MAYER • BROWN

January/February 2013

Bulletin for Pensions Managers

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Pensions news

WHITE PAPER AND DRAFT PENSIONS BILL: STATE PENSION REFORM

In January, the DWP published a White Paper setting out detailed proposals for the introduction of a single-tier ("flat rate") state pension, after which the state pension will no longer include separate basic and State Second Pension elements. A draft Pensions Bill was subsequently published setting out some of the detail of the reforms.

The White Paper and draft Pensions Bill contain the following announcements directly affecting occupational pension schemes:

- DB contracting-out will be abolished when the new single-tier state pension is introduced (now expected to be in 2016).
- Employers will be given a unilateral statutory power to change scheme rules for future service to offset the increased level of employer National Insurance contributions (subject to certain restrictions).
- There will be no further simplification of the laws on GMPs except perhaps to make it easier for schemes to convert GMPs into other benefits of equal actuarial value.
- State pension age will be increased to 67 by 2028 as previously announced, and going forward will be reviewed every 5 years.

The statutory employer amendment power will not be used in public sector schemes, but the DWP is consulting on whether it should override the Protected Persons Regulations, so that employers in privatised industries where those regulations apply (such as electricity and coal) can use it.

Action

No action currently required.

MARRIAGE (SAME SEX COUPLES) BILL

This Bill, which introduces same sex marriage, was presented to Parliament in January.

Among other things, it amends existing legislation, including the Equality Act 2010, so that a same sex spouse has the same state and occupational pension rights as a civil partner.

Action

No action currently required, but once the legislation has been passed, schemes should review their rules to identify any amendments which may be required to cater for same sex marriages.

CHILDREN AND FAMILIES BILL

This Bill was presented to Parliament in February. It allows parents to share the rights that mothers currently have to statutory maternity leave and pay if both parents meet certain conditions.

After a mother has taken the compulsory period of two weeks maternity leave after giving birth, parents will be able to split the remaining period of maternity leave and pay between them. This will be called flexible parental leave and pay. The proposals are due to be implemented in 2015.

Action

No action currently required, but once the new system is in operation, it is likely to affect employer contributions made in respect of fathers. Currently, employers do not have to pay fathers who take parental leave and as such, do not have to make pension contributions for them. However, if fathers take flexible parental leave, it is likely that the employer will have to make contributions for them while they are receiving flexible parental pay.

GUARANTEED MINIMUM PENSION INCREASE ORDER 2013

This Order, which provides for a 2.2% increase to post-88 GMPs, has been laid before Parliament. It comes into force on 6 April 2013.

Action

Ensure that the required 2.2% increase is applied to the post-88 GMP element of pensions in payment.

CALL FOR EVIDENCE ON DB FUNDING

In January, the DWP published a call for evidence on whether to:

- introduce a new statutory objective for the Pensions Regulator to consider the long-term affordability of deficit recovery plans to sponsoring employers; and
- allow companies undergoing valuations in 2013 or later to smooth asset and liability values.

It was announced in the Budget 2013 that the Government would proceed with the first of these proposals, but not the second. We expect the new statutory objective to be added to the Pensions Bill 2013 as it passes through Parliament.

Action

No action currently required.

CHANGES TO DISCLOSURE REGIME

The DWP has published a consultation on draft regulations which are designed to consolidate and simplify the disclosure requirements.

In addition to consolidating the requirements for occupational and personal pension schemes in a single set of regulations and clarifying existing requirements, the draft regulations would make some changes to the substance of the disclosure regime, including requiring schemes which operate a "lifestyling" strategy to provide information on that strategy.

The finalised regulations are due to come into force on 1 October 2013.

Action

No action currently required, but schemes will need to review their communications ahead of the finalised regulations coming into force to reflect any changes in the disclosure requirements. Schemes may also wish to take advantage of any additional flexibilities offered by the regulations such as the extended ability to provide information electronically.

PENSION PROVISION FOLLOWING TUPE TRANSFERS

The DWP has published a consultation on draft regulations which make two changes to the pension protection provisions under TUPE.

Firstly, the regulations would allow transferee employers who choose to meet their pension protection obligations by paying a statutory minimum level of contributions to a DC scheme to either match the contributions paid by the transferor immediately before the transfer or to match the employee's contributions up to a maximum of 6% of pensionable pay.

Secondly, the regulations would clarify that, where a transferee chooses to match the employee's contributions, the employee has the right to choose the level of his or her own contributions (subject to any minimum specified in the scheme rules).

The finalised regulations are due to come into force on 1 October 2013.

Action

No action required, but employers taking on staff under a TUPE transfer after 1 October 2013 will need to bear the changes in mind when determining how best to comply with their obligations in respect of pensions under TUPE.

REGULATING DC WORK-BASED SCHEMES

The Pensions Regulator is consulting on a package of measures designed to achieve good governance of work-based DC pension schemes. The package is based around a set of 31 DC quality features (building on the draft key features which the Regulator published last year) and consists of a new code of practice and accompanying regulatory guidance, and a regulatory approach document.

Action

No action currently required, but once the finalised documents are published, DC schemes may wish to consider whether they should make any changes to their governance arrangements in light of the documents.

RPI CONSULTATION OUTCOME

Following its consultation in 2012 on options for changing how RPI is calculated, the Office for National Statistics (**"ONS"**) has announced that the formula for calculating RPI will remain unchanged. However, because this formula does not meet international standards, a new RPI-based index using a different formula (to be known as RPIJ) will also be published in future, alongside the current RPI.

Action

No action required. Where scheme rules refer to the "retail prices index" or "index of retail prices" published by the Government, Department of Employment or the ONS, the safest course is for trustees to continue to use the "all items" RPI, not RPIJ.

AUTOMATIC TRANSFERS AND "MICRO POTS"

The DWP has announced that it does not intend to proceed with an exception to its proposed automatic transfer system for small DC pots whereby particularly small pots (**"micro pots"**) would still be refunded. As a result, the proposed automatic transfer system will apply to all small pots.

Action

No action required.

TRANSFERS TO DB ARRANGEMENTS – ANNUAL ALLOWANCE ISSUES

It has emerged that HMRC believes that, under current legislation, members who are transferred between DB schemes could face an annual allowance (**"AA"**) charge if the benefits credited in the receiving scheme are more generous than the actuarial equivalent of the transfer payment received from the transferring scheme.

If HMRC was right, this could mean that members face an AA charge on a standard scheme merger where the transferring scheme is underfunded, even though the receiving scheme promises members only the same benefits as they had before the merger: the assets paid across by an underfunded scheme would not actuarially justify that promise.

HMRC has proposed draft legislation to cure the problem it sees here. However, that legislation has now been delayed to an as yet unspecified date whilst HMRC works on improving its drafting and sees if it can make the legislation retrospective.

Action

No action required, but if trustees are currently deciding whether to agree to a merger or other bulk transfer, they may wish to consider postponing the merger or transfer until the promised legislation is in place, or to speak to their normal Mayer Brown contacts about other options.

GAD ANNOUNCEMENTS ON PASSPORT AND BROAD COMPARABILITY CERTIFICATES

The Government Actuary's Department (**"GAD"**) has announced that it will no longer accept applications for passport certificates against the Local Government Pension Scheme (England & Wales) until the Local Government Pension Scheme Regulations 2013 are on the statute book (which is expected to be in spring 2013), unless the applicant can justify a short term need. It will however continue to accept applications for individual broad comparability certificates where the staff transfer in question will occur before then.

The GAD has also announced that contractors can apply to amend their certificates of broad comparability to reflect the new employee contribution rates which will apply from April 2013 under the Principal Civil Service Pension Scheme (Great Britain & Northern Ireland) (**"PCSPS"**) and the Teachers Pension Scheme (England & Wales) (**"TPS"**).

Action 1

Employers who are or will soon be involved in public sector outsourcings should bear the GAD's announcement on passport certificate applications in mind when project planning.

Action 2

Employers who currently hold broad comparability certificates against the PCSPS or the TPS may wish to consider applying to amend those certificates to reflect the new employee contribution rates. However, they should bear in mind that a change to employee contribution rates is likely to require a rule amendment and that all necessary formalities for a rule amendment would need to be met.

PENSIONS REGULATOR RECORD-KEEPING THEMATIC REVIEW

Following its 31 December 2012 deadline for schemes to improve the quality of their records, the Pensions Regulator has launched a thematic review into record-keeping to check whether schemes have met the Regulator's targets and how they have addressed the Regulator's record-keeping guidance. The Regulator will approach a sample of around 250 schemes.

The Regulator also plans to update its record-keeping guidance later this year to reflect the results of the review.

Action

No action required.

GMP EQUALISATION DELAYED UNTIL 2014

The Pensions Minister has confirmed that the Government does not plan to put forward the finalised GMP equalisation legislation until spring 2014.

Action

No action required.

Pensions finance

DERIVATIVES – THE IMPLICATIONS OF EMIR FOR PENSION SCHEMES

New European legislation on derivatives trading, the European Market Infrastructure Regulations (**"EMIR"**), is likely to come into force during 2013. There will be a temporary exemption for pension schemes from the central clearing requirements imposed by EMIR. But new risk mitigation and reporting requirements will apply to pension scheme trustees who are parties to certain derivative contracts.

Action

Trustees should consult their fund managers to ensure that they are in a position to comply with the new requirements.

FINANCIAL TRANSACTION TAX: NO EXEMPTION FOR PENSION SCHEMES

The European Commission has adopted a proposal for a financial transaction tax which will apply in 11 countries (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain).

The tax will apply to:

- financial transactions where one of the parties is established in one of those 11 countries, irrespective of where the transaction actually takes place; and
- financial instruments issued in one of those 11 countries, irrespective of where the parties to the instrument are established.

The tax rate will be 0.1% for shares and bonds, and 0.01% for derivatives.

Pension schemes will not be exempt from the tax.

Action

No action required, but schemes may wish to consult their investment managers to confirm whether any of their assets will be subject to the tax.

Pensions litigation

DUMBRECK V OFCOM [2012]

An Employment Tribunal has held that closing a DB scheme to future accrual by terminating members' employment and offering them new employment contracts with membership of a DC scheme did not amount to age discrimination. It had been argued that the change discriminated against older employees.

The Tribunal held that, as the new terms of employment did not contain a mandatory retirement age, the length of time to retirement was dependent not upon age but personal choice, and that in fact an older employee was arguably in a better position than a younger employee because an older employee would have built up more DB rights (which were not subject to market changes like DC rights were) than a younger employee. The minority member of the Tribunal however agreed with the claimant that older employees would be more disadvantaged than younger employee.

Action

No action required.

Mayer Brown events

If you, any of your colleagues or any of the trustees of your scheme(s) are interested in attending any of our events, please contact Katherine Dixon (kdixon@mayerbrown.com) or your usual Mayer Brown contact. All events take place at our offices at 201 Bishopsgate, London EC2M 3AF.

TRUSTEE FOUNDATION COURSE

Tuesday 28 May 2013
Tuesday 17 September 2013
Tuesday 10 December 2013

Our Foundation Course aims to take trustees through the pensions landscape and the key legal principles relating to defined benefit funding and investment matters, and some of the specific issues relating to defined contribution schemes, in a practical and interactive way.

TRUSTEE BUILDING BLOCKS CLASSES

Tuesday 18 June 2013
Tuesday 19 November 2013

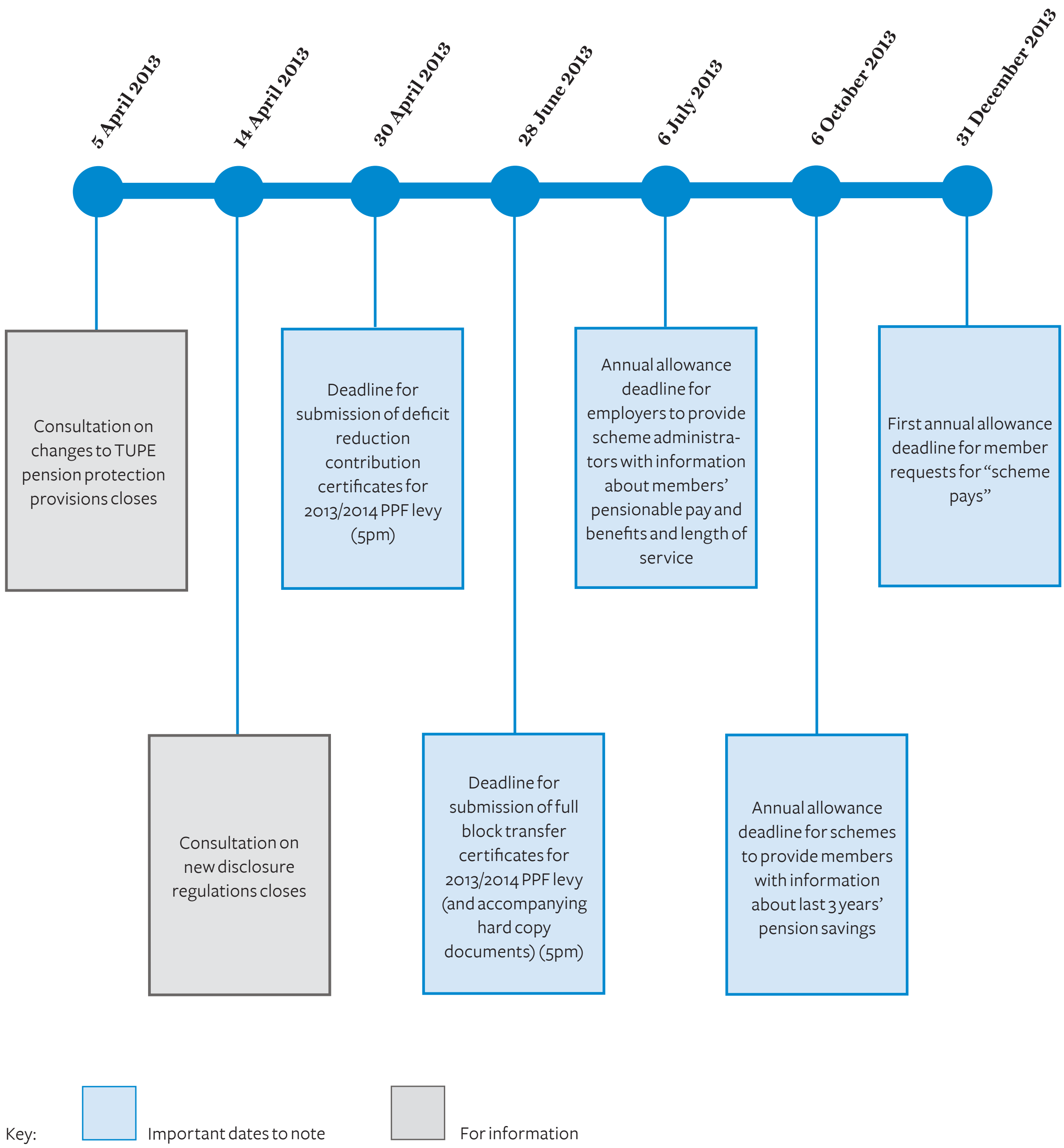
Our Building Blocks Classes look in more detail at some of the key areas of pension scheme management. They are designed to be taken by trustees who have already taken our Foundation Course.

ANNUAL PENSIONS FORUM

Tuesday 16 April 2013

Our Annual Pensions Forum takes a look back at some of the key developments over the last 12 months and looks forward to expected developments in the coming year.

Dates to note over the next 12 months



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We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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