Sackers

Quarterly briefing

December 2022

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

Q4
December 2022

On the front cover this quarter: Ian Cormican (partner) and Lucy Bennett (senior associate)

In this issue

Abbreviations

AE: Automatic enrolment

AVCs: Additional voluntary contributions

CDC: Collective DC

CMA: Competition and Markets Authority

CPI: Consumer Prices Index

CPIH: CPI including owner occupiers' housing costs

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

EAT: Employment Appeal Tribunal

ET: Employment Tribunal

EU: European Union

FCA: Financial Conduct Authority

HMT: HM Treasury

ICO: Information Commissioner's Office

ISP: Integrated service provider

PASA: Pensions Administration Standards Association

PDP: Pensions Dashboards Programme

PPF: Pension Protection Fund

PSA21: Pension Schemes Act 2021

RPI: Retail Prices Index

SIP: Statement of investment principles

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

UKSA: UK Statistics Authority

WPC: Work and Pensions Committee

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Current legal agenda

Topic	Summary	Timing
Pensions dashboards	PDP consulted on draft standards over the summer. Draft regulations laid before Parliament on 17 October 2022	Schemes starting to connect from April 2023 (see pages 6 and 7)
DB scheme funding[1]	DWP consultation on draft regulations on new funding and investment strategy closed on 17 October 2022	TPR's consultation on draft code expected later this year
Single code[2]	Draft code consulted on in 2021. Revised code to be published	Expected autumn 2022
CDC	Legislation for single or connected employer schemes came into force on 1 August 2022	DWP expected to consult on multi-employer schemes by end of 2022
Value for Money ("VfM")	FCA and TPR are working to develop a common framework for measuring VfM in DC schemes, including considering metrics that schemes should disclose	They are aiming to consult towards the end of 2022
Notifiable events[3]	Consultation on changes to the regime back in 2021. Response to consultation and final regulations are outstanding	Timings TBC

1 See our Alert: DWP consults on DB funding and investment strategy (27 July 2022) and our Consultation Response
2 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
3 See our Hot Topic: New reporting requirements (January 2022)

Hot topic: high inflation

Cost of living increases have reached levels unprecedented in recent history. The 12-month CPI rate has been 9% or above since April 2022. It reached 10.1% in both July and September, estimated to be the highest figure since around 1982. High inflation has wide implications for pensions, with different considerations for DB and DC schemes.

DB considerations

Current levels of inflation will reduce the value of most pensions

Discretionary pension increases

Even inflation-linked benefits are unlikely to give most pensioners full protection against the current level of cost of living rises. However, scheme rules often contain powers to increase or augment benefits in excess of normal pension increases. While the approach taken will vary on a scheme-by-scheme basis, trustees and employers may wish to review whether it would be appropriate to use these powers in the current environment. Relevant factors to consider include:

- inflation protection provided under the scheme rules and legislation
- the impact of cost of living rises on the scheme's particular membership
- the scope of the relevant powers under the scheme rules, including who holds the power (employer, or trustees, or both) and any restrictions on its use
- the scheme's funding position, the impact on that position and the security of members' benefits as a whole, and
- whether additional contributions would be required to meet the cost of any increases.

Check whether early retirement factors remain appropriate

Early retirement factors

Early retirement calculation methods may need to be reviewed more frequently to ensure they remain appropriate in the current high inflation environment, and to ensure that trustees are complying with their legal (preservation) duties in relation to the value of "short service" benefits.

Funding implications

Trustees should also engage with their advisers to assess whether the current high inflation environment is affecting the scheme's journey plan (taking into account the impact on liabilities, investments, employer covenant, and whether funding assumptions remain appropriate).

DC considerations

For DC members, protection against cost of living rises will depend to a large extent on investment returns and decumulation options. Trustees should consider with their advisers:

- the impact on the performance of the default fund and any investment pathways offered. Are changes recommended to the range of self-select funds?
- how members entering decumulation are affected by high inflation.

Considerations for all schemes

Trustees of all schemes may also want to consider whether:

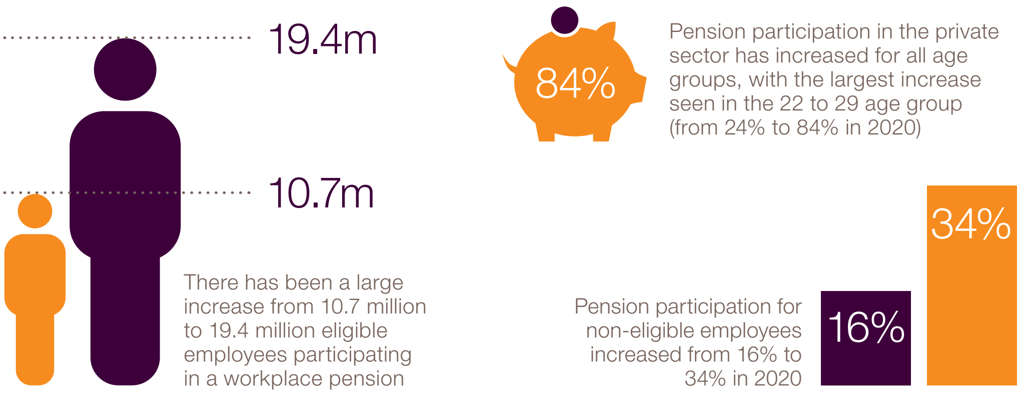
Are you communicating with your members about inflation?

- there is a change in the way members access benefits – are members delaying retirement, or requesting to access benefits more frequently?
- the options available to members are suitable, whether members understand and make use of the options available to them, and/or whether the scheme can offer additional support?
- they should be communicating to members about the issue, and whether any current communications remain appropriate (eg in relation to member options).

Automatic enrolment: ten years on

AE was introduced in 2012 to help address the decline in individuals saving for their retirement and to make long-term pensions saving the "norm". Having been phased in gradually, AE's roll out was only finally completed in April 2019.

Some key Government statistics since 2012



Source: Workplace pension participation and savings trends of eligible employees: 2009 to 2020

What is a qualifying scheme?

A DC scheme used for AE must have a minimum overall contribution rate of 8% of "qualifying earnings" (including tax relief), with at least 3% employer contributions, or meet one of the alternative requirements set out below. There are no minimum member contributions, so bridging the gap between the employer and overall minimum contributions levels is a matter of scheme design.

Alternative requirements for DC AE schemes

1. 9% of "pensionable pay" with at least 4% employer contributions. Pensionable pay must be at least equivalent to basic pay
2. Total overall contributions of at least 8% of "pensionable earnings", with at least 3% employer contributions, provided that the total pensionable earnings of all relevant jobholders (taken in aggregate) constitutes at least 85% of their total earnings. Pensionable earnings must be at least equivalent to basic pay
3. Total contributions of at least 7% of "total earnings" (including employer contributions of at least 3%) for each jobholder. All earnings must be pensionable

There are separate minimum standards that apply to DB schemes.

What's still to come?

Possible changes to the AE regime in the future

Since AE arrived on the scene, there have been questions as to whether the regime should be expanded. The Automatic Enrolment Review 2017 recommended:

- reducing the lower eligibility age limit from 22 to 18
- removing the lower qualifying earnings threshold (currently £6,240 for 2022/23).

However, no timeframe has been given by the Government as to when this might be taken forward.

Pensions dashboards

The PSA21 sets out a framework for introducing a pensions dashboard service, a digital interface designed to enable individuals to see all their pensions information in one place.

Final draft regulations have been laid before Parliament

Dashboard developments continue, with final draft regulations having been laid before Parliament in October, and currently expected to come into force by the end of the year.[4] The FCA has also finalised its dashboard rules for FCA-regulated pension providers.

Regardless of when a scheme is required to comply with the dashboard duties, TPR and the DWP expect all schemes to be taking preparatory steps now.

When do trustees need to comply?

Trustees of schemes in scope, ie registrable UK-based occupational pension schemes with 100 or more members excluding pensioners, will need to comply by their staging deadline.

A scheme's staging deadline depends on the size and type of their scheme, with large DC master trusts and large DC schemes used for AE, first to connect.

Schemes will start connecting from April 2023

Type (excluding CDC schemes)	Number of members (excluding pensioners)	Staging deadline
DC Master Trusts	20,000 or more	By 31 August 2023
DC schemes used for AE	10,000 or more	By 30 September 2023
Schemes with DB benefits	20,000 or more	By 30 November 2023
Remaining large schemes	1,000 or more	30 September 2023 to 30 September 2024*
Public service pension schemes		By 30 September 2024
Medium schemes	100 to 999	31 October 2024 to 31 October 2025*

* A scheme's specific deadline depends on type of benefits and number of members.

Trustee action

If you haven't already, pinpoint your staging date and check that all your relevant advisers agree with this timing.

What are the key trustee duties under the regulations?

The key duties for trustees under the regulations have not changed significantly from the earlier draft regulations, and can be broken down into three main areas:

- connecting to the dashboard ecosystem
- processing find requests
- responding to view requests.

4 See our Alert: Pensions Dashboards – draft regulations published (19 October 2022)

Pensions dashboards cont.

Trustees should speak to their administrators

Connecting to the dashboard ecosystem

Trustees must connect to the dashboard ecosystem by their staging deadline. As part of that process, they will need to decide **how** to connect.

> **Trustee action**
>
> Trustees should talk to their administrators and software providers to understand how they are planning to connect and assess whether this can meet the scheme's needs, or whether they should consider engaging a separate ISP.

Schemes need to make sure data is "dashboard ready"

Find requests

Schemes must be ready to receive find requests from their staging deadline. Once a find request is received, a scheme will have to check whether the information in the find request matches any member record held by the scheme.

Trustees will need to decide the data items that they are going to use for matching purposes. The chosen criteria will depend on what data is available and how confident trustees are of its accuracy. Administrators may have a "preferred approach" to matching, so it will be important to understand their position too.

> **Trustee action**
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> As a starting point, trustees should ensure the scheme data is accurate and good quality by:
>
> - auditing their scheme data
> - putting in place a plan to improve and / or digitise data, if needed.

View requests

Schemes must also be ready to respond to a view request from their staging deadline. When a scheme receives a "view request", it will need to provide:

- administrative data – information about the scheme, administrator and relevant employment
- signpost data – a link to a website where the individual can find information about member-borne costs and charges, the scheme's SIP and implementation statement
- value data – accrued and projected pension values. The value data that needs to be provided will depend on the member's status and the benefit type. Responding to industry concerns, the regulations give schemes more flexibility in respect of the value data that needs to be provided.

Schemes will have six months' notice before dashboards "go live" to the public

What happens next?

Although timing has not been confirmed, current expectation is that the regulations will come into force before the end of the year, followed by final versions of the PDP's standards and guidance.

Dashboards are currently expected to go live to the public in 2024, but schemes will be given at least six months' prior notice.

> **Trustee action**
>
> If they haven't already, trustees will need to decide how to manage their dashboard preparation at trustee board level. They should liaise with administrators and other advisers to help identify any potential capacity constraints and to check what support and options are on offer.

DC update

Broadening investment opportunities for DC schemes

The DWP published a consultation on draft regulations and statutory guidance in October, which are intended to remove performance-based fees from the DC charge cap and implement certain of the changes proposed in its March 2022 consultation.[5] The proposals include:

- amending the default SIP requirements (and main SIP requirements for CDC schemes) to ensure that schemes which provide DC benefits (excluding schemes where the only DC benefits are AVCs) disclose and explain their policies on illiquid investments
- requiring DC and CDC schemes to publicly disclose and explain their default asset class allocation in their annual chair's statement
- excluding "well-designed" performance-based fees from the charge cap that applies to default arrangements in DC schemes used for AE, and
- requiring trustees and managers to have regard to the DWP's proposed guidance in relation to the asset allocation disclosures, and when determining whether a performance-based fee falls within the new charge cap exemption.

DWP intends to make it easier for DC schemes to invest in illiquid assets

The consultation closed on 10 November 2022 and the draft regulations are currently expected to come into force on 6 April 2023.

PASA guidance on DC transfers

Aiming to improve member experience through "faster and more secure" DC transfers, PASA published new guidance in October 2022. The guidance includes template communications that are intended to improve DC transfer processes, and a recommendation that trustees agree acceptable service levels and timescales with their administrators.

Simpler annual benefit statements – what are the new requirements?

Since 1 October 2022, trustees of DC schemes used for AE must issue "simpler annual benefit statements" to all their members (excluding pensioners) within 12 months of the end of each scheme year. Schemes must also have regard to guidance issued by the DWP on content and layout.

Key points from the legislation and guidance that schemes should be aware of include:

- ✓ the statement should be no more than two sides of A4 when printed (except for formats provided to comply with Equality Act 2010, eg large print)
- ✓ language used should be simple, accessible, and jargon-free
- ✓ typeface and font should be of a size that is easily readable and accessible
- ✓ the statement can use a provider's own colour scheme so long as this doesn't prevent the other requirements from being met.

5 See our Alert: Consultation – Broadening the investment opportunities of DC schemes (11 October 2022)

Regulator roundup

TPR

TPR to publish diversity and inclusion guidance

Diversity and inclusion action plan

TPR has issued an action plan to improve diversity and inclusion across trustee boards. TPR's actions include publishing guidance for trustees and employers on equality, diversity and inclusion by the end of its 2022/23 financial year (ie by the end of March 2023).

Employers should engage with trustees about any M&A activity

Guidance on mergers and acquisitions

TPR has published a blog discussing its expectations in relation to mergers and acquisitions involving UK companies which sponsor a DB pension scheme. Employers should "immediately alert trustees about a proposed corporate transaction" and provide trustees with direct access to bidders at the earliest opportunity. In addition, outgoing and incoming executive management teams should support trustees in implementing "a robust funding plan, underpinned by cash and/or tangible security with proven sustainable value".

Enforcement and prosecution policies

TPR has published a consolidated enforcement policy and an updated prosecution policy. The policies were updated to reflect the PSA21 and TPR's experience from using its existing enforcement powers, and are largely in the form consulted on earlier this year. Revised versions of the case team and determinations panel procedures have also been issued, setting out the steps TPR will follow when considering using its "reserved" powers. Alongside the revised policies, TPR published an enforcement strategy setting out the aims of TPR's enforcement work (except in relation to AE).

TPO

New Ombudsman appointed

Dominic Harris has been confirmed as the new Pensions Ombudsman. He will take over from 16 January 2023, replacing the current incumbent, Anthony Arter, who has been in place since May 2015.

PPF

Proposed reduction in levy

The PPF published its Long-Term Funding Strategy review and consultation on the 2023 to 2024 levy rules in September 2022, announcing its proposal to reduce the total amount of PPF levy charged by nearly half, to £200 million, so that "[a]lmost all levy payers will be paying less levy next year". The proposed reduction recognises the PPF's current financial position and changes in risk as it moves towards a new "maturing" funding stage.

The consultation closed on 10 November 2022, with the final rules expected in December.

In other news

Ministerial appointments

Mel Stride has been appointed as Secretary of State for Work and Pensions, replacing Chloe Smith, who had only been in the role since early September.

Laura Trott has been appointed as Pensions Minister, following Alex Burghart's brief spell as the Minister for Pensions and Growth earlier in the autumn. Guy Opperman, the UK's longest serving Pensions Minister, left the role in September, having served in the post since June 2017.

Market volatility

After the "mini-budget" in late September 2022, there was a surge in gilt markets, which resulted in the Bank of England purchasing certain gilts for a temporary period.

Trustees expected to manage investment and liquidity risks after recent market volatility

During this time, TPR published a statement setting out the main points it expects trustees to consider in managing investment and liquidity risks in the face of those market conditions. For DB trustees, this includes engaging with investment advisers to gain an accurate understanding of the scheme's position so as to prioritise the key areas of concern, such as operational processes, liquidity, liability hedging and funding. Actions for DC trustees include reviewing their investment strategy and operational factors in executing this strategy, but while "maintaining a long-term perspective".

Following the recent market volatility, the WPC launched an inquiry into DB schemes with LDI and issued a call for evidence, looking at issues including the impact of the rise in gilt yields on DB schemes, the impact on members in both DB and DC arrangements and whether the experience suggests other policy or governance changes are needed. The call for evidence closes on 15 November 2022.

Guidance on changing administrators

Planning ahead can make administration transitions easier

PASA has published guidance on exit agreements, which are used when transferring administration services to a new administrator. The guidance is designed to support trustees, administrators and scheme managers when planning and managing a transition and includes a template exit agreement.

The guidance also includes an updated version of PASA's Code of Conduct on Administration Provider Transfers, with the updates coming into effect from 1 January 2023.

Data protection

In a blog published in September 2022, the ICO has set out key advice for organisations dealing with subject access requests. The ICO's recommendations include using plain English in any responses, being proactive to build trust with the individual making the request, and keeping privacy notices up to date to help individuals to understand how their data is being used.

Do you need to review your investment consultant's objectives?

Regulations integrating relevant aspects of an order produced by the CMA in 2019 (the "Order") into pensions law came into force on 1 October 2022. Subject to limited exceptions, the Order requires trustees to carry out a tender process for fiduciary management services and to set objectives for their investment consultants ("ICs"). The regulations, which largely replicate the Order, bring the requirements under the pensions law umbrella, allowing TPR to oversee compliance rather than the CMA.

Where the objectives for an IC were set before 1 October 2022, the trustees must complete the first review of these objectives within three years from the date they were set under the Order. As these objectives were originally required to be set by 10 December 2019, some schemes are likely to be required to complete their first review by 10 December 2022.

In addition, schemes that had a fiduciary manager in place, without a competitive tender, will also need to consider when they need to carry out a competitive tender, if they haven't already done so.

Cases

BT Pension Scheme Trustees v UK Statistics Authority (High Court) – 1 September 2022

RPI to align with CPIH from 2030

The High Court has recently delivered its judgment in the application made to seek judicial review of the proposed change to how RPI is to be calculated.[6] The proposed change to RPI came about as a result of HMT's and the UKSA's decision to change the methodology and data sources for calculating RPI by aligning these with CPIH with effect from 2030.

The Court rejected the claim for judicial review. It found that the UKSA has the authority to amend RPI in the way envisaged and had properly assessed the rationale for the change, ie its statistical quality and its fitness for purpose to be used as an index for measuring inflation.

In addition, HMT had followed a proper process of consideration and consultation when making its decisions, both to allow the change from 2030 and also in deciding not to compensate holders of index-linked gilts.

Harpur Trust v Brazel (Supreme Court) – 20 July 2022

The Supreme Court recently handed down its judgment in a case concerning the calculation of statutory annual leave and holiday pay entitlements by "part-year" workers, ie those who work for varying hours for only certain weeks of the year, but are employed for the full year.[7] The Court found the amount of leave (and associated holiday pay) to which such a worker is entitled should be based on the average weekly remuneration in a reference period set out in relevant legislation, rather than a pro-rated amount of the leave of a full-time worker. The pro-rated method had resulted in lower holiday pay for the claimant than the average weekly method.

Employer action

Employers affected by this decision should ensure that any adjustments to holiday pay, including any back payments, are tracked through into pensionable pay, where relevant. For DB schemes, this could result in changes to benefit calculations and payments.

Secretary of State for Work and Pensions v Beattie and others (Employment Appeal Tribunal) – 27 October 2022

The EAT has given its judgment in an appeal from the ET concerning the exemption from age discrimination requirements which applies to pensionable service before 1 December 2006 ("the 2006 limitation").[8] This is the latest development in a line of claims relating to PPF compensation caps.

The EAT agreed with the reasoning behind the ET's finding that the 2006 limitation was inconsistent with general principles of EU law. However, the European Union (Withdrawal) Act 2018 means that the 2006 limitation could be disapplied only in relation to claims brought before 31 December 2020 ("IP completion day"). Of the multiple claimants, only two had brought their claims before IP completion day, and therefore were able to rely on the relevant principle of EU law to continue their claim. The other claimants were not able to do so.

The decision to restrict the disapplication of the 2006 limitation to claims brought before IP completion day curbs the case's wider impact, which will be a relief to trustees.

6 See our case summary: BT Pension Scheme Trustees v UK Statistics Authority (1 September 2022)
7 See our case summary: Harpur Trust v Brazel (20 July 2022)
8 See our case summary: Secretary of State for Work and Pensions v Beattie and others (Employment Appeal Tribunal) (27 October 2022)

Sackers

Upcoming seminars and webinars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars and webinars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on topics.

Quarterly legal update	17/11/2022	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.
Trustee training: pensions for new trustees	09/02/2023	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	09/02/2023	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

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Recent publications

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

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

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