Sackers

Quarterly briefing

June 2022

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

Q2
June 2022

On the front cover this quarter: Faith Dickson (Partner) and Sonya Fraser (Associate Director)

Abbreviations

AA: Annual allowance

AE: Automatic enrolment

BEIS: Department for Business, Energy and Industrial Strategy

CDC: Collective DC

CETV: Cash equivalent transfer value

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

EU: European Union

FA04: Finance Act 2004

FP16: Fixed Protection 2016

GMP: Guaranteed minimum pension

HMRC: HM Revenue & Customs

LTA: Lifetime allowance

MaPS: Money and Pension Service

NMPA: Normal minimum pension age

PASA: Pensions Administration Standards Association

PLSA: Pensions and Lifetime Savings Association

PPA: Protected pension age

SIP: Statement of investment principles

TPR: The Pensions Regulator

In this issue

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Current legal agenda

Topic	Summary	Timing
Pensions dashboards	Consultation and draft regulations published 31 January 2022. Consultation closed 13 March 2022	Final regulations to be laid before Parliament in 2022, with delivery set for 2023 (see page 5)
Notifiable events	Response to consultation on draft regulations awaited	Awaiting final regulations "in due course" (see page 6)
Stronger nudge	Response to consultation and final regulations published in January	In force 1 June 2022 (see page 8)
CDC	Response to consultation and final regulations published December 2021	In force 1 August 2022
Single code[1]	Revised code to be published	Summer 2022
DB scheme funding	Consultations on draft regulations introducing the new funding and investment strategy and TPR's revised funding code to be published	Consultation on draft regulations due before the summer Consultation on draft code expected later this year (see page 6)
Simpler annual benefit statements[2]	Response, regulations and guidance published October 2021	1 October 2022
Climate change governance and reporting requirements	Schemes with £1bn or more in relevant assets in scope	1 October 2022 (see page 7)

1 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
2 See our Alert: Simpler annual statement – response to consultation and final regulations (20 October 2021)

Spotlight: increase in NMPA

Background

NMPA to increase from 55 to 57 from 6 April 2028

The FA04 sets out the earliest age at which a member's benefits can generally be taken as an authorised payment from a registered pension scheme. This is known as NMPA and is currently age 55. The Finance Act 2022, which received Royal Assent earlier this year, will increase NMPA from age 55 to 57 with effect from 6 April 2028.

We are expecting HMRC guidance but it is not clear when this will be published and there may also be transitional provisions published in due course.

The new PPA regime

Some individuals will still be able to take benefits before NMPA if they have a PPA. Certain individuals may already benefit from a PPA, stemming from when NMPA increased from age 50 to age 55 in 2010. The new PPA regime will be completely separate from the existing regime.

Some individuals will be able to retain a PPA of under 57

The conditions for qualifying for a PPA of between 55 and 57 are set out in the legislation. Broadly speaking, once NMPA increases to age 57, an individual will have a PPA if they were a member of the pension scheme before 4 November 2021 and had an "actual or prospective right" to take benefits before age 57, provided that right was set out under scheme rules in force on 11 February 2021.

Whether a member has such a right can be complex and scheme rules will need to be checked carefully. But, in basic terms, a PPA can apply when a member has a right to take their benefits from a specific age without needing any other party to agree.

Block transfers

As with the existing PPA regime, a member's PPA will be preserved where a "block transfer" takes place, ie where the benefits of at least two members form part of a single transaction. In this case, a member's PPA will apply in relation to **all benefits**, so those already built up as well as future benefits under the receiving scheme.

Individual transfers

In contrast to the existing PPA regime, recognising the retirement flexibilities now available to pension savers, a PPA of between 55 and 57 may also be preserved on an individual transfer. But the protection in these cases will only apply to benefits **built up before the transfer**, requiring assets representing transferred-in rights to be ringfenced in the receiving scheme. However, it is not entirely clear how the transferred benefits should be ringfenced, or the extent to which receiving schemes can rely on information from the transferring scheme regarding PPAs. It remains to be seen whether HMRC's guidance addresses these issues.

When to tell members

Inform members in the next member communication

Whilst the legislative position could be clearer, we suggest that trustees inform relevant members of the increase in NMPA at a convenient point in the not too distant future, for example, in the next member newsletter. However, where members might benefit from a PPA of between 55 and 57, individual transfer packs should be updated as soon as possible to include a warning about the impact of the increase in NMPA on transfers.

Pension Schemes Act 2021

Pensions dashboards: preparatory work begins

Consultation closed on 13 March 2022

Back in January, the DWP published a consultation on draft regulations on pensions dashboards, which closed on 13 March 2022.[3] The regulations set out requirements that a pensions dashboards service must meet in order to be a "qualifying pensions dashboard service", as well as the obligations on trustees or managers of relevant occupational pension schemes to cooperate with and connect to the dashboard ecosystem.

The DWP is aiming to lay the revised regulations before Parliament "later this year, when parliamentary time allows", and for the requirements to start being phased in from April 2023. There has seemingly been a great deal of feedback from the industry, particularly on the tight timeframe for implementation.

In addition to the final regulations, we are also expecting a first suite of "standards" from MaPS (the body responsible for running the non-commercial pensions dashboard) in the summer, along with guidance from both MaPS and TPR, which should help trustees and managers prepare. TPR has confirmed that it will publish draft guidance in May 2022.

What's our expected staging date?

Final regulations expected later this year, along with draft standards over the summer

Under the draft regulations, there will be a staged approach to compliance, with the largest schemes (starting with master trusts and personal and stakeholder schemes, followed by DC schemes used for AE) expected to start complying from April 2023.

Each scheme will need to check carefully to see when their staging date is, as the exact date will depend on several factors, but the table below provides a high-level summary:

Type*	Number of members**	Staging period
Master Trusts	20,000 or more	30 June 2023
DC schemes used for AE	20,000 or more	31 July 2023
Remaining Master Trusts / DC used for AE	1000 to 19,999	30 September 2023 to 29 February 2024
Other large schemes	1000 or more	30 November 2023 to 30 September 2024
Medium schemes	100 to 999	31 October 2024 to 31 October 2025

* Excluding public service and CDC schemes
** "Members" for these purposes excludes pensioners

TPR is aiming to contact trustees at least 12 months ahead of their expected staging date, starting this May.

3 See our Alert: Pensions Dashboards – your DWP needs you (1 February 2022) and our Consultation Response (March 2022)

Given the timeframes, trustees should:

- check when their expected staging date is, ie the date by which they are expected to connect to the dashboard framework (see above)
- liaise with their scheme administrators to understand the steps they are taking to get ready for dashboard compliance
- explore possible industry solutions for connecting to the dashboard ecosystem, such as the use of a third party service provider
- continue working on improving their scheme data.[4]

CDC: multi-employer schemes by end of 2022 / early 2023

CDC to be expanded to unconnected multi-employer schemes

Guy Opperman, the Pensions Minister, has confirmed that the Government "will move to multi-employer CDCs in the latter part of this year, going into next year, and will move at a sufficient pace" that feels "appropriate". This expansion will follow the introduction of CDC as an option for single and connected employer schemes from 1 August this year.[5]

Notifiable events: awaiting final regulations

Notifiable events regulations are still awaited

Last autumn, the DWP consulted on proposed changes to the notifiable events regime, which requires trustees and employers to notify TPR when certain events occur in relation to a DB scheme.[6] In summary, the draft regulations accompanying the consultation included two new notifiable events for employers to report to TPR, relating to material sales and granting or extending certain security. Under the proposed changes, in some cases, employers would need to inform the trustees as well as TPR.

A response to the consultation had been expected earlier this year but the DWP has not yet confirmed an expected date for publication. However, as the regulations may come into force at short notice, DB employers should be ready to act swiftly when the final regulations are published.

DB scheme funding: regulations expected before the summer

A consultation on draft regulations outlining the detail of the new requirement for DB trustees to determine, with the agreement of sponsoring employers, a strategy for ensuring that scheme benefits can be provided over the long term is expected before the summer.

The second stage of TPR's consultation on its revised DB scheme funding code is now unlikely to be published until later this year, with the code not expected to come into effect until later in 2023.[7]

4 See Hot topic: Is your data ready for Dashboards (October 2019)
5 See 7 Days (20 December 2021)
6 See our Alert: New notifiable events and the declaration of intent (9 September 2021) and Hot topic: new reporting requirements (January 2022)
7 See our Alert: Pension Schemes Act 2021 – the dawn of a new regulatory era? (11 February 2021)

Climate change

Background

Schemes with £1bn or more in assets caught from 1 October 2022

New climate reporting obligations were introduced in 2021. The new requirements are being phased in, with larger schemes whose net assets are £5bn or more and master trusts already required to comply. Schemes with £1bn or more in assets will be in scope from 1 October 2022.

Trustees of such schemes must put in place appropriate governance arrangements to manage climate-related risks during the first scheme year which ends after 1 October 2022, and must publish a report setting out how they have complied with the requirements within seven months of the scheme year end.[8]

What should trustees of affected schemes be doing now?

Trustees will need to carry out some work now to ensure they can meet the 1 October deadline. For example:

- ✓ arranging trustee training to ensure they understand the new requirements
- ✓ identifying individuals and advisers who will undertake or advise on relevant governance activities on behalf of the trustees (eg investment managers)
- ✓ deciding who will be responsible for the oversight of climate-related risks in the scheme, eg the full trustee board or a sub-committee
- ✓ considering the possible options for climate-related metrics and targets, and engaging with investment managers on the data they have available
- ✓ establishing and documenting governance and risk management processes. This should include updated trustee investment beliefs and, once agreed, the chosen metrics and targets for the scheme.

What analysis needs to be carried out before the end of the relevant scheme year?

Certain actions need to be carried out before the end of the first scheme year ending after 1 October 2022. These include:

Further action before first scheme year end after 1 October 2022

- selecting climate-related metrics and targets and agreeing dates for data capture
- selecting the scheme's approach to scenario analysis and deciding who will carry it out
- carrying out scenario analysis
- obtaining emissions data, calculating metrics and using these to identify climate-related risks and opportunities
- measuring performance against agreed targets.

Specific actions will depend on the scheme

The actual timings and specific steps required to meet the statutory timelines will vary from scheme to scheme. Please speak to your usual Sackers contact to discuss your scheme's needs further.

8 See our Guide: A guide to trustee disclosures from 2021 (August 2021) and our Alert: Government response to consultation on climate change regulations and guidance (8 June 2021)

DC update

Proposal for DC schemes to "disclose and explain" their policy on illiquid assets

DWP consultation on facilitating investment in illiquid assets

The DWP has published a consultation on proposals and draft regulations to improve the accessibility of illiquid assets for DC pension schemes, which closed on 11 May 2022.[9] It proposes:

- amending the SIP requirements to ensure that relevant DC schemes, and the DC section of hybrid schemes, disclose and explain their policies on illiquid investments
- requiring trustees of DC and hybrid schemes with over £100m in total assets to publicly disclose and explain their default fund asset class allocation in their annual chair's statement
- amending the current restrictions on employer-related investment for master trusts with 500 or more participating employers.

The consultation also includes the Government's responses to:

No new regulatory requirements on consolidating DC schemes in 2022

- the consultation on "Enabling Investment in Productive Finance". Given the "mixed reaction" to its proposals on exempting certain performance-based fees from the charge cap, the DWP will consider how to address the concerns raised and intends to consult on principle-based draft guidance alongside any consultation on draft regulations[10]
- its call for evidence on the "Future of the defined contribution pension market: the case for greater consolidation". The DWP has decided not to introduce any new regulatory requirements with the sole purpose of consolidating the DC market in 2022.[11]

The employer-related investment changes are scheduled to come into force on 1 October 2022, but no timescale has yet been given for when the changes to the SIP and chair's statement will come into force.

TPR updates DC guidance for stronger nudge

TPR has updated its communicating and reporting guidance for DC schemes, to reflect the new stronger nudge requirements that are coming into force on 1 June 2022.[12] Key points from the update include:

Trustees should review transfer and retirement communications

- TPR considers it "good practice" to offer to book a Pension Wise appointment as early as possible in the process, as well as providing Pension Wise's telephone number and website details so the member can contact them directly if preferred
- the separate opt-out communication could consist of a further phone call, an online opt-out form through a member portal, or an email or separate form provided with an application.

9 See our Alert: Facilitating investment in illiquid assets by DC schemes (5 April 2022)
10 See 7 Days (6 December 2021)
11 See 7 Days (21 June 2021)
12 See our Alert: Stronger Nudge to pensions guidance (17 January 2022)

GMP equalisation

HMRC guidance on historical transfers and conversion

HMRC has released further guidance on some of the pensions tax issues associated with equalising benefits for the effect of GMPs.[13] The guidance focuses specifically on tax issues arising in respect of correcting past transfers out, as well as some of the tax issues arising on GMP conversion. It confirms HMRC's views that:

Useful guidance for trustees considering historical transfers

- where trustees need to take corrective action in respect of a historical transfer out, this could potentially be addressed either by way of a transfer payment to another scheme or a lump sum paid directly to the member
- a top-up transfer to another pension scheme will generally be an authorised payment, as long as the conditions for a "recognised transfer" are satisfied
- the authorised lump sum options are a "relevant accretion", a small lump sum payment, or a winding-up lump sum provided, in each case, that the relevant conditions are met.

Further guidance on GMP conversion is expected

HMRC also provides views on the pensions tax implications of GMP conversion, principally in respect of existing pensioners, as it needs to "undertake further work" in respect of deferred members.

Tax treatment of interest on arrears

Alongside a number of other organisations, the PLSA has published a statement addressing the tax treatment of any interest applied to a payment of arrears of pension, where the arrears have arisen as a result of GMP equalisation.[14] It confirms that the interest should be treated for pensions tax purposes as interest paid in respect of a late payment of pension instalments, and an obligation for schemes to withhold income tax is unlikely to arise where the member is UK resident. This point is expected to be confirmed in a future HMRC newsletter.

The statement doesn't deal with the tax position of the arrears themselves, as HMRC has already addressed this issue.[15]

PASA releases GMP equalisation FAQs

PASA published further GMP equalisation guidance at the end of March 2022. The new guidance responds to frequently asked questions on the equalisation process and will be updated over time. Among other topics, the guidance includes commentary on:

- whether an LTA check is needed if a member has been underpaid and is receiving an arrears payment and/or an increase in pension
- member communications and other practicalities in relation to equalising death benefits.

GMP conversion Bill receives Royal Assent

Bill receives Royal Assent but more detailed regulations to follow

A Private Member's Bill on GMP conversion received Royal Assent at the end of April. It aims to address some of the requirements of the GMP conversion legislation which can pose problems in practice. The Pension Schemes (Conversion of Guaranteed Minimum Pensions) Act 2022 will be brought into force on a day to be appointed by regulations.

13 See our Alert: HMRC publishes GMP equalisation guidance on historical transfers and conversion (7 April 2022)
14 See 7 Days (25 April 2022)
15 See our Alert: HMRC releases GMP equalisation tax guidance (21 February 2020)

In other news

Scheme funding: TPR publishes annual funding statement

TPR encourages trustees to have an "open dialogue" with employers

TPR has published its latest annual funding statement. It focuses on the current period of "significant economic uncertainty" and how this may impact schemes. The statement repeats themes from previous years: an integrated approach to risk management; an emphasis on long term planning; and the importance of an open dialogue with employers.[16]

Data protection: International Data Transfer Agreement comes into force

The International Data Transfer Agreement and the International Data Transfer Addendum to the EU Commission's standard contractual clauses came into force on 21 March 2022. These documents replace the current standard contractual clauses for international transfers and will be of use to organisations transferring personal data outside the UK.

Ban on corporate directors: BEIS responds to 2020 consultation

BEIS has published its white paper on corporate transparency and register reform, which includes its response to the consultation on implementing the ban on corporate directors. Provisions, which are yet to be brought into force, in the Small Business, Enterprise and Employment Act 2015 gave the Government the power to prohibit corporate entities from being appointed to company boards. They also provided scope for the Government to make regulations to set out exceptions to that prohibition.

Professional trustee companies can still be directors of pension trustee boards

In the response, specific consideration was given to the pensions sector, given the widespread use of the corporate trustee model. The Government has now confirmed that it will continue to be permissible for professional trustee companies to be appointed as a director of a trustee board when the provisions come into force, as long as the professional trustee company maintains all natural person directors on its own board.

Auto-enrolment: Bill fails to progress through Parliament

Guy Opperman, Pensions Minister, has confirmed that a Private Member's Bill on AE will not make it through Parliament before the Queen's Speech (usually delivered in May). The Bill had proposed expanding the AE regime to all jobholders aged at least 18, and removing the lower qualifying earnings threshold. However, he went on to say that the Government will "in the fullness of time, bring forward or support legislation to take the matter forward".

Scheme pays: changes introduced from 6 April 2022

Legislation extending the information and reporting deadlines for scheme pays came into force on 6 April 2022. The changes apply to the use of scheme pays where there has been a retrospective change of facts that affects an individual's pension input amount and their AA, including individuals affected by the *McCloud* remedy.[17]

16 See our Alert: TPR publishes annual funding statement in "turbulent times" (29 April 2022)

17 See our case summary: The Lord Chancellor and Secretary of State and another v McCloud and Mostyn and others and Sargeant v London Fire and Emergency Planning Authority and others (2 January 2019)

Cases

Punter Southall Governance Services Ltd v Benge & Anor (High Court, 1 February 2022)

The High Court has approved a decision by the trustees of the BST Group Pension Scheme to distribute death benefits in respect of a member to his partner, after objections were raised by the deceased member's son.[18]

Helpful discussion about dependency

In reaching his decision, the judge considered the meaning of "dependant", noting that the phrase "necessaries of life" takes account of the relevant status, in terms of class and position in life, of the person concerned. In each case, what constitutes the "necessaries of life" will therefore be fact sensitive. The judge also considered that being dependent on someone for the "necessaries of life" is materially the same as the definition of "dependant" under the FA04.

Moan v HMRC (Tax Tribunal, 4 April 2022)

The First-Tier Tax Tribunal has upheld an appeal against the loss of FP16 following an individual being auto-enrolled into his new employer's pension scheme.[19] In reaching its decision, the Tribunal considered the employer's duties to provide employees with information about AE, and the time limits for opting out of AE.

This case concerned very specific facts in relation to loss of FP16, but is a helpful summary of some of the employer requirements to provide information about AE to jobholders. As the judge commented, the AE regime is "highly prescriptive" and employers should be aware of the strict timeframes for providing information and the consequences of failing to comply, particularly in relation to postponement periods.

T v T (Family Court, 10 November 2021)

The judge in the Family Court has rejected a member's application to vary a pension sharing order, on the basis that a change in the member's CETV does not meet the necessary test to agree to such an order.[20]

The value of the member's CETV increased dramatically from that used to award the ex-spouse 40% of the member's benefits in the pension sharing order. The increase was due to significant delays in the financial proceedings, combined with changing market conditions during this time.

Lack of understanding and uncompromising approach can contribute to high legal fees

The member applied for the percentage in the pension sharing order to be reduced to just 17%, to reflect the increase in capital value of the pension benefits. The judge rejected his application, on the basis that the capital value back in 2015 would not be sufficient for the ex-spouse to purchase the same retirement income in 2021. In addition, although the value of the ex-spouse's share may have increased, so had the member's.

The process took around six years in total and the couple had amounted legal costs of over £300,000 in that time. The judge was highly critical of the unreasonable approach of the member, and of the poor advice given by particular legal advisers in the process. This case serves as a cautionary tale as to how quickly legal costs can escalate.

18 See our case summary: Punter Southall Governance Services Ltd v Benge & Anor (1 March 2022)
19 See our case summary: Moan v HMRC (12 May 2022)
20 See our case summary: T v T (4 May 2022)

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.

Practical implications of some key recent pensions rulings – what you need to know	17/05/2022	In person seminar In this session, Sackers' litigation team will guide you through the broader context of some key cases and take a practical look at the implications of those cases. This session will also be run as an online webinar on 24 May 2022.
Trustee training: pensions for new trustees	19/05/2022	In person seminar This interactive seminar is a full day session aimed at new trustees, where we focus on the key legal issues for new trustees of DB, DC and hybrid schemes (as well as those who would like to refresh their knowledge). You will have the opportunity to ask questions and share your experiences with other trustees.
Quarterly Legal Update	14/07/2022	In person seminar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees. This session will also be run as an online webinar on 18 July 2022.

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Recent publications

The Finance & investment briefing – June 2022 takes a look at current issues of interest to pension scheme investors.

Our latest GMP equalisation checklist GMP equalisation: The conversion process – the questions trustees need to ask – April 2022.

The DC briefing – March 2022 highlights topical news on DC pensions from a legal viewpoint.

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