NORTON ROSE FULBRIGHT

Essential UK Pensions News

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Introduction

Essential UK Pensions News covers the latest pensions developments each month.

Pension Schemes Bill 2019-20 reintroduced to House of Lords following Election

The Pension Schemes Bill 2019-20 has been republished and it received its first reading in the House of Lords on January 7, 2020. Its second reading is scheduled for January 28, 2020. The revised Bill includes the same measures as those contained in the bill announced in the Queen's Speech in October 2019, before Parliament was dissolved ahead of the general election. For a summary of these measures, please our see our October 2019 newsletter.

The Bill is in substantially the same form as the October 2019 version, although it includes some changes. Most of these appear to be minor drafting amendments, but some more substantial revisions include changes to clause 103:

- the drafting of the provisions concerning contribution notices issued under the new employer resources test. For the purposes of determining the estimated section 75 debt for this test, "relevant time" is now defined as the time immediately before the first of the acts (or failures to act) occurred, where there has been a series of acts or failures. In all other cases it will be the time immediately before the act occurred, or failure to act first occurred. The previous version of the Bill allowed the Regulator to determine the relevant time where there had been a continuing failure
- the drafting of the conditions that must be met for the availability of the statutory defence to a contribution notice issued by reference to the employer resources test has also been amended. Condition C now states that it must have been reasonable for the individual to conclude that the act or failure would not bring about a reduction in the value of the employer's resources "*that would be a material reduction relative to the estimated section 75 debt*." The previous version of the Bill did not refer to materiality.

Minor changes have also been made to the drafting of provisions in the collective money purchase schemes and pensions dashboard sections of the Bill relating to the lawful grounds for processing personal data.

Comment

Now that there is a Governmental majority in Parliament, it seems there is nothing to stop the Bill becoming law, although detailed regulations are awaited which will be subject to the full consultation process.

The new criminal offences of avoiding an employer debt and of engaging in conduct risking accrued scheme benefits remain in the resurrected Bill, and possible jail terms of up to seven years will apply to those convicted of these offences. Together with the criminal offence of failing to comply with a contribution notice (which may attract an unlimited fine), they constitute a new package of fortified weapons in the Regulator's armoury. The Bill is also unchanged in that these enhanced Regulatory powers may apply to "any person" regardless of whether the person has a connection to, or association with, the scheme or its employer.

The previously touted authorisation and supervision provisions for DB consolidator arrangements is still absent, as are the necessary amendments to ensure GMP conversion legislation works as intended.

Budget Day announced for March 11, 2020, along with postponed consultation on proposed RPI changes

On January 7, 2020, the Chancellor Sajid Javid confirmed that the 2020 Budget will be held on Wednesday March 11, 2020. Following the cancellation of the 2019 Budget, there should be nothing to stop it going ahead this time.

Of interest from a pensions perspective is the expected announcement of the Government's plans for dealing with the tapered annual allowance for senior NHS clinicians, along with any knock-on effect this may have for further pensions tax reform.

In addition, the joint consultation between the Government and the UK Statistics Authority on proposed changes to the RPI, which was originally scheduled to be launched this month, will now be launched at the Budget and will remain open for responses for a period of six weeks, closing on April 22, 2020. The proposals focus on whether RPI and CPIH should be merged and, if so, at what point between 2025 and 2030.

In his letter to the House of Lords' Economics Affairs Committee Chairman Lord Forsyth, the Chancellor also confirmed that both the Government and UKSA would respond to the consultation before the parliamentary Summer recess.

HM Treasury is accepting representations on Budget considerations as part of the policy-making process until midnight on February 7, 2020.

Bauer judgment: ECJ decides that any reduction in benefits on employer insolvency must not be "manifestly disproportionate"

On December 19, 2019, the ECJ judgment in the *Bauer* case was published, in which the Court disagreed with the opinion of the Advocate General. The case involved a complaint about the German equivalent of the PPF and examined the level of pension benefits which remained unpaid in the form of compensation following the employer's insolvency. Following publication of the AG's opinion, there was a concern that the PPF and other Member States' equivalent bodies would be compelled to increase considerably their levels of compensation for accrued pension benefits of employees whose schemes entered the lifeboat fund. In the UK, there was a concern that if the ECJ's judgment followed the AG's opinion, it could have meant that the PPF's 10 percent reduction in pension benefits for those below normal pension age was not compatible with EU law, and 100 percent compensation could then become the default level.

However, the ECJ ruled that in transposing EU requirements into domestic law, Member States have "*considerable latitude*" in both deciding the means and the level of protection for accrued pension benefits and that EU law "*cannot be interpreted as requiring a full guarantee of the rights in question*". In the *Hampshire case*, the ECJ had previously ruled that an individual must receive no less than 50 percent of their accrued rights following PPF entry of the employer's scheme, and this judgment is still being implemented by the PPF.

In *Bauer*, in the ECJ's view, reduced pension benefits on the employer's insolvency would be seen as mainfestly disproportionate where the employee would have to live below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned. The UK threshold is currently in the region of £11,000 per annum.

Comment

Although the ECJ's judgment has been generally welcomed, the administrative headache for the PPF may not have been entirely avoided. In order to ensure that PPF compensation meets the at-risk-of-poverty test, it is possible that information will be needed from some individuals about other sources of income. However, in many cases, the full State pension entitlement of just over £9,110 from April 2020 will make up a substantial part of the new threshold requirement.

Nevertheless, the ECJ decision has provided substantial relief to the PPF, which could otherwise have been obliged to provide substantially higher member compensation, potentially retrospectively, with knock-on increases in the PPF levy paid by schemes.

In relation to the ECJ judgment, the PPF has stated that:

"*We consider that the implementation methodology we announced following the ECJ's judgment in Hampshire, which will make sure that all our members receive at least 50 percent of the value of their accrued benefits, meets this* [meaning the Bauer judgment] *requirement.*

There are other details of the judgment that we'll need to work through with the Department for Work and Pensions. In the meantime, we'll continue to make payments in line with the existing levels, and to assess and increase payment to those members affected by the Hampshire ruling."

Trustees and employers should take advice on the possible impact for their scheme of the ECJ's decision. Possible levy reduction measures continue to play an important part in benefit funding strategies. Schemes which have not already done so should consider putting in place contingent assets or funding guarantees well ahead of the March 2020 deadline. The PPF provides indicative levy estimates on request, which could be of assistance to schemes considering such actions.

PPF consults on changes to insolvency risk mechanism from 2021/22 and launches new D&B portal

The Pension Protection Fund is consulting on a revised system for calculating the likelihood of employer insolvency as part of its new partnership with Dun & Bradstreet (D&B), which will provide the revised methodology. The first levy invoices to be calculated with D&B will be issued in Autumn 2021, based on scores from April 2020.

The new methodology is intended to reflect the change in provider to D&B but the PPF is of the view that the current model works well and only necessary changes have been made.

The consultation document states that "*in terms of levy impact… a third of schemes see a similar amount of levy with almost a half of schemes seeing a lower levy*", although one in five schemes are projected to see an increase. This includes ultimate parents of groups, independent employers with over £30 million turnover and the largest subsidiary companies (with £50 million turnover and £500 million in assets).

Further consultations have also been confirmed and will cover other aspects of the assessment of insolvency risk, including whether the current grouping of scheme employers into ten bands and the associated levy rates remain fit for purpose. The PPF will also review how it assesses the funding position of schemes, including the asset information used, and the stresses it applies, to a scheme's assets and liabilities.

The consultation closes on February 11, 2020. The first levy invoices to be calculated with D&B insolvency scores will be issued in Autumn 2021, based on scores from April 2020.

The start of the consultation also coincides with the launch by the PPF and D&B of a newly designed digital portal, in beta, which allows levy payers to view insolvency risk scores calculated by D&B. Schemes which previously had access to the Experian portal should now have received a registration email for access to the D&B portal. The PPF strongly recommends that schemes review their scores on the new portal and check that the information held by D&B is accurate, so that any concerns can be raised before the start of the new levy year.

Comment

It is likely that quite a number of employers will see a change in their Levy Band from April 2020. Employers are urged to check their online D&B scores without delay, so that any inaccuracies can be addressed as soon as possible.

FCA policy statement confirms extension of IGC remit

On December 17, 2019, the Financial Conduct Authority published a policy statement in which it confirms its decision to extend the remit of independent governance committees (IGCs) as proposed in its April 2019 consultation paper. The statement outlines the FCA's final rules and guidance, which come into force on April 6, 2020, and broadly reflect those consulted on, with some amendments to the detail to reflect feedback.

In summary, this means that the FCA is introducing two new duties for IGCs:

- to report on their firm's policies on environmental, social and governance (ESG) issues, consumer concerns and stewardship, for the products that IGCs oversee
- to oversee the value for money of investment pathway solutions for pension drawdown.

The statement also confirms related guidance for providers of pension products and providers of investment-based life insurance products on how firms should think about ESG risks and consumer concerns when making investment decisions on behalf of consumers.

The FCA sets out next steps for firms, which include ensuring that they have in place, by April 6, 2020, a Governance Advisory Arrangement or IGC and the FCA's guidance is intended to help firms decide which is the more appropriate. Firms with existing IGCs will need to decide whether the IGC needs more resources and expertise to fulfil its extended duties. IGCs (and GAAs) will need to assess the proposed design of pathway solutions, and firms will need to take account of their concerns, before August 1, 2020 when rules on investment pathways for non-advised consumers entering drawdown come into force.

Supreme Court allows appeal by part-time judges on time limit for bringing part-time pensions claim

The Supreme Court has allowed an appeal in *Miller and others v Ministry of Justice* [2019] by four fee-paid, part-time judges against a decision that their claims for less favourable treatment in relation to pensions under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 were out of time.

The time limit for such claims is within three months of the less favourable treatment or detriment. The appellants' claims were each lodged within three months of retirement, but more than three months after the end of a part-time appointment. At first instance, the employment judge held that the three-month period started at the end of a period of part-time employment and therefore their claims were out of time.

The Supreme Court held that a part-time judge may properly claim both during their period of service (that their terms of office were less favourable than those for full-time judges) and at the point of retirement (that the failure to make a pension available at that point amounted to less favourable treatment). The former did not exclude the latter.

Pensions issues in the pipeline

New or changed items are in *italics*.

January 31, 2020 – the UK is due to withdraw from the EU.

October 1, 2019 – new SIP requirements came into force relating to environmental, social and governance (ESG) factors.

GMP Equalisation – GMPEWG conversion guidance has now been published although guidance from HMRC (promised "in December" is still awaited).

Revised Funding Regime – *consultation on a revised Code of Practice was expected "in the summer" (of 2019) with technical provisions expected to remain broadly as they are, and with the main change being the addition of a secondary long-term funding target. However, now the UK General Election is over, the Pension Schemes Bill was reintroduced to the House of Lords on January 7, 2020, essentially in the same form as previously. The DWP and TPR are due to produce documentation for consultation on the new DB funding regime.*

New Pension Schemes Bill – *in the latest political drama, the Conservatives were returned to Government with a majority of 80. The new Pension Schemes Bill includes provisions covering the Pensions Dashboard, the Regulator's powers, and the revised Funding Regime, and its passage through Parliament will now proceed, with the second reading due on* January 28, 2020.

October 1, 2020 – new disclosure obligations apply for trustees in relation to scheme's Statement of Investment Principles under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

October 1, 2021 – new requirements apply for trustees to publish information on a publicly available, free website relating to voting and capital structure of investment companies under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

PPF – Bauer judgment – *the ECJ judgment in Bauer was published on December 19, 2019. The Court disagreed with the AG's opinion. It decided that any reduction in benefits on employer insolvency must not be "manifestly disproportionate" and that EU law "cannot be interpreted as requiring a full guarantee of the rights in question". This means that Member States have "considerable latitude" and the PPF can continue legitimately to reduce by 10 percent the benefits of those below retirement age. However, PPF compensation must not fall below the at-risk-of-poverty threshold. Even if the impact makes a case for increasing the levy, there is little scope to do so for 2020-21, and the PPF's approach seems sensible.*

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