

TRUSTEE QUARTERLY UPDATE

1 December 2017

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Cases

Safeway v Newton: Court of Appeal refers "Barber window" case to EU court

The Court of Appeal has decided to refer to the Court of Justice of the European Union the question of when the "Barber window" was closed in a case where there was a gap of almost five years between the date of the announcement to members telling them that benefits would be equalised and the date of the deed of amendment dealing with equalisation. The scheme's amendment power stated that amendments could take effect retrospectively from the date of any prior written announcement to members. For more information, [click here](#).

Court increases level of Pensions Ombudsman award for maladministration

In the case of Smith v Sheffield Teaching Hospitals NHS Foundation Trust, the court increased the level of a Pensions Ombudsman award for maladministration. The High Court judge held that the Deputy Pensions Ombudsman had erred in law in making a maladministration award of £500 (the bottom end of the scale for such awards) and awarded £2750 instead. Key factors were: (a) the number of occasions on which misleading information had been provided to the member and the length of the period in which misleading information had been provided (6 years immediately prior to the member's retirement); and (b) the ease with which the correct position could have been established (ie simply by referring to the scheme rules). For more information, [click here](#).

Court rejects claim that fund manager fees should be exempt from VAT

In the case of United Biscuits (Pension Trustees) Limited v Commissioners for HMRC, the court has rejected a pension fund trustee's claim that pension fund management services provided by non-insurers are entitled to an exemption from VAT by reason of EU law. The trustee had argued that as a matter of EU law such services were insurance transactions and therefore attracted a mandatory exemption from VAT, but this argument was rejected. HMRC currently treats pension fund management services provided by insurance companies as VAT exempt, but as reported under "VAT developments" in our Update, is ending this practice in relation to defined benefit schemes from 1 April 2019 following the UK's exit from the EU.

Legislation

HMRC publishes guidance on application of money laundering regulations to pension schemes

In our last Update we reported on the lack of clarity regarding how new money laundering regulations, which came into force on 26 June 2017, applied to pension schemes. There are broadly two elements to the requirements: (a) a requirement for trustees to maintain records of "beneficial owners"; and (b) a potential requirement for trustees to provide specified information to HMRC by 31 January. HMRC has now published guidance which includes a section on HMRC's approach when applying the regulations to occupational pension schemes. Key points are:

- ▶ confirmation that, although not all schemes will be required to provide information to HMRC, HMRC does take the view that the record-keeping requirements under the regulations will generally apply to occupational pension schemes
- ▶ confirmation that scheme administrator liability for an annual allowance charge, lifetime allowance charge and various other tax charged relating to a specific member benefits do not trigger an obligation to provide information to HMRC under the regulations. So for practical purposes, whether the trustees will be required to provide information to HMRC will normally depend on whether the trustees have incurred a stamp duty liability (eg as a result of holding shares or property directly) in the previous tax year
- ▶ if a scheme is required to provide information to HMRC, it will only be required to identify beneficiaries by class rather than by name if the number of named beneficiaries exceeds ten;

- ▶ for the purposes of the regulations, HMRC regards the "settlor" as being the original employer. If that employer has ceased to participate, HMRC is content with details of the original and current participating employers only rather than regarding as settlors all employers that have ever participated and
- ▶ where details of asset values have to be provided to HMRC, it is content for information from the latest scheme accounts to be used, provided they provide a reasonably good estimate of the market value of the assets at the point when the scheme is first registered with the trust registration service under the money laundering regulations.

The regulations are not specifically targeted at pension schemes, but non-compliance is a criminal offence if trustees have not taken all reasonable steps to comply. Trustees should consider in the light of HMRC's guidance whether there is any action they need to take in order to comply.

Legislation passed to reduce money purchase annual allowance

As expected, legislation has now been passed to reduce the money purchase annual allowance from £10,000 to £4,000 for the current tax year. The legislation also provides for an income tax exemption for up to £500 worth of employer-arranged pensions advice. The legislation for both these measures was due to have been enacted earlier, but was postponed due to the General Election.

Trustees who wish to pay an annual allowance charge on behalf of the member where there is no legal obligation to do so under the "scheme pays" provisions should check whether their scheme rules allow this, as a rule amendment will often be required in such circumstances.

Pension Protection Fund

PPF Levy Developments

The Pension Protection Fund (PPF) has published a policy statement regarding its levy policy for the third "triennium" (the three year period running from 2018/19 to 2020/21) and has also consulted on the levy rules that will apply for the 2018/19 levy year. Where a contingent asset will result in a levy saving of more than £100,000, the PPF intends to require trustees to obtain a consultant's report before the contingent asset is certified (making the position more akin to the existing regime for asset-backed contributions).

The PPF has also consulted on revised standard form contingent asset agreements which will need to be used for any new contingent assets for the coming levy year. The PPF will not require existing agreements to be re-executed for the coming levy year, but has said it is likely to require re-execution for the following year.

Pensions Ombudsman

Scheme ordered to re-take death benefits decision after failure to consider potential beneficiaries

In the case of Mr Y (PO-17599), the Deputy Pensions Ombudsman (DPO) has ordered a scheme to re-take its decision regarding the distribution of a lump sum death benefit where the lump sum had been paid to the member's estate without considering payment to various potential beneficiaries. The case illustrates the importance of genuinely exercising discretion rather than sticking rigidly to fixed principles, and considering potential beneficiaries regardless of whether the individuals in question have put themselves forward as such. For more information, [click here](#).

Trustees required to reimburse advice fee where transfer value wrongly quoted as over £30,000

In the case of Mr K (PO-13094), trustees were not held to a "guaranteed" transfer value quotation where a calculation error was discovered before the transfer value was paid, but were ordered to reimburse the member for the £950 fee which he had paid to a financial advisor on the basis that as the transfer value was over £30,000, he would not be permitted to take a transfer value without taking financial advice.

The member was initially quoted a transfer value of £30,485. The accompanying literature gave a period for which the transfer value was guaranteed, but stated that it would not be binding should an error subsequently be discovered. Legislation provides that trustees must not pay a transfer value in excess of £30,000 from a defined benefit to a money purchase scheme unless the member has received independent advice from a financial advisor. The evidence showed that the member had been reluctant to appoint a financial advisor, but had eventually done so on the understanding that it would not otherwise be possible to transfer his benefits. He agreed to pay the adviser a fee of £950. Subsequently (before any transfer had taken place) the scheme administrator informed the member that the transfer value quoted had been incorrect. The correct figure was £25,000.

The Pensions Ombudsman rejected the member's claim that the scheme should pay the transfer value originally quoted, but did order the scheme to pay the member £950 in respect of the financial adviser's fee. Rejecting the argument that the member would have been advised to take financial advice even for a lower transfer value, the Ombudsman found the evidence indicated that the member was reluctant to pay for financial advice and only did so because he believed that the trustees would be unable to pay the transfer value otherwise due to it being over £30,000.

Ombudsman upholds complaint where administrator fails to comply with the higher standard for anti-pension scam duties

In his determination in Mr N (PO-8048) the Pensions Ombudsman has held that the administrator of a transferring scheme committed maladministration by failing to carry out appropriate checks and failing to issue the Regulator's 'scorpion' leaflets. The trustee of the receiving scheme had also committed maladministration by failing to respond to enquiries raised by the complainant or the office of the Pension Ombudsman. For more information, [click here](#).

Ombudsman awards compensation for loss of investment return based on member's personal investment history

In the case of Mr D (PO-13219) the Deputy Pensions Ombudsman based her award for investment loss on the member's personal investment practice. Due to a series of administrative errors, the member's pension commencement lump sum from his defined benefit scheme was paid approximately 8 months late. The member was able to produce documents showing that he had a practice of using large payments received to make investments, generally investing around 90% of any lump sum received. The DPO was satisfied on the balance of probabilities that had the member received his lump sum on time, he would have invested 90% of it, split between an investment account and an ISA. She therefore based her award for late payment of the lump sum on the investment returns that would have been made had the lump sum been invested in this way.

Comment

If a substantial benefit has been paid late, trustees should be aware of the risk that the member may be able to bring a successful financial loss claim for more than just a basic rate of interest if he/she can demonstrate a past investment practice which would have produced significantly higher returns.

Ombudsman awards £500 where information did not make clear revaluation calculated over whole period of deferment rather than year by year

The Deputy Pensions Ombudsman has awarded a member £500 for distress and inconvenience where the member received a lower pension than he was expecting based on his own calculations. The member had based these on an information sheet which suggested that benefits were revalued year on year rather than by of a single percentage figure covering a longer period. The case illustrates the need for care when providing information which members might use to perform "DIY" benefit calculations, particularly in relation to revaluation methodology. For more information, [click here](#).

Pensions Regulator

New questions on scheme return

In our Trustee Quarterly Update of 1 March 2017, we reported that the Pensions Regulator will be asking schemes to submit more information around scheme data as part of the annual scheme return. The Pensions Regulator has now provided more detail on the specific questions it will be asking.

The first additional question will be "when was the last data review?" and the second will be "what is the scheme's data score?" The data score is the percentage of members for which the scheme has full and accurate data records. Both questions will be asked in relation to both "common data" (data which the Regulator expects all schemes to hold, such as member's date of birth, NI number etc) and "scheme specific data" (previously known as "conditional data"). "Scheme specific data" means required data that is specific to the scheme. For example, the salary details that a scheme needs to hold will vary according to how pensionable salary is defined in the scheme rules.

The scheme return also asks whether the scheme has a professional trustee. When answering this question, trustees should have regard to the Regulator's definition of professional trustee on which we reported in our last Update.

Regulator publishes guide for trustees preparing chair's statement

The Regulator has published a "quick guide" to preparing the chair's statement for trustees of DC schemes. The guide addresses some common misunderstandings and omissions seen by the Regulator, along with examples of what it would consider to be good or poor practice. There is a checklist at the end. The guide can be found on the section of the Regulator's website dealing with communicating and reporting for DC trustees.

Consultations

Consultation on bulk transfer of DC pensions without member consent

The DWP has published a consultation response and draft regulations following its call for evidence on the law relating to bulk transfers of DC benefits without member consent. Issues commonly raised by respondents to the consultation were that the current law, drafted with defined benefit schemes in mind, made little sense when applied to DC schemes. In response, the Government has decided to remove the requirement to obtain an actuarial certificate for a DC to DC transfer, and the requirement for the relevant schemes to be related through a common employer or financial transaction. Instead the transfer will either have to be to an authorised master trust or the trustees of the transferring scheme will have to obtain and consider written advice of a "suitably qualified professional" who is independent of the receiving scheme.

The Government plans to make the changes with effect from 6 April 2018.

Consultation on regulations requiring disclosure of costs and charges

The Government is consulting on draft regulations, due to come into force on 6 April 2018, which will require trustees of schemes providing DC benefits (other than those where the only DC benefits are AVCs) to publish online more detailed information about costs and charges, and include in members' annual benefit statements details of the website on which the information can be viewed. The regulations will also require the trustees of such schemes to provide to members on request information about the investments underlying "pooled funds". This is in particular aimed at schemes invested in unit-linked contracts of insurance where it may not be possible for the member to establish meaningful information about the underlying investments from the name of the unit-linked contract alone.

Government consults on draft master trust regulations

In previous Updates we have reported on the Pension Schemes Act 2017 which introduces a prohibition on operating a master trust scheme without authorisation from the Pensions Regulator. On 30 November 2017, the DWP published a consultation on draft regulations supplementing the detail of the master trust authorisation regime. The consultation closes on 12 January 2018. The draft regulations have a coming into force date of 1 October 2018.

HMRC

VAT developments

Without publicising the fact, HMRC has effectively performed a U-turn in relation to its position regarding VAT on pension scheme services, to a business as usual position. For more detail, see our e-bulletin.

Separately, HMRC has announced that from 1 April 2019 (ie after the UK has left the EU) it will end its policy of treating pension fund management services provided by insurance companies in relation to defined benefit schemes as exempt from VAT. (The exemption will generally continue for services provided to defined contribution schemes.) The change was originally due to have taken effect from 1 January 2018.

End of contracting out: HMRC will not issue statements to individuals as previously planned

In its Countdown bulletin 30, HMRC has announced that it is no longer intending to send statements to individual members following the reconciliation process in relation to the end of contracting-out.

Introduction of lifetime allowance look up service

In its Pension schemes newsletter 91, HMRC announced the launch of its online service allowing scheme administrators to look up whether a member enjoys any of the statutory protections against the lifetime allowance such as enhanced protection. To use the service, scheme administrators will need to obtain from the member his/her protection notification number and scheme administrator reference number.

Lifetime allowance to increase in line with CPI

In a Budget that was uneventful from a pensions perspective, it was announced that the lifetime allowance will increase to £1,030,000 for tax year 2018/19 in line with CPI.

HMRC Pensions digital service

In its Pension schemes newsletter 90, HMRC announced that it is planning to migrate existing pension schemes on to its new Pensions Online Digital Service by April 2018, a year earlier than previously announced. HMRC asks all pension scheme administrators to log on to Pension Schemes Online as soon as possible to check that their details are up-to-date. If an administrator has not logged on to the current online service since April 2015, HMRC may not have enough information to move it to the new service, meaning that the administrator will only be able to use the new service by registering as a new user from April 2018.

Miscellaneous

Pension schemes need legal entity identifier (LEI) by 3 January 2018

As a result of the recast Markets in Financial Instruments Directive (MiFID II) pension schemes will generally have to obtain a "legal entity identifier" (LEI) by 3 January 2018 in order for the scheme's investment manager to execute trades on behalf of the scheme after that date. A LEI is a unique globally recognised 20 character code that can be used to identify a party

participating in a transaction. In the UK, the issuing authority for LEIs is the London Stock Exchange. A fee of £115 plus VAT is payable to obtain a LEI. Trustees should make sure this issue has been addressed in relation to their scheme. Some investment managers may be willing to apply for a LEI on the scheme's behalf.

Publication date for pensions White Paper may now be end of February 2018

In our last Update we reported that the Government had announced plans to publish a White Paper later this year on the regulatory regime for defined benefit pension schemes. However a DWP speaker at the PLSA conference has since given the publication date as end of February 2018.

IFRIC 14: IASB considers change to more principles-based approach

In our March 2017 Update we reported on the International Accounting Standards Board's (IASB's) proposed changes to IFRIC 14, the accounting standard which addresses the circumstances in which a pension scheme surplus can be recognised in a company's accounts. At its meeting on 20 September, the IASB decided to perform further work to assess whether it can establish a more principles-based approach for assessing the availability of a refund of surplus rather than adopting the changes as originally proposed.

FCA policy statement on standardising disclosure of transaction costs

On 20 September 2017 the FCA published its policy statement PS17/20 which sets out rules requiring asset managers to disclose transaction costs to trustees of DC pension schemes in a standardised way. The duty placed on asset managers is intended to ensure trustees can comply with their duty to report on transaction costs as far as they are able. The rules come into force on 3 January 2018.

Guidance for personalised risk warnings for members with GARs

On 13 November 2017, the DWP published guidance for pension scheme trustees concerning new obligations due to come into force on 6 April 2018 that will require personalised risk warnings to be issued to members who are considering giving up the benefit of guaranteed annuity rates (GARs).

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