BRIEFING

TRAVERS SMITH

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.

January 2020

Legislative and regulatory developments

The following are expected developments with known dates:

KEY DATE

Investment disclosure

1 October 2019, 1 October 2020 and 1 October 2021

Trustees have new obligations starting from October 2019 concerning the content of statements of investment principles (SIPs) and the disclosure of information about investment matters, including as to environmental, social and governance (ESG) factors, climate change and stewardship. DC and hybrid schemes also have to publish their SIP on a publicly accessible website. DB schemes will have to publish their SIP on a publicly accessible website from October 2020. Scheme annual reports and websites will have to include implementation statements (from October 2020 for DC schemes and October 2021 for DB schemes). Benefit statements will have to alert members. See WHiP Issues 73 and 76.

Fiduciary management and investment consultancy

Since 10 December 2019 (CMA order) / 6 April 2020 (proposed legislation)

The government proposes to introduce regulations to reinforce a Competition and Markets Authority (CMA) order regarding a new regime for fiduciary management. This affects pension scheme trustees who engage (or are looking to engage) providers of these services as well as the providers themselves. There is also a requirement for trustees to set strategic objectives for their investment consultants. Trustees will have to confirm compliance annually. See our briefing note Investment consultancy and fiduciary management: a dose of CMA medicine.

Brexit

11pm on 31 January 2020 and 31 December 2020

The UK is set to leave the EU at 11pm GMT on 31 January 2020. There will be a transitional implementation period until 31 December 2020, during which the status quo is generally maintained, to agree the future relationship.

See our briefing note Leaving the EU: the legal implications for an outline of the potential impact in various areas, including pensions. See also WHiP Issues 74 and 75.

Professional trustee accreditation

Early 2020(?)

The Professional Trustee Standards Working Group has published new standards for professional trustees of occupational pension schemes. Details of the accreditation framework are awaited. See WHiP Issue 75. A Pensions Regulator consultation on professional trusteeship issues is also awaited.

Budget

11 March 2020

The Chancellor of the Exchequer will deliver the first Budget since October 2018 on 11 March 2020. This is expected to include news of the review of the annual allowance taper as it has been affecting NHS staffing.

Pension protection levy and contingent assets

31 March 2020

The 2020/21 pension protection levy will be higher than for 2019/20 for many schemes. This is due to declines in gilt yields resulting in larger deficits and the increased likelihood of employer insolvencies. Contingent assets, for example a parent company guarantee, can be used to reduce the levy but must be in place and certified or recertified to the Pension Protection Fund by 31 March. See WHiP Issue 79.

From April 2020

A new Dun & Bradstreet method for calculating insolvency risk scores will apply from April 2020. This is expected to increase 2021/22 pension protection levies for the schemes of large employers. See the next issue of WHiP.

National living wage and national minimum wage

1 April 2020

The national living wage and national minimum wage will be increased by significantly more than average earnings. This may be relevant to employers who operate salary sacrifice for member pension contributions because salary sacrifice in some cases has to be disapplied or limited in order to ensure that statutory minimum wages are paid. The larger than usual increase means that more workers than usual may be affected.

Parental bereavement leave

6 April 2020

Working parents who suffer the loss of a child under the age of 18 (including stillbirths after 24 weeks of pregnancy) will be entitled to two weeks' statutory leave. Those with at least six months' service will be entitled to statutory pay. The pensions treatment of this leave will be the same as for, for example, paternity leave. See the next issue of WHiP.

Lower earnings limit

6 April 2020

The lower earnings limit (LEL), above which National Insurance Contributions are payable, will be increased from the current £6,136 pa to £9,500 pa for 2020/21. In recent years, the LEL has also been the lower earnings threshold for automatic enrolment 'qualifying earnings'. If the alignment is maintained, minimum pension contributions could be reduced.

IR35: personal service companies

6 April 2020

Tax obligations and National Insurance contribution liabilities may attach to fees paid to individuals who act through a personal services company (PSC). Currently, the obligations to determine tax status and account for taxes rest with the PSC. The new rules in many cases pass this obligation to the recipient of the services. This may affect pension schemes where, for example, an individual independent trustee provides their services via a PSC. See our Incentives & Remuneration and Employment departments' briefing Off-Payroll Working Rules: The final proposals revealed – What do you have to do under the New Rules?.

HMRC priority in corporate insolvencies

6 April 2020(?)

The last draft Finance Bill included a provision that would give HMRC preferential creditor status in corporate insolvencies. This would place HMRC above pension scheme trustees and other unsecured creditors in the insolvency priority order. Employer and guarantor covenant advice may be affected. See WHiP Issue 77.

Securities Financing Transactions (SFT) Regulation

11 October 2020

This EU Regulation relates to SFTs such as repo/reverse repo and securities lending transactions. Record-keeping obligations are already in force and trustees are required to issue prescribed risk warnings to their counterparties. The requirement for pension schemes to report SFTs to a trade repository will come into force on 11 October 2020. See WHiP Issue 57. *(See also note 1 below*: *Effect of Brexit.*)

DC charges cap

2020

The government will again review the DC charges cap. For more details, see our briefing note DC charges and governance and WHiP Issue 68.

Automatic enrolment reviews

2020

The government is required to review the automatic enrolment DC and DB scheme alternative quality requirements.

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

5 April 2021

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.

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

17 June 2021

The temporary clearing exemption for pension schemes has been extended as part of the "REFIT" of EMIR. The exemption applies to certain OTC derivatives transactions used to reduce investment risks and liabilities. Notwithstanding this, the FCA continues to encourage all market participants, including pension schemes, to prepare for mandatory central clearing as early as practicable. See WHiP Issue 76. (*See also see note 1 below: Effect of Brexit.)*

London Inter-Bank Offered Rate (LIBOR) to be discontinued

During 2021

The FCA is encouraging all market participants to transition away from the use of LIBOR, which will no longer be supported by it from the end of 2021. Pension schemes may use LIBOR as a benchmark against which the investment performance of their managers is judged as well as having positions in interest-rate derivatives referable to LIBOR. There is not yet a settled, market-wide view of what will replace LIBOR but industry groups are active in seeking suitable alternatives.

Automatic enrolment changes

Mid-2020s

The government has proposed significant changes to the scope of the automatic enrolment duties, including extending automatic enrolment to 18 to 21 year olds and removal of the lower pensionable pay threshold, subject to finding ways to make these changes affordable. See WHiP Issue 68.

RPI and CPI

By 2030 but not before 2025

The Chancellor of the Exchequer has responded to the UK Statistics Authority's request to reform RPI by aligning it with CPIH (the Consumer Prices Index including owner-occupier housing costs). There will be a consultation launched in March 2020 on whether to make the change before 2030, but not before 2025. See WHiP Issue 78.

Normal minimum pension age to be raised to 57

From 2026 to 2028

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

Ongoing and recurring events

The following are events that are ongoing or recurring:

Automatic re-enrolment

Every three years

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. It must then be repeated every three years. See our briefing note Automatic re-enrolment.

State pension ages rising

Until 2046 or perhaps 2039 (with implications already for schemes with bridging pensions or state pension offsets)

State pension age for both men and women is now rising above age 65, currently to age 68 by 2046. The increase from 66 to 67 has been brought forward by eight years, to take place between 2026 and 2028. The government has proposed 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.

Pending cases

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

Retrospective equalisation of pension ages

In *Safeway v Newton*, the Court of Appeal will consider the European Court’s judgment regarding the use of a scheme's retrospective amendment power to 'level down' benefits accrued in a *Barber* window period. The European Court ruled that EU law prohibits a scheme, in the absence of objective justification, from adopting a measure which retroactively raises women's pension ages to be the same as men's, even where the amendment is permitted by national law and the scheme trust deed. In the absence of a settlement, the Court of Appeal can now be expected to consider the objective justification question and an additional argument about the effect of UK law. See WHiP Issue 78.

VAT and DB schemes

In the *United Biscuits* case, HMRC is being challenged on its historic practice of exempting investment management services supplied to DB schemes by insurers but not the same services supplied by fund managers. The High Court ruled in favour of HMRC, effectively holding that pension fund management services are not insurance and so should not be exempt from VAT even when provided by insurance firms, but this is being appealed. A preliminary European Court ruling is awaited, to be followed by the judgment of the Court of Appeal. See WHiP Issue 68.

Expected developments with no confirmed date

The following are expected legislative and regulatory developments for which there is no confirmed date:

GMPs and sex discrimination

The *Lloyds Banking Group* case provided some clarity about the need to equalise benefits to remove the discriminatory effects of GMPs but a further hearing, to consider the need or otherwise to revisit past transfers-out, is expected in April/May 2020.

The government previously stated its intention to legislate to remove the need for a claimant to point to a comparator of the opposite sex in order to establish unlawful discrimination. Implementation was delayed, however, pending the *Lloyds* litigation and consideration of a combined value-equalisation and GMP-conversion process.

An industry group is considering issues for trustees and administrators following publication of a 'call to action' in July 2019 and has started to issue guidance. An HMRC group is considering tax issues (initial guidance was expected in December 2019 but has been delayed).

See our briefing notes Equalisation of benefits that include GMPs and GMP equalisation: court ruling, and WHiP Issues 74, 76 and 77.

Pension Schemes Bill

The government has reintroduced its Pension Schemes Bill to Parliament, with a few tweaks. It covers the following matters. (See our briefing note Confirmed government plans for the protection of DB pensions and WHiP Issue 78.)

- **DB scheme funding and investment:** DB schemes will have to have a "funding and investment strategy". This is a strategy for ensuring that benefits can be provided over the long term. After determining or revising such a strategy, trustees will have to prepare a "statement of strategy". Further details are awaited. Valuations will have to be submitted to the Pensions Regulator.

  The Pensions Regulator is developing a new Code of Practice on Funding Defined Benefits (with new accompanying guidance), to define "prudent" (in relation to technical provisions) and "appropriate" (in relation to recovery plans) and to ensure that long-term objectives for the scheme are considered when setting funding objectives. A consultation is expected, following a consultation on a new scheme funding framework (now due in March 2020). See WHiP Issue 78.

- **Contribution notices:** There will be two new grounds (subject to certain defences) for the Regulator to issue a contribution notice. These are in circumstances where (a) if a section 75 debt had fallen due immediately after an act or failure to act, the act or failure to act would have materially reduced the amount of the debt likely to be recovered by the scheme and/or (b) where an act or failure to act reduced the employer's resources by an amount that is material, relative to the estimated section 75 debt.

- **New offences:** There will be two new criminal offences, subject to certain defences: avoidance of an employer debt and conduct risking accrued scheme benefits.

- **Notifiable events:** There will be new notifiable events (ie, events that must be notified to the Regulator). The detail will be in regulations but the government previously indicated that these will be the "sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities" and "granting of security on a debt to give it priority over debt to the scheme".

- **Restriction of statutory transfer right:** With a view to combating pension transfer scams, the government will be able to prescribe that the statutory transfer right is subject to conditions relating to the member's employment or place of residence and to the provision of evidence about those matters. The government had previously proposed to limit the right so that a statutory transfer value could only be taken to: a personal pension operated by an FCA authorised firm; an occupational pension scheme where there is evidence of genuine earnings from an employment to which the scheme relates; or an authorised master trust. See WHiP Issue 66.

- **Collective money purchase benefits:** There are provisions to enable the provision of collective defined contribution pensions as "money purchase benefits". Collective DC schemes target defined benefits but do not guarantee them and the pensions are paid from the scheme rather than externally. Initially, the only permitted model will be the one agreed by Royal Mail with the Communication Workers Union. See WHiP Issue 75.

- **Pensions dashboard:** Schemes will be required to make data available for pensions dashboards. The obligation is expected to be staged, with the largest DC schemes affected first. See WHiP Issue 76.

DB consolidation

The government has consulted on legislation governing DB consolidator schemes which are intended to operate in some circumstances as an alternative to buy-out. Its response is awaited. See WHiP Issue 74.

IORP II directive

Existing internal controls requirements have been broadened to require occupational pension schemes to "establish and operate an effective system of governance including internal controls", which must be "proportionate to the size, nature, scale and complexity of the activities of the occupational pension scheme".

The Pensions Regulator's code of practice on internal controls is required to be updated. Schemes with 100 or more members will need to check existing policies or introduce new policies in relation to various matters. Trustees of such schemes will also be required to carry out and document an "own-risk assessment" of their system of governance. See WHiP Issue 62 and 73. (*See also note 2 below: Effect of Brexit.*)

Shared parental leave for grandparents

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

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) Act 2018, they will continue to apply in the UK until domestic law changes after Brexit.*

Effect of Brexit Note 2*: When/if the UK leaves the EU, and subject to any agreed exit terms, it will not be obliged to implement EU directives. Some Brexit models would, however, require the UK to continue to implement many directive requirements. 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.*

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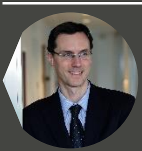

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