

What's happening in Pensions



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Automatic Enrolment

Ban on deducting consultancy charges under automatic enrolment schemes

The Government has laid regulations before Parliament to prohibit members' DC funds from being reduced in order to pay consultancy charges in schemes used for automatic enrolment. These are consultants' charges for helping employers to set up a pension scheme, which the employer recovers from members' contributions or DC funds. The prohibition will apply to personal pensions and DC occupational pension schemes.

A scheme would be disqualified as an automatic enrolment scheme if it includes any "provision that allows for -

- (i) *any amount to be deducted from any payments made to the scheme by or on behalf of or in respect of the jobholder;*
- (ii) *any amount to be deducted from any income or capital gain arising from the investment of such payments; or*
- (iii) *the value of the jobholder's rights under the scheme to be reduced by any amount,*

where the amount is to be paid to a third party under an agreement between the employer and the third party."

A "third party" is anyone other than the jobholder and the trustee or personal pension provider – normally a consultant.

There is a limited exception for schemes where there was a legally enforceable agreement in place between the employer and the third party before 10 May 2013 (when this proposal was first announced) under which the employer is bound to make such payments.

The ban will not immediately apply to other "qualifying schemes" used to satisfy the employer duties for existing members or where employees are "contractually enrolled" (ie, enrolled when not required to be or before the automatic enrolment duty applies.

Ministerial statement:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130701/wmstext/130701m0001.htm#13070130000011>

Draft regulations:

<http://www.legislation.gov.uk/ukdsi/2013/9780111100530/contents>

There will, however, be a consultation on using a proposed power in the Pensions Bill (see **WHIP Issue 39**) to extend the ban to apply in these cases too.

The regulations are expected to be debated in Parliament in October and to come into force in November. Please ask us for advice if you think you may be affected.

Exceptions to the automatic enrolment duty

The Government has issued a briefing paper on the provision of the Pensions Bill that would give it power to exclude groups of individuals from the automatic enrolment requirement (see **WHIP Issue 39**).

Suggested exclusions (including members with enhanced or fixed protection against the lifetime allowance charge and those who have handed in their notice) will be tested against four core policy principles:

- *"Is pension saving likely to put the individuals at financial or legal risk?"*
- *Are the individuals unlikely to benefit from pension saving?*
- *Are employers able to identify the individuals with minimal burden?*
- *Is the employer able to arrange membership of a scheme without unreasonable financial or legal risk?"*

A consultation on draft proposals will be issued in the autumn.

Removing NEST restrictions

The Government has decided to remove:

- the annual NEST contribution limit (currently £4,500), from April 2017;
- the restrictions on individual transfers in and out of NEST, from the same time that the automatic transfer regime is introduced for small DC pots, probably in 2014 or 2015 (see **WHIP Issue 39**); and
- the prohibition of bulk transfers to NEST, from April 2017.

Timeline planner

The Pensions Regulator has published a timeline planner, aimed at employers with between 50 and 250 employees, showing tasks to be completed for implementing automatic enrolment from their particular staging date and when they ought to be started.

EU IORP Directive review

The Government has welcomed an announcement by EU Commissioner for internal markets, Michel Barnier, that he is postponing the scheme funding aspects of the proposed new IORP directive (ie, the "holistic balance sheet" approach to capital requirements for IORPs such as UK DB occupational pension schemes). The draft IORP directive to be introduced in the autumn will now focus on governance, transparency and reporting requirements.

Lifetime allowance: individual protection

As announced in the December 2012 Autumn Statement (see **WHIP Issue 37**), fixed protection 2014 and individual protection will be available to individuals to mitigate against the effects of the reduction of the lifetime allowance (LTA) from £1.5 million to £1.25 million on 6 April 2014. The Government has issued a consultation on the proposed individual protection regime, including draft legislation. This also includes some more details of how fixed protection 2014 will work. The consultation closes on 2 September 2013.

Fixed protection 2014 will operate in a very similar way to the existing fixed protection regime: individuals will be able to retain an LTA of £1.5 million provided they opt out of future pension saving. Individual protection will enable individuals to elect for a personalised LTA, equal to the value of pension rights they have already accrued as at 5 April 2014, up to a maximum of £1.5 million. Under individual protection, an individual will not have to opt out of future pension saving, but benefits in excess of the member's personal LTA will be subject to the LTA charge.

Please see the table on the next page for more detail.

Briefing paper:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209935/pensions-bill-automatic-enrolment-powers-general-exceptions.pdf

Ministerial statement:

http://www.parliament.uk/documents/commons-vote-office/July_2013/9-July/10-DWP-Pensions.pdf

Press release:

<https://www.gov.uk/government/news/government-publishes-supporting-automatic-enrolment-paper>

Timeline planner:

<http://www.thepensionsregulator.gov.uk/employers/planning-for-automatic-enrolment.aspx>

European Commission Memo:

http://europa.eu/rapid/press-release_MEMO-13-454_en.htm

Government press release:

<https://www.gov.uk/government/news/uk-welcomes-eus-change-of-heart-on-damaging-plans-for-solvency-ii-pensions-rules>

Consultation:

<https://www.gov.uk/government/consultations/pensions-tax-relief-individual-protection-from-the-lifetime-allowance-charge>

	Fixed protection 2014	Individual protection
Who can apply?	Any member of a registered pension scheme (but see box below)	Anyone with pension savings above the reduced LTA of £1.25 million on 5 April 2014 (but see box below)
Interaction with other forms of protection	<p>Not available to individuals with primary or enhanced protection or fixed protection 2012</p> <p>Can be applied for alongside individual protection</p> <p>Fixed protection 2012 or 2014 takes precedence over individual protection (but individual protection is not lost if fixed protection is)</p>	<p>Not available to individuals with primary or enhanced protection</p> <p>Available to individuals with fixed protection 2012</p> <p>Can be applied for alongside fixed protection 2014</p> <p>Fixed protection 2012 or 2014 takes precedence over individual protection (but individual protection is not lost if fixed protection is)</p>
Deadline for applying	<p>Before 6 April 2014</p> <p>NB Applications not possible until Finance Bill 2013 receives Royal Assent, probably in summer 2013</p>	<p>Before 6 April 2017</p> <p>NB Applications not possible until Finance Bill 2014 receives Royal Assent, probably in summer 2014</p>
What is the protected individual's lifetime allowance?	£1.5 million	<p>Personal LTA = value of pension savings as at 5 April 2014 (maximum £1.5 million)</p> <p>Personal LTA is reduced if a pension sharing debit is made. Debit might be revalued (not yet decided)</p> <p>Possible adjustment when there is a "scheme pays" AA charge reduction (not yet decided)</p>
Is the individual's protected lifetime allowance increased annually?	No, but if the standard LTA rises above £1.5 million then the individual's LTA reverts to the standard figure	No, but if the standard LTA rises above the individual's personal LTA (or is higher than it due to a pension sharing debit reduction) then the individual's LTA reverts to the standard figure
Can the individual still make pension savings and keep the protection?	No – protection is lost (and LTA reverts to standard level) if further pension savings are made	Yes, but an LTA charge applies to pension savings above the individual's personal LTA
When is the protection lost?	If additional pension savings are made (see above)	Never (except that if the standard LTA is increased above the member's personal LTA, then the personal LTA no longer applies)
Can there be a lifetime allowance charge (even if conditions for protection are still met)?	Yes – if total pension savings exceed the individual's protected lifetime allowance	Yes – if total pension savings exceed the individual's personal lifetime allowance (NB this is likely even if there are no ongoing contributions or accrual, due to DC investment returns and/or DB revaluation)

Call for evidence on workplace DC pension scheme quality

The Government has issued a call for evidence, closing on 9 September 2013, on how workplace DC pension schemes should be managed. It includes a request for views on the following proposed legislative requirements.

Scheme governance (especially of group personal pensions)

- All schemes must be overseen by a governance body with a duty to act in members' interests, which meets at least every six months to consider the running of the scheme.
- The governance body must be able freely to exercise its duty to act in members' interests and must be able to explain how any conflicts of interest are handled.
- For multi-employer schemes, both occupational and group personal, a majority of the individuals on the governance body must be independent.
- 25% of the membership of the governance body must have an appropriate professional qualification.

Default investment options

- Default options are designed in the interests of members, with a clear statement of aims, objective and structure, and how these are appropriate for the membership.
- The characteristics and net performance of the default option are regularly reviewed to ensure alignment with the interests of members, and action is taken to make any necessary changes.

Administration and record keeping

- An annual check that the number of units allocated to the member is commensurate to the contributions received for that member, with any errors addressed.
- A check that contributions have been invested in line with members' instructions
- A regular check that all contributions have been invested within five days of being received into the scheme bank account.
- A monthly reconciliation of the total number of units held by investment managers with the units allocated to members, and any errors addressed.
- Scheme managers must ensure that adequate processes and controls are in place to ensure completeness and accuracy of common data.

Scale

- People running a pension scheme must consider whether members are disadvantaged by the size of their scheme and take appropriate action if they consider this to be the case.

Pensions Regulator

DC governance: code of practice and guidance

The Pensions Regulator has also been active in the area of DC governance. Following consultation (see **WHIP Issue 37**), it has laid before Parliament a revised code of practice covering DC occupational pension scheme governance matters, due to come into force in November 2013. Accompanying guidance is expected in the Autumn. We will report on this in a future issue of WHIP.

Contributions: codes of practice and guidance

The Pensions Regulator has published:

- Draft code of practice no.5 and accompany guidance: Reporting late payment of contributions to occupational pension schemes
- Draft code of practice no.6 and accompany guidance: Reporting late payment of contributions to personal pension schemes
- Information for employers: A quick guide to paying contributions to personal pension schemes and defined contribution occupational pension schemes

These aim to ensure that contributions are paid properly and on time by employers and that trustees and pension providers adequately monitor the payment of contributions and report failures when appropriate.

The draft codes spell out when the Regulator expects (and does not expect) trustees to report unpaid contributions to it and to members. An original proposal requiring nil returns has been dropped.

In the code, the Regulator expects occupational pension scheme trustees and personal pension providers to monitor incoming contributions. To the extent that trustees operate

Call for evidence:
<https://www.gov.uk/government/consultations/quality-standards-in-workplace-defined-contribution-pension-schemes>

Press release:
<http://www.thepensionsregulator.gov.uk/press/pn13-23.aspx>

Press release:
<http://www.thepensionsregulator.gov.uk/press/pn13-19.aspx>

risk-based monitoring, this includes obtaining sufficient information from employers to demonstrate that amounts paid reconcile with amounts due. Trustees are expected to report to the Regulator if they request information from an employer and it is not provided within 14 days.

If contributions have not been paid, the Regulator expects (in the guidance, not the code) three attempts to contact the employer within 90 days after the contribution due date, after which reporting of unpaid contributions is required. At least one of these attempts should normally be made by telephone.

The draft codes have been laid before Parliament and are expected to come into force in the autumn. A consultation response has also been published.

Scheme funding analysis

The Regulator has published its latest analysis of valuations and recovery plans, covering schemes with triennial valuation dates between 22 September 2010 and 21 September 2011 (known as "Tranche 6"). Points of interest include the following.

- The proportion of schemes with more than 60% of their asset portfolio held in equities has fallen from 35% to 24% since Tranche 3 (ie, 22 September 2010 to 21 September 2008).
- Schemes in deficit were on average 83% funded on the statutory "technical provisions" basis (up from 81% since Tranche 3). On the PPF basis, the average funding level was 95%. On a buyout basis, it was 59%
- 19% of schemes in deficit reported having a contingent asset in place. Just under half were recognised by the PPF. 74% of the contingent assets were guarantees.
- The average recovery plan period was 7.5 years. This figure was 8.4 years in Tranche 3, three years previously, which implies that recovery plan periods have been extended by an average of nearly two years.

Governance survey

The Regulator has published its seventh annual survey of occupational pension scheme governance. Key findings include:

- Large schemes and DB/hybrid schemes are more likely to have higher governance standards than small, medium and DC schemes.
- 75% of schemes have documented their internal controls (up from 68% last year).
- Administration standards are formally documented by 79% of schemes and 82% of those schemes receive a report on administration service levels at least annually.
- 88% of schemes have a risk register.
- Only 54% of DC schemes have reviewed their statement of investment principles in the last three years (which is required by law).
- Four out of five trustees make use of the Trustee toolkit, with the majority rating the programme as useful.
- 76% of schemes say they are aware of the six principles for good workplace DC schemes published in December 2011 but only 31% say they fully comply.
- 45% of the DB/hybrid schemes surveyed have a "journey plan" or "flight path" in place. The areas of focus are typically to pay out benefits, progressively de-risk, and cover their technical provisions.
- Three out of ten DC schemes have guaranteed annuity rates (but only 6% of large schemes).

Prohibition orders

The Regulator has issued a statement explaining the policy it will adopt in exercising its powers to prohibit persons from being trustees on the grounds that they are not fit and proper to act.

Corporate Plan

The Regulator has published its business plan for the coming year and its corporate plan for the next three years. Key priorities for the current financial year include proactively engaging with selected schemes in a risk-based manner early in the valuation process and encouraging trustees to take an integrated approach to addressing covenant, investment, and funding risks.

DC governance, automatic enrolment and pension liberation also feature in the Regulator's key priorities.

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn13-21.aspx>

Governance survey:

<http://www.thepensionsregulator.gov.uk/doc-library/research-analysis.aspx#s2102>

Statement:

<http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-june-2013.pdf>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn13-18.aspx>

Lehman Brothers FSD litigation

The trustees of the Lehman Brothers pension scheme (for whom we act) had made a reference to the Upper Tribunal in respect of the September 2010 determination of the Determinations Panel of the Pensions Regulator (see **WHIP Issue 22**) not to issue a financial support direction (FSD) to 38 Lehman Brothers group companies which had been given a warning notice. (The issue of an FSD was determined for six other group companies.)

37 of the 38 companies had sought to strike out the trustees' application, arguing that:

- the trustees were not "*directly affected*" persons entitled to refer a determination to the Tribunal under section 96(3) Pensions Act 2004;
- a decision not to issue an FSD to a party was not a determination that could be referred; and
- the two year time limit for the Determinations Panel's power to be exercised had passed and so it was too late for an FSD to be issued to them.

The Court of Appeal upheld the decision of the Upper Tribunal (see **WHIP Issue 34**) and found in favour of the trustees, dismissing the appeal. The appeal to the Court of Appeal concerned the first and third of these arguments. The second point was not appealed.

- As regards the first argument, the Court of Appeal held that the trustees were directly affected because the determination concerned the potential creation of rights conferred on them. The restriction of the right of appeal to directly affected persons was intended to exclude, for example, "mere busybodies" or persons with derivative rights that could be enforced by the holder of the direct interest.
- As regards the third argument, it held that the two year time limit only applied to the period for issuing the initial FSD determination. The potential extension of the FSD to more companies would not be a fresh exercise of the Determination Panel's power.

(Note that this time limit was changed from 3 January 2012 by the Pensions Act 2011: the Regulator now has two years to issue a warning notice and the Panel's determination can be made outside that period.)

Age discrimination: objective justification

In *Seldon v Clarkson Wright & Jakes*, the Supreme Court had held (see **WHIP Issue 33**) that three aims of a provision in the law firm's partnership agreement requiring Mr Seldon to retire from the partnership at the end of the year following his 65th birthday were legitimate and therefore the age discrimination could be objectively justified. It referred back to the Employment Tribunal (ET) the question whether reliance on the clause was a proportionate means of achieving those legitimate aims and in particular whether age 65, rather than any other age, was appropriate. The ET has now ruled in the firm's favour on these questions.

Background

The three aims of the provision that were held to be legitimate by the Supreme Court were:

- "*ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm;*
- "*facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise; and*
- "*limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the Respondent firm*".

It had not, however, been shown that age 65, and not any other age, was an appropriate means of achieving the third aim: there was a difference between justifying a retirement age and justifying that retirement age. The question was therefore referred back to the ET whether the first two aims were sufficient in themselves. As part of this, the ET was free to reconsider the first two aims in the light of the particular retirement age chosen.

Lady Hale had added: "*I would emphasise, however, that they are considering the circumstances as they were in 2006, when there was a designated retirement age of 65 for employees, and not as they are now.*" The implication was that such treatment is more difficult to justify now that there is no default retirement age under legislation. (The default retirement age in the age discrimination legislation, now repealed, never applied to partners such as Mr Seldon.)

The ET decision

The ET considered the first two aims in light of the chosen retirement age of 65. It decided as follows.

Case report:
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/751.html>

"A mandatory retirement age to achieve the two aims has to be a balance between the interests of the practice, the partners and of associates who aspire to partnership. Any determination has to weigh up the needs of the partnership against the harm caused by the discriminatory treatment. In addition to the matters referred to ... above, the Tribunal took account of the fact that the lower the retirement age the more harm to the partners who are required to retire and the higher the retirement age the more harm to the associates who may leave. The age has also to reflect that the Respondent needs to be able to plan for its future and that such plan has to ensure that there are partners in place with relevant experience to ensure the future of the practice and its various practice areas. In short the age has to reflect the expectations of the partners and associates, ensure succession and fulfil the needs of the partnership.

The Tribunal has found that there is a narrow range of ages any one of which would achieve the two aims. In concluding that the age of 65 was proportionate the Tribunal has taken into account ... in particular that the partners had consented to the mandatory retirement age and that the default retirement age at the relevant time was 65".

EU pension portability directive

The European Council has agreed the European Commission's proposal for a directive on improving the portability of workplace pension rights. It will now be considered by the European Parliament.

The directive concerns workplace pension rights for workers who move from one EU member state to another but member states will be encouraged to provide the same protections for members who change employment within the same member state. The key points are as follows. UK legislation is already compliant in most respects. The obvious exception is the proposed one year vesting requirement for members over age 25.

- Where membership is conditional on completing a period of employment, it must not exceed one year.
- Where a minimum age is stipulated for accrual of vested rights, this must not exceed age 21.
- Vesting periods must not exceed one year for members over age 25. For members below age 25, they must not exceed five years.
- DB schemes should always refund contributions to members who leave employment without vested rights. In the same circumstances, DC schemes should refund the value of the member's account attributable to his or her own contributions.
- Workers who leave employment should have the right to leave their vested rights preserved as "dormant" rights in the scheme (unless, in the case of DC members, they are transferred to another scheme).
- Preserved rights should be adjusted in line with investment returns, inflation or salary levels (with caps permitted).
- Schemes may be permitted to transfer or cash out small value pensions (below a threshold set by the member state).
- Member states should endeavour as far as possible to improve the transferability of vested pension rights.
- Information on the effect of termination of employment on pension rights and the value of preserved rights must be provided on request.

Pension Protection Fund

Olympic Airlines pension scheme not able to enter PPF

The trustees of the Olympic Airlines UK pension scheme have failed in the Court of Appeal in their application to have the company's UK presence wound up. Unless the decision is successfully appealed, this leaves scheme members unable to claim PPF compensation.

Olympic Airlines SA was placed in liquidation in Greece on 2 October 2009. The Greek liquidation did not trigger a PPF assessment period because foreign liquidation proceedings do not count as "qualifying insolvency events" under the Pensions Act 2004. The trustees of Olympic's UK pension scheme therefore applied to the UK Court for a winding-up order in respect of its UK presence. They won in the High Court but lost in the Court of Appeal.

Press releases:

http://europa.eu/rapid/press-release_MEMO-13-587_en.htm?locale=en

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/137549.pdf

Proposed directive:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0603:FIN:EN:PDF>

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/643.html>

The Court of Appeal held that:

- On 20 July 2010, when these proceedings began, the company did not have an establishment or economic activity in the UK because (a) it had only two ad hoc employees who were engaged in helping the liquidator, (b) it had no assets of any value and (c) all commercial activity had ceased.
- There was therefore no jurisdiction for a winding-up order to be made in the UK.
- Regrettably, this meant that scheme members were not protected by the PPF.

Trustees of DB schemes with foreign sponsoring employers should consider the potential implications for their scheme.

Compensation cap

The Government intends to increase the PPF compensation cap (which currently stands at £34,867.04 at age 65) by 3% for every full year of pensionable service in the relevant scheme above 20 years, up to a maximum of double the standard cap. This will not be retrospective but it will apply to future compensation payments for those already in receipt. The Government has proposed an amendment to the Pensions Bill to achieve this.

This is a reaction to the plight of long-serving members of the Visteon pension scheme, who had their pensions substantially reduced. It is not clear that the revised cap is adequate to satisfy EU law requirements for the protection of pensions. In recent cases, including *Hogan* (see **WHIP Issue 39**), the European Court has ruled that members who would receive less than 50% of their scheme benefits are not adequately protected. The PPF compensation cap will still have that effect for some individuals.

The increased cap would result in larger scheme deficits measured on the PPF basis and higher pension protection levies (partly because of greater PPF compensation and partly due to increased underfunding levels).

Higher earning members with longer service would become entitled to a greater share of the assets when an underfunded scheme enters PPF assessment or winds up but does not pass to the PPF.

Strategic Plan 2013-16

The PPF has published its strategic plan for 2013-16. It is 84% confident of achieving its target of becoming self-sufficient by 2030 but says that it may have to extend this timescale if current market conditions continue.

The PPF foresees levies rising, due to fewer employers offering DB schemes, very low interest rates resulting in increased deficits, and the Pensions Regulator's new statutory objective to consider the long-term affordability of deficit recovery plans.

The PPF's updated strategic objectives are:

- *"Meet our funding target through prudent and effective management of our balance sheet.*
- *Deliver excellent customer service to our members, levy payers and other stakeholders.*
- *Pursue our mission within a high calibre framework of risk management."*

Employer debt regulations

The Government has consulted on a change to the employer debt regulations, designed to correct drafting that unintentionally prevents a body which changes its legal status from taking advantage of the restructuring easement (see **WHIP Issue 17**).

Triennial review of pensions bodies

The Government has issued a call for evidence (open until 9 August 2013) asking for views on the following organisations and their functions, including any overlaps or gaps between them:

- The Pensions Regulator
- Pensions Ombudsman
- Pension Protection Fund Ombudsman
- The Pensions Advisory Service

Ministerial statement:

http://www.parliament.uk/documents/commons-vote-office/June_2013/25-June-2013/4.DWP-Pension-Protection.pdf

Impact assessment:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210728/pension-protection-fund-compensation-cap-amendments.pdf

Press release:

<http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=324>

Consultation:

<https://www.gov.uk/government/consultations/employer-debt-regulations-amendment>

Call for evidence:

<https://www.gov.uk/government/consultations/triennial-review-of-pensions-bodies>

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Paul Stannard, Peter Esam, Philip Stear, Susie Daykin and Daniel Gerring.

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