmark their objectives against the performance of the funds and to determine if the objectives are being met.

Retirement risk warnings: the second line of defence

In light of the new retirement flexibilities, the FCA has made changes to its rules on retirement risk warnings, requiring firms to personalise warnings given to individuals and the choice they are making by asking a series of questions and actively engaging with the customer.¹⁵ The aim of the new measures is to achieve a fair balance between protecting consumers and addressing valid concerns from firms about their ability to comply from 6 April 2015.

Disclosure of transaction costs

In a call for evidence which closed on 4 May 2015, the FCA and DWP have been seeking views as to how information about transaction costs and charges should be reported in a standardised, comparable format.¹⁶ Among other things, they have been looking at transparency in reporting information, what costs to include and whether to provide information on other factors that influence investment returns.

Responses received will be used by the FCA to shape its proposed rules which are due to be the subject of a consultation in autumn 2015.

Automatic transfers

New system for automatic transfers outlined

It is anticipated that following the roll-out of automatic enrolment, there will be a proliferation of dormant, often small, DC pension pots. To address this, the Pensions Act 2014 provides a legislative framework for automatic transfers (often referred to as “pot follows member”).

The DWP has now published its proposals for a framework for the automatic transfer of individuals’ small DC pension pots (initially pots worth £10,000 or less) when they change jobs.¹⁷ The DWP’s policy paper sets out how workers may be able to consolidate small pension pots within their current employer’s pension scheme through a “federated model” – a network of registers that store and match information about eligible small pots to be automatically transferred.

It is anticipated that the first phase of the new system, under which members would have a choice as to whether to transfer to their new employer’s scheme, will be in place by October 2016, with a fully automated system to follow at a later date. However, implementation and timing will depend on the new Conservative government’s priorities for workplace pensions.

Framework for “pot follows member”

¹⁴ See our March 2015 [DC Briefing](#)

¹⁵ [PS15/4 Retirement reforms and the guidance guarantee: retirement risk warnings](#) (27 February 2015)

¹⁶ [Transaction Costs Disclosure: Improving Transparency in Workplace Pensions - A call for evidence](#) (2 March 2015)

¹⁷ [Automatic Transfers: A framework for Consolidating Pension Saving](#) (11 February 2015)

Automatic enrolment

New thresholds in place

The automatic enrolment thresholds for the tax year 2015/16 are now in place:

- the earnings trigger (for establishing eligibility) remains at £10,000
- the qualifying earnings band (for calculating contributions) has increased to £5,824 - £42,385.

Technical changes

Measures designed to simplify automatic enrolment and reduce burdens on employers were brought into force by regulations on 1 April 2015. These include:

- an alternative quality requirement for DB schemes, as schemes which are contracted-out on a DB basis will no longer be able to use the reference scheme test once DB contracting-out is abolished in 2016
- simpler information requirements, so that individuals are not overwhelmed with different communications
- exceptions to the employer duty to automatically enrol jobholders in certain circumstances, such as where an individual has tax protected status or is in a notice period.

Employers can continue to comply with the original information requirements and use existing systems if they prefer.

Qualifying schemes: No global list

At the end of 2014, TPR consulted on proposals to publish a list of pension schemes that are directly available to all employers for automatic enrolment, irrespective of how many workers they have or how much they pay them.¹⁸ The idea of such a list would be to address the risk of non-compliance among employers struggling to find a scheme, particularly those which do not intend to seek an adviser to help them.

As a result of the consultation, TPR decided not to publish this list. It was felt that it would be difficult to manage such a list in an objective and transparent way, without commonly agreed criteria. However, TPR plans to keep the position under review.

Abolition of NEST contribution and transfer restrictions

A number of restrictions were initially placed on NEST to allow it to focus on its target market and provide stability during the initial rollout of automatic enrolment. An Order is now in place which will remove these restrictions from 1 April 2017, so that there will no longer be an annual limit on contributions that are paid into the scheme and the current restrictions on transfers in and out of NEST will be lifted.

Compliance

TPR publishes monthly information on automatic enrolment, derived from information submitted by employers when they complete their declaration of compliance, as well as annual reports with additional analysis and commentary.

The latest statistics illustrate the success of automatic enrolment to date with 45,820 employers having met their duties as at the end of March 2015.

Exceptions to the auto-enrolment duty in force

NEST transfers from 2017

18 [Helping small and micro employers identify a pension scheme for automatic enrolment](#) – TPR response to consultation (5 March 2015)

DB focus

Value Added Tax

Deduction of VAT on pension fund management costs

In the past, HMRC allowed employers to recover VAT on invoices for general administration fees for work commissioned by and delivered to the trustees of UK occupational pension schemes under [VAT Notice 700/17: Funded Pension Schemes](#). In the wake of two European cases, HMRC revised its original position on VAT and pension schemes.¹⁹

In November 2014, HMRC set out in Brief 43 its interpretation of the legal position. HMRC's view was that an employer could recover input tax in relation to the management of its pension scheme ("management" covers investment management and day-to-day administration) only if there is contemporaneous evidence that it: is the recipient of the services; is party to the contract for those services; and has paid for them. HMRC's latest brief²⁰ follows on from this and outlines HMRC's position on the use of tripartite contracts to evidence an employer's entitlement to deduct VAT paid on services relating to the management of DB schemes.

In the meantime, a transitional period is running until 31 December 2015, during which businesses can continue to use the VAT treatment outlined in Notice 700/17 should they choose, if both employer and trustees agree the same treatment.

The latest brief also states that HMRC intends to provide further guidance "in the summer" on VAT recoverability relating to other types of service (such as legal, actuarial or accounting) and other types of scheme (such as DC or hybrid).

**Tripartite contracts
may be used in certain
circumstances**

Abolition of DB contracting-out

Statutory modification power

DB contracting-out will come to an end with effect from 6 April 2016, when the new single tier state pension is introduced.²¹ As a result of this change, employer and employee NICs will increase to the standard rate.

The Pensions Act 2014 provides employers with a unilateral power to amend pension scheme rules to take account of this change. The statutory power can only be used to recoup the increase in employer NICs by either adjusting members' future pension accrual or future contributions. It may not be used in a way which would or might adversely affect the subsisting rights of a scheme member or survivor.

Regulations came into force on 6 April 2015 which set out the detail of how the statutory power may be used, in particular, how the (employer appointed) actuary should calculate and certify that the value of the proposed amendments is not greater than the increase in the employer's NICs.

**Statutory power to
amend scheme rules**

Employer debt

Non-associated multi-employer schemes

The DWP has issued a call for evidence²² on the operation of the employer debt regime for non-associated multi-employer schemes. In particular, the DWP is looking to assess the effect of current easements open to employers in such schemes and the possible impact of changes that have been put forward.

**Call for evidence
closes 22 May 2015**

¹⁹ See our Alert: [VAT on professional fees](#) (17 December 2014)

²⁰ [Revenue and Customs Brief 8 \(2015\): deduction of VAT on pension fund management costs](#) (26 March 2015)

²¹ See our Alert: [Abolition of DB contracting-out: response to consultation and final regulations on statutory override](#) (5 March 2015)

²² [Section 75 Employer Debt in Non-Associated Multi-Employer Defined Benefit Pension Schemes](#) (12 March 2015)

Regulatory

Clampdown on pension scams

Regulatory Action

In recent months there has been a concerted effort from various parts of the pensions industry to curb pension scam activity, with both TPR²³ and the FCA²⁴ updating their pension scam materials.

Standard due diligence process

In addition, the Pension Liberation Industry Group has published a voluntary Code of Good Practice²⁵ which is designed to set an industry standard for dealing with requests from pension scheme members to transfer their benefits from a UK registered pension scheme to another arrangement, or to a recognised overseas pension scheme.

Among other things, the code provides guidance on:

- members' transfer rights
- different types of scam
- the due diligence process, including initial analysis and further information requests
- record keeping and reporting.

The code also includes example communications, including letters to members and discharge wording, and an example pension scam decision sheet.

HM Revenue & Customs

Pensions Tax Manual

New PTM live on HMRC website

HMRC has published new guidance on the taxation of pension schemes in the form of the "Pensions Tax Manual". The manual includes guidance previously found in the RPSM, which it is set to replace when the PTM is finalised in the summer of 2015. The new manual also incorporates guidance on the new retirement flexibilities.

It should be noted that the RPSM is no longer being updated.

Pension Protection Fund

Last man standing schemes

Deadline to report LMS scheme is 29 May 2015

LMS schemes are multi-employer schemes which do not have an option or requirement to segregate assets when a participating employer leaves. In order to receive appropriate credit in the 2015/16 PPF levy, schemes reporting as LMS are required to submit a form to the PPF confirming that they have received legal advice on the scheme's structure. If a scheme does not provide this confirmation, it will not be treated as LMS for the purposes of the levy.

A new "last man standing certificate" has now been published by the PPF. Trustees need to complete this form by 29 May 2015 to indicate they have received the appropriate legal advice.²⁶

23 TPR: [Scamproof your savings](#)

24 FCA: [As new pension freedoms arrive be ScamSmart](#)

25 [Code of Good Practice on Combating Pension Scams](#) (16 March 2015)

26 See our Alert: [Is your scheme last man standing?](#) (13 March 2015)

Cases

High Court

Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd and others

The Scheme is a non-sectioned industry wide DB scheme which was established with effect from 6 April 1978 for the benefit of British Merchant Navy “Ratings” and their dependants. It has been in serious deficit since the late 1990s. The trustee applied to the court to approve the introduction of a new deficit repair regime, a key feature of which was that it would increase the pool of employers from whom deficit contributions could be required (calculated using a particular actuarial method). It would also allow the trustee to give credit for past contributions going back to 2001.²⁷

Trustees have discretion to determine contribution model

The court found that it was within the trustee’s discretion to decide how best to achieve an appropriate contribution model, and a proper use of the amendment power to alter the Scheme to introduce the new regime. The court also found that, for the purposes of the employer debt legislation, the scheme was frozen as no members were in pensionable service. A right to an enhanced rate of revaluation was not sufficient for this purpose.

An issue which is frequently debated on scheme closure is whether retaining a final salary link means that members remain “active members” for the purposes of the employer debt legislation. Whilst the financial element in question was different, the logic of this decision would strongly suggest that it does not.

IBM United Kingdom Holdings Ltd and another v Dalgleish and others

In 2014, the High Court ruled that IBM UK was in breach of the implied duty of good faith, and its contractual duty of trust and confidence, owed to members in relation to decisions taken as to the future of its DB plans in 2008/09.²⁸ This latest decision focuses on the remedies available to members.²⁹

Members entitled to damages and equitable remedies

The High Court considered a list of 30 questions, mostly specific to the facts and circumstances of the IBM DB plans. As a result, the court found that members can be entitled to both damages and equitable remedies in respect of IBM’s breach of duty. This means that the decisions of the employer can be set aside, with members able to claim damages if this does not result in any loss they have suffered being eradicated.

Given the potential cost of the remedies ordered by the court, an appeal from IBM should not be discounted.

Horton v Henry: an update

Following the case of *Horton v Henry*,³⁰ in which the High Court rejected an application from a trustee in bankruptcy for access to a bankrupt’s pensions that were not yet in payment, the Insolvency Service has published a summary³¹ of its guidance for official receivers and Debt Relief Order (DRO) intermediaries on how to deal with undrawn pension entitlements. In essence, this states that receivers / DRO intermediaries must not include undrawn pensions in the calculation for Income Payments Orders or agreements. Only pensions which are in payment at the date of the bankruptcy order may be considered in the calculation.

This provides useful clarification on the treatment of pensions on bankruptcy given the availability of flexible benefit options. However, this may not be the end of the story as we understand that permission to appeal has been given to the trustee in *Horton*.

27 See our Alert on the [Impact of Merchant Navy judgment](#) (4 March 2015)

28 See our [Alert](#) on the 2014 High Court decision for details

29 See our more detailed [summary](#) of the case on our website for further information

30 See our case summary: [Horton v Henry \(High Court\), 17 December 2014](#)

31 [Undrawn pension entitlements in insolvency: summary of new guidance](#) (updated 27 March 2015)

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 Disputes seminar - transfers	23/06/15	Breakfast seminar (09:00am-10:30am) An interactive discussion on pension transfers, designed to share advice and practical tips on a range of transfer issues from the everyday through to pension scamming.
Pensions Disputes seminar - transfers	25/06/15	Lunchtime seminar (12:30pm-2:00pm) An interactive discussion on pension transfers, designed to share advice and practical tips on a range of transfer issues from the everyday through to pension scamming.
Quarterly Legal Update	16/07/15	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world.
Employer forum	08/10/15	Evening seminar (5:30pm-7:00pm) A forum designed to allow pension scheme employers to discuss key issues affecting their pension arrangements.
Quarterly Legal Update	19/11/15	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.

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Recent publications



With DC trustees now having to assess whether costs and charges in their schemes represent "good value", in our latest **DC briefing** Helen Ball, Partner, considers what this will mean in practice.