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Pensions Update

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General Data Protection Regulation (GDPR) and Data Protection Act 2018

The GDPR came into effect on 25 May 2018. It introduces significant changes to the data protection regime in EU Member States. In the UK it is also supplemented by new data protection legislation (the Data Protection Act 2018), which received Royal Assent and came into effect on 23 May 2018.

We have been working closely with our clients to help them put in place appropriate arrangements to ensure compliance with the new requirements. ***However, we anticipate that this will continue to be an area of focus for trustees and employers as the new requirements bed in.***

Joint Select Committee Report on Carillion highly critical of the Pensions Regulator

The findings of the joint inquiry undertaken by the Business, Energy and Industrial Strategy and Work and Pensions Select Committees have been published, heavily criticising the Carillion board, key regulators and auditors.

The report criticises the Carillion board on a number of fronts, including prioritising dividend payments ahead of funding the pension scheme. This is something which the Pensions Regulator (the "Regulator") is already putting trustees under increasing pressure to monitor - most recently in its annual 2018 funding statement.

The report is also heavily critical of the Regulator, concluding that it "*failed in all its objectives regarding the Carillion pension scheme*". According to the report the Regulator requires "*substantial cultural change*", with the authors concluding that "*we are far from convinced that TPR's current leadership is equipped to effect that change*".

In response, Lesley Titcomb, the Chief Executive of the Regulator, has sought to highlight changes which are already underway to make the Regulator a "quicker, clearer and tougher" organisation. These themes are picked up in the Regulator's corporate plan for 2018-2021, including confirmation that there will be a headcount increase of 12% and additional budget of £9.8 million in 2018, together with assurance that the increased level of proactive case work which was seen in 2017 will be maintained in 2018-2019.

The full report can be viewed here.

Anti-money laundering - further guidance on the Trust Registration Service

We have reported in previous Updates on the new anti-money laundering regime ("AML") which came into force last year and what this means for trustees of occupational pension schemes. As part of the regime, a new online platform, the Trust Registration Service, had been set up by HMRC in order to allow trustees of "relevant taxable trusts" to provide certain information about their scheme, in line with the requirements. In November (click here) we noted that, in practice, many pension schemes are unlikely to fall within the category of relevant taxable trusts and so will not trigger a requirement to provide information to HMRC, but we recommended that trustees check with their administrators whether this is the case from year to year.

HMRC has now provided some further guidance which confirms that if a pension scheme has not already registered with the TRS for the purposes of the AML and a requirement to provide information is triggered in the future, trustees do not now need to register with TRS. Instead, information should be provided via Pension Schemes Online or, in due course, the new Manage and Register Pension Schemes Online Service. This new guidance is intended to streamline the process for both trustees and HMRC.

Brexit - impact on occupational pension schemes

The European Commission has published a "Notice to Stakeholders" on the possible impact of the UK's withdrawal from the EU on Institutions for Occupational Retirement Provision (IORPs). In particular, it notes that, subject to any transitional arrangement:

- from the withdrawal date, IORPs registered or authorised in the UK will no longer be able to provide services within the EU and will be treated, in the EU Members State(s) where they operate cross-border, as "third country undertakings" subject to the local rules of the relevant EU Member State(s). This may mean registration or authorisation with the relevant authorities in the EU Member State(s) is required;

- IORPs registered or authorised in the UK and which are active cross-border should contact the relevant authorities in the EU Members State(s) in which they are engaged in cross-border activities to confirm under what conditions they may be allowed to continue operating cross-border. This may require contingency steps to be taken in advance of the UK's withdrawal; and

- sponsoring employers who contribute to cross-border IORPs will need to consider whether and under what circumstances such arrangements can continue after the UK's withdrawal.

Most UK pension schemes have, in our experience, taken steps to ensure that they are not and do not become "cross-border schemes", which are subject to the relevant requirements under the IORP Directive and related UK legislation. Where schemes have members who are or have been mobile within the EU, they have generally sought to rely on the exception applicable to "seconded workers" under the relevant UK regulations. This will need to be considered further when there is greater clarity around the status of the IORP Directive in the UK post-Brexit and the impact on the legislation which implemented the cross-border regime into domestic UK law.

Master Trusts - revised draft Regulations

The DWP consulted in November 2017 on the first draft of the Occupational Pension Schemes

(Master Trust) Regulations 2018 relating to the authorisation and supervisory regime for master trusts under the Pension Schemes Act 2017.

On 19 March 2018 it published its response to the consultation. Revised draft Regulations have now been laid before Parliament which reflect respondents' feedback. While a number of technical changes have been made, the revised Regulations are close to the original consultation version. The Regulations are due to come into effect on 1 October 2018. Key changes in the revised Regulations are:

- amended authorisation fees (£41,000 or £23,000 for existing and new master trusts respectively);
- removal of the requirement for an auditor's report confirming the scheme funder is a going concern;
- two new exemptions for schemes where the only money purchase benefits relate to pension credit rights or AVCs in respect of non-money purchase members who ceased to be active members after reaching a maximum service limit;
- inclusion of revised requirements for the scheme's business plan (on which a Code of Practice from the Regulator is expected).

The Regulations can be viewed by clicking here.

DC bulk transfers without consent - new guidance

On 30 April 2018, the DWP published guidance to assist trustees in complying with the recent amendments to the Regulations governing bulk transfers (without consent) of pure DC benefits (i.e., money purchase rights that do not include guarantees). We reported on the consultation in our November Pensions Update (click here).

The guidance is intended to be used alongside the Pensions Regulator's DC Code of Practice and guidance on Managing DC benefits. ***Primarily, the new DWP guidance relates to the process for making a DC bulk transfer where the transferring trustees have obtained and considered the written advice of an appropriate adviser whom they have determined to be independent from the receiving scheme.***

It is also possible for such transfers to be made without advice where the receiving scheme is an authorised master trust or there is sufficient corporate connection between the schemes' employers.

Guidance is provided on the following points:

- the meaning of "appropriate adviser" and how trustees should determine independence;
- circumstances in which the corporate connection test would be met;
- "fund mapping" and the circumstances in which a default charge cap must be maintained or will apply in a receiving arrangement where there is a bulk transfer;
- general "good practice" in relation to all DC bulk transfers (including choosing an adviser, what advice should cover, criteria for assessing a receiving scheme, communications, data quality, documentation and transition management);
- consideration of tax protections which may be lost on a bulk transfer.

The guidance can be viewed by clicking here.

"Pot follows member" will not be pursued

In response to a question in Parliament, the Secretary of State for Work and Pensions (Guy Opperman) has confirmed that "*it is not the right time*" to implement a system of automatic transfers, whereby a employee's pension pot follows them to their new scheme on a change of employment. He noted that the Government's priority for private pension savers remains the roll out of auto-enrolment.

Members' statutory rights to request a transfer and the introduction of the Pensions Dashboard were also cited in the response as giving members greater control and visibility of their pension savings.

Pensions Disputes News

PPF compensation levels may not be adequate - *Hampshire v PPF*

The Advocate General of the Court of Justice of the European Union ("CJEU") has provided an opinion in the case of *Grenville Hampshire v. The Board of the Pension Protection Fund*. The opinion states that the compensation levels provided to members by the Pension Protection Fund ("PPF") do not wholly meet the requirements set by Directive 2008/94 on the protection of employees in the event of the insolvency of their employer.

Previous decisions of the Court in *Robins* and *Hogan* found that employees must retain at least 50% of their entitlement to old age benefits where their employer becomes insolvent. However, the application of that test has been debated - in particular, is it conducted on an individual member-by-member basis or applied as an average across the relevant scheme?. To date, the PPF has taken the view that it is an average test.

The compensation provided by the PPF is the means by which the UK has sought to comply with its obligations under the Directive. PPF compensation is subject to certain limits, including a 90% compensation level and cap for those under normal pension age. All members receive inflationary increases on pensions accrued but at a lower level and only in respect of qualifying employment after 6 April 1997.

Mr Hampshire's pension scheme had entered a PPF assessment period after the insolvency of his former employer. The PPF had determined that the scheme was sufficiently well funded to provide benefits at or above PPF levels and so the scheme was wound up outside the PPF. However, Mr Hampshire saw a 67% reduction in his pension (including receiving minimal inflation protection because he left service in 1998) as a result of the application of PPF compensation levels through the compensation rules in the Pensions Act 2004. He brought a claim before the English Courts, which referred the matter to the CJEU.

The Advocate General's opinion concluded, broadly, that each member must receive at least 50% of their accrued entitlement (i.e., the individual member-by-member test applied). It did not matter that Mr Hampshire's scheme had ultimately not entered the PPF because the limits on his benefits reflected compensation rules set by a public body, the PPF, to which the Directive is directly applicable.

As noted above, this is an advisory opinion of the Advocate General and does not bind the Court. However, such opinions are highly influential and commonly followed. The ruling of the Court is awaited. The potential impact upon the PPF and schemes in winding up will then need to be assessed, together with the effect of Brexit.

Recovery of overpayment - *Burgess v BIC*

This case principally considered whether a benefit which had been provided in practice (the application of increases to pension accrued before 1997) had been validly granted under the rules of the scheme. If such increases had not been validly granted, the Court was also asked to consider certain questions relating the trustees' duty to recover any overpayments which had resulted.

In the event, the Court decided that the increases had been validly granted but went on to consider the theoretical overpayment questions in any case. On that basis, the comments of the judge (Arnold J) are strictly *obiter* (persuasive rather than binding). However, they may be of interest to trustees looking to recover overpayments by way of "recoupment".

Recoupment is an equitable "self-help" remedy which allows overpayments to be recovered (or set-off) by reducing future pension payments. The employer argued that the trustees should recover the overpayments without any regard to limitation bars. However, the trustees in this case argued that a statutory six-year limitation period applied to such claims. ***The Court held that, as an equitable remedy, recoupment is not subject to the statutory limitation period. However, under general principles of equity, undue delay or neglect in recovering overpayments may limit recovery.***

The Court also decided that, if the member disputed the recoupment, an order of a Court would be required before it could be enforced by the trustees. This last point was based on the premise that recoupment is a form of "set-off" and so subject to the provisions of section 91 of the Pensions Act 1995. However, this point was not subject to argument (both parties accepted the premise). ***It would still, in our view, be possible to argue that any overpayments are a pre-payment of future pension instalments and so not subject to the restrictions on set-off.*** This point has, as far as we are aware, not yet been tested in the courts.

Box Clever judgment issued

In this long running, saga, the Upper Tribunal has concluded that it was reasonable for the Pensions Regulator to use its anti-avoidance powers to issue Financial Support Directions ("FSDs") against ITV in respect of the Box Clever Group Pension Scheme. If ITV does not appeal the decision with the relevant time limit, the Regulator's Determination Panel will issue the FSDs.

The Regulator has issued a statement on the decision, in which it flags the Upper Tribunal's agreement with its position on the use of FSDs as follows:

- retrospective use – the Regulator needs to be able to take into account pre Pensions Act 2004 events in order to meet its objectives;
- fault – it is not a fault-based regime, but a regime based on responsibility, in this case responsibility for the risks associated with the joint venture structure from which ITV benefited; and
- reasonableness – the Regulator states that "*This is assessed by balancing all the relevant facts to reach a conclusion, with the relationship between the targets and the pension scheme starting point.*" and also commented that relevant terms from legislation, for example, "benefit", "relationship with the employer" and "involvement with the scheme" should be given a broad interpretation.

This is helpful for employers and trustees in confirming some circumstances in which the Regulator may consider exercising its anti-avoidance powers.

Contact us

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

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