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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

December 2018

Introduction

Essential pensions news covers the latest pensions developments each month.

PPF confirms final levy determination for 2019/20

Following the consultation launched in September 2018, the Pension Protection Fund (PPF) published its final levy rules for the 2019/20 levy year, the second of the current three-year cycle, on *December 12, 2018*.

The total levy the PPF expects to collect is confirmed at £500 million, down from the £550 million estimate for 2018/19.

The levy rules will remain largely unchanged from the proposals set out in the consultation, as the PPF reports that the majority of respondents supported its view that the core methodology is working well.

The consultation confirms that respondents' comments have been taken on board in setting out the PPF's methodology for calculating a levy for commercial consolidators, and proposals have been published to refine proposals to establish a workable rule for 2019/20. The PPF envisages the approach developing in subsequent years as the market and regulation take shape, and its approach dovetails with the DWP's and TPR's approaches.

A full list of the relevant deadlines for the 2019/20 levy year has been published alongside the levy determination.

Item	Key dates
Monthly Experian Scores	Between April 20, 2018 and March 31, 2019
Deadline for submission of data to Experian to impact PPF-specific Monthly Scores	One calendar month prior to the Score Measurement Date
Submit scheme returns on Exchange	By midnight on March 31, 2019
Reference period over which funding is smoothed	5-year period to March 31, 2019
Guarantor Strength Reports (where relevant) to be completed and Contingent Asset Certificates to be submitted on Exchange	By midnight on March 31, 2019
Contingent Asset hard copy documents where required (including Guarantor Strength Reports) to be posted/delivered to PPF at Pension Protection Fund Renaissance 12 Dingwall Road Croydon, Surrey CR0 2NA	By 5pm on April 1, 2019
ABC Certificate to be sent to PPF by email	By midnight on March 31, 2019
Mortgage Exclusion (“Officers”) Certificates and supporting evidence to be sent to Experian by email	By midnight on March 31, 2019
Accounting Standard Change certificate to Experian by email	By midnight on March 31, 2019
Special category employer applications (and confirmation of no change) to PPF by email	By midnight on March 31, 2019
Deficit Reduction Contribution Certificates to be submitted on Exchange	By 5pm on April 30, 2019
Exempt transfer applications with supporting evidence to PPF by email	By 5pm on April 30, 2019
Certification of full block transfers to be completed on Exchange or sent to PPF (in limited circumstances)	By 5pm on June 28, 2019
Invoicing starts	September 2019

The PPF has received requests for guidance on whether and how the outcome of some significant court cases (*Hampshire*, *Beaton* and *Lloyds*) should be reflected in section 179 valuations. It has published some initial FAQs indicating how it expects these decisions to affect section 179 valuations and is considering when to issue further guidance.

Pension scheme trustees and employers can log on to view and check their insolvency data and scores at: www.ppfscore.co.uk.

View the final levy determination.

Comment

It should be noted that where the time deadline for submission of a document on Exchange or by email is *March 31, 2019*, and that this is a Sunday. Where hard copy documents are being delivered, the deadline is *5pm, Friday March 29, 2019*.

Schemes are also reminded that preparation and execution of contingent asset agreements can take several weeks, and the process should be started well in advance of the *March 31, 2019* (effectively *March 29, 2019*) deadline.

Auto-enrolment: DWP announces earnings trigger and qualifying earnings band for 2019/20

The DWP has conducted its annual review of the auto-enrolment earnings trigger and qualifying earnings band. For the 2019/20 tax year, the following will apply

- The earnings trigger will remain fixed at £10,000.
- The lower end of the qualifying earnings band will rise from £6,032 to £6,136.
- The upper end of the qualifying earnings band will rise from £46,350 to £50,000.

The changes to the upper and lower limits of the qualifying earnings band maintain its alignment with those for paying National Insurance contributions. The relevant statutory instrument formalising the changes will be published in the New Year.

Together with these changes, minimum total contributions are set to increase from 5 per cent to 8 per cent of qualifying earnings (and minimum employer contributions from 2 per cent to 3 per cent) from *April 6, 2019*.

Pension schemes newsletter no. 105

On *November 23, 2018*, HMRC published the latest edition of its Pension schemes newsletter for administrators. The main contents are summarised below.

Double taxation
Bulk requests for 2019 Certificates of Residence can be submitted by email for up to ten schemes at a time. HMRC asks that submissions are made as soon as possible so that they can be produced early in January 2019.

Overseas transfer charge
A request is made for comments on the draft regulations by *December 7, 2018*.

Reporting of non-taxable death benefits
Further clarification is provided on this issue in advance of an update to the official guidance which will be featured in a future newsletter.

Tax relief in pension schemes: joint article from HMRC and TPR
This article addresses tax relief problems raised by pension schemes, specifically that some members are receiving tax relief twice and others are not getting the tax relief they're due.

Pension scheme members can obtain tax relief on their contributions in one of two ways

- Relief at source. Members pay contributions net of income tax, the scheme administrator claims the basic rate relief back from HMRC and pays this into the pension scheme on the member's behalf.
- Net pay arrangement. Here members get tax relief by paying contributions before tax is deducted, so relief is applied immediately.

Some member contributions paid using a net pay arrangement have been made after tax and national insurance have been deducted, so the member will not have received the right amount of tax relief. Similarly, in some relief at source arrangements member contributions are being paid before any deductions, but basic rate tax relief is also then being claimed from HMRC.

HMRC confirms that it will work with any schemes that think they have incorrectly applied the rules on giving tax relief. In addition, HMRC and TPR will work with schemes to ensure their administration systems process and monitor contributions correctly, and in line with TPR's codes of practice and guidance.

View the Newsletter.

Countdown Bulletin no. 39

On *November 26, 2018*, HMRC published the latest edition of its newsletter for formerly contracted out schemes. The main contents are summarised below.

Scheme Financial Reconciliation
Schemes currently in scope are invited to request their financial position as at October 7, 2018. A template email format for the request is provided.

Contributions Equivalent Premiums
Some pointers for payment of CEP bills.

Scheme cessation
The awaited technical advice on contracting-out legislation has now been received and the deadline of *December 31, 2018,* remains for scheme cessation queries. The aim is that all queries submitted by that date will receive a response by *March 31, 2019*.

Scheme Reconciliation Service
Due to a higher than forecast increase in SRS queries leading up to the *October 31, 2018,* deadline, HMRC is currently unable to sustain the agreed 3 month turnaround time for responses. However, responses should be provided by *March 31, 2019*.

View the Bulletin.

DWP publishes feasibility report and consultation on pensions dashboards

After considerable delay, the DWP published a feasibility report and consultation paper on pensions dashboards on December 3, 2018. The report sets out an industry-led system of multiple dashboards, allowing savers to access some key information on benefit entitlements from each of their pension schemes (including state provision) in a single place online. Consultation on the proposals runs until *January 28, 2019*.

The Government's role will be limited to

- Facilitating creation of the dashboard framework. In particular, the new single financial guidance body (SFGB) will convene and oversee an industry delivery group, which will be charged with implementing the plans.
- Legislating to compel pension schemes to provide their data for dashboards, when parliamentary time allows. State pension data will also be included.

The DWP seeks respondents' views on the scope of exemptions from compulsory participation, for example for SSASs.

The DWP proposes a phased approach under which a non-commercial dashboard hosted by the SFGB is established first, followed by commercial dashboards provided by the pensions industry. Underlying the dashboards, pension schemes will be required to provide their data to a single "pension finder service", the creation of which will be overseen by the industry delivery group. Users will authenticate themselves through a suitable identity service, and a governance register will ensure only appropriate parties can access the system. The infrastructure will be underpinned by "architectural principles" designed to ensure the industry adheres to its data protection obligations, including the individual's right to data portability and principles of accuracy, storage, access and security.

Although the Government committed to certain development funding for the dashboard project in the Autumn Budget, the DWP indicates that the full costs of the dashboard service should be funded "in a fair and equitable way", possibly through existing industry levies.

The Government has accepted that offering a dashboard without comprehensive coverage would be ineffective and has indicated that the 2019 Pensions Bill should include measures on compulsion on schemes to supply data to the bespoke "pension finder" search engine sitting behind the dashboard.

Subject to the outcome of its consultation, the DWP expects that some schemes (such as master trusts) will start to supply data to dashboards on a voluntary basis from 2019/20. The majority of schemes should be incorporated in the compulsory framework within three to four years after the first dashboards are introduced.

Comment

The consultation has been generally welcomed as a major step forward in dashboard provision, which is seen as an essential tool to help savers plan for retirement. As the dashboards start to appear, individuals' interest in their pension rights may well increase meaning that security of the online offering and accuracy of data will be crucial. Preparation for future provision of dashboard information should be a standing item on the trustee board agenda as soon as possible.

View the consultation.

Consultation launched on DB "superfund" proposals

On *December 7, 2018*, the DWP published its consultation paper on DB consolidation vehicles or "superfunds". The consultation period runs until *February 1, 2019*. TPR has also issued guidance for trustees and, separately, for employers considering transfers to the new arrangements.

The DWP consultation

The DWP's consultation seeks views on a new legislative framework for authorising and regulating defined benefit superfund consolidation schemes – "DB superfunds" – as described in its White Paper "Protecting defined benefit pension schemes", published in March 2018. It gives an indication of the Government's policy intentions and likely focus of the legislation.

The proposal is to consolidate DB occupational pension schemes into superfund entities, so that they benefit from improved funding, economies of scale and better governance, and thus will hopefully provide more security for members of DB pension schemes.

In the DWP's view, the advantages of superfund schemes are that they

- Protect savers through a capital buffer, which will provide greater security by reducing the risks associated with future employer insolvencies.
- Provide an alternative way for employers in certain circumstances to separate themselves from legacy pension arrangements by moving closed pension schemes into a superfund, freeing them to focus on the day-to-day running of their business.
- Improve the likelihood of members' benefits being paid in full.
- Enable access to a wider and potentially more innovative mix of investment opportunities.

The DWP proposes a "gateway" approach to enable it to assess which schemes enter a superfund and an authorisation regime to ensure an effective supervision structure. The intention is to define superfunds as DB occupational scheme vehicles with the express purpose of consolidating liabilities. The employer link would be severed and a capital buffer would be provided by external investment acting as a covenant. However, the consultation makes clear that it is not the intention for a DB superfund to provide the same level of security as a regulated insurer. Developing a regulatory regime to safeguard financial sustainability is likely to prove the biggest challenge. There are also plans for a mechanism to be put in place so that benefits are paid directly to members.

TPR's authorisation and supervision

The proposals are for DB superfunds to apply for TPR authorisation and to meet regulatory criteria similar to those in place for master trusts. For example, criteria will need to be met in relation to trustees being "fit and proper persons", and for the superfund to evidence that appropriate administration, governance and investment arrangements are in place.

As regards the DWP's "gateway" approach to assessment, TPR will look at the "gatekeepers" – that is, the trustees – to ensure that the correct actuarial, covenant and legal advice is taken and that a transfer to a superfund is in the members' best interests.

TPR states that it will assess any proposed transfer to a superfund on an individual case-by-case basis while the consultation on the authorisation and supervisory regime is ongoing.

Comment

The Government's view is that well-run superfunds have great potential to deliver more secure retirement incomes for workers while allowing employers to concentrate on running their businesses. However, the new regime will need proper regulation, and it is essential that robust authorisation and supervision controls are established.

Many in the pensions industry have welcomed the prospect of DB superfunds and have stated that they will provide a much needed new option for many schemes, especially those with weaker employer covenants.

However, some potential limitations of commercial DB consolidators have been noted, and it is essential to ensure that governance was tight enough to prevent employers regarding a superfund transfer as a cheap way for employers to sidestep their pension responsibilities. A cautionary note was also sounded in relation to the new regulatory regime, which needs to ensure prudent behaviour, but not be so stringent that it forced superfunds, in effect, to become insurance companies, which would make their existence pointless.

High Court dismisses claim for judicial review of Financial Ombudsman's decision upholding complaint against SIPP administrator

In *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Ltd* [2018], the High Court has dismissed a claim for judicial review of the final decision of from the Financial Ombudsman Service (FOS) relating to a complaint against Berkeley Burke SIPP Administration Ltd, a self-invested personal pension (SIPP) provider and administrator.

The Ombudsman found that the Berkeley Burke had not acted fairly and reasonably in its dealings with the complainant, a customer.

Berkeley Burke challenged the lawfulness of the Ombudsman's decision. However, the court found the Ombudsman had not erred in law and it therefore dismissed the SIPP provider's claim.

In entering into the investment and the Berkeley Burke SIPP, the customer had signed documents confirming (among other things) that

- Berkeley Burke was acting only to execute his instruction.
- Berkeley Burke had not advised on the investment within the SIPP and the responsibility for assessing its suitability of the investment lay with the customer and his professional advisers.
- The investment was high risk.

Berkeley Burke had conducted little or no investigation into the investments and its focus had been on whether the investment was "SIPPable" (that is, whether the investment would attract tax relief when placed into the SIPP, in line with HMRC guidance).

Comment

The decision means that SIPP providers can no longer avoid liability by accepting business on an execution-only basis and, in future, they will need to be more diligent in deciding on appropriate investments for their clients.

As a result of the ruling, SIPP members with potential complaints about the poor performance of their investments are likely to take their complaints to the FOS rather than the Pensions Ombudsman, as they will have a greater chance of success.

SIPP trustees will be reviewing not only new investments but all existing investments to ensure they do not fall foul of the FOS decision.

RPI/CPI: BT loses appeal that RPI had not become inappropriate for calculating pension increases

The Court of Appeal has agreed with a High Court decision and has ruled against British Telecommunications Plc (BT) on appeal on whether the Retail Prices Index had become "inappropriate" for the purpose of calculating annual increases to pensions in payment for certain members of the BT Pension Scheme.

The relevant scheme rule provided that the cost of living would be measured by RPI "or if this ceases to be published or becomes inappropriate", such other measure as BT, in consultation with the trustee, decided.

The Court of Appeal held that the question of whether RPI had become inappropriate was an objective state of affairs, which was inevitably fact-sensitive and a matter of evaluative judgment. In default of agreement by the employer and the trustees, the question had to be decided by the Court. There was no basis for concluding that the High Court judge's decision had been flawed.

Comment

Once again, the Courts have ruled that the ability of a scheme to swap from RPI to CPI as its inflation measure for benefit increases turns largely on its specific facts, and the drafting of the scheme's own rules.

Here, when considering past versions of the scheme rules, the Court of Appeal found that the "archaeology" of the scheme offered little assistance when interpreting its subsequent provisions. The Court considered Lord Hodge's judgment in Barnardo's, especially his comment that a pension scheme had "several distinctive characteristics … relevant to the court's selection of the appropriate interpretative tools". As Asplin LJ noted in the BT case, these included the fact that members of a pension scheme are not parties to the instrument which confers significant rights on them, and may have joined the scheme many years after it was initiated. In such circumstances, "background facts have a very limited role to play in the task of interpretation" of a pension scheme›s governing rules.

GMP equalisation: further judgment in Lloyds Bank case (High Court)

Of interest to schemes which were formerly contracted out on a final salary basis is the short supplemental judgment handed down by the High Court in the *Lloyds Bank* case. The further judgment clarifies a specific point raised by the parties when making submissions about the form of the judge›s order on the possible methods for equalising benefits for the effect of unequal guaranteed minimum pensions.

The second *Lloyds Bank* judgment below covers the calculation process for method D (actuarial equivalence), summarised below

- When doing an actuarial equivalence test, the unequalised male and unequalised female benefits are compared. There is no requirement to calculate the actuarial value of an equalised pension.
- The benefits are valued is decided by the scheme actuary. There is no requirement to use the 1 per cent above base rate interest rate which is used for other types of equalisation calculation.
- D is a two-stage calculation for members whose benefits are already in payment. The past must be equalised using one of methods A, B or C (and this is determined by the employer or negotiated by the parties) to work out back-payments. The actuarial valuation is only in respect of future payments.

The Court confirmed that there will be a further hearing on the question of transfers.

Taxpayer wins appeal against revocation of fixed protection on basis of mistake: Hymanson v HMRC [2018]

Fixed protection 2012 was introduced when the lifetime allowance was reduced from £1.8 million to £1.5 million with effect from the start of the 2012/13 tax year. It had to be claimed before April 6, 2012.

An individual who has fixed protection 2012 benefits from a protected lifetime allowance of the greater of

- £1.8 million.
- The standard lifetime allowance (£1.055 million in 2019/20).

However, an individual only retains the benefit of fixed protection 2012 after April 6, 2012 if he or she does not lose it in one of the ways specified in legislation, including accruing further benefits by way of continuing to make additional contributions.

In *Hymanson*, the member failed to appreciate that he was required to stop making contributions and continued making monthly payments under standing order. When HMRC discovered the continued payments, it revoked the member's fixed protection and levied a tax charge.

Allowing the taxpayer's appeal, the tribunal held that where an individual who had been granted a certificate of fixed protection was mistaken as to the tax consequences of continuing to make pension scheme payments – namely the loss of fixed protection – he would be granted the remedy of rescission of those payments. The tribunal then applied the equitable maxim to treat "that which ought to have been done as having been done" and proceeded on the basis that the additional payments should be ignored for the purposes of the fixed protection legislation.

The test on mistake was clarified in *Pitt v Holt* in 2013, in which HMRC lost on appeal to the Supreme Court. The Court clarified the test between the "effect" and the "consequences" of a transaction and found there are three key elements to the test

- The gravity of the mistake must be assessed by a close examination of the facts.
- Injustice of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an "intense focus on the facts of the particular case".
- The court must make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected, and form a judgment about the justice of the case.

In *Hymanson*, the member had mistakenly paid in £7,000 of extra contributions and had incurred a tax charge of £50,000, and this seems to have convinced the tribunal of the injustice of not permitting the him to treat the erroneous scheme payments as if they had never been made.

There is no indication that HMRC intends to appeal but we will report further if they do.

Comment

This case appears to be the first tribunal decision concerning a purported revocation of a transitional protection certificate, as most previous decisions have arisen from claims for late notification of a taxpayer's intention to rely on transitional protection. Further benefit accrual is also a trigger for the loss of several other forms of protection from the lifetime allowance charge, and individuals should take care to understand the implications of further pension saving.

In *Hymanson*, the tribunal seems to have reached their decision by considering the potential injustice of a situation in which the taxpayer was faced with an additional £50,000 tax liability on account of having made relatively small pension contributions.

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1 TNB & Partners in association with Norton Rose Fulbright Australia
2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
3 Alliances

Contacts

If you would like further information please contact:

London

Lesley Browning
Partner
Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com

Peter Ford
Partner
Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com

Lesley Harrold
Senior knowledge lawyer
Tel +44 20 7444 5271
lesley.harrold@nortonrosefulbright.com

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