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THE BAKER MCKENZIE PENSIONS TEAM

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*If, like us, having put aside the tinsel and turkey for another year, your thoughts are turning to planning the pensions year ahead, here to assist is our 2018 Pensions Legal Planner. Packed with the usual mix of forthcoming legislative and regulatory changes, cases to watch out for in the courts and, perhaps, some crystal ball gazing, we wish you happy reading and, above all, a healthy and prosperous New Year!*

### **PREPARE FOR NEW DATA PROTECTION REGIME - IN FORCE FROM MAY 2018**

The EU General Data Protection Regulation (GDPR) will come into effect on 25 May 2018 and will lead to a significant change to the data protection regime in EU countries. All data controllers, including trustees of UK schemes, will be required to comply with the GDPR. In the UK, the GDPR will be supplemented by a new Data Protection Act, which is currently before Parliament.

Preparing for the new regime will remain a key item on employers' and trustees' agendas in the run-up to May 2018. Preparing for the new regime can seem daunting, particularly for those organisations and trustee boards that are less advanced in their preparations. We will continue to provide our clients with support in their preparations in the coming months, including taking a look at the practical steps employers and trustees should be taking in our Annual Seminar.

### **THE FUTURE OF DB PENSIONS - WHITE PAPER DUE EARLY IN 2018**

A White Paper on the future of DB schemes is due to be published this winter - possibly in February. The White Paper follows on from the February 2017 Green Paper on the security and sustainability of DB schemes. In the Green Paper, the Government had said that it thought that the regulatory and legal framework was working well overall. There was therefore some doubt within the industry as to whether the White Paper would result in any significant changes. Subsequent developments, have, however, suggested that we could potentially see some significant proposals put forward in the White Paper - including, potentially, in areas such as the Pensions Regulator's powers and scheme consolidation. ***Although it is unlikely to contain anything which will require trustees or employers to take any immediate action in relation to their schemes, it is one for anyone involved in the running of DB schemes to watch out for.***

## **AUTO-ENROLMENT CONTRIBUTION INCREASES - NEW YEAR CHECK FOR COMPLIANCE**

Last year, the Government changed the legislation so that the planned increase to minimum statutory auto-enrolment contributions takes place at 6 April 2018 and 6 April 2019, instead of at October 2017 and October 2018. Whilst the increases in member and employer contributions remain the same, it is the date of change that has been pushed back.

Where a scheme or Group Personal Pension (GPP) provides for minimum statutory contributions only to be paid, employers should ensure that payroll systems will be set up in time to ensure that the increased contributions will be deducted from 6 April.

Employers should also have checked the rules of the scheme (or their communications with members if they pay into a GPP) and, where applicable, employment contracts, to check that they align with the new dates or whether action needs to be taken to bring the two into alignment. Where a scheme's rules simply provide that contribution rates will increase as required under the automatic enrolment legislation from time to time, there should be no issue with delaying the increase. However, where a scheme's rules expressly set out the "old" timetable, the scheme will from 1 October 2017, strictly, be going beyond the minimum automatic enrolment requirement, as the contribution rates will be above the minimum between 1 October 2017 and 5 April 2018. Alternatively, the employer may wish to delay the increase until 6 April 2018. In either case, it may be necessary for employers to consult or for employment law advice to be taken.

***Employers with schemes which may have this issue should consider if they wish to change the increase date or address the issue of higher contributions having been deducted than those specified in the rules.***

The Government is also considering changes to the auto-enrolment requirements, principally by extending them to workers aged between 18 and 21 and requiring contributions to be calculated from the first pound earned. The current minimum age requirement is 22 and it is understood that this would bring another 900,000 workers within the scope of auto-enrolment. It is currently possible to limit contributions to a band of earnings only (£5,876 to £45,000 for the 2017/8 tax year). The proposal would require contributions on earnings from pound one.

***The changes under consideration, if enacted, would be brought into effect in the mid 2020s. They would have a potentially significant cost impact for employers with workers earning above the earnings threshold (currently £10,000) aged 18 to 21 and/or whose pension arrangements currently require contributions on band earnings.***

The Government also proposes to investigate how best to bring self-employed people into workplace saving (acknowledging that not all self-employed need help to save). A consultation will be run and feasibility work will be undertaken to address the diversity of the self-employed population. There will be a focus on how existing systems (e.g. digital taxation) can be used to facilitate pension saving. Again, the intention would be to introduce these changes in the mid 2020s.

Full details are set out in the [DWP's Automatic Enrolment Review 2017: Maintaining the Momentum](#). We will keep you updated via our monthly Pensions Update.

## **ANTI-MONEY LAUNDERING - NEW INFORMATION KEEPING REQUIREMENTS FOR TRUSTEES - ARE YOU COMPLIANT?**

New requirements for trustees of occupational pension schemes to keep up-to-date written records about the beneficial owners of the scheme (i.e. not just the legal owners) came into force during 2017 under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (Money

Laundering Regulations).

**If they have not already done so, trustees of all occupational pension schemes should check that they are now complying with the new information-keeping requirements.**

In addition, if trustees are liable to pay relevant UK taxes such as income tax, capital gains tax and stamp duty reserve tax in any tax year, they must, in principle, now register with HMRC via the new online Trust Registration Service and provide information to HMRC. Although it is likely, based on our understanding of HMRC guidance at the time of writing, that many schemes will not be required to register with HMRC, **if they have not already done so schemes should check with their administrators early in the new year whether any of the relevant taxes have been incurred in case they are required to register and provide information to HMRC and a 31 January 2018 deadline applies.**

If trustees are not required to register with HMRC in 2018, they will need to check with their administrators on an ongoing basis (i.e. at the end of each tax year) to confirm whether any of the relevant taxes have arisen as a requirement to register and provide information will then be triggered. Given the uncertainty that this may create from year to year, trustees will need to consider whether to register as a matter of routine.

Further details about the new requirements can be found in our [June](#) and [November](#) Pensions Updates.

## **PENSION PROTECTION FUND (PPF) LEVY MANAGEMENT - KEY DATES REMINDER**

Key actions and dates for trustees and employers are:

<b>Item</b>	<b>Key dates*</b>
Monthly Experian Scores	Between 31 October 2017 and 31 March 2018
Deadline for submission of data to Experian to impact on PPF-specific Monthly Scores	One calendar month prior to the Score Measurement Date
Submit scheme returns on Exchange	By midnight, 31 March 2018
Reference period over which funding is smoothed	5-year period to 31 March 2018
Contingent Asset Certificates to be submitted on Exchange	By midnight, 31 March 2018
Contingent Asset hard copy documents to be submitted as necessary to PPF	By 5pm, 29 March 2018
ABC Certificate to be sent by e-mail to PPF	By midnight, 31 March 2018
Mortgage Exclusion ('Officers') Certificates and supporting evidence to be sent to Experian	By midnight on 31 March 2018
Accounting Standard Change certificate	By midnight on 31 March 2018
Special category employer certificate	By midnight on 31 March 2018
DRCs Certificates to be submitted on Exchange	By 5pm, 30 April 2018
Certification of full block transfers to be completed on Exchange or sent to PPF (in limited circumstances)	By 5pm, 29 June 2018 (Exempt transfer application by 5pm 30 April 2018)
Invoicing starts	Autumn 2018
Certification of full block transfers to be completed on Exchange	By 5pm, 29 June 2018

\*Source: PPF News bulletin published 19 December 2017

The PPF will take into account information submitted on Exchange by these deadlines in the correct format when calculating a scheme's PPF levy. Note that some deadlines are 5pm on the relevant date whilst others are midnight.

The PPF has proposed updating the wording in its standard form contingent asset agreements, including the wording in its standard form Type A (parent company) guarantees. **Any schemes that are planning to enter into a new contingent asset agreement to be taken into account from March 2018 onwards, should be aware that we are anticipating new documentation. Existing contingent asset agreements which are executed prior to the date the standard forms are updated will continue to be able to be submitted for recognition in the levy for 2018/19.**

## **TRANSFER OF CONTRACTED-OUT RIGHTS - APRIL 2018 REGULATIONS?**

The industry awaits promised legislation to resolve the problem of not being able to transfer contracted-out rights to a scheme that has never been contracted-out. When contracting-out was abolished at April 2016, the legislation was amended to ensure that schemes that had been contracted-out could continue to accept a transfer of contracted-out rights built up before the abolition date, be they GMPs or reference scheme test rights. However, the legislation was not amended to provide for such transfers to a scheme that had never been contracted-out, frustrating mergers where a new vehicle is set up to be the ongoing scheme. This issue stopped legitimate scheme mergers happening. Consultation and draft regulations are expected shortly, with a view to the legislation to address this being in place around April 2018.

## **DC SCHEMES - NEW CHARGES AND COSTS DISCLOSURE REQUIREMENTS EXPECTED AT APRIL 2018**

The DWP has proposed changes to the disclosure of pension costs and charges in DC occupational pension schemes which are due to come into force on 6 April 2018. The proposals include:

- a requirement to publish charges and transaction cost information and disclose this to members and beneficiaries of the scheme and others including recognised trade unions – and that this should apply, subject to a small number of exceptions, to schemes that provide money purchase benefits;
- the costs and charges information to be published on the internet for public consumption;
- trustees and managers should also provide an illustration of the compounding effect of the costs and charges affecting pensions savings;
- trustees and managers should, as a minimum, publish costs and charges on a similar annual cycle to the Chair's Statement; and
- that each member who receives an annual benefit statement must also be provided, at the same time, with a web address where members can find the costs and charges for their scheme.

***Trustees of DC schemes will need to ensure compliance with the new requirements in accordance with the new legislation.***

## **INVESTMENT CONSULTANTS AND FIDUCIARY MANAGERS REFERENCE - PROVISIONAL DECISION DUE JULY 2018**

The FCA has confirmed that it will make a Market Investigation Reference to the Competition and Markets Authority in relation to investment consultancy and fiduciary management services. The FCA may make a reference such as this when it believes that it has reasonable grounds to suspect that features of a market prevent, restrict or distort competition. It has suggested that the investment consultancy and fiduciary management markets may have a weak demand side, as it believes that pension scheme trustees may have difficulty assessing the quality of the services provided, or comparing them with other options. The FCA also identified that the three largest firms had a market share between 50 and 80%, and that barriers may exist which restrict new consultants from developing their business. "Vertical" business models were also identified as creating potential conflicts of interest.

A final report is not due until 13 March 2019 but a provisional decision report is expected in July 2018.

## **DC TO DC BULK TRANSFERS - A NEW TEST?**

The DWP's response to its consultation on the process for making transfers from one defined contribution (DC) scheme to another is awaited. The current legislative framework for DC transfers without consent, in particular the need for an actuarial certificate has caused much debate in the industry and we were pleased

to have the opportunity to respond to the Government's proposals to address this. In short, that proposal would:

- remove the need for an actuarial certificate for DC to DC bulk transfers and replace this with a requirement to obtain investment advice where the transfer is being made to a DC scheme that is not a master trust;
- remove the requirement to have some employer relationship between the schemes to which the transfer relates; and
- maintain charge cap protections for those transferred without consent.

The proposed changes would not apply to defined benefit (DB) schemes or to DC schemes with guarantees.

***No timing has been announced for any changes which will be of interest to DC scheme trustees and sponsors - we will keep you informed via our monthly UK Pensions Update.***

## **PENSION SCAMS - PROPOSED FURTHER MEASURES TO COMBAT SCAMS**

Following a joint consultation by the DWP and HM Treasury in December 2016, the Government confirmed in August 2017 that it would take forward a number of proposals to combat pensions scams. The current status of these proposals is:

- **Ban on cold calling** - the Government indicated at the time of its consultation response in August 2017 that it intended to introduce legislation to implement a ban during 2018. Since then, cross party amendments have been introduced into the Financial Guidance and Claims Bill which give the new single financial guidance body the power to advise the Secretary of State to introduce a ban. The Bill is currently making its way through Parliament. We will need to wait and see if the final legislation includes this amendment.
- **Limiting the statutory right to transfer** - the Government has confirmed that it will legislate to introduce new limits on the current statutory transfer regime. Broadly, this would mean that statutory transfers could only be made in the following cases:
  - transfers to personal pension schemes authorised by the Financial Conduct Authority (FCA);
  - transfers to authorised Master Trust schemes;
  - transfers where a genuine employment link to the receiving occupational pension scheme could be evidenced; and
  - overseas transfers to QROPs.

We are still awaiting draft legislation to implement this proposal and it is unlikely that we will see any final legislation until 2019.

- **Making it harder to open fraudulent pension schemes** - the Finance (No. 2) Bill 2017-2019, which is currently progressing through Parliament, includes provisions which widen the circumstances in which HMRC can refuse to register a pension scheme, or de-register an existing pension scheme.

## **AND IN CASE YOU THOUGHT WE WEREN'T GOING TO INCLUDE SOMETHING ON BREXIT.....**

Much of 2018 will be occupied by the next phase of the negotiations on the terms of the UK's withdrawal from the EU. Based on the European Commission's current preferred timings, it is possible that we could see these concluded by October or November 2018.

Phase 2 of the negotiations is set to cover transitional arrangements and consider the framework for the

future relationship between the EU and the UK, although the European Council has said that the terms of the future relationship cannot be finalised until after the UK has left the EU.

We will continue to provide coverage of Brexit developments in 2018, including those which are particularly relevant in the context of pension schemes, on our specialised [Brexit Blog](#) and via our monthly UK Pensions Update.

## **OTHER THINGS TO WATCH OUT FOR**

### **The Taylor Review: "Good Work" report**

Back in July 2017, the Taylor Review of Modern Working Practices published its wide-ranging recommendations about modern working practices, including agency work, zero hours contracts and introducing a concept of "dependent contractor" to whom certain employment rights attach. In December, the Work and Pensions and BEIS Select Committees published a draft Bill for the Government to consider. The draft Bill seeks to implement some of the Taylor Review recommendations. The Courts also looked at the status of individuals (drivers and delivery riders) as to whether or not they were "workers" and, again, entitled to certain employment rights. In the *Uber* case, drivers were found to be workers (and this was upheld on appeal), whilst in the *Deliveroo* case, riders were found to be self-employed.

This is one to watch from a pensions perspective because, depending on the Government's response to the Taylor Review and draft Bill and on developing case law, it may be that some organisations will find themselves with pension obligations - and associated costs - that attach to individuals who were thought previously not to be in scope.

### **TPAS and Pensions Ombudsman to merge**

The Pensions Advisory Service ("TPAS") will merge with The Pensions Ombudsman ("TPO") to centralise dispute resolution within TPO. This will take place before the merger of TPAS with Pensions Wise and the Money Advice Service to form a single financial guidance body, as proposed in the Financial Guidance and Claims Bill 2017.

### **IORP II to be implemented by January 2019**

The second EU Directive on Institutions for Occupational Retirement Provision ("IORP") focuses on scheme governance and member communications, following the removal of controversial solvency funding provisions at an early stage. IORP II must be incorporated into national law by January 2019, which is before the UK's withdrawal from the EU in March 2019.

### **New requirements for Master Trusts to be registered with Regulator**

As reported in our [December Pensions Update](#), the Department for Work and Pensions ("DWP") has issued draft regulations under the Pension Schemes Act 2017 that set out further detail (and some limited

exemptions) for the regulation of Master Trusts. Under the new framework the Pensions Regulator (the "Regulator") will authorise and supervise Master Trusts, and the new regime is expected to commence from October 2018. The regime is broadly applicable to occupational pension schemes which are used by unconnected employers and which provide money purchase benefits (either alone or with other benefits).

### **Changes to employer debt regime**

As reported in our [April Pensions Update](#), the DWP has consulted on amending regulations that include a proposal for an employer in a multi-employer scheme to defer the requirement to pay an employer debt when it ceases to employ active members. This "debt deferral arrangement" would be subject to the condition that the employer retains its responsibilities to the scheme and continues to be treated as if it were an employer in relation to the scheme. Implementation of the regulations has been delayed and they are expected to come into force some time in the new year.

### **SOME HOUSEKEEPING ITEMS FOR 2018**

Here are a few items to put on your housekeeping list for 2018:

#### **Pension for civil partners and same sex spouses**

Has your scheme been reviewed to ensure compliance with the 2017 judgment of *Walker v Innospec* in the Supreme Court, which ruled that the 2005 time limit is contrary to EU equal treatment law when calculating survivor pensions for civil partners and same sex spouses?

Following the judgment, trustees and employers should have reviewed pensions already in payment to civil partners and same sex spouses and considered scheme rules with a view to removing the 2005 time limit.

We understand that no appeal against the judgment has been lodged at the European Court and so employers and trustees should proceed to review pensions in payment and scheme rules, if not already in hand.

Further details are available in our [Special Update](#).

#### **DB schemes - maximising VAT recovery**

Following HMRC's recent announcement that the current approved options for employers to recover VAT on services supplied to DB pension scheme will be retained indefinitely, employers may now wish review their current arrangements for recovering VAT on services supplied to any DB schemes which they sponsor to consider whether they are complying with HMRC requirements and whether they can do more to maximise recovery.

#### **Corporate trustees and governance - are your articles of association up to date?**

If you are reading this as a trustee director or a corporate trustee - do you know when your articles of association were last reviewed? If these have not been reviewed for some time, you may wish to consider reviewing and updating these to ensure that they reflect current legal requirements and set out clear and practical procedures for conducting trustee business.

## **WHAT'S IN COURT**

### **Payment of discretionary increases**

In *British Airways v Spencer*, the High Court held that the trustees of the Airways Pension Scheme had validly exercised the power of amendment to introduce a new provision to allow them to pay discretionary increases, and subsequent exercise of the new provision was also valid. The appeal to the Court of Appeal is listed for 1 May 2018.

### **ITV's appeal against Regulator's decision to issue FSD to be heard in January**

The substantive hearing in the long running anti-avoidance dispute between the Pensions Regulator and ITV in relation to the 'Box Clever' pension scheme will take place in the Upper Tribunal in January. ITV is challenging the Regulator's decision in 2011 to issue a financial support direction (FSD) against five ITV group companies following a joint venture between Granada and Thorn, which took place over 17 years ago. The intervening years have been taken-up with litigation over a number of procedural issues.

***The outcome of the case will be of interest to anyone involved in running DB schemes and will be of particular interest given the scrutiny which the Regulator's powers are currently under.***

### **Supreme Court to consider RPI to CPI switch**

The *Buckinghamshire v Barnados* case concerns changing the basis for revaluation and indexation of pensions from RPI to CPI. The Court of Appeal rejected an appeal by Barnados against a High Court decision that the scheme rules do not allow the trustees to switch the basis of pensions revaluation and indexation from RPI to CPI. Barnados' appeal to the Supreme Court is expected to be listed for 12/13 June 2018.

### **GMP equalisation - the answer?**

A very old chestnut - GMP equalisation - is due to be cracked by the High Court in 2018 in the *Lloyds Bank case (Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank PLC and others)*. The case is being brought by female members of the Lloyds Bank pension schemes, with union backing.

There has been uncertainty for many years as to whether or not there is a legal obligation to equalise GMPs or whether they are excluded from the general equalisation principle by their nature (being related to State benefit provision). The potential cost implications of equalisation are significant (reportedly c.£500m for the Lloyds schemes).



***Many of schemes in the UK, like Lloyds, have not taken steps to equalise their GMP liabilities and so this judgment will be of interest to many. We will keep you updated via our monthly UK Pensions Update.***

### **How to equalise benefits**

In 2017, the Court of Appeal ruled on pensions equalisation in *Safeway Ltd v Newton* and, importantly, made a referral to the European Court to rule on a long-held principle of equalisation that benefits in the "Barber window" should be levelled up, that is, treated in a more generous way when comparing male and female benefits.

Full details of the case are set out in our [October Pensions Update](#). In short, the key point in contention is whether or not it is correct, as a matter of European law, to apply the principle which appears to prevent retrospective levelling down of pension ages in order to equalise normal pension ages even where the scheme's power of amendment expressly allowed changes to be made retrospectively. This question has been referred to the Court of Justice of the European Union as the Court of Appeal held that the law in this area was not sufficiently clear for them to rule on.

We will have to wait and see what the Court of Justice of the European Union rules in this regard (and what the implications and timing of Brexit may be).

It is worth noting that the ability to amend a pension scheme retrospectively in a way which would or might affect accrued rights or entitlements has been considerably restricted since 6 April 1997 by the introduction of Section 67 of the Pensions Act 1995. Given this restriction, the impact of the Court of Justice of the European Union's ruling in relation to this is likely to be restricted to pension schemes that have the ability to amend retrospectively and did so before 6 April 1997 in circumstances similar to the Safeway case. ***Nevertheless, for sponsoring employers and trustees of schemes in this category, the outcome could be highly material.***

### **Scheme closure and final salary linkage**

We understand that the High Court has heard a case relating to the Wedgwood Pension Plan (*Wedgwood Pension Plan Trustee Limited v Salt*) relating to the purported closure of the scheme to accrual, salary linkage and the scheme's power of amendment. Judgment is awaited. Whilst cases of this nature inevitably turn on their own facts, complex issues of this type rarely come before the Court and may, nonetheless have some application to other schemes. We will keep you informed via our monthly UK Pensions Update.

### **OUR ANNUAL SEMINAR - THURSDAY 18 JANUARY 2018**

Many of the above topics and more will be considered in our **Annual Pensions Seminar on Thursday, 18 January 2018**. The seminar will cover:

- 2017 in review: a case law and Pensions Ombudsman update;

- practical steps for pension scheme compliance with the GDPR by May 2018;
- the DC arena; and
- 21st Century Trusteeship: independence and added value.

We look forward to seeing those of you who have registered.

If you would like more information about any of the items in this update, please contact your usual Baker McKenzie contact.

**IN THE MEANTIME, WE WISH YOU  
ALL THE VERY BEST FOR 2018**

## **Contact us**

Editors: **Sue Tye, Tracey Akerman and Sarah Hickling**



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