Sackers

Quarterly briefing

December 2015

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

Q4
December 2015

On the front cover this quarter: Sarah Stimson, Associate and Joe Riviere, Associate.

Abbreviations

AA: Annual Allowance
ABC: Asset Backed Contribution
BSP: Basic State Pension
CJEU: Court of Justice of the European Union
CPI: Consumer Prices Index
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
FCA: Financial Conduct Authority
FP16: Fixed Protection 2016
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
HMT: HM Treasury
ICO: Information Commissioner's Office
IP16: Individual Protection 2016
LMS: Last man standing
LTA: Lifetime Allowance
MAS: Money Advice Service
NICs: National Insurance Contributions
PO: Pensions Ombudsman
PPF: Pension Protection Fund
ROPS: Recognised Overseas Pension Scheme
RTI: Real Time Information
QROPS: Qualifying Recognised Overseas Pension Scheme
RPI: Retail Prices Index
RST: Reference Scheme Test
TPAS: The Pensions Advisory Service
TPR: The Pensions Regulator
UFPLS: Uncrystallised funds pension lump sum

In this issue

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Current legal agenda

Pensions tax

The changes to pensions tax relief are explained on page 6

The Chancellor recently announced in Parliament[1] that HMT's broad consultation on pensions tax (launched at this year's summer Budget),[2] is "completely open and a genuine Green Paper". Having received "a lot of interesting suggestions on potential reform", HMT plans to respond fully to the consultation in the 2016 Budget.

More immediate tax changes are on the horizon, with a taper applying to the AA for those earning over £150,000 from 6 April 2016. Also from that date, the LTA is set to reduce to £1 million. New protections (FP16 and IP16) will be available to help those with pension savings affected by this change.

Single-tier state pension

When the single-tier state pension is introduced from 6 April 2016, DB contracting-out will be abolished.

See page 4 for actions on the end of DB contracting-out

Employers and trustees should therefore be getting ready now to deal with the impact of these changes on their schemes. Preparation should include:

- considering whether action is needed to deal with the loss of the employer's NIC rebate
- registering with HMRC's Scheme Reconciliation Service to ensure GMP records are accurate and up-to-date
- for schemes with an RST underpin, checking whether a rule change is required.

VAT on professional fees

HMRC has issued its latest missive on the recoverability of VAT on professional fees paid in relation to occupational pension schemes.

HMRC's latest VAT guidance for schemes is outlined on page 7

Crucially, it grants an extension to the current transitional arrangements, confirming that the VAT treatment outlined in Notice 700/17 can continue to be used until 31 December 2016.

The notice also expands on HMRC's thinking in relation to the use of tripartite contracts, including the corporation tax implications, and looks at alternative solutions for schemes.

DC Schemes

DC schemes should by now be getting to grips with the new governance standards which came into force on 6 April 2015.

DC matters are discussed on page 5

We await the latest version of TPR's DC code of practice, which is expected to be published for consultation any day now. In the meantime, TPR has published new guidance to help trustees ensure they come up to scratch.

1 HMT questions 27 October 2015
2 See our Alert: Summer Budget 2015 (8 July 2015)

Pensions reform

DWP agenda for retirement reform

Ministerial programme

The Pensions Minister, Ros Altmann, recently set out her agenda for retirement savings in a written statement to both Houses of Parliament. Her main focus will be to consolidate those reforms that are already in train.[3]

With the introduction of the new single-tier, flat rate state pension and associated abolition of DB contracting-out, the continued roll-out of automatic enrolment (as well as re-enrolment for larger employers), and continuing work to ensure that individuals are able to take full advantage of the pension freedoms that were introduced on 6 April 2015, she certainly has her work cut out.

Automatic transfers on hold

But this does mean that a number of her predecessor's key projects, including defined ambition, collective DC and automatic transfers (known as "pot follows member") are on hold, at least for the time being.

Where's Workie?

It may have sent you running for cover, but it is virtually impossible to ignore the DWP's latest campaign on workplace pensions.[4] "Workie", the "physical embodiment of the workplace pension" aims to encourage engagement, particularly among smaller employers who will be facing automatic enrolment for the first time.

Abolition of DB contracting-out

Loss of the contracting-out rebate

Statutory power to amend scheme rules

Employers and members of contracted-out DB schemes currently pay reduced NICs[5] but will pay at full rate from 6 April 2016. To help deal with the additional cost, employers have been given a unilateral power to amend their schemes. This statutory power may only be used to recoup the increase in employer NICs by adjusting future accrual or contributions, not to make other changes.[6]

Reference Scheme Test

Since 6 April 1997, contracted-out DB schemes must provide benefits which are at least as good as those which would be provided under the statutory "reference scheme".

Some DC schemes have an RST underpin which provides members with a guaranteed minimum level of benefit at retirement. The DWP has yet to determine how best to deal with preservation of the RST for schemes that have not hardwired it into their rules. In the interim, it will preserve the provisions relating to the RST until 6 April 2019. Trustees should discuss with the employer whether a rule change is required to remove or retain the underpin for service on and from 6 April 2016.

Impact for automatic enrolment "qualifying schemes"

Schemes which meet the RST automatically qualify as auto-enrolment schemes. In order to continue to be used as "qualifying schemes" for automatic enrolment purposes from 6 April 2016, schemes formerly contracted-out on a DB basis will need to meet the "cost of accruals" test. This varies according to the scheme's definition of "pensionable earnings" and is intended to represent, broadly, the cost of providing the benefits of the RST.

3 Priorities on pensions: Written statement - HCWS245 (15 October 2015)
4 DWP campaign: Don't ignore the Workplace Pension
5 Employer contributions are reduced by 3.4% and employee contributions by 1.4%
6 See our Alerts for trustees and employers on the Countdown to the abolition of DB contracting-out

Pensions reform cont.

GMPs

Register with HMRC's Scheme Reconciliation Service

Schemes need to register with HMRC's "Scheme Reconciliation Service" before 5 April 2016 in order to reconcile their membership and GMP data against records held by HMRC. While not compulsory, it is the responsibility of trustees / scheme administrators to ensure that records are accurate, as mistakes could be costly to rectify. HMRC plans to introduce an online self-service facility to provide GMP and contribution / earnings information for scheme members from April 2016.

Benefit design

Check rules continue to operate as intended

Some schemes were designed to integrate with state benefits. There are a number of ways in which schemes can take account of state benefits in their rules, including a deduction in pensionable salary, deduction in pension in payment, or through bridging pensions.

The DWP has confirmed that the value of the BSP will be published in an annual Uprating Order, as it will continue to be required for those pensioners who remain entitled to BSP under the current rules (those who retire on or before 5 April 2016). A power to modify scheme rules to reflect the reforms will not be introduced.

DC matters

Financial guidance and advice

A number of measures aimed at improving financial advice and guidance in connection with the new pension freedoms are in the pipeline.

The Bank of England and Financial Services Bill aims to increase the scope of "Pension Wise", by extending the provision of guidance to pensioners who are considering selling or transferring their annuities when this facility is introduced.[7]

Consultations close 22 December 2015

In their Financial Advice Market Review, the FCA and HMT are looking at how financial advice could work better for consumers.[8] The first major milestone in the review is the FCA and HMT's joint consultation on what can be done to improve customers' access to affordable financial advice.

HMT is also consulting on the provision of public financial guidance relating to debt, pensions and "money and financial capability". Among other things, the consultation looks at the roles of MAS, Pension Wise and TPAS, including whether there may be scope for "a more joined up relationship between the latter two".[9]

Ban on member-borne commission payments

Consultation closes 27 November 2015

The DWP is consulting on how it will regulate to prevent commission and consultancy charges being imposed on members.[10] The ban will apply to workplace pension schemes that are used as qualifying schemes for automatic enrolment and which provide DC benefits. The consultation forms part of the Government's drive to protect pension savers and help ensure value for money.

New governance guidance for trustees

Since 6 April 2015, new minimum governance standards have applied to DC schemes, including a cap on charges in default schemes and the requirement for the chair of trustees to sign off an annual governance statement. To help DC trustees meet the new governance standards, TPR published guidance in October 2015.[11]

7 Currently scheduled for 2017
8 Financial Advice Market Review: Terms of Reference (3 August 2015)
9 Public financial guidance: consultation (12 October 2015)
10 Better workplace pensions: banning member-borne commission in occupational pension schemes (26 October 2015)
11 TPR: Helping you meet the new governance standards (October 2015)

Pensions tax

Annual Allowance charges for 2014/15

Self-Assessment reporting deadline is 31 January 2016

HMRC is urging schemes to remind members that those who have exceeded the AA of £40,000 in the tax year 2014/15 must declare this on their Self-Assessment tax return.[12]

Members who have exceeded the AA and who do not have sufficient unused AA to carry forward from previous tax years will have to pay a tax charge. Members can use HMRC's AA calculators to help them work out whether they are affected by a charge and if they will need to complete a tax return.[13]

The tapered Annual Allowance

From 6 April 2016, the AA for individuals earning over £150,000 (including pension contributions) will be tapered by £1 for every £2 over that amount, leaving those earning £210,000 with an AA of just £10,000.[14]

Pension Input Periods to align with tax year

All pension input periods open on 8 July 2015 were automatically closed on that date, with the next pension input period running from 9 July 2015 to 5 April 2016. All subsequent pension input periods will be concurrent with the tax year from 2016/17 onwards. This is the case even if members are not affected by the taper.

Reduction in the Lifetime Allowance: Protecting pension savings

From 6 April 2016, the LTA will be reduced to £1 million (from £1.25m).

New protections available

As with previous reductions in the LTA, two forms of protection will be available to individuals with pension savings in excess of the new allowance: Individual Protection 2016 and Fixed Protection 2016.[15] Individuals will need to apply for protection before taking their benefits as they will need a reference number from HMRC to rely on the protection. However, there is no other cut-off point (as such) for applying for the protection.

Individuals will be able to use an online self-service facility to apply for the new protections. But, as this will not be available until July 2016, members wishing to take their benefits between 6 April 2016 and that date will need to write to HMRC informing it of their intention to rely on the new protections.

Taxation of lump sum death benefits

As announced in the 2015 summer Budget, the charge on taxable lump sum death benefits paid to individuals will change to the recipient's marginal rate of income tax from 6 April 2016. Lump sum death benefits are taxable where they are in respect of a member aged 75 or over or, if the member was under age 75, outside the normal two year rule for distributing such lump sums.

From 6 April 2016, the scheme administrator for tax purposes (the trustees of an occupational pension scheme) will no longer need to report the payment of taxable lump sums on the "Accounting for Tax" return. Instead, Normal PAYE rules will apply to these payments, which will need to be reported through RTI.[16]

12 Pension schemes newsletter 73 (23 October 2015)
13 HMRC pension schemes annual allowance checking tool
14 Pensions tapered annual allowance (HMRC, 8 July 2015)
15 See footnote 12 above
16 Pension Schemes Newsletter 72 (8 July 2015)

Regulatory

HM Revenue & Customs

Recovery of VAT on pension fund management services

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.

In the wake of two European cases, HMRC revised its position and, in November 2014, set out 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.

In a further brief in March 2015, HMRC outlined its 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. HMRC's latest Brief (17/15) confirms the position and addresses concerns regarding the implications of tripartite arrangements for Corporation Tax deduction. The October 2015 Brief also addresses other options, including the supply of scheme administration services to an employer by the trustees, and the inclusion of a corporate pension scheme trustee in an employer's VAT group.

Transitional period extended

In the light of recent developments, the transitional period which allows businesses the option to continue using the VAT treatment outlined in Notice 700/17 (if both employer and trustees agree the same treatment) has been extended to 31 December 2016.

The March 2015 Brief had promised further guidance 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). Brief 17/15 touches on these and it is unclear whether anything further on this can be expected from HMRC.

Employers and trustees will welcome the extension of the transitional period and should use this to discuss the issue with their tax and legal advisers.

Overseas transfers

For a transfer from a UK registered pension scheme to an overseas pension arrangement to be made free of UK tax, it must be made to a QROPS.

HMRC maintains a list of schemes which have notified HMRC that they meet the conditions to be a ROPS.[17] A scheme will become "qualifying" once it has made this notification and given certain undertakings to HMRC about ongoing reporting.

HMRC QROPS guidance updated[18]

When the new retirement freedoms were introduced on 6 April 2015, associated changes were made to the QROPS requirements which resulted in many schemes being removed from the list as they did not meet the new requirements, such as the "pension age test" (namely, that benefits cannot usually be paid before age 55 unless the transferring member is retiring due to ill-health).

This caused difficulties for schemes which regularly receive requests for overseas transfers. However, the list appears to be growing again as overseas schemes confirm that they meet the new tests.

17 HMRC list of Recognised Overseas Pension Schemes notifications (updated on the first and 15th day of each month or next working day). See also our Alert: Recognised Overseas Pension Schemes - HMRC's list (19 June 2015)

18 HMRC's guidance on managing, notifying and reporting in relation to ROPS was updated on 1 October 2015. Form APSS 251 was updated on 2 October 2015, together with the notes on completing the form

Information Commissioner's Office

Since 2000, the US-EU "Safe Harbor" allowed US companies to comply with the EU Directive on the protection of personal data if they fulfilled set principles. However, the Safe Harbor has now been held to be invalid by the CJEU in a case involving Facebook in the Republic of Ireland.

Check procedures for any transfer of data to the US

The ICO explains that businesses which use the Safe Harbor now need to review how they transfer data to the US, to ensure that they comply with EU data protection principles.[19] Pension schemes which transfer data to the US will therefore need to ensure that adequate alternative measures are in place, and that any third party service providers who need to transfer personal data to the US are no longer using the Safe Harbor test.

Pension Protection Fund

PPF levy for 2016/17

In its proposals for the 2016/17 levy year,[20] the PPF plans to build on the rules for 2015/16 by making a limited number of technical improvements aimed at reducing the burdens on schemes. These include:

Consultation on the PPF levy for 2016/17

- requiring the recertification of immaterial mortgages only, with the benefit of other existing certificates to be carried over
- permitting companies that voluntarily provide full accounts to provide preceding years' full accounts
- a "light-touch approach" to recertifying ABCs.

Update on "last man standing" schemes

LMS schemes are multi-employer schemes which do not have an option or requirement to segregate assets when a participating employer leaves. They receive a levy reduction because potential access to the PPF does not arise until the last employer becomes insolvent.

New invoices for schemes which reported change in status

Due to concerns that schemes were misreporting, all schemes that had identified themselves as LMS in their 2014/15 Scheme Return were required to confirm, by 29 May 2015, that they had received legal advice regarding their structure. Only schemes which indicate that they have received advice which supports their LMS status will receive the levy discount. Schemes which are no longer reporting as LMS will be contacted by the PPF later in 2015 or in the levy year 2016/17 and, where appropriate, re-invoiced.

For 2016/17, schemes will be able to provide the legal advice confirmation in the Scheme Return. Schemes do not need to take advice on their structure each year – only if their structure has, or could have, changed.

Guidance for closed schemes

The PPF has updated its guidance for trustees of schemes which have been authorised by it to operate as closed schemes.[21] The guidance covers the winding-up requirements, what level of benefits the closed scheme should pay, and continuing responsibilities for the PPF levy and for valuations.

19 ICO response to ECJ ruling on personal data to US Safe Harbor (6 October 2015)
20 See our Alert: PPF consults on 2016/17 pension protection levy (23 September 2016)
21 PPF: Treatment of closed schemes and applications by closed schemes for a further assessment period under section 157 (15 October 2015)

The Pensions Regulator

Assessing and monitoring the employer covenant: New guidance from TPR

TPR has replaced its guide on "monitoring employer support", with new practical guidance on evaluating the "extent of an employer's legal obligation and financial ability to support its DB scheme now and in the future".[22]

The general approach of the guidance is not new, but the content has been revamped in the light of the new DB funding code of practice which came into force on 14 July 2014. In particular, it now addresses TPR's statutory objective of minimising any adverse impact on the sustainable growth of an employer when exercising its scheme funding functions.

Covenant review in conjunction with scheme valuations

Trustees are advised to perform a full covenant review at each valuation and regularly monitor it between formal reviews. The assessment should focus on entities with a legal obligation to support the scheme. The guidance suggests trustees "consider obtaining independent external covenant advice where they lack the objectivity or expertise required to perform an appropriate assessment".

Update on pension scams

TPR investigation

TPR has published details of an investigation into a suspected multi-million pension scam.[23] In this case, TPR believes that "a pension scam had taken place in which funds totalling around £13.7 million belonging to 242 members have all but disappeared – including through the payment of exorbitant fees and commission payments".

The report explains how TPR's Determinations Panel appointed an independent trustee to administer 17 pension schemes to prevent further loss and to claim back funds.

TPR outlines hallmarks of pension scams

TPR notes that the case features many "hallmarks" that people should watch out for to protect themselves from pension scams, such as cold calls or texts by people claiming they can help get early access to the cash in a pension, or unusually high investment returns.

Savers warned to be on their guard over pension scams

Citizens Advice, official providers of face-to-face guidance under the Pension Wise brand, report that two in five of their staff have seen people targeted repeatedly with scams. They have also seen an evolution in the types of scam being used, with new techniques emerging since the introduction of the retirement freedoms in April 2015.

22 See our Alert: Assessing and monitoring the employer covenant: TPR's new guidance (14 August 2015)
23 TPR case reference: C38699667 – final notice (published 9 October 2015)

Public Sector pensions

Exit charges

Government set to legislate

Cap includes employer pension contributions

During the summer, HMT ran a consultation on the possible introduction of a cap on exit payments. It proposed a cap of £95,000 on the total value of payments made to an individual in relation to their exit from public sector employment.[24] For this purpose, exit payments include employer pension contributions and early access to unreduced pensions.

The Government now plans to introduce this cap as part of the Enterprise Bill.

Transfers

Closure of loophole on overseas transfers

No transfers from public sector DB schemes to QROPS

Regulations which came into force on 7 September 2015, aim to prevent transfers from public sector DB schemes to QROPS which could provide flexible benefits as a result of the transfer.[25]

Although the Pensions Act 2015 already restricts such transfers, the restriction did not apply if the proposed receiving scheme met certain prescribed requirements. The regulations therefore close a potential loophole.

The regulations do not affect transfer applications made before the regulations came into force.

Local Government Pension Scheme

Pooling of LGPS investments

The Chancellor, George Osborne, has announced that the existing 89 Local Authority pension funds will be pooled into six new British Wealth funds, each with assets of over £25 billion.[26]

The aim of this move is to save "millions of pounds every year in costs and fees" and for the new funds to invest in major infrastructure projects.

24 Consultation on a Public Sector Exit Payment Cap and HMT's response (response published 16 September 2015)
25 The Unfunded Public Service Defined Benefits Schemes (Transfers) Regulations 2015
26 Chancellor announces major plan to get Britain Building (5 October 2015)

Cases

Court of Appeal

O'Brien v Ministry of Justice / Walker v Innospec

The Court of Appeal ruled that rights cannot be claimed retrospectively when there is a subsequent change in legislation.[27] This is because EU law does not have retroactive effect, except in certain limited circumstances. Amending legislation also only applies immediately to the future effects of a situation, unless otherwise specifically provided.

Anti-discrimination provisions do not apply retrospectively

Mr O'Brien worked part-time between March 1978 and March 2005. He became entitled to a pension when the Part-Time Workers Directive came into effect in the UK in April 2000. The pension relates to his service from April 2000 onwards, not to his entire service from 1978.

Mr Walker retired in 2003, before the Equal Treatment Framework Directive came into force in the UK. Therefore, his partner is not entitled to a surviving spouse's pension, as there was no requirement for schemes to provide these until civil partnerships were introduced in December 2005.

High Court

Buckinghamshire v Barnardo's

The rules of the Barnardo's scheme provide for pension increases and revaluation to be calculated by reference to RPI "or any replacement [index] adopted by the Trustees".[28]

Ability to change index depends on construction of scheme rules

The employer's argument that the adoption of a new index, such as CPI, by the trustees constituted a replacement index for the purposes of the scheme rules was rejected by the court. RPI was the only official inflationary index being published at the time the scheme rules were adopted (1988), suggesting that the reference to a "replacement" index was designed to cater for RPI becoming obsolete. Although CPI is now generally used as the main measure of inflation, in this case, the trustees did not have the power to select a different index so long as RPI remains a published index.

Pensions Ombudsman

Kenworthy

The PO found that trustees may defer taking action to equalise GMPs.[29]

The GMP component of a scheme's benefits can be unequal between the sexes. This is because the calculation method, which is set out in legislation, provides for different accrual rates, payment ages and increases for men and women.

Equalisation of GMPs may be deferred

The Government consulted on GMP equalisation back in 2012[30] but we continue to await the outcome of discussions on alternative approaches. As the legal position on equalising GMPs remains unclear, it is reasonable to monitor developments and defer taking action until the issue has been resolved.

27 See our summary: O'Brien v Ministry of Justice; Walker v Innospec (October 2015)
28 See our summary: Buckinghamshire v Barnardo's (July 2015)
29 See our summary: Kenworthy (PO-4579) (July 2015)
30 See our Alert: "GMP equalisation: the DWP calls time!" (24 January 2012)

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 (DC schemes)	17/11/15	Afternoon workshop (12pm-3:30pm) Aimed at new trustees or those wanting an introduction to DC benefits, this seminar will look at key legal issues for trustees
Pension managers' forum	26/11/15	Lunchtime seminar (11:30am-1:30pm) Forum for pension managers focussing on the latest round of tax changes
Quarterly legal update	04/02/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	12/05/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	14/07/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	10/11/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world

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Recent publications

Our October 2015 DC briefing examines four key issues for DC schemes, including managing the "transition" to retirement, the tapered AA, communicating changes to members and the possible introduction of a "second line of defence" for trust-based schemes. We also share our spotlight interview with Andrew Warwick-Thompson, Executive Director at TPR.

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