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December 2020

The Pensions Brief

At a glance...

Issues affecting all schemes

BREXIT AND THE END OF THE TRANSITION PERIOD

House of Commons publishes two topical briefing papers

ICO ISSUES PENALTY IN CONNECTION WITH PENSIONS COLD CALLING

Company penalty for unsolicited calls offering "up-to-date transfer valuations"

HMRC ISSUES GUIDANCE ON IN-SPECIE CONTRIBUTIONS

HMRC has updated its guidance on in-specie contributions

PENSIONS OMBUDSMAN DECISION ON FINANCIAL LOSS AFTER MALADMINISTRATION CORRECTED

The Pensions Ombudsman held that payment of missing contributions including interest meant there was no financial loss

PENSIONS OMBUDSMAN DECISION ON FAILURE TO PAY DEDUCTED CONTRIBUTIONS

The Pensions Ombudsman held that an employer's failure to pay deducted pension contributions constituted unjust enrichment

TRANSFER OF ANNUITY BUSINESS FROM PRUDENTIAL TO ROTHESAY LIFE MAY BE APPROVED

The Court of Appeal has upheld Prudential and Rothesay Life's appeal against a decision of the High Court refusing to allow a transfer of annuity business from Prudential to Rothesay

Issues affecting DB schemes

PPF LEVY CHANGES CONFIRMED

The PPF confirms several changes to the 2021/22 levy rules

▲ Action required

▲ Follow development and keep under review

Issues affecting all schemes

Brexit and the end of the transition period

On 24 December 2020 it was announced that the United Kingdom and European Union had reached an agreement, in principle, outlining the basis for the ongoing relationship between the UK and EU following the end of the Brexit transition period on 31 December 2020.

The House of Commons has published a briefing paper in connection with Brexit and the end of the transition period. This paper focuses on Brexit and private pensions and reminds UK nationals in the EEA or Switzerland of the UK Government's guidance which advises individuals in receipt of a pension to check with their pension provider to make sure they can still get payments following the UK leaving the EU. The briefing paper also emphasises that UK law allows for workplace pensions to be paid overseas and the UK Government does not expect this to change after Brexit.

Action

For noting.

ICO issues penalty in connection with pensions cold calling

The ICO has issued a penalty of £45,000 in connection with a company making more than 39,000 nuisance calls to people about their pensions.

On 9 January 2019, a ban on pensions cold calling was introduced. Following the ban, companies can only phone individuals and talk to them about their occupational or personal pensions if the caller is authorised by the Financial Conduct Authority, is a trustee or manager of the scheme, or if the recipient of the call provides their consent or has an existing relationship with the caller.

Having carried out a raid of the company's offices, the ICO found that staff were connecting with people on LinkedIn and using their contact details to target them with direct marketing calls related to pensions schemes. In total, the ICO found that the company had made over 39,000 unsolicited calls between January 2019 and September 2019 offering to provide "up-to-date transfer valuations".

Action

For noting.

HMRC updates guidance on in-specie contributions

In December 2020, HMRC updated its guidance on in-specie contributions.

The starting point is that tax relief is not generally available in respect of contributions made by in-specie transfers.

HMRC has confirmed in its updated guidance that settlement of a pension contribution by transfer of non-monetary assets, even if the transfer is in respect of an earlier monetary obligation, will not attract tax relief.

However, the HMRC guidance provides that it is possible, in certain circumstances, for an offset arrangement to give effect to a pension contribution as a monetary contribution and therefore qualify for tax relief. Such an offset arrangement would cover a situation where a pension scheme trustee agrees to purchase an asset from a party with an obligation to make a monetary pension contribution. The monetary value of the asset is then treated as payment of the pension contribution. There are various conditions that must be met to enable such an offset arrangement to qualify for tax relief. For example, there must be an obligation on the contributing party to pay a specified amount in monetary terms (e.g. £10,000) and this obligation must be separate (and covered in a separate agreement) to the agreement to sell an asset to the pension scheme trustee at market value as well as separate from the agreement to allow the cash contribution debt to be offset against the consideration payable for the asset.

HMRC has said that it will continue to review in-specie cases and consider what it means for those who have already claimed and received tax relief but it is clear that any contribution that has been paid under an effective contractual offset arrangement will be unaffected.

Action

For noting. If trustees are considering entering into an offset arrangement, they should seek legal and tax advice.

Pensions Ombudsman decision on financial loss after maladministration corrected

The Pensions Ombudsman has made its determination in Miss X (PO-29179).

Miss X was employed by Comfy Quilts in November 2016 and due to an administrative error was not automatically-enrolled into its pension scheme. As a result, no monthly contributions were paid into the scheme for her and no employee contributions were deducted from her salary.

On 1 April 2017, Miss X's employment with Comfy Quilts was transferred to E-Bedding in accordance with the Transfer of Undertakings (Protection of Employment Regulations 2006 (the TUPE Regulations). E-Bedding also failed to automatically enrol Miss X into its pension scheme. In May 2017, Miss X raised concerns about her pension provision.

In January 2018, the Comfy Quilts management team took over the common management of both E-Bedding and Comfy Quilts. At that point in time, Miss X's pension contributions in the E-Bedding bank account were paid into the Comfy Quilts scheme. Comfy Quilts also complied with Miss X's request to pay her the missing contributions (as well as interest) from the period from November 2016 to March 2017.

However, Miss X complained that both Comfy Quilts and E-Bedding had failed in their obligation to automatically enrol her into the pension scheme in accordance with her contracts of employment, adding that the delay in making contributions to the scheme had caused a loss of interest that would have been due had the funds been paid into the scheme in a timely manner. Miss X also alleged that by holding her pension contributions in the E-Bedding bank account, the companies had financially profited from the interest growth.

The employers responded by stating that they had acted in good faith and that there had been no intention to hold onto Miss X's pension contributions and that they had not financially benefited from her contributions. Comfy Quilts also added that when calculating the interest of her late contributions, it had opted for a higher interest rate of 6% to ensure Miss X had not suffered any financial loss.

The Pensions Ombudsman dismissed Miss X's complaint and followed the earlier opinion of the Adjudicator. It held that the failure to automatically enrol Miss X had constituted maladministration by both Comfy Quilts and E-Bedding. However, the Pensions Ombudsman acknowledged that the missing contributions had been paid into the pension scheme in June 2018 along with interest (which exceeded the interest that the Pensions Ombudsman would have awarded if required to do so). E-Bedding had also invested all of Miss X's contributions into the scheme and had promised to perform a unit adjustment calculation to determine the loss of investment that arose from the delayed contribution payments. Comfy Quilts had also given Miss X the opportunity to pay her missing employee contributions, but she had chosen not to. The Pensions Ombudsman was therefore satisfied that the employers had taken steps to rectify their errors and put Miss X back in the position she would have been in had there been no maladministration. Therefore Miss X had not suffered any financial loss.

Action

For noting.

Ms R: Pensions Ombudsman held that employer's failure to pay deducted pension contributions into member's scheme accounts constituted unjust enrichment

The Pensions Ombudsman has made its determination in relation to an employer's failure to pay deducted pension contributions into a member's scheme accounts.

Ms R was employed by a nursery which was required to comply with automatic enrolment obligations. The employer nursery was named Jigsaw Earlsdon Ltd ("**Jigsaw**") and had previously been known as Early Years Learning Academy ("**EYLA**"). When the employer nursery was known as EYLA, it had enrolled Ms R into the Smart Pension scheme. When the employer nursery rebranded itself to be known as Jigsaw, it enrolled Ms R into a new pension scheme set up with the National Employment Savings Trust ("**NEST**").

Ms R bought a complaint to the Pensions Ombudsman on the basis that the employer nursery had not paid all the necessary employer and employee contributions to Smart Pension and/or the new scheme with NEST.

The Pensions Ombudsman held that, based on the evidence available, it seemed that Ms R's employee contributions had been deducted from her salary but not paid across to the appropriate pension arrangement and neither had all the necessary employer contributions been paid to the appropriate pension arrangement by the employer nursery.

This is clearly a breach of pensions legislation and the employer nursery's automatic enrolment obligations. However, the Pensions Ombudsman went further: He noted that Ms R had been given information by the nursery employer which indicated that action was being taken to correct the position. Therefore the employer nursery's failure to pay the contributions across to the appropriate pension scheme amounted to unjust enrichment. The Pensions Ombudsman ordered that the employer nursery should pay:

- the outstanding unpaid (employee and employer) contributions to the relevant pension scheme;
- an amount equal to the loss of investment gains from the due date of each contribution to the date of actual payment based on the assumption that the contributions had been paid on the date due and invested in Ms R's chosen investment fund;
- any reasonable administration fee charged by the pension arrangements to calculate the investment loss (if applicable); and
- Ms R £1,000 in respect of serious distress and inconvenience suffered.

Action

Employers should ensure compliance with automatic enrolment obligations and that they have suitable administrative processes in place.

Transfer of annuity business from Prudential to Rothesay Life may be approved

The Court of Appeal has upheld Prudential and Rothesay Life's appeal against a decision of the High Court refusing to allow a transfer of annuity business from Prudential to Rothesay. The High Court's approval for the transfer had been sought under Part VII of the Financial Services and Markets Act 2000. The decision on whether to allow the transfer will now be re-considered by the High Court.

The Court of Appeal held that:

- the Court must take account of relevant factors and ignore factors which should not be taken into account. The paramount concern in these circumstances is whether the transfer would have a material adverse effect on the annuitants receiving their annuities, payments being paid under the annuities and the service standards provided under the annuities;
- the High Court had to fully consider the opinion of experts and while it is entitled to ask questions to ensure it does so, it should not substitute its own opinion for that of any expert's opinion;
- the High Court had not been justified in concluding that there was a material disparity between the non-contractual external financial support potentially available for each of Prudential and Rothesay;
- the High Court failed to give adequate weight to the lack of objection to the transfer by the Prudential Regulation Authority and Financial Conduct Authority, and to the continuing future regulation of Rothesay; and
- the High Court should not have given any weight to the fact that policyholders: (a) may have chosen Prudential on the basis of its age and established reputation; and (b) may have assumed that Prudential would provide their annuity throughout its term.

Action

For noting.

Issues affecting DB schemes

PPF levy changes confirmed

On 15 December 2020, the PPF confirmed changes it will be making to the 2021/22 levy rules prior to the publication of the levy determination in its final form in January 2021.

The announcement confirmed two key changes:

- the implementation of the small scheme adjustment, which halves the levy for schemes with less than £20 million in liabilities and tapers levies for schemes with between £20 million and £50 million of liabilities; and
- the implementation of the reduction in the risk-based levy cap to 0.25 per cent of liabilities from 0.5 per cent.

The announcement also confirmed that the PPF will continue to measure insolvency risk on the basis in use since April 2020 using credit ratings and the PPF insolvency risk model operated by Dun & Bradstreet.

The PPF also confirmed that the levy estimate of £520 million for 2021/22 and the levy scaling factor of 0.48 will be retained.

Additionally, the announcement stated that the PPF's policy statement, which will be published alongside the 2021/22 levy rules, will confirm that the PPF will continue to monitor the impacts of COVID on schemes and sponsors and will respond flexibly to any issues that arise.

Action

For noting.

Mayer Brown news

Upcoming events

We will provide 2021 dates for our Trustee Foundation and Building Blocks Courses in our next Pensions Brief.

Due to the COVID-19 restrictions, our events will be hosted via telephone/video conference until further notice. We will provide further details nearer the time of each event.

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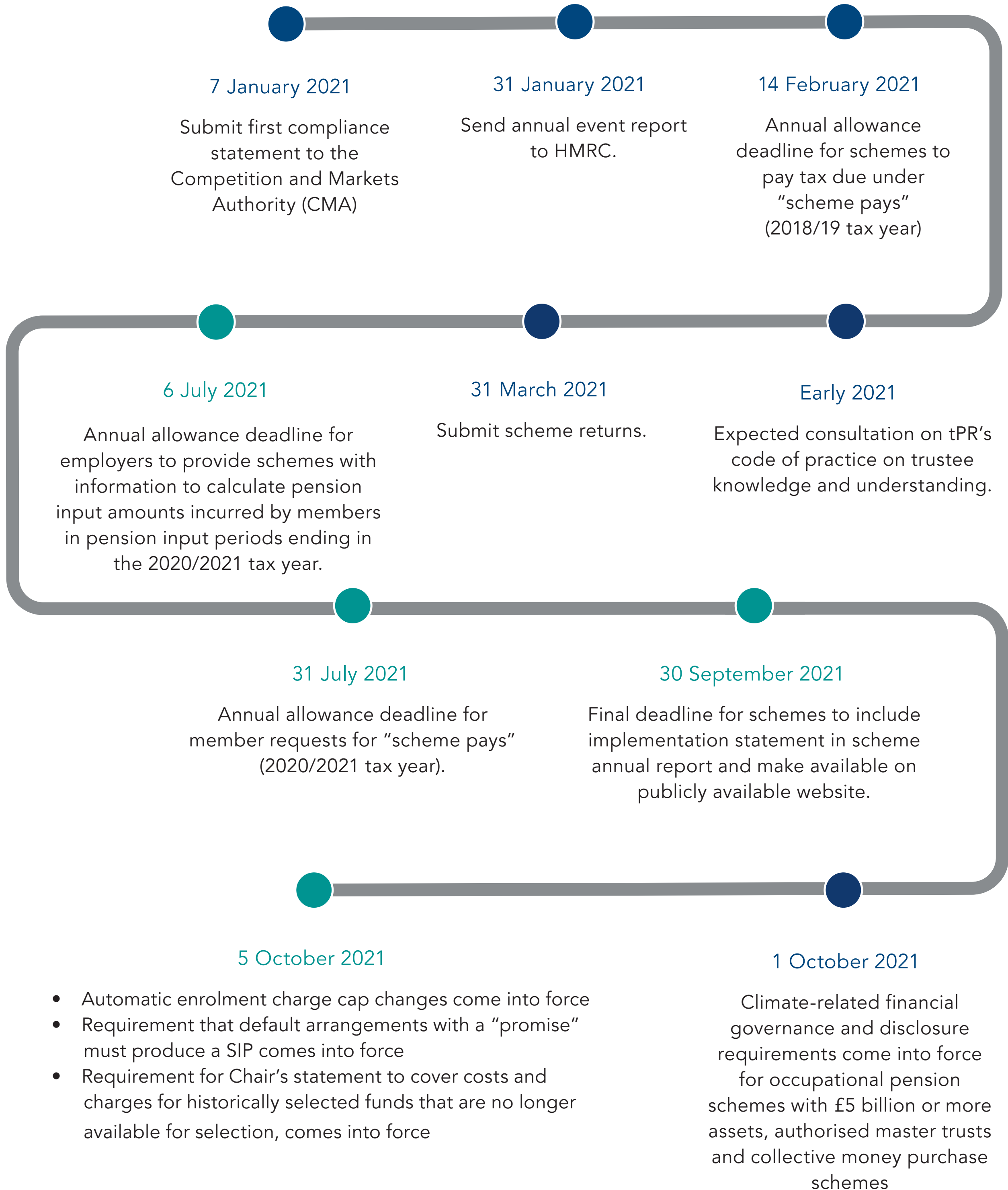
Dates to note over the next 12 months



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