

Welcome

Welcome to Pensions, our bimonthly newsletter keeping you informed of developments in pensions law.

To find out more about how we can help you with pensions issues, please email richard.knight@burgess-salmon.com or call him on 0117 939 2259.

In brief

Legal

Pension Schemes Bill

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Liberation

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DC: 30 day vesting

As anticipated, from 1 October 2015, a new member's DC benefits in an occupational pension scheme will vest after 30 days *qualifying service*. Pensionable service has to begin on or after 1 October for this to apply.

DC: Pot follows member

The system for small DC pots to follow an individual to their latest employer's scheme will be rolled out in stages, phase one starting in October 2016. There will be a second phase and could be more.

DC: Charges and governance

The DWP has finalised its regulations about

governance and charges in DC schemes. The differences from the draft are about details, not policy.

DC: Change in definition

Trustees of schemes with benefits that ceased to count as "money purchase" after the change in the definition of the term in July 2014 have until 31 March 2015 to inform the Regulator.

Auto-enrolment

In draft regulations, the DWP proposes to exclude certain groups from auto-enrolment.

Cases

The Supreme Court has two pensions cases in the pipeline.

Regulatory

Incentives code applies to commutation

The voluntary Code of Practice for Incentive Exercises applies to trivial/small pension commutation exercises, its Monitoring Board says.

PPF levy

A reminder of the deadlines for the 2015/16 levy year. The main one is 5pm on 31 March 2015 but there are others.

Tax

Annual allowance charge

The annual allowance (AA) will have fewer anomalies following a range of technical changes.

Legal

Pension Schemes Bill

As we go to press, lot of practical detail about flexi-access to DC has yet to be published even in draft. Meanwhile, the Pension Schemes Bill, designed to reconcile pensions legislation with the new tax-driven options, is close to becoming law.

Flexi-access is permissive, not mandatory. Schemes will vary in the flexibility they allow and so in the extent to which they need to get to grips with the regulatory regime.

Guidance guarantee

The rules for the free guidance to be delivered by TPAS,



Citizens Advice Bureau and the Pension Wise website wait to be finally settled. Meanwhile the FCA has announced a “second line of defence” for cases where the saver has not taken up the offer of guidance. Contract-based providers will be required to ask the saver questions relevant to their decision, give appropriate risk warnings and again remind them of the offer of guidance. These ideas will also apply to trust-based schemes in a form being worked up now by the DWP and the Regulator. Trustees will be keen to know how their obligations will sit with their duties under trust law and existing legislation.

Independent advice: DB to DC transfers

Where a scheme member with DB benefits (known as *safeguarded benefits* in this context) proposes to turn them into DC or cash balance benefits (known together as *flexible benefits*) by transferring them to another scheme, the DB trustees must check the individual has had independent financial advice. This applies whether the member is exercising a statutory right to transfer or an option under the scheme rules to convert their benefits.

The advice must come from an FCA authorised adviser and satisfy any other requirements set out in regulations (yet to be published). In debate, the Minister has made clear trustees will not be required to evaluate the content or quality of the advice: their task will be to obtain evidence that advice has been taken.

However, there will be no requirement for independent advice where the value of a member's DB benefits is less than £30,000 (the trivial commutation ceiling) on a CETV basis.

To underpin the policy here, giving advice on the transfer or conversion of benefits into a flexible form is to be a new regulated activity under financial services legislation. FCA rules will apply.

Employers can be required to arrange and pay for the advice. The plan is that they will have to do so where a transfer is the result of an employer-led exercise or is between the DB and DC sections of the same scheme. The details will be set out in regulations (yet to be published).

As anticipated, the Regulator has issued draft guidance to DB trustees about handling transfers. It draws attention to the need to have sound procedures, to consider the potential impact of the scheme's funding and investment arrangements and to provide members with high quality information to help them make decisions. The consultation period closes in mid March.

Cash balance and flexi-access

The Bill has measures to align pensions legislation with tax legislation over cash balance benefits.

Cash balance benefits are not classed as *money purchase benefits* in pensions legislation. Since the Bill confines flexi-access to *money purchase benefits*, it allows regulations to be made about converting cash balance to *money purchase*. Typically, conversion would be prompted by a member wanting flexible access. As we go to press, no regulations have yet been published.

Transfers

Members will have a separate statutory right to transfer each type of benefit they have accrued in a scheme. Today, all accrued benefits must be transferred (subject to contracting-out rules).

The benefit types are:

- money purchase benefits,

- flexible benefits that are not money purchase (e.g. cash balance) and
- benefits that are not flexible benefits (e.g. DB).

The right to a transfer no longer depends on the member's pensionable service ending. Instead, the member must stop accruing benefit of the type they want to transfer.

Scheme rules may not require a member who wants to transfer one benefit type to transfer another type too. Nor may they prohibit a member who transfers one type from continuing to accrue another.

For benefits that are not flexible, the deadline of one year before NPA for exercising the statutory transfer right will continue to apply. On the other hand, the right to transfer money purchase and other flexible benefits will remain available until the benefit comes into payment, or sums are designated for drawdown.

Further ahead

The Bill also tackles the longer term future by defining foundational concepts for new varieties of shared risk (defined ambition) and collective saving schemes that might be created in future.

This item is based on the current edition of the Bill (published on 28 January).

Liberation

The Pensions Ombudsman is in the process of considering a complaint that trustees allowed a member's transfer request to go through when they should have blocked it because it had the stamp of liberation. A surprising claim, on the face of it. If the PO finds for the member, trustees will be in a quandary.

No go

Meanwhile, the PO has issued decisions answering the opposite complaint, namely that trustees refused to give effect to a transfer because they saw a possibility of liberation.

In each of these cases, the PO found the member's transfer request was invalid because it did not comply with the normal technical conditions for a statutory transfer.

This means trustees are still without concrete examples from decisions by the court, the PO or the Regulator on the circumstances, if any, in which they can delay giving effect to a transfer request, or refuse to do so, because they suspect liberation.

Trustees are right to insist on full technical correctness, for the member's protection as well as their own. But what they would really like to know is whether they can legitimately stall if a request meets the legal requirements.

The Regulator has power to extend the normal time limit but only on grounds that are also concerned mainly with technical compliance and not broader issues like good faith. The limited comfort the Regulator offers is that if trustees have well founded concerns a member's savings might be at risk, it would take that into consideration in deciding any action it might take over non-payment of a transfer. See the section on *Carrying out due diligence* in the Regulator's July 2014 **Pension scams action pack**.

Go

The PO expects to issue its decision in the “failure to block” case in the first half of this year. There are no further details at this stage.

In the meantime the PO says there is no need for members to submit complaints on the same or similar issues. Any such complaint would be parked pending a decision in the case currently under consideration.

On the three year time limit for complaining, the PO says: *"If it does become necessary for you to complain to us, the time from now until the first case is published will not count against you for the purpose of deciding whether your complaint has been made within our time limit. (That would usually be three years from when the transfer was made, but potentially longer than that where the delay was reasonable)."*

HMRC

From April 2015, HMRC will gather more information with a view to preventing liberation. The registration process for new schemes will ask extra questions to improve the information base for the "fit and proper person" test. And a new reporting requirement about changes in scheme structure is designed to provide information on schemes that have a conventional appearance when set up but are later altered to facilitate liberation.

DC: 30 day vesting

As anticipated, from 1 October 2015, a new member's DC benefits in an occupational pension scheme will vest after 30 days *qualifying service*. Pensionable service has to begin on or after 1 October for this to apply.

The result is that short service refunds of DC saving will be more or less abolished.

Originally, the plan was for this change to coincide with the start of *pot follows member* but that has been put back to October 2016.

Where a member is entitled to the higher of a DC and a non-DC benefit (e.g. a DB underpin), the two year vesting rule will continue to apply.

DC: Pot follows member

The system for small DC pots to follow an individual to their latest employer's scheme will be rolled out in stages, phase one starting in October 2016. There will be a second phase and could be more.

The DWP has published a high level description of how the system will work. A network of compatible registers run by private sector bodies will handle the data needed to match the schemes to pay and receive a transfer.

A test group of about 20 pension providers that together cover the majority of people who have been auto-enrolled will participate in phase one. Pots will only be transferred at this stage if the member opts in. The transferring scheme will receive a statutory discharge.

Pots will be eligible for transfer only if they began in July 2012 or later and are invested in the old scheme's charge-capped default investment fund. They will be invested in the new scheme's capped default fund.

In phase two (timing unspecified), transfer will be automatic unless the member opts out.

In later phases, the system might be extended beyond default investment funds and to pots that began before July 2012.

The maximum pot size for a transfer will be £10,000 (subject to review every five years).

DC: Charges and governance

The DWP has finalised its regulations about governance and charges in DC schemes. As the sample changes below indicate, the differences from the draft are about details, not policy.

The Regulator has published a brief [Essential guide to governance standards and charge controls](#).

Charges

Single member schemes are now excluded from the scope of the charges measures as well as those on governance.

An arrangement with a third party pensions promise (i.e. about the amount of the benefit) is not a default arrangement and so the 0.75% charge cap does not apply.

An extra option is added to the methods available for assessing cap compliance.

Charges that relate solely to survivor benefits are excluded from the definition of charges for the cap.

Members whose only contributions to a fund are AVCs are ignored when working out whether the fund passes the 80% test for a default arrangement.

Governance

Trustees need only appoint a chair under the regulations if they do not already have one.

The definition of, and requirements around, professional trustees are clarified.

The bar to restrictions on trustees' choice of service providers will bite only to those found in the scheme's rules.

There is a transitional easement about the timing of the chair's first annual statement about compliance with the measures on governance and charges.

The ban on active member discounts (AMDs) is clarified: it is not limited to charges that are subject to the 0.75% cap.

Simultaneously, the FCA has published rules for contract based personal pension schemes that correspond with the DWP's for occupational schemes.

Next steps

Subject to Parliamentary approval, most of the regulations will come into force on 6 April 2015. The ban on AMDs will come into effect on 6 April 2016.

This spring, the DWP and FCA aim to publish a joint call for evidence on proposals to introduce greater transparency of costs and charges.

Also in 2015 the DWP will consult on regulations to ban member-borne adviser commission and consultancy charges in occupational schemes used for auto-enrolment.

Action

Trustees should check their schemes against the new requirements and make changes as necessary.

DC: Change in definition

Trustees of schemes with benefits that ceased to count as "money purchase" after the change in the definition of the term in July 2014

have until 31 March 2015 to inform the Regulator. Delay beyond then could lead to the Regulator considering a civil fine.

March 2015 is a long-stop date for starting the process of bringing the benefits into the correct regulatory regime e.g. for DB benefits with its funding and PPF levy obligations. Earlier deadlines included October 2014 to appoint an actuary.

The nature of a scheme's benefits is part of the "registrable information" that trustees must report to the Regulator and keep up to date.

Auto-enrolment

In draft regulations, the DWP proposes to exclude certain groups from auto-enrolment.

Employers would not be required to auto-enrol people:

- who are leaving their job e.g. have given notice or are about to retire,
- who cancel their membership after being contractually enrolled and
- who have informed the employer they have any of the tax protections for existing pension saving.

The terms of the exceptions vary e.g. there may be timing conditions or stipulations about re-enrolment dates.

The consultation paper said the DWP is not proposing an exception for employees in flexible drawdown. This is mainly on the ground that the potential tax consequences of auto-enrolment in these circumstances will be less adverse with the advent of flexi-access. But views to the contrary were invited.

The next step is for the DWP to respond to the comments it received during the consultation. The plan is for the final regulations to come into force in April 2015.

Cases coming up

The Supreme Court has these pensions cases in the pipeline.

Trustees of Olympic Airlines SA Pension Scheme v Olympic Airlines SA: a technical point of EU insolvency law that has large consequences for the members of a UK DB scheme sponsored by an employer in another EU jurisdiction. Are they eligible for PPF protection (for which the scheme has paid via the levy) if the employer becomes insolvent in its own jurisdiction? The UK presence is a branch office and not a

corporate entity and so cannot have a qualifying insolvency event for PPF purposes under UK law. Can it do so under EU law? UK law was changed specifically to give the *Olympic* members (only) access to the PPF but the general question is unanswered. Depending on the outcome of the appeal, a more general change to the PPF legislation is likely to be needed to align the obligation to pay the levy with the right to protection. The case was heard earlier in this year.

Brewster v N Ireland LGPS: is an unmarried partner's human right to equality of treatment regardless of marital status breached by a scheme rule that someone in their position is only entitled to a survivor's pension if they were expressly nominated by the member? The SC is due to hear an appeal against a lower court's "no". That court considered that requiring nomination was a proportionate means of establishing a marriage-like public commitment. The outcome in the SC could affect other schemes with similar rules.



Regulatory

Incentives code applies to commutation

The voluntary Code of Practice for Incentive Exercises applies to trivial / small pension commutation exercises, its Monitoring Board says.

An "incentive" is any offer to a member to change the form of their accrued DB benefit that has an aim of reducing risk or cost to the scheme, and the offer is not normally available.

In principle, one-off small / trivial pension exercises will generally meet these two tests. But the Board accepts the Code does not apply where members have no choice, which is often the case with "small pot" (under £10,000) commutation. On the other hand, the Board suggests the Code could still be a helpful guide to conduct.

Exercises involving choice will be "modification exercises", which means the Code's value test will apply, those concerned should receive guidance (as defined in the Code) and vulnerable customers should receive particular attention.

It makes no difference to the application of the Code whether it is the trustees or the employer that runs an exercise.

Anticipating renewed interest in incentive exercises from April 2015, the Board is planning to review the Code once the legislative and regulatory measures for flexi-access are in place.

PPF levy 2015/16: timetable reminder

The main filing deadline is 5pm on 31 March 2015. But there are a number of others.

The PPF will apply all the deadlines strictly.

Action	Key dates
Monthly Experian scores	Between 31 October 2014 - 31 March 2015
Submission of data to Experian to impact on monthly Experian scores	One calendar month before the month end (excluding weekends and Bank holidays) when an Experian score is taken
Submit scheme return on Exchange	5pm, 31 March 2015
Reference period over which funding is smoothed	5 years to 31 March 2015
Contingent asset certificates to be submitted on Exchange and, where necessary, hard copy documents to PPF	5pm, 31 March 2015
Asset backed contributions certificates to be sent to PPF	5pm, 31 March 2015
Mortgage exclusion certificates and supporting evidence to be sent to Experian	5pm, 31 March 2015
Deficit-reduction contributions certificates to be submitted on Exchange	5pm, 30 April 2015
Confirm legal advice held on LMS status to be sent to PPF	29 May 2015
Certification of full block transfers to be completed on Exchange or (in limited circumstances) sent to PPF	5pm, 30 June 2015
Invoicing starts	Autumn 2015

Tax

Annual allowance charge

The annual allowance (AA) will have fewer anomalies following a range of technical changes. They include:

- unintended pension input amounts will not arise following a transfer where the member's past service benefits remain the same but the transfer was underfunded,
- removing a number of circumstances where unintended AA charges could arise for deferreds e.g. those who became deferred before 2006 and later resume active membership and providing for more revaluation methods to be ignored for AA purposes and
- removing an oddity that meant a member's AA charge could be lower under scheme pays than if they met it themselves and making clear that, as on a bulk transfer, a scheme receiving an individual transfer is liable under scheme pays.



Some of the changes are backdated to tax year 2011/12; others operate from 28 January 2015 when the amending regulations came into force.

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