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What's happening in Pensions

Issue 9 ***March 2009***

Miscellaneous amendment regulations

Regulations:

http://www.opsi.gov.uk/si/si2009/uksi_20090615_en_1

New amending regulations make a variety of amendments to legislation. They all take effect from 6 April 2009 except as otherwise stated below. Those of greatest interest are as follows.

- **Power to reduce revaluation and/or indexation**
  Trustees may modify scheme rules by resolution to reflect the new 2.5% statutory revaluation cap for deferred pensions and/or the 2.5% statutory indexation cap for pensions in payment. This can be done even if the scheme rules do not allow it. Employer consent is required.
- **Pension sharing on divorce/dissolution**
  Pension credit benefit may be paid to a member's ex-spouse or civil partner in the same circumstances as a member's benefits can be paid under the Finance Act 2004 tax regime.
- **Employer-related investments**
  The investment regulations are amended from 23 September 2010 to reflect the expiry of transitional provisions under the EU directive. Those transitional arrangements, as reflected in the investment regulations, provide exemptions relating to collective investment schemes, AVCs and certain qualifying insurance policies. The latter two exemptions are removed from 23 September 2010. It had originally been proposed that the collective investment schemes exemption also be removed, but the final amending regulations do not do this. Finally, investment in an employer-related deposit account, which is currently unlimited, will become subject to the 5% limit from the same date.
- **Consultation regulations - penalties**
  The Pensions Regulator will have power to impose a civil penalty for non-compliance with the requirements of the Pensions Act 2004 for consultation before making certain changes to a pension scheme. Until now, there has been no sanction.
- **Member-nominated trustee directors**
  The MNT/MND regulations are amended in respect of schemes with two or more corporate trustees when one is a traditional trustee company and the other is an independent corporate trustee. In such circumstances, the independent corporate trustee will not be required to appoint MNDs. (There is already an exemption where the independent trustee company is the sole trustee.)
- **Scheme funding when a scheme section is in winding-up**
  The scheme funding regulations will not apply to a section of a scheme in winding-up if assets are segregated. Segregation must be strict for this exemption to apply: many schemes' partial winding-up rules will not satisfy the requirements.
- **Scheme funding when the actuary sets the contribution rate**
  In some schemes, the actuary has sole power to set the employer contribution rate in some but not all circumstances. The scheme funding regulations are amended to apply the relevant provisions (under which the actuary must certify that the contributions are no less than he or she would have determined) to those schemes to that extent.

A draft of these regulations included provisions relating to trivial commutation but they were dropped from the final regulations because of delays to the parallel HMRC regulations (see "Authorised payments regulations" below).

Authorised payments regulations

HMRC announcement:

http://www.hmrc.gov.uk/PENSIONSCHEMES/arrangements-for-changes-pbr07.htm

The draft authorised payments regulations published in May 2008 (see WHiP Issue 3) are not yet finalised. When they are implemented, many provisions will have effect backdated to 6 April 2006. In the meantime, HMRC has confirmed that "*where scheme administrators act in accordance with the draft regulations, neither they nor members will be subject to HMRC sanctions for failing to operate in accordance with the existing legislation*" (for example, not filing an event report).

If the final regulations differ from the draft in a material way, administrators will be expected to file an event report quickly once the regulations are laid. Whether any tax is due will depend on the final version of the regulations.

Automatic enrolment and Personal Accounts

Consultation paper:

http://www.dwp.gov.uk/consultations/2009/pensions-auto-enrol-regs2009.pdf

The DWP has published the first of three proposed consultations on draft regulations on automatic enrolment. The Pensions Act 2008 (see WHiP Issue 7) contains the basic outline of the requirements for automatic enrolment and the Personal Accounts scheme.

In short, from 2012 (but with some transitional provisions likely) employers will have a new statutory obligation to enrol most of their workers automatically into a pension scheme. The scheme must be of a specified standard and the employer must pay minimum specified contributions to it. The worker may choose to opt out of automatic enrolment. The Personal Accounts scheme will be one option available for employers to use to satisfy this requirement.

The first set of draft regulations proposes the following.

- There will be a period of up to 14 days to enrol the member, with membership backdated to the start of employment (or the date the requirement first applies, if later).
- Employers will be allowed to postpone automatic enrolment for up to 90 days if they provide a qualifying DB scheme or a DC scheme that meets a higher quality standard. This is intended to encourage the retention of higher quality pension arrangements. There can be no postponement if the Personal Accounts scheme is used.
- Information about the scheme and about opting-out must be provided to new workers within 14 days (seven days if it is a workplace personal pension).
- The opt-out period will be 30 days. Opting-out must be in accordance with a strict procedure. When an automatically enrolled member opts out within the statutory period, his or her contributions must be refunded by the employer. The employer may claim them back from the scheme if they have already been passed on.

We will be producing a more detailed briefing note on automatic enrolment and Personal Accounts soon.

Further consultations will follow in Spring and Autumn 2009. This consultation closes on 3 June 2009.

Disclosure of information

Consultation paper:

http://www.dwp.gov.uk/consultations/2009/pen-scheme-disclosure-reqts-consultation.pdf

The Government is consulting on proposals for the future of the disclosure of information regime.

A working group concluded that an entirely principles-based approach would not be appropriate. This was partly because Government lawyers advised that terms of the EU directive had to be specifically reflected in UK legislation. The Government believes that the following areas have scope for some deregulation:

- basic scheme information
- annual report
- annual information
- statutory money purchase illustrations

The Government makes the following proposals.

- A single set of disclosure regulations is proposed, but with many exceptions.
- There will be a single, high-level principle: "*Members should be given sufficient information that allows them to understand the benefits to which they will be entitled and any other relevant information that will enable each member to make decisions in his or her best interests*".
- Regulations which require information to be provided within a specified time will generally be redrafted so that the information must be provided "*within a reasonable period*". The Pensions Regulator would issue a Code of Practice on what such a period might be. There would be an exception for basic scheme information: a 14 day time limit would be prescribed to allow employees to decide on scheme membership within the time frame for opting out of automatic enrolment (see above).
- Electronic disclosure (i.e. by email or website) will be permitted but members may ask for a hard copy. For deferred members, there will be deemed disclosure if something is sent to the member's last known personal email address.

The consultation closes on 6 May 2009. There will be a consultation on draft regulations later in 2009, with a view to new legislation coming into force on 6 April 2010.

Age discrimination: compulsory retirement at age 65

The European Court of Justice (ECJ) has given its decision in the case brought by Age Concern (Heyday) against the UK Government over the permitting of compulsory retirement at age 65 under the age discrimination regulations. Please see WHiP Issue 5 for the background.

The ECJ followed the Advocate General's opinion and ruled as follows.

- The provisions of the UK's age discrimination legislation concerning employment retirement ages are within the scope of the equal treatment directive.
- The directive does not require EU Member States to list definitively the kinds of age discrimination which may be objectively justified, whether in line with those mentioned in the directive or otherwise. Accordingly, national legislation may provide for the possibility of objective justification in situations of discrimination not falling within the categories listed.
- A law permitting employers to retire workers at age 65 can in principle be justified if it is "*'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"*. Member States have *"the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification*".

The case now returns to the High Court to determine the justification issues outlined in the third bullet point above.

ECJ decision:

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-388/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

Conversion of GMPs

The Government has published its response to the consultation on GMP conversion regulations (see WHiP Issue 5).

The Government's position on GMP equalisation is that "*the GMP is not a separate pension but a calculation factor in determining overall benefits and thus does not have to be separately equalised*". In other words, the Government's view is that if you have equalised the overall benefit, that is enough to satisfy the legal obligation. This over-simplifies the issue, but it could be helpful in supporting a decision to take no action to equalise GMPs separately from the total pension.

The regulations will provide for the actuarial equivalence test for GMP conversion and the circumstances in which survivors' benefits have to be provided.

As expected, the provisions on conversion of GMPs will come into force on 6 April 2009.

Consultation response:

http://www.dwp.gov.uk/consultations/2008/occ-pen-contracting-out-consultation-gov-res.pdf

Regulations:

http://www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111474310_en_1

Commencement order:

http://www.opsi.gov.uk/si/si2009/uksi_20090406_en_1

Pensions Regulator statement to UK employers

The Pensions Regulator has issued a statement to employers who sponsor DB pension schemes regarding the impact of current economic conditions. The statement stresses that the existing scheme funding regime is flexible enough to cope with an economic downturn. It adds that all unsecured creditors must be treated equitably and the pension scheme not disadvantaged. For example, an existing recovery plan should not be disturbed for the purposes of allowing the continued paying of dividends to shareholders.

TPR statement:

http://www.thepensionsregulator.gov.uk/whatsNew/pn09-02.aspx

Financial support directions and notifiable events

Regulations concerning the role of the Pensions Regulator come into force on 6 April 2009. They confirm the proposals we reported in WHiP Issue 7, to:

Regulations:

http://www.opsi.gov.uk/si/si2009/uksi_20090617_en_1

- extend the "look back" period for financial support directions from 12 to 24 months, with a transitional period between 6 April 2009 and 6 April 2010; and
- abolish the requirement to notify the Regulator of the following events:
    - two or more changes in a key scheme post
    - change in the credit rating of the employer
    - change in key employer posts

Pension Protection Fund

PPF risk-based levy

The PPF chief executive has urged schemes with struggling employers to contact the PPF if they are facing genuine difficulties paying the PPF risk-based levy. In some cases, the PPF is reportedly prepared to agree to a deferral or staggering of the levy payment.

Amending regulations

With effect from 1 April 2009, amending regulations will:

Regulations:

http://www.opsi.gov.uk/si/si2009/uksi_20090451_en_1

- allow schemes with an EEA credit institution or insurer as sponsoring employer to enter the PPF;
- remove the requirement for the PPF to provide for revaluation of compensation in certain special circumstances;
- allow compensation to be paid in respect of deferred and pensioner members who died before the assessment period began (this was already possible in respect of active members only); and
- require the PPF to pay 90% of transfer payments and contribution refunds to which the member became entitled before the assessment period began.

Consultation on disclaiming onerous contracts

The PPF has power to disclaim onerous contracts or to substitute a reasonable term or condition in place of an onerous one, when a scheme transfers to the PPF. This power has not yet been exercised, but fund managers have been concerned about the possibility. Some have included a clause terminating the agreement upon the transfer of the scheme to the PPF, before the PPF is able to exercise the power to amend terms and conditions unilaterally.

Consultation letter:

http://www.pensionprotectionfund.org.uk/s161_letter.pdf

This is not generally in the trustees' interests. The PPF is therefore consulting on a proposal to provide for the automatic termination of contracts upon transfer of the scheme to the PPF unless the PPF has notified the counterparty in writing that it will not use its power. The consultation closes on 8 May 2009.

Trustee good practice guide

The PPF has published the "Trustee Good Practice Guide". It aims to help trustees understand what is needed to complete a PPF assessment period in a timely and effective way.

PPF Guide:

http://www.pensionprotectionfund.org.uk/news-details.htm?id=7004

Compensation cap increased

The PPF pension compensation cap for members who have not attained normal benefit age is increased to £31,936.32 from 1 April 2009, an increase of 3.5%. 90% of this figure (the maximum annual compensation available at age 65) is £28,742.69.

Regulations:

http://www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111474266_en_1

Pension sharing orders and subsequent benefit awards

Case report:

http://www.bailii.org/ew/cases/EWHC/Ch/2009/226.html

In *Slattery v Cabinet Office (Civil Service Pensions) and HMRC*, the High Court overturned a determination of the Deputy Pensions Ombudsman concerning the effect of a pension sharing order.

Mr Slattery was a member of the Principal Civil Service Pension Scheme (PCSPS). In January 2002, he divorced his wife. She was granted a pension sharing order to the tune of 50% of the cash equivalent transfer value (CETV) of his PCSPS pension, calculated as at the date of the order.

In August 2006, Mr Slattery was made redundant, three years before his normal retirement age. He was granted an early retirement pension in accordance with the Civil Service Compensation Scheme (CSCS) without actuarial reduction for early payment. The scheme administrator informed him that his pension payments had to be reduced according to the terms of the pension sharing order. Mr Slattery disagreed, claiming that the pension debit should only affect his pension from his normal retirement age. The Deputy Pensions Ombudsman found against him, so he appealed to the High Court.

The High Court allowed the appeal. Although the pension credit and debit had to be equal, there was no requirement for equality in the payments to be made to the two parties, whether as to amounts or timing. The early pension benefit under the CSCS was a "contingent discretionary benefit" that was not part of the CETV that was the subject of the pension sharing order. The pension sharing order therefore only applied so as to reduce his annual pension from his normal retirement age.

Netherlands tax ruling

The Strathclyde Pension Fund has successfully challenged the Netherlands tax authorities over a "withholding tax" levied on dividend payments. The authorities have accepted that there should be no such tax on tax exempt bodies located in other EU member states. Taxes going back to 2003 are reportedly to be repaid, though the Netherlands tax authorities have not conceded claims dating before 2007.

NAPF VAT case

The NAPF's challenge to HMRC over VAT on investment management expenses (see WHiP Issue 3) is slowly progressing. The NAPF reports that HMRC has formally agreed that the Wheels (Ford) CIF case is an appropriate test case. The VAT tribunal has accordingly agreed to join the three Ford schemes which are members of the Wheels CIF to the appeal. The NAPF had already been joined. A further directions hearing is due for May. All other similar appeals are stayed pending the outcome of this test case.

Pensions Ombudsman: limitation periods

Determination:

http://www.pensions-ombudsman.org.uk/determinations/docs/2008/dec/27178.doc

The limitation period for bringing a complaint to the Pensions Ombudsman is generally three years, but he has a discretion to accept complaints brought outside that period. The Deputy Pensions Ombudsman has rejected a complaint because it fell outside the statutory limitation period of six years for a court claim. He ruled as follows:

"*I have the discretion to decide whether or not to investigate a complaint even if it falls within my jurisdiction. The time limits which apply to complaints referred to me differ from those which apply to proceedings before the courts. However, even though I may have the power to investigate a complaint which would be time barred if brought before a court, it is unlikely that I would decide that it was right for me to do so. I am mindful of the fact that it might be somewhat odd, if a matter would be time barred if taken direct to court, but not, if it came before me first and onward to the court on appeal against my decision.*"

NAPF corporate governance guidelines updated

NAPF press release:

http://www.napf.co.uk/DocumentArchive/Press%20Releases/01_2009/20090213_13-02-2009%20-%20NAPF%20Updates%20Corporate%20Governance%20and%20Voting%20Guidelines.pdf

The NAPF has updated its corporate governance policy and voting guidelines. There are no changes to remuneration policy. However, investors are reminded about the Combined Code and in particular its stance that executive pay should be aligned with pay policies in the company as a whole.

Sea Containers: financial support arrangements approved

The Pensions Regulator has approved financial support put in place following the financial support directions issued in relation to two Sea Containers schemes. The financial support reportedly consists of minority shareholdings in a new company incorporated to hold Sea Containers' main asset: a container joint venture with GE. Other creditors are also shareholders.

Please see WhiP Issue 5 for the background to this.

Notional earnings cap

HMRC has announced that the notional earnings cap for the tax year 2009/10 will be £123,600.

HMRC announcement:

http://www.hmrc.gov.uk/pensionschemes/earns-cap-0910.htm

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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 and Philip Stear.

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