Sackers

Quarterly briefing

June 2017

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

Q2
June 2017

On the front cover this quarter:
Sebastian Reger, Partner

In this issue

Abbreviations

CARE: Career averaged revalued earnings

CPI: Consumer Prices Index

DB: Defined benefit

DC: Defined contribution

DEEU: Department for Exiting the European Union

DWP: Department for Work and Pensions

ESG: Environmental, social or governance

FCA: Financial Conduct Authority

FP16: Fixed Protection 2016

GAD: Government Actuary's Department

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

HMT: HM Treasury

IP16: Individual Protection 2016

LGPS: Local Government Pension Scheme

LTA: Lifetime Allowance

MPAA: Money purchase annual allowance

NIC: National Insurance Contributions

NPA: Normal Pension Age

PPF: Pension Protection Fund

QROPS: Qualifying Recognised Overseas Pension Scheme

RAA: Regulated Apportionment Arrangement

RPI: Retail Prices Index

SPA: State Pension Age

TPR: The Pensions Regulator

UKHPI: UK House Price Index

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On the horizon

General election watch

Pensions seem set for yet another shake-up as the UK heads back to the polls on 8 June 2017.

At the time of going to press, party policies are only starting to emerge, but there is already much hype surrounding the "triple lock" – the commitment of the current Government to increase the State Pension in line with the higher of prices, earnings or 2.5% – which is now seemingly ripe for review.

See page 6 to find out which measures survived the cut in this year's first Finance Act

While some legislation was rushed through ahead of the dissolution of Parliament, in other areas there were casualties. Legislation making changes to the rules for section 615 schemes and the new charge on offshore transfers is now in force. But the proposed reduction in the MPAA, and changes to the income tax exemption on the provision of financial advice by an employer have fallen by the wayside, at least for now. Likewise, the Government's review of the State Pension Age, which had been due on 7 May, has been put on hold.

Brexit beckons

Meanwhile, David Davis' DEEU has published the Government's White Paper on the "Great Repeal Bill".[1]

As part of its plans to achieve a smooth transition of legislation when the UK exits the EU, the Government's overall approach is to repeal the European Communities Act 1972 (in order to end the supremacy of EU law) and then to convert the body of existing EU law into domestic law through the Great Repeal Bill. After this, Parliament (and, where appropriate, the devolved legislatures, such as the Scottish Parliament) will be able to decide which elements of that law to keep, amend or repeal following Brexit.

DEEU says there will be no future role for the European Court in the interpretation of UK legislation

This move is intended to provide certainty for businesses, workers, investors and consumers by ensuring that, as a general rule, the same rules and laws will apply immediately after Brexit as they did before. This means that, for example, workers' employment and pension rights in the UK that are derived from EU law will continue to apply after Brexit.

The Great Repeal Bill is not designed to make major changes to policy or to establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one. Parliament will then have "the fullest possible opportunity to scrutinise this legislation", with a view to deciding what to keep and what to amend or repeal in the longer-term.

Data protection – getting ready for 2018

The General Data Protection Regulation (GDPR) promises a major shake-up of European data privacy laws when it comes into effect on 25 May 2018.[2]

Trustees, employers and pension providers should start preparing now as, despite Brexit, the Government has confirmed that the GDPR will apply in the UK from that date.

1 The Great Repeal Bill: White Paper (30 March 2017)

2 See our Alert: Data protection – the new requirements (4 April 2017)

DB schemes

Green Paper on DB pensions

DWP seeks security and sustainability for DB schemes

The DWP's Green Paper[3] sets out evidence about key challenges facing DB schemes and wrestles with an array of feedback from commentators. No firm proposals are put forward by the Government, not even, as expected, in relation to indexation, but rather a number of questions are posed instead.[4]

Consultation closed on 14 May 2017 – Government feedback awaited

Although the DWP believes the regulatory regime for DB schemes to be generally satisfactory, it notes that there may be a case for limited changes to help employers and trustees manage liabilities more effectively in certain circumstances. The Green Paper addresses a number of key themes, all of which have the potential to affect the security and sustainability of DB schemes, including: funding and investments; employer contributions and affordability; "special arrangements" for stressed sponsors and schemes; member protection and TPR's powers; and the consolidation of schemes, with options for benefit reform.

PLSA DB Taskforce

Second report

The second report[5] of the PLSA's DB taskforce outlines how consolidation into new "superfunds" could help tackle issues which place risk on DB scheme members.

The report looks at four models for consolidation, covering the consolidation of administration functions only, asset pooling, asset pooling combined with governance and back office functions, and fully merged "superfunds" that are designed to absorb and replace existing schemes, discharging employers and trustees from their obligations in the process.

Employer debt

DWP consults on new option for multi-employer schemes

The DWP has also been consulting on proposals to address employer debt in multi-employer schemes.[6]

Consultation closes on 18 May 2017

Among other things, the consultation looks at the option of allowing employers to defer the requirement to pay an employer debt on ceasing to employ an active member, provided certain conditions are met. It is intended that this option would sit alongside current options for managing employer debt, such as flexible apportionment arrangements.

A small number of technical amendments to clarify the employer debt legislation are also put forward.

3 Defined benefit pension schemes: security and sustainability (20 February 2017)
4 See our Alert: Security and sustainability in DB schemes (21 February 2017)
5 The case for consolidation (7 March 2017)
6 See our Alert: DWP consults on new employer debt option for multi-employer schemes (25 April 2017)

DC schemes

Master trust regulation

Pension Schemes Act 2017

The Pensions Schemes Act 2017 introduces an authorisation regime for master trusts which provide DC benefits.[7] Among other things, it will:

New regime for master trusts

- require master trusts to demonstrate to TPR that they meet certain key criteria on establishment (or, for existing master trusts, when the relevant provisions are brought into force)
- give TPR new supervisory powers to authorise and de-authorise master trusts according to strict criteria, ensuring that master trusts continue to meet the required standards throughout their existence
- introduce specific trustee requirements on wind-up or closure of master trusts.

Much of the detail of the new regime is due to be set out in regulations this autumn, so whether these proposals will be affected by the General Election remains to be seen.

The act also makes provision for regulations to be laid to introduce further measures on administration charges (the cap on early exit charges and the ban on member-borne commission).

Costs and charges

Proposed standardised disclosure of charges and transaction costs

Consultation responses awaited

The Investment Association has been consulting on proposals to standardise the disclosure of charges and transaction costs.[8] This includes a draft industry code which is designed to provide a blueprint for the reporting of charges and transaction costs using a consistent approach across the market, in line with regulatory requirements.

The consultation forms part of an ongoing industry-wide and European initiative on enhanced transparency. It is intended to be fully compliant with final rules for the UK DC market following the FCA's October 2016 consultation on transaction cost disclosure in workplace pensions.[9]

Proposals to cap early exit charges and ban existing member-borne commissions

Changes due in force 1 October 2017

The DWP is consulting on plans to restrict early exit charges for members of occupational pension schemes who are eligible to access the retirement flexibilities.[10] It proposes that members who join an occupational pension scheme before 1 October 2017 will not be able to incur an early exit charge (or combination of charges) exceeding 1% of the value of the benefits being taken, converted or transferred. Existing early exit charges below 1% will not be able to be increased and new early charges will not be able to be imposed.

The DWP also aims to prevent member-borne commissions being imposed to recover the cost of any ongoing payments in relation to contracts entered into before 6 April 2016 (such charges having already been banned for new arrangements since that date).[11]

The consultation closes on 31 May 2017.

7 See our Alert: Pension Schemes Act 2017 – new regulatory regime for master trusts (2 May 2017)
8 Enhanced disclosure of charges and transaction costs – technical consultation (27 March 2017)
9 CP16/30: Transaction cost disclosure in workplace pensions (5 October 2016)
10 Occupational pensions: capping early exit charges and prohibiting existing member-borne commission charges (5 April 2017)
11 See our Alert: Capping early exit charges: government response (16 November 2016)

Tax

The Finance Bill was rushed through Committee stage to receive Royal Assent ahead of the dissolution of Parliament and the General Election. As a result, a number of provisions were culled (subject to review in the next Parliament), while others were amended.

Finance Act 2017 – what's in?

Salary sacrifice

Salary sacrifice arrangements in relation to occupational pension schemes are exempt from reforms to remove income tax and employer NIC advantages where benefits in kind are provided through salary.

However, group income protection and excepted group life insurance are caught, meaning that employers who offer group life insurance schemes or group health schemes by salary sacrifice will no longer be able to do so from the earlier of their existing arrangements being renewed, varied, or 6 April 2018.

Overseas pensions – "section 615" schemes

New DC contributions and increases in the value of DB benefits above a set amount (known as the "relevant percentage") after 5 April 2017 will result in the loss of the protected tax status that section 615 schemes currently enjoy, meaning that benefit payments to all members would then be taxed as UK income. Funds accrued in a section 615 scheme before 6 April 2017 can continue to be paid out using the existing rules provided there are no further DC contributions / increases in the value of DB benefits above the relevant percentage from this date.

Offshore transfers

QROPS must provide HMRC with undertaking of compliance with new charge

A 25% charge on certain transfers to QROPS that were previously tax free was introduced with effect from 9 March 2017. The aim is to align the tax treatment of overseas and UK pension schemes. In addition, payments out of funds transferred to a QROPS on or after 6 April 2017 will be subject to UK tax rules for five years after the date of the transfer, regardless of where the individual is resident.

Transfers with a legitimate purpose (for example, for individuals retiring overseas) and which fulfil set conditions, and those transfers which had been formally requested before 9 March 2017, are still permitted free of tax.

Finance Act 2017 – what's out?

Reduction of the money purchase annual allowance

The MPAA, which applies to individuals who have accessed their pension savings flexibly, was due to be reduced to £4,000 but remains at £10,000 for now.

Pensions advice income tax exemption

Provisions on hold – subject to review in next Parliament

The Finance Bill originally contained provisions allowing employers to pay for individuals to take relevant pensions advice, or reimburse individuals for the costs of such advice, without any liability for income tax, provided that the payment did not exceed £500 in a tax year. This change was due to allow advice on general financial and tax issues relating to pensions, as well as general pensions advice (the current income tax exemption is limited solely to pensions advice and is capped at £150). However, this measure has also been cut meaning that, for now, the current exemption and its £150 limit still applies.

General pensions reform

State pension age reform

DWP publishes analysis on the future of SPA

The DWP has published two reports to help with the Government's review of the SPA. The final report by John Cridland CBE[12] follows his independent review of arrangements for the SPA after 2028. His report recommends a timetable for increasing SPA to age 68 over a two-year period, starting in 2037, and that SPA should not increase more than one year in any ten-year period. The report also recommends removing the "triple lock", the Government's current commitment to raise the State Pension in line with the higher of prices, earnings or 2.5%, in the next Parliament.

Review deferred until after the election

The second is a report by GAD,[13] whose analysis considers scenarios where a specified percentage of adult life will be spent in retirement. One scenario envisages that if adulthood begins at age 20, and the percentage of retirement is calculated at 32%, then SPA could rise to 69 between 2040 and 2042. However, if the percentage is calculated at 33.3%, SPA could rise to 69 between 2053 and 2055.

The Government had been due to publish its review of SPA by 7 May 2017 but this has seemingly now been postponed until after the General Election.[14]

Contracting-out

GMP equalisation

The DWP plans to introduce a new methodology for private sector pension schemes to help them equalise benefits for the effect of GMPs.[15] Schemes will not be required to use this method to equalise GMPs.

Further DWP work on timing and guidance anticipated

The proposed method involves a one-off calculation and actuarial comparison of the benefits that a man and woman would have, with the greater of the two converted into an ordinary scheme benefit using the existing GMP conversion mechanism. Under the current proposals, a GMP cannot be converted into DC benefits, which will cause difficulties for DC schemes with GMP underpins.

The DWP has said that it will consider its position on GMP equalisation in light of any developments following the action taken by the Lloyds Trade Union as to whether the inequality of GMPs constitutes unlawful sex discrimination.

Transfers to schemes that have never been contracted-out

DWP to consider further changes to contracting-out transfers later in 2017

The DWP consulted during April 2017 on changes to enable the transfer of pensioner members with contracted-out benefits, with their consent, to schemes that have never been contracted-out.

Regulations coming into force on 3 July 2017 will introduce a limited easement to permit transfers of such pensions in payment (whether GMPs or pensions derived from section 9(2B) rights) where a scheme has been through a PPF assessment period or an RAA has been made.

12 State Pension age independent review: final report (23 March 2017)
13 State Pension age periodic review: report by the Government Actuary (23 March 2017)
14 House of Commons Briefing Paper CBP-06456 (2 May 2017, at paragraph 2.4)
15 See our Alert: GMP equalisation – Government response to consultation (15 March 2017)

Automatic enrolment

Update on recent developments

New exemptions from the employer duty

Individuals with pension savings above the current LTA may be protected from tax charges under enhanced or fixed protection. Such protections can be lost if an individual is automatically enrolled into pension saving.

In some cases, the employer duties to enrol or re-enrol eligible jobholders are turned into a discretion, so that an employer can choose not to enrol jobholders in certain prescribed circumstances. These now include the situation where an employer has reasonable grounds to believe that a jobholder holds FP16 or IP16 because, for example, they have a copy of the individual's HMRC protection certificate.[16] The onus is on employees to keep their employer informed.

DC contributions to increase from April 2018

The minimum employer and overall DC contribution rates are set to rise from 6 April 2018, not 1 October 2017 as originally planned. A further increase will be required from 6 April 2019.

Phasing timetable for DC contributions extended

When band earnings (earnings between £5,876 and £45,000 in the tax year 2017/18) are used to calculate contributions, the minimum employer contribution will be 2% (5% overall) from April 2018, rising to 3% and 8% respectively in April 2019.

The actual percentage increase which will apply to a particular DC scheme will be dictated by the elements of income which are pensionable in that scheme.

Both the DWP and TPR have updated their automatic enrolment guidance to reflect these changes.[17]

Technical changes

After consultation,[18] the DWP introduced certain technical changes from 1 April 2017 to simplify the automatic enrolment process for new employers due to become subject to automatic enrolment duties during 2017. These are:

- a change to the automatic enrolment duties trigger for these new ("post-staging") employers to provide certainty about when their automatic enrolment duties will apply
- an extension of an existing easement so as to give these employers the option to defer automatic enrolment by up to three months for new workers.

TPR to carry out automatic enrolment inspections

TPR has said that it will carry out spot checks on employers across the UK to ensure they comply with their workplace pension duties.[19] Employers who are judged to be at risk of failing to comply with their duties will be visited by TPR to investigate any non-compliance, help employers get back on track, or take enforcement action where necessary. Employers will receive a short period of notice ahead of an inspection.

16 The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2017

17 Guidance on certifying money purchase pension schemes (DWP) and Detailed automatic enrolment guidance (TPR)

18 Government response to the workplace pensions automatic enrolment miscellaneous regulations package 2017 consultation (10 March 2017)

19 Spot check on employers: TPR steps up inspections in compliance drive (2 March 2017)

Regulatory

Financial Conduct Authority

Financial advice fact sheet

Consultation closes 11 July 2017

The FCA is consulting on guidance to clarify its regulatory framework in four areas.[20] This includes a draft fact sheet, developed in conjunction with TPR, which aims to provide an outline to employers and trustees on how they can support informed decision making on financial matters by employees or members, without stepping over the boundary into regulated advice.

The FCA plans to publish the final document in September 2017.

HM Treasury

Pensions dashboard prototype

A prototype dashboard[21] has been unveiled by HMT, confirming plans to involve multiple pension dashboards.

The Pensions Dashboard Prototype Project has placed the data standards which sit behind the prototype in the public domain. These are technical documents which spell out exactly how data had to be presented by firms to connect successfully to the Pensions Dashboard prototype. While the standards will be further developed, it is intended that the industry should view them as a guide to what is likely to be expected of them when it comes to connecting to the dashboard.

Pension Protection Fund

Compensation cap changes

PPF long service cap in force

The PPF compensation cap for those with long service was increased on and from 6 April 2017 by 3% for each full year of pensionable service above 20 years (ie 21 years or more), up to a maximum of twice the standard compensation cap.

The amount of the standard PPF compensation cap for 2017/18 is £38,505.61, up from £37,420.42 the previous year.

Levy Determination for 201718

The PPF confirmed its final levy determination for 2017/18 in March.[22] The levy rules have not changed substantively from those published in December 2016,[23] except to include a new levy rule for schemes which cease to have a substantive sponsor following a restructuring, on which the PPF consulted during February.[24]

The PPF is due to consult again on this subject for 2018/19 and is keen to receive further comment and views from stakeholders.[25]

20 Financial Advice Market Review (FAMR): implementation part I (11 April 2017)
21 Pensions Dashboard Prototype Project
22 PPF confirms final levy determination for 2017/18 (30 March 2017)
23 See our Alert: PPF levy determination for 2017/18 (4 January 2017)
24 See our Alert: PPF consults on a levy rule for schemes without a substantive sponsor (23 February 2017)
25 PPF Levy Policy Statement for 2017/18 (30 March 2017)

Regulatory cont.

Consultation on third PPF Levy triennium

The PPF has been consulting on its plans for developing the PPF levy for the next triennium, which begins in 2018/19.[26] Changes proposed include:

- changes to the PPF's scorecards with the aim of "a more accurate assessment of insolvency risk"
- an alternative approach to assessing a scheme's insolvency risk for schemes with types of sponsor for whom the PPF does not consider the current methodology appropriate
- trustees certifying / recertifying a Type A contingent asset with a realisable recovery of at or over £100 million being required to obtain a guarantor strength report, prepared by a professional adviser, prior to certification
- a request for views on the possibility of a levy discount for good governance and reducing the administrative burden for smaller schemes.

PPF's response awaited

The Pensions Regulator

DB investment guidance published

TPR has published new DB investment guidance aimed at occupational DB scheme trustees, with a view to helping them understand, manage and monitor key aspects of a scheme's investment arrangements, objectives and strategy.[27]

The guidance provides practical information for trustees and includes examples of approaches that can be taken, and factors to consider, when investing scheme assets to fund DB schemes. Among other things, the guidance focuses on governance, understanding risks and ESG issues.

TPR provides more support for trustees in fight against pension scams

TPR has added a number of new features to its "scorpion campaign" to help prevent pension savers falling victim to scams.[28] These include videos for trustees and savers on typical scammer tactics and the potential consequences for victims, an online "scam-spotting" tool, a five-step practical guide for savers, and a due diligence checklist for trustees to use when considering transfer requests.

Consultation on standards for trustees and monetary penalties policy

TPR has been consulting on a draft policy for monetary penalties, alongside a revised description of a "professional trustee".[29]

TPR's response is awaited

The revised professional trustee description forms part of TPR's "21st Century trustee" initiative, which seeks to raise standards of governance and administration and to protect member benefits by being clearer about what it expects trustees to do. TPR is of the view that remuneration alone is not necessarily determinative of whether someone is acting in the capacity of professional trustee and that it is more appropriate to consider whether a trustee is acting in the course of the business of being a trustee or is an expert, or holds themselves out as an expert, in trustee matters generally.

26 See our Alert: Consultation on the third PPF levy triennium (19 April 2017)
27 See our Alert: TPR publishes DB investment guidance (31 March 2017) and the June 2017 edition of our Finance & Investment Briefing
28 TPR press release (14 March 2017)
29 Draft monetary penalties policy and revised professional trustee description consultation (23 March 2017)

Cases

Supreme Court

In the matter of an application by Denise Brewster for Judicial Review (NI)[30]

Discrimination against unmarried couple unjustified

Cohabiting partners of LGPS members in Northern Ireland could qualify for survivor benefits provided they had been nominated by the member. There was no equivalent nomination requirement for married or civil partner members. While the court could understand why procedural requirements "designed to establish that a genuine and subsisting relationship existed had been included", it did not see why a nomination form was required. The Supreme Court therefore held that this provision discriminated against cohabiting unmarried couples and, as it was not justified, should be disapplied.

This decision should act as a prompt for trustees to revisit their rules and scheme literature in relation to the provision of survivors' benefits, and to speak to their advisers to ensure that any potential problems are properly addressed.

High Court

Thales UK Limited v Thales Pension Trustees Limited[31]

This case considered the extent to which the scheme's trustees and employer had the power to change the index by reference to which pension increases and revaluation were calculated from RPI to CPI.

Power to change the index will depend on scheme rules

Under the scheme's CARE section, a material change in the compilation of RPI required the employer, with the trustees' agreement, to "determine the nearest alternative index". In another section for transferred-in members, a new index could be selected by the trustees if RPI was "otherwise altered". While the Court agreed that a change in the housing components of RPI (by using UKHPI) triggered both provisions, nonetheless, RPI (as amended by UKHPI) was considered to be the nearest alternative index to RPI.

As with all construction cases, the outcome turned on the specific wording of the rules under consideration.

Employment Tribunal

Sargeant v London Fire and Emergency Planning Authority[32]

Transitional protections put in place to minimise the impact of public sector pension reforms was found not to constitute unlawful age discrimination because they were a proportionate means of achieving a legitimate aim.

Age discrimination cases being appealed

The age-related provisions were designed to protect members who were within 14 years of NPA. Those within 10 years would see no change to their benefits, while those between 10-14 years from NPA would receive tapered protection. These measures were found to be a proportionate means of achieving a legitimate aim and, as such, the direct age discrimination was objectively justified.

The recent McCloud[33] case (in which there was found to be unlawful age discrimination) was disregarded by the judge, despite being based on similar facts. Both this decision and the McCloud case are being appealed.

30 See our case summary: In the matter of an application by Denise Brewster for Judicial Review
31 See our case summary: Thales UK Limited v Thales Pension Trustees Limited
32 See our case summary: Sargeant and others v London Fire and Emergency Planning Authority and others
33 See our case summary: McCloud v Lord Chancellor and Secretary of State for Justice

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 & investment litigation seminar	23/05/17	Lunch time seminar (12:30pm-2:00pm) An interactive discussion designed to share practical advice and tips on overpayments
Pensions & investment litigation seminar	25/05/17	Breakfast seminar (9:00am-10:30am) An interactive discussion designed to share practical advice and tips on overpayments
Quarterly legal update	27/07/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
DC seminar	21/09/17	Breakfast seminar (9:00am-10:30am) An update on the latest DC developments
Data protection seminar	12/10/17	Breakfast seminar (9:00am-10:30am) Practical steps to help trustees and employers get ready for the General Data Protection Regulation
Quarterly legal update	09/11/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world

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Knowledge

Our new Corporate Briefing highlights the latest developments in pensions for employers and corporate investors. In the first edition, we cover:

- DC: increases to DC contribution rates from April 2018 (auto-enrolment)
- DB: articles on "Facing the DB strain", which includes a case study on solvent restructuring (Halcrow), and RPI/CPI
- Employee benefits: changes to salary sacrifice arrangements introduced from 6 April 2017.

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