



**VERY BEST WISHES FOR 2017 FROM THE BAKER MCKENZIE PENSIONS TEAM**

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2017 promises to be another interesting year on the pensions front. With Brexit a continuous backdrop - we await the judgment on whether a parliamentary vote is needed to trigger Article 50 and the detail of the Great Repeal Bill - there is some speculation that no brand new pensions legislation is likely to arise, but Treasury can sometimes surprise us. We set out below a number of issues to assist you with your pensions legal planning for 2017 - with or without any new pensions legislation, there is certainly plenty to consider.

Several important pensions cases are also due to be heard by the Courts during the year, which may have implications for employers and trustees of other pension plans. We will keep you updated on these and other legal developments during 2017 via our monthly Updates.

**VAT ON SERVICES PROVIDED TO PENSION PLANS**

The VAT treatment of services to defined benefit pension plans is an issue that will need to be addressed in 2017. Following the European case of *PPG*, HMRC had confirmed that the current difference in treatment of management/administration services on the one hand and investment services on the other would cease to apply from December 2016. HMRC has now extended the deadline until **31 December 2017**. The current practice permits VAT to be recovered by the employer on services regarded as part of the employer's business activities (including actuarial and legal expenses). Concessional treatment allows 30% recovery on combined invoices relating to investment and administration services. From 31 December 2017, new arrangements will need to be made in order to recover VAT on these services. Various potential options are being discussed but we still await the full revised guidance and clarification from HMRC on this. The VAT savings for individual employers and the suitability of the various options will vary from employer to employer: **employers should consider their own position well in advance of the December 2017 deadline**. We will alert you when the full guidance is available via our monthly Updates.

**GMP EQUALISATION - GOVERNMENT CONSULTATION AND PROPOSED METHODOLOGY**

As mentioned in our December Update, the Government has published a consultation paper which includes consultation on equalising pensions for the effect of inequalities caused by Guaranteed Minimum Pensions (GMPs). The consultation proposes a new method for the **equalisation of GMPs** but makes it clear that it is only a proposal, would not be mandatory and would not constitute legal confirmation that the proposed methodology would meet the equalisation requirements. This will be of interest to the majority of plans with GMPs that have not taken action to equalise. Further details are included in our December Update. The consultation period ends on 15 January 2017 and **trustees and sponsoring employers will wish to continue to monitor developments and reassess the position in the light of the outcome of the consultation**.

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

The total estimated PPF levy for 2017/18 is £615 million, the same as for 2016/17. **Key actions and dates for trustees and employers are:**

| Action  | Deadline                   |
|---|----------------------------|
| Submit Scheme Return on Exchange  | By midnight, 31 March 2017 |
| Submit Contingent Asset Certificate or re-certification of a Contingent Asset for existing arrangements (e.g. company guarantees, securities, credit or bank guarantees) on Exchange with hard copy documents as necessary to the PPF | By midnight, 31 March 2017 |
| Asset Backed Contribution Certificate to be sent to PPF   | By midnight, 31 March 2017 |
| Mortgage Exclusion ("Officers") Certificate and supporting evidence to be sent to Experian  | By midnight, 31 March 2017 |
| Deficit Reduction Contributions Certificate to be submitted on Exchange   | By 5pm, 28 April 2017      |
| Certification of full block transfers to be completed on Exchange   | By 5pm, 30 June 2017       |
| Invoicing starts  | Autumn 2017                |

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

**SOME OTHER APPROACHING DEADLINES**

**Individual Protection 2014 deadline: 5 April 2017** - when the Lifetime Allowance (LTA) was reduced to £1.25 million at 6 April 2014, individuals could apply for **"Individual Protection 2014"** (IP 2014) to protect pension savings with a value of more than £1.25 million at 5 April 2014. The deadline for applying for this is 5 April 2017 and applications must be submitted online via the HMRC website. Protected status is an issue **primarily for individuals** - the individual and not the employer will have knowledge of his or her total pension savings and it is the individual who must apply to HMRC for protection. However, **employers may wish to consider communicating the deadline to their workforce**, in particular where they have issued communications on the issue previously.

**Fixed rate GMP revaluation deadline: 5 April 2017** - when contracting-out was abolished at 5 April 2016 a technical issue arose as to when a plan could switch to fixed rate revaluation rather than using section 148 orders. Plans have typically been set up to follow the legislation and so permit the switch when contracted-out employment ends. But for plans that have continuing pensionable service after contracted-out employment ended at 5 April 2016, this may have created a problem, depending on the wording of the plan rules. Many plans can amend their rules to address this. Others, in particular those with restrictions in their power of amendment, can only do so by using a resolution procedure introduced by the Government to address the issue. Any such resolution must be passed before 6 April 2017 **so trustees should consider if any amendment needs to be made to plan rules to retain this flexibility - using the plan's power of amendment or the resolution procedure - in good time before the resolution deadline**.

**THE DEFINED CONTRIBUTION (DC) LANDSCAPE: MORE ON CHARGES AND GOVERNANCE**

The increased focus on DC charges is set to continue in 2017 with implications for **both trustees and employers** with DC arrangements. Master trusts are also due to become subject to greater governance requirements:

- the Government has concluded that exit charges in occupational pension schemes are a barrier to members accessing their benefits flexibly, in the new, post April 2015 DC arena. Government therefore proposes to legislate to cap early exit charges for members of occupational pension schemes. The level of the cap will be 1% for existing members of occupational pension schemes and 0% (i.e. a ban) for new members of such schemes after the legislation comes into force. This is expected to be October 2017. The Government has said it is targeting "all charges imposed on members (who are eligible to access their pension savings flexibly) when seeking to access their pension early, which they would not face if they carried out the same transaction at their pension age". Market value adjustments and terminal bonuses will be outside the cap. This will bring exit charges under occupational pension schemes into line with those under contract-based arrangements and **trustees will need to ensure compliance with the new requirements once enacted**;

- legislation is also in progress in relation to the governance of master trusts. This will provide for a new authorisation and supervision regime to be introduced, which will require master trusts to demonstrate to the Pensions Regulator that they meet certain key criteria (relating, for example, to their financial position and systems and processes) on establishment and then continue to do so. Existing master trusts will be brought into the regime and required to meet the new criteria. The Regulator will be provided with greater powers to take action where the key criteria are not met. Requirements will also be placed on trustees to act in certain ways in the event of wind up or closure of a master trust with a view to ensuring an "orderly exit". We will provide more details as the developments occur via our monthly Updates.

**AUTO-ENROLMENT: RE-ENROLMENT, NEW CONTRIBUTION DEADLINES AND EARNINGS TRIGGERS**

Auto-enrolment staging dates during 2017 apply to smaller employers and new employees. Larger and medium-sized employers will need to plan for their **three-yearly re-enrolment process**, reassessing their workforce in a similar way as at their original staging date, auto-enrolling eligible jobholders who are not in a qualifying scheme. Employers auto-enrolling workers for the first time or at the re-enrolment stage may take advantage of some **new exemptions for specified categories of worker, including individuals with certain tax protections and limited liability partnerships**.

The Government has also pushed out the **deadlines for increasing the minimum contributions for defined contribution arrangements** to align them with the tax year. The first scheduled increase due at 1 October 2017 will now be due at 6 April 2018, and that at 1 October 2018 has been moved to 6 April 2019. **Employers should review their auto-enrolment arrangements to check whether they provide for contribution increases to be made at 1 October 2017 or whether there is scope to defer this until the new 6 April 2018 date, if required**.

Finally, the DWP has confirmed that the **earnings trigger for auto-enrolment eligibility** for the 2017/18 tax year is £10,000 and the **earnings band on which contributions must be paid** for the "qualifying earnings" compliance test remains £5,876 to £45,000.

**DATA PROTECTION: ACTION REQUIRED**

As noted in our November Pensions Update, the General Data Protection Regulation (GDPR) - a European emanation - will need to be implemented despite Brexit. **Trustees and employers will need to begin to consider what they will need to do to comply with the GDPR**. Given the complex requirements of the GDPR this is something which should be considered early in the New Year - **watch out for our more detailed commentary on this later in January**.

**2017 - WHAT'S IN COURT**

2017 brings with it a raft of pensions cases across a number of key areas, many on appeal from the lower courts. Whilst, of course, each case is determined on its own merits, the principles adopted by the Courts can often be applied to other cases and plans. Here is a selection of the appeal judgments that we are expecting:

- the High Court is expected to issue its judgment shortly in a case relating to **discretionary pension increases** under the British Airways pension scheme, *British Airways Plc v Spencer & Ors*. The British Airways trustees exercised a **unilateral power of amendment** to confer on themselves a unilateral power to grant pension increases - and then exercised that power. British Airways challenged this. On a **preliminary issue** relating to the relevance of professional advice, the trustees argued that their decision-making was, in effect, bullet-proof because they had acted as the basis of professional advice. However, the Court decided that there was nevertheless potential for British Airways to challenge the trustees' decision (if, for example, the advice may have been obtained without exercising all proper care and diligence or the trustees relied on advice falling outside the scope of advice that the relevant expert could properly have given). A **full hearing** took place in November and December and judgment on the facts is awaited;
- an application for leave to appeal to the Supreme Court has been made in the *Buckinghamshire v Barnardo's* case. This case concerns **whether the trustees have power under their rules to change the index** by which pensions in payment are increased and deferred pensions revalued, specifically whether they have power to switch from **RPI to CPI**. At first instance, and on appeal to the Court of Appeal in 2016, it was held that the trustees did not have power under the rules to select a different index. Whilst specific to the wording in the Barnardo plan rules, other plans may have similar wording and so the **outcome of this appeal may be of relevance to both employers and trustees**;
- both the *IBM* and *Bradbury v BBC* cases are due to be heard on appeal to the Court of Appeal in the first part of the year. Both cases concern the **change to future service benefits** by the employer, focusing on whether the employer acted properly in making the various changes and the **duty of confidence and good faith** owed by the employer to its employees. In the High Court, IBM was found to be in breach of that duty, whereas the BBC was not. As such, the outcome of the appeals may be of **significance to any employer contemplating changing future service benefits**;
- in 2016, the Court of Appeal dismissed British Gas' appeal in the *Lock v British Gas Trading Ltd* about **what constitutes pay**. We understand that British Gas intends to apply for leave to appeal to the Supreme Court. This case is relevant to pension provision because it considers whether elements on top of basic pay should be taken into account under the Working Time Directive when **calculating holiday pay**. For Mr Lock, the elements of pay in question were fluctuating monthly commission. The Court of Appeal, in dismissing the appeal, concluded that this element of pay should be counted when calculating holiday pay. **The outcome may be relevant to both the contribution and benefit calculations made by employers and trustees for workforces whose pay structure includes this element of pay**;
- appeals are also due to be heard in 2017 on time limits attaching to the **provision of pension for surviving civil partners** (Walker v Innospec in the Supreme Court) and **equalising benefits as between men and women** (Safeway v Newton in the Court of Appeal). Both cases could have implications for other schemes and we will update you as the judgments come through via our monthly Updates.

**IORP II**

IORP II has been adopted by the Council of the European Union and when implemented will: clarify cross-border activities of occupational pension schemes; ensure good governance and risk management; provide clear and relevant information to members and beneficiaries; and ensure that national regulators have the necessary tools to supervise workplace pensions effectively. Once it comes into force in mid January, Member states will have two years to incorporate its provisions into national law. **Given the uncertain timing of Brexit, it seems likely that IORP II will be applicable in the UK, at least for a short time - and the provisions could be retained**.

**WHAT'S ON THE HORIZON?**

Looking perhaps towards the end of 2017 and beyond, we shall certainly be keeping an eye on the following, potentially far reaching, developments...

- the **Work and Pensions Committee**, in the wake of the BHS situation, invited written **submissions on defined benefit pension plans**, addressing issues that include: the adequacy of regulatory powers, the application of those powers, whether greater supervision and pro-active regulation is appropriate, pre-clearance for specified transactions (e.g. company disposals) and powers relating to recovery plans. The deadline for submissions was 16 September 2016. At the PLSA annual conference, pensions minister Richard Harrington MP announced that the Government will soon be launching a **Green Paper on defined benefit pensions** inviting stakeholders to participate in the consultation. Clearly the regulatory framework around defined benefit schemes remains somewhat in a state of flux;
- the Government has yet to reach a conclusion on whether, in a bid to strengthen the incentive to save, there is a case to **reform the current system of tax relief on pensions savings**. The current exempt, exempt, taxed model (EET - on contributions, investments and benefit payments respectively) is under consideration, with a possibility of moving to a taxed, exempt system (TEE), which would see tax relief on contributions fully removed. This could have far-reaching implications for pension provision in the UK;
- the Finance Bill 2017 implements changes outlined in the Chancellor's Autumn Statement including: an income tax exemption for the first **£500 of employer arranged pensions advice**; extension of the period of non UK residence during which UK tax charges can apply; taxation of non UK based pension schemes; eligibility criteria for overseas pension schemes; and reduction in the money purchase annual allowance from £10,000 to £4,000 if an individual has already accessed their pensions savings. Consultation on the Bill closes on **1 February 2017** and the Bill is **expected to come into force in the summer, with most measures being retrospective to 6 April 2017**;
- a consultation on **pension scams** identifies three areas where the Government intends to legislate: a ban on cold calling; measures to clarify the law to allow pension schemes to block pension transfers that look like a scam by limiting the statutory right to transfer in certain situations; and measures to allow only active employers to register a pension scheme to make it harder for pension plans to be registered for fraudulent purposes. **The consultation closes on 13 February 2017**. However, it is not clear when the Government intends to implement the measures proposed;
- a consultation on the draft Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) (Amendments) Regulations 2017 to change the conditions that must be met by an **overseas pension scheme or recognised overseas pension scheme** in order to receive UK tax relief on contributions or to make a transfer tax free. These include removal of the requirement that schemes designate 70% of funds that have received UK tax relief to a retirement income, and permitting schemes to pay benefits before age 55 if such payments would be authorised payments if paid from a registered pension scheme. **The changes include relaxations that mirror the flexibilities in the UK pensions regime**;
- the Pensions Regulator has published the response to its paper on **21st Century Trusteeship and Governance** in which the pensions industry was asked for its views on a number of questions in relation to these topics. **The response will be covered in our Annual Pensions Seminar**.

We will keep you updated on these issues in our monthly Update as developments occur.

**OUR ANNUAL SEMINAR - THURSDAY 19 JANUARY 2017**

Many of the above topics and more will be considered in our **Annual Pensions Seminar on Thursday, 19 January 2017**. The seminar will cover:

- 2016 in review: a case law and Pensions Ombudsman update;
- Restructuring powers and benefits to achieve defined benefit survival?
- Travelling risk in DB schemes; and
- 21st Century Trusteeship: The changing role of trustees.

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 2017**

**Contact us**

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

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