



What's happening in Pensions

Issue 13

October 2009

Automatic enrolment

The Government has published three consultation papers on the details of the automatic enrolment regime that will begin in 2012:

- Consultation response on The Pensions (Automatic Enrolment) Regulations 2009 (see WHIP Issue 9)
<http://www.dwp.gov.uk/docs/pae-regulations-2009-govt-response-sept09.pdf>
- Consultation on draft regulations: "Workplace Pension Reform – Completing the Picture" (consultation closes on 5 November 2009)
<http://www.dwp.gov.uk/docs/workplace-pension-reform-completing-the-picture-consultation240909.pdf>
- Consultation on "The use of Default Options in Workplace Personal Pensions and the use of Group Self Invested Personal Pensions for Automatic Enrolment" (consultation closes on 17 December 2009)
<http://www.dwp.gov.uk/docs/workplace-personal-pensions-default-options-consultation240909.pdf>

The consultation and response change and flesh out previous proposals (see WHIP Issue 9). They can be summarised as follows.

- Employers' automatic enrolment obligations will be phased in over three years (to be known as the "staging period"), beginning on 1 October 2012. Employers will be split into 25 to 30 groups, with larger employers generally becoming affected first.
- Employers who plan to automatically enrol workers in a qualifying DC scheme need not pay the full 3% employer contribution until 1 October 2016. Contributions for the largest employers, who will become subject to the automatic enrolment obligation on 1 October 2012, will be as follows:

Date	Minimum employer contribution	Minimum total contribution
1/10/12 to 30/9/15	1%	2%
1/10/15 to 30/9/16	2%	5%
1/10/16 onwards	3%	8%

Other employers will follow the same timetable but will be joining it part way through.

- Employers who plan to automatically enrol workers in a qualifying DB scheme will not need to do so until October 2015. In the meantime, qualifying workers must be entitled to opt into a qualifying scheme. If the employer later decides not to enrol them in a qualifying DB scheme, it must backdate contributions to a qualifying scheme.
- There will be self-certification by employers of compliance with the requirements for automatic enrolment schemes. Draft guidance for actuaries and employers is provided on determining whether a scheme meets the applicable scheme quality requirements. It will be mandatory to follow the guidance when deciding whether it is possible to self-certify a scheme.

Press release:

<http://www.dwp.gov.uk/newsroom/press-releases/2009/september-2009/dwp037-09-240909.shtml>

- Employers will now be required to register their compliance with the Pensions Regulator within nine weeks of the automatic enrolment obligation applying to them (their "staging date") and every three years thereafter. The Government is consulting on whether this requirement is workable.
- There will be a £500 fixed penalty for failure to comply, plus escalating penalty charges for continuing failure of between £50 and £10,000 per day (based on size of employer).
- The joining window for automatic enrolment to be achieved will now be one month. The opting-out period will be one month from the date the joining window ends (or six weeks if the employer notifies the jobholder that his or her opt-out is invalid).
- Specified information about the automatic enrolment scheme must be provided to jobholders within one month of the automatic enrolment requirement applying to them; employers will have two months to provide more limited information to existing members of an automatic enrolment scheme.
- Automatic re-enrolment will take place every three years but on a "per scheme", not "per member", basis. Workers who have opted-out in the last 12 months need not be re-enrolled.
- There will be a new duty on employers to pay their contributions to the scheme before the 19th day of the month following the month to which they relate (i.e. similar to the obligation to pass on member contributions). Employers will have one month extra to do this (for both employer and member contributions) for the first month of membership following automatic enrolment. This will help to avoid scheme refunds that would otherwise be required for workers who opt out following automatic enrolment.
- Proposed guidance sets minimum standards for default options used in workplace personal pensions. The Government is also asking whether there should be corresponding guidance for DC occupational pension schemes. It will not be mandatory to follow the guidance.
- Proposed guidance sets out how group SIPPs should be operated if they are to be offered as an automatic enrolment scheme and how they should be structured. Self-investment, where the member has a direct role in managing his or her investments, should not be the default option.

Employer debt regulations - proposed amendments

The Government has followed up its December 2008 informal consultation on changes to the employer debt regulations (see **WHIP Issue 7**) with a formal consultation. The changes would affect the treatment of section 75 debts under multi-employer DB schemes. The headline proposals are as follows.

- Currently, if an employer in a multi-employer occupational pension scheme ceases to employ any active members of the scheme at a time when other employers still do, there is an "employment-cessation event" and a section 75 debt is usually triggered against that employer. It is now proposed that if certain conditions are met and specified steps are followed in the right order, there will be no "employment-cessation event" on the transfer of the business and assets from one employer in an occupational pension scheme to another employer in the same group.

Broadly, the new employer must take on – all at the same time - the old employer's assets, employees and scheme liabilities and must be at least as likely as the old employer to meet those liabilities (as well as meeting its own scheme liabilities). Only "one-to-one" restructurings will satisfy these requirements, though a series of such arrangements could qualify. The new employer must be based in the UK.

The new employer must be satisfied that it is unlikely to have an insolvency event within the next 12 months if the restructuring takes place; the old employer must be satisfied that it is unlikely to have an insolvency event within the next 12 months if the restructuring does not take place. In other words, it must be a solvent restructuring, not one designed to result in, or to stave off, an insolvency.

If it later comes to light that the employers were unreasonably optimistic about the solvency issues, or that the requisite steps were not properly taken, a section 75 debt can then be triggered.

Key differences from scheme apportionment arrangements under the existing regulations are that:

- there is no scheme funding test; and

Consultation:

<http://www.dwp.gov.uk/docs/consultation-employer-debt-draft-regs.pdf>

- whilst the trustees are involved and need to be satisfied that the relevant requirements are satisfied, their agreement would not be required. There would, however, be onerous responsibilities placed on trustees to oversee the restructuring.

This easement is also likely to apply where an employer changes its legal status, e.g. a charity incorporating or a partnership becoming a limited liability partnership.

- For small scale restructurings, a "*de minimis*" easement may apply. The scheme must have been at least 100% funded on the PPF valuation basis at its last valuation; DB members with employment with the old employer must represent less than 2% of all DB members in the scheme; those DB members' share of the scheme's PPF "protected liabilities" must be no more than £100,000; and fewer than 5% of DB members must become the responsibility of new employers under this provision in any three year period.

The process would broadly be the same, except that the trustees would not need to be satisfied that the new employer would be at least as likely as the old employer to meet the scheme liabilities.

- The definition of "scheme apportionment arrangement" would be amended to clarify how these are intended to operate. They would be able to operate on a "floating" basis (i.e. with the amount apportioned to another employer (or employers) determined at the time of a later triggering event according to what would have been the exiting employer's share of the deficit at that time) or on a fixed basis (i.e. so that the liability of the other employer(s) is for a fixed amount). This was doubtful before the clarification.

If there is a fixed (as distinct from floating) apportionment, the amount apportioned may exceed the relevant share of the deficit when the debt falls to be paid. In what must be a drafting error, the amount of a fixed apportionment would be treated as a debt due at the time of the apportionment, rather than being deferred until a later triggering event.

- Technical changes would be made to the regulations to ensure that the actuary's role (as distinct from the trustees' role) in the section 75 calculations goes no further than the calculation of pension liabilities (i.e. it does not extend to asset valuation or estimating winding-up expenses).
- For approved withdrawal arrangements, a new formula is included for calculating a "floating" amount (i.e. a percentage of a scheme deficit rather than a fixed sum) to be paid at a later triggering event, to make this option easier to use in practice.
- There are proposed changes to the regulation that sets out how section 75 liabilities may or must be allocated between employers when it is not clear which liabilities belong to which employer.
 - If the last employer of the relevant employees is not known, the trustees would have to consider whether the unallocated liabilities can be attributed to one or more employers "in a reasonable manner". Only if they cannot be so attributed would they then fall to be treated as "orphan" liabilities.
 - If the last employer is known, trustees would be required to allocate the relevant liabilities to that employer.

The consultation closes on 19 November 2009. These changes were originally intended to come into force this month but the timetable has slipped. It is not known when the changes would take effect.

The consultation documents address dozens of other issues. There is no space to report them all here. If there is any aspect of the employer debt regulations that you have been particularly concerned about, please ask us for specific advice.

Pension protection levy

The Pension Protection Fund is consulting on the pension protection levy for 2010/11 and contingent asset certification. The headline change is that the risk-based levy cap, which was previously 1% of the scheme's PPF liabilities, will be reduced to 0.5%. As a result, the weakest 10% of employers (previously 5%) will be protected against a big rise in their risk-based levy. In other words, there will be more subsidy from stronger employers.

The Consultation closes on 11 November 2009 but no significant changes to these proposals are expected.

Press release:

<http://www.pensionprotectionfund.org.uk/News/Pages/details.aspx?itemID=127>

Consultation by employers on pension changes

The Government is consulting on draft amending regulations to come into force on 6 April 2010. The main proposal is for a new "listed change" in the consultation regulations. Listed changes are the pension changes about which employers must first consult affected employees.

The listed changes for a DB scheme already include a change in "the basis for determining the rate of future accrual". There is doubt about what this means in practice.

The proposed new listed change would be a change to the definition of pensionable earnings in a DB scheme. This would affect, for example, proposals to limit increases in pensionable earnings.

The consultation closes on 18 December 2009.

Consultation

<http://www.dwp.gov.uk/docs/consultation-occ-pen-misc-regs-2010.pdf>

Age discrimination cases

Compulsory retirement at age 65 – Heyday case

The High Court has given its judgment in the "Heyday" age discrimination case on compulsory retirement at age 65. The European Court had ruled (see **WHiP Issue 9**) that a law permitting employers to retire workers at age 65 could in principle be justified if it was "*objectively and reasonably justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary*". It was, however, up to the UK courts to determine whether there was such objective justification in the present case.

The High Court has now held as follows.

- The Government had clear and discernible social policy concerns, when designating a default retirement age, in protecting the integrity of the labour market. Those concerns were legitimate aims. The decision in 2006 to adopt a designated default retirement age of 65 was both legitimate and proportionate. It was not based on any decision that workers above age 65 were of less social worth than younger workers.
- The Government did, therefore, have an objective justification in 2006 when it designated 65 as the age from which employers could compulsorily retire their workers. The Government had acted within the scope of the EU directive.
- There was, however, a "compelling case" now for a change to the designated default retirement age of 65. The judge noted that the Government had already announced that it was bringing forward to 2010 its review of permitted compulsory retirement at age 65 (see **WHiP Issue 12**). He also commented that if the Government had not announced this review he would have concluded that a default retirement age of 65 was no longer proportionate.

On the same day on which this judgment was issued, the Government announced the abolition of compulsory retirement ages for senior civil servants.

In its review next year, the Government will have to decide whether to keep a default retirement age at all. If it decides to keep one, it seems clear that it will need to be higher than 65. Age 68 (the age to which state pension ages will rise by 2046) is a possible outcome.

Dismissal to avoid liability for enhanced pension

In *London Borough of Tower Hamlets v Wooster*, the Employment Appeal Tribunal (EAT) gave its decision in an age discrimination claim brought by an employee made redundant at age 49.

Mr Wooster was a member of the Local Government Pension Scheme (LGPS) under which he was entitled to an unreduced early retirement pension if he was made redundant aged at least 50. He had been seconded by Tower Hamlets council to a registered social landlord. It was proposed that he be made redundant upon the expiry of the secondment. He claimed that he was made redundant before his 50th birthday in order to avoid the expense of the enhanced early retirement pension.

Mr Wooster succeeded in his claim for unlawful direct age discrimination in the Employment Tribunal. The council appealed, primarily on the basis that it was not within its powers to extend his secondment and it should not be required to extend employment purely so as to entitle the employee to an enhanced pension benefit.

The EAT found that whilst the refusal to extend the secondment was not in itself direct age discrimination, it was indicative of a general disinclination to continue to employ Mr Wooster beyond his 50th birthday. That did amount to unlawful direct age discrimination. The council's appeal therefore failed.

Case report:

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/2336.html>

Case report:

http://www.bailii.org/uk/cases/UKCAT/2009/0441_08_1009.html

NAPF pension quality mark

The NAPF has launched a "quality mark" for DC schemes, covering occupational schemes, group personal pensions, group stakeholder schemes, and (from October 2012) contributions to Personal Accounts. Details of how to apply for the quality mark are on the scheme's website: <http://www.pensionqualitymark.org.uk/>

European pensions regulator proposed

The European Commission is proposing to establish a European Insurance and Occupational Pensions Authority. Its primary aims include the stabilisation of financial markets and the strengthening of international supervisory coordination. Its objectives for pension schemes would include "*a high, effective and consistent level of regulation and supervision*" and "*protecting ... beneficiaries*".

The Commission proposes that the new Authority will be able to issue guidelines and recommendations to national supervisory authorities (i.e., in the UK, the Pensions Regulator), which those authorities "*shall make every effort to comply with*". There are potentially far-reaching implications for UK defined benefit pension schemes.

HMRC guidance on the special annual allowance

HMRC has added pages to the Registered Pension Schemes Manual (RPSM) covering the special annual allowance under the Finance Act 2009 (see **WHiP Issues 10 and 12**). These are the "anti-forestalling" measures in connection with planned tax relief changes in 2011.

The online RPSM will be updated with these pages by the end of October. This new guidance supersedes the various sets of guidance published in connection with the 2009 Budget announcement.

TPR/FSA guidance on talking to employees about pensions

The Pensions Regulator and the FSA have jointly published a "*Guide for employers: talking to your employees about pensions*". It covers what can and cannot be said about pensions and how to answer employees' questions (e.g. about investment choices). It applies to DB and DC, and occupational and contract-based schemes.

Maternity / paternity leave

The Government has proposed that "additional paternity leave" be introduced for parents of babies expected on or after 3 April 2011. Fathers will be able to take up to six months' additional paternity leave, by reducing the mother's additional maternity leave correspondingly. Up to three months' additional paternity leave will be paid by "additional statutory paternity pay" in place of additional statutory maternity pay.

There is no indication in the consultation paper as to when (or whether) earlier proposals to increase statutory maternity pay from 39 to 52 weeks will be implemented.

The consultation closes on 20 November 2009.

Data protection fees

From 1 October 2009, increased fees for notification under the Data Protection Act 1998 will apply. A data controller with an annual turnover of £25.9 million and 250 or more members of staff, and public authorities with 250 or more members of staff, will have to pay initial and annual renewal notification fees to the Information Commissioner of £500. Pension scheme trustees are data controllers under the Act. Certain occupational pension schemes with fewer than 12 members will be exempt from the higher fee but will continue to pay the existing £35 fee, as will all other data controllers falling below the threshold for the higher fee.

Authorised payments - DWP consultation

Following the new authorised payments regulations earlier this year (see **WHiP Issue 10**), the Government has consulted on amendments to contracting-out and other regulations. The aim is to ensure that payments that will be authorised payments under the new HMRC legislation from 1 December 2009 (e.g. the new options for cashing out very small pensions) will also be permitted by DWP legislation from the same date.

EC proposal:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0502:FIN:EN:PDF>

HMRC guidance:

<http://www.hmrc.gov.uk/pensionschemes/guidance-special-allowance.htm>

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn09-13.aspx>

Consultation:

<http://www.berr.gov.uk/files/file52940.pdf>

ICO website:

http://www.ico.gov.uk/what_we_cover/data_protection/notification/fees_consultation.aspx

Consultation:

<http://www.dwp.gov.uk/docs/opps-auth-pyt-regs-consultation.pdf>

Employer-financed retirement benefit schemes

New Employment Income Manual pages

HMRC has added a number of new pages to its online Employment Income Manual (EIM) covering employer-financed retirement benefits schemes (EFRBS), in particular as regards the tax implications for employees.

Anti-avoidance

HMRC has added a new item to its "Spotlights" web page, which highlights tax avoidance schemes that HMRC considers to be ineffective.

The new "Spotlight 6" concerns employers claiming corporation tax deductions for employer contributions to EFRBSs on the basis that either (a) the contribution or (b) a subsequent transfer to a second EFRBS is a "qualifying benefit" for the purposes of the Corporation Tax Act 2009. HMRC's view is that neither transaction involves the provision of a qualifying benefit.

Pensions and divorce

Following a review of the pensions and divorce legislation, the DWP has decided not to make any changes to the current law. *"The review did not reveal any areas where a change in legislation would significantly simplify the pensions on divorce procedures or significantly reduce the burdens for occupational pension schemes."*

Source: letter to consultation responders, 5 August 2009

Compensation for loss of DB pension on unfair dismissal

The Court of Appeal has overturned the Employment Appeal Tribunal (EAT) decision in *Roberts v Aegon UK Corporate Services*. The EAT had ruled that the loss of a DB pension by Ms Roberts was a "very significant factor" calling for special consideration and compensation, even though she had found a new job with a better overall remuneration package.

The Court of Appeal held that a final salary pension scheme does not have some special status but is simply an important part of an overall remuneration package. There was therefore no compensation due, other than for loss of statutory rights, because the overall remuneration package in Ms Roberts's new job was better.

Financial assistance scheme

The Government has published a consultation paper on draft regulations amending the Financial Assistance Scheme (FAS). The regulations will conclude the implementation of the FAS extensions originally announced in December 2007, including:

- the transfer of scheme assets to the Government;
- payment of tax free lump sums (equivalent to pension commencement lump sums); and
- provision for members who would have been better off had their scheme wound up rather than entering the FAS.

This and previous issues of WHiP can be found on our website: www.traverssmith.com/?pid=24&level=2&eid=17

Hyperlinks in this document can be clicked via an up to date version of Adobe Acrobat Reader. We are not responsible for the contents of external websites to which we provide links.

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 and Andrew Block.

EIM updates:

<http://www.hmrc.gov.uk/manuals/eimanual/updates/eimupdate100809.htm>

Spotlights:

<http://www.hmrc.gov.uk/avoidance/spotlights.htm>

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/932.html>

Consultation:

<http://www.dwp.gov.uk/docs/fas-misc-amend-regulations2010.pdf>

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