90 Days - March 2012

Abbreviations commonly used in 90 Days

DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
FSA: Financial Services Authority
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
LTA: Lifetime Allowance
PA95: Pensions Act 1995
PPF: Pension Protection Fund
TPR: The Pensions Regulator

Legislation

Employer debt

- On and from 27 January 2012, amendments to the Employer Debt Regulations[1] introduce a new method for managing employer debts, the flexible apportionment arrangement ("FAA").[2]
- An FAA may be used in both open and closed DB schemes.
- Under an FAA there is no need to calculate or to estimate the amount of a debt as it is the liability (rather than the debt itself) that is apportioned.

Legislation

Abolition of DC contracting-out

- Contracting-out on a DC basis (protected rights) will be abolished with effect from 6 April 2012.[3]
- Protected rights are subject to certain statutory restrictions (for example, they have to be separately identified from non-protected rights). On 6 April 2012, any protected rights not yet in payment will become ordinary scheme benefits and all the statutory restrictions will fall away.
- However, the protected rights provisions in a scheme's trust deed and rules will not be removed automatically. Therefore, on 6 April 2012, regulations will introduce an easement allowing trustees, by resolution, to remove "all or part of a scheme rule which makes special provision in relation to the protected rights of members".[4]
- Schemes will have until 5 April 2018 at the latest to make changes and may make amendments retrospective to 6 April 2012.

[1] The Occupational Pension Schemes (Employer Debt) Regulations 2005
[2] Please see our Alert: "Flexible Apportionment Arrangements" dated 16 December 2011
[3] Please see our Alert: "Abolition of DC Contracting-Out: The Final Countdown" dated 23 January 2012
[4] Please see our Alert: "Abolition of DC contracting-out: final regulations published" dated 1 March 2012

Pensions Reform

GMP Equalisation

- Having concluded that:

  - schemes are obliged to equalise scheme benefits "for the effect" of GMPs which accrued between 17 May 1990 and 5 April 1997; and

  - there is no need for an opposite sex comparator when considering inequality in GMPs;

  the DWP has issued a consultation[5] on draft regulations and a "possible method" for equalisation.[6]

- If the DWP's method of equalisation is adopted, there will be no obligation on schemes to use it.

- As the proposals are at an early stage, a "wait and see" approach would seem sensible for schemes which have not yet addressed this thorny issue.

Pensions Reform

Automatic enrolment

- The requirement to enrol "eligible jobholders" into a qualifying pension scheme will be phased in from October 2012. The DWP has published a revised table of auto-enrolment start dates for all employers.

- For more information about preparing for auto-enrolment and where Sackers and Sackers Support Services can help, please contact your usual Sackers advisers or Mark Wileman, Head of Business Development (mark.wileman@sackers.com).

Pensions Reform

Refunds, transfers and trivial commutation

- The DWP is consulting on the future abolition of short service refunds of contributions from DC arrangements and options for transfers to address the proliferation of small pension pots.[7] Three options are proposed:

  - make member initiated transfers easier and less expensive;

  - an "aggregator scheme" for easy consolidation of small pots; and

  - a system where small pension pots follow individuals from job to job.

- With effect from 6 April 2012, it will be possible to commute small pension pots of £2,000 or less from personal pension schemes. To prevent abuse of this easement, an individual will only be able to take two such lump sum payments in their lifetime.

[5] The consultation was published on 20 January 2012 and closes on 12 April 2012
[6] Please see our Alert: "GMP equalisation: the DWP calls time!" dated 24 January 2012
[7] Please see our Alert: "Government consults on transfers and small pension pots" dated 19 December 2011

Tax

Draft Finance Bill

- The draft Finance Bill includes provisions designed to ensure that the value of tax relief given to employers accurately reflects, but does not exceed, the amount of the payments received by schemes under asset-backed contributions ("ABCs"), while preserving flexibility for employers to continue using ABCs to manage pension deficits.
- Further provisions in the Bill, which will be effective from 22 February 2012,[8] will introduce new conditions that must be met for an arrangement to qualify for upfront relief. For example, the pension contribution promised must be due to be paid to the pension scheme and not be intended to be held in a subsidiary structure.
- From 6 April 2012, the LTA will reduce to £1.5 million from the current £1.8 million. Individuals wishing to apply for fixed protection (which allows the crystallisation of benefits up to £1.8 million but limits ability to accrue further benefits) must apply by 5 April 2012.[9]

TPR

Miscellaneous

- From April 2012, TPR plans to issue an annual statement setting out its expectations of those trustees who are embarking on a valuation process.[10]
- TPR is in "a dialogue" with the pensions industry on six principles for good design and governance of workplace DC pension provision. The six principles span the lifecycle of a DC scheme from design and set-up through to ongoing management.
- TPR, HMRC and FSA have issued a joint statement warning consumers about pension offers that claim to be able to provide loans or to release tax-free cash from their pensions before age 55.

Cases Round-up

Alexander Forbes Trustee Services v John Doe & Richard Roe[11]

- Two underfunded hybrid schemes went into winding-up in June 2000 and March 2003 respectively. In both schemes, DC and DB benefits were provided from the same fund.
- The legislation removes DC assets from the statutory priority order. However, in a hybrid scheme, it is not clear whether such assets should then be used only to meet a scheme's DC liabilities or if they remain subject to the priority order in a scheme's rules.
- The Court held that the schemes' DC benefits were outside its winding-up priority order and could therefore only be used to provide members' DC benefits.

[8] The date on which they were announced by the Government
[9] Please see our Alert: "Fixed Protection: the deadline approaches" dated 27 February 2012
[10] For details of the current regime, please see our paper on the Scheme funding cycle
[11] [2012] 019 PBLR

Cases Round-up

***Premier Foods Group Services Limited and another v RHM Pension Trust Ltd*[12]**

- This case considered whether a deed of intention (the "Deed") was effective to equalise the scheme at age 65 for all members.
- The Deed expressed an intention to amend the scheme to equalise normal pension age but also stated that, pending the scheme's amendment, the trustee should administer it on the basis that equalisation had occurred. The deed of amendment was not executed until two years later.
- The court agreed that the purpose of the Deed was to make an interim alteration to the scheme, pending execution of a deed of amendment.
- This pragmatic decision was estimated to have saved the employer over £17.5 million.

Cases Round-up

***BESTrustees plc v Kaupthing Singer & Friedlander (in administration)*[13]**

- On 8 October 2008, the scheme's sponsoring employer went into administration, triggering the calculation of a debt under section 75 of the PA95. The trustees applied to the court for confirmation of the correct date to be used to calculate the cost of buying-out the scheme's benefits.
- The employer argued that both the pension scheme's assets and the notional cost of purchasing annuities should be valued at the "applicable time" under the Employer Debt Regulations,[14] (i.e. the date of insolvency).
- However, the trustees considered that the buy-out cost should be calculated as at the date the actual calculation is performed by the scheme actuary (which is likely to be some time later). If correct, this would have added almost £70 million to the section 75 debt.
- Mr Justice Sales concluded that there was "overwhelming textual and contextual support for the employer's interpretation".

[12] [2012] EWHC 447
[13] [2012] EWHC 629
[14] The Occupational Pension Schemes (Employer Debt) Regulations 2005