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Essential pensions news

Updater

February 2019

Introduction

Essential pensions news covers the latest pensions developments each month.

A stronger Pensions Regulator – Government announces possible prison sentences for directors who recklessly mismanage pension schemes

The Department for Work and Pensions (DWP) has published the Government's response to its June 2018 consultation on plans to improve the powers of the Pensions Regulator (TPR). It is unlikely that any changes will be implemented before the Spring of 2020.

Press headlines have trumpeted the two new criminal offences

- The first is a new custodial sentence of up to seven years' imprisonment, or an unlimited fine. It will target individuals who "wilfully or recklessly" endanger members' pensions by such actions as chronic mismanagement of a business, allowing unsustainable deficits to build up or taking investment risks (or a combination of any of these).
- The second is an unlimited fine for a failure to comply with a contribution notice. A civil sanction of up to £1 million will also be introduced for this offence.

New notifiable events are to be introduced covering

- Sale of a material proportion of the business or assets of a scheme employer with funding responsibility for at least 20 per cent of the scheme's liabilities.
- Granting of security on a debt giving it priority over debt to the scheme.

Wrongful trading of the sponsoring employer is to be removed from the notifiable events framework.

The proposal for a *Declaration of Intent* has been retained in respect of the three following scenarios

- Sale of the controlling interest in a sponsoring employer.
- Sale of the business assets of a sponsoring employer.
- Granting of security on a debt to give it priority over debt to the scheme.

In relation to the proposal at the time *Heads of Terms* are agreed for the provision of advance warning of events which could have a significantly detrimental effect on a scheme, the consultation response recognises that the area requires further work. Identification of circumstances where early notification could be beneficial is needed and the DWP intends to work with industry to establish how best to make this clear.

On the subject of the *payment of dividends*, the consultation noted the intention to address the issue of dividend payments as part of the separate consultation by BEIS on corporate governance, and not to consider such payments as part of the notifiable events framework.

The response confirms that the DWP has no proposals to extend the framework to cover the payment of dividends. However, TPR will consider whether the level of dividend payment made by the sponsoring employer or its parent company is appropriate in relation to the scheme's funding when the triennial valuation is submitted or where a recovery plan has been agreed.

Comment

The consultation also proposed criminalising a failure to comply with the notifiable events framework but this has not been pursued. The consultation responses expressed concern that such a failure to comply could result in a criminal sanction. Criminal sanctions should be limited to only the very worst wilful or reckless behaviour, and questions remain in relation to how they are to be defined and enforced. Collecting evidence that passes the criminal burden of proof of "beyond reasonable doubt" is unfamiliar territory for TPR and will be fundamental to the effectiveness of the deterrent.

The DWP recognises that the definition of terms (including a re-working of material detriment) relating to each of the new notifiable events will be crucial, and it is difficult to comment in detail until the relevant draft regulations and revised codes are available for consultation.

The removal of the existing notifiable event of "wrongful trading of the sponsoring employer" is sensible, as a requirement relying on self-reporting is unlikely to be effective.

Questions of proportionality arise in relation to the proposed Declaration of Intent and in the consultation response we suggested it would be inappropriate to capture transactions involving employers where the scheme is fully funded or where a relatively low percentage of the business or assets is to be sold. If small asset disposals are not to be caught, it may be more relevant to require a Declaration of Intent only where all the business or assets of a sponsoring employer are to be sold. Again, the details on the proposed mandatory contents

of the Declaration in future regulations, and clear guidance in the revised Notifiable Events Code of Practice will be key. The consultation response states that the DWP recognises this and will work with TPR to ensure dovetailing of the Declaration of Intent contents with the new notifiable events framework.

The DWP's confirmation that it has no intention to extend the notifiable events framework to the payment of dividends is welcome. Many respondents to the DWP's consultation commented that responsible dividend policies play an important part in business growth and in the overall investment returns for the economy. Dividend payments should not be considered automatically to be detrimental to pension schemes.

It is unlikely that any of the DWP's proposed changes will be in force before the Spring of 2020.

The answers to many of the questions raised in the consultation remain outstanding and subject to future consultation, followed by the eventual production of revised Codes of Practice from TPR and draft regulations from the DWP. One such issue is where the money will go from increased fines on errant corporates, and the consultation response merely states that the Government is giving consideration to the treatment of civil penalty proceeds.

Generally, the new criminal sanctions have dominated the headlines in the pensions and financial press. The Government sees the introduction of the new criminal offences as "a major step forward in stamping out abuses ... and bringing fat-cat failures to book." Although this move has been welcomed by some, it was first announced as an intention in 2017 and is still some way from being implemented. It may be difficult to establish that someone behaved "wilfully or recklessly" and as a result endangered a pension scheme and members' benefits, particularly with the high level of proof required to impose a criminal sanction.

For more detail and commentary please see our February 2019 Stop Press.

Pensions Regulator: Brexit statement

On January 24, 2019, TPR issued a short statement about Brexit, aimed primarily at trustees of DB schemes.

Noting that UK pension schemes are largely domestic in nature, TPR does not expect Brexit to have a significant impact on the legislative framework applying to schemes or on trustees' ability to administer them effectively. However, the statement reminds trustees about several topics that have previously been raised by TPR or the DWP

- If they have not already done so, trustees should undertake "no-deal" contingency planning. TPR reminds trustees of the guidance in its 2018 annual funding statement, and states that further guidance Brexit-related risk management will be set out in TPR's 2019 funding statement, which is due to be published in early March 2019.

- Trustees should also familiarise themselves with the guidance issued by the DWP about the payment of benefits for EU citizens in the UK and UK nationals in the EU in a no-deal scenario.

- Schemes currently authorised and approved to accept cross-border contributions, and those considering applying for authorisation and approval, will need to consider the Brexit implications and how either a negotiated settlement or no-deal scenario may affect them and their members.

For further detail and commentary, see our January 2019 Brexit Stop Press.

Continuing on the Brexit theme, the DWP's Occupational and Personal Pension Schemes (Amendment etc.) (EU Exit) Regulations 2019 have now completed their journey through Parliament after an error resulting in some unintended consequences was discovered in the previous version towards the end of 2018.

The regulations import into UK law much of our DWP pensions law, including that governing TPR, the PPF and the FAS, by (for the most part) replacing references to the EU and EEA with references to the UK and relevant institutions. However, that simplistic blanket replacement exercise was seen not to work when it became apparent that post-Brexit, occupational pension schemes would not have been able to invest in any non-UK regulated market once all EU references were removed.

It seems unlikely that this will be the only unintended legal consequence of the hundreds of Brexit-related statutory instruments that are being churned out by Parliament, and ongoing vigilance will be required.

Comment

Brexit is now on the horizon, yet (at the time of writing) there is no more certainty. Scheme trustees should do what they can to be properly prepared and take any pre-emptive steps. Trustees should engage with the employer and ask how the business is preparing for Brexit, which will be particularly important if the scheme has a significant deficit requiring future employer contributions.

It is in the interests of businesses and trustees to work together on their Brexit strategy. Trustees should use this planning exercise and apply it to their understanding of the scheme covenant. For some businesses, Brexit will affect the amount of cash they generate, which could result in financial difficulties for the employer and lower deficit reduction contributions, where applicable. For others, such as manufacturing, input costs could rise, and transport cross border links could be affected.

The strength and resilience of the business could have repercussions for the scheme's investment strategy, and the level of risk should be reviewed by the trustees and the employer. Are there any short-term actions which could be taken to reduce risk? Interest rate, inflation and equity hedging are all possibilities, as is diversification of investment.

Some scenarios can be modelled for contingency planning purposes, and various market shocks, such as extreme fluctuations in commercial UK property prices, inflation spikes and interest rate rises could be considered.

It is clear that one way or another, Brexit will affect the economy and TPR has advised that trustees should "review actions and contingency plans in the context of a no deal". A range of outcomes should be examined and applied to both the employer's business and the scheme, and such integrated risk management can demonstrate that trustees are taking all action possible to protect members' benefits and meet future obligations.

TPR publishes review of support given to British Steel members and makes recommendations on member communications

TPR has published the report of its independent review of communications and support given to members of the British Steel Pension Scheme (BSPS).

The review was produced by Caroline Rookes, former CEO of the Money Advice Service, and was commissioned following concerns raised by the House of Commons Work and Pensions Committee about whether BSPS members were given sufficient information by the BSPS trustees to enable them to make informed decisions when during the scheme restructuring in 2017/18.

Under a regulated apportionment arrangement (RAA) agreed by the trustees, over 124,000 BSPS members were given the option of moving into a new pension scheme or the PPF. In the event, around 25,000 members did not make an active choice and defaulted into the PPF.

The review recommends that TPR and the DWP should consider whether there is scope for two possible legislative changes

- A simplification of the choices available to members in the event of a restructuring, either through allowing a partial default into a new scheme or requiring that a new scheme must provide better benefits than the PPF.

- Whether TPR should be able to consider a scheme's preparedness to handle member consultation in the event of an RAA and, if necessary, delay or stop the RAA.

The review also suggests that TPR and the DWP should consider "whether the duties for trustees of DB schemes should more explicitly cover a duty to communicate effectively with members". It makes several recommendations about steps TPR, the Financial Conduct Authority (FCA) and the new single financial guidance body (SFGB) could take to improve their communications strategies in future similar situations.

The review advocates that TPR, the FCA and the SFGB should review their website content about transfers-out and work together to develop guidance for members, specifically aimed at transfers out of DB schemes, explaining the risks and how members might seek help.

The report was generally welcomed and TPR, the FCA and the SFGB are to consider how to take forward its recommendations. It will be important for trustees and employers to keep these proposals in mind when reviewing member communication strategies.

Please see item below for commentary.

Read the review (41 pages).

Joint protocol published between TPR, FCA and TPAS

The FCA, TPR and the Pensions Advisory Service (TPAS) have published a joint protocol, which has been drawn up for the purpose of enabling early intervention by the three bodies to ensure members of DB pension schemes are adequately and fully informed about their options when considering transferring their benefits. The organisations will work alongside the PPF as necessary and will share information, to the extent permitted by law, to help identify potential issues that may arise and improve communication channels when working with pension schemes.

The protocol provides that TPR will share information with the FCA and TPAS from its regular market intelligence DB report and will let the FCA know if it requires any company-specific information about a company regulated by the FCA which appears in a report.

The protocol was published alongside the report of Caroline Rookes' independent review regarding communications and support given to members of the BSPS on the scheme's restructuring (see item above).

Comment

The BSPS member consultation was probably one of the largest exercises of its type ever undertaken, giving some 122,000 members the choice of staying in the original scheme and moving into the PPF, moving to a second BSPS or transferring out altogether. While 97,000 members completed and returned their forms, some 25,000 members failed to reply. In addition, 8,000 members requested a cash transfer and according to Rookes, it was this member cohort that was the most problematic for the trustees.

The BSPS office was "swamped" with transfer requests and that had not been foreseen. Rookes concluded that schemes in similar situations should learn lessons from this, get professional help if confronted with a large member communication exercise, and embrace social media and other digital communications channels to stem the flow of false information. She also said regulatory bodies should work together to ensure consistency of messaging and asked whether trustees or trade unions might be able to suggest a panel of advice firms for members to choose from without actually straying into advice themselves.

View the joint protocol.

TPR publishes new quick guide on measuring scheme data

TPR has published a quick guide for pension scheme trustees and managers about measuring scheme data. TPR expects data to be reviewed at least annually and warns that additional reviews may be needed on the occurrence of specific events, such as a change in scheme administrator or winding-up being triggered.

While the assessment of common data (that is, basic data used to identify scheme members) should be fairly straightforward, the guide highlights that scheme-specific (or conditional) data varies from scheme to scheme. In assessing this type of data, the guide recommends that trustees and managers should focus on data that is key to running their scheme and meeting their legal obligations.

The quick guide sets out advice for trustees and managers on

How to measure their data
According to TPR, the key issue for trustees and managers is whether data is present and accurate, such that they are confident their scheme administrator has put sufficient processes and controls in place to ensure the quality of new and historical data.

How to calculate their data score
The data score is the percentage of members in the scheme that are assessed as having fully present and accurate common or scheme-specific data. If issues arise in relation to a scheme's data score, TPR recommends trustees and managers should put in place an improvement plan.

DWP publishes consultation on defined contribution scheme "illiquid" investments and small scheme consolidation

On February 5, 2019, the DWP published a consultation paper entitled "Investment Innovation and Future Consolidation", which sets out proposals to encourage DC pension schemes to consider investing more widely. The suggested investment areas include start-up companies, housing and green energy.

The proposals include

- Requiring large DC schemes to document and publish their policy on investment and illiquid assets, and report annually on their approximate percentage allocations.
- Requiring smaller schemes (those with fewer than 1,000 members or less than £10 million in assets) to assess, every three years, whether they should consolidate into a larger scheme.
- Offering an additional method of assessment for compliance with the charge cap as a way of making it easier for trustees to consider investment in assets with performance fees.

The deadline for responses is April 1, 2019.

Comment
The first and third of the proposals above result from the Chancellor's announcements in the October 2018 Budget which focussed on encouraging DC fund investment in long-term "patient capital". The Government's view is that pension schemes, with their long-term investment outlook are ideal sources for investment in illiquid assets. Any change in investment policy would then be set out in the scheme's SIP investment disclosure (applicable from *October 1, 2019*) and the Implementation Statement (from *October 1, 2020*) detailing the extent to which the SIP has been followed (as reported in our September 2018 update). The Government has set out in the consultation paper a proposed alternative method for compliance with the charge cap where illiquid assets have charges based on variable performance fees and therefore may not fall within the 0.75 per cent maximum for default arrangements.

As an aside, the consultation seems to be the first time the DWP has publicly supported the regular consideration by smaller DC schemes of the merits of consolidation. While this has been welcomed by some, others have dismissed it as yet another “tick-box” requirement for smaller schemes which are more likely to be poorly governed. Real changes in poor governance and increased scale in DC schemes would require a mandatory regime.

HMRC launches online money purchase annual allowance calculator

HMRC has published an online calculator for individuals who have flexibly accessed their pension, and are therefore subject to the reduced money purchase annual allowance (MPAA) of £4,000, which has applied since the beginning of the 2017/18 tax year. The calculator will help determine when the MPAA applies, what their alternative annual allowance is and if they need to pay tax on their pension savings.

Access the MPAA calculator.

Comment

The MPAA calculator has been launched at a time when many who have accessed their DC pension funds under the pension freedoms are receiving an unpleasant surprise in the form of a tax demand. Many who access their pension pots from the earliest permitted age of 55 have done so expecting to continue working and making further contributions for years to come. However, accessing even £1 over the 25 per cent tax free cash means that the total annual pensions savings which can be made with tax relief drops to just £4,000.

HMRC publishes Pension Schemes Newsletter no. 106

On *January 30, 2019*, HMRC published the latest edition of its pension schemes newsletter. Key contents include

- The total value of flexible pensions processed between October 1 and December 31, 2018 was £30,242,426.
- Confirmation that the standard lifetime allowance will be raised from £1,033,000 to £1,055,000 for the 2019/20 tax year to reflect the rise in the Consumer Price Index.
- Correction of an online error in Newsletter no. 104 and confirmation that when reporting non-taxable death benefits online, scheme administrators should leave the starting date field blank.
- HMRC email addresses will be changing from @hmrc.gsi.gov.uk to @hmrc.gov.uk, although emails sent to the old HMRC address will be automatically redirected for the next few months.
- HMRC will provide more information and guidance relating to tax issues arising from the decision in the Lloyds case on GMP equalisation in the coming months.

- A reminder that the deadline for applying for Master Trust authorisation is *March 31, 2019*. HMRC notes that a master trust operating without authorisation is one of the grounds for it to be de-registered, although de-registration is not automatic. HMRC has discretionary powers to de-register pension schemes and would consider the impact on a case by case basis. Master trusts operating without authorisation may also be subject to penalties from the Pensions Regulator.

View the Newsletter.

HMRC publishes issues no. 41 and 42 of its Countdown Bulletin

On *January 21, 2019* and *February 11, 2019*, HMRC published the latest issues of its bulletin for schemes formerly contracted-out on a final salary basis.

The contents of the bulletins include

- A Scheme Financial Reconciliation update – in bulletin no. 39 HMRC confirmed which schemes were in scope for Financial Reconciliation and how schemes could request surplus or deficit information. The latest scan of scheme financials will provide the position as at December 13, 2018 and the update provides detail about the implications for schemes which do not request their financial position information. Bulletin 42 confirms that where schemes are in deficit following reconciliation, HMRC will send a letter in the week commencing *April 15, 2019*, requesting payment by *May 21, 2019*.

  Schemes which are in surplus will receive a letter confirming this in the week commencing *May 13, 2019*, with cheques for refunds being provided by *June 21, 2019*.

- Contributions Equivalent Premiums guidance after April 5, 2016 – HMRC is due to publish guidance on the ongoing administration of contracted-out pension rights soon. The bulletin provides detail on the criteria applying to CEPs after April 5, 2016.

- Further queries in relation to the Scheme Reconciliation Service.

View Countdown Bulletin No. 41. View Countdown Bulletin No. 42.

PPF compensation cap and levy ceiling set for 2019/20

The PPF compensation cap and levy ceiling for the 2019/20 financial year have been fixed by statutory instrument, laid before Parliament on *February 4, 2019*.

With effect from *April 1, 2019*, the compensation cap will rise from its current level of £39,006.18 to £40,020.34, to reflect the increase in the general level of earnings. The 90 per cent level of compensation that applies for members of schemes entering the PPF who are below their scheme's normal pension age will therefore equal £36,018.31. The levy ceiling for the financial year beginning on *April 1, 2019* is £1,058,176,617.

High Court allows appeal against Ombudsman decisions on pension increases: *Coats UK Pension Scheme Trustees Limited v Styles and Others* [2019]

The High Court has allowed an appeal against the decision of the Deputy Pensions Ombudsman (DPO) concerning the correct level of pension increases due to scheme members. The judge held that although an amendment to the scheme's rules to reduce the members' right to a five per cent annual increase was potentially invalid under section 67 of the Pensions Act 1995, the operation of section 68 of the Act, in conjunction with the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006, meant that the amendment was "valid and effective". In addition, a provision in a transfer agreement, put in place as part of a historic scheme merger, which operated to protect the members' pension rights, was not contravened by the amendment.

Comment

The overall result was that the Court allowed the Trustee's appeal against the decision of the DPO on the ground that the members were not entitled to a five per cent annual increase with effect from 2008, as that was contrary to the Scheme rules as modified by the 2008 deed, which was validly made under section 68 of the 1995 Act.

The case serves as a reminder of the possible alternative route of amending scheme rules where the specific requirements of section 68 are fulfilled.

The appeal was one of a small number of cases that proceed to the High Court from the PO based on a point of law. It is more usual for issues concerning the construction of pension scheme documents to be brought directly to the High Court by a scheme's trustees.

High Court allows appeal on interpretation of scheme's incapacity rule: *Universities Superannuation Scheme Ltd v Scragg and Others* [2019]

This was a successful appeal by the Trustee of the Universities Superannuation Scheme against a PO determination from March 23, 2018 under which the member, Mr Scragg, complained about his dismissal on grounds of incapacity and the Trustee's refusal to award him an ill-health benefit.

The relevant part of the Scheme's ill-health early retirement rule provided

15.1.2 Employer agrees incapacity

In the employer's opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment.

15.1.3 Trustee company agrees incapacity type

The trustee company determines that the member is suffering from total incapacity or partial incapacity.

The High Court found that the Trustee must come to its own decision concerning a member's entitlement to early retirement benefits on ill health grounds. The trustee was not bound by the employer's conclusion.

The Court ruled that the Trustee should determine for itself, based on medical opinion, whether the member was suffering from total or partial incapacity, and that entitled the Trustee to determine whether there was any incapacity at all.

Other issues raised by the member relating to the adequacy of the medical opinion were not considered as they had not been raised by him during the Scheme's internal dispute resolution process (IDRP).

Comment

Employees may be confused by the fact that an employer may be able to dismiss them from their employment on grounds of ill-health, yet they may be rejected for an ill-health or incapacity pension. This decision serves as a useful reminder that the test that the employer may apply under its employment contract with the member may not be the same as the test for incapacity under the scheme.

Here, the Judge gave the example of an employer dismissing a member for incapacity where they might be able to undertake other work of a similar scope and nature to the work they currently do, but where no such work was available with that employer. The member could be dismissed for ill-health but the employer would not be able to support the application for early retirement, if it correctly applied the test under the scheme rules.

The Court also highlighted that current legislation generally requires an IDRP decision on an issue before it can be taken before the PO. However, in practice the PO's role is evolving to encompass a less formal dispute resolution service before or during IDRP, in addition to its formal adjudication role, and the DWP is consulting on potential changes to legislation to clarify the PO's jurisdiction. In this case, the Court found that the member's newly cited issues in relation to the adequacy of the medical opinion had not been raised before the PO at all, and it was therefore inappropriate to consider them on an appeal against the original determination.

Pension developments in the pipeline

Below is a summary of pension changes expected in the near future in addition to those outlined above. Changes since the last update are italics.

Key dates in 2019

- March 29 – the UK withdraws from the EU, although it is (currently) unclear exactly what form Brexit will take.
- March 31 – Master Trust authorisation application deadline.
- March 31 – scheme return and PPF deadline (effectively 29 March as 31 March is a Sunday).
- March 31 – GMP reconciliation deadline for HMRC queries.
- April 6 – increases to auto-enrolment contributions.
- October 1 – new SIP requirements in force relating to environmental, social and governance (ESG) factors.
- DB consolidation and superfunds – *consultation closed February 1, 2019*.

- Pensions dashboard – the Government says "tremendous progress" is being made.
- Pensions Regulator's powers – DWP response *published February 11, 2019*.
- New Pensions Bill is due in Summer 2019 covering "multiple areas of pensions law", including DB consolidation and CDCs.
- EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. A further EMIR temporary exemption extension for pension scheme arrangements applied to August 16, 2018 and has now expired. In the absence of a further temporary exemption, ESMA expects national competence authorities not to prioritise their supervisory actions towards entities that are expected to be exempted again relatively shortly. *The UK Government has confirmed that, as far as possible, the regime set out in the EMIR legislation will not change after the UK has left the EU.*
- The DC scheme Chair's annual governance statement – this must be completed within seven months of the end of the scheme year. For example, schemes with a March 31, year end should have submitted the statement by October 31, 2018. TPR issued trustee guidance on the statement in November 2017 and the guidance was updated in June 2018 and further in September 2018.
- IORP II – the transposition date was January 12, 2019. Brexit should be achieved by March 29, 2019. The UK will then leave the EU from the effective date of withdrawal agreement or, failing that, two years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.
- New regulations – the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 came into force April 6, 2018 setting out new requirements to *improve transparency on DC benefit costs and charges to members*. They do not apply to DB schemes providing only DC AVCs. Members must be provided with access to information via a website with seven months of the scheme's year-end date – meaning the earliest date was November 6, 2018 for schemes with year-end April 6, 2018.
- VAT – HMRC's existing practice on VAT and pension schemes is to continue indefinitely. Employers should consider taking steps to preserve (or enhance) their pensions-related VAT recovery.
- Auto-enrolment – cyclical re-enrolment now applies within a six-month window related to the employer's staging date. e.g. employers with a July 1, 2015 staging date must complete the cyclical re-enrolment process between April 1, 2018 and September 30, 2018. Total minimum contributions were increased to five per cent (of which minimum employer contribution of two per cent) from April 6, 2018. Total minimum contributions will increase to eight per cent (of which minimum employer contribution of three per cent) from April 6, 2019.

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