

Pensions Legal Update

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Legal Update Contents

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Do one thing this month

The deadline for scheme members wishing to apply for lifetime allowance protection is 5 April 2009. This allows individuals with benefits earned before 6 April 2006 to protect their benefits against the lifetime allowance charge.

Members need to apply using form APSS200 for primary or enhanced protection (see below). If members miss this deadline any benefits taken that are worth more than the lifetime allowance will be liable to the lifetime allowance charge.

Although there is no legal requirement to do so, pension schemes should consider alerting members who may be affected to this final deadline if they have not already done this.

An application for enhanced or primary protection using form APSS200 must be made to HMRC by 5 April 2009.

Lifetime allowance

Summary. HM Revenue & Customs (HMRC) has published guidance for members wishing to apply for lifetime allowance protection.

Background. The lifetime allowance was introduced by the Finance Act 2004 (FA 2004), and limits the total pension savings that can be accrued by an individual in a tax-efficient way. The total value of benefits must fall within the lifetime allowance, or a tax penalty will apply. The current standard lifetime allowance is £1.65 million. If this is exceeded, a tax charge of 55% of the excess applies if it is taken as a lump sum, or 25% if it is taken as a pension. However, the FA 2004 allows individuals with benefits earned before 6 April 2006 to protect their benefits against the lifetime allowance charge.

Facts. HMRC's guidance deals with the following:

- A description of the two kinds of protection available: primary and enhanced protection:
 - primary protection is available to those whose benefits at 5 April 2006 had a value that already exceeded £1.5 million (the standard lifetime allowance at that time). That value is registered with HMRC and the excess is expressed as a percentage of the standard lifetime allowance. Its monetary value is automatically increased in line with increases in the standard lifetime allowance; and
 - enhanced protection allows a member to protect all the benefits he has built up before 6 April 2006, provided that broadly no further contributions are paid (defined contribution schemes) or further accrual is built up (defined benefit schemes) under any registered pension scheme.

- An application for enhanced or primary protection using form APSS200 must be made to HMRC by 5 April 2009.
- HMRC will notify the applicant within 15 working days whether the notification is acceptable.

The consequences of missing the deadline without reasonable excuse are that any benefits taken that are worth more than the lifetime allowance will be liable to the lifetime allowance charge.

Comment. Pension schemes should inform individuals wishing to take advantage of protection that they need to make their applications by 5 April 2009.

Source: The guidance, www.hmrc.gov.uk/pensionschemes/life-allow-pn.htm.

The Pensions Regulator's view does not resolve the ambiguity in the legislation but it does in practice make it unthinkable that the Regulator will fine employers who do not consult when they adopt the new 2.5% cap.

Revaluation

Summary. The Pensions Regulator has confirmed that schemes will not have to consult members before making a rule change to reduce the cap on revaluation of deferred benefits to 2.5%.

Background. Under the Pensions Act 2008, benefits in a final salary pension scheme earned on and after 6 April 2009 only have to be revalued during deferment in line with RPI up to a cap of 2.5%. For certain benefits earned through service before 6 April 2009 the cap remains 5%. It is not clear whether legislation requires employers to consult affected members about rule changes which adopt the 2.5% cap. Failure to consult in accordance with a legal obligation does not invalidate the rule change. However, from 6 April 2009, it could expose the employer to a fine imposed by the Pensions Regulator.

Facts. The Pensions Regulator has confirmed that, in its view, there is no need for sponsoring employers to consult affected members about rule changes which adopt the 2.5% cap.

Comment. The Pensions Regulator's view does not resolve the ambiguity in the legislation but it does in practice make it unthinkable that the Regulator will fine employers who do not consult when they adopt the new 2.5% cap. As a result, in practice scheme rules on revaluation can now be amended to reduce the cap for revaluation without consultation. Depending on the wording of their members' booklets, schemes who make this change may still be required to announce it to members who could be affected.

Equitable Life

Summary. The government has responded (the response) to the Parliamentary Ombudsman's report into the regulation of Equitable Life (the report).

Background. The Parliamentary Ombudsman's report was published in July 2008. She made ten findings of maladministration on the part of the Department for Trade and Industry, the Government Actuary's Department and the Financial Services Authority (FSA). She called for the government to set up an independent compensation scheme to provide redress for all policy holders who have sustained injustice as a result of the maladministration.

Facts. The response includes the following:

- The government agreed that there has been maladministration and that government action is merited. The regulatory public bodies involved should have raised questions about Equitable Life's regulatory returns in the period from 1990 to 1996, but did not. The response acknowledges that this may have led to injustice for policy holders. It also agreed that certain statements made by the FSA after 2001 had the potential to mislead and may have caused injustice.
- The government considers that it is not generally appropriate for the taxpayer to take on the costs of paying compensation even where there has been regulatory failure. The government stands by its view that the primary responsibility for the losses suffered lies with Equitable Life.
- The government has apologised for the maladministration and stated that it is prepared to set up an ex-gratia scheme to help policy holders who have been disproportionately affected.
- Before such a scheme can be set up, the Rt Hon Sir John Chadwick will be asked to advise on the scope of the compensation that would be paid and to whom. The government wishes to identify which losses suffered by policy holders were attributable to maladministration, as opposed to the actions of Equitable Life.

The report recommended that a compensation payment scheme should be completed within two years of being set up, but the response indicated that it may take significantly longer than this to implement the scheme.

Comment. Pension schemes that invested in Equitable Life will need to wait for details of the compensation scheme before they will know whether they will receive compensation.

Source: The response, www.hm-treasury.gov.uk/statement_cst_150109.htm.

The government has apologised for the maladministration and stated that it is prepared to set up an ex-gratia scheme to help policy holders who have been disproportionately affected.

Equalisation of retirement ages

Summary. The High Court has held that a company announcement was not effective to equalise male and female retirement ages.

Facts. The case concerned the interpretation and application of a scheme's amendment power and whether normal retirement ages for men and women had been effectively equalised.

In October 1994, the sponsoring employer of a pension scheme issued an announcement purporting to equalise normal retirement ages for men and women. At the time of the announcement, the sponsoring employer was also the sole trustee of the pension scheme. In 2008, the independent trustee of the scheme sought the view of the court on whether the announcement was effective in equalising normal retirement ages for men and women.

Decision. The court concluded that the employer's announcement was not effective in equalising normal retirement ages.

- The parties agreed that the announcement was not an effective exercise of the scheme's amendment power.
- The announcement was not an effective exercise of a power contained in the definition of normal retiring date ("NRD") to determine a special NRD in particular cases. NRD was defined as 60 for females who joined the scheme before September 1992 and 65 for all other members or such day as the employers determined in any particular case and notified in writing to the member concerned. The court held that the power for the employers to determine NRD could be exercised for more than one member, but not for a class of member. Therefore, because the announcement was trying to make a change to NRD for a class of members, it fell outside the scope of the power in the definition. The Court also raised doubts about whether such a power could be used later than when the members' pensionable service started.

Comment. The decision shows the reluctance of the court to uphold attempts at equalisation of normal retirement ages that do not comply strictly with a scheme's amendment power.

Case: Capital Cranfield Trustees Ltd v Beck & Another [2008] EWHC 3181 (Ch).

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