Pensions Radar

Pensions Radar is a quarterly listing of expected future changes in UK law affecting work-based pension schemes. Please speak to your usual Travers Smith contact if you would like to know more about any topics.

**Automatic re-enrolment**

Every three years, an employer must carry out an exercise to re-enrol, into an automatic enrolment scheme, eligible jobholders who opted out after they were automatically enrolled. This duty first arises three years from the employer’s staging date, when automatic enrolment was first required, and there is a six month window around that anniversary during which the exercise must be carried out. For the very largest employers, which had a staging date of 1 October 2012, the process therefore began from 1 July 2015. Other employers become subject to the requirement later. See our briefing note Automatic re-enrolment and WHIP Issue 57 for details.

**Chair’s annual DC governance statement**

Scheme annual reports must now include a governance statement, signed by the chair, with specified content. There is a mandatory fine for failing to include this statement. See our briefing note DC charges and governance for details.

**Securities Financing Transactions (SFT) Regulation**

This EU Regulation, which includes obligations in connection with SFTs regarding record-keeping that were already in force, imposes requirements around collateral reuse and, later, reporting. Trustees who are party to arrangements including receipt and reuse of collateral (for example, in connection with OTC derivatives transactions) may be required to issue prescribed risk warnings to their counterparties. See WHIP Issue 57 for details. Effect of Brexit: see note 1 on page 6.

**European Markets Infrastructure Regulation (EMIR): margining of uncleared OTC derivatives transactions**

Since 13 July 2016 and from early 2019

Parties to uncleared OTC derivatives transactions are required to exchange variation margin (cash or non-cash collateral). While most pension schemes that enter into OTC derivatives transactions already use collateral as part of prudent

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risk-management, the EMIR margin requirements may necessitate changes to processes (and so require the input of investment managers and custodians) as well as amendments to legal documentation. Certain foreign exchange and currency OTC derivatives transactions, which previously may have been uncollateralised, are now in-scope for these requirements. See our briefing note EMIR: Are you ready for margining for details.

| DC scheme charges | 2017 |
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The government will review the level of the DC charges cap and consider whether transaction costs should be covered by the cap. For more details, see our briefing note DC charges and governance.

| End of automatic enrolment DB transitional period | 30 September 2017 |
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The transitional period which has allowed deferral of automatic enrolment for jobholders eligible to join qualifying DB schemes will end.

| Early exit charges | 1 October 2017 |
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Regulations under the Pension Schemes Act 2017 will cap charges applicable when a member accesses his or her occupational pension scheme DC benefits early and prohibit such charges altogether under new contracts. See WHiP Issue 58 and 65 for details.

| Deferred debt arrangement | 1 October 2017 |
---|---|
A new option for deferring an employer debt may apply. The government proposes to allow employers who have an employment-cessation event under a multi-employer scheme to defer, subject to several conditions, paying their section 75 debt and instead continue to be treated as if they were still a scheme employer for funding and other purposes. See WHiP Issue 64 for details.

| VAT treatment of services to pension schemes | 31 December 2017 (with a further extension possible) |
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Recent European cases (PPG and ATG) concern the recovery of input VAT relating to the management and administration of pension funds. This has caused HMRC to revise its policy on the treatment of VAT on pension scheme expenses and fees, and to withdraw VAT Notice 700/17. HMRC has published revised guidance in various Briefs but is allowing a transitional period, most recently extended up to 31 December 2017, during which former practices are permitted to continue. Further HMRC guidance including options for employers is awaited. The effect of Brexit remains to be seen. See WHiP Issues 47, 49, 51, 55 and 60 for details.

| Automatic enrolment review | End of 2017 |
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The government is reviewing the automatic enrolment regime and may propose changes. See WHiP Issue 62 for details.

| Pension protection levy deadline | 30 March 2018 |
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The first deadline for submitting certificates and documents to the Pension Protection Fund for reducing a scheme’s 2018/19 pension protection levy will be 30 March 2018. This includes the certification of contingent assets, deficit reduction contributions and asset-backed contribution arrangements. The PPF has been reviewing its levy rules and material changes are expected, which may require guarantees in favour of pension scheme trustees to be amended if they are to continue to reduce the PPF levy payable: see WHiP Issue 64 for details.

| End of first automatic enrolment DC transitional period | 5 April 2018 |
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The minimum automatic enrolment DC contribution rates will increase when this first transitional period ends.
Expiry of statutory power to remove protected rights rules

The statutory power facilitating the amendment of scheme rules to remove protected rights provisions will expire.

Lifetime allowance to be inflation-linked

The lifetime allowance will start to be increased in line with increases in the consumer prices index. See WHiP Issue 51 for details.

DC bulk transfer rules

The government has consulted on how to improve the legislation on bulk transfers without consent as it applies to DC schemes, in order to assist consolidation. See WHiP Issue 62 for details.

Shared parental leave for grandparents

The government intends to extend rights to shared parental leave and pay to working grandparents.

EU pension portability directive

This directive requires EU member states to introduce by this date national laws on eligibility, vesting, preservation and transfer rights when an individual leaves employment and moves to another member state, by this date. See WHiP Issue 46 for details. Effect of Brexit: see note 2 on page 6.

Data protection reform

The EU’s new General Data Protection Regulation is more onerous than the existing legislation, with much higher penalties for breaches. See our briefing note here for details. Effect of Brexit: see note 1 on page 6.

European Markets Infrastructure Regulation (EMIR): mandatory clearing of OTC derivatives transactions

The exemption for IORPs and other pension scheme arrangements from the mandatory central clearing requirements of EMIR currently expires on 16 August 2018. The exemption applies to certain OTC derivatives transactions used to reduce investment risks and liabilities. As part of a broader review of EMIR, it is proposed that the exemption be extended for 3 years from the date on which the proposed amendment to EMIR comes into effect (which is expected to be late 2018 at the earliest). The FCA continues to encourage all market participants, including pension schemes, to prepare for mandatory central clearing as early as practicable. See our briefing note EMIR reporting: are you ready? and WHIP Issue 62 for details. Effect of Brexit: see note 1 on page 6.

Master trust authorisation regime

The Pension Schemes Act 2017 includes provisions for the authorisation and regulation of master trusts. Trustees of existing master trusts have six months from when the authorisation provisions are commenced to apply for authorisation or to decide to wind up the scheme. However, the Act already imposes some notification and discontinuance funding obligations. See WHiP Issue 64 for details.

Reconciliation of contracting-out records

HMRC will no longer accept reconciliation queries after October 2018.

State pension ages raised

Women’s state pension age will be 65 by November 2018 and state pension age for men and women will thereafter start to increase, currently up to age 68 by 2018 to 2046 or perhaps 2039 (with implications already for schemes with
The increase from 66 to 67 has been brought forward by eight years, to take place between 2026 and 2028. The government proposes that the increase from 67 to 68 now be made between 2037 and 2039.

See our briefing note Bridging pensions – state pension age issues, on the issues that rising state pension ages can cause for schemes that attempt to integrate with the state pension.

IORP II directive

The new EU IORP directive replaces the existing one and must be implemented by 13 January 2019. Whilst it contains no new funding requirements, and relaxes the funding requirements for cross-border schemes, it does include provisions on matters such as investment, scheme governance and disclosure of information that will require new UK legislation. See WHIP Issues 45, 59 and 62 for details. Effect of Brexit: see note 2 on page 6.

Brexit

The UK’s notice under Article 50 of the Treaty on European Union started a two year period for the UK and EU to agree exit terms and their post-Brexit relationship, before the UK leaves the EU. The European Union (Withdrawal) Bill has been published. See our briefing note Leaving the EU: the legal implications for an outline of the potential impact in various areas.

End of second automatic enrolment DC transitional period

The second transitional period for phasing in automatic enrolment DC contribution rates will end: full rates will then apply.

Expiry of statutory power to amend contracted-out DB scheme rules

The unilateral employer power to amend formerly contracted-out scheme rules to reduce future benefit accrual and/or increase member contributions will expire. See our briefing note State pension reform and the end of contracting-out for details.

Normal minimum pension age to be raised to 57

The government intends to raise normal minimum pension age from 55 to 57 and thereafter to maintain a ten year gap with state pension age.

The following are expected developments for which there is no announced date:

Consultation on the future of DB pensions

The government has consulted on changes to the legislative and regulatory regimes that apply to DB pension schemes. A white paper with the government’s proposals is expected "later this year". There is no announced timetable for any resulting changes.

GMPs and sex discrimination

The government previously stated its intention to legislate further in this area, to remove the need for a claimant to point to a comparator of the other sex in order to establish unlawful discrimination. Such a change would be expected to increase the pressure on trustees to equalise benefits accrued between 17 May 1990 (the Barber v GRE judgment) and 5 April 1997 (when GMPs stopped accruing). Implementation has been delayed, pending consideration of whether a combined value-equalisation and GMP-conversion process can be used to eliminate inequalities. The government has consulted on such a process but the implementation timescale is unclear. The Lloyds Banking Group case (see below) is also relevant. For more details, see our Equalisation of benefits that include GMPs briefing note and WHiP Issues 32, 38, 61 and 63.
Survivors' pensions for same sex spouses, civil partners and widowers

The Supreme Court’s decision in Walker v Innospec Limited (see WHiP Issue 65) requires pensions for surviving same sex spouses and civil partners to be provided on the same basis as for opposite sex spouses. It also raises difficult questions, not considered by the Supreme Court, about survivors’ GMPs and benefits for widowers in respect of pre-April 1988 service. The government is reviewing the position.

Combating pension scams

The government has consulted on proposals to tackle pension scams, including limiting the right to a statutory cash equivalent transfer value, banning pensions cold calling and making it harder to set up fraudulent schemes. Its response is awaited. See WHIP Issue 61 for details.

The following pending cases may result in judgments that affect schemes other than just those involved:

Employer duties

The Court of Appeal will shortly decide whether or not the BBC acted in breach of its implied duties to Mr Bradbury and other employees when offering pay rises on the basis that, if accepted, only up to a 1% increase would be pensionable. See WHiP Issue 52 for details.

Aspects of the High Court decisions in the IBM cases on the employer duty of good faith have been appealed to the Court of Appeal. The decisions concerned employees’ reasonable expectations and non-pensionable pay increases, scheme closure and curtailment of a favourable early retirement window. See WHiP Issues 46 and 51 for details.

GMPs and sex discrimination

Lloyds Banking Group and the trustees of three group schemes will ask the High Court to consider the trustees’ duties in respect of equal pension claims by female members. They complain that their pensions are smaller than comparable men’s, with the discrepancies due to unequal GMPs. See WHiP Issue 65 for details.

Retrospective equalisation of pension ages

In Safeway v Newton, the Court of Appeal will consider the High Court’s decision (see WHiP Issue 57) to declare ineffective an amendment that purported to equalise pension ages at 65 retrospectively.

Discrimination against part-time workers

In O’Brien v Ministry of Justice, the European Court will decide on the retrospective effect or otherwise of the European law requirement introduced in 2000 to provide pro rata pensions for part-time workers.

Switching from RPI to CPI

The Supreme Court has granted permission to appeal in the Barnardo’s case. In that case, the Court of Appeal held that a DB scheme’s definition of "Retail Prices Index" (RPI), which includes "any replacement adopted by the Trustees without prejudicing Approval", does not permit the trustees to switch to the Consumer Prices Index (CPI) while RPI remains an officially published index. (See WHiP Issue 61 for more detail.)

The Court of Appeal also (but without setting a binding precedent because it did not need to be decided) confirmed the decisions in Danks v QinetiQ and Arcadia (see WHiP Issues 33 and 48 respectively). In those cases, the High Court held that, where under scheme rules the trustees have a choice of index, until that choice is made it is not possible to say that a member has a subsisting right to an increase based on any particular index. Accordingly, section 67 of the Pensions Act 1995 – which restricts amendments that affect or could affect subsisting rights - would not prohibit the switch.

The BA case

The High Court’s decision on the lawfulness of steps taken by the trustees of one of British Airways’ pension schemes to exercise their unilateral amendment power to allow them to grant discretionary pension increases above the CPI annual increase (following an automatic switch from RPI) and the use of that power
to grant such increases is expected to be appealed to the Court of Appeal. See WHIP Issue 65 for details.

VAT cases

There is a pending case involving the United Biscuits pension scheme concerning VAT paid on investment management fees and EU rules on VAT exemptions. The hearing is currently listed for October 2017. An appeal to the First-tier Tribunal in the Wheels (Ford schemes’ common investment fund) case (see WHIP Issue 38) has been stayed pending the outcome of that case.

Effect of Brexit Note 1: EU regulations (as distinct from directives) apply in member states without the need for domestic implementing legislation. Under the European Union (Withdrawal) Bill, they will continue to apply in the UK until domestic law changes to give effect to “Brexit”.

Effect of Brexit Note 2: Strictly speaking, obligations on the UK to implement EU directives by applicable deadlines that pre-date the UK leaving the EU should be complied with. It remains to be seen whether this will occur in practice. Some Brexit models would require the UK to continue to implement many directive requirements.

Pensions Radar is not a substitute for proper legal advice. If you wish to discuss any topics, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Susie Daykin, Daniel Gerring, David James, Dan Naylor, Paul Stannard and Philip Stear.

Please see our website for briefing notes and issues of our regular newsletter, “What’s Happening in Pensions”.

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