Pensions Update

April 2016

BAKER & McKENZIE

In this issue

If you wish to discuss any of these issues further, please contact your usual Baker & McKenzie lawyer.

Jeanette Holland
jeanette.holland@bakermckenzie.com

Robert West
robert.west@bakermckenzie.com

Arron Slocombe
arron.slocombe@bakermckenzie.com

Chantal Thompson
chantal.thompson@bakermckenzie.com

Editor: Tracey Akerman
tracey.akerman@bakermckenzie.com

Regulator consults on "how to" guides to support the new DC code of practice

The Pensions Regulator (the "**Regulator**") has launched a consultation on a series of "how to" guides to support the new code of practice for defined contribution ("**DC**") schemes. While the code of practice sets out the standards trustees of DC schemes (or schemes with a DC element) are expected to meet when complying with the law, the guides provide information on how to meet those standards in practice and cover six areas: the trustee board, scheme management skills, administration, investment governance, value for members, and communicating and reporting. The guides are not intended to be prescriptive, although in some instances the Regulator sets out what it considers to be best practice.

The consultation on the guides runs until 11 May 2016, and it is expected that the code and guides will come into force in July this year. The consultation document and the draft guides can be accessed by clicking here.

> Back to Top

Hybrid schemes quality requirements published

The DWP has published The Hybrid Schemes Quality Requirements Rules 2016. The Rules set out the detailed quality requirements that a hybrid pension scheme must satisfy to be used as an employer's automatic enrolment. The rules can be accessed by clicking here.

> Back to Top

Earnings trigger and qualifying earnings band for 2016/17 confirmed

The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2016 came into force on 6 April 2016 and will be of interest to employers in relation to their auto-enrolment duties. It confirms that:

- the earnings trigger (which determines who must be automatically enrolled into a workplace pension) remains at £10,000;
- the lower limit of the qualifying earnings band (which sets minimum contribution levels) remains at £5,824 - this retains the link with the National Insurance Contributions lower earnings limit; and
- the upper limit of the qualifying earnings band increases to £43,000 (from its current value of £42,385) - again, this retains the link with the National Insurance Contributions upper earnings limit.

> Back to Top

Regulator publishes draft compliance and enforcement policy

Trustees of DC schemes (or schemes with a DC component) should note that the Regulator is consulting on a revised compliance and enforcement policy for DC occupational pension schemes. Key changes to the current policy, which was published in November 2013, include the following:

- The Regulator proposes to broaden its proactive approach, enabling it to engage with schemes on a more regular basis and target its actions where it considers there to be the greatest risks.
- The draft policy sets out the principles that will guide the Regulator in determining the amount of a civil penalty.
- The draft policy also sets out a proposed mechanism for calculating the mandatory penalty for breaching the requirement to produce a chair's statement - all schemes will receive the minimum penalty of £500, which will be increased by 10p per member (or 20p per member if the requirement has been breached in the previous three years) up to the maximum of £2,000. The draft policy states that, where the scheme has a professional trustee in place, the penalty will generally be £2,000.
- The draft policy includes a proposed procedure for exercising the Regulator's powers under the Occupational Pension Schemes (Charges and Governance) Regulations 2015.

The closing date for responses is 3 May 2016 and the draft policy can viewed here.

> Back to Top

DWP publishes auto-enrolment guidance for DB schemes

Prior to the abolition of contracting-out on 6 April 2016, many employers will have relied on the existence of a contracting-out certificate as evidence that their defined benefit ("**DB**") scheme satisfied the relevant quality requirements for auto-enrolment purposes. From 6 April 2016, this is no longer possible and scheme quality must be demonstrated either by comparing the scheme against the test scheme standard or by applying one of the alternative quality requirements (such as the cost of accruals test).

The Department for Work and Pensions (the "**DWP**") has published guidance which is intended to assist in the practical application of the alternative quality requirements for DB schemes (and the DB elements of hybrid schemes). The guidance can be accessed by clicking here.

The guidance notes that, ideally, confirmation that one of the tests is met should have been provided on or before 5 April 2016 but, "so long as [the employer is] certain that the scheme remains of sufficient quality that confirmation can be given, it can follow shortly after 5 April 2016". The guidance suggests that the confirmation should take the form of written advice from an actuary (a certificate is not required). **If they have not already done so, employers therefore need to take action as soon as possible to determine whether their scheme satisfies the requirements and obtain the necessary confirmation.**

> Back to Top

Finance (No. 2) Bill 2016 published

The Finance (No. 2) Bill 2016, which was published on 24 March 2016, includes the following provisions in relation to pensions:

- **Reduction of the lifetime allowance:** the lifetime allowance is reduced from £1.25 million to £1 million with effect from 6 April 2016. It will then increase in line with increases in the consumer prices index each year from April 2018 onwards. The legislation will also put in place two transitional protection measures: fixed protection 2016 and individual protection 2016, for use by members whose benefits exceed £1 million or are likely to do so when they take their benefits.
- **Bridging pensions:** the legislation will allow schemes to continue to pay a

bridging pension up to a member's state pension age following the introduction of the single tier state pension.

- **Dependants' scheme pensions:** the legislation introduces exceptions from the anti-avoidance calculations that must otherwise be carried out in respect of annual increases in dependants' scheme pensions where an individual who was entitled to a scheme pension dies having reached age 75.

- **Pension flexibilities:** the legislation makes various minor changes to ensure the pension flexibility changes introduced from 6 April 2016 operate as intended. These changes were announced at Budget 2016 and we reported on them in our March 2016 Pensions Update.

- **Inheritance tax and drawdown funds:** the legislation introduces an exemption so that an inheritance tax charge will not arise where a person has failed to exercise their rights to draw designated funds from a drawdown pension fund or a flexi-access drawdown fund during their lifetime and so has left unused funds when they die.

HM Revenue & Customs ("**HMRC**") has published edition 77 of its pension schemes newsletter, which includes practical guidance and information on these and a number of other issues. In particular, the guidance sets out the process for claiming the new lifetime allowance protections (there is no deadline for doing this). The newsletter can be viewed here.

> Back to Top

EIOPA recommends enhanced risk assessment and transparency

The European Insurance and Occupational Pensions Authority ("**EIOPA**") has published its Opinion on a Common Framework for Risk Assessment and Transparency for Institutions for Occupational Retirement Provision ("**IORPs**"). Employers with DB pension schemes in the UK will be relieved that EIOPA does not, at this time, advise harmonising capital or funding requirements. Instead, EIOPA has recommended:

- introducing a standardised risk assessment to calculate the impact of common, pre-defined stress scenarios on pension schemes' balance sheets - the balance sheet would be prepared on a market consistent basis and would include all available security and benefit adjustment mechanisms, such as sponsor support, pension protection schemes and benefit reductions;

- disclosing the market-consistent balance sheet and the outcome of the standardised risk assessment to members, sponsors and other interested parties; and

- allowing for exemptions, the use of simplified methods and a lower frequency of risk assessments for smaller IORPs.

The Opinion can be accessed by clicking here.

> Back to Top

Court of Appeal strikes out claim to a DB pension on the basis of oral statements

The Court of Appeal has handed down its judgment in a case (*Prometric Limited v John Cunliffe*) concerning an HR manager who claimed, on the basis of a conversation with an HR director, that he was entitled to remain in a DB scheme following the sale of his employer.

Mr Cunliffe became a member of the Thomson Pension Scheme, a DB pension scheme, following the takeover of his employer by the Thomson Corporation in 2000. He claimed that a conversation with an HR director at the time amounted to a binding undertaking that he would continue to be a member of the Thomson Pension Scheme whilst he remained employed by his employer. In 2007, the Thomson

Corporation sold Mr Cunliffe's employer, at which point he ceased to be a member of the Thomson Pension Scheme and was provided with benefits under a DC scheme. Mr Cunliffe claimed this breached the contractual undertaking provided in 2000.

In deciding that Mr Cunliffe's claim should be struck out, the Court of Appeal held that it was "inconceivable" he would succeed at trial, adding that: "On subjects as complex as pensions, businessmen do not enter into oral agreements; and if they do, they certainly confirm them in writing".

This decision should prove useful to any employer faced with claims from employees based on oral statements made many years ago.

> Back to Top

Equalisation case to be appealed

We reported in last month's update (click here) on the successful equalisation claim by a representative beneficiary in the case of *Safeway Ltd v Newton.* Safeway is appealing the High Court's decision. The appeal is currently listed to be heard by 8 March 2017.

> Back to Top